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 March 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: **20 March 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA SLAVKO PUHALIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Government of Bosnia and Herzegovina

via the Embassy of Bosnia and Herzegovina to The Netherlands, The Hague

The Accused

Mr. Radovan Karadžić

Standby Counsel

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 Slavko Puhalić", filed publicly with a confidential annex on 1 March 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 Slavko Puhalić, former assistant to the commander of Trnopolje camp, to testify as a witness in this case on 7 May 2013.[1] The Accused submits that he has attempted to obtain Puhalić's voluntary co-operation.[2] In support, the Accused attaches as a confidential annex to the Motion a declaration from his case manager, who spoke to Puhalić on the telephone twice on 27 February 2013 ("Declaration").[3] The Accused submits that after providing a statement to the Accused's defence team, Puhalić has stated "unequivocally" that he refuses to testify in this case without "full protective measures", namely pseudonym, and image and voice distortion.[4] According to the Declaration, the Accused's case manager explained to Puhalić the basis for granting protective measures under the Tribunal's jurisprudence and Puhalić informed him that he could not provide "any specific example showing the existence of [a] threat to the safety of himself or his family" to support his request for protective measures.[5] Despite this, the Accused submits that Puhalić remains firm in his position to testify only if the requested protective measures are granted.[6] The Accused argues that this satisfies the requirement that he make reasonable efforts to obtain Puhalić's voluntary co-operation.[7]

2. The Accused further contends that there are reasonable grounds to believe that Puhalić has information which can materially assist his case, given that Puhalić assisted the commander of Trnopolje camp, Slobodan Kuruzović, to set up the camp in 1992 and served as his assistant

[1] Motion, paras. 1, 11.

[2] Motion, para. 4.

[3] Declaration, paras. 1–2. Following an inquiry from the Chamber, the Accused filed the "Corrigendum to Motion for Subpoena to Slavko Puhalić", with confidential annex, on 14 March 2013 ("Corrigendum"), wherein he submits a revised version of the Declaration to correct errors contained in the original; namely references to Puhalić's last name and to the Rule 65 *ter* number assigned to a statement he provided to the Defence team. Corrigendum, para. 1, Confidential Annex A. *See also* Hearing. T. 35417–35418 (13 March 2013).

[4] Motion, para. 4; Declaration, para. 3.

[5] Motion, para. 4; Declaration, paras. 4–5.

[6] Motion, para. 4; Declaration, paras. 4–5.

[7] Motion, para. 4.

and logistics officer while the camp was in operation.[8] In the Motion, the Accused states that Puhalić can testify that the authorities at Trnopolje camp "attempted to treat people residing at the camp in the best possible way" and that any mistreatment which may have occurred there was "not the desire or at the behest of the authorities".[9] In support, the Accused refers to the statement Puhalić provided to the Accused's defence team ("Statement").[10] The Accused therefore maintains that Puhalić's testimony is relevant to show that the authorities at Trnopolje camp were not in favour of the mistreatment or expulsion of Bosnian Muslims and that "any mistreatment was not as part of some policy or joint criminal enterprise" ("JCE") in which the Accused or the "State" participated.[11]

3. The Accused also argues that Puhalić's testimony is necessary for his case because he is the "only witness who participated in the setting up and running of" Trnopolje camp, as Slobodan Kuruzović has died, and that this information is necessary for a fair determination of the issues being tried.[12]

4. The Accused requests that the Motion be served on the Government of Bosnia and Herzegovina ("BiH") and Puhalić and that they both be invited to respond to the Motion if they so wish.[13] The Accused further suggests that the Government of BiH be requested to serve the subpoena on Puhalić and to provide any assistance requested by the Registry to facilitate his attendance as a witness.[14]

5. On 1 March 2013, the Office of the Prosecutor ("Prosecution") notified the Chamber *via* e-mail that it did not wish to respond to the Motion.

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 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

[8] Motion, paras. 5–6.
[9] Motion, para. 6.
[10] Motion, para. 6. The Statement is uploaded to e-court as Rule 65 *ter* number 1D06092.
[11] Motion, para. 7.
[12] Motion, paras. 9–10.
[13] Motion, para. 13.
[14] Motion, para. 12.

