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: 4 April 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: **4 April 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S SECOND MOTION TO SUBPOENA NASER ORIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Counsel for Naser Orić

Mr. Vasvija Vidović
Mr. John Jones

The Accused

Mr. Radovan Karadžić

Standby Counsel

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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 "Second Motion for Subpoena to Naser Orić" filed on 7 February 2013 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence ("Rules"), that the Chamber issue a subpoena compelling Naser Orić to testify in his case on 26 March 2013.[1] The Accused submits that after the Chamber denied his first request to subpoena Orić on the grounds that reasonable efforts had not been exhausted to obtain Orić's voluntary co-operation to testify about the matters the Accused identified,[2] he sent a letter to Orić on 14 January 2013 ("14 January Letter") requesting him to testify on 7 February 2013.[3] On 23 January 2013, counsel for Orić replied, asking the Accused if he understood the risks of calling Orić as a defence witness and the following day, the Accused responded *via* email through his legal adviser that he understood and accepted the risks, and reiterated that Orić should appear on 7 February 2013 to testify or a subpoena would be sought.[4] The Accused contends that since no response to that email was received and Orić did not appear in court on 7 February 2013, he has made reasonable efforts to obtain Orić's voluntary co-operation to testify, and that a subpoena should therefore be issued to compel him to testify on 26 March 2013.[5]

2. On 8 February 2013, the Office of the Prosecutor ("Prosecution") informed the Chamber *via* email that it would not respond to the Motion.

3. On 13 February 2013, counsel for Orić filed the "Defence Request for Leave to Respond to Second Motion for Subpoena to Naser Orić" ("Request"), in which Orić requested the Chamber to grant him leave to respond to the Motion.[6] On 15 February 2013, the Chamber granted the Request and ordered Orić to file a response by no later than 22 February 2013.[7]

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[1] Motion, paras. 1, 7. Orić is currently listed on the Accused's list of witnesses scheduled for April and May 2013. *See* Defence Submission of Order of Witnesses for April and May 2013, 28 February 2013, Confidential Annex, p. 5.

[2] Decision on Accused's Motion to Subpoena Naser Orić, 11 January 2013 ("First Decision"), paras. 15, 18.

[3] Motion, paras. 2–3. *See also* Letter to Brigadier Naser Orić, 14 January 2013 ("14 January Letter").

[4] Motion, paras. 4–5, Annex A.

[5] Motion, paras. 6–7.

[6] Request, para. 7.

[7] Decision on Naser Orić's Request for Leave to Respond to Accused's Second Motion for Subpoena, 15 February 2013.

4. On 21 February 2013, counsel for Orić filed the "Response to Second Motion for Subpoena to Naser Orić" ("Response"), requesting that the Chamber deny the Motion on the grounds that the Accused has failed to show that the issuance of a subpoena is necessary and that Orić's proposed testimony would not materially assist the Accused's defence.[8] With respect to material assistance, Orić argues that the Accused has failed to show that information from Orić will materially assist him, instead the Accused simply puts forth a number of propositions as to what Orić could testify about and that in relation to some of the proposed topics, he does not have any information at all.[9] According to Orić, it "appears likely that the sole purpose of the proposed subpoena is for the propaganda coup that it would hand the Accused to be seen to be 'cross-examining'" him.[10] Orić further contends that once he is called as a defence witness, the Accused would be prohibited from cross-examining him, putting leading questions to him, or impeaching him and doing so would be tantamount to an abuse of process.[11]

5. Orić further submits that the Accused has failed to show any legitimate forensic purpose for obtaining the proposed information, arguing that it is either not in his possession or it is available to the Accused through other means.[12] He argues that contrary to the Accused's contention, he did not command the troops in the Srebrenica enclave during 1992–1995[13] and he is unable to testify to the alleged "sacrificing of Srebrenica by the Bosnian government" or to the alleged attacks on the Bosnian Serb villages prior to the fall of Srebrenica in July 1995.[14]

II. Applicable Law

6. 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

[8] Response, paras. 1, 12–26.
[9] Response, paras. 12, 15.
[10] Response, para. 16. The Chamber notes that in the Response there are two paragraphs with the number 16.
[11] Response, para. 17.
[12] Response, paras. 19, 24.
[13] Response, para. 20, citing the factual findings made in the Trial Judgement in the case of *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, 30 June 2006, paras. 696–798, that "during 1992 and 1993, Orić did not command all of the military troops in the Srebrenica area".
[14] Response, para. 21

> 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.[15]

7. 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.[16]

8. 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.[17] 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.[18]

9. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[19] 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.[20] In essence, a subpoena should be considered a method of last resort.[21]

III. Discussion

10. The Chamber first recalls that in the First Decision the Accused's request to subpoena Orić was denied on the basis that the Accused had failed to show that reasonable efforts had been exhausted to obtain Orić's voluntary co-operation to testify about the topics identified by the Accused in his first motion.[22] Following the First Decision, on 14 January 2013, the Accused again

[15] *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision"), para. 10; *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 ("*Halilović* Decision"), para. 6; *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.

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

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

[18] *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.

