



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 LJUBIŠA BEARA

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Counsel for Mr. Ljubiša Beara

Mr. John Ostojić

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 Ljubiša Beara”, filed on 3 April 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue a subpoena, pursuant to Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), compelling Ljubiša Beara, former Chief of the Security Administration of the Main Staff of the Army of Republika Srpska (“VRS”), to testify as a witness in this case on 9 May 2013.¹ The Accused claims that he has met the requirements for the issuance of a subpoena pursuant to Rule 54 in the present case.²

2. The Accused submits that he has attempted to obtain Beara’s voluntary co-operation without success,³ and explains that Beara first refused to meet with him to discuss his testimony and, subsequently, refused to testify.⁴ In support, the Accused attaches copy of email correspondence between the Accused’s legal adviser and Beara’s counsel.⁵

3. In relation to relevance, the Accused contends that there are reasonable grounds to believe that Beara has relevant information which can materially assist the Accused’s case.⁶ According to the Accused, Beara is expected to testify that 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”).⁷ The Accused adds that Beara is also expected to testify that he never put anything in writing about the execution of prisoners in Srebrenica, which is relevant to rebut the claim of the Office of the Prosecutor (“Prosecution”) that the Accused had knowledge of the execution of prisoners and must have learned of such executions from reports of the various reporting sources, including the VRS Security Administration, headed by Beara.⁸

¹ Motion, paras. 1, 10, 15. *See also* Motion, paras. 2–3.

² *See* Motion, paras. 3, 5, 9, 12.

³ Motion, para. 5.

⁴ Motion, para. 4.

⁵ Annex A.

⁶ Motion, paras. 6, 9.

⁷ Motion, para. 7.

⁸ Motion, paras. 8, 10.

4. In relation to necessity, the Accused explains that Beara was convicted by the Trial Chamber in the case of *Prosecutor v. Popović et al.* (“*Popović et al.*”) which sentenced him to life imprisonment for being “intimately involved” in the execution of prisoners from Srebrenica.⁹ The Accused argues that Beara’s prospective testimony is necessary to establish that Beara never informed the Accused, orally or in writing, of the execution of prisoners from Srebrenica, and to rebut the Prosecution’s claim that the Accused had knowledge of such executions.¹⁰

5. The Accused adds that he “is willing to keep the focus of his examination of Beara as narrow as possible”.¹¹ Finally, the Accused notes that, given that Beara has appealed the *Popović et al.* Trial Judgement, and that the appeal process will not be completed before the Accused’s defence case is concluded, Beara should be compelled by the Chamber to testify while being provided with the protection against self-incrimination contained in Rule 90(E) of the Rules.¹²

6. On 8 April 2013, the Prosecution notified the Chamber *via* 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 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.¹³

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

⁹ Motion, paras. 10, 13.

¹⁰ Motion, paras. 10–11.

¹¹ Motion, para. 14.

¹² Motion, para. 13.

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.

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

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.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

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.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

11. As a preliminary matter, the Chamber notes that the Accused's efforts to meet with Beara have produced no results other than Beara refusing to testify as a witness in this case.²⁰ The Chamber is therefore satisfied that the Accused has made reasonable efforts to obtain Beara's voluntary co-operation to testify as a witness in this case but has been unsuccessful.

12. 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. The Chamber notes that Beara's prospective testimony is related to events in Srebrenica in 1995, namely, that he never informed the Accused orally or in writing of the killing of prisoners in

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, 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".

²⁰ See Motion, para. 4; Annex A.

Srebrenica, and that he never put anything in writing about such killings.²¹ In that regard, the Chamber recalls that the Accused is charged in the Indictment with being a participant in a joint criminal enterprise (“JCE”), the objective of which was to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the remainder of the population.²² The Chamber thus considers that Beara’s prospective testimony relates to live issues in this trial, namely the commission of crimes in Srebrenica and the Accused’s responsibility for such crimes, including his knowledge thereof, pursuant to the alleged JCE. Accordingly, the Chamber finds that the information sought from Beara pertains to clearly identified issues relevant to the Accused’s case and is satisfied that there is a good chance that Beara’s evidence will materially assist the Accused in the presentation of his case.

