IT-02-54-R77.5
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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-02-54-R77.5
		Date:	3 February 2009
		Original:	English

IN A SPECIALLY APPOINTED CHAMBER

Before:	**Judge Carmel Agius, Presiding** **Judge Alphons Orie** **Judge Bakone Justice Moloto**
Acting Registrar:	**Mr John Hocking**
Decision of:	**3 February 2009**

IN THE CASE AGAINST

FLORENCE HARTMANN

PUBLIC

REASONS FOR DECISION ON URGENT DEFENCE MOTION FOR THE ISSUANCE OF SUBPOENA TO *AMICUS CURIAE* PROSECUTOR

***Amicus Curiae* Prosecutor**

Mr Bruce MacFarlane, QC

Counsel of the Accused

Mr Karim A. A. Khan, Counsel

Mr Guénaël Mettraux, Co-Counsel

1. At a status conference held on 30 January 2009, the Specially Appointed Chamber ("Trial Chamber") of the International Criminal Tribunal for the former Yugoslavia ("Tribunal") rendered its oral decision on the "Urgent Defence Motion for the Issuance of a Subpoena to *Amicus Curiae* Prosecutor Mr. Bruce MacFarlane Pursuant to Rule 54" ("Motion"), filed 27 January 2009, with written reasons to follow.[1]

2. In its Motion, the Defence requests the Trial Chamber to "urgently issue a subpoena to summon Mr. MacFarlane to be interviewed by the Defence as soon as practicable".[2] According to the Defence, what preceded the request was an exchange of letters between the Defence and Mr. Bruce MacFarlane, *Amicus Curiae* Prosecutor[3] ("Prosecutor") appointed to the present case.[4] In its letter to the Prosecutor, the Defence sought the Prosecutor's consent to an interview regarding the conduct and manner of his investigation this case. The Prosecutor responded by deferring his decision on whether to submit to an interview until certain pending motions were decided by the Trial Chamber.

3. In general terms, the Defence submits that a subpoena is necessary "for the purposes of Defence investigations and proper Defence case preparation" and that questioning of the Prosecutor and his appearance as a witness may prove relevant to the outcome of pending motions and additionally at the trial.[5]

4. With respect to the motions pending at the time the present Motion was filed – and for which the Defence considered that questioning of the Prosecutor "may prove relevant" – these were identified as a Motion for Reconsideration, a Motion for *Voir-Dire* Hearing, a Motion for the Taking and Disclosure of the Statements of the Proposed Prosecution Witnesses, and a Motion for Stay of Proceedings for Abuse of Process.[6] The Trial Chamber subsequently decided all four motions, fully cognizant of the present Motion,[7] and thus the specific submissions within the present Motion which relate only to their purported relevance to a

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[1] At the time of the Status Conference, the *Amicus Curiae* Prosecutor had not filed a response to the Motion, although a limited oral response was submitted. The Trial Chamber considered it unnecessary as on the basis of the Defence submissions alone, *cadit quaestio*.
[2] Motion, para. 6.
[3] Deputy Registrar's Decision Appointing Mr. Bruce MacFarlane, Q.C., as *Amicus Curiae* Prosecutor in the *Hartmann* Case, *Confidential*, 1 September 2008.
[4] Motion, paras 2 and 3. The letters were not filed with the Registry, but for the purposes of this Decision the Chamber accepts the Defence's proffer of their contents.
[5] Motion, para. 10.
[6] Motion, para. 11.
[7] Joint Decision on Defence Motion for Reconsideration and Defence Motion for Voir Dire Hearing and Termination of Mandate of the Amicus Prosecutor, 29 January 2009; Decision on Urgent Defence Motion Requesting an Order to the Amicus Curiae to Take and Disclose Proposed Witness Statements, 29 January 2007; Oral Decision on Defence Motion for Stay of Proceedings for Abuse of Process, rendered at the Status Conference of 29 January 2009 with written reasons to follow.

determination of the four motions need not be repeated here.[8] Rather, the Trial Chamber will address those (primarily legal) submissions which relate to the propriety of issuing of a subpoena under the existing circumstances and in preparation for trial.

