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: 1 December 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: **1 December 2011**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR SUBPOENA TO INTERVIEW CHRISTOPH VON BEZOLD

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of Germany

via the Embassy of Germany
to the Netherlands

The Accused

Mr. Radovan Karadžić

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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 Interview: Christoph von Bezold", filed on 5 April 2011 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 19 May 2010, in its "Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany)" ("Decision"), the Chamber ordered the Federal Republic of Germany ("Germany") to provide the Accused with documents pertaining to the investigation of the German *Parlamentarische Kontrollkommission* of the alleged 27 March 1994 dispatch of ammunition to Bihać which was allegedly disguised as humanitarian aid and organised by Christoph von Bezold. The Chamber found that such documents are relevant to the allegations made in the Third Amended Indictment ("Indictment"), namely that the Accused restricted humanitarian aid to Bosnian Croat and Bosnian Muslim enclaves in order to permanently remove non-Serb population from those territories.[1] The Chamber, by majority, Judge Kwon dissenting, also found that these documents are relevant to the charges relating to the events in Srebrenica and hostage-taking of UN personnel.[2]

2. On 21 June 2010, Germany filed its response to the Decision, noting that it was not in possession of any of the requested documents.[3] As a result, the Accused "continued to investigate" and obtained material which led him to believe that Germany may have information concerning Christoph von Bezold and the alleged shipment of ammunition to Bihać.[4] On 11 March 2011, the Accused asked Germany to make Christoph von Bezold available for an interview,[5] and on 25 March 2011 received a response from Germany stating that neither the Tribunal's Rules of Procedure and Evidence ("Rules") nor German national laws contain any basis for the Accused's request.[6] As a result, the Accused filed the Motion, arguing that the requirements of a subpoena for interview, mandated by Rule 54 of the Rules, have been satisfied as (i) he has made reasonable efforts to obtain the voluntary co-operation of "the German government to conduct the interview of Christoph von Bezold", (ii) there are reasonable grounds

[1] Decision, para. 38. *See also* Indictment, paras. 14(j), 74.
[2] Decision, para. 38 and footnote 70. *See also* Partially Dissenting Opinion of Judge Kwon, paras. 6–13.
[3] Response of the Federal Republic of Germany, 21 June 2010. Although it was dated and signed on 18 June 2010, the Response of the Federal Republic of Germany was filed on 21 June 2010.
[4] Motion, para. 12.
[5] Motion, para. 13, Annex D.
[6] Motion, para. 14, Annex E.

to believe that Christoph von Bezold has information that can materially assist his case, and (iii) the Chamber has already found that documents relating to the alleged arms shipment to Bihać are relevant to his case.[7] The Accused also submits that the information obtained from von Bezold can be used in two ways, namely to direct Germany to the precise documents concerning the alleged Bihać arms shipment and to serve as the basis of a written statement from von Bezold which can be used during trial.[8]

3. On 8 April 2011, the Chamber issued an invitation to Germany, seeking a response to the Motion and requesting Germany that it inform von Bezold of the Motion in case he was minded to respond to the Accused or the Chamber directly.[9] On 20 May 2011, Germany filed its response confidentially, reiterating its position that German national law does not envisage a subpoena for an informal interview. Germany also stated that the "federal government has prompted to inform Mr von Bezold in writing about [the Accused's] request".[10]

4. On 31 May 2011, the Accused sent a letter to Germany noting that he had not been contacted by von Bezold and asking Germany to provide him with von Bezold's contact information ("Letter").[11] On 19 August 2011, the Chamber sought an update from the Accused on the Motion and was informed that Germany responded to the Letter refusing to provide von Bezold's contact details and insisting that any correspondence with him should go through German authorities. As a result, the Accused had, on 23 June 2011, written a letter to von Bezold and sent it to the German authorities but, at the time of the Chamber's inquiry, was still waiting to hear back from Germany.[12]

5. Finally, on 18 October 2011, the Accused filed the "Supplemental Report on Motion for Subpoena to Interview: Christoph von Bezold" ("Supplement") in which he informs the Chamber that Germany advised him in September 2011 that it had personally served his request on von Bezold. Having received no response from von Bezold, the Accused filed the Supplement requesting the Chamber to now dispose of the Motion and issue the requested subpoena.[13]

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[7] Motion, paras. 15–20, 22–23.

[8] Motion, para. 21.

[9] Invitation to Germany Regarding Motion for Subpoena of Christoph von Bezold, 8 April 2011.

[10] Confidential Correspondence from Germany, 20 May 2011.

[11] Letter from the Accused to Germany, 18 October 2011.

[12] *See* T. 17485–17486 (19 August 2011). The Chamber first sought an update on 31 May 2011. *See* T. 13881 (31 May 2011).

[13] Supplement, paras. 1–4. Following an inquiry by the Chamber, the Accused's legal adviser provided the Chamber, via email and on notice to the Office of the Prosecutor, a copy of the correspondence from Germany referred to in the Supplement. *See* T. 20614 (28 October 2011).

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". This power includes the authority to "require 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".[14] The Appeals Chamber has stated that a Trial Chamber's assessment 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] 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 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.[16]

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.[17]

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.[18] 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.[19]

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[14] *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Decision"), para. 10.

[15] *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 ("*Halilović* Decision"), para. 7. *See also 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. 41.

[16] *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. *See also Milošević* Decision, para. 38.

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

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

[19] *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.

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.[20] 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.[21] In essence, a subpoena should be considered a method of last resort.[22]

III. Discussion

10. As can be seen from the procedural history related to the Motion, both the Accused and the Chamber have attempted to obtain the voluntary co-operation of Christoph von Bezold. While the German authorities have passed on the Accused's request for an interview to von Bezold, the Accused has received no response in relation thereto. In addition, the Accused is unable to contact von Bezold directly due to Germany's unwillingness to provide him with the latter's contact details. Accordingly, the Chamber is satisfied that the Accused has made reasonable attempts to obtain von Bezold's voluntary co-operation, but was ultimately unsuccessful.

