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: 4 March 2013

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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: **4 March 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE ACCUSED'S MOTION FOR BINDING ORDER TO INTERNATIONAL COMMISSION FOR MISSING PERSONS

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 Binding Order to International Commission for Missing Persons", filed on 15 May 2012 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. The Motion arises out of a complex and extensive procedural background, dating back to pre-trial, which this Chamber has outlined in a number of previous decisions and orders, and which shall not be repeated here. For the purposes of this Decision, it is sufficient to recall that the former pre-trial Judge and this Chamber agreed that the Accused should be able to engage his own DNA expert to run DNA identification tests relating to alleged victims of the conflict in Bosnia and Herzegovina ("BiH"), similar to those conducted by the International Commission for Missing Persons ("ICMP") and the expert witness Thomas Parsons, for the purpose of checking the accuracy of the ICMP's identifications and challenging Parsons' evidence.[1] In order to do so, the Accused requested that he be provided with the ICMP's entire database of genetic profiles obtained from blood samples taken from family members of alleged victims. The ICMP refused to provide the database without obtaining the consent of the affected families, arguing further that obtaining those consents would take a significant amount of time in light of the number of the samples taken.[2] The parties eventually reached an agreement whereby the Accused would select 300 cases from the ICMP's list of identified victims for the purpose of conducting his own tests while the ICMP would seek the consent of the 1,200-odd family members of those victims before providing their genetic information to the Accused's expert.[3] Following further discussion and litigation between the parties, including the ICMP, on the method for selecting the 300 test cases,[4] the parties finally agreed that 295 of those cases would be selected by a random sampling method, while five would be hand-picked by the Accused.[5] By January 2012, once the list of the selected names was handed over, the ICMP embarked on the task of contacting the relevant family members.

2. On 8 May 2012, the Accused was informed by the ICMP that it could not provide the genetic data in relation to one of the five test cases because of the lack of consent of the

[1] Order on Selection of Cases for DNA Analysis, 19 March 2010 ("Order"), p. 2; Decision in Relation to Selection of Cases for DNA Analysis, 23 September 2011 ("Decision"), p. 2.

[2] Order, p. 2.

[3] Order, pp. 2–3; Decision, pp. 2–3.

[4] *See* Decision.

[5] Motion, para. 5.

identified victim's family members and that, with respect to 295 test cases, family members of 150 of those cases had consented by then, while 15 had refused consent. A further four could not be located and thus consent could not be obtained.[6] The Accused then promptly filed the Motion.

A. Motion

3. In the Motion, the Accused moves the Chamber, pursuant to Rule 54 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), for an order directing the ICMP to make available DNA case files for testing by his expert irrespective of the consent of the victims' families.[7] Should the Chamber consider that it cannot issue a binding order to the ICMP, he argues that it then has the power to issue an order or a subpoena to the ICMP under Rule 54, as it would to any private organisation or citizen.[8]

4. As to the requirements for the issuance of a binding order and a subpoena, which overlap to a large extent, the Accused argues that his request is specific enough as he has identified specific DNA test cases and the ICMP has not complained of any difficulty in identifying those cases.[9] He also argues that the information he is seeking is relevant as it goes to the issue of the identification of the alleged Srebrenica victims.[10] It is also necessary in order to test the evidence provided by Parsons.[11] With respect to the requirement of necessity, the Accused refers to cases in national jurisdictions which have established the right of an accused to access the underlying DNA material relied upon by the prosecution's expert witnesses.[12] He also argues that the sample sought from the ICMP is less than 5% of the total identifications made by the ICMP and that if withheld because of lack of consent a "fair sample is not possible".[13] According to the Accused, it is "unreasonable and unfair to make production of a sample of DNA cases to the defence dependent upon consent" and that the ICMP's insistence on consent is "misguided and unnecessary".[14] He also claims that, having made its evidence available to the Office of the Prosecutor ("Prosecution") for use in its case, the ICMP is in no position to decline making that evidence available to the Accused, irrespective of consent.[15] Finally, in support of his claim that a binding order can be issued to an organisation such as the ICMP, the Accused

