



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: 21 August 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: 21 August 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S SECOND MOTION FOR SUBPOENA TO INTERVIEW
PRESIDENT BILL CLINTON**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

**The Government of the
United States of America**

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

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 “Second Motion for Subpoena to Interview President Bill Clinton”, filed on 9 July 2012 publicly and with confidential Annex C (“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 to President Bill Clinton compelling him to submit to an interview with the Accused’s legal adviser.¹ According to the Accused, in 1994 President Clinton had no objections to the Republic of Croatia (“Croatia”) facilitating the transfer of arms to Bosnian Muslims, which then led to Croatia permitting the flow of arms from Iran to Croatia and onward to Bosnia and Herzegovina (“BiH”).² The Accused also argues that in 1995 President Clinton personally sent a delegation to the Balkans which then informed Bosnian Muslim leaders that if peace efforts failed the United States (“U.S.”) would be prepared to offer direct military assistance to the Bosnian Croats and Bosnian Muslims; this, according to the Accused, served as an incentive for the Bosnian Muslims to stage the shelling of Markale market on 28 August 1995 for which the Accused is charged.³

2. The Accused argues, relying on the Chamber’s earlier decisions, that it is “well established” that the information sought from President Clinton relating to the smuggling of arms to the Bosnian Muslims is relevant to his case.⁴ He acknowledges that the Chamber has also held that knowledge and approval of arms smuggling by United Nations (“UN”) member states is not relevant to the charges against him but notes that this decision, “while politically correct, was legally wrong”.⁵ As for the issue of an offer of military assistance, he argues that such information is relevant to demonstrate that the Bosnian Muslims had a motive to stage the Markale market shelling.⁶

¹ Motion, para. 1.

² Motion, paras. 8–10.

³ Motion, paras. 11, 20, relying on the transcript of a meeting between Croatian President Franjo Tudman and the U.S. delegation, attached in Annex B to the Motion.

⁴ Motion, paras. 13–16.

⁵ Motion, paras. 17–18.

⁶ Motion, para. 20.

3. In terms of necessity for an interview, the Accused contends that in the past he has tried to obtain information on the existence, nature, and extent of the shipment of arms but has been unable to do so.⁷ With respect to the U.S. offering military support to the Bosnian Muslims and Bosnian Croats in 1995, he submits that most of the other high ranking officials who would have been aware of this offer have now passed away and that President Clinton is the only one who can provide testimony on this.⁸

4. The Accused also submits that he has tried to obtain President Clinton's voluntary co-operation by sending a letter to the U.S. on 9 May 2012, requesting an interview, but that the U.S. rejected his request on 21 May 2012.⁹ He finally submits that the interview should be held in Washington DC at the U.S. Department of State, on 10 September 2012, and the Motion served on the U.S. and President Clinton so that they may file a response, should they so wish.¹⁰

5. Having been invited to respond,¹¹ the U.S. filed the "Response of the United States of America to the Trial Chamber's 20 July 2012 'Invitation to the United States of America'" confidentially on 3 August 2012 ("Response") in which it argues that the Motion should be denied on the basis that the Accused has failed to meet the requirements for the issuance of a subpoena.¹² In support, the U.S. submits that the Accused in his Motion does not explain why he believes that President Clinton has information on the alleged arms smuggling or the offer of military assistance to Bosnian Muslims and Bosnian Croats in 1995 nor does he state how these issues are relevant to his trial.¹³ The U.S. also contends that the Accused cannot establish that a subpoena is the only means available to him to obtain the information he seeks since he has already been provided with documents going to the topic of arms shipments and has himself provided, in support of the Motion, a transcript relating to the U.S.'s offer of assistance to the Bosnian Muslims and Bosnian Croats.¹⁴ In addition, with respect to the U.S.'s alleged offer of military assistance to the Bosnian Muslims and Bosnian Croats, the U.S. responds that this topic was never mentioned in the Accused's request of 9 May 2012 and thus the Accused has failed to make reasonable attempts to secure voluntary co-operation before seeking a subpoena.¹⁵

⁷ Motion, paras. 22–24.

⁸ Motion, para. 25.

⁹ Motion, paras. 27–28, Annex A, confidential Annex C.

¹⁰ Motion, paras. 35–36.

