

**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

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IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi, Pre-Trial Judge

Registrar: Mr Hans Holthuis

Judgement of: 11 September 2008

IN THE MATTER OF LJUBIŠA PETKOVIĆ

PUBLIC DOCUMENT

**REDACTED VERSION OF JUDGEMENT PRONOUNCED ON
11 SEPTEMBER 2008**

The Accused

Mr Ljubiša Petković

Counsel for the Accused

Ms Branislava Isailović

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I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. Trial Chamber III 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”), composed of Judges Jean-Claude Antonetti (presiding), Frederik Harhoff and Flavia Lattanzi (“Chamber”), hereby renders its Judgement in relation to the charges against Ljubiša Petković (“Accused”) pursuant to Rule 77(A)(iii) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).

2. The Chamber will first recall briefly the background preceding the indictment of the Accused by the Chamber on 13 May 2008.

3. On 16 November 2006, the Prosecution filed a confidential and *ex parte* motion before Trial Chamber I seeking the issuance of a subpoena for Witness VS-011.¹ Nonetheless, Trial Chamber I did not rule on that motion at the time due to the suspension of the trial.²

4. On 30 August 2007, the pre-trial Judge partially granted the Prosecution motion seeking protective measures for Ljubiša Petković, granting him the pseudonym “VS-011” up until his testimony [redacted].³

5. On 28 November 2007, the Prosecution informed the Chamber in an electronic communication that it wished to call Witness VS-011 as from 8 January 2008.⁴

6. On 3 December 2007, the Chamber issued a confidential and *ex parte* subpoena (“First Subpoena”) for Witness VS-011 to appear and give evidence before the Chamber on 8 January 2008.⁵

7. On 24 December 2007, Petar Jojić, a member of Vojislav Šešelj’s Defence team and a professional lawyer,⁶ filed an “objection” on behalf of Witness VS-011 with the Tribunal liaison office in Belgrade. In that objection, Witness VS-011 refused to be called as a

¹ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Prosecution’s Motion for Issuance of Subpoena for Witness VS-011 with confidential and *ex parte* annexes A-C, confidential and *ex parte*, 16 November 2006.

² To recall, in its Decision of 8 December 2006, the Appeals Chamber suspended Vojislav Šešelj’s trial, *see The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, 8 December 2006, para. 30.

³ Decision on Adopting Protective Measures, 30 August 2007, pp. 3, 8.

The Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-T, Subpoena, confidential and *ex parte*, 3 December 2007, p. 1.

⁵ First Subpoena.

⁶ *See* Exhibit D13, “Transcription of Interview” dated 15 November 2007.

“witness for the Prosecution” and stated that he was a “witness for the Defence”. Although the Chamber was informed of the existence and content of this document, the document was not filed in *The Prosecutor v. Vojislav Šešelj* because Petar Jojić had no *locus standi*.

8. On 28 December 2007, the authorities of the Republic of Serbia filed a memorandum of service of the First Subpoena.⁷ Witness VS-011 had duly received the First Subpoena on 20 December 2007 and demanded that he be a “witness for the Defence”, and also that he be granted safe conduct among other things.⁸

9. On 7 January 2008, the Prosecution filed a confidential motion for the issuance of safe conduct for Witness VS-011.⁹

10. On 16 January 2008, the Chamber issued a confidential order for safe conduct.¹⁰

II. THE CHARGES AGAINST THE ACCUSED

11. Noting the Prosecution’s silence with respect to Witness VS-011 since the issuance of the safe conduct order on 16 January 2008, and the fact that witnesses are not the property of the parties, the Chamber considered that it was in the interests of justice to hear the Accused as quickly as possible since he was expected to testify on key elements of the case.¹¹ As a result, on 7 April 2008 the Chamber in *The Prosecutor v. Vojislav Šešelj* issued *proprio motu* a confidential subpoena (“Second Subpoena”) for Witness VS-011 to appear as a witness summoned by the Chamber as from 13 May 2008.¹²

12. On 5 May 2008, the authorities of the Republic of Serbia filed a memorandum of service of the Second Subpoena indicating that Witness VS-011 had duly received the Second Subpoena on 18 April 2008 stating, on one hand, the witness’s refusal to appear before the Chamber in any capacity other than that of a “witness for the Defence” and, on the

⁷ Letter from the authorities of the Republic of Serbia, confidential and *ex parte*, dated 28 December 2007, filed on 3 January 2008.

⁸ Memorandum of Service, confidential and *ex parte*, dated 20 December 2007, filed on 3 January 2008.

⁹ Prosecution’s Motion for Issuance of Safe Conduct Order for VS-011, confidential, submitted on 4 January 2008, and filed on 7 January 2008.

¹⁰ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Motion for Issuance of Safe Conduct for Witness VS-011, confidential, 16 January 2008.

¹¹ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Subpoena, confidential, 7 April 2008, pp. 1-2.

