



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: 4 November 2013

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

Order of: 4 November 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**ORDER ON THE ACCUSED'S MOTION FOR
SAFE CONDUCT ORDER OR SUBPOENA: DRAGAN KIJAC**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of the Kingdom of the Netherlands

via the Ministry of Foreign Affairs
Ambassador for International Organisations

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 Safe Conduct Order or Subpoena: Dragan Kijac”, filed on 16 October 2013 (“Motion”), and hereby issues an order in relation thereto.

I. Background and Submissions

1. On 8 October 2013, the Accused filed the “Motion for Safe Conduct Order: Witness Dragan Kijac” (“First Motion”), wherein he requested an order, pursuant to Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), for the safe conduct of witness Dragan Kijac (“Witness”).¹ The Chamber denied the First Motion without prejudice in its “Decision on Motion for Safe Conduct Order: Dragan Kijac”, issued on 10 October 2013 (“Decision on First Motion”), on the basis that the Accused had not provided specific information as to whether any indictments or other proceedings were pending against the Witness and thus had not demonstrated that issuing such an order was in the interests of justice.² The Chamber noted, however, that if “the Accused [had] more information regarding outstanding indictments against the Witness in Bosnia and Herzegovina (“BiH”), or additional information as to why such an order is necessary for the conduct of trial”, he could file another motion again requesting an order for safe conduct.³

2. In the Motion, the Accused now submits that he has obtained additional information from the Witness and again requests that the Chamber issue a safe conduct order for the Witness (“Safe Conduct Request”).⁴ The Accused submits that although the Witness has no information regarding any outstanding charges against him in BiH, he was interviewed as a suspect in 2010 by the Office of the Prosecutor (“Prosecution”), and does not travel to Bosnia out of concern that he may be arrested due to his prior position as Chief of the State Security Department of the Ministry of Interior of Republika Srpska during the war.⁵ The Accused further asserts that the Prosecution is able to ensure its witnesses will not be arrested while travelling through understandings with national prosecutors, an option that he claims is not available to him, and requests that the Chamber consider this in the context of “equality of arms”.⁶

¹ First Motion, para. 1.

² Decision on First Motion, paras. 4-5.

³ Decision on First Motion, para. 5.

⁴ Motion, paras. 3-5.

⁵ Motion, para. 4.

⁶ Motion, para. 9.

3. Alternatively, the Accused contends that, in the event the Chamber does not grant the Safe Conduct Request, the Chamber should issue a subpoena to compel the Witness's attendance at trial ("Subpoena Request"),⁷ as the Accused asserts that he is unable to obtain the presence of the Witness without either a safe conduct order or a subpoena.⁸ The Accused submits that the Witness was "the person in the State Security Service" with whom the Accused had contact, and that he is therefore uniquely placed to provide "irreplaceable testimony" about whether that service informed the Accused about the execution of prisoners in Srebrenica.⁹

4. On 21 October 2013, the Prosecution filed the "Prosecution Response to Motion for Safe Conduct Order or Subpoena: Dragan Kijac" ("Response"), opposing the Motion.¹⁰ Acknowledging that the Motion contains the additional information that the Prosecution interviewed the Witness as a suspect in 2010, the Prosecution notes that both parties have previously called such witnesses without applying for safe conduct orders,¹¹ and that those witnesses have routinely travelled to The Hague without incident.¹² According to the Prosecution, the Motion thus fails to provide "the kind of additional information required by the First Decision".¹³ The Prosecution asserts that the Motion therefore amounts to a motion for reconsideration of the First Motion without meeting the requirements for reconsideration.¹⁴

5. The Prosecution also opposes the Subpoena Request.¹⁵ Observing that the Accused has not demonstrated any effort to inquire with the BiH authorities regarding any prosecutions, investigations, or indictments pending against the Witness, the Prosecution contends that, at this stage, the Subpoena Request cannot be considered to be a means of last resort.¹⁶ Additionally, the Prosecution disputes that the Witness is in a unique position to testify to the content of VRS security and intelligence organ reports.¹⁷ The Prosecution asserts that the Accused's "security advisor," Gordan Milinić, has already testified that part of his work included reviewing reports sent to the Accused by both the VRS security and intelligence organ and the security services of the

⁷ Motion, para. 11.

⁸ Motion, para. 6.

