



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: 20 January 2011

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: 20 January 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

CONFIDENTIAL

DECISION ON PROSECUTION'S MOTION TO SUBPOENA BERKO ZEČEVIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

**The Government of Bosnia and
Herzegovina**

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

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 “Prosecution’s Motion to Subpoena, and for Video-Conference Link for the Testimony of, Berko Zečević with Confidential Appendices A, B and C” (“Motion”), filed confidentially by the Office of the Prosecutor (“Prosecution”) on 10 January 2011, and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Prosecution requests the Trial Chamber to issue both a subpoena directing the witness Dr. Berko Zečević (“Witness”) to appear to give testimony in this case on 2 February 2011,¹ and an accompanying order to the authorities in Bosnia and Herzegovina to provide assistance in serving the subpoena on the Witness.² The Prosecution further requests that the testimony of the Witness be heard by video-conference link, pursuant to Rule 81 *bis* of the Tribunal’s Rules of Procedure and Evidence (“Rules”), due to the condition of his health.³

2. The Prosecution submits that the Witness is an associate professor and head of the defence technology department at the mechanical engineering faculty of the University of Sarajevo and has 35 years of experience in the design, testing and manufacture of mortar and artillery projectiles within the academic and defence industry.⁴ He worked at *Pretis*, a major munitions factory in the former Yugoslavia, until it was taken over by Serb forces and all non-Serb employees were dismissed.⁵ It is anticipated that his evidence will address the nature of modified air bombs, the quantity and type of ammunition produced by *Pretis* and delivered to units of the Army of Republika Srpska after its takeover by Serb forces, and the location from which the projectile that hit the Markale Market on 5 February 1994 (Scheduled Shelling Incident G8) was fired.⁶ According to the Prosecution, the Witness’s testimony is relevant to Counts 4 to 6 and 9 and 10 of the Indictment.

3. The Prosecution submits that it has “made reasonable attempts to obtain the cooperation of the witness and has been unsuccessful.”⁷ On 6 January 2011, the Witness informed the Prosecution by telephone that he is no longer willing to appear as a witness in this case, for the

¹ Motion, paras. 1, 14.

² Motion, para. 14.

³ Motion, para. 2.

⁴ Motion, para. 7.

⁵ Motion, para. 7.

⁶ Motion, para. 8.

⁷ Motion, para. 9.

reasons set out in the Motion and confidential Appendix A thereto.⁸ The Prosecution thus submits that the issuance of a subpoena is necessary to ensure the Witness testifies on the scheduled date.⁹

4. On 17 January 2011, the Accused filed confidentially his “Response to Motion for Subpoena and Video Link: Berko Zecevic” (“Response”). He first requests that the confidential status of the filings related to the Witness be reclassified as public due to the fact that he is not a protected witness and the question of whether an expert witness can be subject to a subpoena “raises a matter of first impression” for the Tribunal.¹⁰

5. The Accused submits that the request for a subpoena in the Motion should be denied because the Witness is being called as an expert witness. He argues that expert testimony is interchangeable and the Prosecution has not shown that it has made any attempt to replace him with either of the two co-authors of the Witness’s expert reports which will be offered into evidence.¹¹ Further, the Accused argues that the obligation for expert witnesses to testify is a consensual one and it is unprecedented, and “maybe unfair”, to “compel such a witness to perform acts he decided to voluntarily undertake, as opposed to requiring a party to obtain another expert”.¹² He states that he can find no case at the Tribunal, the International Criminal Tribunal for Rwanda, the International Criminal Court, or the Special Court for Sierra Leone where “an expert witness has been the subject of a subpoena.”¹³

6. Finally, the Accused opposes the Prosecution’s request for the Witness’s testimony to be given by video link.¹⁴ He reasons that this Witness’s testimony is highly technical in nature and the use of a video-link would make his examination more complicated.¹⁵ Additionally, the Accused cites the value for the Chamber’s assessment of his credibility of being able to examine the Witness’s demeanour and reactions when answering questions put to him.¹⁶ The Accused also argues that the Prosecution has not submitted a medical report indicating that the Witness is

⁸ Motion, para. 10.

⁹ Motion, para. 11.

¹⁰ Response, para. 2.

¹¹ Response, para. 6.

¹² Response, para. 7.

¹³ Response, para. 4.

¹⁴ Response, para. 11.

¹⁵ Response, para. 12.

¹⁶ Response, para. 13.

unable to fly or participate in the trial proceedings in person,¹⁷ and the Prosecution “has failed to establish that there is no prospect of improvement in the witness’ medical condition.”¹⁸

7. On 17 January 2011, the Prosecution sought leave to reply to the Response, on three issues.¹⁹ The Chamber does not find it necessary to receive the reply requested by the Prosecution, and the Request for Leave to Reply is thus denied.

II. Applicable Law

8. 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.²⁰

9. 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.²¹

10. 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.²² 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

¹⁷ Response, para. 14.

¹⁸ Response, para. 15.

¹⁹ Confidential Prosecution’s Request for Leave to Reply to Accused’s Response to Motion for Subpoena and Video-Link: Berko Zečević, 17 January 2011 (“Request for Leave to Reply”).

²⁰ *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.

²¹ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

²² *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.

trial is informed and fair”.²³ Finally, the applicant must show that it has made reasonable attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.²⁴

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.²⁵ A 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 trial tactics.²⁶

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 [...]”

