



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: 19 February 2014

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: 19 February 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION FOR SUBPOENA TO NORMAN SCHINDLER

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of the United States of America

via the Embassy of the United States of America
to The Netherlands, The Hague

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 Norman Schindler”, filed on 14 January 2014 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue a subpoena, pursuant to Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules), compelling Norman Schindler to testify in this case on 17 February 2014.¹

2. The Accused argues that he has made efforts to obtain Schindler’s voluntary co-operation, but that the government of the United States of America (“US”) has declined to make Schindler available for an interview.²

3. The Accused submits that there are reasonable grounds to believe that Schindler, who was the Chief of the “Director of Central Intelligence, Interagency Balkan Task Force” from 1994, has relevant and potentially exculpatory information that can materially assist his case.³ The Accused submits that Schindler could contradict the testimony given by UNPROFOR General Michael Rose that the Bosnian Serbs initiated an offensive in Goražde and that it was an example of the Accused’s coordination and control over the Army of the Republika Srpska (“VRS”).⁴ The Accused also submits that the potential testimony of Schindler could support his case that he lacked effective control over Ratko Mladić and the VRS at the time of the Srebrenica events as well as knowledge that the prisoners at Srebrenica would be executed, and that Schindler could contradict the existence of the alleged joint criminal enterprise (“JCE”) between the Accused, Slobodan Milošević, and Vojislav Šešelj.⁵

4. The Accused contends that the testimony of Schindler is necessary for a fair determination of the issues being tried in his case.⁶ The Accused submits that Schindler held a “unique position at the hub of the intelligence gathering apparatus of the country with the greatest intelligence gathering capacity in the world at a time when that country’s intelligence assets were fully engaged

¹ Motion, paras. 1, 31.

² Motion, paras. 21–23, Annex K.

³ Motion, paras. 2, 7, 24–27, Annex A.

⁴ Motion, para. 25.

⁵ Motion, paras. 25–26.

⁶ Motion, paras. 28, 30.

towards Bosnia”.⁷ The Accused submits that he can identify no other and more credible source of information to establish his own lack of knowledge of, and participation in, the crimes in Srebrenica, his lack of control over Mladić and the VRS at that time, and his lack of involvement in a JCE with Milošević and Šešelj.⁸ Finally, the Accused submits that the US has not identified any other officials who have the same or greater information than Schindler and whom it is willing to allow to be interviewed or to testify.⁹

5. On 15 January 2014, the Office of the Prosecutor (“Prosecution”) notified the Chamber *via* email that it did not wish to respond to the Motion.

6. Having been invited by the Chamber to respond to the Motion,¹⁰ the US filed the “Response of the United States of America to the Trial Chamber’s 21 January 2014 ‘Invitation to the United States of America’” on 5 February 2014 (“Response”). The US argues that the Motion should be denied on the basis of the Accused’s inability to meet any of the three requirements for the issuance of a subpoena.¹¹

7. The US submits that the subpoena is not necessary because the Accused has failed to establish a legitimate forensic purpose for obtaining the evidence and to demonstrate a reasonable basis for his belief that there is a good chance Schindler would be able to give information that would materially assist the Accused in relation to clearly identified issues relevant to the trial.¹² The US submits that Schindler, who was based in Washington, DC during his time as the Chief of the Interagency Balkan Task Force, has no relationship with the Accused and was not a witness to any of the events in the Accused’s case.¹³

8. The US argues that the Accused’s assertions are “replete with mischaracterizations and inaccuracies”.¹⁴ First, turning to the Accused’s claim that Schindler made the statement “the UN believes the Muslims initiated the recent fighting in the Goražde area,” the US submits that the document cited by the Accused in Annex B shows that it was not made by Schindler during the course of a Balkan Task Force meeting.¹⁵ Additionally, the US asserts that the report attached as Annex C to the Motion which the Accused claims was written by Schindler clearly shows that it

⁷ Motion, para. 28.

⁸ Motion, para. 28.

⁹ Motion, para. 28.

¹⁰ Invitation to the United States of America, 21 January 2014.

¹¹ Response, paras. 1, 8.

¹² Response, para. 16.

¹³ Response, para. 10.

¹⁴ Response, para. 11.

¹⁵ Response, para. 12.

was actually authored by another person and there is no indication that Schindler was present at the meeting where the statement was made.¹⁶ The US also contends that three other reports, attached as Annexes D, E, and G to the Motion, indicate that Schindler was not the author of the statements contained therein.¹⁷

9. The US also contends that the Accused has failed to establish that issuing a subpoena to Schindler is the only means available to obtain the information sought.¹⁸ The US submits that the Accused can testify himself to these events, and has had the opportunity to bring witnesses with first-hand knowledge of the events and to cross-examine Prosecution witnesses on these matters.¹⁹ The US further contends that substantial documentary evidence regarding the information the Accused seeks to compel from Schindler already exists on the record or is otherwise available to the Accused, and a subpoena is not the least intrusive means of obtaining the information sought by the Accused.²⁰

10. Lastly, the US contends that the Accused has failed to make reasonable attempts to secure Schindler's voluntary testimony, but asserts that the Chamber need not reach this prong given the Accused's failure to satisfy the first two requirements for the issuance of a subpoena.²¹

II. Applicable Law

11. 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.²²

12. 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

¹⁶ Response, para. 13.

