



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  
Date: 27 March 2009  
Original: English

**IN THE TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge O-Gon Kwon  
Judge Kimberly Prost  
Judge Ole Bjørn Støle – Reserve Judge

**Acting Registrar:** Mr. John Hocking

**Judgement of:** 27 March 2009

**CONTEMPT PROCEEDINGS AGAINST  
DRAGAN JOKIĆ**

***PUBLIC REDACTED VERSION***

**JUDGEMENT ON ALLEGATIONS OF CONTEMPT**

**Counsel for the Accused**

Ms. Branislava Isailović

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## I. BACKGROUND

1. Dragan Jokić (“Jokić”) is charged with contempt 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 (“Tribunal”), pursuant to his refusal to testify before Trial Chamber II (“Trial Chamber”) in *Prosecutor v. Popović et al.* on 31 October and 1 November 2007.<sup>1</sup>

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*,<sup>2</sup> was issued a subpoena on 29 August 2007, to appear before the Trial Chamber to give oral testimony in the case of *Prosecutor v. Popović et al.*<sup>3</sup> The subpoena was issued pursuant to the request of the Office of the Prosecutor (“Prosecution”),<sup>4</sup> and after the Trial Chamber had considered submissions from both the Prosecution and Jokić [redacted].<sup>5</sup> In its decision, the Trial Chamber held that there were good grounds to believe that Jokić’s testimony could be material to the facts at issue.<sup>6</sup> To adequately address Jokić’s concerns, it ordered that Jokić’s testimony be given in closed session, and that he may be represented by a Defence Counsel, “who will be allowed to intervene, should the need arise, only on the specific directions of the Trial Chamber.”<sup>7</sup>

3. On 31 October 2007, when asked by the Presiding Judge to take the solemn declaration, Jokić submitted that he was unable to testify [redacted].<sup>8</sup> [Redacted].<sup>9</sup> The Trial Chamber instructed Jokić to provide a confidential and *ex parte* filing [redacted].<sup>10</sup> Jokić filed his submissions that same day.<sup>11</sup> On 1 November 2007, the Trial Chamber decided that nothing in the filing justified a refusal to testify and no further investigations were warranted as a result of it.<sup>12</sup> As a result of Jokić’s

<sup>1</sup> T. 1–2 (19 November 2007).

<sup>2</sup> *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, paras. 860–861; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007, p. 137.

<sup>3</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Confidential Decision on Prosecution Motion for Subpoena of Dragan Jokić and Decision on Protective Measures (“Decision on Subpoena”), 29 August 2007; *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.

<sup>4</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Confidential Prosecution’s Application to Subpoena Dragan Jokić, 22 June 2007.

<sup>5</sup> Decision on Subpoena, pp. 1–2.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17245–17247, 17254, 17268 (closed session) (31 October 2007).

<sup>9</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17245 (closed session) (31 October 2007).

<sup>10</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17263–17264 (closed session) (31 October 2007).

<sup>11</sup> *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.

<sup>12</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17274 (closed session) (1 November 2007).

continuous refusal to testify,<sup>13</sup> the Trial Chamber issued the “Order In Lieu of Indictment on Contempt Concerning Dragan Jokić”, in which it determined that it had reason to believe that Jokić may 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”.<sup>14</sup>

4. The hearing of the contempt case against Jokić took place on 19 November 2007, 10 December 2007 and 15 December 2008.<sup>15</sup> The contempt charge was read in open court.<sup>16</sup> Jokić pleaded not guilty.<sup>17</sup> He adduced seven exhibits, all of which were admitted by the Trial Chamber, and led evidence from two witnesses, including the psychologist Ana Najman (“Defence Expert”) who submitted a report (“Defence Expert Report”).<sup>18</sup>

5. On 28 February 2008, the Trial Chamber issued an order in which it instructed 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 the service of the subpoena on him.<sup>19</sup> 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”).<sup>20</sup>

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 case of *Prosecutor v. Popović et al.*<sup>21</sup> The subsequent confidential report was filed by the Registry on 20 August 2008 (“Second Chamber Expert Report”).<sup>22</sup>

<sup>13</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17274–17275, 17279 (partly in closed session) (1 November 2007).

<sup>14</sup> See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17279–17281 (1 November 2007).

<sup>15</sup> Scheduling Order, 9 November 2007; T. 1–7 (19 November 2007), T. 1–63 (partly in closed session) (10 December 2007), T. 1–70 (partly in closed session) (15 December 2008).

<sup>16</sup> T. 1–2 (19 November 2007).

<sup>17</sup> T. 2 (19 November 2007).

