



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-95-5/18-T

Date: 11 December 2013

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 11 December 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO SUBPOENA RATKO MLADIĆ

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Ratko Mladić

Mr. Branko Lukić
Mr. Miodrag Stojanović

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: General Ratko Mladić”, filed on 18 April 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests the Chamber to issue a subpoena, pursuant to Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), compelling Ratko Mladić to testify as a witness in this case on 29 July 2013.¹

2. In support of the Motion, the Accused argues that he has made efforts to obtain Mladić’s voluntary co-operation but that Mladić has declined to testify.²

3. The Accused further submits that Mladić, who was the Chief of the Main Staff of the Army of Republika Srpska (“VRS”), is expected to testify that the joint criminal enterprises alleged in the Third Amended Indictment (“Indictment”) never existed and that he never informed the Accused, orally or in writing, that “prisoners from Srebrenica would be, were being, or had been executed”, which is directly relevant to the Accused’s *mens rea* for genocide as charged in Count 2 of the Indictment.³ According to the Accused, Mladić is also expected to testify that in numerous conversations and meetings he had with the Accused “they never agreed or planned to expel Muslims or Croats” from areas under Serb control, which is directly relevant to the Accused’s *mens rea* for crimes against humanity and war crimes as charged in Counts 3 to 10 of the Indictment.⁴ Additionally, Mladić is expected to testify that he regularly assured the Accused that the shelling and sniping in Sarajevo was not indiscriminate or disproportionate and that the VRS did not fire the shells that landed on the Markale market in Sarajevo in 1994 and 1995, which is directly relevant to the Accused’s *mens rea* for infliction of terror as charged in Count 9 of the Indictment.⁵ He is also expected to testify that the decision to detain United Nations (“UN”) personnel following NATO air strikes in May 1995 was made with the good faith belief that they could be lawfully detained as

¹ Motion, paras. 1, 19.

² Motion, paras. 4–6, Annex A.

³ Motion, paras. 8–9, 15.

⁴ Motion, para. 11.

⁵ Motion, para. 10.

prisoners of war and that orders were given not to harm the personnel, which is all directly relevant to the *actus reus* and the *mens rea* required for hostage-taking as charged in Count 11 of the Indictment.⁶ Finally, the Accused submits that Mladić will be able to elaborate on entries in his notebooks which have been admitted in full in this case, despite the Accused's objections, and which deal with individual meetings and discussions Mladić held with the Accused, as well as other participants.⁷

4. The Accused submits that Mladić's testimony is necessary to rebut the claims by the Office of the Prosecutor ("Prosecution") that the Accused had "numerous sources from which he could have learned of the execution of prisoners from Srebrenica", including Mladić.⁸ The Accused further submits that Mladić's testimony is also necessary to rebut the Prosecution's claim that there was a plan between Mladić and the Accused to commit the crimes alleged in the Indictment. Furthermore, according to the Accused, Mladić is the only one who can explain in detail the personal interactions he had with the Accused, including one-on-one conversations in person and over the telephone.⁹

5. Finally, the Accused notes that Mladić is currently on trial before another Trial Chamber and may decline to answer specific questions on the basis of his privilege against self-incrimination.¹⁰ The Accused therefore requests that the Chamber compel Mladić to answer such questions while providing him with the protections against self-incrimination contained in Rule 90(E) of the Rules.¹¹ The Accused also notes that he is willing "to keep the focus of his examination of General Mladić as narrow as possible" and to "agree to any accommodations in the schedule" necessary to provide for Mladić's health concerns, including hearing his evidence for one trial session per day.¹²

6. On 18 April 2013, the Prosecution notified the Chamber *via* e-mail that it did not wish to respond to the Motion.

⁶ Motion, para. 12.

⁷ Motion, para. 13.

⁸ Motion, para. 15.

⁹ Motion, para. 15.

¹⁰ Motion, para. 17.

¹¹ Motion, para. 17.

¹² Motion, para. 18.