¹² Second Subpoena, p. 3.

other hand, a series of conditions that had to be met in order to secure his testimony, in particular the issuance of safe conduct and the payment of various expenses.¹³

13. On 6 May 2008, the Chamber issued a confidential order for the transfer of Witness VS-011 in order to ensure his testimony as a witness summoned by the Chamber (“Transfer Order”).¹⁴ The Chamber ordered the authorities of the Republic of Serbia to take immediately all the necessary measures to secure the witness’ appearance as a witness summoned by the Chamber, and to ensure his presence in The Hague imperatively as from Saturday 10 May 2008 so that he could begin testifying on 13 May 2008.¹⁵

14. On 9 May 2008, the authorities charged with implementing the Transfer Order informed the Chamber that they were unable to contact Witness VS-011 or “his lawyer”.¹⁶

15. Since Ljubiša Petković was absent on 13 May 2008, the date scheduled for his testimony according to the Second Subpoena, the Chamber issued an order in lieu of an indictment for contempt of the Tribunal (“Order in Lieu of an Indictment”)¹⁷ and issued a warrant for his arrest and transfer (“Arrest Warrant”).¹⁸

16. In the Order in Lieu of an Indictment, the Chamber ordered, in accordance with Rule 77 of the Rules, that: (1) Ljubiša Petković (“the Accused”) be prosecuted for knowingly and wilfully interfering with the administration of justice by refusing to comply with the Second Subpoena and to appear as a witness summoned by the Chamber; (2) the Chamber prosecute the matter itself (3) the Accused appear before the Chamber on 27 May 2008, at 1415 hours in Courtroom III; and (4) the Registry of the Tribunal assign a case number to the proceedings instigated against the Accused.¹⁹

17. On 27 May 2008, the Accused contacted the police in Belgrade requesting that they collect him at the hospital where he was reported to have been.²⁰ Brought before an

¹³ Report on Served Order, confidential, dated 5 May 2008, filed on 6 May 2008.

¹⁴ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order for the Transfer of Witness VS-011 in Order to Ensure his Testimony as a Witness Summoned by the Chamber, confidential, 6 May 2008.

¹⁵ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Transfer Order, p. 2.

¹⁶ Letter from the War Crimes Chamber of the Belgrade District Court, confidential and *ex parte*, 9 May 2008.

¹⁷ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order in Lieu of an Indictment for Contempt Against Ljubiša Petković, confidential, 13 May 2008.

¹⁸ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Warrant to Arrest and Transfer Ljubiša Petković, confidential, 13 May 2008.

¹⁹ Order in Lieu of an Indictment, pp. 2-3.

²⁰ Exhibit D 18, “Report from the authorities of the Republic of Serbia,” dated 27 May 2008.

investigating judge of the War Crimes Chamber of the Belgrade District Court (“Investigating Judge”), he stated that he was prepared to travel to The Hague.²¹

18. On 28 May 2008, the Accused was transferred to the seat of the Tribunal, and on the same day the confidentiality was lifted from the Second Subpoena, the Order in Lieu of an Indictment and the Arrest Warrant.²²

19. The initial appearance of the Accused took place on 29 May 2008 before Judge Flavia Lattanzi.²³ Judge Lattanzi, the pre-trial Judge,²⁴ scheduled two status conferences in this case, the first for 4 July²⁵ and the second for 18 July 2008.²⁶

20. On 10 July 2008, a majority of the Chamber denied the motion for provisional release of the Accused filed on 8 July 2008 by Counsel for the Accused.²⁷ On 25 July 2008, the Appeals Chamber dismissed the appeal against the Decision of 10 July 2008.²⁸

21. On 22 August 2008, the Registry assigned Ms Isailović as counsel for the Accused (“Defence”).²⁹

22. The trial was held on 3 September 2008.³⁰ The Defence presented two witnesses: the Accused and his spouse. The Defence requested the admission of 19 documents; 17 of them were admitted by the Chamber and two were marked for identification pending their translation into one of the two languages of the Tribunal.³¹

²¹ *Ibid.*

²² *In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, Order to Lift Confidentiality, 28 May 2008.

²³ *In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1-I, Order Designating Judge for Initial Appearance, 28 May 2008.

²⁴ *In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, Order Assigning a Pre-Trial Judge, 4 June 2008.

²⁵ *In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, Scheduling Order, 1 July 2008.

²⁶ *See In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1-PT, Decision Regarding *Requête de la Défense aux fins de permettre la liberté provisoire de l'Accusé*, 10 July 2008, p. 3.

²⁷ *In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1-PT, Decision Regarding *Requête de la Défense aux fins de permettre la liberté provisoire de l'Accusé*, 10 July 2008.

²⁸ *In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1-AR65.1, Decision on Appeal against the Trial Chamber's Decision on Provisional release, 25 July 2008.