<sup>18</sup> T. 7–62 (partly in closed session) (10 December 2007); Ex. 00001 (confidential) “Letter”; Ex. 00002 (confidential) “Statement”; Ex. 00003 (confidential) “Medical Report”; Ex. 00004 (confidential) “Medical Chart”; Ex. 00005 (confidential) “Request”; Ex. 00006 (confidential) “Letter”; Ex. 00007 (confidential) “Report”; Ex. 00007C (confidential) “Chart”.

<sup>19</sup> Confidential Order to Instruct the Registrar to Appoint a Psychiatric Expert, 28 February 2008.

<sup>20</sup> Confidential Registry Submission Pursuant to Rule 33(B) Regarding the Psychiatric Expert Report, 16 June 2008.

<sup>21</sup> Confidential Order to Instruct the Registrar to Require Further Assessment by the Psychiatric Expert of the Mental Condition of Jokić, 20 June 2008.

<sup>22</sup> Confidential Registry Submission Pursuant to Rule 33(B) Regarding the Second Psychiatric Expert Report, 20 August 2008.

7. On 30 October 2008, the Trial Chamber issued an order in which it instructed Jokić to file a final trial brief within 14 days.<sup>23</sup> Jokić filed his final trial brief on 13 November 2008.<sup>24</sup> On 18 November, pursuant to Jokić's motion,<sup>25</sup> 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.<sup>26</sup> It also held that Jokić was entitled to file the supplement to his final trial brief by no later than 12 January 2009.<sup>27</sup>

8. Jokić cross-examined the Chamber Expert on 15 December 2008,<sup>28</sup> and on 12 January 2009, he filed the supplement to his final trial brief.<sup>29</sup>

## II. APPLICABLE LAW

9. Although the statute of the Tribunal ("Statute") does not address contempt of court, the Appeals Chamber held that the power to pursue contempt proceedings was within the inherent authority of the Tribunal.<sup>30</sup> The Appeals Chamber recognised that to enforce the law, Chambers must have the ability to enforce their processes and to maintain dignity and respect. Contempt proceedings are therefore the necessary means "to ensure that [...] [the Tribunal's] exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded".<sup>31</sup>

<sup>23</sup> Confidential Scheduling Order, 30 October 2008 (in which the Trial Chamber held that the Chamber "considers it unnecessary in the circumstances of the case to hear oral arguments being of the view that the filing of a final trial brief by the Accused will be sufficient and that without prejudice to the result of this case, such brief shall also address matters of sentencing").

<sup>24</sup> Defence Closing Brief, filed confidentially in the original French on 13 November 2008 ("Closing Brief"). English translation filed on 19 November 2008.

<sup>25</sup> 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 (in which Jokić requests that the Trial Chamber either remove from the case file the First and Second Chamber Expert Reports, or disclose them to Jokić pursuant to Rule 94 *bis*, to enable Jokić to "opt for one of the solutions provided in Rule 94 *bis* (B)"). English translation filed on 7 November 2008.

<sup>26</sup> Confidential Decision on Jokić Motion to Amend the Scheduling Order Rendered on 30 October 2008, 18 November 2008 (in which the Trial Chamber held that Rule 94 *bis* is not applicable to the current circumstances where the First and Second Chamber Expert Reports were prepared and filed pursuant to the Trial Chamber's order and in accordance with Rule 74 *bis*; however, in the circumstances of this case, it is in the interests of justice to allow Jokić to cross-examine the Chamber Expert on his reports).

<sup>27</sup> *Ibid.*; T. 70 (15 December 2008).

<sup>28</sup> Scheduling Order, 24 November 2008; T. 9–69 (private session) (15 December 2008).

<sup>29</sup> Further Defence Closing Brief, filed confidentially in the original French on 12 January 2009 ("Further Closing Brief"). English translation filed on 19 January 2009.

<sup>30</sup> *See Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, paras. 14–26 for an extensive discussion of Trial Chambers' authority to pursue contempt cases.

<sup>31</sup> *Ibid.*, paras. 13, 18.

10. Contempt of the Tribunal is described in Rule 77, which provides that:

(A) 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;<sup>32</sup>

[...]

