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: 20 March 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: **20 March 2012**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION FOR SUBPOENA TO INTERVIEW PRESIDENT KAROLOS PAPOULIAS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of Greece

via the Embassy of Greece to
The Netherlands, The Hague

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 for Subpoena to Interview President Karolos Papoulias" filed on 26 January 2012 ("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"), a subpoena to Karolos Papoulias, the current President of the Hellenic Republic ("Greece"), compelling him to submit to an interview with the Accused's legal advisor.[1] In support, the Accused argues that President Papoulias has information relevant to and necessary for the Accused's defence case as he was the Foreign Minister of Greece between 1993 and 1996 and, in that capacity, played a prominent role in the peace negotiations surrounding the conflict in Bosnia and Herzegovina ("BiH").[2] In particular, the Accused submits that President Papoulias has information going to (i) the Accused's alleged responsibility for the shelling of Markale Market in Sarajevo on 5 February 1994, (ii) his alleged responsibility for detention of United Nations ("UN") personnel in May 1995, and (iii) his alleged participation in the overarching joint criminal enterprise, the object of which was to expel Bosnian Muslims from Bosnian Serb-held areas.[3] With respect to (i), the Accused submits that he met with President Papoulias nine days after the shelling of Markale Market and told him that the Serbs were not responsible for it.[4] As for (ii), the Accused explains that he met with President Papoulias on 5 June 1995, at the time when the Bosnian Serbs held a number of UN personnel in detention, and told President Papoulias that he believed that the Serbs were entitled to detain the UN personnel as prisoners of war.[5] Finally, in relation to (iii), the Accused submits that President Papoulias participated actively in efforts to persuade him to accept the Contact Group peace proposal and that during that time the Accused expressed his desire for peace in BiH on multiple occasions, thus not favouring an ethnically pure Serb territory.[6]

2. The Accused also submits that, on 18 November 2011, he sent a letter to Greece, inquiring whether President Papoulias would agree to an interview with his legal adviser and asking Greece to provide him with copies of "notes, memoranda, or reports of his meetings with

[1] Motion, para. 1.
[2] Motion, paras. 2, 18, 23.
[3] Motion, paras. 7, 18–22.
[4] Motion, paras. 3, 19.
[5] Motion, paras. 5, 21.
[6] Motion, paras. 4, 6, 20.

President Papoulias."[7] However, while acknowledging receipt of this letter, Greece provided no response, prompting the Accused to send another letter on 8 December 2011.[8] On 5 January 2012, Greece informed the Accused that it was not in possession of the requested items and that President Papoulias "does not intend to satisfy [the Accused's] request" for an interview.[9] The Accused provided Greece with further information about his meetings with President Papoulias and renewed his request for an interview,[10] but was once again told, on 24 January 2012, that President Papoulias would not satisfy his request.[11] Thus, the Accused argues that he has made reasonable efforts to obtain the voluntary co-operation of President Papoulias.[12]

3. Finally, the Accused submits that obtaining this information from President Papoulias would be "more credible than information or testimony about these topics [from the Accused's] own associates, who can be alleged to be biased".[13]

4. Having been invited by the Chamber to respond to the Motion,[14] Greece filed the "Response of Greece to the Motion for Subpoena to Interview President Karolos Papoulias" on 17 February 2012 ("Response"), arguing that the Motion should be dismissed on the basis that the Accused has failed to show that President Papoulias's confirmation of the Accsued's statements in relation to the three issues listed above would *materially* assist the Accused in his case, particularly in light of the fact that President Papoulias "had never had any direct knowledge concerning the actual occurrence of the crimes allegedly committed".[15] In addition, Greece submits that the Accused has failed to show that the information sought is not obtainable through other means, noting that the Accused has in fact already conceded that some of his associates could provide this information.[16] Greece also refers to the Appeals Chamber jurisprudence on subpoenas and argues that it leaves open the possibility for immunity from a subpoena for certain state officials.[17] It then argues that acting heads of state, such as President Papoulias, should fall into such a category and submits that issuing a subpoena in this case would constitute a disproportionate measure and an unnecessary intrusion on the dignity of the

[7] Motion, para. 12, Annex A.
[8] Motion, para. 13, Annex B.
[9] Motion, para. 14, Annex C.
[10] Motion, para. 15, Annex D.
[11] Motion, para. 16, Annex E.
[12] Motion, para. 17.
[13] Motion, paras. 23–24.
[14] *See* Invitation to Greece Regarding Motion for Subpoena of President Karolos Papoulias, 27 January 2012.
[15] Response, paras. 5, 10–16.
[16] Response, paras. 17–18.
[17] Response, para. 20, relying on *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision"), para. 27. In support of this view, Greece also refers to a number of other domestic and international decisions, including the decisions of International Court of Justice. *See* Response, paras. 22–27.

