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: **IT-01-48-AR73**

Date: **21 June 2004**

Original: **English**

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Decision of: **21 June 2004**

THE PROSECUTOR

v.

SEFER HALILOVIĆ

DECISION ON THE ISSUANCE OF SUBPOENAS

Counsel for the Prosecution:

Mr. Ekkerhard Withopf
Mr. Vladimir Tochilovsky

Counsel for the Defence:

Mr. Stefan Kirsch
Mr. Guénaël Mettraux

1. This interlocutory appeal raises the issue of whether, in deciding a motion for a subpoena, a Trial Chamber may reject the motion merely because the proposed witnesses will in any event be called by the other party and so will be available for cross-examination by the moving party.

Background

2. In the course of preparing for his trial, Sefer Halilović's Defence sought to interview three individuals who have been placed on the Prosecution's list of proposed witnesses. When these individuals repeatedly refused to meet with the Defence, it requested the Trial Chamber to issue subpoenas compelling these witnesses to attend.[1] The Trial Chamber rejected the motion. It noted that all three witnesses will be subject to cross-examination by the Defence at trial, and that the Defence "has not specified what aspects must be covered during [the requested pre-trial] interviews of each of the Three Witnesses that could not be adequately covered during cross examination."[2]

3. The Defence asked the Trial Chamber to reconsider its decision, and submitted additional, more specific information in support of its original request.[3] The Trial Chamber acknowledged that the Defence "submit[ted] further details pertaining to each of the three proposed witnesses," but nevertheless concluded that it will not issue subpoenas for witnesses "who are all expected to testify *viva voce* and be subject to cross examination during trial."[4] The Trial Chamber therefore adhered to its previous decision, but certified the issue for an interlocutory appeal.[5]

4. The Defence filed this appeal, asking the Appeals Chamber to reverse the Trial Chamber's decision of 16 February 2004, and to issue subpoenas to three witnesses or, in the alternative, to direct the Trial Chamber to do so.[6] The Prosecution responded, arguing that the Trial Chamber's impugned decision is correct in law and should be affirmed.[7]

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[1] "Motion for Subpoenas," filed confidentially on 29 December 2003.
[2] Decision on Defence Motion for Subpoenas, IT-01-48-PT, 16 February 2004.
[3] "Motion for Reconsideration and, in the Alternative, Motion for Certification," filed confidentially on 24 February 2004.
[4] Decision on Motion for Reconsideration, or Alternatively, Certification, IT-01-48-PT, 2 April 2004.
[5] *Ibid.*
[6] "Defence Appeal Concerning Issuance of Subpoenas," filed in part confidentially on 13 April 2004.
[7] "Prosecution Response to Defence Appeal Concerning Issuance of Subpoenas," filed on 23 April 2004.

Discussion

5. A Trial Chamber may issue a subpoena when it is "necessary for the purposes of an investigation or for the preparation or conduct of the trial."[8] This power includes the authority to "requir[e] 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."[9]

6. The applicant seeking a subpoena must make a certain evidentiary showing of the need for the subpoena. In particular, he must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial.[10] To satisfy this requirement, the applicant may need to present information about such factors as the position held by the prospective witness in relation to the events in question, any relationship the witness may have had with the accused which is relevant to the charges, any opportunity the witness may have had to observe or to learn about those events, and any statements the witness made to the Prosecution or others in relation to them.[11] 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.[12] As the Appeals Chamber has emphasized, "[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction."[13]

7. In deciding whether the applicant has met the evidentiary threshold, the Trial Chamber may properly consider both whether the information the applicant seeks to elicit through the use of subpoena is necessary for the preparation of his case and whether this information is obtainable through other means.[14] The background principle informing both considerations is whether, as Rule 54 requires, the issuance of a subpoena is necessary "for the preparation or conduct of the trial." The Trial Chamber's

[8] Rule 54 of the Rules of Procedure and Evidence.
[9] *Prosecutor* v. *Krstić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 10.
[10] *Ibid.*
[11] *Ibid.*, para. 11.
[12] *See Prosecutor* v. *Brđanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002, para. 31.
[13] *Ibid.*
[14] *Krstić*, IT-98-33-A, Decision on Application for Subpoenas, paras 10-12; *Brđanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, paras 48-50.

considerations, then, 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]