¹¹ See Invitation to the United States of America, 20 July 2012.

¹² Response, para. 1.

¹³ Response, paras. 2–4, 11–18.

¹⁴ Response, paras. 20–22.

¹⁵ Response, paras. 5, 23.

6. On 13 August 2012, the U.S. filed the “United States of America Filing Regarding the Confidentiality of (1) Annex C to the Accused’s Second Motion for Subpoena to Interview President Clinton and (2) the United States Response to Accused’s Second Motion for Subpoena to Interview President Clinton” confidentially (“U.S. Submission”) in which it provides that it has no objection to the Response in its totality being reclassified as public, nor does it object to confidential Annex C to the Motion being made public.¹⁶ On 15 August 2012, the Accused filed his “Response to United States Request to Reclassify Documents Related to Second Motion for Subpoena to Interview President Bill Clinton” confidentially (“Accused’s Submission”) whereby he concurs with the U.S. in relation to the public status of the Response and Annex C to the Motion.¹⁷

II. Applicable Law

7. 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”.¹⁸ The Appeals Chamber has stated that a Trial Chamber’s assessment 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”.¹⁹ 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.²⁰

8. 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

¹⁶ U.S. Submission, para. 3.

¹⁷ Accused’s Submission, para. 1.

¹⁸ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić* Decision”), para. 10.

¹⁹ *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.

²⁰ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. See also *Milošević* Decision, para. 38.

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.²¹

9. 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.²² 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.²³

10. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.²⁴ 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.²⁵ In essence, a subpoena should be considered a method of last resort.²⁶

III. Discussion

11. Starting with the issue of the status of the Response and confidential Annex C to the Motion, the Chamber recalls the agreement of the parties that these two filings may now be reclassified as public. Accordingly, and in line with Article 20(4) of the Tribunal's Statute, the Chamber shall order the Registry to reclassify both the Response and Annex C to the Motion as public documents. The Chamber shall also reclassify the Accused's Submission, as it does not reveal any confidential information.²⁷

12. With respect to the substance of the Motion, the Chamber considers that the Accused has not satisfied the requirements which have to be met before a subpoena can be issued. Insofar as the alleged arms shipments are concerned, it is clear to the Chamber that the purpose of the

²¹ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

²² *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

²³ *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.

²⁴ *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.

²⁵ *Halilović* Decision, paras. 6, 10.

²⁶ 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. "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".

²⁷ However, due to the fact that it contains some confidential information, the Chamber shall not reclassify the U.S. Submission, which shall therefore remain confidential.

Motion is to show the acquiescence of the U.S. to those shipments rather than the nature and extent of the alleged arms smuggling.²⁸ As the Accused himself acknowledges, this Chamber has already held that the involvement of the UN member states, including the U.S., in the alleged arms smuggling into BiH is irrelevant to and unnecessary for the purposes of this trial.²⁹ In addition, even if the purpose of the Motion is to obtain information on the extent and the nature of alleged arms smuggling, the Accused has made no effort to show why “it is believed”³⁰ that President Clinton possesses “essential information”³¹ in relation thereto. As outlined above, the jurisprudence of this Tribunal provides that to satisfy the requirement of legitimate forensic purpose, the Accused must demonstrate a reasonable basis for his belief that there is a good chance that the prospective witness will be able to give the information sought and thus the Accused 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 the events at issue, and any statement the witness has made to the Prosecution or to others in relation to the events. However, the Accused has made no attempt to provide any such information to the Chamber.

13. In addition, as pointed out by the U.S., the information the Accused now seeks in relation to the alleged arms shipments has already been voluntarily provided to him by the U.S. in the form of “numerous documents” pursuant to Rule 70 of the Rules.³² Moreover, with respect to the U.S.’s alleged offer of military assistance in 1995, the Accused himself attaches a document going to that very issue, thus showing that he already possesses information to that effect. Accordingly, not only does the Chamber not see any necessity for issuing a subpoena in this case, it also notes that the information the Accused seeks appears to be obtainable through other means.