> 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 statements the witness has made to the Prosecution or to others in relation to the events.[16]

8. Furthermore, the Trial 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.[17] 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".[18]

9. 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.[19] 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.[20]

10. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[21] 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.[22]

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[15] *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.

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

[17] *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.

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

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

[20] *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.

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

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

11. With respect to the co-operation from the relevant states involved, Article 29 of the Statute of the Tribunal ("Statute") obliges states to "co-operate with the International Tribunal in the investigation and prosecution of the persons accused of committing serious violations of international humanitarian law". Article 29, paragraph 2, states that this obligation includes the specific duty to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons […]".

III. Discussion

12. At the outset, the Chamber finds that it has sufficient information to decide on the Motion without hearing from the Government of BiH or Puhalić.

13. The Chamber first considers that the Accused has made reasonable efforts to obtain the voluntary co-operation of Puhalić to testify as a witness in this case but has been unsuccessful.[23]

14. 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.[24] The Chamber notes that Puhalić's prospective testimony is related to events in the Trnopolje camp, including: (i) the establishment of the camp; (ii) the arrival of "non-Serb civilians" at the camp; (iii) the actions of the guards at the camp, particularly in relation to their treatment of the individuals held at the camp; (iv) the reasons and intentions behind the activities of the authorities at the camp, including the camp commander, Slobodan Kuruzović; and (v) the conditions at Trnopolje camp generally. The Chamber thus considers that such prospective testimony relates to live issues in this trial, namely the occurrence of crimes at Trnopolje camp and the Accused's responsibility for such crimes pursuant to the alleged overarching JCE to permanently remove Bosnian Muslim and Bosnian Croat inhabitants from the territories of BiH claimed as Bosnian Serb territory as alleged in the Third Amended Indictment ("Indictment").[25] The Chamber therefore finds that the information sought from Puhalić pertains to clearly identified issues relevant to the Accused's case.

[23] *See* Motion, para. 4; Declaration.
[24] *Krstić* Decision, para. 10; *Halilović* Decision, para. 6. *See also Milošević* Decision, para. 38.
[25] Indictment, paras. 9–14.

15. The Chamber recalls that the testimony sought through the issuance of a subpoena must be of "*material* assistance", rather than merely helpful or of some assistance.[26] In other words, it must be of "substantial or considerable assistance" to the Accused in relation to a clearly identified issue that is relevant to the trial.[27] Given that Puhalić was the assistant to the commander at Trnopolje camp during 1992 and was present for the establishment of the camp, as well as the daily management and logistics of the camp during the period relevant to the Indictment, the Chamber is satisfied that his anticipated testimony will be of substantial assistance to the Accused in the presentation of his defence case. In this instance, the Chamber considers that the Accused has satisfied the requirement of the legitimate forensic purpose.

16. Moreover, a subpoena cannot be issued if the information sought through the testimony of the witness is obtainable through other means. Given that Slobodan Kuruzović has passed away, Puhalić, as the assistant commander of Trnopolje camp, is uniquely situated to give evidence regarding the crimes alleged to have occurred in the camp. Thus, the Chamber is satisfied that his particular testimony is not obtainable through other means.

17. For all of the above reasons, the Chamber is satisfied that the Accused has met the requirements for the issuance of a subpoena, pursuant to Rule 54 of the Rules, for the testimony of Puhalić.

[26] Decision on Accused's Motion to Subpoena President Karolos Papoulias, 23 October 2012 ("Papoulias Decision"), para. 15; *Milošević* Decision, para. 39 [emphasis in the original text].

[27] *See* Papoulias Decision, para. 15; *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.

IV. Disposition

18. For the reasons outlined above, the Chamber, pursuant to Article 29 of the Statute and Rule 54 of the Rules, hereby **GRANTS** the Motion, and:

a. **ORDERS** the Registry of the Tribunal to take whatever steps are reasonably necessary to ensure that this Decision, the subpoena and the order to the Government of BiH relating to this matter are transmitted immediately to the Government of BiH; and

b. **REQUESTS** the Victims and Witnesses Section of the Tribunal to provide any necessary assistance in the implementation of this Decision.

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

Judge O-Gon Kwon
Presiding

Dated this twentieth day of March 2013
At The Hague
The Netherlands

[Seal of the Tribunal]