IT-05-88/2-R77.2
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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-05-88/2-R77.2

Date: 9 December 2011

Original: English

IN THE TRIAL CHAMBER II

Before: **Judge Christoph Flügge**
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: **Mr. John Hocking**

Judgement of: **9 December 2011**

IN THE CONTEMPT CASE OF DRAGOMIR PEĆANAC

PUBLIC REDACTED

JUDGEMENT ON ALLEGATIONS OF CONTEMPT

Counsel for the Accused:
Mr. Jens Dieckmann

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I. PROCEDURAL BACKGROUND

1. On 31 August 2011, the Chamber in the case of *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T ("*Tolimir* case") issued a subpoena, Judge Nyambe dissenting, ordering Dragomir Pećanac ("Accused") to appear at the Tribunal during the week of 5 September 2011 or "on a date and time to be specified" ("Subpoena").[1] On 2 September 2011, the Subpoena was served on the Accused, as evidenced by the "Memorandum of Service of the Subpoena for Witness Dragomir Pećanac" ("Memorandum of Service"), dated the same day and signed by the Accused, and filed by the authorities of the Republic of Serbia.[2]

2. On 9 September 2011, the Chamber issued a decision ordering safe conduct for the Accused for his travel to The Hague to testify in the *Tolimir* case ("Decision on Safe Conduct").[3] On the same day the Registrar issued a confidential and *ex parte* Certificate of Safe Conduct.[4]

3. According to an internal memorandum dated 13 September 2011 from the Chief of the Victims and Witnesses Section ("VWS") of the Tribunal ("VWS Memorandum"), beginning in the weekend of 10–11 September 2011, the VWS made several attempts to contact the Accused to make arrangements for his travel to The Hague to testify in the *Tolimir* case.[5]

4. On 15 September 2011, the Prosecution requested that the Chamber issue an order *in lieu* of indictment for contempt against the Accused, as well as a warrant for his arrest and an order directing the authorities of the Republic of Serbia to execute the warrant and transfer the Accused into the custody of the Tribunal.[6] On 21 September 2011, the Chamber issued an order *in lieu* of indictment against the Accused for contempt of the Tribunal ("Order *in Lieu* of Indictment"),[7] by

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1 Ex. C00001 (confidential) (*Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Subpoena *Ad Testificandum* for Dragomir Pećanac, confidential, 31 August 2011). *Cf. Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution's Motion for Issuance of a Subpoena in Relation to Dragomir Pećanac, confidential, 31 August 2011; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Order to the Government of the Republic of Serbia Concerning Subpoena, confidential, 31 August 2011.

2 Ex. C00003 (confidential) (*Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Memorandum of Service of Subpoena for Witness Dragomir Pećanac, confidential, 9 September 2011).

3 Ex. C00002 (confidential) (*Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution Request for an Order for Safe Conduct for Witness Dragomir Pećanac, confidential, 9 September 2011).

4 Ex. D00028 (confidential).

5 Ex. C00004 (confidential) (*Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Prosecution's Application for an Order *in Lieu* of Indictment, a Warrant for Arrest and Order for Surrender of Dragomir Pećanac, confidential, 15 September 2011, Appendix B, Internal Memorandum from the Victims and Witness Section), paras. 3–5.

6 *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Prosecution's Application for an Order *in Lieu* of Indictment, a Warrant for Arrest and Order for Surrender of Dragomir Pećanac, confidential, 15 September 2011, para. 11.

7 Order *in Lieu* of Indictment, confidential, 21 September 2011. The Order in Lieu of Indictment was issued in public redacted form on 19 October 2011. Order Issuing a Public Redacted Version of the "Order *in Lieu* of Indictment", 19 October 2011.

majority, Judge Nyambe dissenting,[8] and issued a warrant for his arrest and transfer.[9] In the Order *in Lieu* of Indictment, and pursuant to Rule 77(D)(ii), the Chamber in the *Tolimir* case decided to prosecute the charge of contempt against the Accused itself.

5. On 27 September 2011 the Accused was arrested in the Republic of Serbia.[10]

6. On 9 October 2011, the Accused was transferred to the seat of the Tribunal in The Hague and was detained at the United Nations Detention Unit ("UNDU") upon his arrival.[11] On the same day the Deputy Registrar assigned Mr. Jens Dieckmann as Duty Counsel.[12]

7. On 10 October 2011, the initial appearance of the Accused was held before Presiding Judge Christoph Flügge.[13] The Accused deferred his plea on the charge of contempt.[14] On 19 October 2011, the further initial appearance of the Accused was held, at which he entered a plea of not guilty.[15]

8. On 2 November 2011, the Deputy Registrar assigned Mr. Jens Dieckmann as permanent counsel to the Accused.[16]

9. On 11 November 2011, the Chamber ordered the Registry to request that the Secretary-General waive the immunity of certain Registry staff who contacted, or attempted to contact, the Accused between 9 and 13 September 2011, so that they could testify in the case against the Accused.[17] On 16 November 2011, the Chamber further ordered the Registry to seek authorisation from the Secretary-General to disclose certain documents to the Accused that were

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8 Dissenting Opinion of Judge Prisca Matimba Nyambe to the Order *in Lieu* of Indictment, confidential, 4 October 2011. The confidentiality of this Dissenting Opinion was lifted on 19 October 2011. Order Lifting the Confidentiality of the Orders and Transcript Related to the Initial Appearance, 19 October 2011.

