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: 6 May 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: **6 May 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA HASAN ČENGIĆ

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 for Subpoena to Hasan Čengić", filed on 21 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 Hasan Čengić, former Secretary-General of the Party of Democratic Action ("SDA"), to testify as a witness in this case on 9 May 2013.[1] The Accused first contends that he has made reasonable efforts to obtain Čengić's testimony.[2] He notes that on 10 August 2012, he sent a letter to the government of Bosnia and Herzegovina ("BiH") requesting that it facilitate an interview between Čengić and the Accused's legal adviser.[3] The government of BiH subsequently informed the Accused that the letter was delivered on 14 September 2012 and that Čengić had no comment to make.[4] On 30 October 2012, the Accused wrote to Čengić and again asked him to submit to an interview with the Accused's legal adviser, this time noting that unless he received a response by 1 December 2012, he would ask the Chamber to issue a subpoena.[5] The Accused again did not receive a response.[6] On 21 January 2013, the Accused asked the government of BiH to inform Čengić that the Accused was requesting his testimony on 19 March 2013 and that, if Čengić did not appear on that day, the Accused would request a subpoena compelling him to testify.[7] On 5 March 2013, the government of BiH sent a letter to the Accused informing him that it had served the request on Čengić on 15 February 2013 and not received a response from him.[8] On 19 March 2013, Čengić did not appear to testify in the defence case.[9]

2. The Accused also contends that Čengić has information relevant to his defence.[10] The Accused notes that Čengić was an associate of President Alija Izetbegović, was a founder of the

[1] Motion, paras. 1, 22.
[2] Motion, paras. 4–11.
[3] Motion, para. 5.
[4] Motion, para. 6.
[5] Motion, para. 7.
[6] Motion, para. 7.
[7] Motion, para. 8.
[8] Motion, para. 9.
[9] Motion, para. 10.
[10] Motion, para. 12.

SDA party and served as its former Secretary-General.[11] The Accused contends that Čengić was "heavily involved" in arms smuggling during the conflict, having signed a receipt demonstrating payment for the shipment of weapons for the territorial defence of Travnik.[12] The Accused also notes that Čengić signed receipts for purchases of arms in October 1992, including smuggling into the Srebrenica and Žepa enclaves in early 1995.[13] In addition, the Accused contends that Čengić organised a campaign to have Bosnian Muslims leave their homes but make it appear that they had been expelled by Bosnian Serbs, specifically in a document entitled "Instructions Concerning the Moving Out from Trebinje" ("Trebinje Instructions").[14] The Accused thus argues that, similar to evidence of Bosnian Muslims sniping and shelling their own people in Sarajevo but blaming Bosnian Serbs, evidence of Bosnian Muslims expelling their own people and blaming Bosnian Serbs is relevant to the Accused's defence case.[15]

3. Finally, the Accused argues that Čengić's evidence is necessary to the Accused's defence.[16] He argues that no other potential witness has more knowledge of the breadth and details of Bosnian Muslim arms smuggling.[17] The Accused contends that Čengić can testify about the smuggling of weapons in Srebrenica and Žepa in early 1995, and trace their manufacture and purchase to Iran.[18] The Accused also notes that other witnesses with knowledge of smuggling operations, such as Bosnian President Bakir Izetbegović and Bosnian Vice President Ejup Ganić, have refused to testify.[19] Finally, the Accused notes that this witness is the sole individual who can testify about the plan to fake expulsions of Bosnian Muslims during the war.[20]

4. On 21 March 2013, the Office of the Prosecutor ("Prosecution") informed the Chamber *via* e-mail that it did not intend to respond to the Motion.

5. On 8 April 2013, Čengić filed "Hasan Čengić's Request for Leave to Respond to Karadžić's Motion for Subpoena to Hasan Čengić" ("Request"), requesting leave to respond to the Motion.[21] The Chamber orally granted the request on the same day.[22]

[11] Motion, para. 13.
[12] Motion, para. 14.
[13] Motion, para. 15
[14] Motion, para. 16.
[15] Motion, para. 17.
[16] Motion, para. 18.
[17] Motion, para. 18.
[18] Motion, para. 18.
[19] Motion, para. 19.
[20] Motion, para. 20.
[21] Request, para. 5.
[22] T. 36828 (8 April 2013).

