



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: 26 February 2013

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: 26 February 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO SUBPOENA
FIKRET ABDIĆ**

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 Accused’s “Motion for Subpoena to Fikret Abdić”, filed on 6 February 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 Fikret Abdić to testify in his trial on 29 May 2013 or another date thereafter as set by the Chamber.¹ He submits that Abdić, as a representative of the Party of Democratic Action (“SDA”) in the Presidency of Bosnia and Herzegovina, could testify about a number of issues relevant and necessary to his case including: (1) meetings of the SDA in the lead up to the war; (2) discussion of proposals and agreements entered into with the Accused for the avoidance of war, securing freedom of movement, prosecution of persons who violated the laws of war, and free passage of humanitarian convoys; (3) his conversations with Ratko Mladić and Milosav Gagović in which they made “good faith efforts to solve problems and avoid civilian casualties in Sarajevo”; and (4) meetings between the Bosnian Serb leadership and Abdić where the Accused demonstrated a willingness to cooperate and work with Bosnian Muslim representatives.²

2. In the Motion, the Accused submits that the evidence of Abdić is necessary for his defence as it refutes the allegation that the Accused and the Bosnian Serbs “wanted the war so they could expel Muslims from areas where Serbs were a majority” and demonstrates that the Accused had a genuine desire to “work with persons of all ethnic groups and respect their rights, including the rights to freedom of residence and of movement”.³ The Accused contends that the information Abdić would provide is not available by other means because he had personal contacts with the Accused, Mladić, and other leaders of Republika Srpska (“RS”) and that his testimony “would have greater credibility” than witnesses from the RS.⁴ The Accused further argues that Abdić is the only SDA leader who could testify about events within the SDA and the Bosnian Muslim Presidency given that other leaders have “categorically refused to testify”.⁵

¹ Motion, paras. 1, 13.

² Motion, paras. 6–10, 12.

³ Motion, paras. 10–11.

⁴ Motion, para. 11.

⁵ Motion, para. 11.

3. The Accused argues that he has made reasonable efforts to obtain Abdić's voluntary co-operation but has been unsuccessful.⁶ In support, the Accused attaches a supporting declaration from his legal adviser which outlines attempts to secure Abdić's agreement to be interviewed and to testify as a witness in this case.⁷

4. On 6 February 2013, the Office of the Prosecutor ("Prosecution") indicated by e-mail that it did not wish to respond to the Motion.

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 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.⁸

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 statement the witness has made to the Prosecution or to others in relation to the events.⁹

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.¹⁰ 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.¹¹

⁶ Motion, para. 4.

⁷ Motion, paras. 4–5, Annex A. The Chamber notes that paragraph 5 of the Motion erroneously refers to Prime Minister Panić.

⁸ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision"), para. 10; *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 ("*Halilović* Decision"), para. 6; *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.

⁹ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

¹⁰ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

¹¹ *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.¹² 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.¹³ In essence, a subpoena should be considered a method of last resort.¹⁴

III. Discussion

9. Preliminarily, the Chamber finds that the Accused has made reasonable efforts to obtain the voluntary co-operation of Abdić but has been unsuccessful.¹⁵

10. 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.¹⁶ The Chamber considers that Abdić's evidence is pertinent to the Accused's meetings and negotiations with Bosnian Muslim representatives in the lead-up to and during the war and could be relevant to the alleged joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory. Accordingly, the Chamber finds that the information sought from Abdić pertains to clearly identified issues that are relevant to the Accused's case.

11. The Chamber first notes that the information sought through the issuance of a subpoena must be of "*material* assistance", rather than merely helpful or of some assistance.¹⁷ In other words, the information must be of "substantial or considerable assistance" to the Accused in relation to a clearly identified issue that is relevant to the trial.¹⁸ The Chamber instructed the Accused that with respect to subpoenas a "serious assessment should always be made about the importance of the proposed evidence, whether the information a witness may provide could

¹² *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.

¹³ *Halilović* Decision, paras. 6, 10.

¹⁴ 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 confidentially and *ex parte* 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".

¹⁵ See Motion, paras 4–5, Annex A.

¹⁶ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. See also *Milošević* Decision, para. 38.

¹⁷ *Milošević* Decision, para. 39 [emphasis in the original text].

¹⁸ See *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.

materially assist his case in relation to relevant issues, whether it is *necessary* for the conduct of the trial, and whether it is obtainable through other means”.¹⁹

12. Much of the information the Accused is now seeking from Abdić is generally similar to documentary evidence already in evidence which relates to Abdić’s position and role in the conflict.²⁰ In addition, the Accused claims Abdić was the only SDA leader who could testify about events within the party and the Bosnian Muslim Presidency as other leaders “have categorically refused to testify”.²¹ The Chamber has no information to support this contention. The Accused should investigate whether other individuals could provide comparable information relevant to his defence case, and in so doing obviate the need to subpoena Abdić.²²

13. The Accused also refers to the personal contact between Abdić and Mladić, however, in that regard the Chamber observes that a number of intercepted conversations between Abdić and Mladić have already been admitted into evidence in this case.²³ The Accused also refers in general terms to contact and meetings between Abdić and the leadership of the RS and that his evidence “would have greater credibility than that of those on the side of Republika Srpska”.²⁴ This assertion alone is not sufficient to negate the conclusion that the proposed evidence of Abdić is obtainable through other means and that the Accused should investigate other avenues before seeking a subpoena for Abdić.²⁵ Accordingly, the Chamber finds that the requirements for the issuance of a subpoena have not been met in this case.

14. The Chamber has consistently reminded the Accused that subpoenas will not be issued lightly, and that their use should be limited and used sparingly as a method of last resort for obtaining information that is both legally and factually relevant and necessary to his case.²⁶ The Chamber finds that the Accused has not paid attention to this direction, and stresses that it is not an appropriate or valuable use of his resources or the Chamber’s time to seek subpoenas for so many witnesses.

¹⁹ Decision on Accused’s Motion to Subpoena Naser Orić, 11 January 2013, para. 17.

²⁰ See for example Milosav Gagović, T. 31878, 31894, 31910–31911, 31915, 31919–31920 (15 January 2013); Vitomir Žepinić, T. 33611 (13 February 2013); KDZ446, P29, T. 21012–21013, 21061, Herbert Okun, T. 1582–1583, 1607–1608 (26 April 2010); Charles Kirudja, T. 21369–21370 (11 November 2011); Colm Doyle, P918, T. 25295 (26 August 2003); Momčilo Mandić, T. 4656 (6 July 2010).

²¹ Motion, para. 11.

²² See Decision on Accused’s Motion to Subpoena Ranko Mijić, 11 January 2013, para. 10.

²³ See P5663, P5662, P5656, and P2236.

²⁴ Motion, para. 11.

²⁵ See Decision on Accused’s Motion to Subpoena Ambassador Hall, 16 January 2013 (“Decision on Ambassador Hall Subpoena”), para. 19.

²⁶ Decision on Accused’s Motion to Subpoena Ranko Mijić, 11 January 2013, para. 11; Decision on Ambassador Hall Subpoena, para. 21.

IV. Disposition

15. Accordingly, 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 twenty-sixth day of February 2013
At The Hague
The Netherlands

[Seal of the Tribunal]