9 Warrant of Arrest and Order for Surrender, confidential, 21 September 2011.

10 Ex. D00026 (confidential).

11 Order for Detention on Remand, confidential, 9 October 2011. The confidentiality of this order was lifted on 19 October 2011. Order Lifting the Confidentiality of the Orders and Transcript Related to the Initial Appearance, 19 October 2011.

12 Decision by the Deputy Registrar on Assignment of Duty Counsel to Dragomir Pećanac, confidential, 9 October 2011. This decision was made public pursuant to the Registrar's Notice of 2 November 2011. Notice to Reclassify Decision by the Deputy Registrar, 2 November 2011.

13 Order Designating a Judge for Initial Appearance, confidential, 9 October 2011; Scheduling Order for Initial Appearance, confidential, 9 October 2011. (The confidentiality of both orders was lifted on 19 October 2011. Order Lifting the Confidentiality of the Orders and Transcript Related to the Initial Appearance, 19 October 2011).

14 T. 13 (10 October 2011).

15 T. 24 (19 October 2011).

16 Decision by the Deputy Registrar on Assignment of Counsel to Dragomir Pećanac, 2 November 2011, p. 2. In the Decision the Deputy Registrar decided to assign Mr. Dieckmann as counsel to the Accused for a temporary period of 120 days. *Ibid.*

17 Order to Request Waiver of Immunity for Certain Staff of the Registry, confidential, 11 November 2011; Further Order Regarding Request for Waiver of Immunity for Certain Staff of the Registry, confidential, 16 November 2011, p. 2.

relevant to the case against him and that gave a record of the alleged contacts between him and the VWS.[18]

10. On 23 November 2011, the Registrar informed the Chamber that the Secretary-General had declined to waive the immunity of the Registry staff and had not authorised the disclosure of the documents giving a record of the alleged contacts between the Accused and the VWS.[19] The Registrar submitted that he was, therefore, not in a position to make the staff members concerned available or to disclose the documents sought by the Accused.[20]

11. On 24 November 2011, the Accused requested, *inter alia*, that the Chamber dismiss the contempt charge against him in the Order *in Lieu* of Indictment and order the immediate release of the Accused from the UNDU, based on the argument that the charge lacked evidentiary support.[21] On 28 November 2011, the Chamber denied the Accused's request, based on the reasoning, *inter alia*, that it would be in the interests of justice for the relevant facts and evidence to be presented in the course of a trial which was to be held, as far as possible, in public and in which all relevant evidence and submissions could be presented so that the Chamber would be best placed to determine the truth in relation to what was alleged in the Order *in Lieu* of Indictment.[22]

12. On 28 November 2011, the Chamber held the Pre-Trial Conference in the contempt case against the Accused.[23] The trial was held on 30 November 2011 and 1 December 2011.[24] The Chamber admitted four exhibits in the case against the Accused.[25]

13. The Accused presented oral Rule 98 *bis* submissions requesting a judgement of acquittal after the presentation of the case against him.[26] The Chamber, by Majority, Judge Nyambe dissenting, denied the Accused's motion for judgement of acquittal pursuant to Rule 98 *bis* on the basis that it concluded that it was not the case that there was no evidence capable of supporting a conviction of the Accused.[27]

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18 Decision on Motion for Disclosure from the Victims and Witnesses Section, confidential, 16 November 2011, p. 3.
19 Registrar's Submission Pursuant to Rule 33(B) of the Rules Regarding Testimony of VWS Staff and VWS Disclosure, confidential, 23 November 2011, para. 5.
20 *Ibid.*, para. 7.
21 Dragomir Pećanac's Motion to Dismiss the Order in Lieu of Indictment and Request for Stay of Deadline, confidential, 24 November 2011, pp. 9–10.
22 Further Partial Decision on the Motion to Dismiss the Order in Lieu of Indictment and Request for Stay of Deadline, 28 November 2011, pp. 4–5.
23 Scheduling Order for the Pre-Trial Conference and the Start of Trial, 10 November 2011.
24 *Ibid.*
25 T. 51–52, 56–57 (30 November 2011).
26 T. 59–64, 65–66 (private session), 66, 67–68 (private session), 68–69 (30 November 2011).
27 T. 71–72 (30 November 2011).

