



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: 23 October 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: 23 October 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF “DECISION ON ACCUSED’S MOTION TO
SUBPOENA RADISLAV KRSTIĆ” ISSUED ON 23 OCTOBER 2012**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Radislav Krstić

Mr. Tomislav Višnjić

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 “Motion for Subpoena: General Radislav Krstić”, filed confidentially¹ by the Accused on 3 October 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 directing his prospective witness, Radislav Krstić (“Witness”) to appear for testimony in this case on 15 January 2013.²

2. The Accused contends that he made efforts to obtain the voluntary co-operation of the Witness without success.³ In support, the Accused notes that on 10 August 2012 he requested an interview with the Witness and subsequently requested that the interview take place on 10 September 2012, but was informed on 28 September 2012 by the Witness’s counsel that the Witness declined to consent to an interview or to testify as a witness for the Accused.⁴ The Accused states that he received a letter from the Witness on 29 September 2012 confirming the Witness’s unwillingness to meet with him or to testify in this case.⁵ In the Accused’s submission, the Witness refused to receive the reply which the Accused tried to send to him on 2 October 2012.⁶

3. The Accused argues that there are reasonable grounds to believe that the Witness has information that would materially assist his defence and that this information is relevant to establishing (1) that the Witness never informed the Accused about the execution of prisoners from Srebrenica; and (2) that in a meeting between the Accused and the Witness, where they discussed the *Krivaja 95* operation, the discussions were limited to the planned separation of the Srebrenica and Žepa enclaves.⁷ The Accused contends that this evidence is directly relevant to his *mens rea* for genocide and his responsibility for events in Srebrenica.⁸ In the Accused’s submission, the Witness’s testimony is also necessary for a fair determination of the issues being tried in this case in order to (1) establish that the contact the Witness had with the Accused “had

¹ A public redacted version of the Motion was also filed on 3 October 2012.

² Motion, paras. 1, 17.

³ Motion, para. 8.

⁴ Motion, paras. 4–6.

⁵ Motion, para. 6.

⁶ Motion, para. 7.

⁷ Motion, paras. 9–12.

⁸ Motion, paras. 10–11.

nothing whatsoever to do with crimes” and that they “never discussed or contemplated the commission of any crimes in Srebrenica”; and (2) establish that the Witness never informed the Accused about the execution of prisoners from Srebrenica.⁹

4. On 8 October 2012, the Office of the Prosecutor (“Prosecution”) informed the Chamber 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 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.¹⁰

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 statements the witness has made to the Prosecution or to others in relation to the events.¹¹

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.¹² 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.¹³

⁹ Motion, paras. 13–15.

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. 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.

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

¹² *Halilović Decision*, para. 7; *Milošević Decision*, para. 41.

¹³ *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.¹⁴ 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.¹⁵

III. Discussion

9. Having considered the expected scope of the Witness's testimony as outlined in the Motion, the Chamber is satisfied that it is clearly relevant to a number of issues in the Accused's defence case. The Witness, as former Chief of Staff and subsequently Commander of the Drina Corps, is expected to testify about contact with the Accused and specifically whether he informed the Accused that prisoners from Srebrenica would be, were being, or had been executed; and what was discussed in the planning of the *Krivaja 95* operation. Both issues pertain to the Accused's responsibility for events in Srebrenica in 1995 and his *mens rea* for the alleged genocide. The Chamber is therefore satisfied that there is a good chance that the Witness will be able to materially assist the Accused in the presentation of his defence with respect to those clearly identified issues which are relevant to this case and thus has satisfied the requirement of the legitimate forensic purpose.

10. Given the nature and scope of the Witness's anticipated testimony, the Chamber is also satisfied that his particular testimony is not obtainable through other means. As the former Chief of Staff and Commander of the Drina Corps who was in regular contact with the Accused, the Witness is uniquely situated to give evidence regarding the crimes alleged to have occurred in Srebrenica in July 1995 and the Accused's knowledge of and involvement therein.

11. Based on the Accused's submission the Chamber is also satisfied that the Accused has made reasonable attempts to secure the Witness's voluntary co-operation through written requests transmitted in August 2012 and that the Witness refused to consent to an interview or to testify in this case.¹⁶ The Chamber emphasises that the Accused should in the future provide the Chamber with the underlying documents which support his contentions in this regard.

12. The Chamber therefore finds that it is necessary to issue a subpoena requiring the Witness to testify in these proceedings. [REDACTED]

¹⁴ *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.

¹⁵ *Halilović* Decision, paras. 6, 10.

¹⁶ Motion, paras. 4–7.

IV. Disposition

13. For the reasons outlined above, and pursuant Rule 54 of the Rules, the Trial Chamber hereby **GRANTS** the Motion and:

- a. **ORDERS** [REDACTED] to take the reasonably necessary steps to ensure that the subpoena is served on the Witness [REDACTED]; and
- b. **REQUESTS** the Victims and Witnesses Section of the Tribunal to provide any necessary assistance in the implementation of this Decision.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-third day of October 2012
At The Hague
The Netherlands

[Seal of the Tribunal]