



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: 12 March 2012

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: 12 March 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR SUBPOENA TO INTERVIEW
VLADIMIR ZAGOREC**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

The Government of Croatia

via the Embassy of the Republic
of Croatia to the Netherlands,
The Hague

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 Accused’s “Motion for Subpoena to Interview: General Vladimir Zagorec”, filed on 10 January 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue, pursuant to Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), a subpoena to General Vladimir Zagorec, former Deputy Minister of Defence of the Republic of Croatia (“Croatia”), compelling him to submit to an interview with the Accused’s legal advisor.¹

2. This Motion relates to two of the Accused’s previous motions: the “Motion for Binding Order: Government of Croatia” filed on 11 September 2009 (“Binding Order Motion”) which is still pending before the Chamber, and the “Motion for Subpoena to Interview: Miroslav Tuđman” filed on 6 September 2010 (“Tuđman Motion”).

3. In the Binding Order Motion, the Accused requests that Croatia provide him with several categories of documents relating to: (i) arms smuggling into Tuzla and onwards to Srebrenica in February and March 1995, (ii) arms smuggling to the army of Bosnia and Herzegovina (“BiH”) from 1992 until 1995, and (iii) the involvement of United Nations (“UN”) personnel in providing arms to the Muslims in BiH.² After lengthy correspondence between Croatia and the Accused, in which Croatia delivered some documents to the Accused,³ which the Accused considered did not meet his request, and following some correspondence between Tuđman and the Accused’s legal advisor that ended in a stalemate,⁴ the Accused filed the Tuđman Motion requesting the Chamber to issue a subpoena directing Tuđman to submit to an interview with the Accused’s legal advisor.⁵ The Chamber, by majority, Judge Kwon dissenting, granted the Tuđman Motion and issued a subpoena directing Tuđman to meet with the Accused’s legal advisor for an interview.⁶

¹ Motion, para. 1.

² Binding Order Motion, para. 1.

³ See Correspondence from Croatia, confidential, 27 October 2009; Correspondence from Croatia, confidential, 9 November 2009; Correspondence from Croatia, confidential, 19 August 2010; Correspondence from Croatia, confidential, 22 September 2010.

⁴ See Tuđman Decision, paras. 3, 22.

⁵ Tuđman Motion, para. 1.

⁶ Decision on the Accused’s Motion for Subpoena to Interview Miroslav Tuđman, 14 July 2011 (“Tuđman Decision”), paras. 30–31. Judge Kwon dissented on the grounds that the requirements for a subpoena were not met.

4. Following Tuđman's interview with the Accused's legal advisor, which took place on 7 November 2011, the Accused filed the Motion stating that due to the lack of information provided to him by Tuđman, he now finds it necessary to interview Zagorec.⁷ He also submits that there are reasonable grounds to believe that Zagorec has information that can materially assist his case as he would be the "person in the Croatian government with the most knowledge of the shipment of arms to the Bosnian Muslims" because he was in charge of the procurement of weapons for Croatia from 1993 to 1996.⁸ The information the Accused seeks from Zagorec pertains to alleged agreements between Croatia and the Islamic Republic of Iran ("Iran") to ship arms to the Muslims in BiH; the nature, method, and the quantity of arms which were smuggled into BiH from 1994 to 1995; and the use of humanitarian convoys to smuggle these weapons.⁹ He submits that this information "directly relates to the same issues [as sought through his interview with Tuđman] and is necessary in light of the lack of information provided by Mr. Tuđman".¹⁰ He further notes that this information may be used in two ways: to direct Croatia to produce the documents pertaining to these topics and to serve as the basis of a written statement, which would then be tendered into evidence.¹¹ The Accused submits that he has attempted to obtain the voluntary co-operation of Zagorec but that Zagorec refused to submit to an interview with his legal advisor.¹² In addition, the Accused submits that he has not been able to find this information through other means.¹³

5. Following an invitation by the Chamber on 25 January 2012,¹⁴ Croatia filed its response confidentially on 9 February 2012 ("Croatia Response"), stating that Zagorec "may share his information about the transfer of weapons to [BiH] from third countries if he personally wishes to do so. However, he cannot testify about the ways in which the armed forces of the Republic of Croatia were armed".¹⁵

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". This power includes the authority to "require a prospective witness to attend at a nominated place and

⁷ Motion, para. 25.

⁸ Motion, paras. 20, 23.

⁹ Motion, para. 23.

¹⁰ Motion, para. 25.

¹¹ Motion, para. 24.

¹² Motion, paras. 21, 26, Confidential Annex J.

¹³ Motion, para. 26.

