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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-T

Date: 25 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: **25 January 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO COMPEL INTERVIEW: GENERAL SIR RUPERT SMITH

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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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 to Compel Interview: General Rupert Smith" filed on 6 January 2011 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Trial Chamber to issue, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence ("Rules"), a subpoena directing General Sir Rupert Smith ("Witness") to submit to an interview by the defence prior to giving testimony.[1] The Motion states that the Witness was contacted by the Tribunal's Victims and Witnesses Section ("VWS") in 2009 and asked whether he would be willing to be interviewed by the defence, but he declined.[2] On 7 December 2010, the Accused sent a letter to the Witness asking him to reconsider.[3] In the letter, the Accused told the Witness that the information he seeks from the interview would be important for his defence to the charge of taking hostages.[4] He also stated that the issue of whether UN personnel were taking an active part in the hostilities at the time of the NATO air strikes on 25 and 26 May 1995 is important to his defence and, "I would like to ask you about the relationship between NATO and UNPROFOR, and the gathering and sharing of information between UNPROFOR and NATO prior to the air strikes".[5]

2. On 21 December 2010, the Witness sent a letter to the Accused declining the interview.[6] In the letter, he stated that, "for one in your position such a request is a serious matter and in that understanding, I have given it considerable thought. Nevertheless, I will not submit to interview by you or your advisor".[7]

3. On 20 January 2011, the Office of the Prosecutor ("Prosecution") filed the "Prosecution's Response to Accused's Motion to Compel Interview: General Rupert Smith" ("Response") opposing the Motion.[8] In support of its position, the Prosecution submits that the information sought by the Accused through the requested interview is not necessary because the

[1] Motion. para. 1.
[2] Motion, para. 2.
[3] Motion, Annex A.
[4] Motion, para. 3.
[5] Motion, para. 3.
[6] Motion, Annex B.
[7] Motion, Annex. B.
[8] Response, para. 1.

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status of UN personnel at the time of the alleged hostage-taking is not material to his defence.[9] The Prosecution submits that common article 3 of the Geneva Conventions of 1949 prohibits hostage-taking of any persons taking no active part in the hostilities and thus includes the UN personnel allegedly taken hostage as set out in Count 11 of the Third Amended Indictment.[10] However, it submits that "should the Trial Chamber determine that some form of discovery is necessary for the defence to prepare its case, General Smith would voluntarily consent to certain procedures described herein upon invitation by the Trial Chamber".[11] The "certain procedures" described in the Response would be followed in facilitating an interview between the Witness and the Accused, which would dispose of the need to resort to a subpoena.[12]

4. On 24 January 2011, the Accused filed a "Request for Leave to Reply: Motion to Compel Interview of General Rupert Smith" ("Request for Leave to Reply"), submitting that he would be willing to accept the procedure set forth by the Prosecution in paragraph 15 of its Response whereby his legal advisor Mr. Peter Robinson would interview the Witness.[13] The Accused sought leave to reply if the Chamber were to "address the elements of the offence of hostage-taking in its consideration of the necessity of a subpoena".[14]

II. Applicable Law

5. 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 obtaining 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.[15]

6. 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

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[9] Response, para. 4.
[10] Response, paras. 5, 7.
[11] Response, para. 1.
[12] Response, paras. 12, 14– 15.
[13] Request for Leave to Reply, para. 1.
[14] Request for Leave to Reply, para. 2.
[15] *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.

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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.[16]

7. 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.[17] 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".[18] 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.[19]

8. 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.[20] 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.[21]

III. Discussion

9. As a preliminary matter, the Chamber reiterates that taking a cautious approach to the issuance of a subpoena is particularly necessary when a party seeks to subpoena a witness who will testify for the opposing party, and who has declined to be interviewed in advance of that testimony. However, it is within the discretion of the Chamber to issue a subpoena, should it consider that the information sought is necessary and will materially assist the applicant, and if the information is not obtainable by any other means. In essence, a subpoena should be considered a method of last resort.[22]

10. With regard to the Accused's assertion that the status of UN personnel at the time of the alleged hostage-taking is material to his defence as it goes to his belief that the UN personnel

[16] *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

[17] *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.

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

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

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

[22] *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.

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were detained lawfully as prisoners of war, a position challenged by the Prosecution, the Chamber recalls that it has previously determined that the status of the UN personnel taken hostage after the NATO air strikes of 25 and 26 May 1995 might be a live issue in this case.[23] Whether or not the legal arguments put forward by the Accused in defence to the charges in Count 11 can ultimately be successful, he is entitled to make those arguments, and to gather evidence in support thereof. While the Accused has a right to build his defence in a way he sees fit, the Chamber will not issue subpoenas lightly to all persons the Accused seeks to interview.

11. The Accused submits that although the Witness's anticipated testimony, as set forth in the amalgamated witness statement of 22 October 2009, discusses the hostage-taking situation, the Accused seeks information about the "relationship between NATO and UNPROFOR and the gathering and sharing of information between UNPROFOR and NATO prior to the air strikes," information which is not contained in the witness statement.[24] The Witness, through his position as the Commander of UNPROFOR in Bosnia and Herzegovina from January 1995 to the end of the conflict, may be uniquely situated to have such information about the relationship or the sharing of information between UNPROFOR and NATO. Further, the Witness was in Sarajevo when the NATO air strikes occurred and subsequently reported that the Bosnian Serbs took UNPROFOR personnel hostage in response. As such, the Chamber is satisfied that the Accused has shown a legitimate need to interview the Witness in order to gather information that may materially assist him in preparing his defence, irrespective of the likelihood of success or failure of such a defence.

12. However, the Chamber will not issue the requested subpoena if other means of obtaining the information sought from the Witness are available. This appears to be the case here, as the Response makes clear that the Witness would be willing to answer questions put by the Accused under certain conditions.[25] The Prosecution submits there are two options for the Accused to obtain information from the Witness; through written questions and answers,[26] or through an interview conducted by his legal advisor Mr. Peter Robinson under certain conditions and upon the request of the Chamber.[27] The Chamber encourages voluntary co-operation both between parties, and between prospective witnesses and the Accused, and is satisfied that the process

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"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".

[23] On that basis, the Chamber issued a binding order to a state to provide material on that topic. Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May 2010, paras. 25-26.

[24] Motion, para. 7.

[25] Response, para. 14.

[26] Response, para. 14.

[27] Response, para. 15.

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proposed by the Prosecution in consultation with the Witness should enable the Accused to gather the information he believes is necessary to his defence. The Accused has indeed agreed to the second option set forth in paragraph 15 of the Response.[28] Accordingly, the Accused and his legal advisor should, with the assistance of the Prosecution and the VWS, undertake to interview the Witness in accordance with the procedure as set out in paragraph 15 of the Response to conduct the requested interview.

13. The Chamber therefore finds that it is not necessary to issue a subpoena requiring the Witness to submit to an interview with the Accused. Further, as it is unnecessary for the Chamber to make any determinations in this decision concerning the legal elements of the offence of taking hostages, it is unnecessary for the Accused to file a reply on this issue and the Request for Leave to Reply will be denied.

IV. Disposition

14. For the reasons outlined above, and pursuant to Rule 54 the Rules, the Trial Chamber hereby, **DENIES** the Motion and **DENIES** the Request for Leave to Reply.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-fifth day of January 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

[28] Request for Leave to Reply, para. 1.

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