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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

In re Request of Naser Orić for Order,
Pursuant to 28 U.S.C. § 1782, Requiring
Sheri Fink, M.D. To Produce Documents and
Things For Use at the International Criminal
Tribunal for the Former Yugoslavia at the
Hague, Netherlands.

Case No.

ICTY Case No (IT-06-38)

**REQUEST FOR ORDER REQUIRING
SHERI FINK, M.D. TO PRODUCE
DOCUMENTS AND THINGS**

The Hon.

Date: November 4, 2004

13 Naser Orić (“Orić”), a defendant in a criminal proceeding before the International Criminal
14 Tribunal for the Former Yugoslavia (“ICTY”) at The Hague, Netherlands, respectfully requests
15 this Court to enter an order pursuant to 28 U.S.C. § 1782 requiring Sheri Fink, M.D. to produce
16 the documents and things identified in the form of order attached hereto as Exhibit “A.” The
17 grounds for this request are the following:

18 **I. STATEMENT OF FACTS**

19 1. Naser Orić is a citizen of Bosnia and Herzegovina and is currently a defendant
20 having been charged by the prosecutor of the ICTY with six violations of the laws and customs of
21 war, including: wanton destruction of cities, towns or villages, not justified by military necessity;
22 plunder of public or private property; and murder and cruel treatment. (ICTY Case No. IT-06-38.)

23 2. Mr. Orić’s trial began before the ICTY on October 6, 2004.

24 3. Sheri Fink, M.D. (“Dr. Fink”) collected information and interviewed several of the
25 witnesses who will be testifying at Mr. Orić’s trial at the ICTY during her research for her
26 published book, War Hospital: A True Story of Surgery and Survival (Public Affairs, Perseus
27 Book Group, 2003). In addition, Dr. Fink collected material relevant to actions allegedly taken
28 and words allegedly spoken by Mr. Orić. These materials and witnesses provided

1 autobiographical information in the form of interviews and other information to Dr. Fink. Besides
2 the autobiographical information, which is crucial to proceedings taking place at the ICTY,
3 portions of the materials and interviews involve and concern those witnesses' versions of Mr.
4 Orić's alleged actions and the consequential charges levied against him. The testimony of the
5 witnesses will concern these same subjects and will commence on October 6, 2004. Further,
6 counsel believes, based on the notes contained in Dr. Fink's book, that Dr. Fink possesses tape
7 recordings, documents, and other materials, including statements of the witnesses which must be
8 examined in light of the testimony those witnesses will offer at the ICTY. This material is
9 necessary to properly conduct the examination of each witness and to ensure a fair proceeding for
10 Mr. Orić.(See, section captioned "The Use," below.) Although the identities of the
11 aforementioned witnesses have been disclosed to Mr. Orić's defense counsel, that information
12 remains protected by the ICTY and is not subject to public disclosure. For that reason this
13 application has been filed under seal, a warning has been attached to the papers served on Dr. Fink
14 and the list of said witnesses is attached hereto, in a sealed envelope, as Exhibit "B-1."

15 4. On several occasions during the past eleven months, Mr. Orić's counsel John Jones,
16 a British Barrister now actively engaged in Mr. Orić's trial at the ICTY in the Hague, Netherlands,
17 requested that Dr. Fink produce all notes and recordings related to her interviews of witnesses for
18 War Hospital. Mr. Jones sent his first request via email to Dr. Fink in October 2003, and his latest
19 email on September 6, 2004. Since that point in time, the undersigned has attempted to speak with
20 Dr. Fink concerning the materials sought. On each occasion, the undersigned was referred to Dr.
21 Fink's lawyer, Herschel Fink, who is her father. When contacted, Mr. Fink refused to accept
22 process on behalf of Dr. Fink and stated that he would contact us formally. That has not occurred.
23 As Dr. Fink's employment and home addresses are not known to the undersigned, service has
24 been accomplished in Chicago during a publicized speaking engagement. A true and correct copy
25 of each available email is attached collectively hereto as Exhibit "C."

26 5. Dr. Fink has been unwilling to produce any of the requested documents.

27 6. Dr. Fink was served with these papers in Chicago, Illinois. See, attached Affidavit
28 of Service.

