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: 11 December 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: **11 December 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA NIKOLA TOMAŠEVIĆ

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 Accused's "Motion for Subpoena to Nikola Tomašević" filed on 14 November 2013 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence ("Rules"), a subpoena directing Nikola Tomašević to appear for testimony in his case on 20 January 2014.[1]

2. The Accused argues that he has made reasonable efforts to obtain the voluntary co-operation of Tomašević by requesting that he testify as a defence witness in this case but that Tomašević, after a number of meetings with the Accused's defence team over the course of several months, ultimately indicated that he did not want to testify and has now discontinued contact with the Accused's defence team.[2]

3. The Accused argues that there are reasonable grounds to believe that Tomašević has information that can materially assist his case.[3] Tomašević was a military Judge in the Banja Luka district.[4] The Accused refers to an interview ("Interview")[5] with the Office of the Prosecutor ("Prosecution"), and contends that Tomašević in the Interview, suggests that there was no national policy or practice to not punish crimes committed by Bosnian Serbs against Bosnian Muslims and Bosnian Croats.[6] The Accused submits that Tomašević's evidence is relevant on this basis.[7] The Accused further argues that Tomašević's evidence is necessary because he was the Judge who ordered the release of individuals in two cases cited by the Prosecution as examples of such a policy, and he is in a unique position to testify about the reasons why those people were released.[8]

4. On 15 November 2013, the Prosecution notified the Chamber by email that it did not intend to respond to the Motion.

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[1] Motion, paras. 1, 12.
[2] Motion, para. 4; Annex A.
[3] Motion, para. 5.
[4] Motion, para. 6.
[5] 1D09195
[6] Motion, paras. 6, 9, 11.
[7] Motion, para. 9.
[8] Motion, paras. 6–8, 10–11.

II. Applicable Law

5. 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.[9]

6. 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.[10]

7. 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.[11] 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.[12]

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.[13] 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.[14] In essence, a subpoena should be considered a method of last resort.[15]

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[9] *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.

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

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

[12] *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.

[13] *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.

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

[15] *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

III. Discussion

9. Based on the submissions received by the Chamber, in this specific instance, it finds that the Accused has made reasonable efforts to secure Tomašević's voluntary co-operation which have been unsuccessful.

10. The Chamber is satisfied based on the Accused's submissions, that there is a good chance that Tomašević would be able to give information which would materially assist him in his case. Tomašević was the Judge of the Banja Luka Military Court who ordered the release of Bosnian Serbs in two cases cited by the Prosecution as examples of where crimes committed against non-Serbs were not punished. The Chamber finds that this information pertains to clearly identified issues relevant to the Accused's case, namely the alleged failure by the Accused to punish crimes committed by his subordinates and whether or not there was a broader policy directed towards the non-punishment of crimes committed by Bosnian Serbs against non-Serbs. The Accused has thus satisfied the requirement of legitimate forensic purpose.

11. Nevertheless, even if the Chamber is satisfied that the applicant has met the legitimate forensic purpose requirement, the issuance of a subpoena may be inappropriate if the information sought is obtainable through other means. The Chamber notes that the prospective evidence of Tomašević is similar in nature to that of other defence witnesses who testified about the investigation and prosecution of crimes by the military courts.[16] More specifically, while Tomašević would be able to testify about the reasons why he ordered the release of Bosnian Serbs in two specific cases to which he was assigned in the Banja Luka Military Court, he is by no means the only person who could testify about those cases.

12. With respect to the case related to the killings at Velagići ("Velagići Case"), the Chamber has already received evidence which explains that one of the reasons the Military Prosecutor recommended that the Banja Luka Military court halt investigative proceedings and release the two Bosnian Serbs in custody was that the majority of the suspects were inaccessible to the prosecuting organs and could not be brought into custody.[17] This is the same evidence which, in the Accused's own submission, Tomašević is expected to provide, namely that he released these two individuals because the Military Prosecutor indicated that it was not possible

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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."

[16] *See, e.g.* Savo Bojanović (who served as a Judge in the Bijeljina Military Court from July 1992), D3076 (Witness statement of Savo Bojanović dated 2 March 2013), paras. 4–10; Novak Todorović (who served as the President of the Republika Srpska Supreme Military Court from 1992), D2986 (Witness statement of Novak Todorović dated 17 February 2013), paras. 2, 4–7, 13–17.

[17] P3616 (Proposal of the Military Prosecutor's Office attached to the 1st Krajina Corps, 29 July 1993).

to proceed while the other suspects were not in custody.[18] The Chamber therefore finds that there is no indication that Tomašević's evidence would add anything new to the evidence already received on this point.[19] The Chamber therefore considers that the information which Tomašević is expected to provide with respect to the Velagići Case is obtainable through other means.

13. With respect to the release of Miladin and Obrenko Sugić ("Sugić Case"), the Chamber has admitted into evidence the case file outlining the investigative steps taken with respect to this case.[20] The Chamber has also received evidence of a specific request from the defence counsel in the Sugić case addressed to the Banja Luka Military Court which outlines the reasons for the requested release of the accused persons[21] and of other requests for their release addressed to the Command of the 1st Krajina Corps.[22] The Chamber therefore considers that the information which Tomašević is expected to provide with respect to the Sugić Case is also obtainable through other means.

14. Accordingly, the Chamber finds that the requirements for the issuance of a subpoena have not been met in this case. The Accused is again reminded that subpoenas are a method of last resort for obtaining information that is legally and factually relevant as well as necessary to his case.[23] The Accused has clearly not paid attention to these repeated instructions when filing this Motion.

[18] Motion, para. 7, referring to Interview, pp. 59–60.

[19] The Chamber also refers to P3596, T. 3894–3896, 3898–3899, 3946-3948 (under seal) and P3773, pp. 34–35 (under seal).

[20] D1798 (Banja Luka CSB criminal case file, August–September 1992).

[21] P3612 (Submission to Banja Luka Military Court, 26 January 1993).

[22] P3610 (Tactical Group 3 request, 27 August 1992); P3611 (Letter from Popovac Local Commune to 1st Krajina Corps, 27 August 1992). The Chamber also refers to P3596, T. 3888–3889 (under seal).

[23] Decision on Accused's Motion to Subpoena Prime Minister Milan Panić, 13 December 2012, para. 14; Decision on Accused's Motion to Subpoena President Karolos Papoulias, 23 October 2012 para. 21; Decision on the Accused's Second Motion for Subpoena to Interview President Bill Clinton, 21 August 2012, para. 16.

IV. Disposition

15. For the reasons outlined above, the Chamber, pursuant to Article 29 of the Statute of the Tribunal 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 eleventh day of December 2013
At The Hague
The Netherlands

[Seal of the Tribunal]