

IT-04-84-T
D22198-D22194
05 SEPTEMBER 2007

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AT



**International Tribunal for the
Prosecution of Persons Responsible for
Serious Violations of International
Humanitarian Law Committed in the
Territory of Former Yugoslavia since
1991**

Case No. IT-04-84-T
Date: 5 September 2007
Original: English

IN TRIAL CHAMBER I

**Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle**

Registrar: Mr Hans Holthuis

Decision of: 5 September 2007

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON MOTION BY WITNESS 28 TO SET ASIDE SUBPOENA OR FOR
ALTERNATIVE RELIEF**

Office of the Prosecutor

Mr David Re
Mr Gramsci di Fazio
Mr Gilles Dutertre
Mr Philip Kearney

Counsel for Witness 28

Ms Virginia Lindsay

Counsel for Ramush Haradinaj

Mr Ben Emmerson, QC
Mr Rodney Dixon
Ms Susan L. Park

Counsel for Idriz Balaj

Mr Gregor Guy-Smith
Ms Colleen Rohan

Counsel for Lahi Brahimaj

Mr Richard Harvey
Mr Paul Troop

1. Witness 28 is subject to a subpoena to testify, served on her on 13 August 2007.¹ It contains a standard clause ordering the witness “to appear as a witness before the Trial Chamber ... or to show cause why this subpoena cannot be complied with”. On 15 August, Witness 28 filed a motion to have the subpoena set aside, or, in the alternative, to have her testimony received in closed session (and related relief).²
2. The Chamber understands Witness 28’s motion to be a response to the aforementioned “show cause” clause in the subpoena. A subpoena is an invasive measure that should not be issued lightly. When a Chamber issues a subpoena, it relies on the facts presented to it by the applicant, in this case the Prosecution. These facts may be wrong or incomplete, and where this is thought to be the case, the subpoenaed witness is entitled to address the Chamber, showing cause why he or she believes that the subpoena should be set aside.
3. The Chamber considers Witness 28’s motion to be a valid action before it, except as it relates to protective measures, as explained in paragraph 9, below.
4. The Prosecution and the Accused made submissions in response to the motion.³ The Prosecution asks for the motion to be dismissed, for reasons similar to those set out in the present decision. There is no reason to reiterate the Prosecution’s points here. The submissions of the Accused, which concern the significance and reliability of the witness’s potential evidence, would have been relevant to this decision only if the Chamber had found that the witness was a “war correspondent” at the relevant time. For the reasons given below, that is not the Chamber’s finding. Thus the Accused’s concerns fall to be considered at a later stage, in the course of Witness 28’s testimony, and not now.

¹ Subpoena ad testificandum, 12 July 2007.

² Motion to Set Aside Subpoena ad Testificandum and in the Alternative, Motion to Protect Confidential Sources and for Closed Session Testimony, 15 August 2007. The motion was first filed as a confidential and ex parte document (excluding the Defence). On 17 August, following a telephone conversation between the Trial Chamber’s legal officer and Ms Lindsay, the motion was refiled as a confidential document, but with the two annexes remaining ex parte. In the meantime, also on 17 August, the Prosecution filed a request to have Witness 28’s motion refiled inter partes. At this point, the dispute had been narrowed down to the filing status of the two annexes. On 21 August 2007, Witness 28 responded to the Prosecution’s request, giving reasons why the two annexes should retain their ex parte status. The Prosecution replied on the same day, and on 22 August 2007 Witness 28 refiled Annex B as an interpartes confidential document. The Chamber’s decision on the outstanding issue of the final status of Annex A will be given at the time of Witness 28’s testimony.

³ Prosecution’s Response to Witness [28’s] Motion to Set Aside the Subpoena ad Testificandum, 28 August 2007; Response on Behalf of Ramush Haradinaj to Application of [Witness 28] to Set Aside Subpoena, 28 August 2007; Idriz Balaj’s Submissions on Witness [28]’s Motion to Set Aside Subpoena ad Testificandum, 28 August 2007; and Response on Behalf of Lahi Brahimaj to Application of [Witness 28] to Set Aside Subpoena, 28 August 2007. An email application from Witness 28 for leave to file a reply to the Prosecution’s response was denied by the Chamber on 30 August 2007.