⁹ Motion, paras. 12–13 (emphasis added). The Accused also submits that the Witness's testimony is highly relevant because he will testify that he never personally informed the Accused of the execution of prisoners from Srebrenica. Motion, para. 12.

¹⁰ Response, para. 1.

¹¹ The Prosecution also contends that the allegation of inequality of arms is unfounded, as the Motion provides no basis for such claims. Response, paras. 9–10.

¹² Response, para. 5 (citing the specific examples of Petar Škrbić, Manojlo Milovanović, Petar Salapura, and Milomir Savčić).

¹³ Response, para. 5.

¹⁴ Response, para. 6.

¹⁵ Response, paras. 11–16.

¹⁶ Response, para. 12.

¹⁷ Response, paras. 14–16.

Ministry of Interior, and has specifically stated that none of them made any references to killing prisoners from Srebrenica.¹⁸

II. Applicable Law

6. Rule 54 of the Rules grants the Chamber the broad authority to issue such orders as may be necessary for the conduct of the trial and this authority includes granting safe conduct to witnesses appearing before the Chamber.¹⁹ Orders for safe conduct are a common device in the practice of the Tribunal for granting witnesses limited immunity under specific circumstances to “secure the attendance of witnesses from areas beyond” the Tribunal’s jurisdiction.²⁰ Such orders are issued by Trial Chambers when deemed in the interests of justice.²¹

7. Rule 54 also 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

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.²³

10. 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

¹⁸ Response, paras. 14–15.

¹⁹ *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video Link, 25 June 1996, para. 8. *See also* Decision on the Prosecution’s Motion for Safe Conduct for Witness Momčilo Mandić, 16 June 2010, para. 4.

²⁰ Order for Safe Conduct, 10 July 2013, fn. 6, and decisions cited therein.

²¹ Order for Safe Conduct, 10 July 2013, fn. 7, and decisions cited therein.

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.

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

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

11. 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

12. The Chamber recalls that the Decision on First Motion explicitly stated that "should the Accused have [...] additional information as to why [an order for safe conduct] is necessary for the conduct of trial", he could file an additional motion requesting such an order.²⁹ The Chamber therefore does not consider that the Motion constitutes a request for reconsideration.

13. However, the Chamber also recalls its finding that the Accused failed to provide specific information regarding why the Witness could be subject to criminal proceedings in BiH beyond the Witness's own concerns.³⁰ The Chamber observes that the Witness acknowledges that he has no such specific information, but was informed that he was a suspect when interviewed by the Prosecution in 2010.³¹ Although the Chamber considers that the mere fact that a witness was interviewed as a suspect by the Prosecution does not, on its own, constitute sufficient justification for issuing a safe conduct order, the Chamber is also of the view that, on the basis of the information that has been provided by the parties, it is not possible to exclude the possibility that the substance of that interview might have been shared with domestic authorities, which may expose the Witness to domestic proceedings. The Chamber also notes that the Witness "does not travel to Bosnia out of concern that he may be arrested".³² Out of an abundance of caution, the

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, confidential and *ex parte*, 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 Decision on First Motion, para. 5.

³⁰ Decision on First Motion, para. 4.

³¹ Motion, para. 4.

³² Motion, para. 4.

Chamber thus considers that it is in the interests of justice to issue an order for safe conduct for the Witness.

14. The Accused's Subpoena Request is therefore moot.

IV. Disposition

15. Accordingly, the Chamber, pursuant to Articles 29 and 30(4) of the Tribunal's Statute and Rule 54 of the Rules, hereby:

- (a) **GRANTS** the Motion;
- (b) **ORDERS** safe conduct for the Witness such that, while in or travelling to The Netherlands for the sole purpose of his testimony in the present case, and while returning to Serbia thereafter, the Witness shall not be arrested, detained, prosecuted, or subjected to any other restriction, whether physical or legal, of his personal liberty, in respect of alleged acts or convictions prior to his departure from Serbia;
- (c) **ORDERS** that the safe conduct order shall apply prior to the Witness's departure from Serbia to The Netherlands, during his transit between Serbia and The Netherlands, upon his arrival at and during his entire stay in The Netherlands, and during his return transit from The Netherlands to Serbia; and
- (d) **REQUESTS** the Registry of the Tribunal to take all necessary and appropriate measures for the implementation of the present order.

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



Judge O-Gon Kwon
Presiding

Dated this fourth day of November 2013
At The Hague
The Netherlands

[Seal of the Tribunal]