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: 11 January 2013

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: **11 January 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA NASER ORIĆ

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 for Subpoena to Naser Orić" filed on 13 November 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 directing Naser Orić to appear for testimony in his case on 5 February 2013.[1]

2. The Accused argues that he made reasonable efforts to obtain the voluntary co-operation of Orić but was ultimately unsuccessful.[2] He submits that on 26 March 2012, he sent a letter to Orić through Orić's counsel, in which he requested that Orić submit to an interview with the Accused's legal adviser so that he could properly evaluate whether to call Orić to testify in his case.[3] Orić's counsel informed the Accused *via* email on 2 April 2012 that Orić was not willing to give any statement or to testify in light of ongoing investigations against him in the Offices of the Bijeljina District Prosecutor and the State Prosecutor of Bosnia and Herzegovina ("BiH") "for the crimes allegedly committed at the territory of Srebrenica in the period from 1992–1995".[4]

3. The Accused contends that there are reasonable grounds to believe that Orić has information that can materially assist his case.[5] He argues that as former commander of the 28th Division of the Army of Bosnia and Herzegovina ("ABiH") in the Srebrenica enclave,[6] Orić can provide evidence with regard to events in the enclave from 1992 to 1995, namely: (1) contrary to its agreement with the United Nations, the ABiH never demilitarised the Srebrenica enclave and the troops under Orić's command continued to possess heavy and light weapons;[7] (2) a large amount of arms and ammunition was smuggled into the enclave after being delivered by helicopter to an area near Žepa and this "smuggling route" between the enclaves was "essential to the continuing supply of weapons to the ABiH troops";[8] (3) the ABiH launched attacks

[1] Motion, paras. 1, 19.
[2] Motion, para. 4.
[3] Motion, para. 4; Annex A.
[4] Motion, para. 4; Annex B.
[5] Motion, para. 5.
[6] Motion, paras. 1, 14.
[7] Motion, para. 6.
[8] Motion, para. 7.

against Bosnian Serb villages from the Srebrenica area, including "attacks just prior to the beginning of the Bosnian Serb attack on Srebrenica in early July 1995";[9] (4) the ABiH appropriated large amounts of humanitarian aid from UNHCR and other agencies;[10] (5) the ABiH often positioned themselves and fired near UNPROFOR observation posts "with the intention of drawing fire upon United Nations personnel from the Bosnian Serbs to obtain international intervention on their side";[11] and (6) the Government of BiH sacrificed Srebrenica and its residents "as part of a greater strategy to obtain parts of Sarajevo" as an eventual settlement to the war.[12]

4. The Accused submits that the information sought is relevant to establish that he had a legitimate military reason to order an attack on Srebrenica so as to separate communications between the Srebrenica and Žepa enclaves and to put an end to the attacks from Srebrenica.[13] In his submission, the evidence will assist him in refuting the allegations made by the Office of the Prosecutor ("Prosecution") that the attack on Srebrenica was part of a joint criminal enterprise to deport Bosnian Muslims from Srebrenica and that the killings charged in the Third Amended Indictment ("Indictment") were part of the goal of that enterprise or were committed with the intent to destroy the Bosnian Muslims as a group.[14]

5. Furthermore, the Accused submits that the information from Orić is necessary for his case as there is no central person who can provide information concerning military activity in Srebrenica during the time relevant to this case other than Orić, who, due to his position, has information from both up and down the ABiH chain of command.[15] He also argues that other ABiH witnesses will be "equally reluctant to testify with the same fear of self-incrimination".[16]

6. With regard to Orić's "fear of self-incrimination", the Accused submits that if necessary, he would not object to an order by the Chamber that his testimony in court not be used against him in other proceedings in accordance with Rule 90(E) of the Rules or that a certain part of his testimony be given in closed session.[17]

[9] Motion, para. 8
[10] Motion, para. 9.
[11] Motion, para. 10.
[12] Motion, para. 11.
[13] Motion, para. 12.
[14] Motion, para. 13.
[15] Motion, para. 14.
[16] Motion, para. 15.
[17] Motion, para. 17.

7. The Accused further requests that the Motion be served upon the BiH Government and Orić and that both be invited to respond to the Motion if they so wish.[18]

8. On 13 November 2012, the Prosecution informed the Chamber by e-mail that it did not wish to respond to the Motion.

9. On 10 December 2012, Orić submitted a "Response to Karadžić's Motion to Subpoena Naser Orić" ("Orić Response"), arguing that the Motion should be denied on the grounds that the Accused has failed to satisfy the requirements for the issuance of a subpoena.[19]

II. Applicable Law

10. 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 having 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.[20]

11. 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 statements the witness has made to the Prosecution or to others in relation to the events.[21]

12. 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.[22] Finally, the applicant must show that he has made reasonable

[18] Motion, para. 21.

[19] Orić Response, paras. 1–20.

[20] *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.

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

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

attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.[23]

13. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[24] 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.[25] In essence, a subpoena should be considered a method of last resort.[26]

III. Discussion

14. The Chamber considers that it has sufficient information to decide upon the Motion without hearing from Orić or the BiH Government. In that regard, the Chamber notes that Orić submitted his response without an invitation by the Chamber or without seeking leave to do so. Given that Orić has no standing in this case, the Chamber will not consider the Orić Response.

15. The Chamber now turns to the merits of the Motion. The Accused contends he has made reasonable attempts to obtain Orić's voluntary co-operation to testify, which have been unsuccessful. In relation thereto, the Chamber first notes that the Accused approached Orić only once, with a general request for an interview with the Accused's legal adviser so as to ultimately determine whether Orić should be called as a defence witness. Second, the letter indicates that the Accused was seeking information "concerning the events in Srebrenica from 1993–95".[27] In response, Orić through his counsel stated that, as advised by his counsel, he was not willing to give any statements or to testify about "the crimes allegedly committed at the territory of Srebrenica in the period from 1992–1995 […] while the investigation against him is still ongoing".[28] In light of the information before it, the Chamber cannot be satisfied that Orić would refuse to testify voluntarily on many of the topics addressed in the Motion. The Chamber is therefore not satisfied that reasonable efforts have been exhausted to obtain Orić's voluntary co-operation to testify in this case on the matters identified in the Motion.

[23] *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.

[24] *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.

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

[26] *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, confidential and *ex parte*, 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."

[27] Annex A.

[28] Annex B.

16. As a result, the Chamber will not enter into a discussion whether the Accused has satisfied the other requirements for issuing a subpoena in this particular case.

17. Once again, the Chamber reminds the Accused that a subpoena will not be issued lightly, that he should make sparing use of this mechanism, and that it should not be the default tool used each time a potential witness refuses to be interviewed or testify in his case. A serious assessment should always be made about the importance of the proposed evidence, whether the information a witness may provide could *materially* assist his case in relation to relevant issues, whether it is *necessary* for the conduct of the trial, and whether it is obtainable through other means, such as other witnesses.

IV. Disposition

18. For the reasons outlined above, the 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 eleventh day of January 2013
At The Hague
The Netherlands

[Seal of the Tribunal]