[6] Motion, Annex A.
[7] Motion, paras. 1, 7, 28–29.
[8] Motion, para. 15.
[9] Motion, para. 17.
[10] Motion, para. 18.
[11] Motion, paras. 18–21.
[12] Motion, para. 22.
[13] Motion, para. 23.
[14] Motion, paras. 24–25.

cites to Appeals Chamber jurisprudence which provides that binding orders can be issued to the United Nations and its organs, as well as to international organisations such as NATO and the World Bank.[16]

B. Response

5. On 29 May 2012, the Prosecution filed the "Prosecution's Response to Accused's Motion for Binding Order to International Commission for Missing Persons" with public and confidential appendices ("Response") in which it opposes the Motion.[17] The Prosecution contends that the Accused's request is "an unjustified departure from the selection process finally agreed upon by [him] which expressly stated that the ICMP would provide samples only after obtaining the required consent from donor family members".[18] According to the Prosecution, the Accused informed the ICMP that in cases where consent could not be obtained from family members for a particular random sample, he would file a motion to compel those individuals to provide their consent.[19] This, according to the Prosecution, meant that the Accused had accepted that the ICMP could not disclose personal genetic data without the consent from the donors; it also indicates that the Accused has abandoned his plan to force victims of the families to consent.[20]

6. In addition, the Prosecution argues that the Accused has failed to show that the information he now seeks is necessary in order to challenge the ICMP methodology as the ICMP could at that stage still provide the Accused with about 150 case files for testing, which is a "reasonably large and representative number".[21] Furthermore, the Prosecution contends that the Accused has made no effort to allow the ICMP to provide the information voluntarily since he has refused to allow it to obtain consent from other randomly selected families. In that respect, the Prosecution submits that the list of 295 names the ICMP received from the Accused in December 2011 was neither random nor representative.[22]

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[15] Motion, para. 25.

[16] Motion, paras. 10–14.

[17] Response, paras. 1, 16.

[18] Response, paras. 1, 4, Appendix A, Confidential Appendices B and C, Appendices D and E. The Prosecution explains that the ICMP is obliged to obtain families' consents because the majority of the families provided their genetic material at a time when the consent form they signed stated that the genetic material would be used only for identification purposes and did not provide for the eventuality that it might be used in criminal trials. *See* Response, para. 8.

[19] Response, para. 5, Appendix A.

[20] Response, para. 6.

[21] Response, paras. 1, 9.

[22] Response, paras. 1, 10–12. At the same time, in paragraph 4 of the Response, the Prosecution contends that the majority of the names were finally chosen in January 2012 as shown by the correspondence attached in Appendix

7. Finally, the Prosecution argues that the Accused has mischaracterised his agreement with the ICMP since the requirement of consent was articulated by the ICMP from the very first communication with the Accused's legal advisers and the Accused cannot now "convincingly prevail upon the Chamber that consent was not one of the main tenets of the original agreement".[23] The Prosecution argues that the Accused has used the issue of consent in order to "attempt to create the impression that he has a valid claim to exclude probative evidence because of unfairness".[24] In that respect, the Prosecution notes that, contrary to the Accused's assertion that the ICMP and the Prosecution work together, the ICMP is an independent international organisation, that has co-operated extensively with the Accused to provide material for his defence.[25]

C. Reply and Sur-Reply

8. Having been granted leave to reply,[26] the Accused filed his "Reply Brief: Motion for Binding Order to International Commission for Missing Persons" on 11 June 2012 ("Reply").[27] In the Reply, the Accused contends that the Prosecution wrongly argues that he had agreed that he would not require samples from those individuals whose families failed to consent to disclosure of their genetic material to the defence.[28] The Accused further explains that he made it clear in his letters to the ICMP, dated 8 December 2011, 10 January 2012, and 31 August 2012, that he would file a motion with the Chamber in relation to cases in which consent was not obtained.[29] He also contends that, while his early correspondence indicated an intention to compel consent of the persons involved, he subsequently decided that it would be more "expeditious and legally sound" to obtain a binding order against the ICMP itself.[30] Accordingly, the Accused argues that the ICMP understood long before it provided the first

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D, which indicates that the ICMP was provided with a random formula for the selection of 295 cases and that this formula was then followed by the ICMP to choose the relevant cases.