14. The Chamber gave a summary of the case against the Accused on 30 November 2011.[28] It did not call any witnesses,[29] but admitted four documents under seal:[30] (1) the Subpoena,[31] (2) the Decision on Safe Conduct,[32] (3) the Memorandum of Service indicating that the Subpoena was served on the Accused on 2 September 2011,[33] and (4) the VWS Memorandum.[34]

15. The Accused requested the admission of 32 exhibits from the bar table.[35] He also initially notified the Chamber that he would be calling one witness.[36] During trial, the Accused withdrew the witness and one of the exhibits and the Chamber admitted the remaining 31 exhibits into evidence.[37] The Accused presented his closing arguments on 1 December 2011.[38]

II. APPLICABLE LAW

16. Although contempt of court is not expressly articulated in the Statute of the Tribunal ("Statute"), it is well-established that the Tribunal possesses the inherent jurisdiction to pursue contempt proceedings.[39] The Appeals Chamber has 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".[40]

17. Rule 77(A) provides in relevant part:

> 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
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> [....]

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28 T. 47–48, 48–49 (private session), 49, 49–50 (private session), 50–51 (30 November 2011).
29 T. 46, 51 (30 November 2011).
30 T. 51–52, 56–57 (30 November 2011).
31 Ex. C00001 (confidential).
32 Ex. C00002 (confidential).
33 Ex. C00003 (confidential).
34 Ex. C00004 (confidential).
35 Dragomir Pećanac's Motion to Admit Documents from the Bar Table, confidential, 29 November 2011.
36 Dragomir Pećanac's Submissions Pursuant to Rule 65*ter* (G), confidential, 29 November 2011, para. 6.
37 T. 76–79 (private session), 79–80 (30 November 2011). *See* Memorandum from Court Officer on Exhibit Numbers Assigned Pursuant to Trial Chamber's Order Dated 30 November 2011, confidential, 1 December 2011 (in which the exhibits admitted were given Exhibit Numbers from Ex. D00001 to Ex. D00031).
38 T. 82–86, 86–91 (private session), 91–93, 93–100 (private session), 101, 101–104 (private session), 104–105, 105–106 (private session), 106–107 (1 December 2011).
39 *Prosecutor v. Duško Tadić,* Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Milan Vujin* Contempt Judgement"), paras. 13–26; *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006, para. 13.
40 *Milan Vujin* Contempt Judgement, para. 13.

> (iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
>
> [....]

18. To satisfy the *actus reus* of contempt under Rule 77(A), an order by a Chamber, whether oral or written, must be objectively breached.[41] The Appeals Chamber has held that a "violation of a court order *as such* constitutes an interference with the International Tribunal's administration of justice".[42]

19. Furthermore, any knowing and wilful conduct in violation of a Chamber's order meets the requisite *mens rea* for contempt.[43] In the *Contempt Case Against Florence Hartmann*, the Trial Chamber held:

> Where it is established that an accused had knowledge of the existence of a Court order, a finding of intent to violate the order will almost necessarily follow. Wilful blindness to the existence of the order, or reckless indifference to the consequences of the act by which the order is violated may satisfy the mental element. Mere negligence in failing to ascertain whether an order had been made is insufficient.[44]

The Appeals Chamber considered this analysis to be consistent with Appeals Chamber precedent and it held that the Prosecution was not required to prove specific intent to interfere with the administration of justice in order to secure a conviction under Rule 77(A).[45]

III. THE CASE AGAINST THE ACCUSED

20. In the Subpoena that was addressed to the Accused, the Chamber ordered the Accused to

> appear at the seat of the Tribunal at Churchillplein 1, 2517 JW The Hague, Netherlands, during the week of 5 September 2011 on a date and time to be specified or at such other time as may be communicated to you, to testify before this Chamber in the case of *Prosecutor v. Tolimir*, or to show good cause why you should not testify.[46]

The Subpoena goes on to state that the date of testimony is subject to change and that certain actions will be taken by the VWS, representatives of the Tribunal and the Government of the Republic of Serbia.[47] The Subpoena included the following warning:

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41 *In the Contempt Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009 ("*Hartmann* Contempt Trial Judgement"), para. 21.

42 *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R7-A, Judgement, 15 March 2007 ("*Jović* Contempt Appeal Judgement"), para. 30 (emphasis in original) (quoting *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 27 September 2006 ("*Marijačić and Rebić* Contempt Appeal Judgement"), para. 44).

43 *Hartmann* Contempt Trial Judgement, para. 53.

44 *Ibid.*, para. 22.

45 *In the Contempt Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 128.

46 Order *in Lieu* of Indictment, p. 1 [*emphasis removed*].

47 Subpoena, p. 1.

> Failure to comply with this Subpoena may constitute contempt of the Tribunal under Rule 77, which is punishable by a term of imprisonment not exceeding seven years, a fine not exceeding 100,000 Euros, or both.[48]

21. In the Order *in Lieu* of Indictment the Chamber ordered the prosecution of the Accused for contempt of the Tribunal, punishable under Rule 77 and it stated that his prosecution was being pursued for

> having been informed on 2 September 2011 of the contents of the *subpoena ad testificandum* dated 31 August 2011, and of his obligation to appear before the Chamber, obstructing all attempts by the VWS to implement the Decision on Safe Conduct and make arrangements for his travel to The Hague, thereby failing to appear before the Chamber as ordered or to show good cause why he could not comply with the Subpoena, and therefore knowingly and wilfully interfering with the administration of justice by refusing to comply with the Subpoena.[49]

IV. THE DEFENCE CASE

22. As the Chamber indicated before the presentation of the Defence case,[50] the Chamber has considered the submissions pursuant to Rule 98 *bis* as well as the closing arguments in determining the responsibility of the Accused.

