



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-T

Date: 21 August 2007

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 21 August 2007

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR ISSUANCE OF A
SUBPOENA**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Julie Condon for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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”);

BEING SEISED OF the “Prosecution’s Motion for Issuance of a Subpoena with *Confidential* Appendices”, filed on 27 July 2007 (“Motion of 27 July 2007”), in which the Prosecution requests that the Trial Chamber issue a *subpoena ad testificandum* (“subpoena”) ordering Witness 164 to appear before the Trial Chamber to give oral testimony “on 20 August 2007, or on a date and time to be notified”,¹ and attaches a confidential appendix describing the reasons purportedly justifying the issuance of such a subpoena (“Annex”);²

NOTING that on 27 July 2007, 9 August 2007 and on 15 August 2007 the Prosecution informed the Trial Chamber and the Accused about its witness schedule for the month of August, indicating that Witness 164 was due to testify on 22 and 23 August 2007;

NOTING that none of the Accused responded to the Motion of 27 July 2007;

NOTING the “Order Requesting Further Information on Prosecution’s Motion for Issuance of a Subpoena”, filed confidentially on 15 August 2007, in which the Trial Chamber sought clarification from the Prosecution regarding Witness 164’s status as a “war correspondent” during the period of time for which he is expected to offer evidence, assurance that the evidence sought from Witness 164 cannot reasonably be obtained elsewhere, and further information as to why Witness 164 refuses to voluntarily testify at the Tribunal;³

NOTING the “Prosecution’s Submission of Additional Information in Support of Motion for Issuance of a Subpoena with Appendices A-C”, filed confidentially on 16 August 2007, (“Prosecution’s Additional Information”),⁴ in which the Prosecution:

- (1) provides information on the status of Witness 164 as a “war correspondent” during the period of time for which he is expected to offer evidence;⁵

¹ Motion of 27 July 2007, para. 1.

² *Ibid.*; Confidential Annex A. Confidential Annex A contains information on the unsuccessful attempts of the Prosecution to obtain the consent of Witness 164 to voluntarily testify before the Tribunal; Confidential Annex B contains a proposed *subpoena ad testificandum*; Confidential Annex C contains a proposed order to the Government of the Republic of Serbia.

³ Order Requesting Further Information on Prosecution’s Motion for Issuance of a Subpoena, confidential, 15 August 2007, p. 3.

⁴ Prosecution’s Submission of Additional Information in Support of Motion for Issuance of a Subpoena with Appendices A-C (“Prosecution’s Additional Information”). Confidential Appendices A and B contain the declarations of two Prosecution’s investigators describing their attempts to obtain the consent of Witness 164 to voluntarily testify before the Tribunal; Confidential Appendix C contains an unofficial translation of an article recently published in Belgrade in which Witness 164 purportedly gives other reasons why he refuses to testify before the Tribunal.

(2) provides reasons why the information sought cannot reasonable be obtained elsewhere;⁶ and

(3) states that Witness 164 refuses to testify because he does not wish to be seen in Belgrade as a Prosecution witness, as well as because of his animosity towards a Prosecution investigator;⁷

NOTING the “Prosecution’s Motion to Amend ‘Prosecution’s Motion for Issuance of a Subpoena with *Confidential* Appendices”, filed confidentially on 20 August 2007, with confidential appendices (“Motion of 20 August 2007”) in which the Prosecution submits that, given the time necessary for the subpoena to be served and executed, it is no longer possible for Witness 164 to appear before the Trial Chamber on 22 August 2007, and therefore requests the Trial Chamber to issue a subpoena directing Witness 164 to appear and give oral testimony before the Trial Chamber on or about 30 August 2007;⁸

NOTING Article 29 of the Statute of the Tribunal (“Statute”), which provides that “States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law”,⁹ and obliges a state to comply without undue delay with any request for assistance or an order issued by a Trial Chamber;¹⁰

NOTING Rule 54 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), which provides that, “[a]t the request of either party [...] a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary [...] for the preparation or conduct of the trial”;