[23] Response, para. 13.

[24] Response, paras. 13–14.

[25] Response, para. 15.

[26] As the Chamber was not sitting at the time, the parties were informed *via* email sent by the Chamber's legal officer on 4 June 2012 that the Chamber decided to grant the Accused leave to reply to the Response.

[27] The Reply was initially filed publicly on 4 June 2012 but was then re-classified on 5 June 2012 as confidential due to the fact that Annex B of the Reply contained the names of the identified victims. *See* Notice Reclassifying Filing, Confidential, 5 June 2012. On 11 June 2012, the Accused filed a public redacted version of the Reply removing the list of names from Annex B. On the issue of the classification of ICMP documents as public or confidential, *see* Decision on the Accused's Motion to Unseal ICMP Exhibits, 25 April 2012; Interim Decision on Prosecution's Motion for Partial Reconsideration or Clarification of the Chamber's Decision on the Accused's Motion to Unseal ICMP Exhibits, 11 July 2012; Decision on Prosecution's Motion for Partial Reconsideration or Clarification of the Chamber's Decision on the Accused's Motion to Unseal ICMP Exhibits, 5 September 2012.

[28] Reply, para. 4.

[29] Reply, paras. 5–6. These letters are contained in Appendix A of the Response and in Annex A and Annex B of the Reply.

[30] Reply, para. 8.

sample that he would be seeking a court order to obtain access to the cases in which the persons did not consent.[31] Finally, the Accused argues that any sampling that excludes those cases in which there is no consent would be "completely unreliable and unscientific since it would be in cases of fraud or misreporting that one would be least likely to obtain such consent".[32]

9. Having been granted leave to file a sur-reply,[33] the Prosecution filed the "Prosecution's Sur-Reply to Accused Reply Brief: Motion for Binding Order to International Commission for Missing Persons" on 11 June 2012 ("Sur-Reply"). In the Sur-Reply, the Prosecution reiterates that the Accused's subsequent decision to file the Motion is a "marked departure" from the almost three years of negotiations with the ICMP and the extensive associated litigation, and thus violates his earlier commitment to the ICMP.[34] The Prosecution argues that there is a considerable difference between compelling the ICMP to disclose files irrespective of consent of the relevant family members and compelling the consent of those family members, the former option being contrary to the principles to which the ICMP is committed and also to the ICMP's good faith negotiations with the Accused.[35]

D. Interim Order and Subsequent Submissions

10. On 19 July 2012, the Chamber issued its "Interim Order on the Accused's Motion for Binding Order to International Commission for Missing Persons" ("Interim Order"), wherein it noted that the Motion was filed before the ICMP was in fact able to contact the family members related to all of the 300 test cases and before the final results of that process were known to the Accused and the Chamber.[36] Having considered that it would benefit from having the total number of consents and refusals obtained by the ICMP before disposing of the Motion, the Chamber ordered the Accused to wait for the ICMP to complete the exercise of contacting all family members and then file a submission updating the Chamber on these numbers. Noting further in the Interim Order the Prosecution's contention that it appeared that the 295 selected test cases were neither randomly selected nor representative as was originally agreed upon, the Chamber also instructed the Accused to address that contention in his submission. Finally, the Chamber noted in the Interim Order that the Prosecution never addressed the Accused's argument that the jurisprudence of the Tribunal allows it to issue a binding order to an organisation such as the ICMP. Accordingly, the Chamber instructed the Prosecution to file,

[31] Reply, para. 7.
[32] Reply, para. 9.
[33] As the Chamber was not sitting at the time, the parties were informed *via* email sent by the Chamber's legal officer on 8 June 2012 that the Chamber decided to grant leave for the Prosecution to file its sur-reply.
[34] Sur-Reply, paras. 2–5, 8.
[35] Sur-Reply, paras. 6–7.

within seven days of receiving the Accused's submission, its own response, addressing this issue as well as any other issue that may be raised in the Accused's submission.[37]

