IT-95-5/18-PT
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UNITED
NATIONS

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-PT

Date: 8 July 2009

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Iain Bonomy, Presiding**
Judge Christoph Flügge
Judge Michèle Picard

Registrar: **Mr. John Hocking**

Decision of: **8 July 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION FOR SUBPOENA TO DOUGLAS LUTE AND JOHN FEELEY

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of the United States of America

via the Embassy of the United States of America to The Netherlands, The Hague

The Accused

Mr. Radovan Karadžić

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 Lt. General Douglas Lute and Col. John Feeley (Ret.)", filed on 17 June 2009 ("Motion") and hereby renders its decision thereon.

Background and submissions

1. In the Motion, the Accused requests the Trial Chamber to issue subpoenas requiring Lt. General Douglas Lute and Mr. John Feeley to be interviewed by a representative of the Accused's defence team. The two men are officials of the Government of the United States of America ("U.S. Government") and do not appear on the Rule 65 *ter* witness list filed by the Office of the Prosecutor ("Prosecution") on 18 May 2009.

2. The Accused argues that both men were present, as representatives of the United States of America ("U.S."), at the meeting held in Belgrade on 18 and 19 July 1996, when an agreement was negotiated by Richard Holbrooke and Slobodan Milošević, among others, that the Accused would withdraw from office in return for immunity from prosecution before the Tribunal ("Holbrooke Agreement"). The Accused has already interviewed three of the seven U.S. Government officials who were present at the meeting.[1] Having concluded these interviews, the Accused requested interviews with Lute and Feeley.

3. The U.S. Government officials who contacted Lute and Feeley following the Accused's request to interview them reported back to him that the two men have no knowledge of the Holbrooke Agreement being reached at the meeting in Belgrade, or elsewhere, and that notes from the meeting, if any were ever taken, either no longer exist or are no longer in their possession.[2] In subsequent correspondence between the Accused's legal associate and the U.S. Government, the former pursued his request for interviews. On 12 June 2009, the U.S. Government advised that it declined to make the two men available.[3]

4. On 17 June 2009, the Accused filed his Motion. He contends that Lute and Feeley have information which is directly relevant to his "Holbrooke Agreement Motion", filed on 25 May 2009 ("Holbrooke Motion"). The Accused believes that, despite the U.S. State Department's claim

[1] Holbrooke Agreement Motion, filed on 25 May 2009, Annexes W (Roberts Owen), X (Philip Goldberg), and AC (Lawrence Butler).
[2] Motion, Annex A, p. 2.
[3] Motion, Annex A, p. 2.

that they have no useful information, these men, who are non-State Department employees, might be more forthcoming with the information requested by him.[4] In addition, the Accused claims that an interview of these individuals is necessary to attempt to locate documents concerning the discussion at the meeting of 18 and 19 July 1996, or to establish the existence of a deliberate decision that no written record should be made of that meeting.[5] The Accused believes he has exhausted his ability to arrange interviews through informal means and therefore has no other option than to request to Chamber to issue subpoenas, requiring the two men to be interviewed by a representative of his defence team.

5. In the "Response to the Accused's Motion for Subpoena to Lt. General Douglas Lute and Col. John Feeley (Ret.)", filed on 26 June 2009 ("Response"), the U.S. Government argues that, since it communicated to the Accused's legal associate in writing on 12 June 2009 that the two men have no knowledge of any "immunity agreement", have no notes of the 1996 meeting, and that reports to Washington were delivered orally and via a 19 July 1996 reporting cable, the Accused has no reasonable grounds for believing that the two men are likely to provide material information that may assist him.[6] The Accused, according to the U.S. Government, has failed to establish that the information sought is necessary for the resolution of specific issues at trial. Additionally, in light of the interviews with other U.S. officials already conducted by the Accused's legal team, the U.S. Government holds that the subpoenas are not justified because the information sought is merely of a cumulative or corroborative nature.[7] Furthermore, it claims that there is no justification for the use of compulsive measures unless it is established that information concerning the alleged Holbrooke Agreement is necessary for the resolution of a specific issue at trial.[8]

6. The U.S. Government also submits that, because it has already provided the Accused with the information in writing he seeks about the meeting, the information sought by way of a subpoena is available through other means.[9] Additionally it contends that, unless and until the Trial Chamber determines that an evidentiary hearing on the alleged Holbrooke Agreement is warranted, it would be inappropriate to issue subpoenas to these two men.[10]

7. The Prosecution did not respond to the Motion.

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[4] Motion, para. 9.
[5] Motion, para. 11.
[6] Response, paras. 13-14.
[7] Response, para. 16.
[8] Response, para. 17.
[9] Response, para. 18.
[10] Response, para. 21.

