



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

**DECISION ON ACCUSED'S MOTION TO SUBPOENA
PRESIDENT KAROLOS PAPOULIAS**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of Greece

via the Embassy of Greece 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 to Subpoena President Karolous Papoulias”, filed on 17 August 2012 (“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 President Karolos Papoulias to testify in his trial on 26 March 2013.¹ He submits that President Papoulias was the Foreign Minister of the Hellenic Republic (“Greece”) from 1993 until 1996, and as such played a prominent role in peace negotiations in Bosnia and Herzegovina (“BiH”).² Specifically, the Accused submits that on 15 February 1994, soon after the shelling of the Markale market in Sarajevo on 5 February 1994, he met with President Papoulias in Belgrade and told him that the Bosnian Serbs were not responsible for the shelling and that they were ready to place their heavy weapons under United Nations (“UN”) control.³ The Accused cites two more specific instances of meeting with President Papoulias. First, on 30 July 1994, during the Contact Group’s peace plan negotiations where he allegedly expressed his desire to negotiate for a peaceful settlement based on the Contact Group’s plan.⁴ Second, on 5 June 1995, after the Bosnian Serbs detained UN personnel following the North Atlantic Treaty Alliance (“NATO”) air strikes in May 1995.⁵ On that occasion, the Accused submits, he told President Papoulias that the Bosnian Serbs were entitled to detain the UN personnel as prisoners of war and that the NATO air strikes had rendered both the UN and NATO into combatants.⁶

2. The Accused argues that he has made reasonable efforts to obtain the voluntary cooperation of President Papoulias but has been unsuccessful.⁷ In support, he submits that following the Chamber’s decision denying his motion for a subpoena to interview President Papoulias,⁸ he sent Greece a letter stating that he now intended to subpoena President Papoulias to testify in his

¹ Motion, paras. 1, 32.

² Motion, para. 2.

³ Motion, para. 3.

⁴ Motion, para. 4.

⁵ Motion, paras. 5, 26.

⁶ Motion, paras. 5, 26.

⁷ Motion, paras. 20–22.

⁸ Decision on Motion for Subpoena to Interview President Karolos Papoulias, 20 March 2012 (“First Decision”).

trial but received no response.⁹ Further, he argues that President Papoulias has relevant information that is necessary to and can materially assist the defence case, since he could testify as to what the Accused told him during conversations about the Markale market shelling, the Contact Group peace process, and the detention of the UN personnel.¹⁰ Finally, the Accused argues that President Papoulias' testimony is necessary as it would be more "trustworthy and of greater weight" than the Accused's public statements or those of the Accused's own associates, given President Papoulias' position and the fact that he spoke to the Accused in private meetings.¹¹ On the issue of whether the Tribunal may subpoena a sitting head of state, the Accused refers to the arguments he made earlier, in his "Reply Brief: Motion for Subpoena to Interview President Karolos Papoulias" filed on 12 March 2012 ("Reply to Motion for Interview") that heads of state do not enjoy immunity from a subpoena of a Chamber of the Tribunal.¹²

3. On 31 August 2012, the Office of the Prosecutor ("Prosecution") filed the "Prosecution's Response to Motion to Subpoena Karolos Papoulias" ("Prosecution Response") stating that while it does not take a position on the Motion, it does have some observations on the relevance and necessity of President Papoulias' testimony.¹³ At the outset, the Prosecution submits that President Papoulias took part in meetings and discussions with the Accused in a strictly diplomatic context and without any actual direct knowledge concerning the alleged crimes.¹⁴ It further submits, with respect to the Accused's statements to President Papoulias that the Bosnian Serbs were not responsible for the shelling of Markale, that the "eliciting evidence that the Accused denied a crime can hardly be said to materially assist him" and confirmation of these statements without attestation to their truth cannot be considered of substantial or considerable assistance to the Accused's defence.¹⁵ In relation to the Accused's assertion regarding the status of the detained UN personnel following the NATO air strikes, the Prosecution argues that it is irrelevant and that there is evidence in this case to the same effect.¹⁶ It also submits that the Accused's claims regarding his desire to agree to the Contact Group's peace plan in July 1994 are based on speculation, as evidenced by the fact that he rejected the plan.¹⁷ The Prosecution concludes that the Accused has

⁹ Motion, paras. 20–21.