7. On 25 April 2013, the Chamber orally granted Mladić's request for leave to respond to the Motion.¹³

8. On 14 May 2013, Mladić confidentially filed the "Response of Ratko Mladić to Motion for Subpoena: General Ratko Mladić" ("Response") with a confidential and *ex parte* annex ("Annex"), opposing the Motion.¹⁴ He submits that Article 21(4)(g) of the Statute of the Tribunal ("Statute") provides that an accused shall not "be compelled to testify against himself or confess guilt", and thus protects him from being forced to testify in the *Karadžić* case, which "is in essence the same" as his own case.¹⁵ He argues that, given the similarity between his own indictment and the Indictment against the Accused, the topics identified in the Motion would require him to testify on the essential elements of his own indictment.¹⁶ He further submits that the Prosecution has already stated that it would seek to introduce any testimony given by him before other courts as evidence in his case.¹⁷ Accordingly, if he were compelled to testify by this Chamber, he would in essence be forced to testify against himself in the proceedings against him, thus violating Article 21(4)(g) of the Statute.¹⁸

9. Mladić also submits that forcing him to testify would be contrary to judicial economy. He states that because the proposed topics of questioning go to the essence of his indictment, they "would rightly be objected to and [he] would rightly assert his right not to answer them", thereby "rendering the resulting testimony of little value".¹⁹

10. Finally, Mladić submits that his deteriorated health limits him to participating only in his own trial.²⁰ In support, he attaches a number of medical reports to the Response.²¹ Furthermore, Mladić submits that he and his defence are overwhelmed by his own trial and his defence team is not able to prepare him for the prospect of giving testimony in the *Karadžić* case.²²

11. On 5 July 2013, the Chamber informed the parties that it would postpone the determination of the Motion until such time as the Appeals Chamber issued its decision on Zdravko Tolimir's

¹³ Hearing, T. 37771 (25 April 2013); *see also* Defense Request for Leave to Respond to Motion for Subpoena: General Ratko Mladić, 25 April 2013.

¹⁴ Response, para. 3.

¹⁵ Response, paras. 4–5.

¹⁶ Response, para. 6.

¹⁷ Response, para. 7.

¹⁸ Response, para. 7.

¹⁹ Response, paras. 8–11.

²⁰ Response, paras. 12, 15.

²¹ Response, para. 12; Annex.

²² Response, paras. 13–14.

appeal of this Chamber's decision compelling Tolimir to testify in the present case.²³ The main issue in Tolimir's appeal was whether an accused whose case is still pending before this Tribunal, as is the case with both Tolimir and Mladić, can be compelled to give evidence in another accused's case before the Tribunal and thus risk giving self-incriminatory evidence. The Chamber decided to delay the determination of the Motion as the outcome of that appeal would have a direct impact on it.

12. On 13 November 2013, the Appeals Chamber issued its "Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir" ("*Tolimir* Appeal Decision"), in which it denied Tolimir's appeal and held that protection against self-incrimination, as provided for the Tribunal's accused in Article 21(4) of the Tribunal's Statute ("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.²⁴ It also noted that Rule 90(E) of the Rules, which allows the Chamber to compel a witness to make self-incriminating statements, prohibits subsequent use of those statements, "directly or indirectly", in a case against that witness and thus provides adequate protection to the Tribunal's accused if they are compelled to make incriminating statements when giving evidence in another case.²⁵

13. On 15 November 2013, the Accused's legal adviser informed the Chamber that Mladić was still refusing to testify, despite the Appeals Chamber's assurances in the *Tolimir* Appeal Decision.²⁶

II. Applicable Law

14. 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 obtaining 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

²³ See Hearing, T. 40841–40842 (5 July 2013). See also Decision on Accused's Motion to Subpoena Zdravko Tolimir, 9 May 2013 ("*Tolimir* Subpoena Decision"); Decision on Tolimir Request for Certification to Appeal Subpoena Decision, 4 June 2013.

²⁴ *Tolimir* Appeal Decision, para. 36.

²⁵ *Tolimir* Appeal Decision, paras. 43–45.

²⁶ Hearing, T. 43626 (15 November 2013).