6. In the "Response to Motion for Subpoena to Hasan Čengić", filed on 19 April 2013 ("Response"), Čengić argues that the Motion should be denied.[23] Čengić argues that the mere fact that he was a "long time associate" of President Alija Izetbegović would not materially assist the Accused and is irrelevant to his defence case.[24] Čengić also argues that the Accused's argument regarding Čengić's involvement in arms smuggling must also fail because the Accused relies on a document, dated 6 August 1992, related to the shipment of weapons to the territorial defence of Travnik.[25] Čengić notes that Travnik is not one of the municipalities alleged in the Third Amended Indictment ("Indictment") and thus would not materially assist the Accused's case.[26] Čengić also claims that no evidence supports the Accused's claim that arms were smuggled into Srebrenica and Žepa in early 1995, and thus the Accused is "ready to mislead the Trial Chamber in order to grant his Motion".[27] Čengić also argues that he never authored or signed the Trebinje Instructions, and that it was impossible to send such instruction because by 20 January 1993, the date on the Trebinje Instructions, Trebinje was under Bosnian Serb control and thus it would have been impossible to send such a document to the SDA branch in Trebinje.[28] Čengić also argues that he does not possess the information that the Accused contends, namely, that Bosnian Muslims sniped, shelled, and expelled their own people in Sarajevo.[29] He also claims he is unable to give any information because he was only in Sarajevo a total of 30 days between May 1992 and November 1995.[30]

7. Čengić also argues that the subpoena is unnecessary and that the Accused has failed to show any legitimate forensic purpose.[31] Čengić contends that the Accused errs in arguing that no other potential witness has more knowledge of the breadth and details of Bosnian Muslim arms smuggling than Čengić.[32] Čengić notes that he was never charged with arms smuggling during the conflict, though he was investigated by Slovenian authorities.[33] Čengić also reiterates that the Accused is purely speculative in contending that he can testify about the smuggling of weapons from Iran through Croatia in early 1995.[34] Finally, Čengić argues that any prospective testimony is

[23] Response, paras. 1, 25.
[24] Response, para. 9.
[25] Response, para. 10.
[26] Response, para. 10.
[27] Response, para. 11.
[28] Response, para. 12.
[29] Response, para. 13.
[30] Response, para. 13.
[31] Response, paras. 17–23.
[32] Response, para. 18.
[33] Response, para. 18.
[34] Response, para. 19.

unnecessary and inappropriate for the conduct and fairness of the trial, and adds that the stress of testimony would negatively affect his existing heart condition.[35]

II. Applicable Law

8. 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.[36]

9. 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.[37]

10. 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.[38] 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".[39]

11. 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

---

[35] Response, paras. 22–24.

[36] *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.

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

[38] *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.

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

obtainable through other means.[40] 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.[41]

12. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[42] 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.[43]

III. Discussion

13. The Chamber considers that the Accused has made reasonable efforts to obtain the voluntary co-operation of Čengić to testify as a witness in this case but has been unsuccessful[44] and that, furthermore, Čengić has made clear that he does not intend to testify as a witness in the Accused's defence case.[45]

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.[46] With regard to the requirement that the witness be able to give information in relation to clearly-identified issues relevant to his trial, the Chamber notes that Čengić's prospective testimony is related to: (i) the smuggling of arms into the Srebrenica and Žepa enclaves in early 1995; and (ii) the organisation of "fake expulsions" of Bosnian Muslims from certain territories by Bosnian Muslims, by specific reference to a document related to Trebinje. With regard to the former, the Chamber considers by majority, Judge Kwon dissenting,[47] that it relates to a live issue in the trial.[48]

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

[41] *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.

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

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

[44] *See* Motion, paras. 4–11.

[45] *See generally* Response.

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

[47] Judge Kwon finds that this issue is not relevant for the same reasons articulated in his Partially Dissenting Opinion in the "Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany)", issued on 19 May 2010 ("Germany Decision").