¹⁷ Response, paras. 14–15.

¹⁸ Response, para. 17.

¹⁹ Response, para. 18.

²⁰ Response, para. 19.

²¹ Response, para. 21, Annexes A, B.

²² *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.

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.²³

13. 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.²⁴ 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.²⁵

14. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.²⁶ 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.²⁷ In essence, a subpoena should be considered a method of last resort.²⁸

III. Discussion

15. 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.²⁹ According to the Accused, Schindler is expected to testify about: (i) the situation in Goražde which would contradict General Rose's testimony that it was a Bosnian Serb offensive and would demonstrate the Accused's level of coordination and control over the VRS; (ii) the Accused's relationship with other participants in the JCE from 1991 until 1995; (iii) the Accused's lack of control over Mladić and the VRS at the time of the Srebrenica events; and (iv) the Accused's lack of knowledge regarding the treatment of prisoners

²³ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

²⁴ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

²⁵ *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.

²⁶ *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.

²⁷ *Halilović* Decision, paras. 6, 10.

²⁸ 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".

²⁹ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. See also *Milošević* Decision, para. 38.

from Srebrenica.³⁰ The Chamber therefore finds that the information sought from Schindler pertains to clearly identified issues relevant to the Accused's case.

16. As the Chamber has previously stated, the information sought through the issuance of a subpoena must be of “*material* assistance” rather than merely helpful or of some assistance.³¹ In other words, it must be of “substantial or considerable assistance” to the Accused in relation to a clearly identified issue that is relevant to the trial.³² The Chamber notes that Schindler was based in Washington, DC while acting as Chief of the Interagency Balkan Task Force from 1994 until 1997.³³ His knowledge of the events during this period came from reports written by others and there is no indication that he himself had any direct contact with the Accused or witnessed any of the events in question.³⁴

17. The Chamber has reviewed the documents submitted by the Accused in support of the Motion.³⁵ Two of the documents either fail to state the name of the author or were authored by someone other than Schindler.³⁶ Annex C contains a report of the “Meeting of the Principal's Committee” under the National Security Council heading.³⁷ Schindler's name does not appear on the included roster of attendees and his name is not mentioned anywhere in the report.³⁸ Annex F is from the American Embassy in Belgrade and is a summary of a meeting between Milošević and the Contact Group.³⁹ The document was sent to the US Secretary of State in Washington, DC but there is no indication Schindler received it or had knowledge of it.⁴⁰

18. The three documents in Annexes D, E, and G are intelligence reports issued by the Balkan Task Force at the time Schindler was its Chief, but the documents contain no indication that Schindler authored the reports.⁴¹ One document does not identify the author.⁴² In the two other

³⁰ Motion, paras. 25–26.

³¹ Decision on Accused's Motion to Subpoena President Karolos Papoulias, 23 October 2012 (“Papoulias Decision”), para. 15; *Milošević* Decision, para. 39 [emphasis in the original text].

³² See Papoulias Decision, para. 15; *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.

³³ Response, para. 10.

³⁴ Motion, Annex A.

³⁵ Motion, Annexes A, B, C, D, E, F, G, H.

³⁶ Motion, Annexes C, F.

³⁷ Motion, Annex C.

³⁸ Motion, Annex C.

³⁹ Motion, Annex F.

⁴⁰ Motion, Annex F.

⁴¹ Motion, Annexes D, E, and G.

⁴² Motion, Annex E.

documents, the author's name has been redacted but reference is made that "comments and queries [...] may be directed to Chief, DCI Interagency Balkan Task Force".⁴³

19. Finally, the three remaining documents in Annexes A, B, and H were authored by Schindler.⁴⁴ The first is an article entitled "Reflections on the DCI Interagency Balkan Task Force", in which Schindler describes his role and duties as Chief.⁴⁵ The document speaks to the operation of the Balkan Task Force and Schindler's role in providing information to other agencies in the US government.⁴⁶ The second document contains notes of a meeting of the "Principals Committee Meeting on Bosnia" held on 10 April 1994 in which Schindler notes that "the UN believes the Muslims initiated the recent fighting in the Goražde area".⁴⁷ Schindler reports the opinion of the United Nations ("UN") at that time and provides no personal insight to the issue. Lastly, the third document is a 13 July 1995 memorandum sent by Schindler to the Director of Central Intelligence in preparation of the Principals Committee meeting on Bosnia and Herzegovina to be held on 14 July 1995, which refers to a redacted portion that "offers some thoughts on what the Bosnian Serbs might do next [in Srebrenica]".⁴⁸ The Chamber finds that, as Chief of the Balkan Task Force, Schindler had knowledge of some of these documents and could speak to the information contained therein. The Chamber is thus satisfied that there is a good chance that Schindler's evidence will materially assist the Accused in the presentation of his defence case. Thus, the Accused has satisfied the requirement of the legitimate forensic purpose.

