



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: 28 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: 28 May 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA SVETOZAR ANDRIĆ

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

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 Svetozar Andrić”, filed on 29 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 Svetozar Andrić to testify in his case on 19 July 2013.¹ The Accused argues that he has made reasonable efforts to obtain the voluntary co-operation of Andrić but that these efforts have not been successful.² He submits that his defence team has contacted Andrić on several occasions but he “consistently and steadfastly refused to testify, or even provide a written statement which could be offered pursuant to Rule 92 *bis*”.³

2. The Accused contends that there are reasonable grounds to believe that Andrić has information which is relevant to his case and may materially assist him in his defence.⁴ The Accused argues that Andrić, who was the Commander of the Birač Brigade from May 1992 and became the Chief of Staff of the Drina Corps in July 1995, authored a number of documents relied upon by the Office of the Prosecutor (“Prosecution”) to demonstrate that a joint criminal enterprise existed to “expel Muslims and to commit crimes while doing so”.⁵ In that regard the Accused points to two documents which have been admitted as Prosecution exhibits in this case, authored by Andrić, which refer to: (1) the need to organise and co-ordinate the “moving out” of Bosnian Muslim women and children; (2) the placement of Bosnian Muslim men “fit for military service” in camps for exchange; and (3) the burning of Bosnian Muslim villages.⁶ The Accused asserts that Andrić would be able to explain that these documents were referring to requests by villagers for relocation and not “forcible expulsions” and that the burning of structures in areas of combat operations was only done selectively and for legitimate military purposes.⁷

¹ Motion, paras. 1, 21.

² Motion, paras. 4–5.

³ Motion, para. 4, Annex A.

⁴ Motion, paras. 6, 14.

⁵ Motion, paras. 7–8.

⁶ Motion, paras. 9–11, referring to P3055 (Order of Birač Brigade, 28 May 1992) and P3162 (Report of 1st Birač Infantry Brigade, 2 March 1993).

⁷ Motion, paras. 10–11.

3. The Accused further submits that as a brigade commander in Eastern Bosnia and Herzegovina (“BiH”) Andrić could testify that “there was no plan to expel” Bosnian Muslims from the area, that he was not aware of any instructions from or position expressed by the Accused that Bosnian Muslims should be expelled and on the contrary the Accused “repeatedly affirmed that the rights of civilians should be respected”.⁸ With respect to events in Srebrenica, the Accused submits that Andrić issued an order on 14 July 1995 to “put captured and disarmed Muslims in appropriate facilities which can be guarded” and that he is expected to testify that this order was intended to ensure the safekeeping of prisoners and that he knew of no plan to execute prisoners from Srebrenica.⁹

4. With regard to necessity, the Accused submits that the information from Andrić is necessary given that as the author of these “important documents” he is the only person who can explain their meaning and intent in order to avoid the “incorrect inferences and connotations from these documents” suggested by the Prosecution.¹⁰ In the Accused’s submission, the necessity of Andrić’s testimony is heightened by the refusal of General Radislav Krstić to testify in this case.¹¹ The Accused concludes that he is confident that Andrić’s testimony would be of assistance to him given that Andrić, in his interviews with the Prosecution, consistently maintained that “he did not participate in any crimes, including expulsions and murders”.¹²

5. On 13 May 2013, the Prosecution informed the Chamber *via* email that it would not respond to the Motion.

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

⁸ Motion, para. 12.

⁹ Motion, para. 13 and Annex B.

¹⁰ Motion, para. 15.

¹¹ Motion, para. 16. The Chamber notes that the Motion erroneously refers to the necessity of General Zivanović’s testimony.

¹² Motion, para. 17.

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.¹³

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.¹⁴

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.¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ In essence, a subpoena should be considered a method of last resort.¹⁹

III. Discussion

10. The Chamber first considers that the Accused has made reasonable efforts to obtain the voluntary co-operation of Andrić to testify as a witness in his case but has been unsuccessful.²⁰

11. 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

¹³ *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.

¹⁴ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

¹⁵ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

¹⁶ *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.

¹⁷ *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.

¹⁸ *Halilović* Decision, paras. 6, 10.

¹⁹ 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”.

²⁰ See Motion, paras. 4–5, Annex A.

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.²¹ Having assessed the expected scope of Andrić'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. Andrić, as the Commander of the Birač Brigade from May 1992 who was appointed Chief of Staff of the Drina Corps on 14 July 1995²², is expected to clarify the meaning and intent of documents authored by him which have been admitted as Prosecution exhibits in this case which pertain to (1) the need to organise and co-ordinate the "moving out" of Bosnian Muslim women and children; (2) the placement of Bosnian Muslim men "fit for military service" in camps for exchange; (3) the burning of Bosnian Muslim villages; (4) the placement of captured and disarmed Muslims from Srebrenica in appropriate facilities which could be guarded.²³

12. These issues pertain to the Accused's responsibility for charged crimes committed pursuant to the alleged joint criminal enterprise to permanently remove Bosnian Muslim and Bosnian Croat inhabitants from the territories of BiH claimed as Bosnian Serb territory ("Overarching JCE") and the alleged joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the remainder of the population ("Srebrenica JCE").²⁴ Accordingly, the Chamber finds that the information sought from Andrić pertains to clearly identified issues that are relevant to the Accused's case.

