



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: 15 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: 15 November 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION FOR SUBPOENA TO INTERVIEW 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 Interview: Edin Garaplija”¹ filed on 22 October 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 to Edin Garaplija, a former operative of the Ministry of the Interior of Bosnia and Herzegovina (“BiH”), compelling him to submit to an interview with the Accused’s legal adviser.² 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.³ In the Accused’s submission this satisfies the requirement that he make reasonable efforts to obtain Garaplija’s voluntary co-operation.⁴

2. The Accused submits that there are reasonable grounds to believe that Garaplija has information which can materially assist his case.⁵ 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”.⁶ 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 shells outside the city”.⁷ 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.⁸

3. 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

¹ The Chamber notes that the Accused erroneously refers to Edin Garaplija when the reference should be to Edin Garaplija, *see* Motion, Annex B.

² Motion, para. 1.

³ Motion, para. 6, Annex B.

⁴ Motion, para. 6.

⁵ Motion, para. 7.

⁶ Motion, para. 8.

⁷ Motion, para. 9.

information may materially assist his case and is necessary for a fair determination of the issues being tried.⁹ With respect to Garaplija's claim that he cannot remember war time events, the Accused submits that he is entitled to try to refresh his memory by playing the video recording of the Interview for him.¹⁰

4. The Accused requests that the Motion be served on the Government of BiH and Garaplija and they both be invited to respond to the Motion if they wish.¹¹ The Accused further requests that the interview be conducted by his legal adviser at the Tribunal's Liaison Office in Sarajevo on 8 January 2013 and that the government of BiH be requested to serve the subpoena on Garaplija.¹²

5. On 23 October 2012, the Prosecution filed the "Prosecution Response to Karadžić's Motion for Subpoena to Interview Eden Garaplija" ("Response"). While the Prosecution indicates that it takes no position with respect to the Motion, it comments that the need for a subpoena appears to be questionable.¹³ In that regard, the Prosecution observes the Accused possesses the recorded Interview and that this "contains exactly the information which he seeks to elicit" from Garaplija in the proposed interview with the Accused's legal adviser.¹⁴

II. Applicable Law

6. 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". This power includes the authority to require "a prospective witness to attend at a nominated place and time in order to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial".¹⁵ The Appeals Chamber has stated that a Trial Chamber's assessment 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".¹⁶ A subpoena is deemed "necessary" for the purpose of Rule 54 where a legitimate forensic purpose for obtaining the information has been shown:

⁸ Motion, paras. 8, 9.

⁹ Motion, paras. 11–12.

¹⁰ Motion, para. 13.

¹¹ Motion, para. 16.

¹² Motion, paras. 14–15.

¹³ Response, paras. 1–2.

¹⁴ Response, para. 3.

¹⁵ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision"), para. 10.

¹⁶ *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004 ("*Halilović* Decision"), para. 7. *See also* *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on

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.¹⁷

7. 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.¹⁸

8. 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.¹⁹ 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.²⁰

9. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.²¹ 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.²² In essence, a subpoena should be considered a method of last resort.²³

III. Discussion

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

11. The Chamber recalls that it has recently denied a motion for subpoena to interview on the basis that there was no need to meet with and interview the potential witness given that the

Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, 9 December 2005 ("*Milošević* Decision"), para. 41.

¹⁷ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. See also *Milošević* Decision, para. 38.

¹⁸ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

¹⁹ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

²⁰ *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.

²¹ *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.

²² *Halilović* Decision, paras. 6, 10.

²³ 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 *ex parte* and confidential 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".

Accused was perfectly or fully aware of the precise nature of the evidence the potential witness could give.²⁴ In this case, given that the Accused is in possession of the Interview, and has cited to the relevant portions thereof in support of his Motion, the Chamber finds that he is fully aware of the precise nature and relevance of Garaplija's potential testimony. The extent to which Garaplija can still recall the events he recounted in the Interview can be fully canvassed if the Accused ultimately decides to call him as a witness in this case. Issuing a subpoena to allow the defence to try and refresh a potential witness's memory is not an appropriate or sparing use of the subpoena mechanism. Indeed, the Accused himself suggests as an alternative that "[a]t worst, if his memory is not refreshed, the OTP interview might be offered in the course of Mr. Garaplija's testimony as past recollection recorded."²⁵ The Chamber therefore considers that there is no need to subpoena Garaplija to appear for an interview with the Accused's legal adviser.

12. Accordingly, there is no need for the Chamber to enter into a discussion on whether the Accused has satisfied the other requirements for issuing a subpoena in this particular case.

IV. Disposition

13. 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 fifteenth day of November 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁴ *Decision on Motion for Subpoena to Interview President Karolos Papoulias, 20 March 2012, para. 12. See also Krstić Decision, paras. 8–9.*

²⁵ Motion, para. 13.