



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 April 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

Decision of: 23 April 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA MILENKO ŽIVANOVIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of the Republic of Serbia

via the Embassy of Republic of Serbia 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: General Milenko Živanović” filed on 26 March 2013 (“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 directing Milenko Živanović to appear for testimony in this case on 8 May 2013.¹

2. The Accused argues that he made reasonable efforts to obtain Živanović’s voluntary co-operation but was ultimately unsuccessful.² In support, the Accused submits that on several occasions between January and March 2013, his defence team attempted, in vain, to contact Živanović by telephone.³ Ultimately, one of the Accused’s investigators travelled to Živanović’s residence in the Republic of Serbia (“Serbia”) and met him in person, however, Živanović repeatedly refused to testify as a defence witness.⁴ The Accused further contends that while Živanović alluded to threats made against him, he would refuse to testify even if protective measures were granted. The Accused also submits that in any event, given the lack of specificity of these alleged threats, there appears to be no grounds to seek protective measures.⁵

3. The Accused argues that there are reasonable grounds to believe that as the former commander of the Drina Corps until mid-July 1995, Živanović has information that would materially assist his defence.⁶ He submits that Živanović is expected to testify that he never informed the Accused orally or in writing about the execution of prisoners from Srebrenica, which is directly relevant to the Accused’s *mens rea* for genocide as charged in Count 2 of the Third Amended Indictment (“Indictment”).⁷ The Accused further submits that Živanović will

¹ Motion, paras. 1, 22.

² Motion, para. 6.

³ Motion, para. 4.

⁴ Motion, para. 5.

⁵ Motion, fn. 2. *See also* Annex A attached to the Motion, which is an official note prepared by one of the Accused’s investigators. The note states that Živanović explained his refusal to testify by “alleged threats from Muslims in BH and Europe and [he] pointed out that ‘there is a price on his head’”, and that the investigator informed Živanović of the range of protective measures that could be ordered, but he insisted in refusing to testify. The notes further states that in the investigator’s view, Živanović “has been instructed to refuse to testify”.

⁶ Motion, paras. 7–16. *See also* Motion, para. 20.

⁷ Motion, para. 8. *See also* Motion, paras. 13–14, 18.

testify that there was no plan or expectation that Bosnian Muslims would be forcibly transferred or harmed in any way, which is again directly relevant to the Accused's *mens rea* for the crime of genocide and his overall responsibility for the Srebrenica events.⁸

4. The Accused further contends that Živanović's testimony is necessary to explain the "true meaning of" documents Živanović authored, as the Prosecution "attempted to put them in a light most favorable to its case".⁹ He argues that such documents include a Drina Corps order dated 20 March 1995;¹⁰ a Drina Corps order for *Krivaja 95* Operation dated 2 July 1995;¹¹ and an intercepted conversation between Živanović and the Accused on 9 July 1995.¹² The Accused further asserts that a number of reports Živanović authored in 1992 and 1993 are pertinent to events in eastern Bosnia and Herzegovina ("BiH") and that Živanović can testify that there was no plan to expel Bosnian Muslims from eastern BiH and that the military operations described in these documents "were not in furtherance of any plan or joint criminal enterprise to expel Muslims".¹³

5. The Accused submits that in a series of interviews with the Office of the Prosecutor ("Prosecution"), Živanović stated that (1) he had asked UNPROFOR many times to demilitarise Srebrenica; (2) on the evening of 11 July 1995, he spoke with the Accused over the phone, who asked him if Srebrenica had been taken and "if anyone had been killed"; and (3) on 12 July 1995, he signed an order that Bosnian Muslims taken prisoner "should be put in suitable locations where they could be guarded by smaller forces".¹⁴

6. The Accused contends that the information from Živanović, who was in personal contact with him during the operation in Srebrenica, is necessary to rebut the Prosecution's allegations that the Accused had numerous sources, including Živanović, from which he could have learned of the execution of prisoners from Srebrenica.¹⁵ He also submits that the need for this information is "heightened" by the refusal of Živanović's subordinate and successor, Radislav Krstić, to testify in this case.¹⁶

⁸ Motion, para. 9.

⁹ Motion, para. 10.

¹⁰ Motion, para. 11, referring to P3070. The Chamber considers that the Accused incorrectly refers to P3070 when the discussion is related to P3040.

¹¹ Motion, para. 12, referring to P4481.

¹² Motion, para. 13, referring to P4484.

¹³ Motion, para. 14, referring to P3923, P4205, P4207, P4208, P4081, P5493, P5495, P5497, P5499, P5500, P5163 and P5189. The Chamber notes that P5497 is signed by the Drina Corps Chief of Staff Milutin Skočajić, not Živanović.

¹⁴ Motion, para. 15.

¹⁵ Motion, para. 17.

¹⁶ Motion, para. 19.

7. The “Prosecution Submission and Request Regarding Motion for Subpoena: General Milenko Živanović” was filed on 5 April 2013 (“Submission”). In the Submission, the Prosecution states that while it takes no position on the relief sought in the Motion, there are additional considerations that may be relevant to the Chamber’s ruling on the Motion, namely that the Accused overstates the value of the proposed evidence that Živanović could provide and that he makes the unsupported allegation that Živanović refuses to testify as a result of witness interference.¹⁷ With regard to the first point, the Prosecution argues that the Accused’s submission that there are grounds to believe Živanović’s evidence can materially assist his case is based on speculation or on a selective reading of the interviews that Živanović provided to the Prosecution.¹⁸ According to the Prosecution, a detailed analysis of Živanović’s interviews suggests that Živanović “is likely to provide evidence that does not support and indeed rather contradicts the Defence case”.¹⁹ With regard to the second point, the Prosecution requests that the Chamber order the Accused to provide detailed information as to the alleged case of witness interference.²⁰

II. Applicable Law

8. 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.²¹

9. 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

¹⁷ Submission, paras. 1–7, 10–13.