13. 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. The Chamber notes that, according to the Motion, Beara’s prospective testimony that he never informed the Accused of the killing of prisoners in Srebrenica, and that he never put anything in writing about such killings, would serve to rebut the Prosecution’s claims that the Accused “must have learned of the executions from reports from various reporting sources”, such as the VRS Security Administration,²³ and had therefore knowledge of the commission of such crimes.²⁴

14. The Chamber received evidence that, in 1995 the VRS Main Staff Sector for Intelligence and Security Affairs, which was headed by Zdravko Tolimir, was divided into two administrations: the Intelligence Administration, headed by Colonel Petar Salapura, and the Security Administration, headed by Beara.²⁵ The Chamber notes that Salapura is expected to testify as a Defence witness²⁶ and that part of his expected testimony is that he never informed the Accused of the execution of prisoners in Srebrenica in 1995.²⁷ Nonetheless, the Chamber has heard a vast amount of evidence which puts Beara in the centre of the events in Srebrenica in July 1995, as being involved in the organisation of the transportation, killing, and burial of

²¹ Motion, paras. 7–8.

²² Indictment, paras. 20–24.

²³ Motion, paras. 7–8.

²⁴ Motion, para. 10.

²⁵ See Ljubomir Obradović, T. 25121–25122 (23 February 2012); P4444 (Transcript from *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2T), T. 11937, 11949, 11961–11962; Momir Nikolić, T. 4569–24570 (13 February 2012); Petar Škrbić, P4523 (Transcript from *Prosecutor v. Popović et al.*, Case No. IT-05-88-T), T. 15499; KDZ122, T. 26109 (12 March 2012) (closed session). See also P4446 (Organisational Chart of the VRS Main Staff Structure for July 1995).

²⁶ See Defence Submission of Order of Witnesses for June and July 2013, 25 April 2013, Confidential Annex, p. 4.

²⁷ See Defence Further Revised Rule 65 *ter* Witness List”, dated 26 February 2013, p. 91. See also 65 *ter* 1D7726 (Witness Statement of Petar Salapura, undated).

prisoners, and being physically present in Zvornik from 13 to 16 July.²⁸ Consequently, the Chamber considers that Beara is uniquely positioned to give evidence regarding the information passed to the Accused, or lack thereof, in relation to the events in Srebrenica in July 1995, in particular the alleged execution of prisoners.

15. Accordingly, the Chamber finds that the requirements for the issuance of a subpoena for Beara to testify as a witness in this case have been met in this case. Since the initial date referred to by the Accused expires today, the Chamber instructs the Accused to immediately identify a suitable date for Beara's testimony which will be communicated to him by the Registry.

16. The Chamber recalls once again 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 Statute of the Tribunal ("Statute") "not to be compelled to testify against himself or to confess guilt",²⁹ 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 a witness to answer a question or not to do so.³⁰ In exercising its discretion in this particular instance, the Chamber will be cognisant of the fact that Beara is currently involved in appeals proceedings before the Appeals Chamber and will ensure that Beara's rights are safeguarded.

²⁸ See *inter alia* Momir Nikolić, T. 24668–24669, 24676–24678 (14 February 2012), T. 24876–24879 (16 February 2012); KDZ446, P29 (Transcript from *Prosecutor v. S. Milošević*, Case No. IT-02-54), T. 21041, 21092; KDZ320, P4990 (Transcript from *Prosecutor v. Popović*, Case No. IT-05-88), T. 7941–7942; KDZ107, P345 (Transcript from *Prosecutor v. Popović*, Case No. IT-05-88), T. 9368–9370, 9387. See also KDZ122, T. 26169, 26171–26172 (13 March 2012) (closed session).

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

³⁰ *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).

IV. Disposition

17. For the reasons outlined above, the Chamber, pursuant to Article 29 of the Statute 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 Beara 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.

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]