



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 ZDRAVKO TOLIMIR

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Zdravko Tolimir

Mr. Aleksandar Gajić

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 General Zdravko Tolimir”, filed on 12 March 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 Zdravko Tolimir to testify in this case on 7 May 2013.¹ The Accused submits that he has met the requirements for the issuance of a subpoena pursuant to Rule 54 of the Rules.²

2. The Accused submits that on 19 December 2012, he made a written request to the Office of Legal Aid and Detention (“OLAD”) seeking to interview Tolimir, who is currently detained at the United Nations Detention Unit in The Hague (“UNDU”).³ Tolimir declined to be interviewed and in a subsequent conversation between Tolimir and the Accused at the UNDU, Tolimir informed the Accused that he was unwilling to testify as a defence witness in his case.⁴ The Accused submits that his legal adviser then attempted to confirm Tolimir’s position in writing through correspondence with Tolimir’s legal adviser but obtained no response.⁵ Therefore, the Accused submits that he has made efforts to obtain Tolimir’s voluntary co-operation and has been unsuccessful.⁶

3. With respect to relevance, the Accused submits that Tolimir, a former Assistant Commander in the Army of Republika Srpska (“VRS”) and the Chief of the Sector for Intelligence and Security Affairs in the VRS Main Staff, 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 In addition, the Accused submits that Tolimir will testify about a “telegram he sent on 9 July 1995” in which the Accused ordered the

¹ Motion, paras. 1, 20. The Accused has Tolimir listed as a witness in Confidential Annex G of his “Defence Further Revised Rule 65 *ter* Witness List” filed on 26 February 2013.

² See Motion, paras. 8–9, 12, 16–17.

³ Motion, para. 4, Annex A.

⁴ Motion, paras. 5–6.

⁵ Motion, para. 7, Annex B.

⁶ Motion, para. 8.

⁷ Motion, para. 10.

VRS to continue the operations for the takeover of Srebrenica while stipulating that UNPROFOR personnel should be protected and that Bosnian Muslim civilians and prisoners of war must be treated in accordance with the Geneva Conventions of 1949.⁸ The Accused submits that Tolimir will testify that there was “no plan or expectation that Bosnian Muslims would be forcibly transferred or harmed in any way” which he submits is relevant to his “*mens rea* for genocide and his overall responsibility for the Srebrenica events”.⁹ Therefore, the Accused argues that there are reasonable grounds to believe that Tolimir has information which can materially assist his case.¹⁰

4. With respect to necessity, the Accused submits that Tolimir’s prospective testimony is necessary for his defence to rebut the claims by the Office of the Prosecutor (“Prosecution”) that the Accused “had numerous sources from which he could have learned of the execution of prisoners from Srebrenica”, including Tolimir, who could speak to the nature and content of their oral and written communication and contacts.¹¹ In addition, the Accused believes that Tolimir can rebut part of the evidence of the Prosecution’s expert witness Richard Butler that the “Republican Communications Centre log for 13-17 July 1995 indicates that every day the VRS security organs sent reports to the [Accused]” but that none of these reports were ever located.¹² With respect to material assistance, the Accused argues that Tolimir’s testimony will assist him since Tolimir maintained throughout his own trial that he had no knowledge of the killing of prisoners from Srebrenica.¹³

5. Finally, the Accused notes that while Tolimir has been convicted by a Trial Chamber and sentenced to life imprisonment, he has appealed that judgement and he may decline to answer specific questions on the basis of his privilege against self-incrimination. Accordingly, the Accused requests that the Chamber compel Tolimir to answer such questions provided he is granted the protection against self-incrimination afforded by Rule 90(E) of the Rules.¹⁴

6. On 12 March 2013, the Prosecution informed the Chamber *via* e-mail that it did not wish to respond to the Motion. However, on 22 March 2013, the Prosecution filed its “Submission Regarding Motion for Subpoena to General Zdravko Tolimir” (“Submission”), stating that it takes no position on the relief requested in the Motion but that there were “additional considerations not

⁸ Motion, para. 11, referring to P2276 (VRS Main Staff Order, 9 July 1995).

⁹ Motion, para. 11.

¹⁰ Motion, para. 12.

¹¹ Motion, paras. 13, 15.

¹² Motion, paras. 13–14, referring to entries contained in P2989 (Record of coded telegrams of the RS Republican Communications Centre, 1995).