11. The elements of this form of contempt are knowing and wilful interference with the Tribunal's administration of justice by contumaciously refusing or failing to answer a question while being a witness before the Tribunal.<sup>33</sup> The Tribunal's interpretation of "contumaciously" in the context of contempt proceedings under Rule 77(A)(i) has varied. In *Matter of Witness K12 in Prosecutor v. Milošević* the Trial Chamber interpreted "contumaciously" to mean "perverse",<sup>34</sup> although Judge Kwon, in a dissenting opinion, argued that "knowingly", "wilfully", and "contumaciously" under Rule 77 should be taken together to mean "an obstinate refusal to answer without reasonable excuse."<sup>35</sup> In contempt proceedings against Kosta Bulatović, also in *Prosecutor v. Milošević*, the Trial Chamber considered that "the test of 'knowingly and wilfully' interfering with the Tribunal's administration of justice by 'contumaciously' refusing to answer questions was satisfied" when Bulatović "deliberately refused to comply with an order of the Trial Chamber to answer questions and persisted in that refusal when advised [of the likelihood of a contempt charge] and given a further opportunity to respond."<sup>36</sup> Judge Bonomy wrote a separate opinion taking issue with the interpretation of "contumaciously" as "perverse" in the context of the case, stating that "[t]he plain English meaning of contumacious conduct is behaviour that is 'stubbornly or wilfully disobedient to authority'.<sup>37</sup> The Appeals Chamber accepted the Trial Chamber's finding of contempt,<sup>38</sup> although it did not go so far as to define the meaning of "contumaciously", stating that:

In the circumstances, no conclusion could logically follow other than that [the Appellant] wilfully intended to avoid testifying, thereby necessarily interfering with the administration of justice. The Appellant was asked on several occasions to answer the questions posed to him. The possibility of a contempt order, and the reasons therefore, were explained to him. And yet he contumaciously

<sup>32</sup> The French version of the Rules does not contain the qualification "contumaciously" in its analogous Article 77(A)(i). See *Prosecutor v. Milošević*, Case No. IT-02-54-T-R77, Judge Kwon's Dissenting Opinion to Oral Decision on K12, 21 November 2002 ("Judge Kwon's Dissent on Witness K12"), para. 2, n. 2.

<sup>33</sup> Rule 77. See also *Prosecutor v. Milošević*, Contempt Proceedings against Kosta Bulatović, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005 ("*Bulatović* Trial Judgement"), paras. 9, 16.

<sup>34</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-T-R77, Trial Chamber Finding in the Matter of Witness K12, 21 November 2002, T. 33 (closed session) (18 November 2002).

<sup>35</sup> Judge Kwon's Dissent on Witness K12, para. 2.

<sup>36</sup> *Bulatović* Trial Judgement, para. 16.

<sup>37</sup> *Bulatović* Trial Judgement, Separate Opinion of Judge Bonomy on Contempt of the Tribunal, 13 May 2005, para. 1.

<sup>38</sup> *Prosecutor v. Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005 ("*Bulatović* Appeal Judgement"), para. 43.

refused to cooperate with the will of the Tribunal [...] In short, he acted wilfully and with full knowledge of what he was doing.<sup>39</sup>

12. In light of the plain meaning of “contumaciously”, and the interpretations of both Judges Bonomy and Kwon, noting the unnecessarily problematic nature of interpreting “contumaciously” to imply a higher level of intent than “knowingly and wilfully”, the Trial Chamber finds that Rule 77(A)(i) is imposing 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.

### III. SUBMISSIONS

13. Jokić does not challenge the fact that after being served a subpoena, he appeared before the Trial Chamber and declared that he did not feel fit to testify.<sup>40</sup> Jokić submits that [redacted]<sup>41</sup> [redacted] while appearing before the Trial Chamber, he did not act with the specific intent required to interfere with the administration of justice under Rule 77.<sup>42</sup> Jokić avers that the evidence he adduced at trial demonstrates that “there were reasonable excuses for the fact that he did not testify before the Chamber on 31 October and 1 November 2007.”<sup>43</sup>

14. Moreover, Jokić questions the qualifications of the Chamber Expert by comparing them with those of the Defence Expert.<sup>44</sup> He further argues that the First and Second Chamber Expert Reports corroborate the conclusions of the Defence Expert, except as regards the issue of the reliability of any information obtained from Jokić, should he testify before the Tribunal.<sup>45</sup>

15. With regard to the Second Chamber Expert Report, Jokić submits that the Chamber delegated its inherent and exclusive power when it asked the Chamber Expert to address Jokić's state of mind at the time he refused to testify.<sup>46</sup> He submits that the question is legal in nature,<sup>47</sup> and

<sup>39</sup> *Ibid.*, paras. 40–42.

<sup>40</sup> Closing Brief, para. 26; Further Closing Brief, para. 34.

<sup>41</sup> Closing Brief, para. 27; Further Closing Brief, para. 41.

