



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: 4 May 2015

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: 4 May 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF “DECISION ON ACCUSED’S MOTION TO
SUBPOENA WITNESS KW540” ISSUED ON 3 FEBRUARY 2014**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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 Accused’s “Motion for Subpoena to Witness KW540” filed confidentially on 16 December 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests, pursuant to Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), that the Chamber issue a subpoena compelling Witness KW540 (“Witness”), [REDACTED], to appear for testimony in his case on 11 February 2014.¹

2. The Accused submits that he has attempted to obtain the Witness’s voluntary co-operation and the Witness “firmly indicated that he is unwilling to testify”.² In support, the Accused attaches as a confidential annex to the Motion a declaration from his investigator, who spoke to the Witness on 10 December 2013 (“Declaration”).³ According to the Declaration, the Witness stated that he would not testify before the Tribunal or give a statement to the Accused’s defence team, because [REDACTED].⁴ The Accused’s investigator explained various options to the Witness.⁵ However, the Witness maintained his refusal to appear to testify unless a binding court order is issued.⁶ The Accused argues that this satisfies the requirement that he make reasonable efforts to obtain the Witness’s voluntary co-operation.⁷

3. The Accused further contends that there are reasonable grounds to believe that the Witness has information which can materially assist his case.⁸ In the Motion, the Accused states that [REDACTED], the Witness testified that [REDACTED].⁹ According to the Accused, the Witness further testified in that case that [REDACTED].¹⁰ [REDACTED].¹¹ [REDACTED].¹² The Accused therefore maintains that the Witness’s evidence, including documentary evidence to be tendered through him, is relevant to refute Prosecution evidence and show that: (i)

¹ Motion, paras. 1–2, 16.

² Motion, para. 4.

³ Declaration, p. 1.

⁴ Declaration, p. 1.

⁵ Declaration, p. 1.

⁶ Declaration, p. 1.

⁷ Motion, para. 4.

⁸ Motion, para. 5.

⁹ Motion, para. 6.

¹⁰ Motion, paras. 6–7.

¹¹ Motion, paras. 7–8.

¹² Motion, para. 9.

operations to disarm Bosnian Muslims in villages [REDACTED] were not a “pretext for ethnic cleansing”; (ii) Bosnian Muslims were not arrested solely because they were Bosnian Muslims; and (iii) there was not a policy and practice to fail to punish crimes committed by Bosnian Serbs against Bosnian Muslims and Bosnian Croats.¹³

4. Finally, the Accused argues that the Witness’s testimony is necessary for his case because he was [REDACTED].¹⁴ Thus, according to the Accused, no other person can give this testimony or explain the documents authored by the Witness and this information is necessary for a fair determination of the issues being tried.¹⁵

5. On 16 December 2013, the Prosecution notified the Chamber by email that it did not wish to respond to the Motion.

II. Applicable Law

6. 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.¹⁶

7. 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.¹⁷

8. 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

¹³ Motion, paras. 10–12.

¹⁴ Motion, para. 13. See Motion, paras. 10–12.

¹⁵ Motion, paras. 13, 15.

¹⁶ *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.

¹⁷ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

obtainable through other means.¹⁸ 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.¹⁹

9. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.²⁰ 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.²¹ In essence, a subpoena should be considered a method of last resort.²²

III. Discussion

10. The Chamber first considers that the Accused has made reasonable efforts to obtain the voluntary co-operation of the Witness but has been unsuccessful.²³

11. As stated above, in order to meet the necessity requirement for the issuance of a subpoena, the applicant must show that he has a reasonable basis for his belief that there is a good chance that the witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to his trial.²⁴ The Chamber notes that the Witness's prospective testimony is related to [REDACTED] crimes alleged in the Third Amended Indictment ("Indictment") including forcible transfer, unlawful detention in detention facilities, destruction of property, and killings. The Chamber thus considers that such prospective testimony relates to live issues in this trial, namely the occurrence of crimes [REDACTED] and the Accused's responsibility for such crimes in regard to the alleged joint criminal enterprise to permanently remove Bosnian Muslim and Bosnian Croat inhabitants from the territories of BiH claimed as Bosnian Serb territory.²⁵ Furthermore, having considered the Accused's submissions, the Chamber is satisfied that there is a good chance that the Witness's evidence will materially assist the Accused in the presentation of his defence case with respect

¹⁸ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

¹⁹ *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.

²⁰ *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.

²¹ *Halilović* Decision, paras. 6, 10.

²² See *Prosecutor v. Martić*, Case No. IT-95-11-PT, Decision on the Prosecution's Additional Filing Concerning 3 June 2005 Prosecution Motion for Subpoena, confidential and *ex parte*, 16 September 2005, para. 12. "Such measures [subpoenas], in other words, shall be applied with caution and only where there are no less intrusive measures available which are likely to ensure the effect which the measure seeks to produce."

²³ See Motion, para. 4; Declaration.

²⁴ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. See also *Milošević* Decision, para. 38.

²⁵ Indictment, paras. 9–14.

to those clearly identified issues which are relevant to his case and thus, that the Accused has satisfied the requirement of the legitimate forensic purpose.

12. However, the Chamber recalls that even if it 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. The Chamber first notes that it has already received evidence tendered by the Accused on the issues the Witness is expected to testify about, including from witnesses who occupied positions of a similar nature as the Witness.²⁶ The Chamber further notes that the Witness's prospective evidence is similar in nature to witnesses who are scheduled to testify for the Accused imminently,²⁷ as well as to witnesses who are listed on the Defence Sixth Revised Rule 65 *ter* Witness List, [REDACTED].²⁸ The evidence of these witnesses is related to (a) [REDACTED];²⁹ (b) [REDACTED];³⁰ (c) [REDACTED];³¹ (d) [REDACTED];³² (e) [REDACTED];³³ [REDACTED];³⁴ and (g) [REDACTED].³⁵

13. As such, the Chamber is not satisfied that there would be any specific evidence that the Witness would add to what has already been obtained, or is obtainable, through other means. The Accused is again reminded that subpoenas are a method of last resort for obtaining information that is both legally and factually relevant and necessary to his case.³⁶

14. Accordingly, the Chamber finds that the requirements for the issuance of a subpoena have not been met in this case.

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ *See, e.g.*, [REDACTED].

²⁹ *See, e.g.*, [REDACTED].

³⁰ *See, e.g.*, [REDACTED].

³¹ *See, e.g.*, [REDACTED].

³² *See, e.g.*, [REDACTED].

³³ *See, e.g.*, [REDACTED].

³⁴ *See, e.g.*, [REDACTED].

³⁵ *See, e.g.*, [REDACTED].

³⁶ Decision on Accused's Motion to Subpoena Prime Minister Milan Panić, 13 December 2012, para. 14; Decision on Accused's Motion to Subpoena President Karolos Papoulias, 23 October 2012 para. 21; Decision on the Accused's Second Motion for Subpoena to Interview President Bill Clinton, 21 August 2012, para. 16.

IV. Disposition

15. For the reasons outlined above, the Chamber, pursuant to Rule 54 of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this fourth day of May 2015
At The Hague
The Netherlands

[Seal of the Tribunal]