23. The Accused addressed three questions in both his closing arguments and his Rule 98 *bis* submissions: first, whether the Accused failed to comply with an order to attend before the Chamber; secondly, if so, whether he had a just excuse; and, thirdly, whether the Accused knowingly and wilfully interfered with the administration of justice.[51]

24. With regard to the first question, the Accused submitted that the Subpoena did not specify a contact person or contact office where he should submit good cause, nor the date on which he was required in The Hague to give testimony.[52] The Accused also submitted that he was informed that the date of testimony was subject to change and that he would be notified of any change in the date through the Registrar.[53] He pointed out that the Subpoena ends with the words "the Tribunal and the Government of the Republic of Serbia have been directed to take whatever steps are reasonably necessary to ensure his appearance at trial".[54] In the submission of the Accused, on the basis of the Subpoena and the Memorandum of Service, the following steps needed to be taken to ensure his appearance at trial: contacting him with information about date of appearance and travel; securing a

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48 *Ibid.*, p. 2 [*emphasis removed*].
49 Order *in Lieu* of Indictment, p. 3.
50 T. 80 (30 November 2011) ("JUDGE FLUEGGE: [....] You requested two hours [for closing arguments]. In light of your submission pursuant to Rule 98 bis, I think it should be appropriate to have one hour.")
51 T. 63 (30 November 2011); T. 85 (1 December 2011).
52 T. 87 (private session) (1 December 2011).
53 *Ibid.*
54 T. 87–88 (private session) (1 December 2011). The final sentence of the Subpoena in fact reads: "Representatives of the Tribunal and the Government of the Republic of Serbia have been directed to take whatever steps are reasonably necessary to ensure service of this Subpoena and your appearance at trial." Subpoena, p. 1.

national passport to travel internationally; evaluating his health; issuing an Order for Safe Conduct; and securing the permission of his Government for his testimony.[55]

25. It is the position of the Accused that while an Order for Safe Conduct was issued, the organs of the Tribunal did not communicate a specific time for the Accused to present himself for testimony or travel dates; they did not provide him with a passport until 7 October 2011;[56] they did not take any steps to obtain medical records from the Accused and they did not schedule or attempt to schedule any evaluation to determine his fitness for testimony; and finally they did not make any attempt to obtain permission from the Government of Serbia to allow him to testify on potentially confidential matters.[57] The Accused submits that he was doing as he was ordered in the Subpoena and awaiting a proper contact by the local authorities as indicated in the last sentence of the Subpoena.[58]

26. With regard to the question whether the Accused had a just excuse, the Accused submits that he did not receive the Order for Safe Conduct to allow him to travel until 14 September 2011, which was the date on which he was scheduled to testify;[59] the evidence does not show that anyone from the Tribunal or the Serbian authorities contacted him about processing a passport;[60] the proper procedure of authorisation for his testimony in view of his previous employment had not been followed in accordance with the law;[61] and finally [REDACTED][62]

27. As to whether the Accused knowingly and wilfully interfered with the administration of justice, it is his contention that he was substantially compliant throughout these events and, in particular, he provided information and stated a "willingness to testify (sic)".[63] In the submission of the Accused, there is no direct evidence of an intention to obstruct;[64] and that if any weight is attached to the VWS Memorandum, it is reasonable to believe that the VWS personnel misunderstood the Accused's reaction as unwillingness instead of a disproportionate response due

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55 T. 89–90 (private session) (1 December 2011). *Cf.* T. 65 (private session) (30 November 2011).
56 Ex. D00029 (confidential).
57 T. 93–94 (private session) (1 December 2011). *Cf.* T. 65–66 (private session) (30 November 2011).
58 T. 95 (private session) (1 December 2011).
59 T. 97 (private session) (1 December 2011).
60 T. 98 (private session) (1 December 2011).
61 *Ibid.*
62 [REDACTED]
63 T. 101–102 (private session) (1 December 2011) (referring to Ex. C00003 (confidential)). *Cf.* T. 66, 68 (private session) (30 November 2011).
64 T. 102–103 (private session) (1 December 2011); Ex. C00003 (confidential). *Cf.* T: 66, 67 (private session) (30 November 2011).

to his mental illness.[65] The Accused concludes that on the totality of the record there can be no finding of *mens rea* sufficient for a conviction for contempt.[66]

V. DISCUSSION

A. The *Actus Reus* of Contempt

28. The Chamber will now examine whether during the period from the service of the Subpoena on the Accused on 2 September 2011 to his arrest on 27 September 2011 the Accused failed to appear before the Chamber as ordered or to show good cause why he could not comply with the Subpoena.