5. Witness 28 claims a “qualified testimonial privilege” on the strength of her work as a war correspondent and investigative journalist. (In order to protect the identity of the witness and preserve the public status of this decision, the Chamber will not discuss her career in detail.) By her own account, Witness 28 worked as a war correspondent some years *prior* to the period covered by the indictment in this case.⁴ During the indictment period, when Witness 28 was interviewing victims and witnesses about their experiences in Kosovo, she was neither a war correspondent nor a journalist. She worked for a human rights organization whose function it was to research human rights violations by means of such interviews. The organization had been cooperating with the Tribunal since before the indictment period.⁵ Witness 28 did not return to professional journalism until some time after the indictment period.⁶ She gave two statements to the Office of the Prosecutor, one in 1999 and another in 2002, concerning her work and observations during the indictment period, and her eventual testimony is expected to focus on those earlier statements.

6. Witness 28 is not covered by the testimonial privilege which she invokes. Not only was she not a war correspondent at the relevant time, she worked for an organization whose very purpose it was to gather information about, and assist the prosecution of, human rights violations.⁷ Witness 28 relies on a decision in the *Brđanin* case, wherein the Appeals Chamber postulated a testimonial privilege for “war correspondents”. It defined war correspondents as “individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict.”⁸ Witness 28 suggests that this covers her circumstances, since she was, for a time, a war correspondent.⁹

7. This is an insupportable interpretation. The *Brđanin* case concerned a war correspondent who was subpoenaed to testify about an interview he had conducted while working as a war correspondent.¹⁰ The *Brđanin* decision sought to obviate the creation of a public perception “that war correspondents can be forced to become witnesses against their interviewees” and thus be made to breach source confidentiality, with the potential result that war correspondents can no longer perform their jobs effectively.¹¹ The *Brđanin* decision does

⁴ Motion, para. 7. The indictment covers the period 1 March 1998 to 30 September 1998.

⁵ Motion, para. 8; see also the Prosecution’s response, para. 9.

⁶ Motion, para. 11.

⁷ *Ibid.*, para. 8.

⁸ Decision on Interlocutory Appeal, *Prosecutor v. Radoslav Brđanin and Momir Talić*, 11 December 2002 (*Brđanin* decision), para. 29.

⁹ Motion, para. 16.

¹⁰ *Brđanin* decision, paras 3-4.

¹¹ *Ibid.*, paras 42-43.

not bestow testimonial privilege on a war correspondent for activities carried out in a capacity other than that of war correspondent.

8. Witness 28 argues, apparently in the alternative, that “Those who defend human rights are often in a position that warrants the recognition of a testimonial privilege.”¹² The phrase “are often” is a concession that this proposition, even if true, is not conclusive. Witness 28’s attempted analogy between the work performed and privileges enjoyed by employees of the International Committee of the Red Cross, on the one hand, and members of the human rights organization which Witness 28 belonged to during the indictment period, on the other, fails for the reason that ICRC privileges are specific to the ICRC and cannot be extended to other groups by analogy. As a Trial Chamber of this Tribunal has said:

the right to non-disclosure of information relating to the ICRC’s activities in the possession of its employees in judicial proceedings is necessary for the effective discharge of the ICRC of its mandate. The Trial Chamber therefore finds that the parties to the Geneva Conventions and their Protocols have assumed a conventional obligation to ensure non-disclosure in judicial proceedings of information relating to the work of the ICRC in the possession of an ICRC employee, and that, conversely, the ICRC has a right to insist on such non-disclosure by parties to the Geneva Conventions and the Protocols.¹³

Apart from anything else, the human rights organization which Witness 28 worked for at the relevant time had as one of its aims to disclose information gathered from its activities to this Tribunal for use in judicial proceedings.¹⁴ Thus there is no analogy.

9. The other issues raised by Witness 28 in her motion concern trial-related protective measures to which the witness may be entitled. It is for the calling party, in this case the Prosecution, to move the Chamber for protective measures for its witnesses. The Chamber does not receive motions on such matters directly from witnesses. This part of the motion is therefore not validly filed before the Chamber and is hereby dismissed without consideration of the merits of the arguments therein.

¹² Motion, para. 26.

¹³ Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, *Prosecutor v. Blagoje Simić et al.*, 27 July 1999, para. 73.


¹⁴ Motion, para. 8.

FOR THE FOREGOING REASONS,

The motion is **DISMISSED** in its entirety;

Witness 28 is **ORDERED** to comply with the subpoena and to appear to give testimony in this case on a date to be communicated to her by the Tribunal's Registry.

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



Judge Alphons Orie
Presiding Judge

Dated this 5th day of September 2007
At The Hague
The Netherlands

[Seal of the Tribunal]