<sup>42</sup> Closing Brief, paras. 17–18, 32; Further Closing Brief, para. 41. Jokić submits that “[a]t no point did he defy the authority of the Chamber nor did he want to impose conditions on his testimony.” Closing Brief, para. 32; Further Closing Brief, para. 41.

<sup>43</sup> Closing Brief, paras. 28–32; Further Closing Brief, paras. 36–39, 41.

<sup>44</sup> Further Closing Brief, para. 27. In addition to the differences between the Experts' areas of expertise, Jokić notes that the Chamber Expert has not studied psychology, while the Defence Expert has, and that the Chamber Expert has only testified as an expert witness on two occasions, while the Defence Expert has been a forensic expert since 1988 and has testified on several occasions. *Ibid.*

<sup>45</sup> *Ibid.*, paras. 33, 40.

<sup>46</sup> *Ibid.*, para. 32.

<sup>47</sup> *Ibid.*

thus it would violate the basic principles of the judicial function for the Chamber to take his expert's answer into account.<sup>48</sup>

16. Moreover, Jokić complains about the conduct of the proceedings in his contempt trial. He argues that he was deprived of his procedural rights under Rule 94 *bis* pursuant to the Trial Chamber's ruling on 18 November 2008 that Rule 94 *bis* was not applicable under the circumstances,<sup>49</sup> and that his right to a public hearing was violated by the Trial Chamber's order that the cross-examination of the Chamber Expert was to be held in closed session; a violation which was not remedied by the Trial Chamber's subsequent decision to open the proceedings to the public.<sup>50</sup>

## IV. DISCUSSION

### A. Preliminary Issues

17. Jokić questions the qualifications of the Chamber Expert,<sup>51</sup> and the reliability of his reports.<sup>52</sup> He also argues that the Trial Chamber should not have asked the Chamber Expert to address Jokić's state of mind when he refused to testify, and should not take the Chamber Expert's evaluation into account when deciding about the responsibility of Jokić.<sup>53</sup>

18. The Trial Chamber notes that the Chamber Expert is a psychiatrist,<sup>54</sup> whose name is included in the Tribunal list of experts prepared pursuant to Rule 74 *bis*.<sup>55</sup> He already appeared once as a court expert at this Tribunal,<sup>56</sup> and was also consulted in a case before a national court.<sup>57</sup> He was assigned to this task by the Registrar, following the Trial Chamber's approval, because of his professional expertise and experience.<sup>58</sup> The jurisprudence of this Tribunal defines an expert witness as a witness that "has at his or her disposal the special knowledge, experience, or skills needed to potentially assist the Trial Chamber in its understanding or determination of issues in dispute".<sup>59</sup> The Trial Chamber has no doubt that the Chamber Expert is qualified to serve as an

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, para. 25.

<sup>50</sup> *Ibid.*, para. 26. *See also* n. 26 above.

<sup>51</sup> T. 11–16 (15 December 2008); para. 14 above.

<sup>52</sup> T. 16–36, 38–68 (private session) (15 December 2008); para. 14 above.

<sup>53</sup> *See* para. 15 above.

<sup>54</sup> T. 11 (15 December 2008).

<sup>55</sup> Confidential Letter from the Deputy Registrar to Trial Chamber II, 2 April 2008, para. 6.

<sup>56</sup> T. 14–15 (15 December 2008).

<sup>57</sup> T. 16 (15 December 2008).

<sup>58</sup> Confidential Order, 28 February 2008.

<sup>59</sup> *Prosecutor v. 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 ("Appeals Chamber Decision regarding an Expert Witness"), paras. 27–28; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Rule 94 *bis* Notice Regarding Prosecution Expert Witness Richard Butler, 19 September 2007, para. 23.



expert witness in this case. The fact that the Defence Expert is also very experienced,<sup>60</sup> does not undermine the qualifications of the Chamber Expert.

19. The role of an expert witness in proceedings before the Tribunal is to provide Chambers with evidence based on the expert's specialized knowledge that may assist the Chambers to understand the evidence in their cases and to determine the disputed issues.<sup>61</sup> Jokić's submission that he was unfit to testify because of his health condition led the Trial Chamber to appoint a psychiatric expert to examine Jokić's health and to report to the Chamber.<sup>62</sup> The Trial Chamber, which is vested with the ultimate authority and responsibility to adjudicate on the disputed matters in this case, assessed the reliability of the evidence in the case, including the Chamber Expert's evidence, and determined what weight should be accorded to it.

20. The Trial Chamber thus holds that the appointment of the Chamber Expert and the consideration of his evidence have not infringed upon any of Jokić's rights and have not compromised the fairness of the judicial process in this case. On the contrary, it assisted the Trial Chamber to fulfill its duties pursuant to the Statute and the Rules.