²⁹ *In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, Decision, 22 August 2008. With regard to the title of the case, *See “Corrigendum”* of the Registry, 28 August 2008. Mr Gregor Guy-Smith was appointed as Duty Counsel for the Accused by the Deputy Registrar on 29 May 2008. On 1 July 2008, the Deputy Registrar assigned Ms Isailović as Counsel for the Defence of the Accused for a period of 120 days.

³⁰ *See In the Matter of Ljubiša Petković*, Case No. IT-03-67-R77.1-PT, Scheduling Order, 22 July 2008.

³¹ *See paras. 38-40 infra.*

III. APPLICABLE LAW

23. While the Tribunal's jurisdiction to initiate proceedings and try offences of contempt is not recognized by the Statute of the Tribunal ("Statute"), it has been recognized that the Tribunal has an inherent jurisdiction deriving from its judicial function. The Tribunal must have the power to ensure that the exercise of the functions given to it by the Statute is not frustrated.³²

24. The Chamber has therefore considered the conduct of the Accused in the light of the provisions of Rule 77 of the Rules, which provides in particular 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:

[...]

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

[...]

25. The Chamber notes that, to date, this is the first judgement rendered by the Tribunal for contempt under sub-paragraph (A)(iii) of Rule 77 of the Rules. Nonetheless, the Chamber wishes to recall that the necessity to punish all conduct which tends to obstruct, prejudice or abuse the administration of justice is intended to ensure that the exercise of the jurisdiction which is expressly given to it by the Statute is not frustrated and that its basic judicial functions are safeguarded.³³

26. Moreover, the Chamber recalls that according to the Appeals Chamber, the rules applicable to contempt are not intended to buttress the dignity of the judges or to punish mere affronts or insults to a court or tribunal; rather, it is justice itself which is flouted by a contempt of court, not the court or judge who is attempting to administer justice.³⁴

³² *The Prosecutor v. Duško Tadić*, Case No. IT-94-1A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Tadić* Appeal Judgement on Milan Vujin"), para. 13; *The Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006, para. 13.

³³ *Tadić* Appeal Judgement on Milan Vujin, para. 18, cited in *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95/1-AR77, Judgement on Appeal by Anto Nobile Against Finding of Contempt ("*Aleksovski* Appeal Judgement on Anto Nobile"), 30 May 2001, para. 36.

³⁴ See *Tadić* Appeal Judgement on Milan Vujin, para. 16, cited in the *Aleksovski* Appeal Judgement on Anto Nobile, para. 36.

IV. ARGUMENTS PRESENTED BY THE DEFENCE

27. In limine, the Chamber notes that the arguments presented by the Defence with respect to the determination of the sentence will be examined, if necessary, in a separate section.

28. Concerning the arguments in connection with the responsibility of the Accused, the Defence first noted that the *actus reus* of the offence of contempt set out in Rule 77(A)(iii) of the Rules was constituted by the mere failure to appear at the time and location indicated by the Chamber.³⁵ Nonetheless, the Defence submitted that the circumstances surrounding the service of the Second Subpoena as well as the deterioration of the Accused's health constituted a just excuse within the meaning of Rule 77(A)(iii) of the Rules.³⁶ Consequently, the Accused should be acquitted.³⁷

1. Circumstances Surrounding the Service of the Second Subpoena

29. During his testimony, the Accused stated that he received the Second Subpoena on 18 April 2008 while at his shop in Palilula. He first received a call from the police station asking him to come and collect the said document and informing him of the nature of the document. As the Accused could not close his shop to go to the police station, he was informed that someone would come and deliver the document to him within half an hour.³⁸ Before the police representatives arrived, the Accused had the time to contact an attorney, Mr Petar Jojić.³⁹

30. Two police officers in civilian clothing served the Second Subpoena on the Accused in the presence of Petar Jojić. Because he did not have his eyeglasses or the time to do so, the Accused did not read the said document before going home later that same evening. The Accused stated however that he repeated out loud to the police officers the same demands that he initially made after receiving the First Subpoena. One of the police officers retranscribed the Accused's demands on a plain sheet of paper with no official letterhead.⁴⁰

³⁵ Hearing of 3 September 2008, Transcript in French ("T(F)") 126.

³⁶ *Id.*, T(F) 126-127.

³⁷ *Id.*, T(F) 132.

³⁸ Ljubiša Petković, T(F) 53-54.

³⁹ *Id.*, T(F) 54, stating that he first attempted to contact Zoran Stojković, and then Zoran Jovanović, without success.

⁴⁰ *Id.*, T(F) 55; Exhibit D5, "Report on Served Order".

