



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: 18 December 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: 18 December 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA DRAGAN KALINIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

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 Dragan Kalinić”, filed on 15 November 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 Dragan Kalinić to testify in his case on 14 January 2014.¹ Dragan Kalinić was the Minister of Health of the Republika Srpska (“RS”) at the time relevant to the Third Amended Indictment (“Indictment”). The Accused argues that he has made reasonable efforts to obtain the voluntary co-operation of Kalinić but that these efforts have not been successful as Kalinić has indicated that he is not willing to testify in this case.²

2. The Accused argues that there are reasonable grounds to believe that Kalinić has information which is relevant to his case and may materially assist him in his defence.³ The Accused submits that Kalinić will testify that he “never favored the extermination of the Bosnian Muslims” in whole or in part,⁴ despite the Office of the Prosecutor (“Prosecution”) using a statement made by Kalinić on 12 May 1992 during a session of the Assembly of the RS (“RS Assembly”) and its approval by the Accused during the same session as evidence of genocidal intent.⁵ The Accused also submits that Kalinić will refute the Prosecution’s allegations that the Accused and the Bosnian Serb leadership deliberately impeded the delivery of humanitarian convoys as part of an alleged joint criminal enterprise to expel Bosnian Muslims and Bosnian Croats from Bosnian-Serb held areas in Bosnia and Herzegovina (“BiH”).⁶ Finally, the Accused argues that Kalinić will be in a position to testify that at a meeting he had with the Accused on 19 July 1995, the Accused “gave no indication that prisoners from Srebrenica had been executed.”⁷

3. On 15 November 2013, the Prosecution informed the Chamber *via* email that it would not respond to the Motion.

¹ Motion, paras. 1, 14. The Chamber notes that paragraph 14 was incorrectly numbered.

² Motion, para. 4, Annex A.

³ Motion, paras. 5, 13.

⁴ Motion, para. 8.

⁵ Motion, para. 7.

⁶ Motion, para. 11.

⁷ Motion, para. 12.

II. Applicable Law

4. 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

5. 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

6. 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

7. 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

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.

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, confidential and *ex parte*, 16 September 2005, para. 12. “Such

III. Discussion

8. The Chamber notes that the Accused made efforts to persuade Kalinić to testify in this case but that Kalinić has refused to co-operate.¹⁵ The Chamber is satisfied that the Accused has made reasonable efforts to secure Kalinić's voluntary co-operation but has been unsuccessful.

9. As noted above, in order to meet the legitimate forensic purpose 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 that are relevant to his trial.

10. Having assessed the expected scope of Kalinić's testimony, as outlined in the Motion, the Chamber is satisfied that it is relevant to a number of issues in the Accused's case. The Chamber notes that the Accused wishes to elicit evidence from Kalinić on three topics, namely (i) a speech that Kalinić gave on 12 May 1992 at a session of the RS Assembly; (ii) the free passage of humanitarian convoys in BiH; and (iii) a meeting Kalinić had with the Accused on 19 July 1995.¹⁶

11. However, the Chamber is not satisfied that Kalinić will be able to give information which will materially assist the Accused in his case or that the information sought is not obtainable through other means. First, with respect to the speech given by Kalinić at the RS Assembly, the Chamber finds that calling Kalinić to explain his speech, which is already in evidence and can be understood in the context of other evidence, is not necessary and will not materially assist the Accused.¹⁷ Next, with respect to the meeting that Kalinić had with the Accused on 19 July 1995, the Chamber is not convinced that Kalinić would have received, in his position as Minister of Health in the RS government, information that may be relevant to the alleged killings in Srebrenica in July 1995 or plans to that effect. Further, even if he had received information about Srebrenica, the Chamber is not satisfied that Kalinić would add anything to the evidence which the Chamber has received so far in that regard.¹⁸ The Chamber thus does not find it necessary to compel him to

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 Motion, Annex A.

¹⁶ Motion, paras. 6-8, 11-12.

¹⁷ P956 (Transcript of 16th session of SerBiH Assembly, 12 May 1992); P1355 (Minutes of 16th session of SerBiH Assembly, 12 May 1992).

