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 April 2011

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 April 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO COMPEL INTERVIEW: GRIFFITHS EVANS

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 "Motion to Compel Interview: Griffiths Evans", filed by the Accused on 5 April 2011 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 2 November 2009, the Chamber issued a "Decision on Prosecution's Sixth Motion for Admission of Statements and Transcripts of Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*—Hostage Witnesses" ("92 *bis* Hostage Decision"), wherein it provisionally admitted the statement of Griffiths Evans ("Statement" and "Witness", respectively) pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules") without requiring him to appear for cross-examination, pending the Prosecution providing the Statement in a form which complies with the requirements of Rule 92 *bis*(B) of the Rules.[1]

2. The Accused submits that between 2009 and 2011, the Witness was contacted on several occasions by the Victims and Witnesses Unit of the Tribunal and asked whether he would be willing to be interviewed by the Accused's defence team but that, on each occasion, he declined.[2]

3. The Accused contends that Gunnar Westlund, whose evidence was also admitted pursuant to Rule 92 *bis* without requiring him to appear for cross-examination in the 92 *bis* Hostage Decision,[3] was interviewed by his defence team, that he "uncovered information favourable to his defence during his interview,[4] and that the statement arising from this interview was also admitted pursuant to Rule 92 *bis*.[5] The Accused submits that while he is not requesting that all the witnesses whose evidence was admitted through the 92 *bis* Hostage Decision be compelled for an interview, he opines that there is a good chance that, in an

1 92 *bis* Hostage Decision, para. 33(1)(a)(i); *see also* Decision on Admission of Witness Statement of Griffiths Evans, 15 April 2011, wherein the Chamber, satisfied that the Rule 92 *bis*(B) formal requirements had been met, admitted the Witness's statement in full.

2 Motion, para. 2.

3 92 *bis* Hostage Decision, para. 33(1)(a)(i).

4 Motion, para. 3.

5 Decision on Accused's Motion for Admission of Supplement to Witness Statement of Gunnar Westlund, 17 December 2009 ("Westlund Decision").

interview with his defence team, the Witness would disclose information which would materially assist his case.[6]

4. More specifically, the Accused submits that the Witness will provide him with the following information:

(i) information refuting the testimony of Janusz Kalbarczyk that Ratko Mladić came to the barracks where UN personnel were detained and participated in the Witness's interrogation and that of another UNMO, Oldrich Zidlik;[7] and

(ii) information on the use of forward air controllers by NATO and the UN in Bosnia and Herzegovina ("BiH"), in contradiction of the testimony of Rupert Smith.[8]

5. On 13 April 2011, the Office of the Prosecutor ("Prosecution") filed the "Prosecution's Response to Karadžić's Motion to Compel Interview: Griffiths Evans" ("Response"), opposing the Motion on the basis that i) the information sought by the Accused is neither relevant nor necessary to render a finding on Count 11 of the Indictment, ii) the Witness has already provided information on the aforementioned topics and there is no basis for the claim that there is a good chance that he would provide additional information in this respect, iii) the Accused's defence team has already had the opportunity to cross-examine two other UNMOs from the Witness's unit and has failed to establish how compelling the Witness to attend an interview will advance the proceedings.[9]

II. Applicable Law

6. Rule 54 of the Rules allows a Trial Chamber to 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

6 Motion, para. 4.

7 Motion, para. 5.

8 Motion, paras. 5–6.

9 Response, para. 1. On 16 April 2011, the Prosecution filed a "Prosecution's Corrigendum to Response to Karadžić's Motion to Compel Interview: Griffiths Evans" stating that while the Witness and Janusz Kalbarczyk were indeed UNMOs in Pale in May 1995, they were not members of the "7-Lima" UNMO team but of the "SE-1" UNMO team.

> 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.[10]

7. The Chamber may also consider whether the information the applicant seeks to elicit through the use of a subpoena is necessary for the preparation of his or her case and whether the information is obtainable through other means.[11] In this regard, the Appeals Chamber has stated that a Trial Chamber's considerations 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".[12] 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.[13]

8. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[14] 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.[15] In essence, a subpoena should be considered a method of last resort.[16]

III. Discussion

9. As a preliminary matter, the Chamber reiterates that, following the cautious approach adopted in earlier decisions,[17] it will only issue a subpoena should it consider that the information sought is necessary and will materially assist the applicant, and if that information is not obtainable by any other means.

