



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: 28 November 2011

Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 28 November 2011

IN THE CONTEMPT CASE OF DRAGOMIR PEĆANAC

PUBLIC

**FURTHER PARTIAL DECISION ON THE MOTION FOR DISMISSAL OF
THE ORDER IN LIEU OF INDICTMENT AND FOR STAY OF DEADLINE**

Counsel for the Accused
Mr. Jens Dieckmann

THIS TRIAL 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 (“Tribunal”) is seised of “Dragomir Pećanac’s Motion to Dismiss the Order in Lieu of Indictment and Request for Stay of Deadline”, filed confidentially on 24 November 2011 (“Motion”), and hereby renders a further partial decision thereon.

I. PROCEDURAL BACKGROUND

1. The Chamber filed confidentially on 21 September 2011 and in public redacted form on 19 October 2011 the “Order *in Lieu* of Indictment”,¹ in which the Chamber, Judge Nyambe dissenting, ordered the prosecution of Dragomir Pećanac (“Accused”) for contempt of the Tribunal punishable under Rule 77 of the Rules of Procedure and Evidence (“Rules”) and decided to prosecute the matter itself.²

2. On 14 November 2011 the Chamber filed the “Order Regarding Preparation for and Conduct of the Trial” (“Order of 14 November 2011”) in which it identified three documents as comprising the documentary evidence in the case against the Accused: (1) the “Subpoena *ad testificandum*” issued on 31 August 2011 in the case of *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T (“Subpoena” and “*Tolimir* case” respectively), (2) the “Memorandum of Service of Subpoena for Witness Dragomir Pećanac” filed confidentially on 9 September 2011 in the *Tolimir* case (“Memorandum of Service”), and (3) an Internal Memorandum from the Victims and Witnesses Section (“VWS”) dated 13 September 2011³ (“VWS Memorandum”). In the Order of 14 November 2011 the Chamber ordered the Accused to provide lists of witnesses and exhibits and time-estimates for his opening and closing statements (“Information about the Defence Case”) by 23 November 2011.⁴

3. The Chamber informed the Defence on 23 November 2011 that, in addition to the documentary evidence referred to in the Order of 14 November 2011, it will also present as evidence the “Decision on Prosecution Request for an Order for Safe Conduct for Witness Dragomir Pećanac”, filed confidentially in the *Tolimir* case on 9 September 2011 (“Safe Conduct Decision”).⁵

¹ Order Issuing a Public Redacted Version of the “Order *in Lieu* of Indictment”, 19 October 2011.

² Order *in Lieu* of Indictment, p. 3.

³ *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, Confidential Appendix B

⁴ Order of 14 November 2011, p. 3.

⁵ E-mail correspondence on behalf of the Chamber to the Defence of 23 November 2011.

4. On 11 November 2011 the Chamber filed confidentially the “Order to Request Waiver of Immunity for Certain Staff of the Registry” (“Order of 11 November 2011”) in which it ordered the Registrar to request that the Secretary-General waive the immunity of certain Registry staff so that they may testify in the instant case.⁶ In addition, the Chamber filed confidentially the “Decision on Motion for Disclosure from the Victims and Witnesses Section” on 16 November 2011 (“Decision on VWS Motion”) in which it ordered the Registrar to seek authorisation from the Secretary-General to disclose certain documents to the Accused that are relevant to the case against him and that give a record of the alleged contacts between him and the VWS.⁷

5. On 23 November 2011 in the confidential “Registrar’s Submission Pursuant to Rule 33(B) of the Rules Regarding Testimony of VWS Staff and VWS Disclosure” (Registrar’s Submission) 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.⁸ 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.⁹

6. On 24 November 2011 the Chamber informed the Defence that it would not be calling any witnesses.¹⁰

7. In the Motion, the Accused requested that the Chamber dismiss the charge in the Order *in Lieu* of Indictment, terminate the contempt proceedings, and order the release of the Accused (“Request for Dismissal of Charge and Release”) and stay the deadline for the provision of the Information about the Defence Case until disposal of the issues raised in the Motion.¹¹

8. In the “Partial Decision on the Motion for Dismissal of the Order in Lieu of Indictment and for Stay of Deadline” filed on 25 November 2011 (“Partial Decision”), the Chamber partially granted the Motion, postponed its decision on the Request for Dismissal of Charge and Release and ordered, *inter alia*, that the obligation of the Accused to provide the Chamber with Information about the Defence Case shall be suspended and that the scheduling of the commencement of trial shall be dependent on the decision to be taken by the Chamber on the Request for Dismissal of Charge and Release.¹²

⁶ Order of 11 November 2011, p. 4.

⁷ Decision on VWS Motion, p 3.

⁸ Registrar’s Submission, para. 5.

⁹ *Ibid.*, para. 7.

¹⁰ E-mail correspondence on behalf of the Chamber to the Defence of 24 November 2011.

¹¹ Motion, pp. 9-10.

¹² Partial Decision, p. 2.