¹⁸ See e.g., Momčilo Krajišnik, T. 43346-43354 (12 November 2013); D3977 (Witness statement of Mile Dmičić dated 29 October 2013), paras. 21-23; D3695 (Witness statement of Bogdan Subotić dated 16 June 2013), paras. 237-238; Dušan Kozić, T. 37020-37022 (10 April 2013); D3376 (Report of RS Government delegation to Srebrenica, 18 July 1995); D3981 (Witness statement of Miroslav Toholj dated 31 October 2013), para. 88; John Zametica, T. 42482-42483 (29 October 2013); D3659 (Witness statement of Ljubomir Borovčanin dated 30 May 2013), paras. 45-47; D3561 (Witness statement of Dane Katanić dated 14 December 2012), paras. 8-9; D2905 (Witness statement of Srđa Trifković dated 5 February 2013), paras. 24-35; D2762 (Witness statement of KW554 dated 14 September 2012),

testify about the 19 July 1995 meeting. Finally, with respect to the free passage of humanitarian convoys in BiH, while the Chamber is satisfied that the Accused has shown a reasonable basis for his belief that there is a good chance that Kalinić will give information that would materially assist him, the Chamber is not satisfied that the information sought is not obtainable through other means.¹⁹

12. Thus, for all the reasons outlined above, the Chamber considers that the Motion should be denied. The Chamber reminds the Accused, yet again, that subpoena motions are not to be used as a trial tactic or a default tool each time a potential witness refuses to testify in his case. The Accused should not expect that subpoenas will be issued as a matter of course to all individuals who are unwilling to testify as witnesses in his case.²⁰ The Chamber reiterates that subpoenas are to be used sparingly and as a method of last resort. This was clearly not the case here with the Accused seeking to compel a witness to testify about a statement he made in the RS Assembly while recently attempting to preclude the Chamber from questioning a witness on statements made in the RS Assembly based on an alleged “parliamentary privilege”.²¹

para. 30; Milenko Indić, T. 32610–32611 (24 January 2013); D3886 (Witness statement of Svetozar Andrić dated 16 July 2013), paras. 30–31; D3749 (Witness statement of Milenko Karišik dated 23 June 2013), paras. 40, 63; D3853 (Witness statement of Zvonko Bajagić dated 5 July 2013), para. 36A-E; D3682 (Witness statement of Gordan Milinić dated 8 June 2013), paras. 17–19; D3720 (Witness statement of Petar Salapura dated 17 June 2013), paras. 22–23; D3993 (Witness statement of Vujadin Popović dated 2 November 2013), paras. 64, 81–83, 90–91; D3960 (Witness statement of Tomislav Kovač dated 28 October 2013), paras. 113–118, 123, 128–138; D3932 (Witness statement of Milenko Živanović dated 27 October 2013), para. 8.

¹⁹ For evidence regarding humanitarian aid going into Sarajevo and Bosnia and Herzegovina, generally, *see e.g.*, John Zametica, T. 42461–42462 (29 October 2013); P5183 (RS Presidential Order, 11 July 1995); P2997 (Radovan Karadžić's Order, 12 July 1995); P4194 (VRS Main Staff Order, 18 June 1995); John Wilson, T. 3995 (21 June 2010); P845 (UNPROFOR report re meeting with Radovan Karadžić, 15 October 1993), p. 1; P890 (UNPROFOR Weekly Situation Report (Sarajevo), 10 June 1995), pp. 1–3; P949 (Announcement of SDS leadership re Sarajevo airport and humanitarian supplies, 27 May 1992); P1029 (Witness statement of John Wilson dated 4 November 2008), para. 123.

²⁰ *See* Decision on Accused's Motion to Subpoena Ambassador Hall, 16 January 2013, para. 21.

²¹ *See* Motion to Preclude Questioning of Momčilo Krajišnik on Statements Made in Parliament, 4 November 2013; T. 43092–43098 (6 November 2013).

IV. Disposition

13. For the reasons outlined above, the Chamber, pursuant to Article 29 of the Statute of the Tribunal and 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 eighteenth day of December 2013
At The Hague
The Netherlands

[Seal of the Tribunal]