10. The Accused contends that access to the Witness is necessary to obtain i) information refuting the testimony of Janusz Kalbarczyk that Ratko Mladić came to the barracks where UN

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[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. 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.

[11] *Halilović* Decision, para. 7; *Krstić* Decision, paras. 10–12; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("*Brđanin and Talić* Decision"), paras. 48–50; *Milošević* Decision, para. 41.

[12] *Halilović* Decision, para. 7; *Milošević* Decision, para. 41. *See also Brđanin and Talić* Decision, para. 46.

[13] *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.

[14] *Halilović* Decision, para. 6; *Brđanin and Talić* Decision, para. 31.

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

[16] *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".

[17] See for example Decision on Accused's Motion to Compel Interviews: Sarajevo 92 *bis* Witnesses, 9 March 2011.

personnel were detained in early June 1995 and participated in the Witness's interrogation and that of another UNMO, and ii) information on the use of forward air controllers by NATO and the UN in BiH, in contradiction of the testimony of Rupert Smith that no air-forward controllers were used by NATO in May 1995.[18]

11. In relation to i) above, the Chamber considers that Mladić's presence at the barracks and his participation in the interrogation of detained UN personnel is a live issue in the case and one which is proximate to the Accused's responsibility as it involves a named member of the alleged joint criminal enterprise relevant to Count 11 of the Indictment, which is partly why the Chamber decided to call Kalbarczyk as a live witness and Jonathon Riley pursuant to Rule 92 *ter*.[19] The Statement makes the following mention: "On 1 June 1995, we had a visit from the General Staff and I was called by a Major, leader of the General Staff, for a private interview. I was interviewed by the Major through an interpreter." The Chamber first notes that this part of the Statement is not necessarily in contradiction with Kalbarczyk's testimony on this issue.[20] It will be for the Chamber to ultimately determine whether Kalbarczyk's evidence on this topic is reliable in light of other relevant evidence received, including the Statement and the related evidence given by a UNPROFOR soldier detained at a different location.[21] In this context, the Chamber does not consider that it is necessary to receive additional information that would supplement this part of the Statement.

12. In relation to ii) above, the Chamber recalls its previous determination that the status of the UN personnel taken hostage after the NATO air strikes of 25 and 26 May 1995 might be a live issue in this case.[22] In the Statement, the Witness provides some detail about the information pertaining to the NATO targets he gave to the "Major, leader of the General Staff" who interviewed him on 1 June 1995. Earlier in the Statement the Witness also stated that on 27 May 1995, tension had arisen as a Serb reporter had reported that "7Lima guys guided the NATO air planes" and the Witness asked the reporter why he had lied to the public.[23] It would therefore seem that the Witness provided exhaustive evidence on this topic and the Chamber sees no reasonable basis for the Accused's claim that should he now be interviewed there is a good chance that the Witness would provide additional information on NATO targets.

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18 *See* para. 4 *supra.*

19 92 *bis* Hostage Decision, paras. 24, 29.

20 Janusz Kalbarczyk, T. 10859–10860 (28 January 2011).

21 *See* P2148 (Witness Statement of Jonathon Riley dated 30 May 1996), p. 5; Jonathon Riley, T. 10777 (26 January 2011).

22 On that basis, the Chamber issued a binding order to a state to provide material on that topic. Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May

13. The Accused partly bases his argument that the Witness may provide information that may be useful to the defence case on the fact that he uncovered information favourable to his defence from the interview conducted voluntarily with Gunnar Westlund. In this respect, the Chamber wishes to clarify that while it did admit Westlund's supplemental statement as the Prosecution did not object to its admission, it also noted that it appeared "to be only marginally relevant to the present case."[24] The Chamber does not consider that the example of Westlund, who had agreed to be interviewed, warrants compelling the Witness to be interviewed by the Accused's defence team.

14. The Accused has therefore not established a legitimate forensic purpose in the information sought, as the Chamber does not consider he is likely to obtain information which would materially assist his case from an interview with the Witness.

IV. Disposition

15. Accordingly, 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 April 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

2010, paras. 25-26. *See also* Decision on Accused's Motion to Compel Interview: General Sir Rupert Smith, 25 January 2011, para. 10.

[23] Statement, p. 9.

[24] Westlund Decision, para. 6.