NOTING the Appeals Chamber’s holding that, for a subpoena to be “necessary” for purposes of Rule 54, the party seeking the subpoena must demonstrate a “legitimate forensic purpose” for having the information sought—that is, the applicant must demonstrate “a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which

⁵ Prosecution’s Submission of Additional Information in Support of Motion for Issuance of a Subpoena with Appendices A-C (“Prosecution’s Additional Information”), paras. 4–10. The Prosecution also notes that Counsel for the Accused Borovčanin has discussed the issue with the Prosecution and agrees that “Witness 164 must be considered a ‘war correspondent’ for the purposes of the subpoena”. *Ibid.*, para. 10.

⁶ Prosecution’s Additional Information, paras. 11–15. The Prosecution also notes that Counsel for the Accused Borovčanin has discussed the issue with the Prosecution and agrees that “the evidence of Witness 164 cannot reasonable obtained elsewhere”. *Ibid.*, para. 15

⁷ Prosecution’s Additional Information, paras. 16–17. *See also*, Confidential Appendices A–C.

⁸ In particular, the Prosecution submits that Witness 164 “shall travel to The Hague on 28 August 2007, in anticipation that he will testify on or about 30 August 2007”. *See* Prosecution’s Motion of 20 August 2007, para. 1. At the hearing of 21 August 2007, the Prosecution reiterated that Witness 164’s testimony is scheduled for 30 August 2007, but that the witness should arrive in The Hague on 28 August 2007.

⁹ Statute, Art. 29(1).

¹⁰ Statute, Art. 29(2).

will materially assist him in his case, in relation to clearly identified issues relevant to the [...] trial”;¹¹

NOTING further that the Appeals Chamber set out a two-pronged test to be satisfied in order for a Trial Chamber to issue a subpoena to a war correspondent, whereby by “war correspondent” the Appeals Chamber means “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”;¹²

NOTING in particular that for the two-pronged test to be satisfied: “[f]irst, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case [...] [s]econd, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere”;¹³

CONSIDERING that there exists a good chance that Witness 164 will provide information which will materially assist the Prosecution in the presentation of its case in relation to clearly identified and relevant issues;

CONSIDERING that it appears from the Prosecution’s Additional Information that Witness 164 was acting in his capacity as a “war correspondent” during the period of time for which he is expected to offer evidence;

CONSIDERING that on the basis of the information available the Trial Chamber is satisfied that the Prosecution has satisfied the two-pronged test set forth by the Appeals Chamber by demonstrating the evidence sought from Witness 164 is of direct and important value in determining a core issue in the case and that the evidence sought cannot be reasonably obtained elsewhere;

NOTING the Prosecution’s unsuccessful attempt to obtain the consent of Witness 164 to voluntarily testify before the Tribunal;¹⁴

CONSIDERING that the assistance of the Government of the Republic of Serbia is required to ensure that the subpoena is enforced, and that the Trial Chamber must therefore also issue an order to them requesting such assistance;

¹¹ See e.g., *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 10 (footnote omitted); *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, paras. 5-7. See also, Decision on Prosecution Motion for Issuance of a Subpoena, 18 January 2007, p. 1.

¹² *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 29.

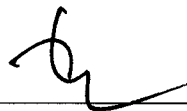
¹³ *Ibid.*, para. 50.

¹⁴ Motion of 27 July 2007, para. 7; Confidential Annex A. See also, Prosecution’s Additional Information, Confidential Appendices A and B.

PURSUANT TO Article 29 of the Statute and Rule 54,

HEREBY GRANTS the Motion of 27 July 2007 and the Motion of 20 August 2007 and **ORDERS** the Registry of the Tribunal to take whatever steps are reasonably necessary to ensure that the subpoena and order relating to this matter are transmitted immediately to the Government of the Republic of Serbia; and requests the Victims and Witnesses Section of the Tribunal to provide any necessary assistance in the implementation of this decision.

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



O-Gon Kwon
Judge

Dated this twenty-first day of August 2007
At The Hague
The Netherlands

[Seal of the Tribunal]