



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: 5 July 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: 5 July 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR SUBPOENA TO INTERVIEW:
GENERAL SEAD DELIĆ AND BRIGADIER REFIK BRĐANOVIĆ**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of Bosnia and Herzegovina

via the Embassy of Bosnia and Herzegovina to
The Netherlands, The Hague

The Accused

Mr. Radovan Karadžić

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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 Sead Delic and Brigadier Refik Brdjanovic” filed on 6 January 2011 (“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”), subpoenas to General Sead Delić, the former Commander of the Bosnian Army’s 2nd Corps headquartered in Tuzla, and Brigadier Refik Brđanović, the former Commander of the Bosnian Army’s Black Wolves Special Forces unit, compelling them to submit to an interview by him.¹ The Accused submits there are reasonable grounds to believe that both General Delić and Brigadier Brđanović will have information about arms smuggled into Tuzla in February 1995 which then “found their way to Srebrenica”.²

2. This Motion is related to the Accused’s “Motion for Binding Order: Government of Bosnia”, filed on 31 August 2009 (“Binding Order Motion”), in which he requests the Chamber to issue a binding order to Bosnia and Herzegovina (“BiH”) requiring the production of numerous categories of documents that relate to the alleged arms smuggling into Tuzla and then onwards to Srebrenica in February and March 1995.³ Initially, BiH responded to the Binding Order Motion submitting that it could not locate any of the documents requested.⁴ However, after receiving some documents from BiH that pertained to his request for “[a]ll reports or records showing the distribution of arms or ammunition from Tuzla to Srebrenica or Zepa during February and March 1995”, the Accused withdrew his request for this specific category of documents but maintained his request for the other categories, including documents relating to the alleged shipments of weapons to Tuzla.⁵ In subsequent responses, BiH submitted that the Accused’s remaining requests had been sent to the competent institutions but that they could not locate the documents requested.⁶ The Accused then sent a letter to BiH requesting that it make

¹ Motion, para. 1.

² Motion, paras. 30, 32.

³ Binding Order Motion, para. 1.

⁴ See Correspondence from BiH, 26 November 2009.

⁵ See Submission on Request to Government of BiH, 11 March 2010, paras. 1–4.

⁶ See Correspondence from BiH, 29 April 2010; Correspondence from BiH, 19 November 2010.

General Delić and Brigadier Brđanović available for interview by him or his legal adviser as they would have relevant information.⁷

3. On 22 December 2010, BiH filed correspondence (“First Correspondence”) stating, with respect to the Binding Order Motion, that all relevant institutions had searched for the documents requested by the Accused and they possess no documents other than those already provided to him.⁸ With respect to the Accused’s request to interview General Delić and Brigadier Brđanović, BiH stated obliquely that it “may satisfy the defence of the accused after the Trial Chamber issues a decision on the necessity of procuring the said documents or grants approval for the said activities to be conducted”.⁹

4. Following the Chamber’s invitation to clarify the First Correspondence,¹⁰ BiH filed further correspondence on 7 March 2011 (“Second Correspondence”) in which it listed, in detail, the various BiH government departments and agencies that have provided documents to the Accused in relation to the Binding Order Motion and the documents that were so provided.¹¹ With respect to whether BiH intended to co-operate with the Accused in facilitating interviews with General Delić and Brigadier Brđanović, BiH stated that it would provide assistance to the Accused through the BiH Criminal Defence Section.¹²

5. On 11 April 2011, the Accused filed a “Supplemental Submission: Motion for Subpoena to Interview: General Sead Delic and Brigadier Refik Brdjanovic” (“Supplemental Submission”) stating that his legal advisor had written to the BiH Criminal Defence Section requesting assistance in facilitating the interviews.¹³ The Criminal Defence Section had then contacted General Delić who declined to be interviewed by the Accused or his legal advisor.¹⁴ Efforts to contact Brigadier Brđanović had been unsuccessful at that stage.¹⁵ The Accused therefore reiterated his request that the Chamber issue a subpoena for General Delić and stated that once Brigadier Brđanović has been contacted, he would file additional information.¹⁶

⁷ Motion, para. 22.