¹⁰ Motion, paras. 23–27, 30.

¹¹ Motion, paras. 28–29.

¹² Motion, para. 31, citing Reply to Motion for Interview, paras. 9–15.

¹³ Prosecution Response, para. 1.

¹⁴ Prosecution Response, para. 3.

¹⁵ Prosecution Response, paras. 5–6.

¹⁶ Prosecution Response, para. 7.

¹⁷ Prosecution Response, paras. 8–9.

failed to show that there is a good chance that President Papoulias will be able to give information that will materially assist the Accused's case.¹⁸

4. Having been invited to respond to the Motion,¹⁹ Greece filed confidentially the "Response of Greece to the Motion to Subpoena President Karolos Papoulias" on 13 September 2012 ("Greece Response"), opposing the Motion on the basis that it fails to satisfy the requirements for the issuance of a subpoena.²⁰ In support, Greece submits that while President Papoulias, in his capacity as Foreign Minister, did meet with the Accused between January 1994 and June 1995, these meetings were strictly in a diplomatic context and that President Papoulias has "no direct knowledge concerning the actual occurrence of the crimes allegedly committed and the circumstances surrounding them".²¹ With respect to the Markale market shelling of 5 February 1994, Greece submits that President Papoulias was not in a position to know who was responsible for it and thus it is not clear how his testimony is directly relevant to the case.²² Referring to the Accused's earlier argument in his Reply to the Motion for Interview that if the Serbs had been responsible for that shelling, the Accused would have confided that fact to Minister Papoulias, Greece submits that it "obviously fails to stand up to legal scrutiny".²³ With respect to the relevance of peace negotiations, Greece submits, relying on a decision from the *Slobodan Milošević* case, that even if peace was the subject matter of conversations, that fact is not relevant to establishing that the Accused did not commit the offences with which he is charged.²⁴ In connection to the detention of UN personnel and their status, Greece argues that confirmation by President Papoulias of the Accused's statement in relation thereto does not materially contribute to clarifying that issue or the elements of crime.²⁵ Accordingly, Greece argues that the information sought by the Accused does not pertain to any relevant issue in this case and therefore, the Accused has not met the legitimate forensic purpose requirement for the issuance of the subpoena.²⁶

5. Greece also argues that the information sought from President Papoulias is obtainable through other means, as acknowledged by the Accused himself, who only wants President Papoulias to testify because he is said to be "more credible" than the Accused's own public

¹⁸ Prosecution Response, para. 9.

¹⁹ Invitation to Greece Regarding Motion to Subpoena President Karolos Papoulias, 23 August 2012.

²⁰ Greece Response, para. 23, 32–33.

²¹ Greece Response, para. 14.

²² Greece Response, para. 15.

²³ Greece Response, para. 15, referring to the Reply to Motion for Interview, para. 26.

²⁴ Greece Response, para. 16, citing *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. 50.

²⁵ Greece Response, para. 17.

²⁶ Greece Response, para. 18.

statements on those issues or any other potential witnesses.²⁷ Accordingly, Greece contends that the Accused has failed to show that the “last resort” requirement of Rule 54 has been satisfied.²⁸

6. In relation to the issue of whether the Tribunal has the power to issue a subpoena to a current head of state, Greece argues that the Appeals Chamber has left open the possibility that certain categories of state officials enjoy immunity from subpoenas and that a serving head of state would fall into this category.²⁹ Greece further argues that issuing a subpoena for President Papoulias’ testimony would be a “disproportionate measure and an unnecessary intrusion on the dignity of President Papoulias’ office”.³⁰

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”. 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.³¹

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 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.³²

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

²⁷ Greece Response, paras. 20–21.

²⁸ Greece Response, para. 22.

²⁹ Greece Response, paras. 25–26.

³⁰ Greece Response, para. 31.

³¹ *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; *Milošević Decision*, para. 38.

³² *Halilović Decision*, para. 6; *Krstić Decision*, para. 11; *Milošević Decision*, para. 40.

obtainable through other means.³³ 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.³⁴

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.³⁵ 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.³⁶ In essence, a subpoena should be considered a method of last resort.³⁷

III. Discussion

11. As stated above,³⁸ the Greece Response was filed confidentially. However, Greece did not specify its reasons for the confidential status of this filing. Furthermore, the information contained in the Greece Response is very similar to the information contained in a submission Greece had filed publicly on 17 February 2012, in response to the Accused's earlier motion for a subpoena to interview President Papoulias.³⁹ Accordingly, the Chamber sees no reason for the Greece Response to remain confidential and therefore finds that it should be reclassified as public.

