



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: 9 May 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: 9 May 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA RADIVOJE MILETIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Counsel for Radivoje Miletić

Ms. Natacha Fauveau Ivanović
Mr. Nenad Petrušić

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 Radivoje Miletić” filed on 2 April 2013 (“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 Radivoje Miletić to testify in his case on 9 July 2013.¹ The Accused argues that he has made reasonable efforts to obtain the voluntary co-operation of Miletić but that these efforts have not been successful.² He submits that on 26 March 2013 his legal adviser met with Miletić and his counsel at the United Nations Detention Unit (“UNDU”) and asked Miletić to testify as a Defence witness in his case, but that they stated unequivocally that Miletić was not willing to testify unless a subpoena was issued.³

2. The Accused contends that there are reasonable grounds to believe that Miletić has information which is relevant to his case and may materially assist his case.⁴ With regard to relevance, he argues that Miletić is able to testify that as Chief of Administration of the Main Staff of the Army of Republika Srpska (“VRS”), he never informed the Accused either orally or in writing that “prisoners from Srebrenica would be, were being, or had been executed”, which is directly relevant to the Accused’s *mens rea* for genocide as charged in Count 2 of the Third Amended Indictment (“Indictment”).⁵ He further submits that Miletić, whose name appears on the Directive for Further Operations No. 7 (“Directive 7”) as the drafter, is expected to testify that he did not know of any plan or intention to expel Bosnian Muslims from Srebrenica and that Directive 7 was “not implemented in the operation conducted in the Srebrenica area in July 1995”, which is directly relevant to the Accused’s *mens rea* for forcible transfer, deportation and other crimes charged in Counts 3 to 8 of the Indictment.⁶

3. With regard to necessity, the Accused submits that the information from Miletić is necessary for his case to rebut the claim of the Office of the Prosecutor (“Prosecution”) that the

¹ Motion, paras. 1, 15.

² Motion, para. 5.

³ Motion, paras. 4–5, Annex A.

⁴ Motion, paras. 6–9.

⁵ Motion, paras. 7, 10.

⁶ Motion, para. 8, Annex A.

Accused “had numerous sources from which he could have learned of the execution of prisoners from Srebrenica, including General Miletić” who forwarded combat information to the Accused on a daily basis, and that the Accused called the VRS Main Staff during the operation in Srebrenica to seek information.⁷ The Accused further argues that as the drafter of Directive 7, Miletić is uniquely placed to explain the language, purpose, and effect of Directive 7, which has been used by the Prosecution as evidence of the Accused’s participation in “the joint criminal enterprise alleged in the indictment”.⁸

4. On 8 April 2013, the Prosecution informed the Chamber *via* email that it would not respond to the Motion.

5. On the same day, the Chamber orally granted Miletić’s request for leave to respond to the Motion.⁹

6. On 16 April 2013, Miletić filed “Radivoje Miletić Response to Subpoena” (“Response”),¹⁰ in which he submits that he does not wish to take a position on the Motion but that he will not testify unless subpoenaed.¹¹ Miletić submits that while, as the drafter of Directive 7, he was familiar with the general process of drafting directives, he was not part of “the narrow command circle” of the VRS and his knowledge regarding directives is therefore “limited to the technical aspects” thereof.¹² He further argues that his knowledge of the military activities in Srebrenica in July 1995 is based on the reports he had received.¹³

7. Miletić further requests that, given his own case is still pending before the Appeals Chamber, should the Chamber decide to subpoena him, the protection contained in Rule 90(E) be granted to him and his counsel be present during his testimony.¹⁴

⁷ Motion, para. 10.

⁸ Motion, para. 11.

⁹ T. 36828 (8 April 2013); *Requête de Radivoje Miletić aux Fins d’Obtenir l’autorisation de Répondre à la Demande de «Subpoena»*, original in French filed on 8 April 2013 with English translation entitled “Radivoje Miletić’s Motion for Leave to Reply to Motion for Subpoena” filed on 9 April 2013.

¹⁰ *Réponse de Radivoje Miletić à la Demande de «Subpoena»*, original in French filed on 16 April 2013 with English translation entitled “Radivoje Miletić Response to Subpoena” filed on 18 April 2013.

¹¹ Response, paras. 5, 17.

¹² Response, para. 13.

¹³ Response, para. 14.

¹⁴ Response, para. 16.

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.¹⁵

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 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.¹⁶

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.¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰ In essence, a subpoena should be considered a method of last resort.²¹

¹⁵ *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.

¹⁶ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

¹⁷ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

¹⁸ *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.

