



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: 18 January 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: 18 January 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA DRAGOŠ MILANKOVIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

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 to Dragoš Milanković” filed on 13 December 2012 (“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 Dragoš Milanković to appear for testimony as a defence witness on 25 February 2013.¹

2. The Accused argues that he made reasonable efforts to obtain the voluntary co-operation of Milanković but that he was ultimately unsuccessful.² He submits that Milanković initially declined to be interviewed and to testify and that, when contacted again and advised that a subpoena would be requested should he be unwilling to testify voluntarily, he again refused to be interviewed or to testify.³

3. The Accused contends that there are reasonable grounds to believe that Milanković has information which can materially assist his case.⁴ He argues that as former commander of the armoured battalion in the 1st Sarajevo Brigade of the Sarajevo Romanija Corps (“SRK”),⁵ Milanković would testify that his battalion, which had a zone of responsibility that included the Dobrinja area, did not fire at civilians, that they had orders not to do so, and that they “never engaged in indiscriminate or disproportionate shelling”.⁶ In the Accused’s submission, Milanković can testify about Scheduled Incidents G4, G5, and G7 and explain what legitimate military targets existed in the directions in which shells were fired by his battalion.⁷

4. The Accused submits that the information sought is relevant to establish that the VRS and its component units, including Milanković’s battalion, did not engage in indiscriminate or disproportionate shelling and that Scheduled Incidents G4, G5, and G7 were not unlawful attacks on civilians.⁸ He further contends that the information is necessary for his case as

¹ Motion, paras. 1, 10.

² Motion, para. 4.

³ Motion, para. 4.

⁴ Motion, paras. 5, 9.

⁵ Motion, paras. 1, 5.

⁶ Motion, paras. 5–6.

⁷ Motion, para. 6.

⁸ Motion, para. 7.

Milanković is the sole witness who can testify to the reason for shelling in the zone of his battalion's responsibility and particularly in the Dobrinja area.⁹

5. The Accused requests that the Motion be served upon the Government of Bosnia and Herzegovina ("BiH") and Milanković and that both be invited to respond to the Motion if they so wish.¹⁰ He further submits that the BiH Government be requested to serve the subpoena on Milanković.¹¹

6. On 13 December 2012, the Office of the Prosecution ("Prosecution") informed the Chamber by e-mail that it did not wish to respond to the Motion.

II. Applicable Law

7. 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 having 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.¹²

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 statements the witness has made to the Prosecution or to others in relation to the events.¹³

9. 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.¹⁴ Finally, the applicant must show that he has made reasonable

⁹ Motion, para. 8.

¹⁰ Motion, para. 12.

¹¹ Motion, para. 11.

¹² *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 ("*Halilović Decision*"), para. 6; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić Decision*"), para. 10 (citations omitted); *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.

¹³ *Halilović Decision*, para. 6; *Krstić Decision*, para. 11; *Milošević Decision*, para. 40.

¹⁴ *Halilović Decision*, para. 7; *Milošević Decision*, para. 41.

attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.¹⁵

10. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.¹⁶ 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.¹⁷ In essence, a subpoena should be considered a method of last resort.¹⁸

III. Discussion

11. The Chamber considers that it has sufficient information to decide upon the Motion without hearing from Milanković or the BiH Government.

12. Turning to the merits of the Motion, the Chamber first finds that based on the Accused's submission, he has made reasonable efforts to secure Milanković's voluntary co-operation in this specific instance. The Chamber re-emphasises, however, that the Accused should provide it with the underlying documents to support his contention.¹⁹ As the Chamber stated during the proceedings on 15 January 2013, in the absence of the necessary supporting material, it might be constrained not to entertain future requests for Subpoena.²⁰

13. As noted above, in order to meet the legitimate forensic purpose 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. The Chamber notes that Milanković's anticipated evidence is pertinent to Scheduled Incidents G4, G5, and G7, which are alleged to have taken place in the Dobrinja area on 1 June 1993, 12 July 1993, and 4 February 1994, respectively.²¹ In the Third Amended Indictment, the Prosecution charges the Accused with being a participant in the joint criminal

¹⁵ *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.

¹⁶ *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.

¹⁷ *Halilović* Decision, paras. 6, 10.

¹⁸ 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".

¹⁹ See Decision on Accused's Motion to Subpoena Radislav Krstić, confidential, 23 October 2012, para. 11.

²⁰ T. 31845 (15 January 2013).

²¹ Third Amended Indictment ("Indictment"), Schedule G, pp. 27–28.

enterprise to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling,²² as well as with command responsibility under Article 7(3) for these crimes.²³ Moreover, according to the Indictment, those who allegedly committed the crimes include members of the VRS, “in particular the Sarajevo Romanija Corps” and “members of other elements of the Serb Forces operating in or with responsibility over the Sarajevo area”.²⁴ Since the Dobrinja area in which Scheduled Incidents G4, G5, and G7 allegedly occurred was in the zone of responsibility of Milanković’s battalion of the 1st Sarajevo Brigade of the SRK, the proposed evidence that his battalion did not engage in indiscriminate or disproportionate shelling is indeed relevant to his case. The Chamber therefore finds that the information sought from Milanković pertains to clearly identified issues relevant to the Accused’s case and will be of material assistance to the Accused.

14. Yet, the Chamber recalls that even if it is satisfied that the legitimate purpose requirement has been met, the issuance of a subpoena may be inappropriate if the information sought is obtainable through other means. Given that there must have been other members in Milanković’s battalion who were operating in the relevant zone of responsibility at the relevant time, the Chamber is not persuaded that the relevant information is obtainable only through Milanković and considers that the Accused, before filing the Motion, should have investigated further whether any of these individuals could provide comparable information about the shellings that allegedly took place in the zone of responsibility of Milanković’s battalion. As a result, the Chamber finds that the information sought from Milanković is obtainable through other means.

15. Accordingly, the Chamber finds that the requirements for the issuance of a subpoena have not been met in this specific case.

²² Indictment, paras. 8, 15–19, 76–79.

²³ Indictment, para. 76.

²⁴ Indictment, para. 18. *See also* Indictment, para. 81.

IV. Disposition

16. For the reasons outlined above, the Chamber, pursuant to Rule 54 of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this eighteenth day of January 2013
At The Hague
The Netherlands

[Seal of the Tribunal]