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: 29 March 2010

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: **29 March 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION TO SUBPOENA PROSECUTION WITNESS RONALD EIMERS FOR INTERVIEW

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed 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 "Motion to Subpoena Prosecution Witness Ronald Eimers for Interview", filed by the Accused on 1 March 2010 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 29 May 2009, pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Prosecution sought the admission into evidence of Ronald Eimers's witness statements and transcripts of his prior testimony in the *Dragomir Milošević* case ("Prosecution's Fourth Rule 92 *bis* Motion"), in which he testified about, *inter alia*, a number of shelling incidents in Sarajevo.[1] On 8 July 2009, the Accused filed his "Omnibus Response to Rule 92 *bis* Motions", opposing the Rule 92 *bis* applications for all witnesses, including Eimers, and requesting to cross–examine them.[2]

2. In the Motion, the Accused requests the Trial Chamber to issue a subpoena compelling Ronald Eimers to be interviewed by his defence team.[3] The Accused submits that Eimers is a Dutch military officer who was deployed to Sarajevo as a United Nations Military Observer from 30 October 1994 to 26 April 1995, where he investigated a number of shelling incidents in the Hrasnica area and ascribed them to Bosnian Serb forces.[4] Thus, given that he is accused of conducting a shelling and sniping campaign in Sarajevo, the Accused argues that there is a "legitimate forensic purpose" for him to interview Eimers. He also claims that he has the right to conduct this interview in order to verify the information in Eimers' statements to the Prosecution, and to develop additional information which could also be admitted, either through Rule 92 *bis* or by requesting the witness to appear for cross-examination.[5] The Accused believes that there is no alternative but to move for the issuance for a subpoena because the Dutch Government has failed to respond to his numerous requests to authorise the interview.[6] He also notes that the interview should be conducted without further delay since the Prosecution will begin its case with the Sarajevo events.[7]

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[1] Prosecution's Fourth Rule 92 *bis* Motion.
[2] Omnibus Response to Rule 92 *bis* Motions, 8 July 2009, para. 3.
[3] Motion, paras. 1, 9.
[4] Motion, para. 5. *See* Prosecution's Rule 65 *ter* Witness List.
[5] Motion, para. 6.
[6] Motion, paras. 2, 7.
[7] Motion, para. 7.

3. In the "Prosecution's Response to Motion to Subpoena Prosecution Witness Ronald Eimers for Interview", filed on 4 March 2010 ("Response"), the Prosecution argues that the Accused has not established that the information sought is necessary for the preparation of his case.[8] It also asserts that the Accused's claim to hold an unqualified right to interview a witness is misguided,[9] and that, to the extent he seeks "to verify the evidence of Ronald Eimers", the appropriate recourse for the Accused is to request the attendance of the witness for cross-examination in response to the Prosecution's Fourth Rule 92 *bis* Motion,[10] which he did on 8 July 2009. The Prosecution submits that the Accused has not demonstrated a reasonable basis for his belief that Eimers would be able to give additional information which would materially assist his case.[11] The Prosecution further claims that the Accused has not established that the information sought is unavailable through other means as it is unclear from the Motion whether Eimers has declined to be interviewed by the Accused. Thus, it would be premature to issue a subpoena at this stage.[12]

4. On 5 March 2010, the Trial Chamber rendered a decision on the Prosecution's Fourth Rule 92 *bis* Motion ordering, *inter alia*, Ronald Eimers to appear for cross-examination and his written evidence to be presented in accordance with Rule 92 *ter*.[13]

II. Applicable Law

5. The Appeals Chamber has held that, where a party wishes to question a state official, as opposed to seeking documents from that state, a subpoena to the individual under Rule 54, as opposed to a binding order to the state under Rule 54 *bis*, is the appropriate mechanism.[14] According to Rule 54, 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." Subpoenas are usually sought for either (i) witnesses who were already scheduled to testify for one of the parties, or expressed a desire to do so, and did not want to submit to an interview by the other party,[15] or

[8] Response, paras. 2–4.
[9] Response, para. 2.
[10] Response, para. 3.
[11] Response, para. 4.
[12] Response, para. 5.
[13] *See* Decision on Prosecution's Fourth Rule 92 *bis* Motion, 5 March 2010.
[14] *Prosecutor v. 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"), paras. 27–28. *See Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision"), para. 24.
[15] *See e.g. Halilović* Decision, para. 2; *Krstić* Decision para. 1.