14. Thus, for all the foregoing reasons, the Chamber is of the view that the Motion must fail.

15. Having considered the substance of the Motion, the Chamber expresses concern over the way in which the Accused has used this highly coercive tool in this particular case. First, other than making general statements, the Motion makes no serious attempt to satisfy any of the

²⁸ For example, the Accused’s narrative as to the facts refers only to President Clinton instructing his staff to inform Croatia that the U.S. had no objections to the proposed arms shipments. *See* Motion, paras. 8–10.

²⁹ *See* Decision on the Accused’s Second Motion for Binding Order (the Islamic Republic of Iran) and Motion for Subpoena to Interview General Director Sadeghi, 10 May 2011, para. 14; Decision on the Accused’s Motion for Subpoena to Interview Miroslav Tudman, 14 July 2011, para. 25.

³⁰ *See* Motion, para. 19.

³¹ *See* Motion, para. 19.

³² *See* Response, para. 21.

requirements of Rule 54 *bis*. Furthermore, the Accused devotes several paragraphs in the Motion to President Clinton's right against self-incrimination wherein he suggests that President Clinton may be liable for crimes committed by Bosnian Muslims against Bosnian Serbs, a subject completely unrelated to the relief requested in the Motion.³³ All this leads the Chamber to believe that the Accused's motive as far as this Motion is concerned is not to advance his legal defence but to make political points and attract media attention.

16. Finally, the Chamber reminds the Accused once again of the jurisprudence of this Tribunal to the effect that subpoenas should be used sparingly and that Trial Chambers should guard against subpoenas being used routinely as a trial tactic.³⁴ Given the proliferation of the subpoena motions filed by the Accused throughout this trial,³⁵ it cannot be said that he has used this tool sparingly. Furthermore, as the Chamber has stated earlier, in light of the limited success he has had in obtaining information relating to alleged arms smuggling despite the prolific use of binding orders against various states and subpoenas against various state officials, it will be particularly vigilant when assessing whether any requests for subpoena amount to a trial tactic rather than a method of last resort in the context of genuine investigatory efforts.³⁶ The Chamber therefore considers that this particular Motion amounts to a trial tactic and warns the Accused once again that he must focus on legal and factual issues relevant to and necessary for his case, rather than the involvement of UN member states in the conflict in BiH. The Trial Chamber also instructs the Accused to revise his strategy on the use of subpoenas and to, should he continue to file them in the future, focus only on issues relevant to and necessary for his case, and on information that cannot be obtained through any other means. Otherwise, there may come a stage where the Chamber rules that his subpoena motions are frivolous.

³³ See Motion, paras. 30–34.

³⁴ *Halilović* Decision, para. 10.

³⁵ See Motion to Subpoena to Interview: Miroslav Tuđman, 6 September 2010; Motion for Subpoena to Interview: General Sead Delić and Brigadier Refik Brđanović, 6 January 2011; Motion for Subpoena to Interview: Christoph von Bezold, 5 April 2011; Motion for Subpoena to Interview: General Director Sadeghi, 5 April 2011. The Accused has also filed a number of other similar subpoena requests in relation to other issues he claims are relevant to his trial, namely Motion to Subpoena Prosecution Witness Ronald Elmers for Interview, 1 March 2010; Motion for Subpoena to Interview: Colonel Guy de Haynin de Bry, 10 November 2010; Motion to Compel Interview: General Rupert Smith, 6 January 2011; Motion to Compel Interviews: Sarajevo 92 *bis* Witnesses, 11 February 2011; Motion to Compel Interview: Griffith Evans, 5 April 2011; Motion to Compel Interview: Witness B, 20 October 2011; Motion for Subpoena to Interview President Karolos Papoulias, 26 January 2012; Motion for Subpoena to Interview Thorwald Stoltenberg, 20 April 2012; Motion for Subpoena to Interview Sgt.-Chef E Dubant, 9 July 2012; Motion for Subpoena to Interview Yasushi Akashi, 10 August 2012.

³⁶ See Decision on the Accused's Motion for Subpoena to Interview Vladimir Zagorec, 12 March 2012 ("Zagorec Decision"), para. 30.

IV. Disposition

17. Accordingly, the Trial Chamber, pursuant to Rule 54 of the Rules, hereby **DENIES** the Motion and **ORDERS** the Registry to reclassify Annex C to the Motion, the Response, and the Accused's Submission as public documents.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-first day of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]