



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: 27 August 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: 27 August 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA JOHN ZAMETICA

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

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: John Zametica”, filed on 2 July 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 John Zametica to testify in his case on 27 August 2013.¹ The Accused submits that Zametica provided his defence team with a signed witness statement on 17 June 2013, but later stated that he was unwilling to testify.² Despite attempts made by the Accused and his defence team to persuade Zametica to testify, he informed the Tribunal’s Victims and Witnesses Section (“VWS”) that he would not travel to The Hague to testify in this case.³ The Accused appends the correspondence between his legal adviser and Zametica in which Zametica expressed his concerns about the way he was treated by the defence team.⁴ In the last and undated email sent to the Accused’s legal adviser, Zametica indicates that there were problems with his witness statement which were not corrected by the defence team.⁵ Accordingly, he demands that the Accused withdraw his statement and that he will not appear as a witness in this case.⁶ The Accused argues that he has made reasonable efforts to obtain the voluntary co-operation of Zametica but that these efforts have not been successful.⁷

2. The Accused contends that there are reasonable grounds to believe that Zametica has information which is relevant to his case and may materially assist him in his defence.⁸ With respect to relevance, the Accused submits that Zametica has information directly relevant to his *mens rea* for the crimes charged in Counts 2 and 9 through 11 of the Third Amended Indictment (“Indictment”).⁹ The Accused submits that Zametica, as his adviser from February 1994 until the end of the conflict, had close contact with him and will testify about three issues, namely:

- (i) despite his frequent meetings with [the Accused] during the period after the fall of Srebrenica, there was no information that prisoners from Srebrenica had been executed; (ii)

¹ Motion, paras. 1, 19.

² Motion, para. 4.

³ Motion, para. 5.

⁴ Motion, Annex A, p. 6.

⁵ Motion, Annex A, pp. 6, 8.

⁶ Motion, Annex A, p. 8.

⁷ Motion, paras. 5–6.

⁸ Motion, paras. 7, 16.

⁹ Motion, para. 9.

the [Army of the Republika Srpska] informed [the Accused] that it had not fired the shell that landed on the Markale market on 5 February 1994; and (iii) there was never any intention to threaten UN personnel once they had been detained in the wake of the NATO airstrikes of 25-26 May 1995.¹⁰

3. With regard to necessity, the Accused submits that the information from Zametica is necessary to his defence because Zametica is in a unique position to “know the thinking and knowledge” of the Accused and his prospective testimony will go to points which are central to the Accused’s defence.¹¹ Furthermore, the Accused argues that due to his prior position, Zametica is “more authoritative” than other witnesses who have testified that the Accused did not have knowledge about the “killings of prisoners from Srebrenica” and he is the only witness who will testify about the Accused’s “lack of intention to threaten UN personnel who were detained, as he was closely involved in the matter”.¹²

4. On 2 July 2013, the Prosecution informed the Chamber *via* email that it would not respond to the Motion.

5. On 2 August 2013, the Chamber issued the “Decision on Accused’s Motions for Severance of Count 1 and Suspension of Defence case”, whereby, *inter alia*, it ordered the suspension of hearings in this case until 28 October 2013.¹³ Following this, on 7 August 2013, the Accused filed the “Submission on Scheduling of Defence Witnesses” (“Accused Submission”), in which he requests that should the Chamber grant the Motion, the testimony of Zametica be scheduled for 29 October 2013.¹⁴

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

¹⁰ Motion, para. 8.

¹¹ Motion, para. 17.

¹² Motion, para. 17.

¹³ Decision on Accused’s Motions for Severance of Count 1 and Suspension of Defence case, 2 August 2013, para. 25.

¹⁴ Accused Submission, para. 6.

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

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.¹⁶

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.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

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.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

III. Discussion

10. The Chamber first notes that the Accused's efforts to persuade Zametica to testify in this case have produced no results other than his persistent refusal.²² The Chamber is satisfied that the Accused has made reasonable efforts to secure Zametica's voluntary co-operation but has been unsuccessful.

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 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.

11. As noted above, in order to meet the legitimate forensic purpose 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 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. Having assessed the expected scope of Zametica'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. Zametica, as former adviser to the Accused in the Presidency as of 6 February 1994, is expected to testify about his contacts with the Accused, and in particular that the Accused was not informed about the killings of the prisoners from Srebrenica, that the VRS informed the Accused that it had not fired the shell on Markale market on 5 February 1994, and that the Accused had no intention to threaten UN personnel who were detained following the NATO air strikes of 25 and 26 May 1995.²³ These issues clearly pertain to the Accused's alleged responsibility for crimes committed pursuant to three joint criminal enterprises as charged in the Indictment.²⁴ In this light, the Chamber is satisfied that Zametica'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.

12. The Chamber is also satisfied, given the nature and scope of Zametica's anticipated evidence, that this particular evidence is not obtainable through other means. As the Accused's adviser and spokesman at the time relevant to the Indictment, Zametica was present at most meetings attended by the Accused and drafted the majority of the Accused's correspondence.²⁵ Therefore, Zametica is uniquely situated to give testimony regarding the Accused's state of mind and knowledge in relation to three issues, namely the killing of prisoners in Srebrenica in July 1995; the shelling of Markale market on 5 February 1994; and the detention of UN personnel in May and June 1995.

13. Based on all of the above reasons, the Chamber is satisfied that the Accused has met the requirements for the issuance of a subpoena to Zametica pursuant to Rule 54 of the Rules.

14. Finally, the Chamber is of the view that given Zametica's concerns with the accuracy of certain information contained in his witness statement prepared by the defence team for this case

²³ Motion, para. 8.

²⁴ Indictment, paras. 15–31, 41–87.

²⁵ See Defence Further Revised Rule 65 *ter* Witness List, 26 February 2013, p. 127.

and the inability of the defence team to address Zametica's concerns,²⁶ it is in the interests of justice to receive Zametica's evidence *viva voce*.

IV. Disposition

15. For the reasons outlined above, the Chamber, pursuant to Article 29 of the Statute of the Tribunal and Rule 54 of the Rules, hereby

- a. **GRANTS** the Motion;
- b. **ORDERS** that Zametica shall testify *viva voce*;
- c. **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 Austria relating to this matter are transmitted immediately to the Government of Austria; and
- d. **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-seventh day of August 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ See Motion, Annex A.