[19] *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.

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

[21] *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".

[22] First Decision, paras. 15, 18.

contacted Orić, seeking his voluntary co-operation to testify about the same topics.[23] The Accused filed the Motion on 7 February 2013, arguing that since he did not receive a response to the email sent to counsel for Orić on 24 January 2013 and Orić did not appear in court on 7 February 2013 as requested, he had made reasonable efforts to obtain Orić's voluntary co-operation.[24] A day after the Motion was filed, counsel for Orić sent a letter to the Accused responding to the topics identified in the 14 January Letter and contending that the test for the issuance of a subpoena had not been met.[25] Taking all these factors into account, the Chamber finds that in this specific instance the Accused has made reasonable efforts to obtain the voluntary co-operation of Orić but has been unsuccessful.

11. As stated above, in order to meet the necessity requirement for the issuance of a subpoena, the applicant must show that he has a reasonable basis for his belief that there is a good chance that the witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to his trial.[26] In this respect, the Accused has submitted that Orić can provide the following information which would materially assist his case, namely: (1) the Army of Bosnia and Herzegovina ("ABiH"), contrary to its agreement with the United Nations, never demilitarised the Srebrenica enclave and the troops under Orić's command continued to possess heavy and light weapons; (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"; (3) the ABiH launched attacks 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"; (4) the ABiH appropriated large amounts of humanitarian aid from UNHCR and other agencies; (5) the ABiH often positioned themselves and fired near UNPROFOR observation posts ("OPs") "with the intention of drawing fire upon United Nations personnel from the Bosnian Serbs to obtain international intervention on their side"; and (6) the Government of Bosnia and Herzegovina ("BiH") "sacrificed Srebrenica and its residents as part of a greater strategy to obtain parts of Sarajevo as an eventual settlement to the war".[27]

[23] 14 January Letter.
[24] Motion, paras. 5–7.
[25] Response, Annex A, pp. 1–4.
[26] *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. *See also Milošević* Decision, para. 38.
[27] First Decision, para. 3.

12. The Chamber considers that the topics identified by the Accused and outlined above are of relevance to the alleged joint criminal enterprise to eliminate the Bosnian Muslims in Srebrenica.[28] Therefore, the information sought from Orić generally pertains to clearly identified issues that are relevant to the Accused's case.

13. Yet the specific information sought through the issuance of a subpoena must be of "*material* assistance" rather than merely helpful or of some assistance to a party's case.[29] In other words, the information must be of "substantial or considerable assistance" to the Accused in relation to a clearly identified issue that is relevant to the trial.[30] In the First Decision, the Chamber reminded the Accused that with respect to subpoenas 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".[31]

14. In this light, the Chamber has examined each of the proposed topics. Some of the information that the Accused is seeking from Orić is generally similar to testimonial or documentary evidence that is already on the record. More specifically, the Chamber has received evidence concerning the demilitarisation of the Srebrenica enclave and the ABiH's possession of weaponry,[32] the ABiH's alleged smuggling of arms and ammunition,[33] and the ABiH's

[28] In this respect, the Chamber notes that it has found, by majority, Judge Kwon dissenting, that documents relating to the smuggling of arms to Srebrenica are necessary for the determination of the Accused's state of mind in July 1995, as well as to the Chamber's determination of the general requirements of crimes against humanity in relation to the underlying offences for which the Accused is charged with responsibility. *See* Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May 2010, para. 22. *See also* Decision on Accused's Motion for Subpoena to Interview: General Sead Delić and Brigadier Refik Brđanović, 5 July 2011, para. 13 and footnote 31.

[29] *Milošević* Decision, para. 39 [emphasis in the original text].

[30] *See Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.

[31] First Decision, para. 17.

[32] Regarding the demilitarisation of the Srebrenica enclave, *see e.g.*, Momir Nikolić, T. 24574–24575 (13 February 2012), testifying that the ABiH did not demilitarise and many of their soldiers kept arms and that civilians were killed; D720 (UNPROFOR report re visit by Rasim Delić to New York, 21 September 1994), p. 1, stating that UNPROFOR "believe that neither Srebrenica nor Žepa are fully demilitarized"; D1038 (Ratko Mladić letter to UNPROFOR, 10 July 1995); and D150 (Order of 2nd Corps of ABiH, 17 February 1995). Regarding the ABiH's possession of weapons, *see e.g.*, D1117 (UNPROFOR protest letter to Rasim Delić, 26 April 1995), p. 1, in which UNPROFOR Chief of Staff Cornelis Nicolai requested to Delić that "all Heavy Weapons within the EXCLUSION ZONES be returned to the WEAPON COLLECTION POINTS and that SAFE AREAS should not be abused by launching military operations from them"; D2011 (Letter from Naser Orić to Ramiz Bećirović, 31 May 1995), p. 1, in which Orić told the ABiH 28th Division Chief of Staff Bećirović "do not let [DutchBat] see your weapons because they might be interested in seeing what you have at your disposal". *See also infra* fn. 33.