8. In this case, the Trial Chamber concluded, in its initial analysis of the Defence application for a subpoena, that the Defence failed to provide information specific enough to satisfy the evidentiary threshold. In the Trial Chamber's conclusion, the Defence "has only provided a general basis in making its request for subpoenas," and its request lacked the requisite specificity.[16] If accurate, this conclusion could be a sufficient basis for the rejection of the Defence request. The Defence sought to cure this deficiency when it sought reconsideration of the Trial Chamber's ruling, by submitting what it describes as additional, more specific information. The Trial Chamber acknowledged this fact, stating that "the Defence submit[ted] further details pertaining to each of the three proposed witnesses of the Prosecution in seeking reconsideration of the matter."[17] The Trial Chamber did not discuss this additional evidence of the Defence, and did not state whether it was specific enough to meet the required evidentiary threshold and warrant the issuance of the subpoena. In the absence of any explicit finding on the issue, the Appeals Chamber must presume that the Trial Chamber accepted, if only *arguendo*, that the additional information presented by the Defence was sufficiently specific.

9. The Trial Chamber's rejection of the Defence application therefore rested on a different ground, namely its conclusion that because the witnesses in question were expected to testify for the Prosecution at trial, the Defence could elicit the information it needed during cross-examination.[18] The Trial Chamber's precise analysis of this issue is, however, not entirely clear. In its initial ruling on the Defence application, the Trial Chamber stated, as the reason for rejecting the request, that the Defence "has not specified what aspects must be covered during such interviews of each of the Three Witnesses that could not be adequately covered during cross examination."[19] In other words, the Trial Chamber seems to have concluded that the Defence failed to provide any reasons for its request to interview the

[15] *See, e.g., Brđanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, para. 46 (in deciding whether a subpoena should issue, a Trial Chamber must take into account not only the interests of the litigants but the overarching interests of justice and other public considerations).
[16] Decision on Defence Motion for Subpoenas, IT-01-48-PT, at 3 & n.7.
[17] Decision on Motion for Reconsideration, or Alternatively, Certification, IT-01-48-PT, at 3 (citing "Motion for Reconsideration and, in the Alternative, Motion for Certification," para. 2).
[18] Decision on Defence Motion for Subpoenas, IT-01-48-PT, at 3; Decision on Motion for Reconsideration, or Alternatively, Certification, IT-01-48-PT, at 3.
[19] Decision on Defence Motion for Subpoenas, IT-01-48-PT, at 3.

Prosecution's witnesses prior to trial other than its desire to prepare for cross-examination of these witnesses.[20]

10. While a preparation for cross-examination is undeniably a part of the overall preparation for trial, it is not, in and of itself, a sufficient basis for an issuance of subpoena. Being a mechanism of judicial compulsion, backed up by the threat and the power of criminal sanctions for non-compliance, the subpoena is a weapon which must be used sparingly. While a Trial Chamber should not hesitate to resort to this instrument where it is necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the presentation of an effective defence, it should guard against the subpoena becoming a mechanism used routinely as a part of trial tactics. Where the information the Defence seeks before trial from the opposing party's witness will, in any event, be presented at trial during that witness's examination-in-chief, there is no need to resort to a subpoena. The information will be present both to the court and to the Defence, and the latter will be able to test this information for veracity, accuracy and reliability during cross-examination. In entertaining a request for a subpoena, a Trial Chamber is therefore entitled to take into account the fact that a witness whom a party seeks to subpoena is scheduled to testify during the trial, and to refuse the request where its sole rationale is to prepare for a more effective cross-examination. A subpoena involves the use of judicial power to compel, and as such, it must be used where it would serve the overall interests of the criminal process, not where it would merely facilitate a party's task in litigation. If this were the Trial Chamber's analysis, its rejection of the subpoena request would be proper.

11. The Trial Chamber, however, employed a somewhat different analysis in its ruling on the Defence request to reconsider. There, the Trial Chamber, having acknowledged that the Defence has now presented further detailed information in support of its request, nevertheless stated that it will not issue subpoenas for witnesses "who are all expected to testify *viva voce* and be subject to cross examination during trial."[21] In contrast to its earlier decision, the Trial Chamber did not examine whether the Defence request for a subpoena went beyond the scope of the issues on which the Prosecution witnesses were expected to testify. Instead, it concluded that the mere fact that the

[20] This interpretation assumes that the Trial Chamber concluded, on the basis of the Defence submissions in support of its request for a subpoena, that it intends to limit its cross-examination of the witnesses in question to the scope of the Prosecution's examination-in-chief. Of course, as explained below, Rule 90(H)(i) of the Rules of Procedure and Evidence allows the scope of cross-examination to be broader. The Trial Chamber's ruling, therefore, may suffer from an additional infirmity, as discussed in paragraph 14, *infra*.

witnesses would be available for cross-examination was sufficient to deny the request for subpoena. This conclusion was in error.