1 Resolution 827.

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3 13. The Supreme Court recently settled previous conflicts in the circuits regarding
4 issues of discovery in §1782 cases in Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2466
5 (2004), a case in which a microprocessor company sought discovery in the United States in
6 furtherance of its complaint filed against a competitor with the Directorate General-Competition
7 of the Commission of the European Communities. The Court confirmed the lower court rulings
8 that §1782 makes discovery available to a broad range of complainants and foreign tribunals. Id.
9 at 2479 (finding the European Commission to be within the ambit of § 1782). Specifically, the
10 Supreme Court held, affirming the views of the majority of the circuits which had addressed the
11 issue (the Seventh had not) that there exists no foreign-discoverability requirement in granting
12 applications based on §1782, and that no showing must be made that the information desired is
13 discoverable under applicable foreign law. Id. at 2476. That determination is left to the foreign
14 court.
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17 14. In deciding the propriety of issuing orders pursuant to 28 U.S.C. §1782, the Second
18 Circuit has held that courts should be guided by the statute's twin aims of 1) providing efficient
19 means of assistance to participants in international litigation; and 2) encouraging foreign countries
20 by example to provide similar means of assistance to our courts. See, e.g., In re Letter Rogatory
21 from Nedenes Dist. Court, Norway, 216 F.R.D. 277, 280 (S.D.N.Y., 2003). The court in Nedenes
22 authorized the deposition of and the taking of a blood sample in connection with a paternity
23 proceeding in Norway. Id. See also, Application of Malev Hungarian Airlines, 964 F. 2d 97, 100
24 (2d Cir. 1992).
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1 15. As a defendant in a proceeding in the ICTY, Mr. Orić is obviously an interested
2 person within the meaning of 28 U.S.C. §1782 and therefore has standing to seek the order
3 requested herein. The seminal case on this precise issue in the Seventh Circuit is case remarkably
4 similar to the instant one, McKevitt v. Pallasch, et al., 339 F. 3d 530, 531 (7th Cir. 2003). In
5 McKevitt, the appellate court upheld the granting of an order pursuant to §1782 to produce a
6 journalist’s tape recordings of interviews of a witness for the prosecution in a criminal trial in the
7 Republic of Ireland because the defendant in that case claimed the interviews would be useful to
8 him in the cross-examination of that individual. Michael McKevitt was prosecuted in Ireland for
9 membership in a banned organization and directing terrorism. He asked the district court for an
10 order pursuant to 28 U.S.C. § 1782 to produce tape recordings that he thought would be useful to
11 him in the cross-examination of key a witness for the prosecution. The District and Circuit Court
12 granted the application. The court directed a number of actual journalists who were engaged in the
13 process of writing the witness's biography and who in the course of their research for the
14 biography interviewed the witness and produced tape recordings to produce those recordings for
15 McKevitt's use, as has been requested here, in preparing for cross examination.
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18 16. The McKevitt court held that, “ When the information in the reporter's possession
19 does not come from a confidential source, it is difficult to see what possible bearing the First
20 Amendment could have on the question of compelled disclosure. If anything, the parties to this
21 case are reversed from the perspective of freedom of the press, which seeks to encourage
22 publication rather than secrecy.” McKevitt at 533, citing Florida Star v. B.J.F., 491 U.S. 524,
23 533-34, 105 L. Ed. 2d 443, 109 S. Ct. 2603 (1989).
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26 17. As stated previously, Mr. Orić, through his counsel John Jones, has requested Dr.
27 Fink to provide the notes and documentation of such interviews, but Dr. Fink has refused to do so.
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1 Due to the location of the ICTY, it is impossible for Mr. Orić to obtain the materials at issue
2 without assistance of this Court.

3 18. The Court’s issuance of the proposed order promotes the aims of efficiency and
4 international cooperation.

