



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 December 2012

Original: English

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**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 December 2012

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

*PUBLIC*

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**DECISION ON ACCUSED'S MOTION TO SUBPOENA  
AMBASSADOR JOSÉ CUTILEIRO**

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**Office of the Prosecutor**

Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

**The Accused**

Mr. Radovan Karadžić

**The Government of Portugal**

via the Embassy of Portugal 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 “Motion for Subpoena Ambassador Jose Cutileiro”, filed on 19 September 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 Ambassador José Cutileiro to testify in his case on 11 February 2013 or any other date set by the Chamber.<sup>1</sup> He submits that Ambassador Cutileiro was interviewed by his legal adviser in February 2012 and signed a statement in April 2012, but maintained throughout that he would not voluntarily testify in this case because he believed that peace negotiators should not be witnesses for either party in criminal proceedings.<sup>2</sup>

2. The Accused argues that Ambassador Cutileiro has information that is relevant to his defence.<sup>3</sup> In support, the Accused submits that starting in February 1992, Ambassador Cutileiro was the chairman for international peace negotiations concerning the future constitutional arrangements for Bosnia and Herzegovina (“BiH”) in which the Accused also participated.<sup>4</sup> As such, he will testify that on 18 March 1992 the Accused agreed to a “Statement of Principles” which provided for a state composed of three constituent units each of which would commit to respect human rights, full religious freedom, and protection of minorities<sup>5</sup> and that by agreeing to this Statement of Principles the Accused and the Bosnian Serb leadership committed to having ethnic and religious minorities in the areas covered by the Serb constituent unit and to respecting the rights of those minorities.<sup>6</sup> According to Ambassador Cutileiro’s statement, the final round of peace negotiations took place on 30 and 31 March 1992 when the Accused agreed to the establishment of the European Community Monitoring Mission in order to report and investigate any human rights violation.<sup>7</sup> The Bosnian government rejected the Statement of Principles in June

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<sup>1</sup> Motion, paras. 1, 22.

<sup>2</sup> Motion, paras. 5–6.

<sup>3</sup> Motion, para. 8.

<sup>4</sup> Motion, Annex A, paras. 3–4.

<sup>5</sup> Motion, Annex A, para. 11.

<sup>6</sup> Motion, Annex A, paras. 10–18.

<sup>7</sup> Motion, Annex A, paras. 17–19.

1992.<sup>8</sup> Further information that will be provided by Ambassador Cutileiro includes the Accused's proposals for cease-fire and resumption of peace talks in 1992;<sup>9</sup> information about the shelling of civilians in a bread queue on Vase Miskina Street, which Ambassador Cutileiro received from a Portuguese army officer;<sup>10</sup> and a meeting on 26 August 1992 in London with Lord Carrington, Cyrus Vance, and Bosnian Serb leaders where the Accused expressed his willingness to return territory to the Bosnian Muslims, support an agreement for the return of all refugees, and agree to accept UN monitors at all Bosnian Serb artillery positions in and around Sarajevo.<sup>11</sup> The Accused argues that all of this information is directly relevant to his *mens rea* and refutes the charges that he participated in two joint criminal enterprises the objectives of which were to expel Bosnian Muslims from Bosnian-Serb held territories in BiH ("Overarching JCE") and inflict terror on the civilian population in Sarajevo ("Sarajevo JCE"), respectively.<sup>12</sup>

3. The Accused argues that the information he seeks to obtain is necessary to his defence because he had "sustained and direct personal contact" with Ambassador Cutileiro during the peace negotiations. Thus, the Ambassador is in a unique position to give information about these negotiations and the Accused's position at that time.<sup>13</sup> With respect to Ambassador Cutileiro's position that peace negotiators should not be witnesses in criminal proceedings, the Accused cites a pre-trial decision in this case stating that the fact that an international negotiator gave evidence at a trial could not be reasonably regarded as justifying the loss of confidence in his total impartiality in that role.<sup>14</sup>

4. On 25 September 2012, the Office of the Prosecutor ("Prosecution") informed the Chamber *via* e-mail that it did not wish to respond to the Motion.