President's office.[18] Finally, Greece notes that a subpoena for an interview "contains an unknown judicial practice under the Greek legal system" and would therefore raise "considerable problems of a legal and practical nature."[19]

5. Having received the Response, the Accused sent, on 21 February 2012, a letter to Greece, proposing that President Papoulias answer written questions in lieu of an interview.[20] On 7 March 2012, Greece filed a response to the letter, informing the Accused that "no reconsideration of the matter is necessary" and thus refusing the Accused's proposal.[21]

6. Having been granted leave to reply,[22] the Accused filed his "Reply Brief: Motion for Subpoena to Interview President Karolos Papoulias" on 12 March 2012 ("Reply"). The Accused submits that there is no immunity for heads of state when it comes to subpoenas issued by the Tribunal.[23] He also argues that Greece cannot rely on its domestic law as a reason for its refusal to co-operate with the Tribunal and notes that the Appeals Chamber has held that subpoenas for an interview are appropriate where a party is unaware of the precise nature of the evidence which a prospective witness can give.[24] He also observes that there does not appear to be a provision in the Greek law which prohibits a subpoena for an interview and submits that, given President Papoulias's refusal to answer the Accused's questions in writing, the reliance on the lack of a domestic provision for such an interview is "simply a device to avoid co-operation with the Tribunal."[25] The Accused then reiterates that the information to be provided by President Papoulias is relevant to his case and, in support, provides extensive detail as to what transpired at the above-mentioned meetings involving himself and the President.[26] Finally, the Accused submits that President Papoulias's evidence cannot be obtained from any other source as Greece denies the possession of any records of the meetings in question and has failed to identify any of President Papoulias's associates who may have been present during those meetings.[27] As far as his own associates are concerned, the Accused repeats that their testimony would not have the same credibility as that of President Papoulias.[28]

[18] Response, paras. 21, 26–27.
[19] Response, para. 28.
[20] *See* Letter to Greece, 21 February 2012.
[21] *See* Correspondence from Greece, 7 March 2012.
[22] Hearing, T. 26096 (12 March 2012). *See also* Request for Leave to Reply: Motion for Subpoena to Interview President Karolos Papoulias, 8 March 2012.
[23] Reply, paras. 9–15.
[24] Reply, paras. 16–17.
[25] Reply, paras. 21–24.
[26] Reply, paras. 25–40.
[27] Reply, paras. 42–44, 46.
[28] Reply, para. 45.

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". This power includes the authority to "require a prospective witness to attend at a nominated place and time in order to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial".[29] The Appeals Chamber has stated that a Trial Chamber's assessment 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".[30] 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.[31]

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.[32]

9. 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.[33] Finally, the applicant must show that he has made reasonable attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.[34]

---

[29] *Krstić* Decision, para. 10.

[30] *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 ("*Halilović* Decision"), para. 7. *See also 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. 41.

[31] *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. *See also Milošević* Decision, para. 38.

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

[33] *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

[34] *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.

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.[35] 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.[36] In essence, a subpoena should be considered a method of last resort.[37]

III. Discussion

11. The Chamber recalls that the procedure for subpoena to submit to an interview was first established in the Tribunal's jurisprudence in 2003, in the *Krstić* case, where the Appeals Chamber, by majority, issued subpoenas to two prospective defence witnesses, requiring them to appear for an interview with the defence. As noted by the Accused in his Reply,[38] the Appeals Chamber issued these subpoenas because:

> [I]n a situation where the defence is unaware of the precise nature of the evidence which a prospective witness can give and where the defence has been unable to obtain his voluntary cooperation, it would not be reasonable to require the defence to "use all mechanisms of protection and compulsion available" to force the witness to give evidence "cold" in court without first knowing what he will say. That would be contrary to the duty owed by the counsel to their client to act skilfully and with loyalty. Accordingly, it is generally inappropriate in this situation to consider orders to the prospective witnesses to attend to give evidence (Rule 54) or for taking his evidence by way of deposition for use later in the trial (Rule 71).[39]

12. Bearing in mind the basic premise behind having the procedure for a subpoena to interview, the Chamber recalls that the information President Papoulias is said to possess stems from the various meetings he had with the Accused, as well as the statements made to him by the Accused during those meetings. Given the Accused's personal involvement in these meetings, it is difficult to see why there is any need for his legal adviser to meet with and interview President Papoulias when both he and the Accused are perfectly "aware of what evidence [President Papoulias] can give".[40] This is indeed confirmed by the Accused's various submissions, which recount in *great detail* the said meetings and the statements the Accused had made to President Papoulias at the time.[41] Accordingly, as the Accused is "fully aware of the

---

[35] *Halilović* Decision, para. 6; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 31.

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

[37] *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".

[38] Reply, para. 17.

[39] *Krstić* Decision, para. 8.

[40] *Krstić* Decision, para. 9.

[41] Motion, paras. 3–6, 19–21; Reply, paras. 25–40.

precise nature of the evidence" President Papoulias could give if called to give evidence during the Accused's defence case,[42] the Chamber considers that there is no need to subpoena President Papoulias to appear for an interview with the Accused's legal adviser.

13. As a result, there is also no need for the Chamber to enter into a discussion on whether the Accused has satisfied the requirements of issuing a subpoena in this particular case or whether acting heads of state enjoy immunity from subpoenas issued by the Tribunal. Accordingly, the Chamber shall refrain from doing so.

IV. Disposition

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

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

Judge O-Gon Kwon
Presiding

Dated this twentieth day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

[42] *Krstić* Decision, para. 9.