



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: 13 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: 13 December 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA MIĆO STANIŠIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Miće Stanišić

Mr. Slobodan Zečević
Mr. Stéphane Bourgon

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 to Subpoena Mićo Stanišić” filed by the Accused on 24 June 2013 (“Motion”), and of the “Motion on Behalf of Mićo Stanišić Seeking Leave to Respond and Response to Karadžić Motion for Subpoena” filed on 8 July 2013 (“Stanišić Response”) 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 Mićo Stanišić to testify in his case.¹ The Accused submits that he has made efforts to obtain the voluntary cooperation of Stanišić but that he has failed as Stanišić has repeatedly indicated that he was unwilling to testify voluntarily.²

2. The Accused further submits that there are reasonable grounds to believe that Stanišić has information which can materially the Accused’s case.³ As the Minister of the Interior of Republika Srpska (“RS”) in 1992 and 1994 and one of the members of the alleged joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian-Serb claimed territory in Bosnia and Herzegovina (“BiH”), as charged in the Third Amended Indictment (“Indictment”), Stanišić is expected to testify that there existed no such joint criminal enterprise, that there was no plan to expel Bosnian Muslims and Bosnian Croats, and that in any event, the RS Ministry of the Interior (“RS MUP”) was never tasked with the implementation of such plan.⁴ He is further expected to testify about numerous meetings and personal conversations he had with the Accused.⁵ Finally, Stanišić is expected to rebut evidence elicited during the case presented by the Office of the Prosecutor (“Prosecution”) by witnesses Milorad Davidović and Branko Đerić.⁶

3. On 24 June 2013, the Office of the Prosecutor (“Prosecution”) informed the Chamber via email that it would not respond to the Motion.

4. During the hearing of 5 July 2013, the Chamber declared that it had decided to stay its determination of the Motion pending resolution by the Appeals Chamber of the “Appeal against the

¹ Motion, para. 1.

² Motion, paras. 4–6. *See also* T. 43626 (15 November 2013).

³ Motion, para. 13.

⁴ Motion, paras. 7–8.

⁵ Motion, paras. 8–11.

⁶ Motion, paras. 12–14.

Decision on the Accused's Motion to Subpoena Zdravko Tolimir" filed on 11 June 2013 by Zdravko Tolimir, which was considered to be of general relevance to the issue of the Chamber's ability to subpoena an accused or appellant currently involved in Tribunal proceedings.⁷

5. In the Stanišić Response, the Stanišić defence seeks leave to respond to the Motion and submits the Motion directly affects Stanišić's rights.⁸ On the substance, the Stanišić defence argues that i) an accused should not be compelled to testify against himself or to confess guilt in accordance with Article 21(4)(g) of the Tribunal's Statute ("Statute");⁹ ii) the Accused has failed to demonstrate that the information he wishes to obtain from Stanišić is of such material assistance to his case so as to override Stanišić's right not to testify;¹⁰ and iii) the information the Accused seeks to elicit from Stanišić is obtainable through other means.¹¹ Alternatively, the Stanišić defence submits that it would not object to Stanišić's interview with the Prosecution being tendered into evidence.¹²

6. The Appeals Chamber issued the "Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir" on 13 November 2013 ("*Tolimir* Appeal Decision"), in which it emphasised "that an accused or appellant may be compelled to testify in other cases before the Tribunal due to the fact that any self-incriminating information elicited in those proceedings cannot be directly or derivatively used against him in his own case".¹³

II. Applicable Law

7. 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.¹⁴

⁷ T. 40841–40842 (5 July 2013).

⁸ Stanišić Response, para. 1.

⁹ Stanišić Response, paras. 3, 13–16.

¹⁰ Stanišić Response, paras. 4, 17–18.

¹¹ Stanišić Response, paras. 5, 19–21.

¹² Stanišić Response, paras. 20–21.

¹³ *Tolimir* Appeal Decision, para. 50.

¹⁴ *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

8. 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.¹⁵

9. Even if the Trial Chamber is satisfied that the applicant has met the legitimate purpose requirement, the issuance of a subpoena may be inappropriate if the information sought is obtainable through other means.¹⁶ 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.¹⁷

10. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.¹⁸ 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.¹⁹ In essence, a subpoena should be considered a method of last resort.²⁰

III. Discussion

11. As a preliminary matter, the Chamber recalls, as noted above, that the Appeals Chamber has held that protection against self-incrimination, as provided for the Tribunal's accused in Article 21(4) of the Statute, does not preclude the possibility of those accused being compelled to testify in proceedings which do not involve the determination of the charges against them.²¹ Accordingly, nothing prevents this Chamber from issuing a subpoena to Stanišić, provided the Accused has satisfied the necessary requirements for the issuance of such subpoena.

on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schröder, 9 December 2005 ("*Milošević* Decision"), para. 38.

¹⁵ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

¹⁶ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

¹⁷ *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.

¹⁸ *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.

¹⁹ *Halilović* Decision, paras. 6, 10.

²⁰ 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."

²¹ *Tolimir* Appeal Decision, para. 36.