13. The Chamber recalls that testimony sought through the issuance of a subpoena must be of "material assistance", rather than merely helpful or of some assistance.²⁵ In other words, it must be of "substantial or considerable assistance" to the Accused in relation to a clearly identified issue that is relevant to the trial.²⁶ The Chamber notes that, according to the Motion, Andrić is expected to testify that the documents authored by him refer to voluntary requests for relocation by villagers and that there was no plan to forcibly expel Bosnian Muslims from municipalities in BiH and secondly that the burning of structures in the area of combat operations was only done for legitimate military purposes.²⁷ In addition Andrić is expected to testify that with respect to the alleged Srebrenica JCE, he was not aware of any plan to execute prisoners from Srebrenica and that he had issued an order to ensure the safekeeping of prisoners.²⁸ The Chamber is therefore satisfied

²¹ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. See also *Milošević* Decision, para. 38.

²² See P4914 (Richard Butler's expert report entitled "Srebrenica Military Narrative (Revised) Operation 'Krivaja 95'", 1 November 2002), p. 22.

²³ Motion, paras. 6–15.

²⁴ Third Amended Indictment, paras. 9–14, 20–24, 41–75.

²⁵ 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].

²⁶ See Papoulias Decision, para. 15; *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.

²⁷ Motion, paras. 9–12.

²⁸ Motion, para. 13.

that Andrić'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. The Chamber recalls that, even if it 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. With respect to the alleged Overarching JCE, Andrić is the author of several documents admitted as Prosecution exhibits. As an example, exhibit P3055 is an order to the Zvornik Territorial Defence dated 28 May 1992 and signed by Andrić as Commander of the Birač brigade that the "moving out of the Muslim population must be organised and co-ordinated with the municipalities through which the moving is carried out. Only women and children can move out, while men fit for military service are to be placed in camps for exchange".²⁹ Another order signed by Andrić on 31 May 1992 is exhibit P3240, which relates to the establishment of a camp in Vlasenica pursuant to a decision of the Serb Autonomous Region of Birač "which regulates the moving out of the Muslim population" from the territory.³⁰ While other witnesses have been asked to comment on these exhibits those witnesses have been unable to confirm the meaning of these documents.³¹ Andrić as the author of these orders is uniquely situated to give testimony about the meaning and context of these documents which have not been obtainable through other means.

15. With respect to the alleged Srebrenica JCE, Andrić is uniquely positioned to give evidence regarding the meaning of the order that he issued which required that captured Bosnian Muslims be put in "appropriate facilities" which could be guarded by smaller forces and also on the absence of a plan to execute prisoners from Srebrenica.³² The Chamber is therefore satisfied that the evidence of Andrić with respect to the meaning of documents signed by him which pertain to the alleged Overarching JCE and alleged Srebrenica JCE is not obtainable through other means. This is particularly so given that Krstić, who was Andrić's predecessor as Chief of Staff of the Drina Corps, refused to testify in this case after having been subpoenaed and is therefore being prosecuted for contempt of the Tribunal.³³

²⁹ P3055 (Order of Birač Brigade, 28 May 1992).

³⁰ P3240 (Order of Birač Brigade, 31 May 1992).

³¹ See e.g., Martin Bell, T. 9937–9938 (15 December 2010); Reynaud Theunens, T. 17133–17134 (21 July 2011); Savo Čeliković, T. 33562–33563, 33569 (13 February 2013); Milenko Stanić, T. 34022–34024 (19 February 2013).

³² Motion, para. 13 and Annex B.

³³ See *In the Contempt Case of Radislav Krstić*, Case No. IT-95-5/18-R77.3, Order in Lieu of Indictment, 27 March 2013.

16. Based on 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 Andrić on 19 July 2013. Given that the reason put forth by Andrić for refusing to testify was his fear of self-incrimination,³⁴ the Chamber reminds him that as a witness before the Tribunal he will be afforded the protection against self-incrimination found under Rule 90(E) of the Rules which is designed to allow a witness to testify in another trial without the fear that his testimony will be used against him in a subsequent proceeding.³⁵

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 this Decision, the Subpoena, and the Order to the Government of the Republic of Serbia relating to this matter are transmitted immediately to the Government of the Republic of Serbia; and
- b. **REQUESTS** the Victims and Witnesses Section of the Tribunal to provide any necessary assistance in the implementation of this Decision.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-eighth day of May 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁴ Motion, Annex A.

³⁵ Decision on Accused's Motion to Subpoena Radivoje Miletić, 9 May 2013, para. 16.