21. Regarding Jokić's complaints about violations of his procedural rights under Rule 94 *bis*, and his right to a public hearing,<sup>63</sup> the Trial Chamber notes that it had already addressed these two issues in the "Confidential Decision on Jokić Motion to Amend the Scheduling Order rendered on 30 October 2008" filed on 18 November 2008, and during the hearing of 15 December 2008, respectively.<sup>64</sup> Therefore it finds no reason to re-address these two issues in the current judgement.

**B. Whether the Accused persistently refused or failed to answer a question without reasonable excuse while being a witness before the Chamber**

22. It is not disputed that on 31 October and 1 November 2007 Jokić repeatedly refused to testify before the Trial Chamber in the case of *Popović et al.*<sup>65</sup> Jokić was asked on several occasions by the Trial Chamber to give evidence, and replied that he did not feel fit to testify.<sup>66</sup> He remained persistent in his refusal to testify even after the possibility that he could be indicted for

<sup>60</sup> She has been practicing as a psychologist since 1976, including ten years in a prison hospital, and appeared as a court expert in both her national jurisdiction and the Tribunal. T. 24–25 (10 December 2007).

<sup>61</sup> Appeals Chamber Decision regarding an Expert Witness, paras. 27–28; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 198.

<sup>62</sup> See paras. 3–5 above.

<sup>63</sup> See para. 16 above.

<sup>64</sup> T. 1–6 (15 December 2008).

<sup>65</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17245–17269 (closed session) (31 October 2007), T. 17274–17281 (closed session) (1 November 2007).

<sup>66</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17245–17248, 17254, 17265–17268 (closed session) (31 October 2007), T. 17274–17281 (closed session) (1 November 2007).

contempt was explained to him.<sup>67</sup> The Trial Chamber thus finds that Jokić persistently refused to testify while being a witness before the Chamber. It will now turn to examine whether his refusal to testify was without a reasonable excuse.

23. [Redacted].<sup>68</sup> [Redacted].<sup>69</sup>

24. The Trial Chamber notes that in the decision granting the Prosecution's request to subpoena Jokić to testify in the case of *Popović et al.*, the Trial Chamber held that there were good grounds to believe that Jokić would be able to give information that would materially assist the Prosecution in the presentation of its case.<sup>70</sup> Jokić, as is the case for any other person issued with a subpoena, was then bound to give testimony. To address the security concerns raised by Jokić, the Trial Chamber granted Jokić's request to testify in closed session.<sup>71</sup> In the Trial Chamber's view due regard was thereby given to the protection of Jokić [Redacted].<sup>72</sup>

25. The Trial Chamber points out that witnesses before this Tribunal, whether they have come forward voluntarily or have been summoned by subpoena, are under a duty to testify. As in other judicial systems, the duty to testify is a basic principle of this judicial institution, and goes to the heart of the notion of justice.<sup>73</sup> It ensures that the evidence required for the proper administration of justice is available; and therefore this duty is subject to only very few exceptions.<sup>74</sup> The decision on whether a proposed witness falls under these exceptions is to be exercised solely by the relevant Chamber, and not by the witness.<sup>75</sup> In so far as there may be concerns for the safety of witnesses or

<sup>67</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17262–17263 (closed session) (31 October 2007), T. 17275–17281 (closed session) (1 November 2007).

<sup>68</sup> See paras. 2–3.

<sup>69</sup> T. 11–15, 30, 37 (closed session) (10 December 2007); Ex. 00007 (confidential) "Report", pp. 4, 7, 14–16. See also First Chamber Expert Report (confidential), pp. 3–6; Second Chamber Expert Report (confidential), pp. 4–5; Ex. 00003 (confidential) "Medical Report"; Ex. 00005 (confidential) "Request".

<sup>70</sup> Decision on Subpoena, pp. 3–4.

<sup>71</sup> In the "Response of Dragan Jokić to Motion for Subpoena and Alternative Request for Protective Measures", which was filed confidentially and partly *ex parte* on 6 July 2007, Jokić requested the Trial Chamber to deny the "Prosecution's Application to Subpoena Dragan Jokić", which was filed confidentially on 22 June 2007 [redacted]. The Trial Chamber granted the Prosecution Motion [redacted]. Decision on Subpoena, pp. 1–2, 4.

<sup>72</sup> See Article 20(1) of the Statute which reads: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

<sup>73</sup> The duty of witnesses to testify before this Tribunal is reflected in the power of Chambers to issue subpoena and initiate contempt proceedings as well as to order production of additional evidence (Rules 54, 77 and 98) combined with the duty of States to cooperate with the Tribunal and comply with any request for assistance or an order issued by Chambers (Article 29 of the Statute). See also *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108 bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.

