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: 21 March 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: **21 March 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO COMPEL INTERVIEWS: SARAJEVO 92 *BIS* WITNESSES

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 to Compel Interviews: Sarajevo 92 *bis* Witnesses" filed on 11 February 2011 ("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"), subpoenas directing eight witnesses, KDZ036, KDZ079, KDZ090, Fatima Palavra, Zilha Granilo, Slavica Livnjak, KDZ289, and Tarik Žunić ("Witnesses") to submit to interviews by him.[1] The transcripts of prior testimony and written statements of the Witnesses have been admitted into evidence in these proceedings pursuant to Rule 92 *bis* of the Rules.[2]

2. The Accused submits that in August and September 2009, the Victims and Witnesses Unit ("VWS") contacted the Witnesses and asked whether they would consent to be interviewed by the Accused's defence team.[3] All the Witnesses declined to be interviewed.[4]

3. The Accused argues that he has now completed the interviews of other Sarajevo witnesses who had agreed to be interviewed and, as a result, he has uncovered information favourable to his defence.[5] He believes that because of the specific role each of the Witnesses played in the crimes charged, an interview with them will result in information which will materially assist his case.[6] However, as a result of the Witnesses' refusal to be interviewed, he does not have the opportunity to learn this valuable information from them.[7] Further, he argues that since the statements and transcripts of these Witnesses were admitted pursuant to Rule 92 *bis* of the Rules, he will not have the opportunity to cross examine them in court.[8]

4. More specifically, the Accused submits that the Witnesses will provide him with the following information:

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[1] Motion. paras. 2, 18-19.

[2] Decision on Prosecution's Fourth Motion for Admission of Statements and Transcripts of Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* – Sarajevo Siege Witnesses, 5 March 2010 ("Decision Sarajevo Siege Witnesses"), paras. 77(C)(iv), (v), (vi).

[3] Motion, para. 2.

[4] Motion, para. 2.

[5] Motion, para. 3.

[6] Motion, para. 4.

[7] Motion, para. 3.

[8] Motion, para. 3.

(i) KDZ036's testimony relates to scheduled incident G13 of the Third Amended Indictment ("Indictment"). KDZ036 was in his apartment at Prvomajska Street on 26 May 1995 when the building was hit by a shell. The Accused submits that this witness may be able to identify "what legitimate military targets in the area the bomb may have been aimed at".[9]

(ii) KDZ079's testimony relates to scheduled incident G15 of the Indictment. He was working for the Territorial Defence and was at the community centre when it was hit by a shell on 16 June 1995. The Accused submits that this witness may have information related to the "use made of the community centre by members of the Territorial Defence or other military personnel, or other legitimate military targets in the vicinity".[10]

(iii) KDZ090's testimony relates to scheduled incident F11 of the Indictment. He was shot while riding a tram on 8 October 1994. The Accused submits that the witness may have important information that "could lead to a reasonable doubt that the Bosnian Serbs were the source of fire".[11]

(iv) Fatima Palavra's statement relates to scheduled incident G2 of the Indictment. She was in her apartment on H. Kreševlijakovića Street on 6 June 1992 when the building was hit by a shell. The Accused submits that she may be able to identify "what legitimate military targets in the area that the bomb may have been aimed at".[12]

(v) Zilha Granilo's statement relates to scheduled incident G2 of the Indictment. She was in her apartment on Bjleve Street on 6 June 1992 when a "shell landed on her neighbour's shed about 10-15 metres away from where she was standing outside of her apartment".[13] The Accused submits that she may be able to identify "what legitimate military targets in the area that the bomb may have been aimed at".[14]

(vi) Slavica Livnjak's testimony relates to scheduled incident F16 of the Indictment. She was a tram driver whose tram was shot at on 3 March 1995. The Accused

[9] Motion, para. 5.
[10] Motion, para. 6.
[11] Motion, para. 7.
[12] Motion, para. 8.
[13] Motion, para. 9.
[14] Motion, para. 9.

submits that she "may have important information that could lead to a reasonable doubt that the Bosnian Serbs were the source of fire".[15]

(vii) KDZ289's testimony relates to scheduled incident F15 of the Indictment. This witness was also a tram driver whose tram was shot at on 27 February 1995. The Accused submits that this witness "may have important information that could lead to a reasonable doubt that the Bosnian Serbs were the source of fire as well as facts which may tend to show whether the tram was hit in the crossfire of military battles".[16]