Applicable law

8. The Appeals Chamber has held that, where a party wishes to question an employee of a state, as opposed to seeking documents from that state, a subpoena to the individual, as opposed to a binding order to the state, is the appropriate mechanism.[11] Where a prospective witness for any reason declines to be interviewed, and a party wishes to compel an unwilling person to submit to a pre-trial interview, it must seek the assistance of the Trial Chamber pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules"), rather than Rule 54 *bis*.[12]

9. Rule 54 provides that "a Trial Chamber may issue such [...] subpoenas [...] as may be necessary for the purpose of an investigation or the preparation or conduct of the trial." According to the Appeals Chamber, this includes "the authority to require a prospective witness to attend at a nominated place and time in order to be interviewed by the defence".[13]

10. In deciding whether the applicant has met the evidentiary threshold for the issuance of a subpoena, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of subpoena is necessary for the preparation of his case and whether this information is obtainable through other means.[14] As the Appeals Chamber has explained, a subpoena pursuant to Rule 54 would become "necessary" for the purposes of that Rule where a legitimate forensic purpose for having the interview [or testimony] 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.[15]

11. The Appeals Chamber has warned that 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] In addition, particular caution is needed where the party is seeking to interview a potential witness

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[11] *Prosecutor v. 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. 27.

[12] *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the other Party, 30 July 2003 ("*Mrkšić* Decision"), para. 15.

[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 Subpoenas, 21 June 2004 ("*Halilović* Decision"), para. 5.

[14] *Halilović* Decision, para. 7.

[15] *Krstić* Decision, para. 10 (citation omitted).

[16] *Krstić* Decision para. 6 (internal quotation marks omitted) (quoting *Prosecutor v. Brđanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("*Brđanin and Talić* Decision"), para. 31).

who has declined to be interviewed.[17] A Chamber's discretion to issue subpoenas, therefore, is "necessary to ensure that the compulsive mechanism of the subpoena is not abused."[18]

Discussion

12. Despite the fact that the previous situations for which Rule 54 subpoenas were sought concerned either (i) witnesses who were already scheduled to testify for one of the parties, or expressed a desire to do so, and did not want to submit to an interview by the other party,[19] or (ii) witnesses who did not want to testify at all but were nevertheless sought by one of the parties as prospective witnesses at trial,[20] the Chamber is of the view that there is no reason why Rule 54 cannot be applied to the circumstances raised in the Motion.

13. Insofar as the information Lute and Feeley might give to the Accused turns out to be relevant to any eventual sentence,[21] the Chamber is of the view that this information is not necessary for the preparation of his trial *at this stage*. Indeed, the Accused will have plenty of time to contact these officials and, if necessary, seek a subpoena for them to be interviewed and/or give evidence on his behalf in the course of the trial.

14. In addition, the Trial Chamber has examined the existing and proposed evidence relating to the alleged Holbrooke Agreement and considers that Lute and Feeley would be unlikely to add anything to the information the Accused already has. The Accused has been told that they can add nothing to the material he already has, and merely speculates that they may. Having regard to all the material before it, the Chamber considers that he has failed to demonstrate a reasonable basis for his belief that there is a good chance that they will be able to give information which would materially assist him in his case at this stage.

15. The Trial Chamber also recalls the Appeals Chamber jurisprudence to the effect that subpoenas should not be issued lightly, especially in cases where the potential witness refuses to be interviewed.[22] Accordingly, the Chamber finds that the subpoenas sought are not necessary at this stage for the purpose of an investigation or the preparation or conduct of the trial.

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[17] *Milošević* Decision, para. 35 (quoting *Halilović* Decision, Dissenting Opinion of Judge Weinberg de Roca, para 4.).
[18] *Halilović* Decision, para. 6.
[19] *See e.g. Halilović* Decision, para. 2; *Krstić* Decision para. 1.
[20] *See e.g. Milošević* Decision, para. 1.
[21] *See* Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008, paras. 21, 23.
[22] *See above* para. 10; *see also Halilović* Decision, para. 10 (the subpoena is a "weapon which must be used sparingly" and a Trial Chamber "should guard against the subpoena becoming a mechanism used routinely as a part of trial tactics").

Disposition

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

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

Judge Iain Bonomy, Presiding

Dated this eighth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]