



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 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: 28 January 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA MILOŠ TOMOVIĆ

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 Miloš Tomović” filed on 17 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 Miloš Tomović 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 Tomović but was ultimately unsuccessful. He submits that although Tomović provided a statement to an investigator in the Accused’s defence team, when contacted to complete the forms of travel to The Hague, Tomović stated emphatically that he had decided not to testify. When advised that a subpoena would be requested should he be unwilling to testify voluntarily, Tomović maintained his refusal.²

3. The Accused contends that there are reasonable grounds to believe that Tomović has information which can materially assist his case.³ He argues that as former commander of the 1st battalion of the VRS in Foča,⁴ Tomović’s anticipated evidence challenges the allegations that Bosnian Muslims were expelled from Foča and that there was a plan to expel or destroy them.⁵ Furthermore, the Accused submits that the anticipated evidence describes the military situation in Foča, including the facts that the VRS did not take any offensive actions and that Bosnian Muslims were firing from the Aladža mosque, which is listed in Schedule D10 of the Third Amended Indictment (“Indictment”).⁶

4. The Accused submits that the information is necessary for his case as Tomović is the sole witness whom he has identified who can testify to the events in Foča and particularly the shooting from the mosque.⁷

¹ Motion, paras. 1, 8.

² Motion, para. 4.

³ Motion, paras. 5, 7.

⁴ Motion, para. 1.

⁵ Motion, para. 5.

⁶ Motion, para. 5. *See also* 65 *ter* number 1D26391 (Statement of Miloš Tomović), paras. 12, 25.

⁷ Motion, para. 6.

5. The Accused requests that the Motion be served upon the Government of Bosnia and Herzegovina (“BiH”) and Tomović, and that both be invited to respond to the Motion if they so wish.⁸ He further submits that the BiH Government be requested to serve the subpoena on Tomović.⁹

6. On 7 January 2013, 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.¹⁰

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.¹¹

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.¹² 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.¹³

⁸ Motion, para. 10.

⁹ Motion, para. 9.

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. 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.

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

¹² *Halilović Decision*, para. 7; *Milošević Decision*, para. 41.

¹³ *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.

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.¹⁴ 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.¹⁵ In essence, a subpoena should be considered a method of last resort.¹⁶

III. Discussion

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

12. Turning to the merits of the Motion, the Chamber first finds that the Accused has made reasonable efforts to secure Tomović's voluntary co-operation.¹⁷

13. As stated 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 considers that Tomović's anticipated evidence is pertinent to the alleged Joint Criminal Enterprise ("JCE") to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory, including Foča municipality, and to the destruction of Aladža mosque as alleged in Schedule D10 of the Indictment.¹⁸ In the Indictment, the Prosecution charges the Accused with being a participant in that JCE as well as with command responsibility under Article 7(3) of the Statute of the Tribunal for these crimes.¹⁹ Moreover, according to the Indictment, those who allegedly committed the crimes include members of the VRS.²⁰ The Chamber therefore finds that the information sought from Tomović pertains to clearly identified issues relevant to the Accused's case and will be of material assistance to the Accused.

¹⁴ *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.

¹⁵ *Halilović* Decision, paras. 6, 10.

¹⁶ *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".

¹⁷ *See* Motion, para. 4.

¹⁸ Indictment, paras. 9–14, 48, Schedule D, p. 17.

¹⁹ Indictment, paras. 9–14, 32–35, 50.

²⁰ Indictment, para. 12.

14. The Chamber recalls, however, 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. The Chamber notes that the proposed statement of Tomović indicates he was appointed commander of the 1st Battalion in Foča in late July 1992 and it had around 520 soldiers at the time.²¹ While in the Motion the Accused argues that Tomović is the only witness he has identified who can testify to military events in Foča, he does not explain why that is the case, particularly given the large size of the 1st Battalion. Moreover, the Motion fails to show that he has exhausted all other means of obtaining the evidence concerning the takeover of Foča municipality and the destruction of the Aladža mosque. Accordingly, the Chamber is not persuaded that the proposed evidence is not obtainable through other means and considers that the Accused, before filing the Motion, should have investigated further whether any of the former members of Tomović's Battalion or of the VRS deployed in the relevant area could provide comparable information. As a result, the Chamber finds that this particular requirement for the issuance of a subpoena has not been met in this specific case.

IV. Disposition

15. 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 twenty-eighth day of January 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

²¹ 65 *ter* number 1D26391 (Statement of Miloš Tomović), para. 18.