20. However, the Chamber recalls that even if it 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.⁴⁹ First, on the topic of Goražde, the Chamber has received evidence that the opinion of the UN was that it may have been the Bosnian Muslims who instigated the fighting.⁵⁰ The Chamber has also received evidence about the relationship between the Accused and Milošević and has heard the testimony of a number of witnesses who stated that there was no JCE, including testimony from members of the alleged JCE.⁵¹ Lastly, the Chamber

⁴³ Motion, Annexes D, G.

⁴⁴ Motion, Annexes A, B, and H.

⁴⁵ Motion, Annex A.

⁴⁶ Motion, Annex A.

⁴⁷ Motion, Annex B.

⁴⁸ Motion, Annex H.

⁴⁹ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41. See also Decision on Accused's Motion to Subpoena President Karolos Papoulias, 23 October 2012 ("Papoulias Decision"), para. 9

⁵⁰ See e.g., Michael Rose, T. 7372–7374, 7386 (6 October 2010); D137 (UNPROFOR Daily Report 10 July 1995), pp. 5–6; Anthony Banbury, T. 13431–13435 (16 March 2011); D1154 (UNPROFOR Report, 25 April 1994); D1155 (UNPROFOR Report 27 April 1994); D3496 (UNPROFOR Report, 16 April 1994).

⁵¹ For evidence regarding the Accused's relationship with Milošević generally, see e.g., P823 (UNPROFOR Weekly Political Assessment, 3 November 1993), pp. 1, 6; P829 (UNPROFOR Weekly Political Assessment, 16 April 1994),

notes that the Accused has consistently, throughout his case, presented evidence that he was not told about the alleged executions in Srebrenica and that there were no plans to that effect.⁵² Accordingly, the Chamber finds that the information sought is obtainable through other means and it will not issue a subpoena, pursuant to Rule 54 of the Rules.

21. The Chamber finds that it is not necessary to assess whether the Accused has made reasonable efforts to obtain the voluntary co-operation of Schindler because the Motion fails on other grounds.⁵³

22. The Chamber once again reminds 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.⁵⁴ The Motion indicates that the Accused has paid no heed to the Chamber's warning in this regard.

p. 4; P831 (SRS Weekly Situation Report, 26 April 1995), p. 3; P2257 (UNPROFOR Weekly Situational Report, 18 March 1995) pp. 2–3; P2567 (Note from FRY's SDC 42nd session, 23 August 1995); P3804 (Witness statement of Charles Kirudja dated 17 November 2010), paras. 138–145; P3861 (UNPROFOR report, 23 August 1994); P3864 (UNPROFOR report, 24 November 1994); P3868 (UNPROFOR report, 16 February 1995); P3870 (UNPROFOR Weekly Situation Report, 3 June 1995). For information about the existence of a JCE, *see, e.g.*, Milan Martić, T. 38090–38093 (9 May 2013), T. 38160 (13 May 2103); D3528 (Witness statement of Milan Martić dated 7 May 2013), para. 23; D3665 (Witness statement of Vojislav Šešelj dated 1 June 2013), paras. 31–35; Vladislav Jovanović, T. 34274–34275, 34283–34285 (26 February 2013); D3015 (Witness statement of Vladislav Jovanović dated 22 February 2013, paras. 50–52; Milorad Dodik, T. 36842–36844, 36902–36903 (9 April 2013); Momir Bulatović, T. 34540–34542 (28 February 2013); D3051 (Witness statement of Momir Bulatović dated 25 February 2013), paras. 14–18; D3659 (Witness statement of Ljubomir Borovčanin dated 30 May 2013), para. 46; Momčilo Krajišnik, T. 43269–43270, T. 43298–43302; John Zamećica, T. 42470–42471 (29 October 2013); D3993 (Witness statement of Vujadin Popović dated 2 November 2013), paras. 39, 54; D3932 (Witness statement of Milenko Živanović dated 27 October 2013), para. 13.

⁵² *See e.g.*, 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), para. 30; Milenko Indić, T. 32610–32611 (24 January 2013); Momčilo Krajišnik, T. 43351–43353 (12 November 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; D3977 (Witness statement of Mile Dmičić dated 29 October 2013), paras. 21–23; 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.

⁵³ Motion, paras. 21–23, Annexes I–K.

⁵⁴ Papoulias Decision, para. 21; Decision on the Accused's Second Motion for Subpoena to Interview President Bill Clinton, 21 August 2012, para. 16.

IV. Disposition

23. Accordingly, the Chamber, pursuant to Article 29 of the Statute 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 nineteenth day of February 2014
At The Hague
The Netherlands

[Seal of the Tribunal]