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.²⁷

15. 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 statement the witness has made to the Prosecution or to others in relation to the events.²⁸

16. 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.²⁹ 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.³⁰

17. Subpoenas should not be issued lightly as they involve the use of coercive powers and may lead to the imposition of a criminal sanction.³¹ 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.³² In essence, a subpoena should be considered a method of last resort.³³

III. Discussion

A. Subpoena and Tribunal's accused

18. As noted above, 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

²⁷ *Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić* Decision”), para. 10; *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoena, 21 June 2004 (“*Halilović* Decision”), para. 6; *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.

²⁸ *Halilović* Decision, para. 6; *Krstić* Decision, para. 11; *Milošević* Decision, para. 40.

²⁹ *Halilović* Decision, para. 7; *Milošević* Decision, para. 41.

³⁰ *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.

³¹ *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.

³² *Halilović* Decision, paras. 6, 10.

³³ 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, filed confidentially and *ex parte* on 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”.

of those accused being compelled to testify in proceedings which do not involve the determination of the charges against them.³⁴ Accordingly, there is nothing preventing this Chamber from issuing a subpoena to Mladić, provided the Accused has satisfied the requirements outlined in the Applicable Law section above.

B. Requirements for subpoena

19. Having reviewed Annex A of the Motion, wherein the Accused attaches the correspondence which states that Mladić has declined to testify, and bearing in mind the submissions made by the Accused's legal adviser on 15 November 2013,³⁵ the Chamber is satisfied that the Accused has made reasonable attempts to obtain Mladić's voluntary co-operation but has been unsuccessful.

20. 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 Mladić will be able to give information which will materially assist him in his case, in relation to clearly identified issues relevant to his trial.³⁶ The Chamber notes that Mladić was the Chief of the VRS Main Staff and the highest ranking officer in the VRS. As such, he was in contact with the Accused and had the opportunity to observe and participate in many of the events covered by the Indictment. Having also assessed the expected scope of Mladić's testimony, as outlined in the Motion,³⁷ the Chamber is satisfied that it is relevant to a number of issues in the Accused's case. For example, according to the Accused, Mladić is expected to say that the joint criminal enterprises alleged in the Indictment did not exist.³⁸ He is also expected to say that he never informed the Accused that prisoners from Srebrenica "would be, were being, or had been executed" and that there were never any orders or plans on the Accused's behalf to execute those prisoners.³⁹ Accordingly, in light of the above, the Chamber is satisfied that the Accused has shown a reasonable basis for his belief that there is a good chance that Mladić will be able to give information which would materially assist him in his case, in relation to clearly identified issues relevant to his trial.

21. Even if the 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

³⁴ *Tolimir* Appeal Decision, para. 36.

³⁵ *See supra* para. 13.

³⁶ *See supra* para. 14.

³⁷ Motion, paras. 8–13.

³⁸ Motion, para. 8.

³⁹ Motion, para. 9.

obtainable through other means.⁴⁰ The Chamber notes that the Motion is termed broadly in terms of the evidence Mladić is expected to cover and, as such, more or less cuts across the entire case for the Accused. This means, in turn, that the Chamber has already received extensive evidence tendered by the Accused, and by the Prosecution, on some of the issues Mladić is expected to testify about. For example, with respect to his expected testimony about the alleged existence of the joint criminal enterprises charged in the Indictment, the Chamber has heard a number of witnesses testify that no such joint criminal enterprises existed, including the very persons alleged to have been the members of those joint criminal enterprises.⁴¹ In addition, a number of prospective witnesses who are also expected to testify that the alleged joint criminal enterprises did not exist are yet to come, having been subpoenaed by the Chamber, and may be giving evidence soon.⁴²

22. However, the Chamber also considers that there are other, more specific aspects of Mladić's expected evidence that cannot be obtained through any other means, particularly given Mladić's position in the VRS, his alleged involvement in many of the events charged in the Indictment, and his relationship with the Accused. For example, Mladić is uniquely positioned to give evidence regarding the information he passed or did not pass to the Accused in relation to many of the events alleged in the Indictment, including the executions in Srebrenica and the shelling and sniping incidents in Sarajevo. He will also be able to shed light on some of the entries he made in his notebooks contemporaneously with many of the events relevant to the Indictment. Accordingly, the Chamber is of the view that, while some of the evidence that Mladić is expected to give has already been obtained by the Accused or can be obtained through other witnesses, other aspects are not obtainable other than through Mladić himself.