29. The Accused did not appear as ordered before he was arrested on 27 September 2011.[67]

30. The Memorandum of Service is important evidence in relation to the question whether the Accused showed good cause why he could not comply with the Subpoena. In the Memorandum of Service, the Accused is recorded by a Senior Police Inspector in Belgrade ("Police Officer") as having indicated that he was "unable to give testimony for reasons of health".[68] This without further specifics or substantiation cannot amount to showing good cause why he should not testify. He is also recorded as having stated that "[a]s a former member of the armed forces of the Army of the SFRY, Army of Yugoslavia, Army of Republic of Srpska, [he] has the obligation to keep the state, official and military secrets".[69] Again, this cannot amount to showing good cause why he should not testify. It is certainly no impediment to his appearance or to his giving testimony on matters not covered by this obligation. In addition, a procedure could have been followed whereby authorisation could have been obtained in connection with his testimony.[70] In the other points that he mentions—lack of a passport, the need for a safe conduct order and [REDACTED] —the Accused is simply raising practical matters that he and the relevant authorities needed to resolve before he could appear. Moreover, the report on the service of the Subpoena contained in the Memorandum of Service is in no sense a communication with the Tribunal. The Memorandum of Service contains the signature of the Accused, but this merely demonstrates that he had received the Subpoena.

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65 T. 103 (private session) (1 December 2011); Ex. C00004 (confidential).
66 T. 104 (private session) (1 December 2011).
67 Ex. D00026 (confidential), p. 1.
68 Ex. C00003 (confidential).
69 *Ibid.*
70 Ex. D00024, pp. 3, 8 (Law on Cooperation Between Serbia and Montenegro with 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, Arts. 11, 32(1)).

31. The Accused has accepted the truth of the contents of the Memorandum of Service.[71]

32. Of the various issues that the Accused is recorded as having raised with the Police Officer on 2 September 2011, only "reasons of health", if properly substantiated, could constitute a "good cause" for not complying with the Subpoena. After service of the Subpoena, the Accused took no steps to substantiate these "reasons of health".[72]

33. The Subpoena imposed an obligation on the Accused to appear before the Tribunal during the week of 5 September 2011 or on a further date to be specified.[73] It also alerted him to the manner in which this was to be facilitated. Much of what the Accused has submitted rests on the lack of evidence of action on the part of the VWS and the Government of Republic of Serbia to facilitate his attendance at the Tribunal[74] and the lack of evidence that he was informed of the date and time that he should appear at the seat of the Tribunal.[75] Irrespective of the practical arrangements to be made by the VWS and the Serbian authorities for his travel to the Tribunal, in the entire period from the moment of service of the Subpoena until his arrest on 27 September 2011, the Accused took none of the multiplicity of actions necessary either to facilitate his attendance at the Tribunal or to show good cause why he should not attend. He could have communicated with the Tribunal by telephone or in writing. He did not do so despite the contact that the Tribunal staff had with him as shown by the VWS Memorandum.

34. The Chamber, by majority with Judge Nyambe dissenting, concludes that the Accused neither appeared before the Chamber as ordered nor showed good cause why he could not comply with the Subpoena.

B. The *Mens Rea* of Contempt

35. During the conflict in Bosnia and Herzegovina in 1995, the Accused despite his relative youth was a Security and Intelligence Officer in the Main Staff of the Army of Republika Srpska

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71 Notice in Compliance with Order Regarding Documents Referred to in the Order in Lieu of Indictment, 9 November 2011, p. 2.

72 The Accused was not only aware of where relevant documentation on his medical condition was held but he even had an extensive collection of such documentation at his home. *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, T. 17965–17966 (10 October 2011) ("The original medical file, much more extensive than the documents I have with me, are at -- is at my home. All that I have of my medical documentation is easily verifiable at the Military Medical Centre in Karaburma, the Military Medical Centre in Belgrade and the Military Medical Academy also in Belgrade.").

73 Subpoena, p. 1.

74 T. 89–90 (private session), 93–94 (private session), 97 (private session), 98 (private session) (1 December 2011).

75 T. 87 (private session), 93 (private session), 95 (private session) (1 December 2011).

("VRS").[76] Further, it is evident from the reports of two doctors who assessed him while he was in the UNDU that [REDACTED][77] [REDACTED][78] [REDACTED][79]

36. The Memorandum of Service establishes that the Accused was fully aware of the contents of the Subpoena and even that he was able to make the subtle and important distinction between appearing and giving testimony at the Tribunal.[80] Therefore the Chamber, by majority with Judge Nyambe dissenting, finds that the Accused was fully able to comprehend not only the Subpoena and its implications but also the obligations it imposed on him from its service on 2 September 2011 until his arrest on 27 September 2011.

37. The Chamber, by majority with Judge Nyambe dissenting, concludes that the Accused knowingly and wilfully interfered with the administration of justice and therefore the requisite *mens rea* for contempt is proven.

C. Conclusion on the Responsibility of the Accused

38. The Chamber, by majority with Judge Nyambe dissenting, concludes that, by failing to appear before the Chamber as ordered or to show good cause why he could not comply with the Subpoena, the Accused knowingly and wilfully interfered with the administration of justice and thereby committed an act of contempt of the Tribunal punishable under Rule 77.