31. When the Accused went over the documents given to him earlier in the day, he apparently realized that he had been served with the Second Subpoena and the Safe Conduct order, of which he was informed for the first time.⁴¹ While reading the Second Subpoena, the Accused noticed that paragraph 4 of the disposition included not his own name but rather that of [redacted]. The Accused was distressed at the sight of that name and began to have doubts as to the addressee of the document and to think that a similar document bearing his name could have been sent to the wrong person. [redacted].⁴²

32. The Accused is also said to have been greatly disturbed by the statement in the Second Subpoena that [redacted].⁴³ [redacted].⁴⁴ [redacted].⁴⁵

2. Deterioration of the Accused's Mental and Physical Condition

(a) Before 18 April 2008

33. The Accused emphasizes that his psychological and physical condition has deteriorated since 2002, the date of his first contact with the Office of the Prosecutor of the Tribunal. That deterioration is said to have accelerated since 2005.⁴⁶

34. The Accused submits that he was severely intimidated by the Prosecution, which threatened that he could face prosecution as a suspect [redacted].⁴⁷ Additionally, the Accused was informed by a Prosecution representative that Vojislav Šešelj, through his spouse, had made available a list of eight names,⁴⁸ including that of the Accused, which was disseminated throughout Belgrade, thus putting him in danger. Specifically, the Prosecution is said to have told him as follows:

“Mr. Petković, we have information to the effect that Mr. Vojislav Šešelj, via his wife, Jadranka Šešelj, delivered a list with the names of eight witnesses. You are now in danger, as is your family. We advise you to hide somewhere, and as for

⁴¹ Ljubiša Petković, T(F) 55-59; Exhibit D4, “Second Subpoena”; Exhibit D9, “Safe Conduct”.

⁴² Ljubiša Petković, T(F) 60-[redacted]; [redacted].

⁴³ [redacted].

⁴⁴ [redacted].

⁴⁵ [redacted].

⁴⁶ *Id.*, T(F) 77, 79, [redacted]; See also hearing of 3 September 2008, T(F) 133; Ljiljana Petković, T(F) 119.

⁴⁷ Ljubiša Petković, T(F) 58, 76-77, [redacted], [redacted].

⁴⁸ The Chamber notes that, at the time, the Accused had been granted a pseudonym as well as the delayed disclosure of his identity to Vojislav Šešelj up to thirty days before the commencement of Vojislav Šešelj's trial; See Decision on the Prosecution's Motion for Protective Measures for Witnesses during the Pre-Trial Phase, confidential and partly *ex parte*, 21 December 2004 (dated 16 December 2004).

your family, don't worry for them. I will transport them to Slovenia to stay with my friends.”⁴⁹

35. In that context, the Accused's health has progressively worsened, in particular since 2005.

(b) After 18 April 2008

36. According to the Accused, the service of the Second Subpoena was the last straw which destabilized his already precarious mental state. First, the Accused submits that he has no recollection of what happened between 18 April and 27 May 2008, the date of his appearance before the Investigating Judge.⁵⁰ During that period, he broke off all contact with his family and stayed in Belgrade from 5 to 7 May 2008. For three or four days, he went to Zlatibor, located 150 kilometres from Belgrade. Then, after a week or two in Belgrade, he went to Palić to rest.⁵¹ Upon returning to Belgrade on 24 May 2008, the Accused's psychological condition was severe and as a result he wished to be admitted the next day into the hospital closest to his home, which was not possible since 25 May was a holiday. He therefore went to the hospital in Kovin, where the physician gave him an injection but refused to prescribe medication, recommending that he go to any hospital in Belgrade. On Monday 27 May, the Accused went to the specialized hospital for neuropsychiatric disorders on Višegradska street in order to obtain, he claims, medicine that he could bring with him to The Hague. There, the Accused was forcibly held until his spouse signed a form to discharge him the following morning at 0800 or 0900 hours.⁵²

37. Finally, the Accused produced a medical certificate prepared at the Detention Unit on 1 September 2008 by Dr Vera Petrović, dealing with the Accused's medical condition since his arrival on 28 May 2008.⁵³

V. DISCUSSION

A. Admission of Exhibits Marked for Identification

38. During the hearing of 3 September 2008, the Chamber marked for identification two documents whose translation into one of the two languages of the Tribunal it had not

⁴⁹ Ljubiša Petković, T(F) 78 [redacted].

⁵⁰ *Id.*, T(F) 103-104.

⁵¹ *Id.*, T(F) 105.

⁵² *Id.*, T(F) 112-113.

⁵³ Exhibit MFI D17, “Medical Report”, dated 1 September 2008 (letter) and various dates between 29 May and 2 September 2008 (analyses).

received. The Chamber has since received the English translation of Documents MFI D10 and D14.

39. Document MFI D10 is a statement dated 21 September 2007 [redacted].⁵⁴ Since this statement deals with the Accused's decision to appear before the Tribunal only as a "witness for the Defence", the Chamber finds that it complements the Accused's evidence in this connection. Accordingly, the Chamber admits Document MFI D10, which bears sufficient indicia of reliability and relevance.

