



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: 26 November 2012

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: 26 November 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION FOR SUBPOENA: EDIN GARAPLIJA

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 Edin Garaplija”¹ filed on 20 November 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 15 November 2012, the Chamber denied the Accused’s motion for a subpoena to interview Edin Garaplija, a former operative of the Ministry of the Interior of Bosnia and Herzegovina (“BiH”), on the grounds that the Accused was “fully aware of the precise nature and relevance of Garaplija’s potential testimony” and that therefore an interview with the Accused’s legal adviser was unnecessary.²

2. 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 to Garaplija compelling him to testify as a witness in this case on 30 January 2013.³ The Accused was informed by BiH on 16 October 2012 that Garaplija refused to be interviewed by the Accused’s legal adviser on the basis that “as a result of wartime and post-war traumas, he could not remember the events” from the war in BiH.⁴ In the Accused’s submission, this satisfies the requirement that he make reasonable efforts to obtain Garaplija’s voluntary co-operation.⁵

3. The Accused submits that there are reasonable grounds to believe that Garaplija has information which can materially assist his case.⁶ In support of this submission, the Accused refers to an interview between Garaplija and the Office of the Prosecutor (“Prosecution”) in 2000 (“Interview”) where Garaplija stated that a Bosnian Muslim special unit had carried out a sniper attack which killed a French UNPROFOR member in Sarajevo and “staged the shooting to make it look like it came from the Serb positions”.⁷ Garaplija also stated in the Interview that this Bosnian Muslim special unit detonated an explosive at the residence of the Chief of Staff of the ABiH and planted evidence to “make it appear that the explosion had come from the Serbian

¹ The Chamber notes that the Accused erroneously refers to Edin Garaplija when the reference should be to Edin Garaplija, *see* Decision on Motion for Subpoena to Interview Edin Garaplija, 15 November 2012 (“Interview Decision”), fn. 1.

² Interview Decision, para. 11.

³ Motion, paras. 1, 14.

⁴ Motion, para. 5.

⁵ Motion, para. 5.

⁶ Motion, para. 7.

⁷ Motion, para. 8.

shells outside the city”.⁸ The Accused contends that this information about Bosnian Muslims staging incidents could give rise to a reasonable doubt that Bosnian Serbs were responsible for the sniping and shelling incidents as charged in the Third Amended Indictment.⁹

4. The Accused argues that the information from Garaplija is necessary for his case as he “has no other sources within the Bosnian Muslim government for this information” and that the information may materially assist his case and is necessary for a fair determination of the issues being tried.¹⁰ With respect to Garaplija’s claim that he cannot remember wartime events, the Accused submits that he is entitled to try to refresh his memory by playing the video recording of the Interview for him or offer the Interview during his testimony as past recollection recorded.¹¹

5. The Accused requests that the Motion be served on the Government of BiH and Garaplija and that they both be invited to respond to the Motion if they so wish.¹² The Accused further suggests that the Government of BiH be requested to serve the subpoena on Garaplija and to provide any assistance requested by the Registry to facilitate his attendance as a witness.¹³

6. On 20 November 2012, the 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.¹⁴

⁸ Motion, para. 9.

⁹ Motion, paras. 8–9.

¹⁰ Motion, paras. 11–12.

¹¹ Motion, para. 13.

¹² Motion, para. 16.

¹³ Motion, para. 15.

¹⁴ *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

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.¹⁵

9. Furthermore, the Trial Chamber may also consider whether the information the applicant seeks to elicit through the use of a subpoena is necessary for the preparation of his or her case and whether the information is obtainable through other means.¹⁶ In this regard, the Appeals Chamber has stated that a Trial Chamber's considerations must "focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is informed and fair".¹⁷

10. 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.¹⁸ 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.¹⁹

11. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.²⁰ 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.²¹

III. Discussion

12. At the outset, the Chamber finds that it has sufficient information to decide on the Motion without hearing from BiH.

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.

¹⁵ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

¹⁶ *Halilović* Decision, para. 7; *Krstić* Decision, paras. 10–12; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("*Brđanin and Talić* Decision"), paras. 48–50; *Milošević* Decision, para. 41.

¹⁷ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41. See also *Brđanin and Talić* Decision, para. 46.

¹⁸ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

¹⁹ *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.

²⁰ *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.

²¹ *Halilović* Decision, paras. 6, 10.

13. While the Accused was informed by BiH that Garaplija refused to be interviewed by the Accused's legal adviser, the Chamber has not received any information that Garaplija would refuse to testify in this case. In fact, the Accused has not even attempted to ask Garaplija whether he would agree to testify voluntarily. Refusing to submit to an interview with a representative of the defence and refusing to testify in a case before the Tribunal are two very different issues. The Chamber is therefore not satisfied that the Accused has made reasonable efforts to obtain Garaplija's voluntary co-operation to testify in this case.

14. The Chamber will therefore not enter into a discussion on whether the Accused has satisfied the other requirements for issuing a subpoena in this particular case.

15. Moreover, the Chamber reminds the Accused that a subpoena will not be issued lightly, that he should make sparing use of this mechanism, and that it should not be the default tool used each time a potential witness refuses to be interviewed or testify in his case. An assessment should always be made about the importance of the proposed evidence and whether the information a witness may provide could *materially* assist his case in relation to relevant issues and whether it is *necessary* for the conduct of the trial.

IV. Disposition

16. For the reasons outlined above, the Trial 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-sixth day of November 2012
At The Hague
The Netherlands

[Seal of the Tribunal]