VI. SENTENCING

39. The purpose of the law of contempt is to prevent frustration of the administration of justice.[81] 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.[82] 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

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76 Ex. D00031 (confidential), p. 1.
77 [REDACTED]
78 [REDACTED]
79 [REDACTED]
80 Ex. C00003 (confidential).
81 *See Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001, para. 36.
82 *Prosecutor v. Domagoj Margetić*, Case No. IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2005, para. 84; *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77, Judgement, 30 August 2006, para. 26; *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008, para. 103.

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.[83]

40. In his submissions regarding sentencing, the Accused submitted that if the Chamber finds the Accused guilty, he should be sentenced to "time served" and that such a sentence would be more than adequate in view of his medical condition and certain aspects of his treatment while in detention.[84]

41. Contempt of the Tribunal is a serious offence, which goes to the essence of the administration of justice. By his failure to comply with the Subpoena and to appear at the seat of the Tribunal and testify, the Accused has acted against the interests of justice. His failure to testify has deprived the Chamber of relevant evidence. The Tribunal is dependent on witness testimony and the deprivation of such relevant evidence amounts to a serious interference with the administration of justice, and in fact, endangers the fulfilment of the Tribunal's functions and mandate.

42. The Majority attaches some weight to the health of the Accused as a mitigating factor in his sentencing. [REDACTED] [85] [REDACTED]

43. The Chamber is vested with broad discretion in determining the appropriate sentence for contempt.[86] Pursuant to Rule 77(G), it can impose a term of imprisonment of up to seven years, a fine not exceeding 100,000 euros, or both, for contempt.

44. In the current case, taking into account the gravity of the offence, and the mitigating factor mentioned above, the Majority holds that a single term of imprisonment of 3 (three) months is appropriate.

45. The Accused was held in detention in the Republic of Serbia from 27 September 2011, pending his transfer to the Tribunal,[87] which took place on 9 October 2011.[88] He has been held in the UNDU for a total of 62 days since 9 October 2011. Pursuant to Rule 101(C), credit shall be given to him for the 74 days he was detained in the Republic of Serbia and in the UNDU.

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83 *Prosecutor v. Milan Martić,* Case No. IT-95-11-A, Judgement, 8 October 2008, para. 329.
84 T. 105–106 (private session) (1 December 2011).
85 [REDACTED]
86 *See Jović* Contempt Appeal Judgement, para. 38.
87 Ex. D00026 (confidential).
88 Order for Detention on Remand, 9 October 2011.

VII. DISPOSITION

46. For the foregoing reasons, having considered all of the evidence and the submissions in this case, pursuant to the Statute of the Tribunal and Rule 77, the Chamber decides, by majority with Judge Nyambe dissenting, that:

(1) The Accused, Dragomir Pećanac, is **guilty** of contempt of the Tribunal, punishable under Rule 77;

(2) The Accused, Dragomir Pećanac, is hereby sentenced to a single sentence of 3 (three) months of imprisonment, subject to credit being given for the 74 days that he spent in detention;

(3) The Registry shall take all the measures necessary for the execution of this sentence;

(4) Upon service of his sentence, the Accused shall be released, as soon as any necessary formalities with the relevant authorities have been completed; and

(5) The Chamber hereby renders concurrently a public and redacted version of this Judgement.

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

Judge Christoph Flügge
Presiding

Judge Antoine Kesia-Mbe Mindua

Judge Prisca Matimba Nyambe

Dated this ninth day of December 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

VIII. DISSENTING OPINION OF JUDGE PRISCA MATIMBA NYAMBE

1. From the outset I wish to remind myself that in accordance with the Statute and the Rules of Procedure and Evidence of the Tribunal, the Accused is presumed innocent until proven guilty beyond a reasonable doubt. There is no corresponding burden on the Accused to prove his innocence.

2. In this case the Chamber has assumed the role of both the Prosecutor and Judge which is allowed in accordance with Rule 77(D)(ii).

3. The Prosecution did not make an opening or closing statement. Instead the Chamber made a summary of the case against the Accused. The Defence also did not make an opening statement, but did make a closing statement. Neither party called any witnesses.

4. The Prosecution case is contained entirely in Prosecution Exhibits C00001 to C00004. The Defence in addition to their closing statement also produced Exhibits D00001 to D00031. I have reviewed the evidence of both the Prosecution and the Defence.

5. The Prosecution case against the Accused is contained in the Order in Lieu of Indictment which is that the Accused:

> "having been informed on 2 September 2011 of the contents of the subpoena ad testificandum dated 31 August 2011, and of his obligation to appear before the Chamber, obstructing all attempts by the VWS to implement the Decision on Safe Conduct and make arrangements for his travel to The Hague, thereby failing to appear before the Chamber as ordered or to show good cause why he could not comply with the Subpoena, and therefore knowingly and wilfully interfering with the administration of justice by refusing to comply with the Subpoena"

6. The Accused denied the charge. His defence being that he had just and good cause for failing to appear before the Chamber as ordered. His defence is outlined in Exhibit C00003, the Memorandum of Service. In the Memorandum of Service of the Subpoena he stated as follows:

i) Willing to appear but unable to testify,

ii) Willing to appear but unable to give testimony for reasons of health [REDACTED]

iii) In order to testify in the first place I need the decision of free passage,

iv) As a former member of the armed forces of the SFRY, Army of Yugoslavia, Army of Republika Srpska ... has the obligation to keep the state, official and military secrets.