40. Document MFI D14 is a medical analysis report bearing the name of the Accused.⁵⁵ This document consists of four handwritten and three typewritten pages bearing the date of 5 May 2008. The Chamber however entertains a doubt as to the handwritten date which appears on the fourth page of Document MFI D14. In fact, while the month of May and the year 2008 are clear, such is not the case for the day, where two different numbers appear superimposed. The Chamber considers that there is lingering doubt as to whether the day initially written was "07" or "27". The Chamber therefore admits as Exhibit D14 only the last three pages of Document MFI D14.

B. Analysis of the Arguments Presented by the Defence

41. In accordance with the applicable law recalled above, the Chamber will now examine whether the elements of the offence of contempt are constituted, as set out in Rule 77(A)(iii) of the Rules, in other words:

- (i) Did the Accused fail to comply with an order to attend before the Chamber?
- (ii) If so, did the Accused have a just excuse?
- (iii) Where relevant, did the Accused knowingly and wilfully interfere with the administration of justice?

⁵⁴ Ljubiša Petković, T(F) [redacted] – 91; Exhibit MFI D10, "Statement by the Accused" dated 21 September 2007.

⁵⁵ Ljubiša Petković, T(F) 104.

1. Actus reus(a) Did the Accused fail to comply with an order to attend before the Chamber?

42. The Second Subpoena provided that “as from 13 May 2008, Witness VS-011 [would] appear as a witness summoned by the Chamber; should there be any change to the date of appearance, the Registry of the Tribunal [would] promptly inform Witness VS-011”.⁵⁶

43. In its Order in Lieu of an Indictment, the Chamber had already noted the absence of the Accused from the hearing at 1415 hours on 13 May, the date scheduled for his testimony.⁵⁷ Accordingly, by his absence, the Accused failed to comply with the Second Subpoena.⁵⁸ The *actus reus* of the offence of contempt as set out in Rule 77(A)(iii) of the Rules is therefore constituted.

(b) Did the Accused have a just excuse for failing to comply with the Second Subpoena?(i) The Accused’s doubt as to the addressee of the Second Subpoena

44. The Accused submits that he was distressed when he saw the name of [redacted] in paragraph (iv) of the disposition of the BCS version of the Second Subpoena. He claims that he had a doubt as to whether the Second Subpoena was indeed intended for him and feared that the document addressed to him had been given to a third party. [redacted].⁵⁹

45. The Chamber considers that this argument may not under any circumstances constitute a just excuse. To begin, the Chamber notes nonetheless that it contacted the Registrar of the Tribunal, whose purview includes the Translation Section, to ensure that such an error is not repeated.

46. First, the Chamber notes that when the Second Subpoena was served, the Accused knew that the pseudonym VS-011, which appears more than 20 times in the body of the document, had been assigned to him for the purposes of proceedings conducted before the Tribunal. In fact, the Accused not only received the First Subpoena, in which that pseudonym appeared alongside his name and address, but he responded to it on 24 December 2007 in his

⁵⁶ Exhibit D4, “Second Subpoena”, p. 3.

⁵⁷ Order in Lieu of an Indictment, 13 May 2008, confidential (initially, but the confidentiality was lifted by decision of 28 May 2008), p. 1.

⁵⁸ See in this regard, hearing of 3 September 2008, T(F) 126.

⁵⁹ See para. 31 *supra*.

“Objection”, not disputing that it was addressed to him.⁶⁰ Furthermore, by repeating his demands and objections to the Second Subpoena, the Accused acknowledged in effect that this document was addressed to him. The Chamber therefore does not accept the Accused’s argument [redacted].⁶¹

47. Moreover, the Chamber is disturbed by the fact that the Accused never pointed out this error despite numerous opportunities to do so. As early as 18 April 2008, after having reviewed the Second Subpoena, the Accused could have contacted the police, his friend and attorney Mr Petar Jojić, who was present when it was served, Mr Vojislav Šešelj’s Defence team [redacted],⁶² or even the Chamber. Later, during his 28 May 2008 appearance before the Investigating Judge, the Accused had the opportunity to raise this alleged doubt but failed to do so.⁶³

48. Consequently, in view of the aforementioned circumstances, the Chamber considers that the Accused could not have reasonably doubted that the Second Subpoena was indeed addressed to him.

(ii) The circumstances following the service of the Second Subpoena on 18 April 2008

49. The Accused also submits that the service of the Second Subpoena was the last straw which, after six years of intimidation and threats, drove him into a state in which he was no longer able to control himself.⁶⁴

50. In light of the medical certificates provided and the evidence of the Accused and his spouse, it appears that the Accused’s psychological condition has indeed worsened since 2005. In fact the Accused’s wife testified that in 2005 her husband first began to have heart and blood pressure problems, followed by a state of depression combined with an irregular heartbeat and chest contractions.⁶⁵ Prior to May 2008, the Accused was nervous and depressed to the point of insomnia.⁶⁶ The result was that after the Second Subpoena was served, he is said to have left the family home to undergo two spa therapy treatments. According to the Accused’s spouse, when he returned to their home he experienced a few

⁶⁰ See para. 8 *supra*; Exhibit D8, “Objection”.