11. On 13 December 2012, the Accused filed his "Submission on Motion for Binding Order to International Commission on Missing Persons" ("Accused's Submission"), in which he informs the Chamber that the ICMP obtained consents in 281 out of 295 test cases.[38] He further submits that on 10 January 2012, he provided the ICMP with a random sampling method which the ICMP then used to select the 295 cases, starting with the fifth case and selecting every 44th case until 295 cases were obtained.[39] The Accused requests the Chamber to order the ICMP to provide him and his expert with the remaining 14 cases.[40] He makes no specific mention of the five non-randomly selected cases and whether consent is still lacking in relation to one of the five, as indicated in an earlier ICMP correspondence.[41] However, it would appear from the ICMP correspondence dated 29 November 2012, that only 14 cases are missing from the total sample of 300, thus implying that the one case related to the non-randomly selected sample of five test cases has been provided to the Accused.[42]

12. On 20 December 2012, the Prosecution filed the "Prosecution's Submission on Applicability of Rule 54 and Rule 54 *bis* to ICMP and on Karadžić's Supplemental Submission" ("Prosecution's Submission"), in which it argues that the ICMP, as an independent non-governmental organisation, is not subject to Article 29 of the Tribunal's Statute or Rule 54 *bis* of the Rules but may be subject to a Trial Chamber's subpoena under Rule 54 of the Rules.[43] The Prosecution further notes that the ICMP provided the Accused with 95 per cent of the requested material and that the main reason that this number is not closer to 100 per cent is that the Accused is refusing to provide additional randomly selected samples to replace the cases where consent was not obtained.[44] According to the Prosecution, the Accused has therefore failed to satisfy the requirements of both Rule 54 and Rule 54 *bis*, first because the remaining 14 cases are not necessary for the conduct of the trial or the fair determination of the reliability of the ICMP evidence, and second, because the Accused's refusal to accept the ICMP's proposal to substitute 14 test cases with other randomly selected cases means that he has refused to give the ICMP an opportunity to disclose the information voluntarily and has also refused to obtain the

[36] Interim Order, p. 3.
[37] Interim Order, pp. 3–4.
[38] Accused's Submission, para. 2, Annex A.
[39] Accused's Submission, para. 3, Annex B. *See also supra*, footnote 22.
[40] Accused's Submission, para. 4.
[41] *See above*, para. 2.
[42] Accused's Submission, Annex A.
[43] Prosecution's Submission, paras. 1–6.
[44] Prosecution's Submission, paras. 1, 7–8.

necessary information through other means.[45] In addition, the Prosecution submits that requiring the ICMP to disclose private information of the DNA providers, would be unduly onerous given the highly sensitive and personal nature of the genetic material and that disclosing such material could seriously undermine the ICMP's ability to undertake its mission.[46]

II. Applicable Law

A. Binding Orders Under Rule 54 *bis*

13. Article 29 of the Statute obliges states to "co-operate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law". This obligation includes the specific duty to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber [for] […] the service of documents".[47]

14. A party seeking an order under Rule 54 *bis* must satisfy a number of general requirements before such an order can be issued, namely, (i) the request for the production of documents under Rule 54 *bis* should identify specific documents and not broad categories of documents;[48] (ii) the requested documents must be "relevant to any matter in issue" and "necessary for a fair determination of that matter" before a Chamber can issue an order for their production;[49] (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily;[50] and (iv) the request cannot be unduly onerous upon the state.[51]

15. With respect to (i) above, the Appeals Chamber has held that "a category of documents may be requested as long as it is defined with sufficient clarity to enable ready identification by a [s]tate of the documents falling within that category".[52] If the requesting party is unable to specify the title, date, and author of the requested documents, but provides an explanation and is

[45] Prosecution's Submisson, paras. 9–13, 18–20.

[46] Prosecution's Submission, paras. 14–17.

[47] Article 29(2)(c) of the Statute.

[48] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108*bis*.2, Decision on Request of the United States of America for Review, 12 May 2006 ("*Milutinović* US Decision"), paras. 14–15; *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Review"), para. 32; *Prosecutor v. Kordić and Čerkez*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, Case No. IT-95-14/2-AR108*bis*, 9 September 1999 ("*Kordić* Decision"), paras. 38–39.