In other words he needed prior authorisation from the relevant state before he could travel to The Hague to testify. Additionally the Accused had no passport to be able to undertake international travel at the time.

7. The Memorandum of Service was sent to the ICTY Trial Chamber in a letter from the Republic of Serbia, Office of the National Council for Cooperation with the International Criminal Tribunal for the Former Yugoslavia, dated 9 September 2011. By this letter both the ICTY and the Government of Serbia were made aware what practical problems lay in the way before the Accused could appear before the Chamber as ordered. In a nutshell the Accused's defence is that he had good cause for failing to appear as ordered by the Chamber.

8. In amplication of the Accused's defence the Defence adduced the following evidence.

9. That the Accused's evident understanding of the subpoena was that both the Tribunal and the Government of the Republic of Serbia "have been directed to take whatever steps are reasonably necessary to ensure... his appearance at trial". I will briefly summarise each of the reasons advanced by the Accused as constituting a good cause.

A. Securing National Passport

10. At the time of his arrest, he did not have a passport for international travel. The passport was issued on 7 October 2011. Even if he wanted to travel, he could not do so because he did not have a passport.

B. Evaluation of his health

11. In the Memorandum of Service of Subpoena, he indicated that he was willing to appear but unable to give testimony for reasons of health. In other words not medically fit for testimony at that time. There is no evidence that any evaluation of his health was undertaken nor consideration of his claim of inability to testify investigated. [REDACTED] Therefore his indication of unfitness to testify for reasons of health ought to have been evaluated before his travel to The Hague to testify, to determine if he was medically fit to testify or not.

C. Safe Conduct Order

12. As indicated in Exhibit C00003, because of his personal circumstances the Accused needed a decision on free passage. At the time the Accused did not have a Safe Conduct Order, which was supposed to be issued by the Chamber, to enable him to travel to The Hague and testify before it. The Safe Conduct Order, issued by the Chamber indicates that it was issued on 9 September 2011 in English, and translated to B/C/S, the language of the Accused on 12 September 2011. And it was not provided to the Accused until 14 September 2011 as indicated by his signature and the date on the document. Without the Safe Conduct Order he could not travel safely to The Hague.

D. Certificate of Waiver and Authorisation to Testify

13. In the Memorandum of Service of Subpoena the Accused informed both the ICTY and the Government of Serbia that as a military man, he needed a waiver or authorisation from his Government before he could testify before the Chamber as ordered. He could not travel to The Hague without a certificate of waiver being issued by his Government. There is no evidence that any such waiver process was initiated, much less completed by the time he was expected to give testimony, despite the Accused's indication in Exhibit C00003 that it was necessary. The evidence on record shows that this authorisation is a legal requirement pursuant to Article 97 of the Republic of Serbia Criminal Procedure Code, and more importantly Article 11 of the Law on Cooperation. The process to obtain such authorisation is complex, which requires the request to be made to the National Council of Cooperation to obtain the waiver. There is no evidence on record showing that the certificate of waiver was ever issued.

14. Contempt of court is an act or omission intended to interfere with the due administration of justice. In order to make a finding of *mens rea* for contempt it must be established that the Accused had the specific intent to interfere with the Tribunal's due administration of justice.

15. In accordance with the Tribunal's jurisprudence, "mere negligence in failing to ascertain whether an order has been made does not amount to contempt..." "indifference or reckless negligence, while perhaps rising to a level that interferes in the administration of justice could never justify imprisonment or a substantial fine."

16. According to Exhibit C00003, when contacted by the Republic of Serbia MUP, with regard to the subpoena, he provided information and stated willingness to testify. Later when contacted by the Republic of Serbia MUP with regard to the arrest warrant, he again responded in full as shown in Ex. D00027, para. 2, "he", the Accused, "...responded to a telephone call from the Republic of Serbia Ministry of Interior to be served the Order in Lieu of Indictment and Warrant for his arrest

and handover". His full compliance with all properly issued summons is noted in paragraph 4 of Ex. D00027, which stated that "he", the Accused, "had always been available to the High Court of Belgrade War Crimes Department, i.e. he always responded to all summons."

17. The behaviour in a situation when he was properly contacted by his national authorities, as shown herein, is clearly at odds with knowingly and wilfully obstructing the administration of justice.

18. Moreover as the evidence on record shows, the subpoena did not indicate a specific date or time for his compliance, nor was he given such date at any time. Therefore in his mind the subpoena could be complied with when all reasonable necessary steps were taken by the ICTY and the Government of Serbia to solve the practical impediments that he faced.

19. Before the practical problems of lack of passport, medical evaluation, certificate of waiver, and safe conduct order were resolved his arrest was premature. These problems ought to have been resolved before arresting him.