¹³ Motion, para. 16.

¹⁴ Motion, para. 18.

contained in the Motion which may be relevant to the Trial Chamber's analysis".¹⁵ In the confidential appendix attached to the Submission, the Prosecution gives additional reasons that it suggests the Chamber should take into consideration when ruling on the Motion.¹⁶

7. On 13 March 2013, the Chamber ordered the Accused's legal adviser to contact Tolimir, through his legal adviser, one last time to ascertain whether it was clear that Tolimir did not want to testify.¹⁷ On 19 March 2013, the Accused's legal adviser contacted Tolimir's legal adviser *via* e-mail who stated that he would file a written response by 27 or 28 March 2013.

8. On 8 April 2013, Tolimir filed a "Motion to the Trial Chamber to Admit a Response and Response to Karadžić's Motion for Subpoena" ("Tolimir Response"), requesting leave to respond to the Motion and responding to the Motion therein.¹⁸ Tolimir requests that the Chamber deny the Motion on the basis that his status as an accused before the Tribunal puts him in a situation where he may be compelled to answer questions, which is contrary to his right against self-incrimination and the presumption of innocence.¹⁹ He argues that he has the right not to answer any questions about the facts of his own case; however, the topics mentioned in the Motion relate directly to his case and are therefore "covered" by his right to refuse to answer such questions.²⁰ In response to the Accused's submission that Rule 90(E) covers Tolimir's right against self-incrimination, Tolimir responds that the "warning under Rule 90(E) *itself* represents a violation of the presumption of innocence, and [he] would be compelled to testify on issues which directly relate to his own case and regarding which he has an absolute right to remain silent".²¹ With respect to the issue of whether Tolimir informed the Accused about prisoners from Srebrenica being killed, Tolimir submits that he already stated in his closing arguments in his own case that he had no knowledge of such killings and did not receive any orders from "either Mladić or Karadžić with regard to the execution of prisoners of war".²² With respect to the communications between 14 and 17 July 1995, Tolimir argues that he was in Žepa during that time and the information is obtainable through other means.²³

¹⁵ Submission, para. 3.

¹⁶ Submission, Confidential Appendix A, paras. 1–3.

¹⁷ T. 35554–35555 (19 March 2013).

¹⁸ Tolimir Response, para. 2. On 8 April 2013, both the Accused's legal adviser and the Prosecution informed the Chamber that they did not object to Tolimir's request to respond to the Motion, T. 36793, 36827–36828 (8 April 2013).

¹⁹ Tolimir Response, paras. 8–16. Tolimir filed his Notice of Appeal on 11 March 2013 which, he argues, grants him the status of an accused before the Tribunal, *see ibid.* para. 8.

²⁰ Tolimir Response, paras. 11–12.

²¹ Tolimir Response, para. 13–15 [emphasis added].

²² Tolimir Response, paras. 17–18, fn. 6.

²³ Tolimir Response, para. 20.

II. Applicable Law

9. 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.²⁴

10. 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.²⁵

11. 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.²⁶ 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.²⁷

12. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.²⁸ 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.²⁹ In essence, a subpoena should be considered a method of last resort.³⁰

²⁴ *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.

²⁵ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

²⁶ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

²⁷ *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.

²⁸ *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.

²⁹ *Halilović* Decision, paras. 6, 10.

³⁰ 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.

13. Rule 90(E) of the Rules states,

A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony.

III. Discussion

14. As a preliminary matter, the Chamber grants Tolimir's request for leave to respond to the Motion and will thus consider the submissions in the Tolimir Response.

15. The Chamber notes that the Accused's efforts to speak to Tolimir directly and through Tolimir's legal adviser have produced no results other than Tolimir refusing to testify in this case.³¹ Furthermore, Tolimir maintains that he "is not obliged to testify in his own or any other case before the Tribunal".³² Accordingly, the Chamber is satisfied that the Accused has made reasonable efforts to obtain the voluntary co-operation of Tolimir and has been unsuccessful.

16. 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 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.³³ The Accused is charged 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.³⁴ The Prosecution alleges that the objective of this JCE amounted to or included the commission of the crime of genocide and that the Accused shared the intent for this crime with other members of the JCE.³⁵ The substance of Tolimir's proposed testimony pertains to the communication between him and the Accused during the operative time period, namely July 1995, and whether the Accused had knowledge of the crimes that were committed in Srebrenica during this time. Accordingly, Chamber finds that the information sought from Tolimir pertains to clearly identified issues that are relevant to the Accused's case.