12. Where a witness is listed by one party as expected to testify on its behalf with respect to certain issues, it does not necessarily follow that this witness will have no information of value to the opposing party on other issues related to the case. The opposing party may have a legitimate expectation of interviewing such witness in order to obtain this information and thereby better prepare a case for its client. To deprive this expecting party of such ability would hand an unfair advantage to the opposing party, which would be able to block its opponent's ability to interview crucial witnesses simply by placing them on its witness list.

13. Moreover, the party which placed the witness in question on its list of witnesses may then decide not to call the witness at all. While the other party, such as the Defence in this case, could subsequently petition the Trial Chamber for a subpoena to obtain information from the witness, that party would have lost valuable time in procuring this information and may therefore end up at an unfair disadvantage with respect to the preparation of its case.

14. The Trial Chamber also seems to have overlooked the fact that during cross-examination, the party conducting cross-examination can elicit from the witness evidence exceeding the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness, provided that "the witness is able to give evidence relevant to the case for the cross-examining party."[22] Given that during cross-examination the Defence can elicit from the Prosecution witness information which is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the Defence may have a legitimate need to interview this witness prior to trial in order to properly prepare its case.

15. In these circumstances, the Trial Chamber erred in rejecting the Defence request for subpoenas of three Prosecution witnesses solely on the basis of the fact that the Defence will have the opportunity to cross-examine these witnesses. The Trial Chamber should have examined whether the Defence has presented reasons for the need to interview these witnesses which went beyond the need to prepare a more effective cross-examination. As this assessment requires a factual determination which is

[21] Decision on Motion for Reconsideration, or Alternatively, Certification, IT-01-48-PT, at 3.
[22] Rule 90(H)(i) of the Rules of Procedure and Evidence.

properly left to the Trial Chamber, the Appeals Chamber will not undertake this analysis itself.[23] The Trial Chamber is directed to reconsider the Defence request in light of the principles set out in the present decision. If its analysis discloses a need for the Defence to interview the witnesses, as mentioned above, subpoenas should issue.

Disposition

The appeal is granted in part. The Trial Chamber's Decision on Defence Motion for Subpoenas, rendered on 16 February 2004, is reversed. The matter is remitted to the Trial Chamber with directions to reconsider it in light of the present decision and to issue subpoenas should its renewed examination disclose a need to interview the witnesses. Judge Weinberg de Roca dissents from this disposition and would dismiss the appeal.

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

Dated this 21st day of June 2004,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding

Judge Mohamed Shahabuddeen appends a declaration.

Judge Inés Mónica Weinberg de Roca appends a dissenting opinion.

[Seal of the Tribunal]

[23] *See Brđanin and Talić*, IT-99-36-AR73.9, Decision on Interlocutory Appeal, para. 54.

DECLARATION OF JUDGE SHAHABUDDEEN

1. Having had the privilege of reading in draft the dissenting opinion of Judge Weinberg de Roca, I believe that I am under an obligation to explain why I am supporting today's decision although it conflicts with the position taken in paragraphs 20-44 of a dissenting opinion which I gave in *Krstić*[1]. The reason is that I propose to follow the majority position in that case so long as it stands; that also explains my position in *Mrkšić*.[2] However, subject to that consideration, I have had no reason to reconsider the views which I expressed in that dissenting opinion in *Krstić*.

2. For comparison, reference may be made to the position of the Prosecution. Ample as are the powers of the Prosecution under articles 16(1) and 18(2) of the Statute and Rule 39 of the Rules of Procedure and Evidence, in paragraph 15 of its decision in *Mrkšić* the Appeals Chamber recognised that, where "a person for any reason declines to be interviewed, the Prosecution does not have the power to compel the person to attend an interview or to respond to questions posed by the Prosecution." Thus, a potential witness may decline to be interviewed by the Prosecution. The question is whether a Chamber may step in to compel him to attend an interview and to answer any questions – whether the interview is held by one side or the other.