¹⁴ Invitation to Croatia Regarding Interview of Vladimir Zagorec, 25 January 2012.

¹⁵ Croatia Response, p. 2.

time in order to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial”.¹⁶ The Appeals Chamber has stated that a Trial Chamber’s assessment must “focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair”.¹⁷ A subpoena is deemed “necessary” for the purpose of Rule 54 where a legitimate forensic purpose for obtaining 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.¹⁸

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 statement the witness has made to the Prosecution or to others in relation to the events.¹⁹

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 obtainable through other means.²⁰ 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.²¹

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.²² A Trial Chamber’s discretion to issue subpoenas, therefore, is necessary to ensure that the compulsive mechanism of the subpoena is not abused

¹⁶ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić Decision*”), para. 10.

¹⁷ *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 (“*Halilović Decision*”), para. 7. See also *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. 41.

¹⁸ *Krstić Decision*, para. 10; *Halilović Decision*, para. 6. See also *Milošević Decision*, para. 38.

¹⁹ *Halilović Decision*, para. 6; *Krstić Decision*, para. 11; *Milošević Decision*, para. 40.

²⁰ *Halilović Decision*, para. 7; *Milošević Decision*, para. 41.

²¹ *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.

²² *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.

and/or used as a trial tactic.²³ In essence, a subpoena should be considered a method of last resort.²⁴

III. Discussion

10. Turning first to whether the Accused has made reasonable attempts to obtain the voluntary co-operation of Zagorec, the Chamber notes that Zagorec is currently serving a prison term in Croatia and has refused to submit to an interview with the Accused's legal advisor.²⁵ The Chamber therefore finds that the Accused has made reasonable efforts to secure the voluntary co-operation of Zagorec and has been unsuccessful.

11. As to whether the information the Accused seeks through an interview with Zagorec covers issues relevant to his case, the Accused submits that it is the same information that he sought to obtain through his interview with Tuđman. The Chamber recalls that it has found, by majority, Judge Kwon partially dissenting, that most of this information covered issues that were relevant to the Accused's case and that obtaining this information would materially assist him in the conduct of his case.²⁶ The Chamber also found, by majority, Judge Kwon dissenting, that the Accused had a reasonable basis for his belief that there was a good chance that Tuđman would give him information which would materially assist his case.²⁷ Given that the interview with Tuđman failed to get the information sought,²⁸ the Accused now seeks the same information from Zagorec, who he alleges was, by virtue of his position as a person in charge of procurement of weapons for Croatia in the relevant period, more closely involved in the sale of weapons in 1994 and 1995.²⁹ Having

²³ Halilović Decision, paras. 6, 10.

²⁴ 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, filed *ex parte* and confidential on 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".

²⁵ Motion, para. 21.

²⁶ See Tuđman Decision, para. 25. With regard to the issue of information relating to alleged smuggling of arms to Srebrenica and the issue of United Nations personnel's alleged active participation in hostilities, Judge Kwon maintained his dissent on the same basis on which he dissented in Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May 2010; see also Decision on Accused's Motion for Subpoena to Interview General Sead Delić and Brigadier Refik Brđanović, 5 July 2011, para. 13, note 31. Regarding the issue of the alleged restrictions of humanitarian convoys, Judge Kwon agreed with the majority that this was a relevant issue to the Accused's case. However, with respect to that issue, Judge Kwon dissented on the grounds that the Accused did not have a reasonable basis for his belief that there was a good chance that Tuđman would be able to provide him with such information. See Tuđman Decision, note 63.

²⁷ Tuđman Decision, paras. 25, 26. While Judge Kwon maintained his dissent that the issues of alleged arms smuggling into Srebrenica and United Nations personnel's alleged active participation in the hostilities was not relevant, Judge Kwon agreed with the majority that the issue of information relating to alleged restrictions of humanitarian convoys was relevant but he dissented on the grounds that the Accused did not have a reasonable basis for his belief that there was a good chance that Tuđman would provide him with such information. See Tuđman Decision, note 65.

²⁸ Motion, para. 25.

²⁹ Motion, para. 23, Annexes B, C, and D.

examined the documents provided by the Accused in support of this claim, the Chamber finds, by majority, Judge Kwon dissenting,³⁰ that the Accused has a reasonable belief that there is a good chance that Zagorec will provide him with information regarding the relevant issues discussed above.³¹

12. As to whether the information sought is obtainable through other means, the Accused submits that he has tried and failed to get this information through other sources.³² According to the Accused, his interview with Tudman did not yield the relevant information that he expected. In addition, while the states involved—Croatia and BiH—have provided documents responsive to some of the Accused's requests, these documents do not contain the specific information that the Accused seeks through his interview with Zagorec. Accordingly, the Chamber finds, by majority, Judge Kwon dissenting,³³ that the information Zagorec may provide to the Accused is not obtainable through any other means at this stage.