5 19. In deciding the propriety of issuing orders such as the one sought here, pursuant to
6 28 U.S.C. §1782, courts have previously reviewed the legislative history in determining the
7 statute’s goal and have noted that “A Senate Judiciary Committee report supporting the 1964
8 amendment [...]expressed the goal of ‘providing equitable and efficacious procedures for the
9 benefit of tribunals and litigants involved in litigation with international aspects,’ and thereby
10 ‘inviting foreign countries similarly to adjust their procedures.’” Al Fayed v. Central Intelligence
11 Agency, 343 U.S. App. D.C. 308, 229 F. 3d 272 (D.C. Cir. 2000) *quoting* S. Rep. No. 1580, at 2
12 (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3783. Indeed, “the expectation or hope was that by
13 making assistance generously available through the good offices of United States officials and
14 courts, **our country would set an example foreign courts and authorities could follow when**
15 **asked to render aid to United States courts, authorities, and litigators.**” In re Letter of
16 Request, 276 U.S. App. D.C. 272, 870 F. 2d 686 (D.C. Cir., 1989) (emphasis added).
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19 **III. LACK OF PRIVILEGE**

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21 20. No applicable privilege exists that would prevent the provision of the requested
22 material. Dr. Fink was collecting material and interviewing the witnesses at issue here for a
23 book—a book she later published through Perseus Books, a division of Public Affairs Publishing.
24 It is anticipated that Dr. Fink may suggest that the materials are protected from discovery by virtue
25 of a supposed journalistic privilege. It should be recognized that the events described in Dr. Fink’s
26 book date back to before 1992 and concentrate on the Srebrenica massacre of 1995. Her research
27 and interviews took place over the course of almost five years culminating with the publication of
28

1 her book in July, 2003. While of historical value, Dr. Fink was neither a reporter, nor a news
2 gatherer, nor employed by a news gathering agency either before or during the time of her
3 collection of material for her book. None of the materials sought are confidential as all of the
4 witnesses about whom materials are sought have been fully identified in the text of Dr. Fink's
5 book.

6
7 21. In any event, the reality is that there is no Federal journalist privilege upon which
8 Dr. Fink can legitimately rely under these circumstances. The Federal Rules of Evidence do not
9 include a specific rule that would protect a reporter's communications. The controlling decision
10 regarding the applicability of the reporter's privilege in the context of criminal proceedings is
11 Branzburg v. Hayes, 408 U.S. 665 (1972), in which the Court rejected a journalist's claim of
12 privilege, holding that the First Amendment did not provide a newsperson with a privilege from
13 testifying in front of a grand jury in a criminal case, basing its decision on the traditional
14 importance of grand juries and the strong public interest in effective criminal investigation. See
15 also Cohen v. Cowles, 501 U.S. 663 (1991). (First Amendment does not relieve a newspaper
16 reporter of the obligation, shared by all citizens to answer questions relevant to a criminal
17 investigation, even though the reporter might be required to reveal a confidential source.) In any
18 event, no issue of confidentiality is present here. As can be observed in the pages attached to this
19 application as Exhibit "B-2," which contains the War Hospital Chapter Notes relevant to each of
20 the witnesses (also enclosed in the sealed envelope), Dr. Fink has already publicly identified all of
21 the witnesses at issue here in her book.

22
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24 22. In McKevitt v. Pallasch, supra, faced with a similar request from a defendant in a
25 foreign court for a journalist's tape recordings of a witness for impeachment purposes, the Seventh
26 Circuit rejected an actual reporter's claim of privilege and upheld the district court's order that the
27 tapes must be produced. The court stated:

1
2 It seems to us that rather than speaking of privilege, courts should simply make
3 sure that a subpoena duces tecum directed to the media, like any other subpoena
4 duces tecum, is reasonable in the circumstances, which is the general criterion for
judicial review of subpoenas. . . . We do not see why there need to be special
criteria merely because the possessor of the documents or other evidence sought is
a journalist.

5 Id. In this case, the materials sought are not of a confidential nature and are being
6 requested with a good faith basis; it is therefore submitted that there are likewise no
7 “special criteria” which must be satisfied in granting this application.
8

9 23. Dr. Fink is likewise not afforded protection under any journalist shield law
10 even assuming it would be applied in this Court. The only entities which an Illinois
11 reporter’s shield might protect, in State court, not Federal court, are persons and
12 organizations actually engaged in traditional news gathering and news dissemination as a
13 vocation. The Illinois Reporters Shield law states:
14

15 §735 ILCS 5/8-902. Definitions Sec. 8-902. Definitions. As used in
this Act:

16 (a) "reporter" means any person regularly engaged in the business of
17 collecting, writing or editing news for publication through a news
18 medium on a full-time or part-time basis; and includes any person
who was a reporter at the time the information sought was procured
or obtained.