[49] Rule 54 *bis* (A)(ii) of the Rules; *Blaškić* Review, paras. 31, 32(ii); *Kordić* Decision, para. 40; *Milutinović* US Decision, paras. 21, 23, 25, 27.

[50] Rule 54 *bis* (A)(iii) of the Rules; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Sreten Lukić's Amended Rule 54 *bis* Application, 29 September 2006 ("*Sreten Lukić* Decision"), para. 7.

[51] *Blaškić* Review, para. 32(iii); *Kordić* Decision, para. 41.

[52] *Milutinović* US Decision, para. 15; *Blaškić* Review, para. 32; *Kordić* Decision, para. 39.

able to identify the requested documents in some appropriate manner, a Trial Chamber may, in consideration of the need to ensure a fair trial, allow the omission of those details if "it is satisfied that the party requesting the order, acting *bona fide*, has no means of providing those particulars".[53]

16. Regarding (ii) above, the assessment of relevance is made on a case-by-case basis and falls within the discretion of the Chamber.[54] In determining whether the documents sought by an applicant are relevant, Chambers have considered criteria such as whether they relate to the "most important" or "live" issues in the case,[55] or whether they relate to the "defence of the accused".[56] As for the necessity requirement, it obliges the applicant to show that the requested materials are necessary for a fair determination of a matter at trial. The applicant need not make an additional showing of the actual existence of the requested materials, but is only required to make a reasonable effort before the Trial Chamber to demonstrate their existence.[57] Furthermore, the applicant is not required to make a showing that all other possible avenues have been exhausted but simply needs to demonstrate "either that: [he or she] has exercised due diligence in obtaining the requested materials elsewhere and has been unable to obtain them; or that the information obtained or to be obtained from other sources is insufficiently probative for a fair determination of a matter at trial and thus necessitates a Rule 54 *bis* order".[58]

17. With respect to (iii) above, the applicant cannot request an order for the production of documents without having first approached the state said to possess them. Rule 54 *bis* (A)(iii) requires the applicant to explain the steps that have been taken to secure the state's co-operation. The implicit obligation is to demonstrate that, prior to seeking an order from the Trial Chamber, the applicant made a reasonable effort to persuade the state to provide the requested information voluntarily.[59] Thus, only after a state declines to lend the requested support should a party make a request for a Trial Chamber to take mandatory action under Article 29 and Rule 54 *bis*.[60]

18. With regard to (iv) above, the Appeals Chamber has held that "the crucial question is not whether the obligation falling upon [s]tates to assist the Tribunal in the evidence collecting

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[53] *Blaškić* Review, para. 32.

[54] *Kordić* Decision, para. 40.

[55] *See e.g., Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Second Application of General Ojdanić for Binding Orders pursuant to Rule 54*bis*, 17 November 2005, paras. 21, 25; *Prosecutor v. Milutinović et al.*, Separate and concurring opinion of Judge Iain Bonomy in the Decision on Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54 *bis*, 23 March 2005.

[56] *See e.g., Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Requests by the Accused for Trial Chamber II to Issue Subpoena Orders, 3 June 2005, p. 4; *Sreten Lukić* Decision, para. 13 (*see* footnote 45).

[57] *Milutinović* US Decision, para. 23.

[58] *Milutinović* US Decision, para. 25.

[59] *Sreten Lukić* Decision, para. 7.

[60] *Milutinović* US Decision, para. 32.

process is onerous, but whether it is unduly onerous, taking into account mainly whether the difficulty of producing the evidence is not disproportionate to the extent that process is strictly justified by the exigencies of the trial".[61]

19. Finally, the Appeals Chamber has held that "states" under Article 29 refers to all member states of the United Nations, whether acting individually or collectively, and therefore, under a purposive construction of the Statute, Article 29 also applies to "collective enterprises undertaken by States" such as an international organisation or its competent organs.[62]

B. Subpoenas Under Rule 54

20. 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.[63]

21. 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.[64]

22. 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.[65] Finally, the applicant must show that he has made reasonable

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[61] *Kordić* Decision, para. 41; *Blaškić* Review, para. 32(iii).

