UNITED
NATIONS

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-95-5/18-T

Date: 23 September 2011

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **23 September 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION'S MOTION TO SUBPOENA MILAN TUPAJIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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") is seised of the "Prosecution's Motion to Subpoena Milan Tupajić, with Confidential Appendices A, B and C", filed confidentially[1] by the Office of the Prosecutor ("Prosecution") on 8 September 2011 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Prosecution requests the Trial Chamber to issue both a subpoena directing witness Milan Tupajić ("Witness") to appear to give testimony in this case on 3 October 2011,[2] and an accompanying order to the authorities in Bosnia and Herzegovina ("BiH") to provide assistance in serving the subpoena on the Witness.[3]

2. The Prosecution submits that the expected testimony of the Witness will materially assist its case.[4] The Witness was the President of the Sokolac Municipal Assembly and became the President of the Crisis Staff in Sokolac in 1992.[5] He is expected to testify about the communication and implementation of policies between the municipal level and the Bosnian Serb leadership, crimes committed against non-Serbs, and the Accused's position of authority within the SDS and the Republika Srpska.[6] According to the Prosecution, the Witness's testimony is relevant to the criminal responsibility of the Accused for crimes charged in the Third Amended Indictment ("Indictment") and specifically to Counts 1 and 3 to 8 of the Indictment.[7]

3. The Prosecution submits that it has made reasonable attempts to obtain the co-operation of the Witness and has been unsuccessful. The Witness has repeatedly informed the Prosecution by telephone that he is not willing to appear as a witness in this case, for the reasons set out in the Motion and Appendix A thereto.[8] However, the Witness indicated that he would be willing

[1] The Prosecution states that the Motion and the Appendices were filed confidentially because of the nature of the request and the fact that they contain details about the witness's current whereabouts. Motion, footnote 1.
[2] Motion, paras. 1, 9.
[3] Motion, para. 9.
[4] Motion, para. 4.
[5] Motion, para. 5.
[6] Motion, para. 5.
[7] Motion, para. 4.
[8] Motion, para. 7.

to testify if compelled to do so.[9] The Prosecution thus submits that the issuance of a subpoena is necessary to ensure that the Witness testifies on the scheduled date.[10]

4. On 19 September 2011, the Accused's legal advisor informed the Chamber that the Accused would not be filing a response to the Motion.[11]

II. Applicable Law

5. Rule 54 of the Rules provides that a Trial Chamber may issue a subpoena when it is "necessary for the purpose of an investigation or the preparation or conduct of the trial." A subpoena is deemed "necessary" for the purpose of Rule 54 where a legitimate forensic purpose for having the information has been shown:

> An applicant for such […] a subpoena before or during the trial would have to demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the forthcoming trial.[12]

6. To satisfy this requirement of legitimate forensic purpose, the applicant may need to present information about such factors as the positions held by the prospective witness in relation to the events in question, any relationship that the witness may have had with the accused, any opportunity the witness may have had to observe those events, and any statements the witness has made to the Prosecution or to others in relation to the events.[13]

7. Even if the Trial Chamber is satisfied that the applicant has met the legitimate purpose requirement, the issuance of a subpoena may be inappropriate if the information sought is obtainable through other means.[14] Finally, the applicant must show that he has made reasonable attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.[15]

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9 Motion, Appendix A, para. 4.

10 Motion, para. 8.

11 Hearing, T. 19072 (19 September 2011).

12 *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 ("*Halilović* Decision"), para. 6; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision"), para. 10 (citations omitted); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, 9 December 2005 ("*Milošević* Decision"), para. 38.

13 *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

14 *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

15 *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on a Prosecution Motion for Issuance of a Subpoena ad Testificandum, 11 February 2009, para. 7; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Defence Request for a Subpoena for Witness SHB, 7 February 2005, para. 3.

8. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[16] A Trial Chamber's discretion to issue subpoenas, therefore, is necessary to ensure that the compulsive mechanism of the subpoena is not abused and/or used as a trial tactic.[17]

9. With respect to the co-operation from the relevant states involved, Article 29 of the Statute of the Tribunal ("Statute") obliges states to "co-operate with the International Tribunal in the investigation and prosecution of the persons accused of committing serious violations of international humanitarian law". Article 29, paragraph 2, states 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, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons […]".

III. Discussion

10. Having considered the summary of the Witness's expected testimony provided in the Motion, the Chamber is satisfied that it is clearly relevant to a number of issues in the Prosecution's case. The Witness will give testimony on the conditions in Sokolac and the crimes committed against non-Serb civilians therein. As the President of the Sokolac Municipal Assembly and subsequently as the President of the Crisis Staff in Sokolac, the Witness will give evidence about the communication between the Bosnian Serb leadership and the municipalities, with particular emphasis on the work of the Crisis Staff in Sokolac. The Chamber is therefore satisfied that there is a good chance that the evidence of the Witness will materially assist the Prosecution in the presentation of its case with respect to those clearly identified issues and thus has satisfied the requirement of the legitimate forensic purpose.

11. Given the nature and scope of the Witness's anticipated testimony, the Chamber is also satisfied that his particular testimony is not obtainable through other means. As the former President of the Crisis Staff in Sokolac, the Witness is uniquely situated to give evidence on the instructions from the Bosnian Serb leadership to the Crisis Staff in the Sokolac municipality and the subsequent implementation of those instructions. Further, based on the role of the Witness in the Crisis Staff, the Witness will have knowledge about the Accused's position in the Bosnian Serb leadership with respect to communication with the Sokolac Crisis Staff. On the basis of

[16] *Halilović* Decision, para. 6; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 31.

[17] *Halilović* Decision, paras. 6, 10.

the information available to the Chamber at this time, it finds that this information is not obtainable through other witnesses.

12. The Chamber is also satisfied that the Prosecution has made reasonable attempts to secure the Witness's voluntary co-operation, by discussing the matter with him over the telephone and advising him that it may seek a subpoena to compel him to testify, and that the Witness has demonstrated his unwillingness to co-operate and to testify without a subpoena being issued against him.[18]

13. The Chamber therefore finds that it is necessary to issue a subpoena requiring the Witness to testify in these proceedings. In addition, considering that the Witness is not subject to protective measures and that there is no information in the Motion revealing the Witness's current whereabouts, the Chamber finds that the Motion may be reclassified as a public document while maintaining the confidentiality of appendices A, B and C.

[18] Motion, Confidential Appendix A, para. 6.

IV. Disposition

14. For the reasons outlined above, and pursuant to Article 29 of the Statute and Rules 54 of the Rules, the Trial Chamber hereby **GRANTS** the Motion and:

a. **ORDERS** the Registry of the Tribunal to take the reasonably necessary steps to ensure that the subpoena and the order to the Government of BiH relating to this matter are transmitted immediately to the Government of BiH;

b. **REQUESTS** the Victims and Witnesses Section of the Tribunal to provide any necessary assistance in the implementation of this Decision; and

c. **REQUESTS** the Registry of the Tribunal to reclassify the Motion as a public document while maintaining the confidentiality of Appendices A, B and C.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-third day of September 2011
At The Hague
The Netherlands

[Seal of the Tribunal]