13. Rule 81 *bis* of the Rules provides that “[a]t the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link”. In general, examining a witness by video-conference link does not violate the right of the accused to confront the witnesses against him.²⁷ A witness may give his or her testimony via video-conference link if three criteria are met, namely:

- i. the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal;
- ii. the witness’s testimony must be sufficiently important to make it unfair to the requesting party to proceed without it; and

²³ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41. See also *Brđanin and Talić* Decision, para. 46.

²⁴ *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.

²⁵ *Halilović* Decision, para. 6 (internal quotation marks omitted); *Brđanin and Talić* Decision, para. 31.

²⁶ *Halilović* Decision, paras. 6, 10.

²⁷ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution’s Request for Testimony to be Heard Via Video-Conference Link, 17 June 2010; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Testimony of K74 to Be Heard Via Video-Link Conference, 16 November 2006, para. 2; *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Decision on Prosecution Motion for Receiving Testimony by Video-Conference Link, 11 March 2004, p. 4.

- iii. the accused must not be prejudiced in the exercise of his or her right to confront the witness.²⁸

III. Discussion

14. As a preliminary matter, the Chamber notes the Accused's request that the filings concerning the Prosecution's request for a subpoena and video-conference link for the Witness be reclassified as public. However, it considers that it is in the interests of justice for the Motion, Response, Request for Leave to Reply, and this Decision to remain confidential at the present time. The Accused may request the reclassification of these documents when the Witness begins his testimony and the Chamber will consider the matter then.

15. Having considered the summary of the Witness's expected testimony provided in the Motion, the Chamber is satisfied that it is clearly relevant to a number of issues in the Prosecution's case; *inter alia*, the Witness's expert knowledge of the design, testing and manufacture of mortar and artillery projectiles, including modified air bombs, and his knowledge of the investigation and findings regarding the 5 February 1994 Markale market shelling incident are relevant to Counts 4 to 6 and 9 and 10 of the Indictment. It is therefore satisfied that the evidence of the Witness could materially assist the Prosecution in the presentation of its case with respect to those clearly identified issues.

16. Even if the Accused is correct that no expert witness has ever been the subject of a subpoena before this Tribunal, the Chamber notes that the Witness will testify as a partial fact witness. As such, it is not appropriate to strictly categorise him as an expert witness. Furthermore, it is incumbent upon the Chamber to determine whether a subpoena for *this* Witness is necessary and appropriate, not a general category of witnesses, such as experts. The Chamber is satisfied that, given the Witness's technical expertise in the field of modified air bombs, his particular knowledge concerning the availability of such bombs and other types of ammunition to the Bosnian Serb forces during the period relevant to the Indictment, and his participation in the investigation of the 5 February 1994 Markale market shelling incident, the

²⁸ *Prosecutor v Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution's Request for Testimony by Video-Conference Link And Protective Measures, 2 July 2004; *Prosecutor v Tadić*, Case No. IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996, para 19; *Prosecutor v Popović et al.*, Case No. IT-05-88-T, Decision on Popović's Motion Requesting Video-Conference Link Testimony of Two Witnesses, 28 May 2008, para. 8. See also *Prosecutor v Gotovina et al.*, Case No. IT-06-90-T, Reasons for Decision on Prosecution's Renewed Motion for Evidence of Witness 82 to be Presented via Video-Conference Link from Zagreb and Reasons for Decision on the Request of the Markač Defence to Conduct Cross-Examination in Zagreb, 26 February 2009, para. 17; *Prosecutor v Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link, 25 February 2010, para 8.

information that the Prosecution seeks to elicit through the testimony of the Witness is not obtainable by other means.

17. The Chamber is also satisfied that the Prosecution has made reasonable attempts to secure voluntary co-operation from the Witness, by discussing the matter with him over the telephone and advising him that it may seek a subpoena to compel him to testify, and that he has demonstrated an unwillingness to co-operate.

18. The Chamber therefore finds that it is necessary to issue a subpoena requiring the Witness to testify in these proceedings. Due to the place of residence of the Witness, the assistance of the Government of Bosnia and Herzegovina is required to ensure that the subpoena is enforced, and, therefore, the Trial Chamber will issue an order to Bosnia and Herzegovina requesting such assistance.

19. On the request for the Witness's testimony to be given by video-conference link, the Chamber has not received any medical documentation to support the contention that the Witness is physically unable to travel to the seat of the Tribunal to give his evidence. It will therefore postpone its decision on this aspect of the Motion until such documentation has been secured by the Prosecution, with the assistance of the Registry's Victims and Witnesses Section.

IV. Disposition

20. For the reasons outlined above, and pursuant to Article 29 of the Statute and Rules 54 and 126 *bis* of the Rules, the Trial Chamber hereby **GRANTS** the Motion **IN PART, DENIES** the Request for Leave to Reply, 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 Bosnia and Herzegovina relating to this matter are transmitted immediately to the Government of Bosnia and Herzegovina; and
- b. **REQUESTS** the Victims and Witnesses Section of the Tribunal to provide any necessary assistance in the implementation of this Decision, including by assisting the

Prosecution to secure the necessary medical documentation to support its request for the
testimony of the Witness to be heard by video-conference link.

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



Judge O-Gon Kwon
Presiding

Dated this twentieth day of January 2011
At The Hague
The Netherlands

[Seal of the Tribunal]