[62] *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108*bis*.1, Decision on Request of the North Atlantic Treaty Organisation for Review, 15 May 2006, para. 8, citing *Prosecutor v. Simić*, Case No. IT-95-9-PT, Decision on Motion for Judicial Assistance to be provided by SFOR and Others, 18 October 2000, para. 36.

[63] *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 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.

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

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

attempts to obtain the voluntary co-operation of the potential witness and has been unsuccessful.[66]

23. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[67] 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.[68] In essence, a subpoena should be considered a method of last resort.[69]

III. Discussion

24. While the issue of whether the ICMP is a type of an organisation to which a binding order may be issued is indeed a preliminary question posed by the Motion, the Chamber has decided not to enter into that discussion given its finding below that the Accused has not in any event satisfied all the requirements of Rule 54 *bis*. Accordingly, following its analysis on whether the Accused has satisfied Rule 54 *bis* requirements, the Chamber shall proceed to consider whether a subpoena should be issued to the ICMP under Rule 54.

A. Binding Order Under Rule 54 *bis*

25. The Chamber is satisfied that the Accused's request is specific enough in terms of the requirements of Rule 54 *bis*. In addition, the Chamber is also satisfied that his request is relevant as it relates to a live issue in his case, namely the accuracy of the DNA identifications of the victims of alleged crimes in BiH charged against the Accused in the Indictment. Indeed, as stated above,[70] the Accused should be able to engage his own DNA expert to run DNA identification tests. Further, the Chamber is of the view that the Accused has made reasonable efforts to obtain the genetic material relating to the 14 outstanding cases and that it is clear that the ICMP is not willing to disclose those to him.[71] Finally, the Chamber does not consider that

[66] *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Prosecution Motion for Issuance of a *Subpoena ad Testificandum*, Confidential and *Ex Parte*, 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.

[67] *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.

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

[69] *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 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."

[70] *See above*, para. 1.

[71] The Chamber does not accept the Prosecution's argument that the ICMP's willingness to provide the Accused with genetic data relevant to randomly selected cases which are to replace the 14 outstanding cases means that the ICMP is willing to provide the information sought voluntarily. *See* Prosecution's Submission, paras. 18–20. It is

the Accused's request is unduly onerous on the ICMP as the material requested is specific, limited in number, and already identified.[72]

26. However, the Chamber is not persuaded that the outstanding 14 cases, namely five per cent of a randomly selected sample,[73] are necessary for a fair determination of the accuracy of DNA identifications. This is so for a number of reasons.

27. First, the Accused's expert can undertake DNA testing on the sample of 286 cases already provided to the Accused. Not only is the sample large enough for proper testing, it also includes the non-randomly selected cases.

28. Secondly, if not satisfied with the size of the randomly selected sample as it currently stands, the Accused is free to replace the outstanding cases with another 14 randomly selected cases, particularly since the ICMP has already expressed its willingness to seek the relevant consents for the newly selected samples.

29. Thirdly, the only reason the Accused refuses to replace the 14 outstanding cases with other randomly selected cases is because of his claim that any sampling that excludes cases for which there is no consent would be "completely unreliable and unscientific" because it is exactly in "cases of fraud or misreporting" that one would be least likely to obtain such consent.[74] The Chamber disagrees with this assertion and reiterates what it has already said on several occasions, namely that the Accused has not established any basis for his concern that the ICMP would manipulate its database or its results to strengthen its conclusions.[75] Furthermore, throughout the years of litigation concerning the ICMP, the Accused never advanced a specific theory as to how the supposed fraud would be committed, who exactly would perpetrate it, and what the motives behind such a fraud would be. Even now, while making a general accusation

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clear that the information sought here is the genetic data relating to the 14 outstanding cases and it is equally clear that the ICMP is unwilling to provide that data voluntarily.