<sup>74</sup> See Article 21 of the Statute; Rule 90; *Bulatović* Appeal Judgement, para. 11 (where the Appeals Chamber held that "[t]he only basis on which [...] [a witness] could legitimately refuse to answer the questions posed by the Prosecution is in exercise of particular rights held by witnesses in criminal proceedings, such as the right against self-incrimination"). Regarding the issue of compelled testimony by war correspondents see *Prosecutor v. Brđanin*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.

<sup>75</sup> See *Bulatović* Appeal Judgement, para. 11.

their families, other mechanisms have been developed in order to address the concerns and to protect witnesses whose testimony before the Tribunal may put them or their families in danger, and Chambers are vested with the authority to order appropriate measures for the protection of witnesses.<sup>76</sup> Thus, concerns for the safety of witnesses or their relatives do not automatically override the duty to testify.

26. The Trial Chamber notes that it had exercised its authority to grant protective measures when it dealt with the Prosecution's motion to subpoena Jokić. [Redacted]<sup>77</sup> [T]he Chamber did not excuse Jokić from his duty to testify [redacted].<sup>78</sup> [Redacted].<sup>79</sup> In view of the foregoing, the Trial Chamber is not satisfied that the security concerns of Jokić provided a reasonable excuse for his refusal to testify.

27. Jokić further argues that [redacted] he is afraid of falsely incriminating someone.<sup>80</sup> His concern is supported to a certain extent by the Defence Expert [redacted].<sup>81</sup> A different conclusion was reached by the Chamber Expert [redacted].<sup>82</sup>

28. The Trial Chamber notes that the Statute and Rules do not provide a standard on competency to testify before the Tribunal. However applying the plain meaning of the word, competency to testify 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. The witness' credibility and the reliability of his answers can be questioned by the parties to the proceedings and must be assessed by the Trial Chamber.<sup>83</sup> A [redacted] health condition does not automatically disqualify a witness from testifying; in order to undermine the capacity of a person to serve as a witness, such a condition must have a substantial effect on the credibility of the witness, and consequently empty his evidence from having any probative value.

29. After examining the evidence regarding Jokić's condition [redacted] as it emerged from his examination by the experts and his communications with them and with the Chamber at court, the overall conclusion of the Trial Chamber is that Jokić made a conscious decision not to testify. Both

<sup>76</sup> Articles 15, 20, 22 of the Statute; Rules 69, 75.

<sup>77</sup> See paras. 2, 24 above.

<sup>78</sup> Decision on Subpoena, pp. 1–4.

<sup>79</sup> See ns. 18, 71 above.

<sup>80</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17245 (closed session) (31 October 2007). See also First Chamber Expert Report (confidential), p. 3; Second Chamber Expert Report (confidential), pp. 3–5.

<sup>81</sup> T. 55–60 (closed session) (10 December 2007). See also Ex. 00007 (confidential) "Report", pp. 8, 14, 16.

<sup>82</sup> Second Chamber Expert Report (confidential), pp. 3–6; T. 66–68 (private session) (15 December 2008).

<sup>83</sup> Furthermore, based on Rule 85, "a Judge may at any stage put any question to the witness".

Defence and Chamber Experts gave evidence about the health condition of Jokić [redacted].<sup>84</sup> The Defence Expert clarified the features of Jokić's personality which had led him to refuse to testify,<sup>85</sup> but neither she nor the Chamber Expert pointed out any element which, in the Trial Chamber's view, may have substantially affected the trustworthiness of Jokić's testimony and thus render him unfit to testify.<sup>86</sup> On the contrary, from the behaviour of Jokić at court as well as from the Chamber Expert Report and (although to a lesser extent) the Defence Expert Report, it emerges that Jokić is able to understand the trial process and the subject matter discussed, and also to communicate [redacted].<sup>87</sup> [Redacted].<sup>88</sup>

30. The Trial Chamber stresses that unwillingness or fear of implicating others does not provide a reasonable excuse for refusing to testify. As previously noted, the credibility of witnesses can be examined by all parties, and also the Chamber can put questions to them.<sup>89</sup> Furthermore, the Chamber, which is the body that decides whether to subpoena a witness,<sup>90</sup> has the ultimate authority to decide the weight that should be accorded to witness testimony, after properly assessing credibility.<sup>91</sup>

31. On the basis of the foregoing, the Trial Chamber holds that on 31 October and 1 November 2007 Jokić persistently refused to answer questions without a reasonable excuse while being a witness before the Trial Chamber in the case of *Popović et al.*. The Trial Chamber will now turn to examine whether by refusing to testify Jokić knowingly and wilfully interfered with the Chamber's administration of justice.