⁸ First Correspondence, p. 1.

⁹ First Correspondence, p. 2.

¹⁰ See Invitation to Bosnia and Herzegovina, 10 February 2011, pp. 3-4, whereby the Chamber requested clarification from BiH as to whether BiH had provided documents to the Accused and whether it intended to co-operate in facilitating interviews with General Delić and Brigadier Brđanović.

¹¹ Second Correspondence, pp. 1–5.

¹² Second Correspondence, p. 7.

¹³ Supplemental Submission, para. 4.

¹⁴ Supplemental Submission, para. 4.

¹⁵ Supplemental Submission, para. 5.

¹⁶ Supplemental Submission, paras. 6–7.

6. On 18 April 2011, BiH filed further correspondence (“Third Correspondence”) confirming that the Criminal Defence Section had obtained the contact details for General Delić and contacted him on 5 April 2011. General Delić informed them that he did not want to be interviewed by the legal advisor for the Accused.¹⁷ The Criminal Defence Section had failed to obtain the contact details for Brigadier Brđanović and “was unable to get in touch with him”.¹⁸

7. On 26 April 2011, BiH filed yet further correspondence (“Fourth Correspondence”) stating again that General Delić had been contacted by the Criminal Defence Section and that he declines to be interviewed by the Accused.¹⁹ The contact details of Brigadier Brđanović could not be obtained. Thus, BiH submits that it is “necessary for the Trial Chamber to issue an order or adopt a decision based on which the Prosecutor’s Office of Bosnia and Herzegovina, i.e., the authorities of Bosnia and Herzegovina, will take action”.²⁰

8. On 31 May 2011, the legal advisor for the Accused submitted that there had been no further correspondence from the BiH Criminal Defence Section and that the Accused maintains his request for the Chamber to issue an order or summons for both General Delić and Brigadier Brđanović to submit to an interview with him.²¹

II. Applicable Law

9. 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 time in order to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial”.²² The Appeals Chamber has stated that a Trial Chamber’s considerations 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”.²³ A subpoena is deemed “necessary” for the purpose of Rule 54 where a legitimate forensic purpose for obtaining the information has been shown:

¹⁷ Third Correspondence, p. 2.

¹⁸ Third Correspondence, p. 2.

¹⁹ Fourth Correspondence, pp. 1–2.

²⁰ Fourth Correspondence, p. 2.

²¹ Hearing, T. 13880-13881 (31 May 2011).

²² *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić* Decision”), para. 10.

²³ *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.

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.²⁴

10. 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.²⁵

11. 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.²⁶ 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.²⁷

12. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.²⁸ 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.²⁹ In essence, a subpoena should be considered a method of last resort.³⁰

III. Discussion

13. The Chamber recalls its 19 May 2010 "Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany)" ("Germany Decision"), where it found, by majority, Judge Kwon dissenting, that "documents related to the smuggling of arms to Srebrenica are necessary for the determination of the Accused's state of mind in July 1995, as well as to the Chamber's determination of the general requirements of crimes against humanity in relation to the underlying offences for which the Accused is charged with

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

²⁵ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

²⁶ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

²⁷ *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.

²⁸ *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.

²⁹ *Halilović* Decision, paras. 6, 10.

³⁰ *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.

responsibility”.³¹ The majority clarified that while some of the documents requested by the Accused related to the alleged smuggling of arms to Tuzla, rather than to Srebrenica directly, this did not alter its view as to their necessity. This is because “it is conceivable that the Accused will need these documents, which are essentially concerned with the quantity of, and the way in which, the arms were allegedly smuggled into Srebrenica, in order to provide the Chamber with credible arguments relating to the extent to which the inhabitants of Srebrenica were armed and the enclave was demilitarised”.³² Accordingly, the Chamber granted, by majority, the Accused’s request for documents that pertain to the alleged arms shipments into Tuzla in February 1995.³³