[72] The Chamber notes the Prosecution's submission that the Accused's request is unduly onerous on the ICMP because of the strong interests the ICMP has in maintaining the absolute confidentiality of this type of information and because of the implications an order compelling disclosure would have on the ICMP's mission. *See* Prosecution's Submission, paras. 14–17. However, the Chamber considers that the requirement that the request not be unduly onerous is not concerned with protecting the confidentiality concerns of a state or an organisation but with the "identification, collection and scrutiny" of the material requested. In other words, when discussing this particular requirement of Rule 54 *bis*, the Appeals Chamber seems to have been concerned with the burden placed on states in cases where the requesting party is seeking a large volume of material, requiring extensive effort on behalf of the states to identify and collect such material. *See Blaškić* Review, para. 32; *Kordić* Decision, para. 41. This is not the situation here, as the requested materials have already been identified and collected. Accordingly, the Chamber disagrees with the Prosecution that the request is unduly onerous on the ICMP.

[73] The Chamber has reviewed the Accused's Submission and the attached correspondence as to how the random sample of 295 names was chosen and is satisfied that, by January 2012, the method agreed upon for selection of 295 cases indeed resulted in random selection. *See* Accused's Submission, Annex B.

[74] Reply, para. 9.

of "fraud or misreporting", the Accused does not specify what type of fraud or misreporting would have taken place in the 14 outstanding cases or who would have committed the defrauding or misreporting – the family members, the ICMP, or both acting in collusion.

30. Finally, given that the ICMP's work is concerned only with DNA identification of remains, the Chamber is not in fact able to envision a great scope for fraud and thus will not entertain the Accused's speculative position in relation thereto. In that respect, the Chamber also notes that a refusal by a number of people to provide their consent to the release of their genetic data does not necessarily mean that they did so in order to conceal fraud or misreporting. As noted by the Prosecution,[76] there may be many other reasons for this decision, including that the relevant family members did not want to co-operate with the Tribunal and/or the Accused or that they did not want such private information to be used in any matter other than the identification of their loved ones.

31. Accordingly, for all of the reasons outlined in the preceding paragraphs, the Chamber is of the view that the disclosure of the genetic data related to the 14 outstanding test cases is not necessary in order for the Accused to conduct reliable testing of the ICMP's results. The Chamber shall, therefore, not issue a binding order to the ICMP compelling it to produce the requested material.

B. Subpoena Under Rule 54

32. As outlined above,[77] before the Chamber can issue a subpoena, it has to be satisfied that it is necessary to do so for the purpose of an investigation, preparation, or conduct of the trial, which in turn means that the Accused has to demonstrate a reasonable basis for his belief that the information he seeks will materially assist him in his case, in relation to clearly identified issues relevant to this trial.

33. As also noted above,[78] the Chamber is of the view that the testing of the ICMP's results is an issue relevant to this trial. Bearing in mind that the information the Accused seeks in the Motion relates to that issue, the Chamber considers that this information too is relevant to the Accused's trial.

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[75] Order, p. 3; Decision, p. 6.
[76] *See* Prosecution's Submission, para. 12.
[77] *See above*, paras. 20–23.
[78] *See above* paras. 1, 25.

34. However, the information sought through the issuance of a subpoena must also be of "*material* assistance", rather than merely helpful or of some assistance.[79] 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.[80] Given that the ICMP has already provided the Accused with what the Chamber considers to be a large enough sample of test cases for the purpose of testing the ICMP results, the Chamber is not convinced that the disclosure of data in relation to the 14 remaining cases and/or any testimony in relation to those will *materially* assist the Accused or provide substantial and considerable assistance to his case. As stated above,[81] the Chamber is of the view that the sample of 286 names is already large enough for credible testing. Even if that were not the case, the Accused can always boost that sample with another batch of randomly selected 14 cases. Once again, and for the same reasons as stated above,[82] the Chamber does not accept the Accused's argument that the cases where the consent was refused would make the whole sample unreliable.

35. Accordingly, the Chamber shall not issue a subpoena to the ICMP and any of its staff for the purpose of the Accused obtaining the genetic data in relation to the 14 outstanding cases.

IV. Disposition

36. Accordingly, the Trial Chamber, pursuant to Rules 54 and 54 *bis* of the Rules, hereby **DENIES** the Motion.

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

Judge O-Gon Kwon
Presiding

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

[Seal of the Tribunal]

[79] *Milošević* Decision, para. 39 [emphasis in the original text].
[80] *See Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.
[81] *See above* para. 27.
[82] *See above* paras. 29–30.