II. SUBMISSION

A. Motion

9. In the Motion, the Accused submits that the charges against him should be dismissed, the Order *in Lieu* of Indictment withdrawn and the proceedings discontinued on the basis that the evidence is insufficient for a conviction of contempt of the Tribunal pursuant to Rule 77(A)(iii) of the Rules.¹³

10. The Accused submits that the evidence does not show he failed to comply with the Subpoena since there is no evidence in the case against him that he was not given a specific date to appear and testify as a witness in the *Tolimir* case.¹⁴

11. He further submits there were a “number of just excuses for why his testimony would not be practicable, or even possible, on the date it was scheduled”.¹⁵ In his submission, the Memorandum of Service indicated that the following issues had to be resolved before he could testify: (1) a review of his health, (2) issuance of a safe conduct order, and (3) issuance of State permission to testify on state, official and military secrets.¹⁶ The Accused contends that the evidence does not show that all of these practical matters were resolved before his scheduled testimony.¹⁷

12. Finally, the Accused submits that there is no culpable *mens rea* on his part that could be established beyond reasonable doubt and that it has not been shown that he was aware of any interference with the administration of justice by not complying with the Subpoena, let alone a specific intent of obstruction.¹⁸

13. The Accused also claims that there is no way to prove the contents of the VWS Memorandum since the Registry staff concerned will not testify.¹⁹ Therefore, there can be no guarantee of his right under Article 21(4)(e) of the Statute of the Tribunal (“Statute”) which allows him to “examine, or have examined, the witnesses against him”.²⁰ The Accused submits that none of the documents in the case against him can go to show a knowing or willing interference with the

¹³ Motion, paras. 16, 23.

¹⁴ *Ibid.*, para. 17.

¹⁵ *Ibid.*, para. 18.

¹⁶ *Ibid.*, para. 18.

¹⁷ *Ibid.*, para. 18.

¹⁸ *Ibid.*, para. 19.

¹⁹ *Ibid.*, para. 20.

²⁰ *Ibid.*, para. 20.

administration of justice.²¹ He submits that, to the contrary, the documentary evidence indicates his willingness to testify and that he was not fit to testify in the time period concerned.²²

III. DISCUSSION

14. The Accused has been in detention at the United Nations Detention Unit since 9 October 2011;²³ the preparations for the trial are already advanced;²⁴ and the Chamber anticipates that the trial will be very brief. The trial was scheduled to commence on 28 November 2011,²⁵ though the Chamber subsequently ordered in the Partial Decision that the scheduling of the commencement of trial shall be dependent on the present decision.²⁶ In addition, these proceedings are unusual in that owing to the assertion of immunity no witnesses are available to testify in the case against the Accused and the Accused himself has been unable to have access to relevant documents that he has requested. These circumstances and their implications for the administration of justice need to be weighed very carefully.

15. Rule 98 *bis* permits the entry of a judgement of acquittal if there is no evidence capable of supporting a conviction at the close of the Prosecution's case. It is noteworthy that a dismissal of the charge at this earlier stage in the proceedings would not constitute a judgement of acquittal.

16. In the special circumstances of the case the Chamber considers that it would be in the interests of justice for the relevant facts to be determined in the course of a trial which would lead to a reasoned judgement and in which the proceedings would take place as far as possible in public with the opportunity for the Defence to make oral submissions and, if he wishes, to present a Defence case.

17. The Chamber notes the submissions of the Accused that the documentary evidence in the case against him does not establish that he is guilty of contempt;²⁷ and that since the Registry personnel who supplied the information presented in the VWS Memorandum will not testify, there can be no guarantee of the Accused's right under Article 21(4)(e) of the Statute "to examine or have examined the witnesses against him."²⁸ The Chamber considers that it would be preferable for it to consider the merits of these submissions further in the context of a trial, in which all relevant

²¹ *Ibid.*, para. 20.

²² *Ibid.*, para. 21.

²³ Order for Detention on Remand, 9 October 2011, p.1.

²⁴ *Cf.* Order of 14 November 2011.

²⁵ Order of 14 November 2011, p. 3.

²⁶ Partial Decision, p. 2.

²⁷ Motion, paras. 16-19, 21.

²⁸ *Ibid.*, para. 20.

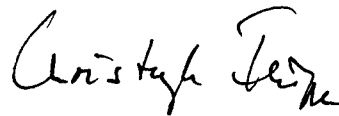
evidence and submissions can be presented so that the Chamber will be best placed to determine the truth in relation to what is alleged in the Order *in Lieu* of Indictment.

IV. DISPOSITION

For these reasons, pursuant to Rules 54, 65 *ter*(G) and 77(E) of the Rules, the Trial Chamber hereby

- (1) **DENIES** the Motion **IN PART**;
- (2) **DECIDES** not to dismiss the charge in the Order *in Lieu* of Indictment nor to order the release of the Accused; and
- (3) **ORDERS** that the trial shall commence at 9:00 a.m. on Wednesday 30 November 2011 and that the Accused shall provide the Chamber with Information about the Defence Case, as set forth in the Order of 14 November 2011, as soon as possible and no later than 4:00 p.m. on Tuesday 29 November 2011.

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



Judge Christoph Flügge
Presiding Judge

Dated this twenty-eighth day of November 2011
At The Hague
The Netherlands

[Seal of the Tribunal]