19 (b) "news medium" means any newspaper or other periodical issued
20 at regular intervals whether in print or electronic format and having
21 a general circulation; a news service whether in print or electronic
22 format; a radio station; a television station; a television network; a
23 community antenna television service; and any person or
corporation engaged in the making of news reels or other motion
picture news for public showing.

24 The Illinois Shield Law explicitly limits the qualified privilege to professional journalists or
25 newscasters. At the time Dr. Fink collected the material at issue she was by no means, collecting
26 news intended for a newspaper, magazine, news agency, press association or wire service or other
27 professional medium or agency which has as one of its regular functions the processing and
28 researching of news intended for dissemination to the public.

1 29. The Court in Bingham next considered the defendant's interest in effective cross-
2 examination and found them paramount. First, the Court established that, as here, the very nature
3 of what was sought made the material unique because they were the witness' prior statements:

4 By their very nature, these statements are not obtainable from any other source.
5 They are unique bits of evidence that are frozen at a particular place and time.
6 Even if the defendants attempted to interview all of the government witnesses and
7 the witnesses cooperated with them the defendants would not obtain the particular
8 statements that may be useful for impeachment purposes at trial. Citing to, United
9 States v. Cuthbertson, 630 F.2d 139, 148 (3d Cir., 1980)

10 See also, United States v. LaRouche Campaign, 841 F.2d 1176, 1180-81 (1st Cir. 1988).

11 30. The ruling in Bingham reflects the courts' views that, in balancing the interests in
12 the application of the reporter's privilege, criminal cases command a weightier impact than civil
13 cases, except, perhaps, where the testimony is peripheral or the charge is minor and the impact on
14 the press great. See, e.g., U.S. v. Burke, 700 F.2d 70 (2nd Cir. 1983) (in weighing interests, stakes
15 are higher in criminal cases than in civil). Indeed, the Fifth Circuit has held that a reporter has no
16 privilege to withhold information in a criminal case unless the source is confidential, which the
17 source in this case is clearly not. U.S. v. Smith, 135 F.3d 963 (5th Cir. 1993). See also, U.S. v.
18 Jennings, 269 F.3d 877 (7th Cir.2001) (The fact that the materials in question are key impeachment
19 materials is also significant.)

20 31. There is a reason it is not possible to find cases in which a criminal defendant,
21 fighting for his life, is denied access to critical impeachment materials, and it lies in the Sixth
22 Amendment. In the context of any articulable balancing test, no court would deny a defendant the
23 right to effectively confront and cross-examine a critical witness against him. Where, as here, the
24 source of the impeachment material is not confidential, and the interests of Dr. Fink is only in the
25 academic application of a non-existent privilege it is inconceivable that Orić's interests do not
26 outweigh those of Dr. Fink's.
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1 34. The attack on Jezestica on 8 August 1992

2 The indictment against Mr. Orić charges him, *inter alia*, with criminal responsibility in
3 relation to an attack on Jezestica (in eastern Bosnia) on 8 August 1992. See paragraph 32 of the
4 Amended Indictment available at <http://www.un.org/icty/indictment/english/ori-ii030328e.htm> :

5
6 On 8 August 1992, the village of Jezestica and the hamlet of Bozici
7 were attacked. The Potocari TO, Suceška TO, Skenderovici TO and
8 Osmace TO participated in this attack.

9 35. Mr. Orić is charged with war crimes in relation to this attack, namely "wanton
10 destruction of cities, towns or villages, not justified by military necessity, a violation of the laws or
11 customs of war, punishable under Articles 3(b) and 7(3) of the Statute of the Tribunal" (Count 3),
12 "plunder of public or private property, a violation of the laws or customs of war, punishable under
13 Articles 3(e) and 7(3) of the Statute of the Tribunal" (Count 4), "wanton destruction of cities,
14 towns or villages, not justified by military necessity, a violation of the laws or customs of war,
15 punishable under Articles 3(b) and 7(1) of the Statute of the Tribunal" (Count 5), "plunder of
16 public or private property, a violation of the laws or customs of war, punishable under Articles
17 3(e) and 7(1) of the Statute of the Tribunal" (Count 6).