(ii) witnesses who did not want to testify at all but were nevertheless sought by one of the parties as prospective witnesses at trial.[16]

6. The Appeals Chamber has elucidated that a subpoena pursuant to Rule 54 is "necessary" where a legitimate forensic purpose for having the interview (or testimony) 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.[17]

7. To satisfy this requirement, 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 relation 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 made to the Prosecution or to others in relation to the events.[18]

8. The Appeals Chamber has also acknowledged that a witness who is scheduled to testify for one party may have information relevant to the case of the opposing party. Thus, the opposing party may have a legitimate expectation to interview such a witness in order to obtain this information and thereby better prepare its case.[19] The Appeals Chamber also held, however, that the mere desire to prepare for cross-examination of a witness is insufficient to warrant the issuance of a subpoena. In other words, where the information the opposing party seeks before trial from the prospective witness will be presented at trial, during the witness's examination-in-chief, there is no need to resort to a subpoena as this information can be tested by the opposing party during cross-examination. Thus, it is only if the opposing party presents additional reasons for the need to interview such a witness, for instance, reasons which go beyond the scope of the issues on which the witness is supposed to testify, that a subpoena should be issued.[20]

9. Furthermore, the Trial Chamber's consideration must "focus not only on the usefulness of the information to the applicant but on its overall necessity in ensuring that the trial is

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[16] *See e.g. Milošević* Decision, para. 1.
[17] *Halilović* Decision, para. 6; *Krstić* Decision, para. 10 (citation omitted); *Milošević* Decision, para. 38.
[18] *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.
[19] *See Halilović* Decision, paras. 12–14.
[20] *See Halilović* Decision, paras. 9–11, 15.

informed and fair".[21] The Trial Chamber may therefore also consider whether the information the applicant seeks to elicit through the use of a subpoena is obtainable through other means.[22]

10. Finally, 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.[23] 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.[24]

III. Discussion

11. The Chamber recalls that, in support of his Motion, the Accused indicates that he "has the right to interview [Ronald] Eimers to verify the information in his statements" and "to develop additional information which could also be admitted".[25] The Chamber is not convinced, however, that by referring to the need to "develop additional information", the Accused has provided a specific enough reason for his need to interview Eimers that goes beyond his preparation for cross-examination. As for his argument that the interview is needed in order to "verify the information in Ronald Eimers statements", given that the Chamber has already decided that Eimers should appear before it for cross-examination, it considers that the Accused will have the opportunity to do so when Eimers comes to the Tribunal to give evidence. The Accused will then be able to test Eimers's evidence, as well as his reliability and credibility. Accordingly, having regard to all the material before it, the Chamber is of the view that the Accused has failed to specify how Eimers is likely to give information which will materially assist him in his case, in relation to clearly identified issues relevant to the trial.

12. For these reasons, and in light of the Appeals Chamber's warning to the effect that subpoenas should not be issued lightly,[26] the Chamber finds that the subpoena sought in the Motion is not necessary for the purpose of the Accused's investigation or the preparation or conduct of the trial.

IV. Disposition

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[21] *Halilović* Decision, para. 7; *Milošević* Decision, para. 41. *See also Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("*Brđanin and Talić* Decision"), para. 46.

[22] *Halilović* Decision, para. 7; *Krstić* Decision, paras. 10–12; *Brđanin and Talić* Decision, paras. 48–50; *Milošević* Decision, para. 41.

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

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

[25] *See above* para. 2.

[26] *See above* para. 10; *see also Halilović* Decision, para. 10 (the subpoena is a "weapon which must be used sparingly" and a Trial Chamber "should guard against the subpoena becoming a mechanism used routinely as a part of trial tactics").

13. For the reasons outlined above, pursuant to Rule 54 of 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-ninth day of March 2010
At The Hague
The Netherlands

[Seal of the Tribunal]