"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".

³¹ Motion, paras. 4–7, Annexes A and B.

³² Tolimir Response, para. 28.

³³ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. See also *Milošević* Decision, para. 38.

³⁴ Third Amended Indictment ("Indictment"), para. 20.

³⁵ Indictment, paras. 20–21.

17. As the Chamber has previously stated, the information sought through the issuance of a subpoena must be of “*material* assistance” rather than merely helpful or of some assistance.³⁶ 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.³⁷ The Accused states that he will focus his direct examination of Tolimir as narrowly as possible and identifies two documents he wishes to discuss with Tolimir.³⁸ The first is a telegram admitted into evidence in this case which Tolimir sent to the Accused, Radislav Krstić, and Milan Gvero at the Drina Corps Forward Command Post on 9 July 1995 (“9 July Telegram”), stating that in the follow-up to the combat operations in Srebrenica, the Accused ordered that all combat units in and around Srebrenica grant the “full protection of UNPROFOR members and the Muslim civilian population”, refrain from destroying civilian targets, and to treat the civilian population and war prisoners in accordance with the Geneva Conventions of 1949.³⁹ The Accused argues that Tolimir’s testimony will establish that there was “no plan or expectation that Bosnian Muslims would be forcibly transferred or harmed in any way” and this is directly relevant to the Accused’s *mens rea* for genocide.⁴⁰ The Chamber considers that as the author of the 9 July Telegram, Tolimir will be able to provide evidence as to its contents and context. Therefore, the Chamber finds that this information will materially assist the Accused.

18. However, as stated above, even if the legitimate purpose requirement has been met, the issuance of a subpoena may be inappropriate if the information is obtainable through other means. The Chamber notes that both Prosecution and Defence witnesses have testified that the Accused ordered the protection of civilians and UNPROFOR personnel and to comply with the Geneva Conventions of 1949 and that on its face, the 9 July Telegram which has been admitted into evidence contains this information.⁴¹ In addition, the Chamber has documentary evidence showing that Tolimir conveyed the order from the Accused contained in the 9 July Telegram to protect UNPROFOR personnel and the civilian population.⁴² Accordingly, the Chamber finds that the

³⁶ 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].

³⁷ See Papoulias Decision, para. 15; *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.

³⁸ Motion, para. 19.

³⁹ P2276 (VRS Main Staff Order, 9 July 1995).

⁴⁰ Motion, para. 11,

⁴¹ See e.g., Srđan Trifković, T. 33370 (6 February 2013), who confirmed that the information contained in the 9 July Telegram was consistent with the views expressed by the Accused for the need to protect civilians during a meeting on 13 July 1995. Ranko Vuković, the Chief of the Republican Communications Centre from 1992 until 1995, also testified the Accused emphasised the need to be aware of the laws of war and the Geneva Conventions of 1949, paying particular attention to those provisions on prisoners of war and the treatment of civilians. Ranko Vuković, T. 15139–15140 (21 June 2011).

⁴² See e.g., P5229 (Notes re telephone conversation between General Cornelis Nicolai and Tolimir, 9 July 1995), in a telephone conversation between Tolimir and General Nicolai of UNPROFOR on 9 July 1995, Tolimir “assured [Nicolai] that the UNPROFOR men would not be under threat”; P5128 (Notes on telephone conversation between General Nicolai and Tolimir, 9 July 1995), in a further telephone conversation between Tolimir and Nicolai also on

information relating to the 9 July Telegram and the Accused's order to protect civilians and UNPROFOR personnel has already been obtained through other means.

19. The second document the Accused wishes to discuss with Tolimir is an encrypted communications log book from the Republika Srpska Republican Communications Centre dated July 1995 ("Log Book").⁴³ The evidence before the Chamber indicates that the Log Book shows the communication flow between Tolimir and the Accused, among others, and that the latter was being informed from various channels, including Tolimir's sector, on a daily basis about the combat operations in Srebrenica, including between 14 and 17 July 1995.⁴⁴ Despite the Log Book showing that these reports existed, the Chamber heard evidence that the reports were never found.⁴⁵ The Accused states that Tolimir's testimony will confirm that Tolimir never informed him about the killing of prisoners from Srebrenica, either orally or in writing.⁴⁶ As stated previously, Tolimir was the Chief of the Sector for Intelligence and Security Affairs and as such he received and transmitted information between the VRS Main Staff and the operations in Srebrenica in July 1995. Tolimir is therefore uniquely situated to give information about the flow of communication between him and the Accused.⁴⁷ He can testify generally about the information he communicated to the Accused, either orally or in writing, and also specifically about the contents of the reports from 14 until 17 July 1995 that are recorded in the Log Book. Therefore, the Chamber finds that the testimony of Tolimir with respect to these reports will materially assist the Accused in his case.