14. As a result of BiH’s response that it found no documents pertaining to the issue of arms smuggling into Tuzla in February 1995, the Accused now seeks to obtain this information through an interview with both General Delić and Brigadier Brđanović.³⁴ He submits that the information obtained from them would be used in two ways, namely, to “direct [BiH] to precise documents concerning these events” and to “serve as the basis of a written statement” to be used in the case pursuant to either Rule 92 *ter* or 92 *bis*.³⁵ He also notes that, as the “commander of the 2nd Corps at the time of the Tuzla air drops in February 1995”, General Delić would have been informed about the existence of the alleged arms shipments, as well as where the documents pertaining to the shipments were kept.³⁶ The Accused submits that General Delić’s predecessor in Tuzla, General Sadić, “told BBC that he had arranged for the drop zone at Tuzla Airport”.³⁷ General Sadić was the commander of the 2nd Corps in Tuzla until late 1994, after which time General Delić took over the command in Tuzla. As for the information he seeks to

“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”.

³¹ Germany Decision, para. 22. Judge Kwon, in his partially dissenting opinion, did not find that the requested documents pertaining to the shipment of arms into Tuzla in February 1995 “met the requirements of relevance and necessity so as to warrant the Chamber to compel Germany to produce those documents.” Partially Dissenting Opinion of Judge Kwon, para. 8. He reasoned that “issues that are relevant to the determination of the general requirements of the crimes against humanity” are “totally separate matters from the existence of military forces inside the enclave and the extent of their armament, which are to be determined by the Trial Chamber based upon the evidence presented before it.” *Ibid.* at para. 6. Thus, “the specific circumstances regarding the delivery of arms into BiH are not relevant or, if at all, only marginally relevant, to the above issue or the Accused’s state of mind about the events in Srebrenica or to the determination of the general requirements of the crimes against humanity.” *Ibid.* (footnotes omitted). Furthermore, “given the above concession by the Prosecution that (i) the Srebrenica enclave was in fact not demilitarised, (ii) attacks were launched against the Bosnian Serb forces and villages by the ‘Muslim forces’ within the enclave, and that (iii) the military forces in Srebrenica were legitimate military targets,” Judge Kwon did “not find the requested documents necessary for the determination of these issues in this case.” *Ibid.* at para. 7.

³² Germany Decision, para. 22.

³³ Germany Decision, para. 44.

³⁴ Motion, para. 32.

³⁵ Motion, para. 31.

³⁶ Motion, para. 30.

³⁷ Motion, para. 16.

obtain from Brigadier Brđanović, the Accused submits that Brigadier Brđanović “has already indicated that he was personally involved in receiving shipments” through his interview on the British Broadcast Corporation news programme entitled *Allies and Lies* in which he stated that “boxes labelled ‘US Army’ had been delivered to Tuzla by air drop and that they contained anti-tank and surface to air missiles”.³⁸ The Accused has previously submitted that he will show that there was a legitimate military objective behind the Bosnian Serb operation in Srebrenica commencing in March 1995, and that evidence of the delivery of arms to the Bosnian Muslims in Srebrenica around that time will support his case.³⁹ In addition, the Chamber has previously found, by majority, Judge Kwon dissenting, that documents relating to the alleged arms smuggling to Srebrenica may go to the issue of whether the population of Srebrenica was predominantly civilian or not and thus may also be relevant for his defence.⁴⁰ Accordingly, given General Delić’s position in the Bosnian Army in Tuzla at the time, and Brigadier Brđanović’s statement to the media about the alleged arms smuggling, the Chamber is satisfied that the Accused has demonstrated that he has a reasonable basis for his belief that there is a good chance that both General Delić and Brigadier Brđanović will be able to give information which will materially assist him with respect to the issue of alleged arms smuggling in February 1995, in particular the quantity of weapons that were delivered into Tuzla at that time and the eventual delivery of these weapons into Srebrenica. The Chamber therefore finds, by majority, Judge Kwon dissenting,⁴¹ that there is a legitimate forensic purpose in obtaining the information sought by the Accused through his interviews with General Delić and Brigadier Brđanović.