⁶¹ [redacted].

⁶² [redacted].

⁶³ See Exhibit D18, “Report from the authorities of the Republic of Serbia,” dated 27 May 2008.

⁶⁴ See paras. 31- 32, 36 *supra*.

⁶⁵ Ljiljana Petković, T(F) 119.

health-related mood swings. On Monday 27 May 2008, the Accused was kept in the hospital psychiatric wing until the next day when his wife signed a discharge form to release him, against the advice of the physicians.⁶⁷

51. The medical file prepared by the Detention Unit physician establishes that the Accused does not suffer from any organic disease but does exhibit numerous symptoms of depression related to stress and fear and to his past traumatic experiences.⁶⁸

52. The Chamber can only note that the Accused is in a precarious mental state which has steadily deteriorated since 2005. Nevertheless, the Chamber is disturbed by the fact that the mental health of the Accused was never mentioned in the submissions expressing his desire to testify for Mr Šešelj's Defence; on the contrary, this became a problem only after he had to respond to the subpoenas issued by the Chamber.⁶⁹ Accordingly the Chamber cannot accept that the Accused's medical condition was such that he was unable to duly inform the Chamber that he could not comply with the Second Subpoena for this reason. On the contrary, the Accused chose to vanish.

(iii) Conclusion

53. In light of the elements discussed above, the Chamber considers that the Accused has failed to provide a just excuse, within the meaning of Rule 77(A)(iii) of the Rules, that could justify his non-compliance with the Second Subpoena.

2. Mens rea: did the Accused knowingly and wilfully interfere with the administration of justice?

54. The Second Subpoena was accordingly served on the Accused on 18 April 2008. Before reviewing the details of its content, the Accused persisted in his refusal to appear before the Chamber, this time as a witness for the Chamber. The Accused therefore knew that he had been ordered to appear before the Chamber on 13 May 2008 in the trial against Vojislav Šešelj. The Accused's wife was also aware of the fact that her husband was to appear before the Chamber on that date.⁷⁰

⁶⁶ *Id.*, T(F) 120.

⁶⁷ *Id.*, T(F) 121.

⁶⁸ Exhibit D17, "Medical Report".

⁶⁹ See Exhibit D7, "Memorandum of Service"; Exhibit D8, "Objection"; Exhibit D10, "Statement by the Accused" dated 21 September 2007.

⁷⁰ Ljiljana Petković, T(F) 120.

55. However, rather than fulfil the obligations which he knew were upon him, the breach of which entailed consequences which should have been known to him, the Accused wilfully chose to take flight. Indeed, the Chamber cannot be satisfied by the explanations given by the Accused about his location and movements throughout May 2008.⁷¹ During that period, the Chamber was in regular communication with the authorities of the Republic of Serbia, who maintained that they had taken all the necessary measures to find the Accused but that his whereabouts remained unknown.⁷²

56. Furthermore, while the Accused initially stated that he did not recall his whereabouts in early May, his wife informed the Chamber that she was in contact with her husband and that she had spoken to him over the 10 to 15 days leading up to 13 May 2008.⁷³

57. Consequently, the Chamber considers that by intentionally failing to comply with the Second Subpoena, the Accused knowingly and wilfully interfered with the administration of justice.

C. Conclusion

58. Consequently, in light of the aforesaid elements and conclusions, the Chamber is satisfied beyond a reasonable doubt that the Accused committed contempt under Rule 77(A)(iii) of the Rules by intentionally failing to comply with the Second Subpoena, and in so doing knowingly and wilfully interfered with the administration of justice.

VI. SENTENCE

A. Arguments Presented by the Defence

59. The Defence submits that in the event the Chamber decides not to acquit the Accused, the Chamber should give him a minimum sentence in view of (i) the sentences handed down before other international tribunals and national courts; (ii) the numerous mitigating

⁷¹ Ljubiša Petković, T(F) 103-108.

⁷² Letter from the Investigating Judge to the Chamber dated 9 May 2008; Letter from the Investigating Judge to the Chamber dated 22 May 2008, in which the Investigating Judge reports on the significant efforts made by him and by the Ministry of the Interior's war crimes section to locate the Accused, who was reportedly at large since the service of the Second Subpoena. These efforts included direct searches for the Accused at his home and at other places he frequented, as well as the publication of "wanted" notices throughout the country.

⁷³ Ljiljana Petković, T(F) 120.

circumstances, such as the personal circumstances of the Accused, and (iii) the fact that the Accused has already been in detention for three months.⁷⁴

B. Determination of Sentence

60. Rule 77(G) of the Rules provides that the maximum penalty imposable on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 euros, or both.

61. In the exercise of its discretionary power to determine which penalty to impose on the Accused within this limit, the Chamber is guided by Articles 24 of the Statute of the Tribunal (“Statute”) and Rule 101 of the Rules. In this case, the Chamber has taken into consideration (i) the gravity of the offence; (ii) the existence of an aggravating circumstance; (iii) the existence of mitigating circumstances, and (iv) the general sentencing practice for similar offences, in particular in the courts of the former Yugoslavia.