5. With respect to trial, the Defence has indicated that anticipates calling Mr. MacFarlane as a witness in the trial proceedings to testify about the process of investigation and preparation of the case against Ms Hartmann.[9] On the basis of this, the Trial Chamber will consider this possibility in its discussion of the Motion, but will not interpret the current request for a subpoena to summon Mr. MacFarlane for an interview as a request for issuance of a subpoena to appear as a witness at trial.

6. The Defence rightly submits that Rule 54 of the Rules of Procedure and Evidence ("Rules") permits a Trial Chamber to issue such subpoenas as may be necessary for the purposes of an investigation or for the preparation or the conduct of the trial. The Defence also correctly looks to a decision of the Appeals Chamber in the *Krstić* case to define "necessary" as being where a legitimate forensic purpose for the interview has been shown, and which requires the moving party to demonstrate a reasonable basis that there is a chance that the prospective witness will be able to give information which will materially assist the cases, in relation to clearly identified issues relevant to the forthcoming trial.[10]

7. With regard to a Chamber's assessment of the chance that the prospective witness will be able to give information which will materially assist in its case, the Defence quotes in part from the same *Krstić* decision that it "will depend largely upon the position held by the prospective witness in relation to the events in question...".[11] The Defence likewise cites from *Krstić* that the test would be applied in a "reasonably liberal way".[12] Here, the Chamber considers it best to set forth in full the relevant language from the Decision, as the position held by the prospective witness is only one of several conjunctive factors to consider:

> The assessment of the chance that the prospective witness will be able to give information which will materially assist the defence in its case will depend largely upon the position held by the prospective witness in relation to the events in question, any relationship he may have (or have had) with the accused which is relevant to the charges, the opportunity which he may reasonably be thought to have had to observe those events (or to learn of those events) *and* any statements made by him to the prosecution or to others in relations to those events. The test would have to be applied in a reasonably liberal way but, just as in relation to such applications for access to confidential material, the defence will not be permitted to undertake a fishing expedition – where

[8] Nonetheless, these submissions are largely found in paras 12-15 of the Motion.
[9] Motion, para. 16.
[10] Motion, paras 7-8. *Prosecutor v. Krstić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 10.
[11] Motion, para. 18. *Prosecutor v. Krstić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 11.
[12] Motion, para. 22. *Prosecutor v. Krstić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 11.

> it is unaware whether the particular person has any relevant information, and it seeks to interview that person merely in order to discover whether he has any information which may assist the defence.[13]

8.. The Defence also relies upon a decision in the *Brđanin* case in submitting that "regardless of the reasonable basis for the need for an interview, it has to be determined whether the information in the possession of the prospective witness is obtainable by other means".[14] The Chamber notes that the *Brđanin* decision dealt with the question of whether a war correspondent could be compelled to testify before the Tribunal. The Chamber held that in order to issue a subpoena to a war correspondent a two-pronged test must be satisfied. First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.

9. Finally, the Defence relies upon a Decision in the *Halilović* case to stress that a Chamber's considerations in deciding whether to issue a subpoena "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".[15] The Trial Chamber notes that this requirement gives definition to that portion of Rule 54 of the Rules which permits a Trial to issue subpoenas as may be necessary for the purposes of an investigation or "for the preparation or the conduct of the trial".[16]

10. Applied to the present case, the Defence submits that the Prosecutor, having previously been appointed as *Amicus Curiae* Investigator in the case,[17] "is in an identical position to an investigating officer in a criminal case and can be called by the Defence as a witness".[18] Having held this position, it is argued, the Prosecutor would (consistent with *Krstić*) be able to give information which will materially assist the Defence in its case. In this regard, the Defence intends the proposed questioning to be in relation to "the focus and conduct of the investigation, the nature and substance of the questioning of witnesses to be called by the Prosecution, his compliance with the guidelines and instructions issued by the Specially Assigned Trial Chamber and regarding the receipt or seizure of exhibits and documentation, that the Prosecution rely upon in their bid to establish the guilt of the Accused".[19]

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[13] *Prosecutor v. Krstić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 11. (Emphasis added).
[14] Motion, para. 9. *Prosecutor v Brđjanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, paras 49-50.
[15] Motion, para. 9. *Prosecutor v Halilović*, IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 7.
[16] *Prosecutor v Halilović*, IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 7.
[17] Deputy Registrar's Decision Appointing Mr. Bruce MacFarlane, Q.C., as *Amicus Curiae* Investigator in the *Hartmann* Case, *Confidential*, 3 March 2008.
[18] Motion, para. 19.
[19] Motion, para. 20.