(viii) Tarik Žunić's testimony relates to scheduled incident F17 of the Indictment. He was shot on 6 March 1995 on Sedrenik Street. The Accused submits that witness Patrick van der Weijden "indicated that the shooter cannot have completely seen the victim because he was still moving. This would have made it impossible to quickly determine if the victim was a combatant or not. Therefore, the witness may have important information which can call into question whether the shooting was a war crime".[17]

5. On 24 February 2011, the Office of the Prosecutor ("Prosecution") filed the "Prosecution's Response to Motion to Compel Interviews: Sarajevo 92 *bis* Witnesses" ("Response") opposing the Motion.[18] In support of its position, the Prosecution submits that the Accused is attempting to undermine the Chamber's decision to admit the prior statements and testimony of the Witnesses pursuant to Rule 92 *bis*.[19] The Prosecution argues that compelling the Witnesses to submit to interviews with the Accused and then admitting the results of this interview into evidence amounts to cross-examining the Witnesses in substance, if not in form.[20]

6. Further, the Prosecution submits that the Accused has failed to show a reasonable basis for believing that there is a good chance these Witnesses would be able to provide information which would materially assist his case.[21] First, the Prosecution submits that the Accused's prior efforts to interview other Sarajevo Rule 92 *bis* witnesses have yielded three statements of little utility to his case.[22] Second, the Prosecution submits that the Accused has failed to establish that

[15] Motion, para. 10.
[16] Motion, para. 11.
[17] Motion, para. 12.
[18] Response, para. 1.
[19] Response, paras. 3– 5.
[20] Response, para. 4.
[21] Response, para. 6.
[22] Response, para. 7, citing the supplemental statements of witnesses Šefik Bešlić, Ašida Fazlić, and Anđa Gotovac tendered by the Accused.

interviews with these Witnesses will result in information that will materially assist his case.[23] The Prosecution argues that the Accused simply wishes to (i) revisit the issues the witnesses have already discussed in their prior statements and testimony, and (ii) seek information from the Witnesses on topics which the Witnesses have no specialised knowledge or expertise.[24]

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 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.[25]

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 statement the witness has made to the Prosecution or to others in relation to the events.[26]

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.[27] 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".[28] Finally, the applicant must show that he has made reasonable

[23] Response, para. 8.

[24] Response, para. 8.

[25] *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.

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

[27] *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.

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

attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.[29]

10. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[30] 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.[31] In essence, a subpoena should be considered a method of last resort.[32]

III. Discussion

11. As a preliminary matter, the Chamber reiterates that, following a cautious approach, it will only issue a subpoena should it consider that the information sought is necessary and will materially assist the applicant, and if that information is not obtainable by any other means.

12. First, turning to whether the information sought from the Witnesses is necessary to his case, the Accused submits that access to these Witnesses is "necessary and appropriate for the conduct and fairness of the trial because their testimony has been admitted without the opportunity for cross examination".[33] In order to satisfy the necessity requirement, the Accused must prove there is a legitimate forensic purpose in subpoenaing the Witnesses. The information the Accused seeks to elicit from the Witnesses concerns two broad areas: first, the existence and location of military targets in Sarajevo if the witness's testimony pertained to a scheduled shelling incident, and, second, the direction of fire if the witness's testimony pertained to a scheduled sniping incident. As part of his defence, the Accused claims there were legitimate military targets in and around Sarajevo and that the direction of fire with respect to the sniping incidents did not always originate from the VRS controlled areas.

13. As previously determined by the Chamber, the evidence of each one of the Witnesses is largely crime-base evidence and concerns the impact of the crimes upon the victims in that the written evidence contains the observations of victims and/or witnesses about different shelling

[29] *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.

[30] *Halilović* Decision, para. 6; *Brđanin and Talić* Decision, para. 31.

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

[32] *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".