62. In limine, the Chamber would point out that in order to hand down the most appropriate sentence, it also considered the objectives of imposing a sentence before the Tribunal, be it imposed for crimes committed under Articles 2 to 5 of the Statute or for an offence committed under Rule 77 of the Rules. Accordingly, although they should not be given undue weight,⁷⁵ the functions of punishment⁷⁶ and deterrence, both general and individual,⁷⁷ are particularly important.

1. The Gravity of the Offence

63. The Accused committed the offence of contempt prohibited by Rule 77(A)(iii) of the Rules for refusing to comply with the Second Subpoena. A few months prior, the Accused had already received a first subpoena to appear before the Chamber. The Accused further stated during his testimony that he regularly followed the trial of Vojislav Šešelj because the Accused’s name was mentioned on numerous occasions.⁷⁸ As chief of the war staff of the Serbian Radical Party at the time of the conflict, the Accused was necessarily the only person

⁷⁴ Hearing of 3 September 2008, T(F) 126-132.

⁷⁵ *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, 26 January 2000, para. 48; *The Prosecutor v. Zejnil Delalić, Zdravko Mucić (alias “Pavo”), Hazim Delić and Esad Landžo (alias “Zenga”)*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, paras. 800-801.

⁷⁶ *The Prosecutor v. Zdravko Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 185.

⁷⁷ *The Prosecutor v. Zejnil Delalić, Zdravko Mucić (alias “Pavo”), Hazim Delić and Esad Landžo (alias “Zenga”)*, Case No. IT-96-21-T, Judgement, 16 November 1998, para. 1234; *The Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006, para. 46.

⁷⁸ Ljubiša Petković, T(F) 71.

to have access to a large amount of information. In the statement he wished to make at the end of his trial, the Accused stated as follows: “under normal circumstances, it would have been an honour and a pleasure for me to testify before this Tribunal and to tell the truth that I do know.”⁷⁹ The Accused was therefore fully aware that his testimony was particularly crucial in the case against Vojislav Šešelj, but he still decided not to obey an order issued by the Chamber.

64. The offence committed by the Accused is particularly serious. In this regard, the Chamber wishes to recall that witnesses are not the property of the parties⁸⁰ and that whenever the Chamber decides, by way of subpoena, that their testimony is necessary for the ascertainment of the truth, the witnesses must comply. Because the Accused was subpoenaed as a witness of the Chamber under Rule 98 of the Rules, he was in no position to refuse to comply with the Second Subpoena by stating that he was a “witness for the Defence”.

2. The Aggravating Circumstance

65. The Chamber finds that the Accused had already been summoned under the First Subpoena, with which he failed to comply. In the opinion of the Chamber, the repeated failure to comply with a subpoena issued by the Chamber must be considered as an aggravating circumstance.

3. The Mitigating Circumstances

(a) The Issue of the Alleged Intimidation of the Accused

66. During his testimony, the Accused stated that he had been intimidated by the Prosecution for six years.⁸¹ [redacted]. Nevertheless, the Chamber can single out two types of “intimidation” alleged by the Accused: (i) reference to the Accused as a suspect, and (ii) informing the Accused that his name appeared on a list identifying Prosecution witnesses that had been disseminated throughout Belgrade.

67. The Chamber does have the information available enabling it to ascertain whether the Prosecution threatened the Accused by questioning him as a suspect and by informing him of the possibility of subsequent prosecution by the Tribunal or national courts. In the view of the Chamber, and in light of the information at its disposal, the Prosecution simply exercised its

⁷⁹ Hearing of 3 September 2008, T(F) 133.

⁸⁰ *The Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003, paras. 15-16.

prosecutorial and investigative functions under the Statute and the Rules. The Accused had been informed of his rights, in particular his right to be assisted by an interpreter and a lawyer who could be present during that interview.⁸²

68. The Accused described the alleged conversation he had in mid-2006 with Dan Saxon, a Prosecution representative, at Mr Saxon's request. Mr Saxon told him that Vojislav Šešelj, through his spouse, had made available a list of the names of eight witnesses, informed him that as a result he was in danger and advised him to go into hiding. The Chamber understands that this announcement may have greatly disturbed the Accused who, as a result, learned not only that his life and that of his loved ones was potentially in danger but also that the protection he believed was afforded to him had not been effective. While the Accused's survival instinct which may have led him to seek to cut off all contact with the Prosecution following this conversation may be understandable [redacted],⁸³ the Chamber nonetheless cannot consider that Mr Saxon's statements in any way diminish the penalty the Accused faces for failing to comply with the Second Subpoena.

