



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: 18 December 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: 18 December 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON SECOND MOTION FOR SUBPOENA: EDIN GARAPLIJA

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of Bosnia and Herzegovina

via the Embassy of Bosnia and Herzegovina to
The Netherlands, The Hague

The Accused

Mr. Radovan Karadžić

Standby Counsel

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 “Second Motion for Subpoena to Edin Garaplija”¹ filed on 3 December 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 15 November 2012, in its “Decision on Motion for Subpoena to Interview Edin Garaplija” (“Interview Decision”), 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 On 26 November 2012, the Chamber denied the Accused’s first motion to subpoena Garaplija (“First Subpoena Motion”) to testify as a witness in this case in its “Decision on Motion for Subpoena: Edin Garaplija” (“First Subpoena Decision”) on the basis that the Accused had not made reasonable efforts to obtain Garaplija’s voluntary co-operation to testify in this case.³

2. In the Motion, the Accused renews his request that the Chamber 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 6 February 2013.⁴ In support, the Accused submits that he was informed by the BiH Embassy 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.⁵ Following the First Subpoena Decision, the Accused sent a letter to the Government of BiH on 27 November 2012 requesting that it determine if Garaplija would be willing to testify in this case.⁶ The Accused was informed on 27 November 2012 by the BiH Embassy that the First Subpoena Motion had been served on Garaplija who had responded that he was not willing to testify in this case.⁷ In

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, fn. 1.

² Interview Decision, para. 11.

³ First Subpoena Decision, paras. 13, 16.

⁴ Motion, paras. 1, 18.

⁵ Motion, para. 6.

⁶ Motion, para. 9.

⁷ Motion, para. 10, Annex E.

the Accused's submission, this satisfies the requirement that he make reasonable efforts to obtain Garaplija's voluntary co-operation.⁸

3. The Accused submits that there are reasonable grounds to believe that Garaplija has information which can materially assist his case.⁹ 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".¹⁰ 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".¹¹ 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 ("Indictment").¹²

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.¹³ With respect to Garaplija's claim that he cannot remember wartime events, the Accused submits that he is entitled to try to refresh Garaplija's memory by playing the video recording of the Interview for him or offer the Interview during his testimony as "past recollection recorded".¹⁴

5. The Accused further asks that Government of BiH be requested to serve the Subpoena on Garaplija.¹⁵

6. On 11 December 2012, the Prosecution informed the Chamber that it did not wish to respond to the Motion.¹⁶

⁸ Motion, para. 11.

⁹ Motion, para. 12.

¹⁰ Motion, para. 8. Note this paragraph is numbered 8, but follows paragraph 12.

¹¹ Motion, para. 13.

¹² Motion, paras. 12–13.

¹³ Motion, paras. 15–16.

¹⁴ Motion, para. 17.

¹⁵ Motion, para. 19.

¹⁶ T. 31198, 31229 (11 December 2012).

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.¹⁷

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.¹⁸

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.¹⁹ 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”.²⁰

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.²¹ Finally, the applicant must show that he has made reasonable

¹⁷ *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 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.

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

¹⁹ *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.

²⁰ *Halilović Decision*, para. 7; *Milošević Decision*, para. 41. *See also Brđanin and Talić Decision*, para. 46.

²¹ *Halilović Decision*, para. 7; *Milošević Decision*, para. 41.

attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.²²

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.²³ 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.²⁴

12. With respect to the co-operation from the relevant states involved, Article 29 of the Statute of the Tribunal ("Statute") obliges states to "co-operate with the International Tribunal in the investigation and prosecution of the persons accused of committing serious violations of international humanitarian law". Article 29, paragraph 2, states that this obligation includes the specific duty to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons [...]".

III. Discussion

13. The Chamber first considers that the Accused has made reasonable efforts to obtain the voluntary co-operation of Garaplija to testify as a witness in this case but has been unsuccessful.²⁵

14. As stated above, 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 relevant to his trial.²⁶ The Chamber notes that the Accused requests a subpoena compelling the testimony of Garaplija to the effect that Bosnian Muslim special units staged a sniping and shelling incident in Sarajevo, which in turn could give rise to a reasonable doubt that Bosnian Serbs were responsible for the sniping and shelling incidents charged in the Indictment.²⁷ While these incidents are not the specific incidents charged in the Indictment, the Chamber considers that the evidence going to the Bosnian

²² *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.

²³ *Halilović* Decision, para. 6; *Brđanin and Talić* Decision, para. 31.

²⁴ *Halilović* Decision, paras. 6, 10.

²⁵ *See* Motion, paras. 6–11; Motion, Annex E.

²⁶ *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. *See also* *Milošević* Decision, para. 38.

²⁷ Motion, paras. 8–13. The Chamber refers to the paragraph numbered "8", which follows paragraph 12.

Muslim forces staging other incidents in order to attribute blame to Bosnian Serb forces may be relevant to the Accused's case. The Chamber thus finds that the information sought from Garaplija pertains to clearly identified issues relevant to the Accused's case.

15. The Chamber recalls that the testimony sought through the issuance of a subpoena must be of "*material* assistance", rather than merely helpful or of some assistance.²⁸ 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.²⁹ When combined with other evidence the Accused may seek to adduce to support his case that certain charged incidents were staged by Bosnian Muslim forces, Garaplija's testimony would be of material assistance to his case as it may give rise to a reasonable doubt that Bosnian Serbs were responsible for the sniping and shelling incidents as charged in the Indictment.

16. In addition, a subpoena cannot be issued if the information sought through the testimony is obtainable through other means. As an operative within the BiH government, Garaplija is uniquely positioned to be able to testify about this issue and the Chamber is satisfied that the evidence he is expected to give is not obtainable through other means.

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 whatever steps are reasonably necessary to ensure that this Decision, the subpoena and the order to the Government of BiH relating to this matter are transmitted immediately to the Government of BiH; 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 eighteenth day of December 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁸ 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].

²⁹ See Papoulias Decision, para. 15; *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.