18
19 36. The attack on Jezestica is covered in Chapter 10 of "War Hospital". See in
20 particular pages 80-81:

21
22 "On August 8, with the hospital already full, the staff overwhelmed,
23 and part of the enclave under fire, a group of soldiers plans a
24 surprise raid on the Serb village of Jezestica, where Serb soldiers
25 have directed cannon fire at a neighbouring Muslim village for
26 months. The action begins around noon. Some Srebrenicans stumble
27 into a minefield and are carried back to the hospital. The remaining
28 soldiers, many of them friends or family members of the dozens of
Muslim men executed by Serbs in nearby Glogova at the start of the
war, fire of a grenade and rush the village. Hand-to-hand fighting
ensues and casualties mount. Serb civilians flee. Eight Serbs are
killed. The Srebrenica soldiers take livestock and other valuables
and set fire to homes. The Serbs counter-attack, injuring and killing
many of the withdrawing Muslims."

1 36(a). Witness “1”

2 Witness “1” was interviewed by Dr. Fink in relation to the August 8, 1992 attack on
3 Jezestica. See page 368 of "War Hospital", which shows book that Witness “1” was
4 interviewed by Dr. Fink for this chapter.

5
6 In his statement submitted to the Tribunal, Witness “1” refers to the attack on Jezestica.
7 This will, therefore, be a matter about which the witness will testify at Mr. Orić’s trial before
8 the ICTY. There are reasons for believing that he will give a discrepant account before the
9 ICTY from what he said about the attack when interviewed by Dr. Fink for her book. It is
10 therefore in the interests of justice and a fair trial for Naser Orić that Dr. Fink's notes of her
11 interview with Witness “1” be disclosed to the Defence for Naser Orić.

12
13 36(b). Witness “2”

14 Witness “2” was also interviewed by Dr. Fink in relation to the August 8, 1992 attack on
15 Jezestica. It is apparent from page 368 of the book that Witness “2” was interviewed by Dr.
16 Fink for this chapter.

17
18 In his statement submitted to the Tribunal, Witness “2” also refers to the attack on
19 Jezestica. This will, therefore, be a matter about which the witness will testify at Mr. Orić's trial
20 before the ICTY. There are also reasons in relation to this witness for believing that he will give a
21 discrepant account before the ICTY from what he said about the attack when interviewed by Dr.
22 Fink for her book. It is therefore in the interests of justice and a fair trial for Naser Orić that Dr.
23 Fink's notes of her interview with Witness “2” be disclosed to the defense for Naser Orić.

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25
26 37. The attack on Kravica on 7 January 1993

27 The indictment against Mr. Orić charges him, *inter alia*, with criminal responsibility in
28 relation to an attack on Kravica (in eastern Bosnia) on 7 January 1993. See paragraph 35 of the

1 Amended Indictment:

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3 "On 7 and 8 January 1993, the village of Kravica and two
4 nearby villages, Siljkovici and Jezestica, were attacked. The
5 Company Stari Grad, Brigade Potocari, Brigade Suceska, Brigade "3
6 Maj" Kragljivoda, Independent Battalion Osmace, Company
7 Pusulici of the Srebrenica Independent Battalion, 6th Detachment
8 Kamenica, 114th East Bosnian Brigade, Independent Battalion
9 Voljavica, Independent Battalion Biljeg, and 1st Cerani Detachment
10 participated in this attack. **Naser ORIC** commanded and partook in
11 the attack."

12 Mr. Orić is charged with war crimes in relation to this attack, namely "wanton destruction
13 of cities, towns or villages, not justified by military necessity, a violation of the laws or customs of
14 war, punishable under Articles 3(b) and 7(3) of the Statute of the Tribunal" (Count 3), "plunder of
15 public or private property, a violation of the laws or customs of war, punishable under Articles
16 3(e) and 7(3) of the Statute of the Tribunal" (Count 4), "wanton destruction of cities, towns or
17 villages, not justified by military necessity, a violation of the laws or customs of war, punishable
18 under Articles 3(b) and 7(1) of the Statute of the Tribunal" (Count 5), "plunder of public or private
19 property, a violation of the laws or customs of war, punishable under Articles 3(e) and 7(1) of the
20 Statute of the Tribunal" (Count 6).