(b) The Personal Circumstances of the Accused

69. The Accused is married and has six children. Four of the children are dependents including three minors, the two youngest of whom are aged four.⁸⁴ The Accused's financial situation, as described to the Chamber, is precarious. His clothing shop in the municipality of Palilula had to be shut down during his detention and his wife stated that her sisters provide financial assistance.⁸⁵

70. The Defence submitted that the Accused had no prior criminal record.⁸⁶ The Chamber finds that there is no information to contradict the Defence on this point.

71. The Defence further submitted that the Accused's medical condition constituted a mitigating circumstance.⁸⁷ In this regard, the Chamber recalls the findings made throughout this Judgment with respect to the Accused's psychological as well as physical health.⁸⁸

⁸¹ See paras. 33-34 *supra*.

⁸² See Article 18(3) of the Statute and Rules 42 and 43 of the Rules.

⁸³ [redacted].

⁸⁴ Ljubiša Petković, T(F) 47; Ljiljana Petković, T(F) 117; Exhibit D1, "Under seal".

⁸⁵ Ljiljana Petković, T(F) 124.

⁸⁶ *Id.*, T(F) 118-119; hearing of 3 September 2008, T(F) 131.

⁸⁷ Hearing of 3 September 2008, T(F) 131.

⁸⁸ See paras. 50-52 *supra*.

72. The Chamber will give due consideration to the family and personal circumstances in its determination of the sentence.

(c) The “Cooperation” of the Accused

73. On 27 May the Accused himself contacted the police in order for them to collect him at the hospital. Moreover, the Accused stated before the Investigating Judge who heard him the same day that he was prepared to testify before the Chamber and, in this connection, the Accused had given his passport to his spouse the day before to facilitate his transfer to The Hague.⁸⁹

74. In light of the disappearance of the Accused for a period of three weeks and his categorical statement that he no longer felt he was able to testify, the Chamber can attach only limited weight to his “voluntary” surrender to the Serbian police authorities and to his expressed willingness to testify on 27 May 2008.

(d) The Expression of Apologies

75. The Accused apologized to the Chamber and emphasized that his intention was never to defy, humiliate, offend or minimize the importance of the Tribunal.⁹⁰

76. In determining the sentence the Chamber has taken into account the apologies expressed by the Accused, which it considers are sincere.

4. General Practice Regarding Prison Sentences in the Courts of the Former Yugoslavia and in Tribunal Jurisprudence

77. As the Chamber has noted above, no Chamber of this Tribunal has had to deliver a judgement and sentence against someone who has refused to comply with a subpoena issued by the Chamber. Nonetheless, the Chamber notes that the sentences imposed for offences committed under other sub-paragraphs of Rule 77 of the Rules are often fines of a few thousand euros⁹¹ or light prison sentences not exceeding a few months.⁹²

⁸⁹ Exhibit D 18, “Report from the authorities of the Republic of Serbia,” dated 27 May 2008.

⁹⁰ Hearing of 3 September 2008, T(F) 133.

⁹¹ *The Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5, Judgement on Allegations of Contempt, 24 July 2008; *The Prosecutor v. Domagoj Margetić*, Case No. IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007 (“*Margetić* Judgement”); *The Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006.

⁹² *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 3 May 2005; *Margetić* Judgement; *The Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005.

78. Article 115 of the Republic of Serbia Code of Criminal Procedure provides that any person who fails to comply with a subpoena may be fined 150,000 Serbian dinars (RSD). Should that person appear but refuse to give evidence, he or she may be subject to an initial fine not exceeding RSD 150,000 followed by a second fine not exceeding RSD 300,000 and a term of imprisonment not exceeding one month, for as long as this person refuses to testify or until his or her testimony becomes unnecessary.⁹³

VII. DISPOSITION

79. Pursuant to Rule 89(C), the Chamber admits into evidence Exhibit MFI D10 and the last three pages of Exhibit MFI D14.

80. For the foregoing reasons, having taken into consideration all of the arguments and exhibits offered by the Defence, the Chamber decides, in accordance with Rule 77 of the Rules, that:

- (i) The Accused, Ljubiša Petković, is guilty of contempt of the Tribunal, punishable under Rule 77(A)(iii) of the Rules;
- (ii) The Accused, Ljubiša Petković, is hereby sentenced to a term of imprisonment of four months, subject to credit being given for the three months and 14 days that he has already spent in the Detention Unit;
- (iii) The Registry shall take all the measures necessary for the execution of this sentence.

81. The Chamber hereby renders concurrently a public and redacted version of this Judgement.

⁹³ Article 115 of the Republic of Serbia Code of Criminal Procedure, *Official Gazette* No. 46/2006, November 2006 (entered into force on 1 June 2007 (*See* Article 555)).

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

/signed/

Judge Jean-Claude Antonetti
Presiding

/signed/

Judge Flavia Lattanzi
Pre-Trial Judge

/signed/

Judge Frederik Harhoff

Done this eleventh day of September 2008
At The Hague
The Netherlands

[Seal of the Tribunal]