11. Before a subpoena can be issued, the Accused must also demonstrate that it is necessary for the purpose of an investigation or conduct of his trial. To do so, the Accused has to show that there exists a legitimate forensic purpose for the information he seeks, namely that he has 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 his trial. As noted above, the Accused is interested in obtaining information from von Bezold relating to the alleged shipment of ammunition into Bihać on 27 March 1994, which was disguised as a humanitarian convoy. As stated above, the Chamber has already found that documents going to this event are relevant to the Accused's case.[23] Therefore, the Chamber is satisfied, Judge Kwon partially dissenting,[24] that this event is a

[20] *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.

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

[22] *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".

[23] *See* para. 1 above. As also noted above, Judge Kwon partially dissented as to the relevance of this material insofar as it may to the allegations relating to events in Srebrenica and the allegations of UN hostage taking.

[24] Judge Kwon's partial dissent is based on the same grounds as his dissent in the Decision, namely that the material relating to the 27 March shipment of arms to Bihać is not relevant to the Srebrenica-related allegations or the allegations of UN hostage taking in the Indictment. *See* Decision, Partially Dissenting Opinion of Judge Kwon, paras. 6–13. *See also* Decision on the Accused's Motion for Subpoena to Interview Miroslav Tuđman, 14 July 2011, para. 25, footnote 63.

clearly identified issue relevant to the Accused's case and that if information is obtained in relation thereto, it may materially assist the Accused in the conduct of his case.[25]

12. Turning next to whether the Accused has a "reasonable basis" for his belief that there is a "good chance" that Christoph von Bezold will provide him with relevant information, the Chamber notes that, according to the supporting materials provided by the Accused, von Bezold is alleged to have been directly and closely involved with the alleged shipment of ammunition to Bihać.[26] Therefore, the Accused has successfully demonstrated a reasonable basis for his belief that there is a good chance that von Bezold will be able to give him information in relation thereto. Furthermore, the Chamber recalls that the Accused seeks to conduct the interview *both* for the purpose of directing Germany to certain documents he requested *and* to use the information provided by von Bezold as the basis of a written statement, which would then be tendered into evidence.[27] Thus, the Accused is clearly treating Christoph von Bezold as a prospective witness in this case. The Chamber therefore finds that the Accused has shown that there is a legitimate forensic purpose in obtaining the information sought through his interview with von Bezold.

13. With respect to the requirement that the information sought must not be obtainable through other means, the Chamber notes that the Accused has attempted to obtain the information related to the alleged shipment of ammunition to Bihać directly through Germany but has been unsuccessful. At the same time, von Bezold is said to have been directly involved in organising this and other shipments to Bihać. The Chamber notes that the material provided by the Accused in support of his Motion implicates not only von Bezold, but also two other German individuals allegedly involved in arms smuggling.[28] While the Accused could potentially try to obtain access to these two individuals, the Chamber considers that in light of the circumstances here, in particular Germany's position that it is to be a conduit for all correspondence between the Accused and von Bezold, it is unlikely to lead to a satisfactory result for him, and would therefore not be conducive to an expeditious and efficient conduct of

[25] The Chamber notes that in the Motion, the Accused also refers to his interest in Christoph von Bezold's firsthand knowledge of the involvement of Germany and other states in the alleged arms shipment of 27 March 1994. The Chamber reminds the Accused, yet again, that the alleged involvement of various states in the alleged smuggling of arms into Bosnia and Herzegovina is not an issue that is relevant to the Accused's case. *See* Decision on the Accused Motion for Binding Order (The Islamic Republic of Iran), 9 June 2010, paras. 20–21.

[26] Motion, Annexes A, B, and C. Annexes A and B contain excerpts from a German current affairs program Monitor, which deal with von Bezold's involvement in arms smuggling in Bosnia and Herzegovina, including shipments of ammunition to Bihać. Annex C contains an article from Sunday Telegraph, dealing with the same subject.

[27] Motion, para. 21.

[28] Motion, Annex B.

the proceedings. Accordingly, the Chamber is satisfied that the information identified above as relevant to the Accused's case is not obtainable through any other means at this stage.

14. Having found that the various requirements for a subpoena are satisfied, it remains within the Chamber's discretion to decline to issue the subpoena. Due to the coercive nature of a subpoena and the implication that failure to comply might lead to criminal sanctions, the Chamber must take a cautious approach and take into account all the surrounding circumstances before determining that this measure of last resort be taken.[29] In the present case, however, the Chamber is convinced that it is necessary to subpoena Christoph von Bezold to submit for an interview given that the issue to be discussed has been deemed relevant to the Accused's case. In addition, in this particular case it would not be reasonable to issue a subpoena *ad testificandum* and require the Accused to cross-examine the witness without first knowing what he will say.[30]

IV. Disposition

15. Accordingly, the Trial Chamber, pursuant to pursuant to Article 29 of the Statute and Rule 54 of the Rules, hereby **GRANTS** the Motion and **ORDERS** as follows:

(a) the Registry of the Tribunal shall take whatever steps reasonably necessary to ensure that the attached Subpoena is transmitted immediately to Germany so that it can be served on Christoph von Bezold; and

(b) Germany shall comply with the instructions in the Order attached to this Decision.

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

Judge O-Gon Kwon
Presiding

Dated this first day of December 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

[29] *See* Decision on Motion for Subpoena to Douglas Lute and John Feeley, 8 July 2009, para. 11.
[30] *See Krstić* Decision, para. 8.