



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: 24 June 2009

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. John Hocking

**Decision of:** 24 June 2009

**PROSECUTOR**

v.

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

**PUBLIC**

**DECISION ON THE EXPEDITED MOTION ON BEHALF OF DRAGO NIKOLIĆ  
REQUESTING THE TRIAL CHAMBER TO ISSUE A *SUBPOENA DUCES  
TECUM***

**Office of the Prosecutor**

Mr. Peter McCloskey

**Counsel for the Accused**

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović  
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara  
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić  
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell 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. Simon Davis 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 “Expedited Motion on behalf of Drago Nikolić Requesting the Trial Chamber to Issue a *Subpoena Duces Tecum*”, filed on 18 June 2009 (“Motion”), in which Nikolić requests that the Trial Chamber issue a *subpoena duces tecum* ordering Sreten Milošević to appear before the Trial Chamber to give oral testimony on a date and time to be notified;<sup>1</sup>

**NOTING** the “Corrigendum to Expedited Motion on behalf of Drago Nikolić Requesting the Trial Chamber to Issue a *Subpoena Duces Tecum*”, filed on 19 June 2009;

**NOTING** Article 29 of the Statute of the Tribunal (“Statute”), which obliges States to “co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law”,<sup>2</sup> and that this obligation includes the specific duty to “comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including [...] the taking of testimony [and] the service of documents”,<sup>3</sup>

**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 show a “legitimate forensic purpose” for having the information sought—that is, the applicant must demonstrate “a reasonable basis for [its] belief that there is a good chance that the prospective witness will be able to give information which will materially assist [it] in [its] case, in relation to clearly identified issues relevant to the [...] trial”;<sup>4</sup>

**NOTING** the “Decision on Nikolić Motion Requesting the Trial Chamber to Exercise its Discretion Pursuant to Rule 98” issued on 15 June 2009, in which the Trial Chamber denied Nikolić’s Motion requesting that it exercise its discretion under Rule 98 and call Sreten Milošević as a Chamber Witness;

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<sup>1</sup> Motion, paras 1, 53.

<sup>2</sup> Statute, Art. 29(1).

<sup>3</sup> *Ibid.*, Art. 29(2). See also *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of Trial Chamber II of 18 July 1997, 29 October 1997, para. 26.

<sup>4</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 10 (internal citation omitted).

**NOTING** that Sreten Milošević has on numerous occasions, and as recently as 13 May 2009, indicated that he is not willing to appear as a Witness for the Defence;<sup>5</sup>

**NOTING** that Nikolić has separately provided information concerning the particulars of Sreten Milošević that are known to him;<sup>6</sup>

**NOTING** that the Prosecution has not filed a response to the Motion;

**CONSIDERING** that there exists a good chance that Sreten Milošević will be able to give information that will materially assist Nikolić in the presentation of his case in relation to clearly identified issues relevant to the trial;

**CONSIDERING** that the assistance of the Government of Bosnia and Herzegovina and the relevant authorities of Republika Srpska 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;

**CONSIDERING** that since Nikolić is seeking the testimony of a witness, a *subpoena ad testificandum* rather than a *subpoena duces tecum* should be issued;

**NOTING** that pursuant to Rule 65ter(G)(i) the defence shall file a list of witnesses it intends to call;

**CONSIDERING** that Nikolić has not requested the addition of Sreten Milošević to its Rule 65ter list of witnesses;

**PURSUANT TO** Article 29 of the Statute and Rules 54 and 65ter,

**HEREBY GRANTS** the Motion in part, and **ORDERS** that:

1. Nikolić file a Motion seeking the addition of Sreten Milošević to its Rule 65ter list of witnesses by close of business on 26 June;
2. a *subpoena ad testificandum* be issued for Sreten Milošević to appear before the Trial Chamber to give oral testimony during the week commencing 6 July 2009 on a date and time to be notified; and
3. 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

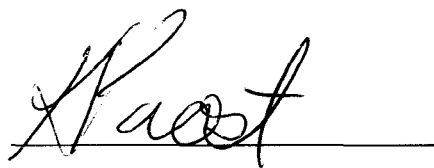
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<sup>5</sup> Motion, paras 2, 46-52.

<sup>6</sup> Email of 23 June 2009 from Mr. Stéphane Bourgon.

Government of Bosnia and Herzegovina 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.

A handwritten signature in black ink, appearing to read 'K Prost', is written over a horizontal line.

Kimberly Prost  
Judge

Dated this twenty-fourth day of June 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**