



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-99-36-T
Date: 19 June 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr. Hans Holthuis

Decision of: 19 June 2002

PROSECUTOR

v.

RADOSLAV BRĐANIN
And
MOMIR TALIĆ

**DECISION TO GRANT CERTIFICATION TO APPEAL THE
TRIAL CHAMBER'S "DECISION ON MOTION TO SET ASIDE
CONFIDENTIAL SUBPOENA TO GIVE EVIDENCE"**

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Mr. Milan Trbojević, for Radoslav Brđanin
Mr. Slobodan Zečević and Ms. Natacha Fauveau-Ivanović, for Momir Talić

Counsel for Jonathan Randal:

Mr. Geoffrey Robertson and Mr. Steven Powles

TRIAL CHAMBER II (“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”) is seised of the “Application for Certification from the Trial Chamber to Appeal the ‘Decision on Motion to Set Aside Confidential Subpoena to Give Evidence’”, filed on 14 June 2002 (“Motion”) on behalf of Jonathan Randal (“Randal”).

I. INTRODUCTION

1. Randal is the author of a newspaper article (“Randal’s Article”) published on 11 February 1993 and which contains quotes attributed to the Accused Radoslav Brđanin (“Brđanin”). In view of Randal’s refusal to appear before the Trial Chamber to give evidence, the Office of the Prosecutor (“Prosecution”) sought a subpoena against him.¹ On 29 January 2002, the Trial Chamber pursuant to Rule 54 of the Rules of Procedure and Evidence (“Rules”), issued a Confidential Subpoena directing Randal to appear before the Trial Chamber to give evidence (“Subpoena”).²

2. Randal applied by way of motion for the Subpoena to be set aside.³ The Prosecution responded,⁴ and the Trial Chamber heard further oral submissions from both Randal and the Prosecution on 10 May 2002. Randal sought to set aside the Subpoena on the grounds that he was entitled, as a former journalist, to a qualified privilege to protect him from being compelled to testify before the Tribunal with regard to his news gathering, and argued that this privilege should not be overcome on the particular facts of his case.⁵ The Trial Chamber by its “Decision on Motion to Set Aside Confidential Subpoena to Give Evidence” of 7 June 2002 (“Decision”) dismissed Randal’s claim.

3. Randal now seeks certification from the Trial Chamber to appeal the Decision, pursuant to Rule 73(B).⁶

¹ Unofficial Trial Transcript (“T”), 927

² Confidential Subpoena to Give Evidence, 29 January 2002.

³ Written Submissions on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence, 8 May 2002.

⁴ Confidential Prosecution’s Response to Written Submissions on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence, 9 May 2002.

⁵ Written Submissions on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence, 8 May 2002, par 47.

⁶ Application for Certification from Trial Chamber to Appeal Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, 14 June 2002, par 2.

II. DISCUSSION

4. In dismissing Randal's claim to a qualified journalistic privilege against being compelled to testify, the Trial Chamber emphasised "the importance that journalists should not be subpoenaed unnecessarily and that the summoning and the examination of journalists before this and similar courts or tribunals be conducted and regulated in a way which will not unduly hamper, obstruct or otherwise frustrate the vital role of news gathering of the journalist and/or the media". A "delicate balancing exercise" was involved which balanced the freedom of expression of journalists reporting from combat zones against the overriding principle that the course of justice should not be unduly impeded by the withholding of evidence.⁷

5. Randal now asserts that the Trial Chamber erred in its decision, particularly insofar as in his view the Trial Chamber failed to recognise a journalist's privilege against being compelled to testify before the Tribunal.⁸

6. The Trial Chamber is aware of the consequences stemming from a finding that the Trial Chamber erred in the exercise of its discretion, or from the recognition of the qualified privilege that Randal seeks to assert as it may apply to Randal's case. Either of these findings could result in that, in the particular case, Randal's Article would be admitted into evidence whilst the Accused, Brđanin in particular, would be deprived from being able to cross-examine its author. It is readily apparent that this course of action would have a significant effect on the Accused's rights under Article 21 of the Statute of the Tribunal, particularly on Brđanin's, and consequently on the fair and expeditious conduct of proceedings or the outcome of the trial. Further, since the allegations against Brđanin contained in Randal's Article go to the core of the charges against him, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

7. In granting the Motion, the Trial Chamber has also taken into consideration that both the Prosecution and counsel for Brđanin and for the Accused Momir Talić have chosen to adopt a neutral position for the purposes of granting Randal certification to appeal.⁹

⁷ Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, 7 June 2002, par 27.

⁸ Application for Certification from the Trial Chamber to Appeal Decision on Motion to Set Aside Confidential Subpoena to Give Evidence, 14 June 2002, pars 8-9.

⁹ Unofficial Trial Transcript, T 6962-6963.

III. DISPOSITION

For the foregoing reasons,

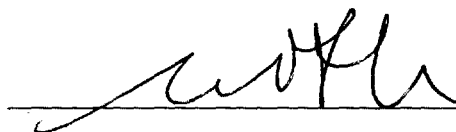
TRIAL CHAMBER II HEREBY grants the Motion.

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

Dated this nineteenth day of June 2002,

At The Hague

The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]