¹⁹ *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.

²⁰ *Halilović* Decision, paras. 6, 10.

²¹ 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

III. Discussion

12. The Chamber first considers that the Accused has made reasonable efforts to obtain the voluntary co-operation of Miletić to testify as a witness in his case but has been unsuccessful.²²

13. Having assessed the expected scope of Miletić's testimony, as outlined in the Motion, the Chamber is satisfied that it is relevant to a number of issues in the Accused's case. Miletić, as former Chief of Administration for Operations and Training of the VRS Main Staff, is expected to testify about his contacts with the Accused and in particular about: (1) whether he informed the Accused that prisoners from Srebrenica would be, were being, or had been executed; and (2) whether there was any plan or intention to expel Bosnian Muslims from Srebrenica, and whether Directive 7 was "implemented in the operation conducted in the Srebrenica area in July 1995". These issues pertain to the Accused's responsibility for crimes committed pursuant to the alleged joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica ("Srebrenica JCE") and his *mens rea* for the crime of genocide charged in Count 2 and for other crimes charged in Counts 3 to 8 of the Indictment.²³ The Chamber is therefore satisfied that Miletić'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 legitimate forensic purpose.

14. Given the nature and scope of Miletić's anticipated evidence, the Chamber is also satisfied that this particular evidence is not obtainable through other means. In the Chamber's view, as the former Chief of the Administration for Operations and Training of the VRS Main Staff and the drafter of Directive 7, Miletić is uniquely situated to give testimony about the directive, which has been adduced in the present trial as evidence of the Accused's participation in the Srebrenica JCE.²⁴ Furthermore, the Chamber considers that given that a number of VRS Main Staff reports sent to the Accused during the relevant period bear Miletić's type-signed signature,²⁵ Miletić is uniquely situated to give evidence regarding the Accused's knowledge of and/or involvement in the alleged execution of prisoners from Srebrenica.

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".

²² See Motion, paras. 4–5, Annex A.

²³ Indictment, paras. 9–14, 20–24, 41–75.

²⁴ P838 (Directive 7, 8 March 1995). The Prosecution submits that the Accused issued Directive 7 "in furtherance of the effort to complete the removal of Muslims from the Drina River Valley". Prosecution's Final Pre-Trial Brief, with Partially Confidential Appendices, 18 May 2009, para. 203.

²⁵ See, e.g., P4449 (VRS Main Staff Report, 10 July 1995); P4450 (VRS Main Staff Report, 11 July 1995); P3054 (VRS Main Staff Report, 12 July 1995); P4464 (VRS Main Staff Report 13 July 1995); P4457 (VRS Main Staff Report, 14 July 1995); P4460 (VRS Main Staff Report, 15 July 1995); D2101 (VRS Main Staff Report, 16 July 1995); D2102 (VRS Main Staff Report, 17 July 1995); P4459 (VRS Main Staff Report, 18 July 1995); P4461 (VRS Main Staff Report, 19 July 1995).

15. Based on 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, for the testimony of Miletić on 9 July 2013.

16. The Chamber recalls that while an accused person cannot be compelled to testify in his own trial or to answer questions by virtue of his fundamental right pursuant to Article 21(4)(g) of the Tribunal's Statute "not to be compelled to testify against himself or to confess guilt",²⁶ the purpose of Rule 90(E) is to allow a witness, albeit a witness who is also an accused person, to testify in another trial without the fear that his testimony will be used against him in a subsequent proceeding. The Chamber emphasises that it maintains the discretion under Rule 90(E) to compel or not to compel a witness to answer a question.²⁷ In exercising its discretion in this particular instance, the Chamber will be cognisant of the fact that Miletić is currently involved in appeals proceedings before the Appeals Chamber and will ensure that Miletić's rights are safeguarded.

IV. Disposition

17. For the reasons outlined above, the Chamber, pursuant to Article 29 of the Statute of the Tribunal 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 the subpoena is served on the Witness at the UNDU; and
- b. **REQUESTS** the Victims and Witnesses Section of the Tribunal to provide any necessary assistance in the implementation of this Decision.

²⁶ *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 17.

²⁷ *Prosecutor v. Ntagerura et al*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, paras. 254–256; *see also* testimony of Radovan Karadžić in the *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, evidentiary hearing on appeal, T. 514–607 (5 November 2008).

18. The Chamber **GRANTS** Miletić's request for the presence of his counsel during his testimony in this case.

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



Judge O-Gon Kwon
Presiding

Dated this ninth day of May 2013
At The Hague
The Netherlands

[Seal of the Tribunal]