



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;¹

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”,² 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”,³

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”;⁴

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;

¹ Motion, paras 1, 53.

² Statute, Art. 29(1).

³ *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.

⁴ *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;⁵

NOTING that Nikolić has separately provided information concerning the particulars of Sreten Milošević that are known to him;⁶

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:

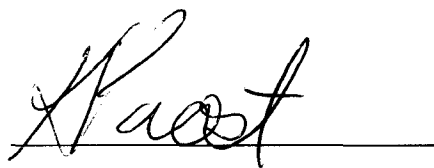
1. Nikolić file a Motion seeking the addition of Sreten Milošević to its Rule 65ter list of witnesses by close of business on 26 June;
2. a *subpoena ad testificandum* be issued for Sreten Milošević to appear before the Trial Chamber to give oral testimony during the week commencing 6 July 2009 on a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

⁵ Motion, paras 2, 46-52.

⁶ 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]