[33] *See e.g.*, D145 (ABiH General Staff Order, 18 January 1995), in which the ABiH Chief of Staff, Enver Hadžihasanović, sent a report to Orić, indicating that he had issued an order to the ABiH Žepa Brigade Commander Avdo Palić with regard to the shipment of weapons by helicopter to the Srebrenica and Žepa enclaves; David Harland, T. 2186–2187 (10 May 2010), testifying that this document "generally accords with our understanding of how weapons were transferred into Žepa and Srebrenica"; D146 (ABiH General Staff Order, 13 February 1995), in which Hadžihasanović issued an order to the Žepa Brigade and submitted it to Orić for his information with regard to the shipment of weapons by helicopter; David Harland, T. 2188 (10 May 2010), confirming that the information

appropriation of humanitarian aid and materials.[34] Furthermore, evidence concerning the ABiH's attacks against Bosnian Serb villages up to 1995 has also been adduced in this case.[35] As such, the Chamber is of the view that the information sought is obtainable through other means, and indeed has been obtained.

15. The Chamber notes that there is evidence indicating that Orić left for Tuzla in March 1995 and did not return to Srebrenica prior to the end of the conflict.[36] The Accused himself acknowledged this during the cross-examination of Prosecution witness Robert Franken and noted that during Orić's absence Razim Bećirović was standing in for him.[37] Against this backdrop and in light of his military position at the relevant time, the Chamber is not persuaded that Orić is in a position to testify about the remaining topics, namely: (1) the ABiH's "attacks just prior to the beginning of the Bosnian Serb attack on Srebrenica in early July 1995", (2) the ABiH firing positions near UNPROFOR OPs "with the intention of drawing fire upon United Nations personnel from the Bosnian Serbs to obtain international intervention on their side", and (3) the "sacrificing of Srebrenica" by the BiH Government. Additionally, the first two topics are generally similar to evidence that is already in the record,[38] and the information is thus obtainable through other means.

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contained in this document was consistent with his knowledge at that time; D148 (ABiH 8th Operative Group report, 17 February 1995), in which Orić sent a report to Hadžihasanović personally, confirming that the ABiH 8th Operative Group received the weapons as per Hadžihasanović's instructions; David Harland, T. 2189–2191 (10 May 2010), testifying that some materials and weapons got through to Žepa and Srebrenica; D149 (Report from Naser Orić to ABiH General Staff, 25 February 1995), in which Orić stated that certain material and technical equipment was received by the Srebrenica material and technical equipment depot in January and February 1995; David Harland, T. 2194–2195 (10 May 2010), confirming that a certain amount of light weaponry and material was transported into the enclaves. *See also* D151 (ABiH General Staff Order, 4 March 1995); D152 (ABiH General Staff Order, 15 April 1995); D153 (ABiH General Staff Order, 27 April 1995).

[34] *See e.g.*, D157 (Order of 1st Birač Infantry Brigade, 12 May 1995), in which the Commander of the 1st Birač Infantry Brigade, Svetozar Andrić, notes that they "have received information that members of UNPROFOR, UNHCR and other international organisations have been transporting fuel illegally to Muslims in the enclaves of Sarajevo, Goražde, Žepa and Srebrenica"; D144 (ABiH Report re fall of Srebrenica and Žepa, 23 February 1996), p. 3, indicating that there "is information indicating that these men [including Naser Orić] smuggled humanitarian aid, weapons, oil, etc. and that they collaborated with members of UNPROFOR and even with the aggressor in their smuggling activities".

[35] *See e.g.*, P2284 (UNSG report entitled "The Fall of Srebrenica", 15 November 1999), paras. 34–37, 225; D2015 (VRS Main Staff Report, 26 June 1995), pp. 6–7; Momir Nikolić, T. 24735–24738 (15 February 2012); Manojlo Milovanović, T. 25523 (29 February 2012).

[36] *See e.g.*, D144 (ABiH Report re fall of Srebrenica and Žepa, 23 February 1996), p. 4; P2284 (UNSG report entitled "The Fall of Srebrenica", 15 November 1999), para. 179.

[37] Robert Franken, T. 23113 (16 January 2012), in which the Accused asked Franken if he recalled that "Mr. Orić was outside of the enclave on the 31st of May and that he did not come back since March and that this Ramiz Bećirović was standing in for him, his Chief of Staff of the 28th Division […]" and Franken confirmed that this was correct.

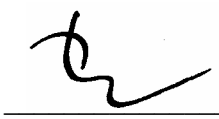
[38] With respect to the first topic, *see e.g.*, P2284 (UNSG report entitled "The Fall of Srebrenica", 15 November 1999), para. 239 *et seq*. With respect to the second topic, Rave testified during cross-examination that "after the attack on OP Echo in the south and after that on the attack of OP Foxtrot, Muslims who gathered around our OPs and tried to get in fire contact with the VRS, tried to get the UN involved in their fire-fights". Evert Albert Rave, T. 22213–22214 (30 November 2011).

16. Accordingly, the Chamber finds that the requirements for the issuance of a subpoena have not been met in this case.

IV. Disposition

17. 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 fourth day of April 2013
At The Hague
The Netherlands

[Seal of the Tribunal]