12. The Chamber also notes that it has previously denied the Accused's request to subpoena President Papoulias for an interview with his legal adviser on the basis that the information President Papoulias may have had stemmed from personal meetings with the Accused and the Chamber saw no need for the Accused's legal adviser to conduct a pre-testimony interview with President Papoulias.⁴⁰ In denying this request, the Chamber did not make a finding on whether the

³³ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

³⁴ *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.

³⁵ *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.

³⁶ *Halilović* Decision, paras. 6, 10.

³⁷ 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".

³⁸ See *supra* para 4.

³⁹ See Response of Greece to the Motion for Subpoena to Interview President Karolos Papoulias, 17 February 2012. See also Motion for Subpoena to Interview President Karolos Papoulias, 26 January 2012, in which the Accused requested the Chamber to issue a subpoena compelling President Papoulias to submit to a pre-testimony interview with his legal adviser.

⁴⁰ First Decision, para. 12.

Accused had met the requirements for issuing a subpoena.⁴¹ The Chamber also did not address the issue of whether acting heads of state enjoy immunity from subpoenas issued by the Tribunal.⁴²

13. The Chamber will now address the requirements for the issuance of a subpoena for testimony. First, the Chamber finds that the Accused has made reasonable efforts to obtain the voluntary co-operation of President Papoulias but has been unsuccessful.⁴³

14. 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.⁴⁴ In the Motion, the Accused requests that the Chamber issue a subpoena compelling the testimony of President Papoulias mainly to confirm statements the Accused made to President Papoulias regarding the three main issues mentioned above.⁴⁵ In terms of the relevance of these issues, the Chamber finds that information pertaining to the determination of who was responsible for the Markale shelling is a live issue and relevant to the Accused's case. Second, the Accused is charged with being a participant in a joint criminal enterprise, the objective of which was the permanent removal of Bosnian Muslims and Bosnian Croats from Bosnian-Serb claimed territory.⁴⁶ Therefore, information that pertains to the Accused's *bona fide* attempts to end the conflict and to agree to various peace proposals is relevant to his case. Finally, although the Chamber did not make a determination as to the legal elements of the crime of hostage-taking, it did note that the reason behind the detention of UN personnel, including the Accused's own state of mind, was a live issue in this case and relevant to the Accused defence.⁴⁷ Accordingly, the Chamber finds that the information sought from President Papoulias pertains to clearly identified issues that are relevant to the Accused's case.

15. The Chamber first notes that the information sought through the issuance of a subpoena must be of "*material* assistance", rather than merely helpful or of some assistance.⁴⁸ In other words, the information must be of "substantial or considerable assistance" to the Accused in relation to a clearly identified issue that is relevant to the trial.⁴⁹ However, as correctly observed by

⁴¹ First Decision, para. 13.

⁴² First Decision, para. 13.

⁴³ See Motion, paras. 20–21.

⁴⁴ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. See also *Milošević* Decision, para. 38.

⁴⁵ See *supra* para. 1.

⁴⁶ Third Amended Indictment, paras. 6–14.

⁴⁷ Decision on Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May 2010, para. 25.

⁴⁸ *Milošević* Decision, para. 39 [emphasis in the original text].

⁴⁹ See *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.

Greece and the Prosecution, the information about which President Papoulias is expected to testify is confined to the Accused's statements to him, in the context of strictly diplomatic meetings and discussions, and without President Papoulias having any actual direct knowledge concerning the crimes alleged in the Third Amended Indictment. As such, for two of the issues, namely the Markale shelling and the detention of the UN personnel, it cannot be said that the substance of his testimony will be of *material* assistance to the Accused's case.