21 38. The attack on Kravica is covered in Chapter 13 of "War Hospital", in particular
22 pages 108-109:

23 "Srebrenica's soldiers plan an offensive on Serb villages,
24 calculating the expected weight and types of goods that might be
25 captured in different places. They choose January 7, Serb Orthodox
26 Christmas, the second time they have launched an attack on an
27 Orthodox holiday. And they choose Kravica, a historic center for
28 Serbnationalism ..."

38(a). Witness "1"

Witness "1" was interviewed by Dr. Fink in relation to the January 7, 1993 attack on

1 Kravica. See page 371 of the book showing that Witness “1” was interviewed by Dr. Fink for
2 this chapter.

3
4 In his statement submitted to the Tribunal, Witness “1” refers to the attack on Kravica.
5 This will, therefore, be a matter about which the witness will testify at Mr. Orić's trial before the
6 ICTY. There are reasons for believing that he will give a discrepant account before the ICTY from
7 what he said about the attack when interviewed by Dr. Fink for her book. It is therefore in the
8 interests of justice and a fair trial for Naser Orić that Dr. Fink's notes of her interview with
9 Witness “1” be disclosed to the defense for Naser Orić .

10
11 38(b). Witness “2”

12 Witness “2” was also interviewed by Dr. Fink in relation to the attack on Kravica on 7
13 January 1993. Again, see page 371 of the book that Witness “2” was interviewed by Dr. Fink for
14 this chapter.

15 In his statement submitted to the Tribunal, Witness “2” also refers to the attack on Kravica.
16 This will, therefore, be a matter about which the witness will testify at Mr. Orić’s trial before the
17 ICTY. There are also reasons in relation to this witness for believing that he will give a discrepant
18 account before the ICTY from what he said about the attack when interviewed by Dr. Fink for her
19 book. It is therefore in the interests of justice and a fair trial for Naser Orić that Dr. Fink's notes of
20 her interview with Witness “2” be disclosed to the defense for Naser Orić.

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23 39. Other matters relevant to Witnesses “1” and “2”

24 Witness “1” and Witness “2” were also interviewed by Dr. Fink in relation to relevant
25 matters that will arise during the trial of Mr. Orić, for example:

- 26
27
- Witness “2” was involved in planning military operations (page 99, War Hospital).

28 It is clear from page 370 of War Hospital that both Witness “1” and Witness “2”

1 were interviewed by Dr. Fink on this subject. Mr. Orić is charged with having
2 planned the very same military operations.

- 3 • Witness “2” was a member of the War Council (page 101, War Hospital). Again
4 this is highly relevant as the issue of the competence of the War Council will be a
5 key issue at trial, and in particular whether it or Mr. Orić was the competent
6 authority for punishing soldiers who committed war crimes.
- 7
- 8 • Witness “1” and Witness “2” were close friends (page 100, War Hospital),
9 therefore raising the possibility of collusion in their testifying against Mr. Orić.
- 10 • The Epilogue to "War Hospital", specifically mentions the case against Mr. Orić
11 before the ICTY. See pages 344-345:
- 12

13 On April 10, 2003, Naser Oric was arrested by NATO-led forces
14 and brought before the International Criminal Tribunal in The
15 Hague where he faced charges of violating the laws or customs of
16 war ... While some Srebrenicans almost certainly committed
atrocities against Serbs in 1992 and early 1993, there exists no
earthly excuse for the genocide Mladic's forces committed against
thousands of Srebrenica's Muslims two years later.

17 It is clear from page 398, that Witness “2” was interviewed by Dr. Fink for the
18 Epilogue. He deals at length with these issues in his statement submitted to the
19 Tribunal. Again, therefore, it is directly relevant to impeaching Witness “2” to
20 discover what he said on this subject when interviewed by Dr. Fink.

21

22 40. There is no other way of obtaining Dr. Fink's material. She alone interviewed these
23 witnesses and she alone will have the notes which would reveal when Witness “1” and
24 Witness “2” provide a different account when testifying before the Tribunal from the account
25 they gave to her.

26

1 pursuant to 28 U.S.C. §1782 requiring Sheri Fink to produce the documents and things described
2 above, at a date and time convenient to the Court but not later than November 18, 2004, for
3 inspection and copying.

4
5 November 4, 2004
6

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