11. The Chamber will address first the law and then the application of it to the present circumstances. The Defence legal submissions as set forth above – already supplemented by the Chamber as noted – omit the most fundamental jurisprudential point concerning the issuance of subpoenas, that being the discretionary standard. As the Appeals Chamber in *Brđanin* emphasized: "The discretion of the Trial Chambers [...] is not unfettered. They must take into account a number of other considerations before issuing a subpoena. Subpoenas must not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction."[20] Likewise, the Appeals Chamber in *Halilović* (relying on *Brđanin*) stated that "The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the required showing, this discretion being necessary to ensure that the compulsive mechanism of the subpoena is not abused".[21]

12. In determining whether to issue a subpoena, a Trial Chamber has first of all to take into account the admissibility and potential value of the evidence sought to be obtained.[22] Secondly, the Trial Chamber may need to consider other factors such as testimonial privileges[23] (as Chambers have done with respect to subpoenas sought for war correspondents[24] and State officials[25]). These initial criteria, set forth by the Appeals Chamber in *Brđanin*, were not addressed by the Defence, which as the moving party bears the burden of persuasion on the Motion.

13. Applying the Tribunal's jurisprudence to the circumstances of this case, the Chamber notes first and foremost that the object of the requested subpoena is no ordinary prospective witness or investigator, but a duly appointed *Amicus Curiae* Prosecutor, appearing before the Chamber pursuant to Rules 74 and 77of the Rules and in accordance with paragraph 14 of the Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the Tribunal, and functionally serving as a party to the proceedings. He is not, as the Defence contends, "in an identical position to an investigating officer in a criminal case" who may have no prosecutorial education, training or experience, and indeed no prosecutorial obligation. The Prosecutor is a professional attorney with substantial experience as a

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[20] *Prosecutor v Brđjanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para 31.
[21] *Prosecutor v Halilović*, IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004, para. 6.
[22] *Prosecutor v Brđjanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para 31.
[23] *Prosecutor v Brđjanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para 31.
[24] *Prosecutor v Brđjanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002.
[25] *Prosecutor v. Blaskić*, IT-95-14-AR108*bis*, Judgement of the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.

prosecutor, and was appointed as *Amicus Curiae* Investigator, and again as *Amicus Curiae* Prosecutor, precisely because of his professional and prosecutorial experience.[26]

14. Significantly, the Defence fails to cite any legal authority supporting use of a subpoena to compel the interview or testimony of counsel for one party at the behest of counsel for the opposing party. Clearly, issuance of a subpoena under such circumstances would require the most extraordinary circumstances, as doing so would likely result in withdrawal from the case by the subpoenaed counsel,[27] along with the attendant costs and delay in the proceedings associated with obtaining new counsel, as well as the intangible cost of losing counsel with an intimate knowledge of the case. It may also trigger similar requests in other cases as a litigation tactic with the potential for abuse. Such extraordinary circumstances may well exist where prosecuting counsel *participated* in the events surrounding the alleged criminal behaviour, as opposed to having only *investigated* the events,[28] but such is not the situation in the present case