E. Mens Rea

20. In order to make a finding of *mens rea* of contempt, it must be established "that the accused had the specific intent to interfere with the Tribunal's due administration of justice". In accordance with the jurisprudence of the Tribunal, "mere negligence in failing... to ascertain whether an order has been made does not amount to contempt... Indifference or reckless negligence while perhaps rising to a level that interferes with the administration of justice could never justify imprisonment or a substantial fine".[89]

21. In accordance with Exhibit C00003 when contacted by the Republic of Serbia MUP with regard to the subpoena, he provided information and stated a willingness to testify. Later, when contacted by the Republic of Serbia MUP with regard to the arrest warrant he again responded in full cooperation as shown in Exhibit D00027 paragraph 2, "he" the Accused, "responded to a telephone call from The Republic of Serbia Ministry of Interior to be served the Order in Lieu of Indictment and warrant for his arrest and hand over". His full compliance with all properly issued summons is noted in Exhibit D00027 in paragraph 4, where it is stated that "he", the Accused, "have always been available to the High Court in Belgrade War Crimes Department, i.e. that he always responded to summons."

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[89] *Prosecutor v. Brđanin Concerning Allegations Against Milka Maglov*, Case No. IT-99-36-R77, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 19 March 2004, para. 39.

22. Moreover the subpoena did not indicate a specific date or time, nor was he ever given such a date until his arrival at the UNDU. His understanding of it was that there was no urgency, believing that the subpoena could be complied with when all reasonable and necessary steps were fully resolved by the relevant institutions.

23. In the evidence on record, it is possible to read the Accused's conduct as reported by the VWS personnel as unwillingness to testify. The Accused's understanding and expectations was that the ICTY and the Government of Serbia would take the necessary steps to ensure his attendance, while the VWS interpretation was that he may be unwilling to testify. Where the evidence creates a doubt, that doubt must be weighed in favour of the Accused. On the totality of the evidence on record there can be no finding of *mens rea* of contempt beyond all reasonable doubt.

F. VWS Personnel – Exhibit C00004

24. Exhibit C00004 is the memorandum from the Victims and Witnesses Section ("VWS") regarding contacts with the Accused. The VWS personnel who indicated their opinion of the Accused's demeanour were not available to testify to prove the contents of Exhibit C00004. The Prosecution conceded the insufficiency of this document in their order of 11 November 2011 that "owing to the assertion of immunity no witnesses are available to testify in this case against the Accused. The circumstances and their implication for the administration of justice need to be weighed very carefully."

25. According to the Defence this document contains double hearsay from unknown VWS personnel, of a summary of what the Accused may have said or done. The exact content of any conversation is unknown as is the identity of the middle actor and the manner in which such information was conveyed to the author. This document, according to the Defence, actually contains what would be further removed from double hearsay as what was relayed may not be direct communication of the Belgrade Registry Liaison Officer's communication with the author. It is entirely possible that the information went from the Belgrade Registry Liaison Officer to another VWS personnel in The Hague before being relayed to the author. Regardless, it is at the minimum double hearsay rendering the contents inadmissible.

26. The contents of this document are not only hearsay but also a kind of summary statement as opposed to direct quotes, and there is no information how these communications were relayed. It could be VWS personnel orally reporting their impressions to the author or they could be written reports. In a Decision regarding Admission of Summary Statements, the Milutinović Trial Chamber held that "... the fact that the statements constitute second-hand or even more removed hearsay seriously weakens whatever probative value they might possess."

27. Without the ability to cross-examine or have any semblance of corroboration this statement holds no probative value such as to support a conviction of contempt beyond a reasonable doubt.

28. In fact the Chamber itself indicated the insufficiency of this evidence at page 3 of its "Order to Request Waiver of Immunity for Certain Staff of the Registry" dated 11 November 2011:

> "...that the oral submissions by the Chief of VWS will be insufficient for the Chamber to establish the facts with regards to the contacts with the Accused and attempts to contact the Accused referred to in paragraphs 4-7 of the VWS memorandum, and that only the Registry staff concerned can prove direct evidence as to what it stated in these paragraphs."

This document, on the face of it, and without proper examination of the author, can never go to show a knowing or wilful interference with the administration of justice, beyond a reasonable doubt by the Accused.

29. There is no evidence of an intent to obstruct, save the hearsay statements by VWS personnel of their impressions that "he seemed unwilling to cooperate". It is entirely possible that the VWS personnel misunderstood the Accused's behaviour.

30. I find the lack of a timely safe conduct order, the lack of a passport, the lack of a certificate of waiver from his Government, the lack of evaluation of his health to determine whether he was medically fit to testify or not are all good causes to exculpate the Accused, within the meaning of Rule 77 (A)(iii).

31. It is for these reasons outlined above that I respectfully differ with my colleagues and instead have concluded that the Accused is not guilty of contempt as charged.

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

Judge Prisca Matimba Nyambe

Dated this ninth day of December 2011
At The Hague
The Netherlands

[Seal of the Tribunal]