15. The Chamber is also satisfied, by majority, Judge Kwon dissenting, that there are no other means available to the Accused, at this stage, to obtain the information sought through the proposed interviews with General Delić and Brigadier Brđanović. As submitted by the Accused, these two officers may have firsthand knowledge of the delivery of weapons to Tuzla in February 1995 and the eventual transport of these weapons into Srebrenica by virtue of their specific roles in the Bosnian Army in Tuzla at that time.⁴² In addition, the Accused has been unable to obtain this information through the documents requested in his Binding Order Motion.

³⁸ Motion, paras. 11, 30.

³⁹ Germany Decision, para. 22.

⁴⁰ Germany Decision, para. 21. Judge Kwon, in his partially dissenting opinion, stated: “I do not find that the documents [. . .] have met the requirements of relevance and necessity so as to warrant the Chamber to compel Germany to produce those documents.” *Supra* note 31, para. 8.

⁴¹ Judge Kwon dissents on this issue on the same basis on which he dissented in the Germany Decision, discussed in *supra* note 31.

⁴² Motion, para. 30. The Accused maintains that the weapons delivered into Tuzla were eventually transported to Srebrenica. *See* Binding Order Motion, paras. 1(3), 6, 18.

16. The Accused submits that he has attempted to obtain the voluntary co-operation of General Delić and Brigadier Brđanović through sending his requests to BiH. Despite these efforts, General Delić has refused to submit to an interview with the Accused or his legal advisor. The Chamber is thus satisfied that the Accused has made reasonable efforts to obtain the voluntary co-operation of General Delić. With respect to Brigadier Brđanović, the BiH Criminal Defence Section “did not manage to obtain the contact details of Brigadier Brđanović, and was therefore unable to communicate with him”.⁴³ It is therefore unclear at this stage whether Brigadier Brđanović would be willing to voluntarily submit to an interview with the Accused’s legal adviser should he ultimately be contacted. While the Accused has made some effort to reach Brigadier Brđanović, the measures taken by the BiH Criminal Defence Section to contact and search for him remain uncertain. Therefore, the Chamber should have more information regarding the steps taken by the Accused and the BiH Criminal Defence Section to locate Brigadier Brđanović before it may even consider issuing a subpoena. Accordingly, the Chamber is not satisfied that the Accused has, at this stage, made reasonable efforts to obtain the voluntary co-operation of Brigadier Brđanović.

17. Having found by majority, Judge Kwon dissenting, that the various requirements for a subpoena are satisfied with respect to General Delić, the Chamber notes that it remains within its discretion to ultimately decide whether or not to issue the subpoena. Due to the coercive nature of a subpoena and the implication that failure to comply might lead to criminal sanctions, the Chamber must take a cautious approach and take into account all the surrounding circumstances before determining that this measure of last resort be taken.⁴⁴ The Chamber recalls, in particular, that the Appeals Chamber has held that subpoenas should not be issued lightly, especially in cases where a potential witness refuses to be interviewed.⁴⁵ In the present case, the Chamber is convinced, by majority, Judge Kwon dissenting,⁴⁶ that it is necessary to subpoena General Delić so that the Accused’s legal advisor can interview him with respect to the matters set out in the Motion.

⁴³ Fourth Correspondence, p. 2.

⁴⁴ See Decision on Motion for Subpoena to Douglas Lute and John Feeley, 8 July 2009, para. 11.

⁴⁵ See *Halilović* Decision, para. 10 (the subpoena is a “weapon which must be used sparingly” and a Trial Chamber “should guard against the subpoena becoming a mechanism used routinely as a part of trial tactics”).

⁴⁶ Judge Kwon maintains his dissent that the information sought through the interview of General Delić is neither relevant nor necessary for the determination of issues in this case, and therefore the issuance of a subpoena is not necessary.

IV. Disposition

18. For the reasons outlined above, and pursuant to Rule 54 the Rules, the Trial Chamber hereby, **GRANTS**, by majority, Judge Kwon dissenting, the Motion **IN PART** with respect to General Delić, and:

- a. **ORDERS** the Registry of the Tribunal to take the reasonably necessary steps to ensure that this Decision, the subpoena, and the order to the Government of BiH relating to General Delić 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;
- c. **DENIES**, without prejudice, the remainder of the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this fifth day of July 2011
At The Hague
The Netherlands

[Seal of the Tribunal]