3. Rule 54 of the Rules of Procedure and Evidence empowers a Judge or a Trial Chamber to "issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purpose of an investigation or for the preparation or conduct of the trial." Those powers are wide; but, wide as they are, they have to be interpreted and applied in accordance with the principles known to nations in the international community. I do not have the impression that the principles known to nations in the international community allow for the issuance by a court of a subpoena requiring a potential witness to attend at a nominated place and time to be interviewed by a party to a criminal matter and more particularly where, as in this case, he has refused to be interviewed; no national case in which a court did that was cited in *Krstić*. A person so interviewed might never be called as a witness in court; meanwhile he would have been subject to the criminal sanctions of a subpoena in respect of an out-of-court meeting with a party.

[1] IT-98-33-A of 1 July 2003.
[2] IT-95-13/1-AR73, of 30 July 2003.

4. There is a public interest in protecting a person's right to privacy as well as a public interest in securing information needed for a criminal trial. Those two public interests have to be held in balance. It is suggested that the balance is struck by defining a line beyond which the privacy of a person can be encroached upon only where there is a countervailing and established legal duty, such as the duty of a person to testify before a process conducted by a judicial officer.

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

Mohamed Shahabuddeen

Dated 21 June 2004
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE WEINBERG DE ROCA

1. I respectfully dissent from the Appeal's Chamber decision on this matter. I believe that the majority has misinterpreted the Trial Chamber's reason for denying the Defence request for subpoena.

2. It is the majority's view that the Trial Chamber denied the Defence's request solely because the witnesses in question would be available for cross-examination. However, it is clear from both the 16 February 2004[1] and 2 April 2004[2] decisions that the Trial Chamber did not consider this fact alone to be sufficient ground for rejection of the subpoena requests. Indeed, the Trial Chamber correctly recognized the possibility that a witness of one party may be interviewed by the opposing party.[3] However, the Trial Chamber stressed the need to exercise "due caution" in applying a mechanism as coercive as subpoena.[4]

3. Accordingly, the Trial Chamber demanded a showing that the requested subpoenas are necessary to reveal information "that could not be adequately covered during cross examination."[5] Having correctly applied this heightened standard, the Trial Chamber remained unconvinced of the necessity of the measure: "The Trial Chamber is still not satisfied that it should issue subpoenas for the three proposed witnesses..."[6]

4. This Appeals Chamber has explicitly recognized the importance of balancing a witness's right to privacy against the Tribunal's duty to adjudicate thoroughly, most notably in the *Mrskic*[7] and *Blaskic*[8] decisions. For this reason, we have exercised caution in applying the coercive power of subpoena, carrying as it does the threat of criminal sanctions. We have further recognized that

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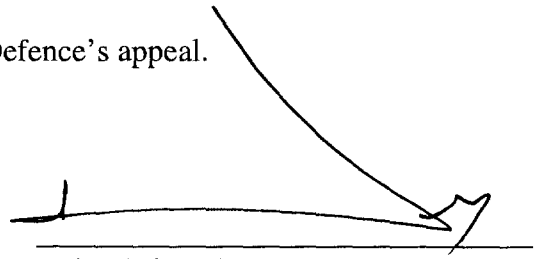
[1] Prosecutor v. Sefer Halilović, Confidential Decision on Defense Motion for Subpoenas, 16 February 2004
[2] Prosecutor v. Sefer Halilović, Confidential Decision on Motion for Reconsideration, or Alternatively, Certification, 2 April 2004
[3] *Ibid*, p 2
[4] *Ibid.*
[5] Prosecutor v. Sefer Halilović, Confidential Decision on Defense Motion for Subpoenas, 16 February 2004, p 3
[6] *Ibid*, p 3
[7] *Prosecutor v. Mrkšić,* Decision on Defense Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party, 30 July 2003
[8] *Prosecutor v. Blaškić,* Confidential and Ex Parte Decision on Defense Prosecution's Application for Subpoena, 26 November 2003

"particular caution is needed where the Prosecution is seeking to interview a witness who has declined to be interviewed," as in the instant case.[9] To compel an unwilling witness to submit to a pre-trial interview, absent a clear showing that such a measure is necessary to the fair adjudication of the case, would be a grave invasion of privacy indeed.

5. The Trial Chamber exercised due caution in this regard, requiring a heightened showing of necessity on the part of the Defence in order to safeguard the important right of the witnesses to privacy. Accordingly, I believe that the Trial Chamber applied the proper standard, and was therefore not in error in denying the Defence's request to subpoena the witnesses in question. With due respect to the majority, I would dismiss the Defence's appeal.



Judge Inés Mónica Weinberg de Roca

Dated this 21st day of June 2004,
At The Hague,
The Netherlands.

[9] *Ibid.*