5. Having been invited to respond to the Motion,<sup>15</sup> the Portuguese Republic ("Portugal") filed confidentially its response on 16 October 2012 ("Response"), providing Ambassador Cutileiro's position.<sup>16</sup> In the Response, Ambassador Cutileiro states that while he chaired talks on the future constitutional arrangements for BiH and participated in peace negotiation meetings throughout his time in BiH, he is reluctant to testify at the Tribunal because he believes that compelling mediators,

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<sup>8</sup> Motion, Annex A, para. 19.

<sup>9</sup> Motion, para. 13, Annex A, paras. 24, 28–29.

<sup>10</sup> Motion, para. 14, Annex A, para. 27.

<sup>11</sup> Motion, para. 15, Annex A, para. 32.

<sup>12</sup> Motion, para. 17.

<sup>13</sup> Motion, para. 18.

<sup>14</sup> Motion, para. 20, citing Decision on Motion Requesting Lord David Owen to Testify as a Court Witness, public with confidential annex, 13 July 2009 ("Owen Decision"), para. 6.

<sup>15</sup> Invitation Regarding Motion to Subpoena Ambassador Jose Cutileiro, 25 September 2012.

<sup>16</sup> Response, pp. 1–2.

such as himself, to do so would lead to other mediators being less trusted by parties to a future conflict.<sup>17</sup> Portugal defends the position of Ambassador Cutileiro but submits that if the Chamber were to issue a subpoena compelling his testimony, he would not be available to testify before 14 February 2013.<sup>18</sup>

## II. Applicable Law

6. 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.<sup>19</sup>

7. 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.<sup>20</sup>

8. 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.<sup>21</sup> 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.<sup>22</sup>

9. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.<sup>23</sup> A Trial Chamber’s discretion to issue subpoenas, therefore, is necessary to ensure that the compulsive mechanism of the subpoena is not abused

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<sup>17</sup> Response, p. 2.

<sup>18</sup> Response, p. 2.

<sup>19</sup> *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.

<sup>20</sup> *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

<sup>21</sup> *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

<sup>22</sup> *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.

<sup>23</sup> *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.

and/or used as a trial tactic.<sup>24</sup> In essence, a subpoena should be considered a method of last resort.<sup>25</sup>

### III. Discussion

10. The Chamber notes that the Response was filed confidentially by Portugal without specifying reasons for its confidential status. The Chamber has evaluated the information contained in the Response and finds that there is no reason for it to remain confidential. Accordingly, the Chamber finds that the Response should be reclassified as public.

11. Turning first to the argument made by Ambassador Cutileiro that compelling mediators to give testimony would lead to the erosion of trust in them by the parties to a conflict,<sup>26</sup> it has been previously stated that it does not consider that the fact that an international negotiator gives evidence in the case of one party could reasonably be regarded as justifying the loss of confidence in the impartiality of the negotiator in that role.<sup>27</sup> Therefore, the Chamber does not accept that testifying in a case for one party will automatically call into question Ambassador Cutileiro's or any other future mediator's impartiality. Indeed, over the years, the Tribunal as a whole, including this Chamber for the purposes of this case, has heard evidence from a number of mediators and/or international witnesses who were involved in various peace negotiations.<sup>28</sup> Furthermore, the Chamber notes that Ambassador Cutileiro voluntarily submitted to a pre-testimony interview with the Accused's legal adviser, gave a comprehensive witness statement which he later confirmed and signed—and was presumably told that it might become part of the evidence in this trial—and yet now refuses to appear in this case for live testimony on the basis that the impartiality of other mediators would be called into question. The Chamber finds Ambassador Cutileiro's argument to be at odds with his willingness to meet the Accused's legal adviser for a pre-testimony interview and sign a witness statement.

12. With respect to the requirement for the issuance of a subpoena pursuant to Rule 54 of the Rules that the Accused must show that he has made reasonable efforts to obtain the voluntary cooperation of Ambassador Cutileiro but has been unsuccessful, the Chamber notes that despite the

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<sup>24</sup> *Halilović* Decision, paras. 6, 10.

<sup>25</sup> 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".

<sup>26</sup> Response, p. 2.

<sup>27</sup> Owen Decision, para. 6.