12. Having reviewed the Motion, Annex A to the Motion, and the Stanišić Response, as well as having considered the further submissions by the Accused's legal adviser on 15 November 2013,²² the Chamber is satisfied that the Accused has made reasonable attempts to obtain Stanišić's voluntary co-operation as a witness in this case but has been unsuccessful.

13. As stated above, in order to meet the necessity requirement for the issuance of a subpoena, the Accused must show that he has a reasonable basis for his belief that there is a good chance that Stanišić will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to his trial.²³ Having assessed the expected scope of Stanišić's testimony, as outlined in the Motion, the Chamber is satisfied that it is relevant to a number of issues in the Accused's case. As the Minister of the Interior of the RS during periods relevant to the Indictment, Stanišić is expected to testify about areas relevant to the alleged joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian-Serb claimed territory in BiH. He is further expected to testify about numerous meetings and personal conversations he had with the Accused. Finally, he is expected to rebut the evidence of Prosecution witnesses, Milorad Davidović and Branko Đerić. These issues clearly pertain to the Accused's alleged responsibility for crimes charged in the Indictment. Accordingly, the Chamber is satisfied that Stanišić's anticipated testimony will materially assist the Accused with respect to clearly identified issues relevant to his case and that the Accused has fulfilled the requirement of legitimate forensic purpose.

14. 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.²⁴ The Chamber notes that the Motion is once again formulated broadly in terms of the evidence Stanišić is expected to provide. As such, the Chamber has received a large amount of evidence on some of the areas Stanišić is expected to testify about. This is true of Stanišić's expected testimony that the alleged joint criminal enterprise to expel Bosnian Muslims and Bosnian Croats from Bosnian-Serb held territory did not exist.²⁵ This is also true of

²² T. 43626 (15 November 2013).

²³ See *supra* para. 7.

²⁴ See *supra* para. 9.

²⁵ See Milan Martić, T. 38090–38093 (9 May 2013), T. 38160 (13 May 2103); D3528 (Witness statement of Milan Martić dated 7 May 2013), para. 23; D3665 (Witness statement of Vojislav Šešelj dated 1 June 2013), paras. 31–35; Milorad Dodik, T. 36842–36844, 36902–36903 (9 April 2013); Momir Bulatović, T. 34540–34542 (28 February 2013); D3051 (Witness statement of Momir Bulatović dated 25 February 2013), paras. 14–18; Momčilo Krajišnik, T. 43269–43270, T. 43298–43302 (12 November 2013); John Zamećica, T. 42470–42471 (29 October 2013); D4027 (Witness statement of Nikola Poplašen dated 11 November 2013), para. 5; D4034 (Witness statement of Radoslav Brđanin dated 8 November 2013), para. 23; D3960 (Witness statement of Tomislav Kovač dated 28 October 2013), paras. 57, 59; D3917 (Witness statement of Čedomir Kljajić dated 30 July 2013), para. 10.

Stanišić's expected evidence as to the role and functions of the RS MUP.²⁶ However, Stanišić is uniquely placed to provide evidence on the contents of personal conversations and meetings he had with the Accused,²⁷ and to address the specific evidence of Prosecution witnesses Davidović and Đerić given that these two witnesses gave evidence as to Stanišić's statements and conduct. Given his position as RS Minister of Interior and his prominent role in these proceedings as one of the key alleged members of the joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian-Serb claimed territory in BiH as charged in the Indictment, the Chamber considers that the evidence on these topics is not obtainable through other means.

15. The Chamber is therefore of the view that the Accused has satisfied the requirements necessary for the issuance of a subpoena to Stanišić. It also recalls that it maintains its discretion under Rule 90(E) to compel or not compel a witness to answer certain questions.²⁸ In exercising this discretion, it will be cognisant of the fact that Stanišić is currently involved in appeal proceedings at the Tribunal, and will ensure that his rights are safeguarded.

²⁶ D3917 (Witness statement of Čedomir Kljajić dated 30 July 2013), paras. 11–16; D3663 (Witness statement of Goran Mačar dated 3 May 2013), paras. 23–29; D3197 (Witness statement of Dobrislav Planojević dated 23 March 2013), paras. 18, 22–24.

²⁷ The Chamber notes that in the Motion, the Accused should have referred to the exact meetings and conversations he meant to discuss with Stanišić as opposed to referring generally to meetings and conversations.

²⁸ Decision on Accused's Motion to Subpoena Zdravko Tolimir, 9 May 2013, para. 22; Decision on Accused's Motion to Subpoena Ratko Mladić, 11 December 2013, para. 23.

IV. Disposition

16. Accordingly, the Chamber, pursuant to Rule 54 of the Rules, hereby:
- a) **GRANTS** the Stanišić request for leave to respond in the Stanišić Response;
 - b) **GRANTS** the Motion;
 - c) **ORDERS** the Registry of the Tribunal to take the reasonably necessary steps to ensure that the Subpoena is served on Mićo Stanišić at the United Nations Detention Unit; and
 - b. **REQUESTS** the Victims and Witnesses Section of the Tribunal to provide any necessary assistance in the implementation of this Decision

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



Judge O-Gon Kwon
Presiding

Dated this thirteenth day of December 2013
At The Hague
The Netherlands

[Seal of the Tribunal]