¹⁸ Submission, para. 3. *See also* Submission, para. 4.

¹⁹ Submission, para. 5. *See also* Submission, para. 6.

²⁰ Submission, paras. 11–13.

²¹ *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.

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.²²

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 obtainable through other means.²³ 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.²⁴

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.²⁵ 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.²⁶ In essence, a subpoena should be considered a method of last resort.²⁷

12. With respect to the co-operation from the relevant states involved, Article 29 of the Statute of the Tribunal ("Statute") obliges states to "co-operate with the International Tribunal in the investigation and prosecution of the persons accused of committing serious violations of international humanitarian law". Article 29, paragraph 2, states that this obligation includes the specific duty to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons [...]".

III. Discussion

13. As a preliminary matter, the Chamber notes that while the Prosecution takes no position in the Submission on the relief sought in the Motion, it nevertheless makes submissions on the merits thereof. The Prosecution submits that "there is no indication in the Motion as to why and

²² *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

²³ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

²⁴ *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.

²⁵ *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.

²⁶ *Halilović* Decision, paras. 6, 10.

²⁷ 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".

how General Živanović is likely to materially assist the Defence”.²⁸ The Chamber views this to mean that for the Prosecution one of the requirements of a legitimate forensic purpose has not been fulfilled. The Prosecution cannot abstain from taking a position on the relief requested in the Motion, namely the issuance of a subpoena to Živanović, and then proceed to challenge the substance of the Motion.²⁹

14. Turning to the merits of the Motion, the Chamber finds that based on the information before it the Accused has made reasonable efforts to obtain the voluntary co-operation of Živanović but has been unsuccessful.³⁰

15. Having considered the expected scope of Živanović’s testimony, as outlined in the Motion, the Chamber is satisfied that it is relevant to a number of issues in the Accused’s defence case. Živanović, as former commander of the Drina Corps until mid-July 1995, is expected to testify about (1) contacts he had with the Accused during the time relevant to this case and specifically whether he informed the Accused that prisoners from Srebrenica would be, were being, or had been executed; and (2) whether he was aware of any instructions or positions expressed by the Accused that Bosnian Muslims should be expelled from Srebrenica. These issues directly pertain to the Accused’s responsibility for such crimes pursuant to the alleged joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica and his *mens rea* for the alleged crime of genocide contained in the Indictment.³¹ The Chamber is therefore satisfied that Živanović’s anticipated testimony will materially assist the Accused with respect to those clearly identified issues relevant to his case and that the Accused has fulfilled the requirement of the legitimate forensic purpose.

16. Given the nature and scope of Živanović’s anticipated evidence, the Chamber is also satisfied that this particular evidence is not obtainable through other means. As the former commander of the Drina Corps who was in regular contact with the Accused, Živanović is uniquely situated to give evidence regarding the crimes alleged to have occurred in Srebrenica in July 1995 and the Accused’s knowledge of and involvement therein. This is particularly so given that Radislav Krstić, who was the Chief of Staff of the Drina Corps, refused to testify in

²⁸ Submission, para. 4.

²⁹ The Chamber further notes that the Prosecution refers to two instances in which the Accused is said to have exaggerated the supposed “usefulness” of the testimony of a witness for whom it was seeking a subpoena. *See* Submission, paras. 8–9 (referring to Naser Orić and Radislav Krstić). The Chamber notes that for both of these witnesses, the Prosecution did not respond to the Accused’s respective requests for subpoena. The Submission, which relates to Živanović, is not an appropriate forum to put these challenges on the record. These challenges should have been raised at the time the subpoena motions pertaining to Orić and Krstić were pending before the Chamber.

³⁰ *See* Motion, paras. 4–5, Annex A.

³¹ Indictment, paras. 20–24, 41–47.

this case after having been subpoenaed and is therefore being prosecuted for contempt of the Tribunal.³²

17. 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 Živanović on 8 May 2013.

18. In relation to the Prosecution's request that the Accused be ordered to provide details as to his claim of witness tampering,³³ the Chamber considers that at this stage the information provided is not such that it would justify the Chamber's immediate intervention. Should the parties wish to enquire further with Živanović on this matter when he appears for testimony in this case, they may do so at that time. Therefore, the Chamber denies the Prosecution's request for further details as to the alleged claim of witness tampering.

IV. Disposition

19. For the reasons outlined above, the Chamber, pursuant to Article 29 of the Statute and Rule 54 of the Rules, hereby **GRANTS** the Motion, and:

- a. **ORDERS** the Registry of the Tribunal to take the reasonably necessary steps to ensure that this Decision, the subpoena and the order to the Government of Serbia relating to this matter are transmitted immediately to the Government of Serbia; and
- b. **REQUESTS** the Victims and Witnesses Section of the Tribunal to provide any necessary assistance in the implementation of this Decision.

³² See *In the Contempt case of Radislav Krstić*, Case No. IT-95-5/18-R77.3, Order in lieu of Indictment, 27 March 2013.

³³ Submission, paras. 2, 10–12.

20. The Chamber **DENIES** the request sought by the Prosecution in the Submission as discussed in paragraph 18 above.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-third day of April 2013
At The Hague
The Netherlands

[Seal of the Tribunal]