20. Given the unique perspective of Tolimir's anticipated testimony in relation to the Log Book, the Chamber is satisfied that the information Tolimir may provide about these communications from 14 to 17 July 1995 is not obtainable through other means.

21. For the reasons stated above, the Chamber finds that the Accused has met the requirements for the issuance of a subpoena, pursuant to Rule 54 of the Rules, for the testimony of Tolimir. Since the initial date referred to by the Accused has expired, the Chamber instructs the Accused to

9 July 1995, Tolimir said he had passed on the message to his subordinate commanders and was informed that the VRS had no particular problems or conflicts with UNPROFOR or the civilian population in Srebrenica and that the UNPROFOR soldiers were being treated "correctly"; P5131 (Report of Drina Corps, 9 July 1995), a report sent from Tolimir to Radislav Krstić at the Drina Corps Forward Command Post on 9 July 1995 to "pay particular attention to protecting members of UNPROFOR and the civilian population".

⁴³ P2989 (Record of coded telegrams of the RS Republican Communications Centre, 1995).

⁴⁴ P2989 (Record of coded telegrams of the RS Republican Communications Centre, 1995); Richard Butler, T. 27612–27613 (18 April 2012); Christian Nielson, T. 16324–16328 (7 July 2011).

⁴⁵ Christian Nielsen, T. 16328 (7 July 2011); Richard Butler, T. 27613 (18 April 2012). The Prosecution made additional arguments as to the whereabouts of these reports. *See* Response, Confidential Appendix A.

⁴⁶ Motion, paras. 13–15.

⁴⁷ *See* P4446 (Organisational Chart of the VRS Main Staff Structure for July 1995).

immediately identify a suitable date for Tolimir's testimony which will be communicated to him by the Registry.

22. Lastly, with respect to Tolimir's argument that Rule 90(E) is in and of itself a violation of his right against self-incrimination, the Chamber finds that this argument is without merit. While an accused person cannot be compelled to testify in his own trial or compelled to answer questions by virtue of his fundamental right pursuant to Article 21(4)(g) of the Tribunal's Statute "not to be compelled to testify against himself or to confess guilt",⁴⁸ 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. Thus, contrary to Tolimir's submission, the very existence of Rule 90(E) protects his right against self-incrimination by limiting the use of potentially incriminating evidence so that this evidence, if given by Tolimir after having been compelled to do so by the Chamber during the course of his testimony in this case, may not be used against him in his own appeals proceeding.⁴⁹ Finally, 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.⁵⁰ In exercising its discretion in this particular instance, the Chamber will be cognisant of the fact that Tolimir is currently involved in appeals proceedings before the Appeals Chamber and will ensure that his rights are safeguarded.

⁴⁸ *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 17.

⁴⁹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Nateletić and Martinović, 5 September 2007, paras. 16–17; *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution's Motion to Admit into Evidence Transcripts of Vojislav Šešelj's Testimony Given in the *Milošević* Case, 30 October 2007, pp. 3–5, wherein the Trial Chamber admitted the transcripts of Vojislav Šešelj's testimony in the *Prosecutor v. Slobodan Milošević* case after having noted that Šešelj had testified voluntarily and was expressly informed that he was not obliged to answer any questions that might tend to incriminate him.

⁵⁰ *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

23. Accordingly, the Chamber, pursuant to Article 29 of the Statute and Rule 54 of the Rules, hereby

(A) **GRANTS** leave to file the Tolimir Response;

(B) **GRANTS** the Motion;

(C) **ORDERS** the Registry of the Tribunal to take the necessary steps to ensure that the Subpoena is served on Tolimir at the UNDU; 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 ninth day of May 2013
At The Hague
The Netherlands

[Seal of the Tribunal]