

**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: 4 October 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

Dissenting Opinion: 4 October 2011

IN THE CONTEMPT CASE OF DRAGOMIR PEĆANAC

CONFIDENTIAL

**DISSENTING OPINION OF JUDGE PRISCA MATIMBA NYAMBE TO
THE ORDER *IN LIEU* OF INDICTMENT**

The Accused
Dragomir Pećanac

The Government of the Republic of Serbia

Office of the Prosecutor
Mr. Peter McCloskey

**The Government of the Kingdom of the
Netherlands**

1. As I have expressed previously, I start from the premise that a Chamber's exercise of its power to hold anyone in contempt is discretionary, and such powers ought to be exercised cautiously and as a last resort.¹

2. My learned colleagues, in majority, are satisfied that "under such circumstances there are sufficient grounds to proceed against Pećanac for contempt, to issue an order in lieu of an indictment [. . .] pursuant to Rule 77(D)(ii)"² and exercise the Chamber's discretion to do so, ordering the prosecution of Pećanac for contempt.³

3. With the greatest respect, I differ with my colleagues in relation to the appropriate exercise of such discretion, preferring instead to deny the Motion for the reason that it is, in my view, premature at this stage. The following reasons lead me to this conclusion.

4. The documentation before the Chamber indicates that on 2 September 2011, Pećanac was served with the subpoena *ad testificandum* issued by the Chamber on 31 August 2011, which ordered him to appear before the Chamber in The Hague in order to testify in this case.⁴ At that time, Pećanac stated that he was willing, but unable to do so on the basis of his health and the existence of an outstanding indictment against him.⁵ Appendix B to the Motion, however, details an exchange between the Belgrade Registry Liaison Officer and Pećanac which ended in Pećanac stating that he would not speak to or meet with any member of the Tribunal's staff, and that any contact with him should be conducted through the local authorities in Serbia.⁶

5. The Chamber has also received further information indicating that, following the filing of the Motion and at the direction of the Chamber, the Registry attempted to contact Pećanac again. However, the Registry did not have the opportunity to fully explain the purpose of the call, i.e. that a motion for an arrest warrant had been filed and whether Pećanac was aware of the consequences, as Pećanac again refused to engage in conversation with the Registry, advised that any contact should be conducted through the local authorities in Serbia, and terminated the call.

6. In light of these circumstances, I am not persuaded that we have reached a point where the Chamber should exercise its discretion to initiate contempt proceedings, as I do not find his request

¹ Order in Lieu of Indictment, Dissenting Opinion of Judge Prisca Matimba Nyambe, confidential, 4 May 2011, paras. 1, 8–9.

² Order in Lieu of Indictment, confidential, 21 September 2011, p. 3.

³ *Ibid.*

⁴ Confidential Appendix A to the Motion.

⁵ Confidential Appendix A to the Motion.

to be contacted by the local Serbian authorities unreasonable. I remain of the view that since the witness did not refuse to testify the contempt proceedings are premature and unduly harsh in the circumstances. Pursuing contact through the local Serbian authorities would not delay the proceedings as the Chamber is not currently sitting.

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



Judge Prisca Matimba Nyambe

Dated this fourth day of October 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

⁶ Confidential Appendix B to the Motion.