15. It can hardly suffice as justification for a subpoena to say, as the Defence does, that the Prosecutor would be able to give information which will materially assist its defence of impugning the investigation. Undoubtedly defence counsel in every case could make such a claim. Nor would denial of a subpoena foreclose the defence of seeking to impugn the investigation. The Defence could submit proposed questions for counsel to the Chamber, for example, and if relevant, the Chamber could pose such questions to the Prosecutor in his role as an officer of the court and expect candid responses. Such an avenue would not exist with respect to an investigator who does not subsequently act as prosecutor at trial. Moreover, the Defence could simply argue on the merits, as it has done in its motions, that the investigation was flawed because of what it did not include, in terms of investigative steps foregone. Further, the Defence is not precluded from communicating with the Prosecutor, and indeed counsel exchange information about the case to the present date, for example, about the possibility of agreed facts.[29] What the Defence seeks, however, is a compelled interview with

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[26] Deputy Registrar's Decision Appointing Mr. Bruce MacFarlane, Q.C., as *Amicus Curiae* Investigator in the *Hartmann* Case, *Confidential*, 3 March 2008; Deputy Registrar's Decision Appointing Mr. Bruce MacFarlane, Q.C., as *Amicus Curiae* Prosecutor in the *Hartmann* Case, *Confidential*, 1 September 2008.

[27] Looking to domestic law, Rule 3.7(a) of the Model Rules of Professional Conduct in the United States, for example, prohibits a lawyer from acting as an advocate at trial if likely to be a necessary witness.

[28] *United States v. Prantil*, 764 F.2d 548 (9th Cir. 1985), para 21: "To be sure, courts have generally disfavored allowing a participating prosecutor to testify, at a criminal trial. *United States v. West*, 680 F.2d 652, 654 (9th Cir.1982). This reluctance is understandable particularly when the defendant seeks to call the prosecutor as a witness. Regardless of who calls the participating prosecutor, there is no absolute bar to calling him as a witness. *Id.* Recognizing the possibility for abuse, however, this Circuit has required that a defendant demonstrate a "compelling need" before a participating prosecutor will be permitted to testify. *United States v. Tamura*, 694 F.2d 591, 601 (9th Cir.1982)".

[29] As discussed at the status conference held 30 January 2009. Defence Counsel (Mr. Khan): "My learned friend provided us with a list of suggested agreed facts. We gave our response sometime ago, more than a week,

the Prosecutor as prospective witness, where the subject matter would extend to the internal thought processes of the Prosecutor during the conduct of his investigation, which the Chamber does not consider to be necessary to the Defence for the preparation or conduct of the trial. To justify such an intrusion, the Defence argues that a prosecuting attorney somehow becomes eligible as a witness by virtue of having acted in an investigatory role in a case. If this were true, every prosecuting attorney would be eligible as a witness, for it is the "Prosecutor" under the Rules who is responsible for conducting the investigatory process.[30]

16. Moreover, the Chamber could have elected to initiate proceedings and prosecute the matter itself under Rule 77(C)(iii) and Rule 77(D)(ii) of the Rules, without recourse to either investigation or prosecution by *amicus curiae*. Surely, this would not render a Chamber subject to compelled interviews with the Defence or to appear as witnesses to answer questions about the conduct of the proceedings. As the case currently stands, with the appointment of *amicus curiae*, the Defence – through means of disclosure of an investigative report, filing of a pre-trial brief, filing of a witness and exhibit list, and access to witnesses and exhibits to be called and offered at trial by the Prosecutor – is well-positioned to defend against the charges without recourse to subpoena of the Prosecutor.

17. Furthermore, it appears that the Prosecutor, in the exchange of letters between the parties, has indicated that he would defer his response to the Defence's request for consent to an interview until the Chamber had decided certain motions, which are now finalised. The Defence may always ask the Prosecutor for an interview, but it will be a matter for the Prosecutor, and not the Chamber, to determine whether he consents to an interview.

18. It is for these reasons, pursuant to Rules 54 and 77 of the Rules, that the Chamber denied the Defence Motion.

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

Judge Carmel Agius
Presiding Judge

Dated this third day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

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anyway. In addition, I received an e-mail only today from my learned friend which was in response to some further suggested agreed facts proposed by the Defence, and in that e-mail - he will correct me if I'm wrong - he states that they seem at first blush to be potentially agreeable, but he wants time to consider them. So, Your Honour, those are matters which are yet to be decided between the parties".

[31] See, e.g., Rules 41-43.