13. Having found that the requirements for a subpoena are satisfied, it still remains within the Chamber's discretion to decide whether or not to issue the subpoena. The Chamber recalls that it must take a cautious approach in issuing subpoenas, as they are coercive in nature and failure to comply with them may lead to criminal sanctions.³⁴ The Appeals Chamber has held that subpoenas should not be issued lightly, especially in cases where a potential witness refuses to be interviewed.³⁵ It has also held that subpoenas should be used sparingly and that Trial Chambers should guard against subpoenas being used routinely as a trial tactic.³⁶ The Chamber notes here that the Accused has throughout this trial been quite prolific in filing a number of motions asking it to issue subpoenas directing various people to meet with his legal advisor and provide information relating to the alleged smuggling of arms into BiH in 1994 and 1995,³⁷ the majority of which the

³⁰ As in the Tudman Decision, Judge Kwon maintains his dissent on the relevance of the issues, *see supra* note 28. However, with respect to the alleged restrictions on humanitarian convoys, which he considers relevant, Judge Kwon dissents on the ground that the Accused does not have a reasonable basis for his belief that Zagorec will be able to provide such information.

³¹ For those issues, *see* Tudman Decision, para. 25.

³² Motion, para. 26.

³³ Judge Kwon maintains his dissent as outlined in the Tudman Decision and is of the view that the information sought from Zagorec lacks a legitimate forensic purpose. He therefore considers that the issuance of a subpoena is not necessary. *See* Tudman Decision, note 74.

³⁴ *See* Decision on Motion for Subpoena to Douglas Lute and John Feeley, 8 July 2009, para. 11.

³⁵ *Krstić* Decision, para. 12.

³⁶ *Halilović* Decision, para. 10.

³⁷ *See* Motion to Subpoena to Interview: Miroslav Tudman, 6 September 2010; Motion for Subpoena to Interview: General Sead Delić and Brigadier Refik Brđanović, 6 January 2011; Motion for Subpoena to Interview: Christoph von Bezold, 5 April 2011; Motion for Subpoena to Interview: General Director Sadeghi, 5 April 2011. The Accused has also filed a number of other similar subpoena requests in relation to other issues he claims are relevant to his trial, namely Motion to Subpoena Prosecution Witness Ronald Elmers for Interview, 1 March 2010; Motion for Subpoena to Interview: Colonel Guy de Haynin de Bry, 10 November 2010; Motion to Compel Interview: General Rupert Smith, 6 January 2011; Motion to Compel Interviews: Sarajevo 92 *bis* Witnesses, 11 February 2011; Motion

Chamber has granted, by majority.³⁸ In the particular case of Zagorec, the Chamber does not consider that the Accused is using the Motion as a trial tactic and will, therefore, exercise its discretion in favour of the Accused. Therefore, the Chamber finds, by majority, Judge Kwon dissenting, that the subpoena should be issued, directing Zagorec to submit to an interview with the Accused's legal advisor. Having said that, however, the Chamber also notes that in light of the limited success that the Accused has had in obtaining information relating to alleged arms smuggling, it will be particularly vigilant when assessing whether any future requests for subpoena amount to a trial tactic rather than a method of last resort in the context of genuine investigatory efforts.

14. Finally, considering that the information contained in the Croatia Response does not reveal any confidential information, the Chamber finds that it can be reclassified as public.

to Compel Interview: Griffith Evans, 5 April 2011; Motion to Compel Interview: Witness B, 20 October 2011; Motion for Subpoena to Interview President Karolos Papoulias, 26 January 2012.

³⁸ See Decision on Accused's Motion for Subpoena to Interview: General Sead Delić and Brigadier Refik Brđanović, 5 July 2011; Decision on the Accused's Motion for Subpoena to Interview Miroslav Tuđman, 14 July 2011; Decision on the Accused's Motion for Subpoena to Interview Christoph von Bezold, 1 December 2011.

IV. Disposition

15. Accordingly, the Chamber, by majority, Judge Kwon dissenting, pursuant to Article 29 of the Statute and Rule 54 of the Rules, hereby **GRANTS** the Motion and:

- a) **ORDERS** the Registry of the Tribunal to take the reasonably necessary steps to ensure that the attached Subpoena and the Order to Croatia relating to this matter are transmitted immediately to Croatia; and
- b) **REQUESTS** the Registry to reclassify as public the Response from Croatia.

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



Judge O-Gon Kwon
Presiding

Dated this twelfth day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]