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: 13 December 2012

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 2012**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA PRIME MINISTER MILAN PANIĆ

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 Prime Minister Milan Panić", filed on 12 October 2012 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused moves for the issuance of a subpoena pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence ("Rules") for Milan Panić, the former Prime Minister of the Federal Republic of Yugoslavia ("FRY"), to testify on 18 February 2013 or a time thereafter determined by the Trial Chamber.[1] The Accused contends that he made reasonable efforts to obtain Panić's voluntary co-operation.[2] According to the Accused, his legal adviser interviewed Panić on 3 January 2012 at which time Panić stated that he was willing to be interviewed but would not agree to testify.[3] Panić then signed a statement on 8 May 2012 ("Statement") and again maintained that he would not testify.[4] As a result, the Accused requested that the Office of the Prosecutor ("Prosecution") agree to the admission of the Statement without Panić coming to testify and, when the Prosecution did not agree, unsuccessfully tried once again to persuade Panić to testify.[5]

2. The Accused also contends that Panić has relevant information for the Accused's defence.[6] He points to "numerous contacts" between himself and Panić during 1992, including: (i) a 26 June 1992 conversation in which the Accused informs Panić that he had given an order to stop shelling in Sarajevo and open up the airport for humanitarian goods;[7] (ii) a letter of 27 June 1992 in which the Accused informs Panić, *inter alia*, that he has "given the strongest order concerning cease-fire in Sarajevo, particularly in the area of the airport";[8] (iii) a 29 June 1992 letter in which the Accused informs Panić that he is willing to co-operate with the United Nations and ensure the safe passage of humanitarian aid from Split to Bosnia and Herzegovina ("BiH");[9] (iv) an early August 1992 conversation in which Panić asked the Accused to sign a prisoner exchange

[1] Motion, paras. 1, 22.
[2] Motion, paras. 5, 7.
[3] Motion, para. 5.
[4] Motion, para. 6, Annex A.
[5] Motion, para. 6, Annex B, pp. 10–15.
[6] Motion, para. 8.
[7] Motion, para. 10.
[8] Motion, para. 10.
[9] Motion, para. 11.

agreement with the Vice Prime Minister of Croatia;[10] and (v) telephone conversations between Panić and the Accused, in which the latter "frequently expressed his desire for peace".[11] The Accused also points to other relevant correspondence and events about which Panić could testify, including: (i) a letter of 11 July 1992, in which Panić informs U.N. Secretary-General Boutros Boutros-Ghali ("Secretary-General") that, *inter alia*, the Accused and the Bosnian Serbs were prepared for an immediate ceasefire and peaceful settlement of the conflict in BiH;[12] (ii) an "appeal" from the Accused to the citizens of Goražde in which the Accused, *inter alia*, urges the citizens to end hostilities and begin negotiations;[13] (iii) a 6 August 1992 letter from Panić to the Secretary-General, in which Panić informs the Secretary-General that he had "pressed" the Accused to arrest and disarm Serbian "irregulars" and that the Accused stated that he had arrested 70 paramilitaries and intended to bring them to trial;[14] (iv) a 6 August 1992 meeting between Panić, Ratko Mladić, and General Života Panić, the Chief of Staff of the Yugoslavian Army, in which the Chief of Staff stated that the Accused wanted peace and should be elected President of BiH;[15] and (v) an 18 August 1992 meeting of the FRY Council of Co-ordination of State Policy, in which the Panić stated, *inter alia*, that the Accused told him that he "had no control over the guns".[16]

3. The Accused therefore contends that Panić's testimony would be directly relevant to his *mens rea* and would refute the allegations in the Third Amended Indictment ("Indictment") relating to the joint criminal enterprise ("JCE") to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian-Serb claimed territory in BiH ("overarching JCE"), as well as the JCE to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling ("Sarajevo JCE").[17] The Accused maintains that this testimony would also demonstrate his readiness to co-operate with international efforts to alleviate suffering in Sarajevo and "stamp out" paramilitaries committing crimes against Bosnian Muslims, as well as his lack of control over the perpetrators of crimes.[18]

4. Finally, the Accused argues that Panić's testimony is necessary to his defence as his correspondence with Panić occurred in 1992, during a time when the alleged shelling and ethnic

[10] Motion, para. 15.
[11] Motion, para. 18.
[12] Motion, para. 12.
[13] Motion, para. 13.
[14] Motion, para. 14.
[15] Motion, para. 16.
[16] Motion, para. 17.
[17] Motion, para. 19. *See also* Indictment, paras. 9–19.
[18] Motion, para. 19.

cleansing were "at their peak".[19] Furthermore, the Accused states that Panić is uniquely qualified to testify about the Accused's willingness to agree to measures that would have alleviated suffering.[20] The Accused also contends that Panić is viewed as a "reformer" and that "[h]is testimony would have credibility unparalleled" by other international and domestic figures from this period.[21]

5. On 25 October 2012, the Prosecution informed the Chamber *via* email that it does not wish to respond to the Motion.

II. Applicable Law

6. 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.[22]

7. 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.[23]

8. 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

[19] Motion, para. 20.

[20] Motion, para. 20.

[21] Motion, para. 21.

[22] *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.