23. The Chamber is therefore of the view that the Accused has satisfied the requirements necessary for the issuance of a subpoena to Mladić. It also recalls that it maintains its discretion

⁴⁰ See *supra* para. 16.

⁴¹ See, e.g., Milan Martić, T. 38090–38093 (9 May 2013), T. 38160 (13 May 2013); 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; Vladislav Jovanović, T. 34274–34275, 34283–34285 (26 February 2013); D3015 (Witness statement of Vladislav Jovanović dated 22 February 2013, paras. 50–52; 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; D2774 (Witness statement of Milenko Indić dated 19 January 2013), paras. 6–7; D3659 (Witness statement of Ljubomir Borovčanin dated 30 May 2013), para. 46; Momčilo Krajišnik, T. 43269–43270, T. 43298–43302, T. 43339–43341 (12 November 2013); John Zametica, T. 42470–42471 (29 October 2013); D3993 (Witness statement of Vujadin Popović dated 2 November 2013), paras. 39, 54; D3932 (Witness statement of Milenko Živanović dated 27 October 2013), para. 13.

⁴² See, e.g., Decision on Accused's Motion to Subpoena Zdravko Tolimir, 9 May 2013, paras. 16–21; Decision on Accused's Motion to Subpoena Ljubiša Beara, 9 May 2013, paras. 12–15; Decision on Accused's Motion to Subpoena Radivoje Miletić, 9 May 2013, paras. 13–15.

under Rule 90(E) to compel or not compel a witness to answer certain questions.⁴³ In exercising this discretion, it will be cognisant of the fact that Mladić is currently on trial, and will ensure that his rights are safeguarded.

C. Mladić's health and case commitments

24. While cognisant of Mladić's submissions relating to his ill health and his commitments to his own case, the Chamber does not consider that these rise to such level that it should exercise its discretion against issuing a subpoena to Mladić.

25. With respect to Mladić's health, the Chamber notes that he has been deemed fit to attend his trial four days a week.⁴⁴ The Chamber is also not persuaded that the medical reports attached in the Response show that Mladić will *necessarily* be unable to give meaningful testimony before this Chamber. Finally, the Chamber is prepared to make accommodations in the schedule of Mladić's testimony such that his health concerns will be addressed.

26. As for Mladić's arguments regarding his and his counsel's commitments to his own case, the Chamber notes that he is scheduled to testify in the Accused's case in January 2014.⁴⁵ The Chamber also notes that the Prosecution in the *Mladić* case is at this time leading its last witness and its case is expected to close by January 2014,⁴⁶ while the Defence phase of the case is expected to start in May 2014.⁴⁷ Accordingly, come January 2014, with the exception of potential Rule 98 *bis* proceedings, Mladić and his counsel will not have to attend and/or prepare for daily hearings and cross-examination of witnesses.

⁴³ See *Tolimir* Subpoena Decision, para. 22.

⁴⁴ See generally, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.3, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, 22 October 2013.

⁴⁵ See Defence Submission of Order of Witnesses for January and February 2014, 29 November 2013, filed publicly with confidential Annex A.

⁴⁶ See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Hearing, T. 18200 (21 October 2013), T. 20189–20191 (3 December 2013).

⁴⁷ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Hearing, T. 20224 (3 December 2013).

IV. Disposition

27. Accordingly, the Chamber, pursuant to Rule 54 of the Rules, hereby **GRANTS** the Motion and:

- a. **ORDERS** the Registry of the Tribunal to take the reasonably necessary steps to ensure that the Subpoena is served on Ratko Mladić 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 eleventh day of December 2013
At The Hague
The Netherlands

[Seal of the Tribunal]