<sup>84</sup> T. 42–47, 50–54 (closed session) (10 December 2007), T. 35–36, 40–46, 66–67 (private session) (15 December 2008); Ex. 00007 (confidential) “Report”, pp. 4–8, 11–16. *See also* Ex. 00007 (confidential) “Report”, pp. 18–31; First Chamber Expert Report (confidential), pp. 3–7.

<sup>85</sup> T. 55–62 (closed session) (10 December 2007); Ex. 00007 (confidential) “Report”, pp. 14–15. *See also* n. 84 above and the testimony of the Chamber Expert in T. 58–59, 62–64 (private session) (15 December 2008).

<sup>86</sup> T. 60–61 (closed session) (10 December 2007). [Redacted]. First Chamber Expert Report (confidential), p. 5; Second Expert Report (confidential), p. 3.

<sup>87</sup> Second Chamber Expert Report (confidential), pp. 3–6; T. 51–52, 55–65 (private session) (15 December 2008); Ex. 00007 (confidential) “Report”, pp. 4, 7–8, 11–13.

<sup>88</sup> T. 61–65 (private session) (15 December 2008); Second Chamber Expert Report (confidential), pp. 5–6.

<sup>89</sup> Rule 85.

<sup>90</sup> Under Rule 54 “[a]t the request of either party[,] a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for [...] the preparation or conduct of the trial”. Furthermore, the Trial Chamber has the power to admit or exclude evidence and to exercise control over the presentation of evidence. It can also “*proprio motu* summon witnesses and order their attendance”. Rules 89, 90, 98.

<sup>91</sup> *See* Article 23 about the duty of judges to accompany the judgement with a reasoned opinion in writing.

**C. Whether by refusing to testify the Accused knowingly and wilfully interfered with the Tribunal's administration of justice**

32. As previously noted, the Trial Chamber issued a subpoena to Jokić.<sup>92</sup> In court, the Presiding Judge informed Jokić that he was summoned by the Prosecution to give evidence and that most of the Defence teams in the case wished to cross-examine him.<sup>93</sup> Jokić was asked to take the solemn declaration, but refused to do so [redacted].<sup>94</sup> It was made clear to Jokić that if he continued to stand by his refusal to testify he could be charged with contempt, yet Jokić persisted in his refusal to testify.<sup>95</sup>

33. The Trial Chamber holds that following the issuance of Jokić's subpoena, his appearance before the court, and the explanation given to him about the possibility of contempt, there is no doubt that Jokić knew that he was obliged to testify in the case of *Popović et al.*, and by refusing to comply with the Trial Chamber's order he knowingly interfered in the administration of justice.

34. [Redacted].<sup>96</sup> [Redacted].<sup>97</sup> [Redacted].<sup>98</sup> The Chamber Expert concluded that the condition of Jokić was not such to render him incompetent to testify.<sup>99</sup>

35. After a careful reading of the Chamber and Defence Expert Reports as well as hearing Jokić and observing his demeanour, the Chamber cannot accept the submission of the Defence Expert that Jokić did not make the decision not to testify. What emerges from the evidence in this case is that Jokić's subpoena presented him with a choice and he made a conscious decision not to testify. As previously noted, there is no doubt that he was aware of his duty to testify, and understood the consequences of his behaviour. [Redacted].<sup>100</sup> Furthermore, the possibility that he was motivated by other considerations is not relevant as long as he knowingly and wilfully interfered with the Tribunal's administration of justice.

36. On the basis of the foregoing, the Trial Chamber holds that Jokić, by refusing to testify in the case of *Popović et al.*, knowingly and wilfully interfered with the Tribunal's administration of justice.

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<sup>92</sup> See paras. 2, 24 above.

<sup>93</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17244 (closed session) (31 October 2007).

<sup>94</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17244–17247 (closed session) (31 October 2007). See paras. 3, 22 above.

<sup>95</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17265–17269 (closed session) (31 October 2007), T. 17273–17281 (closed session) (1 November 2007).

<sup>96</sup> [Redacted]. T. 58 (closed session) (10 December 2007). See also Ex. 00007 (confidential) "Report", pp. 14, 16; n. 85 above.

<sup>97</sup> Second Chamber Expert Report (confidential), pp. 3–4.

<sup>98</sup> T. 64–65 (private session) (15 December 2008).