16. First, with respect to the shelling of Markale market, President Papoulias' knowledge of whether the Bosnian Serbs were responsible for the incident is limited to what the Accused allegedly told him. However, as Greece submits, President Papoulias had no personal knowledge of this event and is not in a position to comment on the truth of the Accused's statement.⁵⁰ Accordingly, his confirmation that the Accused denied the responsibility of the Bosnian Serbs for the Markale market shelling will not materially assist the Accused during his defence case. This is particularly so when the Chamber already has in evidence testimony going to the Accused's denials that the Bosnian Serbs were responsible for this shelling,⁵¹ which in turn also means that this information is clearly obtainable through other means.

17. Similarly, the same reasoning applies to the Accused's statements to President Papoulias that the detained UN personnel were prisoners of war. If President Papoulias were to testify, he would not be able to comment on the accuracy of that statement and will, at most, only confirm that this was the position expressed by the Accused in a strictly diplomatic meeting. This evidence, while of some relevance, will not *materially* assist the Accused's defence case, particularly in light of the fact that the Chamber already has in evidence testimony and documents going to his belief that the UN personnel were detained as prisoners of war.⁵²

18. Regarding the Accused's submission that during the Contact Group's peace negotiations, and in particular the 30 July 1994 meeting, he expressed a desire for peace, the Chamber reiterates that information relating to the Accused's intentions and efforts to achieve peace is relevant to this case.⁵³ Furthermore, as submitted by the Prosecution, there is evidence showing that the Accused was in fact not in favour of the Contact Group's plan and did not sign it.⁵⁴ Therefore, evidence contradicting this evidence led by the Prosecution would materially assist the Accused's case.

⁵⁰ Greece Response, para. 15.

⁵¹ See e.g., P1638 (Witness statement of Michael Rose dated 26 March 2009), para. 38 and D162 (Michael Rose's book entitled "Fighting for Peace: Bosnia, 1994"), pp. 43, 46.

⁵² See e.g., P2264 (UNPROFOR report re meeting with Radovan Karadžić, 9 May 1995), p. 1 and D1056 (Reuters report re Radovan Karadžić, 1 June 1995), p. 2; see also testimony of Rupert Smith, T. 11886–11888 (15 February 2011).

⁵³ See *supra* para. 14.

⁵⁴ Prosecution Response, para. 9.

However, while relevant and of material assistance, this evidence is also obtainable through other means. For example, the Accused himself submits that immediately after the 30 July 1994 meeting with President Papoulias, he made a statement to the media about the discussions that transpired at that meeting.⁵⁵ In addition, he accepts that his own associates were present during all of his meetings with President Papoulias and thus can be called to give evidence on all of the issues outlined above.⁵⁶

19. As stated in the preceding paragraphs, much of the information the Accused is now seeking from President Papoulias is already in evidence before it.⁵⁷ Furthermore, for the evidence that is not before the Chamber already, the Accused also has the option of locating and calling one or more of his own associates who were present at the meetings with President Papoulias to confirm the discussions that transpired during those meetings. For those reasons, the Chamber finds that the evidence pertaining to the issues for which President Papoulias' testimony is now sought is clearly obtainable through other means.

20. Accordingly, the Chamber finds that the requirements for the issuance of a subpoena have not been met in this case. As a result, it will not address the issue of head of state immunity.

21. Finally, the Chamber reminds the Accused once again 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. The Chamber has warned the Accused in the past about his prolific use of subpoena motions as a trial tactic.⁵⁸ It continues to be concerned with what seems to be the Accused's practice, namely to subpoena every individual who is in some way connected to the case but who is not willing to cooperate with him. In that respect, the Chamber notes that the Accused and his legal advisers should neither expect absolute co-operation from all those they wish to speak to or designate as witnesses, nor should they expect that subpoenas would be issued as a matter of course to such individuals. Accordingly, the Chamber once again advises the Accused to use subpoenas only as a method of last resort in seeking information that is not obtainable through other means.

⁵⁵ See Reply to Motion for Interview, para. 38.

⁵⁶ See Motion, paras. 28-29. See also Reply to Motion for Interview, paras. 44-45.

⁵⁷ See *supra* paras. 16, 17.

⁵⁸ Decision on the Accused's Second Motion for Subpoena to Interview President Bill Clinton, 21 August 2012, para. 16.

IV. Disposition

22. Accordingly, the Chamber, pursuant to Rule 54 of the Rules, hereby:

- (A) **DENIES** the Motion; and
- (B) **ORDERS** the Registry to reclassify the Greece Response as public.

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]