[33] Motion, para. 17.

and sniping incidents in Sarajevo.[34] None of them have specialised military knowledge and therefore would not be able to determine whether there were specific military targets in the Sarajevo area with respect to the shelling incidents. With respect to the direction of fire for sniping incidents, the same reasoning applies. Despite the fact that the written evidence of KDZ289, Slavica Livnjak, and Tarik Žunić refers to the source and direction of sniper fire, the Chamber finds that their evidence relates to isolated sniping incidents, the scope of which is relatively limited.[35] As such, the Chamber will not exclusively rely on the witness statements of non-expert witnesses in determining the source and direction of sniper fire. In addition, a significant portion of the cross-examination of KDZ289, Slavica Livnjak, and Tarik Žunić in previous cases, which has been admitted in this case, already related to the general source and direction of fire, as well as to the issue of the VRS positions in the areas in and around Sarajevo.[36]

14. The Accused bases his argument that the information these Witnesses may provide would materially assist his case "upon the success of his interviews of other prosecution Rule 92 *bis* witnesses", and also "upon the specific role of the eight individuals in the crimes charged in the indictment".[37] Therefore, he believes that "there is a good chance that those interviews will result in the disclosure of information which will materially assist him in his case".[38] As stated above, each one of the Witnesses was a victim and/or a crime-base witness. Their testimonies relate to specific scheduled incidents in the Indictment and concern the impact of the particular crimes (sniping and shelling incidents in and around Sarajevo between April 1992 and November 1995) upon them as victims.[39] These Witnesses played no specific role in the crimes charged in the Indictment, other than the fact that they were themselves victims of scheduled incidents. Without an additional basis as to why these Witnesses may provide further information on these topics, other than that already provided in their prior evidence, the Accused has not established that the information to be obtained from the interviews would materially assist his case.

15. In relation to the Accused's argument that access to the Witnesses is warranted to ensure the fairness of the trial since they were never cross-examined in this case, the Chamber recalls its 5 March 2010 Decision Sarajevo Siege Witnesses where it analysed whether these Witnesses should appear for cross-examination pursuant to Rule 92 *bis*(C). In it, the Chamber noted that

[34] Decision Sarajevo Siege Witnesses, paras. 43- 44.
[35] Decision Sarajevo Siege Witnesses, para. 62.
[36] Decision Sarajevo Siege Witnesses, para. 62.
[37] Motion, para. 4.
[38] Motion, para. 4.
[39] Decision Sarajevo Siege Witnesses, para. 44.

KDZ038, KDZ079, KDZ090, and Tarik Žunić were extensively cross-examined during their testimony in the *Dragomir Milošević* case, and KDZ289 was extensively cross-examined during the *Dragomir Milošević* and *Momčilo Perišić* cases.[40] Although, Fatima Palavra and Zilha Granilo were never cross-examined, the Chamber did not consider this fact *per se* necessitated their appearance for cross-examination.[41]

16. Further, this argument is partially based on the fact that the supplemental statements of three other Sarajevo witnesses who agreed to be interviewed by him, namely Ašida Fazlić, Šefik Bešlić, and Anđa Gotovac, have been admitted into evidence.[42] Given the limited information contained in these three supplemental statements, the Chamber does not consider that their admission alters its finding that the Accused has not satisfied the requirement of a legitimate forensic purpose to subpoena the Witnesses.

17. The Accused has also failed to establish that the information sought may not be obtained through calling or cross-examining other witnesses.

18. Therefore, the Chamber finds that it is not necessary to issue a subpoena requiring the Witnesses to submit to an interview with the Accused.

[40] Decision Sarajevo Siege Witnesses, para. 58.

[41] Decision Sarajevo Siege Witnesses, para. 58.

[42] Decision Sarajevo Siege Witnesses (provisionally admitting into evidence the supplemental statements of Ašida Fazlić and Šefik Bešlić); Decision on Prosecution Motion to Formally Admit the Certified Rule 92 *bis* Statements of Sarajevo Witnesses, 9 July 2010 (admitting into evidence the supplemental statement of Ašida Fazlić and ordering the Accused to obtain the Rule 92 *bis*(B) attestation for Šefik Beslić's supplemental statement); Decision on Prosecution's Submission and Requests in Relation to Outstanding Exhibit Issues, 10 December 2010 (admitting into evidence the supplemental statement of Šefik Beslić), Hearing 3 March 2011, T.12908-12909 (admitting into evidence the supplemental statement of Anđa Gotovac).

IV. Disposition

19. For the reasons outlined above, and pursuant to Rule 54 the Rules, the Trial Chamber hereby, **DENIES** the Motion.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-first day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]