<sup>28</sup> For example, the Chamber has heard evidence from Herbert Okun, the special adviser and deputy to Cyrus Vance, who served as deputy co-chairman of the International Conference on the former Yugoslavia in 1992 and 1993.

efforts made by the Accused, Ambassador Cutileiro has made it clear that he would not agree to testify in this case.<sup>29</sup> The Accused is also unable to tender Ambassador Cutileiro's statement into evidence pursuant to Rule 92 *bis* of the Rules because the Prosecution wishes to cross-examine the Ambassador on matters he discusses in that statement.<sup>30</sup> Accordingly, the Chamber is satisfied that the Accused has made reasonable efforts to obtain the voluntary co-operation of Ambassador Cutileiro and has been unsuccessful.

13. In order to meet the necessity requirement for the issuance of the 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 that are relevant to his trial.<sup>31</sup> The substance of Ambassador Cutileiro's proposed testimony pertains to his work for the European Commission's Conference on the former Yugoslavia and the peace negotiations in 1992, in which he was the chairman of the negotiating group entitled, Future Constitutional Arrangements for Bosnia and Herzegovina.<sup>32</sup> In this capacity, Ambassador Cutileiro met with the Accused on a number of occasions during the course of the relevant time period and for the purpose of bringing a peaceful settlement to the ongoing conflict. He personally chaired a series of peace talks from February until March 1992, in which the Accused and President Izetbegović were participants, and which culminated in the parties agreeing to the "Statement of Principles".<sup>33</sup> Indeed, this peace plan was also referred to as the Carrington-Cutileiro Plan.<sup>34</sup> Since the Accused is charged with being a participant in the Overarching JCE<sup>35</sup> and the Sarajevo JCE,<sup>36</sup> the evidence that pertains to his efforts to actively engage in peace negotiations for the purposes of ending the conflict is relevant to his defence case. Accordingly, the Chamber finds that the information sought from Ambassador Cutileiro pertains to clearly identified issues that are relevant to the Accused's case.

14. 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.<sup>37</sup> In other words, it must be of "substantial or considerable assistance" to the Accused in relation to a

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<sup>29</sup> Motion, para. 6.

<sup>30</sup> Motion, para. 6, Annexes A and B.

<sup>31</sup> *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. *See also* *Milošević* Decision, para. 38.

<sup>32</sup> Motion, Annex A, para. 3.

<sup>33</sup> Motion, Annex A, paras. 4–18.

<sup>34</sup> Herbert Okun, P776 (Transcript from *Prosecutor v. Krajišnik*), T. 4320–4321; P798 (Statement of Principles, Lisbon Agreement, 23 February 1992). *See also* D91 (Draft Cutileiro Map).

<sup>35</sup> Third Amended Indictment, paras. 6–14.

<sup>36</sup> Third Amended Indictment, paras. 76–82.

<sup>37</sup> 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].

clearly identified issue that is relevant to the trial.<sup>38</sup> By his own admission, Ambassador Cutileiro was a key member in conducting international peace negotiations with the Accused and the Bosnian Serbs and in this capacity had continuous contact with the Accused during negotiation meetings from February until August 1992.<sup>39</sup> As such, he is uniquely situated to provide testimony relating to the Accused's *mens rea* in connection to the Overarching JCE and Sarajevo JCE. Accordingly, Ambassador Cutileiro's anticipated testimony will be of considerable assistance to the Accused.

15. Given the nature and particularly the scope and the unique perspective of Ambassador Cutileiro's anticipated testimony, the Chamber is satisfied that it is not obtainable through other means. As stated above, Ambassador Cutileiro is uniquely situated to give evidence regarding the involvement of the Accused in the peace negotiation process.

16. For all of the above reasons, the Chamber is satisfied that the Accused has met the requirements for the issuance of a subpoena, pursuant to Rule 54 of the Rules, for the testimony of Ambassador Cutileiro.

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<sup>38</sup> See Papoulias Decision, para. 15; Milošević Decision, para. 39, citing Krstić Decision, para. 11.

<sup>39</sup> See Motion, Annex A, pp. 1–5.

**IV. Disposition**

17. Accordingly, the Chamber, pursuant to Article 29 of the Statute and Rule 54 of the Rules, hereby **GRANTS** the Motion and:

- (a) **ORDERS** the Registry to take the necessary steps to ensure that the Subpoena and the Order to Portugal relating to this matter are transmitted immediately to Portugal; and
- (b) **REQUESTS** the Registry to reclassify the Response as public.

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



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Judge O-Gon Kwon  
Presiding

Dated this nineteenth day of December 2012  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**