#### D. Conclusion on the responsibility of the Accused

37. The Trial Chamber is convinced beyond reasonable doubt that Jokić, by persistently refusing to testify without a reasonable excuse in the case of *Prosecutor v. Popović et al.* while being a witness before the court, knowingly and wilfully interfered with the Tribunal's administration of justice.

#### V. SENTENCING

38. The purpose of the law of contempt is to prevent frustration of the administration of justice.<sup>101</sup> In deciding the punishment to be imposed for contempt, Chambers have taken into consideration both the gravity of the conduct involved and the need to deter such conduct in the future.<sup>102</sup> Article 24 of the Statute and Rule 101 contain general guidelines for Trial Chambers about the factors that should be taken into account when determining the punishment, such as aggravating and mitigating factors and the individual circumstances of the accused. While Trial Chambers are obliged to take these factors into account when determining the punishment, they are not limited to considering them alone. Furthermore, they are vested with a broad discretion as to the weight to be accorded to these factors, based on the facts of the particular case.<sup>103</sup>

39. In his submissions regarding sentencing, Jokić argues that the offence of contempt "is less serious than the offences set out in the Statute of the Tribunal".<sup>104</sup> As mitigating circumstances he points out his health condition as well as his personal situation, including the nine-year imprisonment sentence imposed on him in the case of *Prosecutor v. Blagojević and Jokić*, his family circumstances, his voluntary surrender to the Tribunal, and a period of provisional release.<sup>105</sup>

40. In determining Jokić's sentence, the Trial Chamber considers that Jokić committed a serious offence, which goes to the essence of the notion of justice. By his refusal to testify he has deprived the Trial Chamber of relevant evidence and acted against the interests of justice. The Trial Chamber, however, also takes into account the personal circumstances of Jokić [redacted] as well as

<sup>99</sup> Second Chamber Expert Report (confidential), pp. 5–6; T. 51–52, 61–65 (private session) (15 December 2008).

<sup>100</sup> Second Chamber Expert Report (confidential), pp. 5–6; T. 51–52, 61–65 (private session) (15 December 2008).

<sup>101</sup> See *Prosecutor v. Aleksovski*, Finding of Contempt of the Tribunal, Case No. IT-95-14/1-T, 11 December 1998, para. 36.

<sup>102</sup> *Prosecutor v. Margetić*, Case No. IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2005, para. 84; *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77, Judgement, 15 March 2007, para. 26; *Prosecutor v. Haraqiija and Morina*, Case No. IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008, para. 103.

<sup>103</sup> *Prosecutor v. Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008, para. 329.

<sup>104</sup> Closing Brief, para. 34.

<sup>105</sup> *Ibid.*, paras. 34–38.

the fact that he has no past record of interfering with the administration of justice before this Tribunal. It considers these factors as mitigating circumstances.

41. The Trial Chamber is vested with broad discretion in determining the appropriate sentence for contempt.<sup>106</sup> Pursuant to Rule 77(G), the Trial Chamber can impose a term of imprisonment of up to seven years, a fine not exceeding 100,000 euros, or both, for contempt.

42. In the current case, taking into account the gravity of the offence, and the mitigating factors mentioned above as well as the fact that Jokić is a convicted person who is still in the process of serving his imprisonment period, the Trial Chamber holds that a single term of imprisonment of four (4) months is appropriate. This sentence shall be served consecutively to any other prison term Jokić is currently serving.

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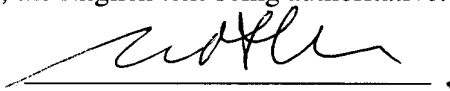
<sup>106</sup> See *Prosecutor v. Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007, para. 38.

## VI. DISPOSITION

43. For the foregoing reasons, having considered all of the evidence and the submissions in this case, the Trial Chamber makes the following disposition pursuant to the Statute of the Tribunal and Rule 77 of the Rules:

1. The Accused Dragan Jokić is **guilty** of Contempt of the Tribunal, punishable under Rule 77(A)(i);
2. Dragan Jokić is hereby sentenced to a single sentence of four (4) months of imprisonment;
3. This sentence shall be served consecutively to any other sentence of imprisonment imposed on Jokić.

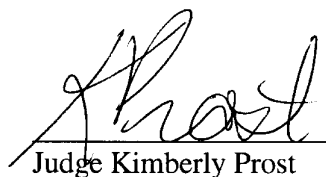
Done in English and French, the English text being authoritative.



Judge Carmel Agius  
Presiding



Judge O-Gon Kwon



Judge Kimberly Prost

Dated this twenty-seventh day of March 2009  
At The Hague  
The Netherlands

[Seal of the Tribunal]