[48] Germany Decision, para. 22; Decision on Accused's Motion for Subpoena to Interview: General Sead Delić and Brigadier Refik Brđanović, 5 July 2011, para. 13 and footnote 31; Decision on Accused's Second Motion to Subpoena Naser Orić, 4 April 2013, para. 12 and footnote 28.

15. With regard to the latter, the Chamber notes that Trebinje is not a municipality included in the Indictment and thus Čengic's prospective testimony about the Trebinje Instructions does not directly relate to any of the charges therein. However, the Chamber recalls that it has, in rare instances, admitted evidence from Trebinje and other municipalities not listed in the Indictment for purposes of demonstrating overall pattern or context for other evidence relevant to charges in the Indictment.[49] In the present case, the Chamber thus considers that Čengić's testimony in this regard does pertain to a clearly identified issue relevant to the trial, namely, the alleged existence of an overarching joint criminal enterprise to permanently remove Bosnian Muslim and Bosnian Croat inhabitants from the territories of BiH claimed as Bosnian Serb territory.[50]

16. The Chamber recalls that testimony sought through the issuance of a subpoena must be of "*material* assistance", rather than merely helpful or of some assistance.[51] 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.[52] With regard to the issue of the smuggling of arms into the Srebrenica and Žepa enclaves in early 1995, the Chamber notes Čengić's submission that Bosnian Muslims did not smuggle arms into Srebrenica and Žepa in early 1995 and thus considers that Čengić's testimony would not provide substantial or considerable assistance to the Accused in this regard.[53] With regard to Čengić's testimony regarding the "fake expulsion" of Bosnian Muslims from certain territories by Bosnian Muslims, the Chamber notes that the Trebinje Instructions have already been admitted into evidence[54] and that Čengić contends that he never authored or signed them.[55] Accordingly, the Chamber considers that Čengić's testimony would not provide substantial or considerable assistance to the Accused in this regard.

17. In addition, a subpoena cannot be issued if the information sought through the testimony is obtainable through other means.[56] With regard to the first issue, the Chamber again recalls that it has received a great deal of evidence concerning non-demilitarisation of the Srebrenica enclave and the ABiH's possession of weaponry[57], as well as the ABiH's smuggling of arms and ammunition

[49] *See, e.g.*, T. 7240 (5 October 2010); T. 1660616608 (14 July 2010). *See also generally* Bozidar Vučurević, T. 35933–36027 (25 March 2013).
[50] Indictment, paras. 9–14.
[51] 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].
[52] *See* Papoulias Decision, para. 15; *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.
[53] Response, para. 11.
[54] D471 (SDA instructions to SDA Trebinje, 20 January 1993).
[55] Response, para. 12.
[56] *See* supra, para. 8.
[57] Decision on Accused's Second Motion to Subpoena Naser Orić, 4 April 2013 ("Second Orić Decision"), para. 14.

into the Srebrenica enclave.[58] Furthermore, the Chamber notes that, while the Accused argues that "other witnesses with some knowledge of the smuggling operations", namely Bakir Izetbegović and Ejup Ganić, have also refused to testify, he does not make clear why these two individuals are the only other ones who can testify about such matters. With regard to Čengić's prospective testimony relating to Bosnian Muslims' responsibility for "fake expulsions" during the conflict, the Chamber considers that the Accused does not sufficiently demonstrate that such evidence could not be adduced through another witness, given that the Accused merely makes the conclusory claim that Čengić is the "sole witness who can testify about the plan to fake expulsions of Bosnian Muslims during the war", in particular in relation to the Trebinje Instructions[59] The Chamber further notes that it has received other evidence on the Trebinje Instructions.[60] As such, the Chamber considers that the information sought from Čengić is obtainable through other means.

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

IV. Disposition

19. Accordingly, the Chamber, pursuant to pursuant to Article 29 of the Statute and 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 sixth day of May 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

[58] Second Orić Decision, para. 14.
[59] Motion, para. 20.
[60] Momčilo Mandić, T. 5258–5261 (15 July 2010).