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

obtainable through other means.[24] 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.[25]

9. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[26] 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.[27]

III. Discussion

10. The Chamber first considers that the Accused has made reasonable efforts to obtain the voluntary co-operation of Panić but has been unsuccessful.[28]

11. As stated above, in order to meet the necessity requirement for the issuance of a subpoena, the applicant must show that he has a reasonable basis for his belief that there is a good chance that the witness will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to his trial.[29] With regard to the requirement that the witness be able to give information in relation to clearly-identified issues relevant to his trial, the Chamber notes that Accused requests a subpoena compelling the testimony of Panić for purposes of confirming a variety of statements the Accused made regarding ceasefire agreements, humanitarian aid, prisoner exchange agreements, control of paramilitaries, and the Accused's "desire for peace". The Chamber recalls that information relating to the Accused's *bona fide* attempts to end the conflict and agree to peace proposals is relevant to the Accused's case[30] and considers that it relates to the live issues of the Accused's *mens rea* and his alleged participation in both the overarching JCE and the Sarajevo JCE.[31] The Chamber thus finds that the information sought from Panić pertains to clearly identified issues relevant to the Accused's case.

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

[25] *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.

[26] *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.

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

[28] *See* Motion, paras. 5–7; Motion, Annex B, pp. 8–15.

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

[30] Decision on Accused's Motion to Subpoena President Karolos Papoulias, 23 October 2012 ("Papoulias Decision"), para. 14.

[31] Indictment, paras. 9–19.

12. However, the Chamber recalls that the testimony sought through the issuance of a subpoena must be of "*material* assistance", rather than merely helpful or of some assistance.[32] 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.[33] In addition, a subpoena cannot be issued if the information sought through the testimony is obtainable through other means.[34] The Chamber notes that Panić is expected to testify about a wide variety of statements that the Accused made in 1992. According to the Statement, most of these have been recorded in written correspondence between the two men or in various other publications, and have either been handed over to the Accused by Panić[35] or are already in the Accused's possession.[36] The nature of Panić's knowledge of the events he is supposed to testify about is also discussed by Panić's assistant who, on 21 September 2012, advised the Accused's legal adviser that the Statement is "mainly based on certain documents from the Archives of the Prime Minister, and not on being a witness in certain events and/or happenings at the time".[37] Prime Minster Panić's assistant also states that "as a witness Mr. Panić could not be able to add anything more than to quote those documents".[38] Accordingly, given that Panić's proposed testimony will consist largely of his recounting statements made to him by the Accused and recorded in written correspondence, rather than Panić's personal knowledge of the events on the ground,[39] the Chamber considers that his testimony will not be of *material* assistance to the Accused's case.

13. Furthermore, given that the Accused's statements are recorded in letters and other publications which are in the Accused's possession already, the Chamber considers that the information sought through Panić's testimony is obtainable through other means. The Accused is certainly free to use the correspondence he has obtained from Panić with other witnesses in this trial and can attempt to tender it through those witnesses. He can also offer the said correspondence for admission through the bar table. In addition, the Chamber recalls that the information presented in this correspondence is similar to documents and testimonial evidence already in evidence in this trial regarding the Accused's: (i) involvement in efforts to end shelling

[32] Decision on Accused's Motion to Subpoena President Karolos Papoulias, 23 October 2012 ("Papoulias Decision"), para. 15; *Milošević* Decision, para. 39 [emphasis in the original text].
[33] *See* Papoulias Decision, para. 15; *Milošević* Decision, para. 39, citing *Krstić* Decision, para. 11.
[34] *See* supra, para. 8.
[35] Motion, Annex A, paras. 7–8, 11, 20, 27. 33, 44.
[36] Motion, Annex A, paras. 13, 24–25, 30–31, 36, 41
[37] Motion, Annex B, p. 14.
[38] Motion, Annex B, p. 14.
[39] Papoulias Decision, paras. 16–18.

in Sarajevo;[40] (ii) desire for the passage of humanitarian aid into Sarajevo and BiH generally;[41] (iii) attempts to arrest, disarm, or disown paramilitary groups;[42] (iv) involvement in prisoner exchange agreements;[43] and (v) desire for peace.[44]

14. Accordingly, the Chamber finds that the requirements for the issuance of a subpoena have not been met in this case. Once again, the Chamber reminds the Accused that subpoenas will not be issued lightly, and that their use should be limited and used sparingly as a method of last resort for obtaining information that is both legally and factually relevant and necessary to his case.[45]

IV. Disposition

15. Accordingly, the Chamber, pursuant to 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 thirteenth day of December 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

[40] *See, e.g.*, D233 (Letter from Radovan Karadžić to Ambassador Cutileiro, 17 May 1992), p. 1; P1036 (UNPROFOR report re meeting with Radovan Karadžić and Nikola Koljević, 30 May 1992), pp. 1–2; P949 (Announcement of SDS leadership re Sarajevo airport and humanitarian supplies, 27 May 1992), p. 1.

[41] *See, e.g.*, P949 (Announcement of SDS leadership re Sarajevo airport and humanitarian supplies, 27 May 1992), p. 1; P1039 (UNPROFOR report re airport meetings in Sarajevo, 3 June 1992), pp. 3–4; D693 (Letter from Radovan Karadžić to Yasushi Akashi, 24 January 1994), p. 1.

[42] *See, e.g.*, P3057, (Radovan Karadžić's Decision, 13 June 1992), p. 2; P3058, (Radovan Karadžić's Report, 6 August 1992), p.1; D1933 (Fax from Radovan Karadžić to Boutros Ghali, 13 June 1992), p. 1; D98 (Announcement of RS Presidency re paramilitary groups, 6 August 1992), p. 1.

[43] *See, e.g.*, P1131 (Two agreements on exchange of prisoners, July 1992).

[44] *See, e.g.*, D2398 (Witness statement of Richard Gray dated 22 April 2012), para. 33; D233 (Letter from Radovan Karadžić to Ambassador Cutileiro, 17 May 1992); D110 (Radovan Karadžić's Platform re Crisis in BiH, 22 April 1992), p. 1.

[45] Papoulias Decision, para. 21; Decision on the Accused's Second Motion for Subpoena to Interview President Bill Clinton, 21 August 2012, para. 16.