

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

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

Registrar: Mr. John Hocking

Date: 18 April 2013

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

MOTION FOR SUBPOENA:
GENERAL RATKO MLADIC

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Witness General Ratko Mladic:
Mr. Branko Lukic
Mr. Miodrag Stojanovic

The Accused:
Radovan Karadzic

1. Radovan Karadzic respectfully moves, pursuant to Rule 54, for the issuance of a subpoena to General Ratko Mladic compelling him to testify at his trial.

2. Rule 54 provides that:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

3. A party seeking subpoena must demonstrate that (1) it has made reasonable attempts to obtain the voluntary cooperation of the witness; (2) the witness' information may materially assist its case ("legitimate forensic purpose" requirement); and (3) the witness' information may be necessary and appropriate for the conduct and fairness of the trial.¹

Efforts at Voluntary Cooperation

4. The subject of General Mladic's testimony at Dr. Karadzic's trial has been the subject of ongoing discussions between Dr. Karadzic's Legal Advisor Peter Robinson and the defence counsel for General Mladic. Those discussions culminated in a request by Dr. Karadzic that General Mladic testify at Dr. Karadzic's trial during the week of 29 July 2013, when the *Mladic* trial is on recess and the *Karadzic* trial is in session.

5. On 16 April 2013, the lawyers for General Mladic provided a final response indicating that General Mladic declined to testify in the *Karadzic* trial.²

6. Therefore, Dr. Karadzic has made efforts to obtain the voluntary cooperation of General Mladic without success.

Relevance and Necessity

7. General Mladic has relevant information for the defence of Dr. Karadzic on all of the components of this case.

8. General Mladic is expected to testify that the joint criminal enterprises alleged in the indictment never existed

9. General Mladic is expected to testify that he never informed Dr. Karadzic orally or in writing that prisoners from Srebrenica would be, were being, or had been

¹ *Prosecutor v. Krstić*, IT-98-33-A, *Decision on Application for Subpoenas*, (1 July 2003) at para. 10; *Decision on Accused's Second Motion for Subpoena to Interview President Bill Clinton* (21 August 2012) at paras. 7-10

² A copy of the e-mail correspondence is attached as Annex A to this motion.

executed, nor had there been any orders, plans, or intention on the part of President Karadzic to execute the prisoners. This testimony is directly relevant to Dr. Karadzic's *mens rea* for genocide as charged in Count Two of the indictment and to the Srebrenica component of the case.

10. General Mladic is expected to testify that he regularly assured Dr. Karadzic that the shelling and sniping in Sarajevo was not indiscriminate nor disproportionate, that protests made by United Nations personnel were unfounded, and that the Serb side had not fired the shells which landed on the Markale market in 1994 and 1995. This testimony is directly relevant to Dr. Karadzic's *mens rea* for infliction of terror as charged in Count Nine of the indictment and to the Sarajevo component of the case.

11. General Mladic is expected to testify that the VRS never had the task to expel the Muslim or Croat population from areas under Serb control and that there was no plan to expel the Muslim population in the municipalities. He can testify that in the numerous meetings and personal conversations that he had with Dr. Karadzic beginning in May 1992, they never agreed or planned to expel Muslims or Croats. He would testify that Dr. Karadzic regularly insisted that the rights of civilians under international law be fully respected. This testimony is directly relevant to Dr. Karadzic's *mens rea* for the crimes against humanity and war crimes as charged in Counts 3-10 of the indictment.

12. General Mladic is expected to testify that the decision to detain UN personnel in May 1995 after the NATO air strikes against the Pale ammunition depot was made in the good-faith belief that those personnel had become combatants and could lawfully be detained as prisoners of war. He will also explain that orders had been given not to threaten or harm the detained personnel. This testimony is directly relevant to the *actus reus* and *mens rea* of the crime of hostage taking as charged in Count Eleven of the indictment.

13. In addition, General Mladic can explain the entries in his notebooks of individual meetings and discussions he held, both in the presence of Dr. Karadzic and with other participants. The Trial Chamber has admitted these notebooks in their entirety, over Dr. Karadzic's objection, and they are shorthand notes of extensive discussions of key events which pertain to each of the components of the case against Dr. Karadzic. General Mladic can explain what these entries mean, just as Herbert Okun was

allowed to amplify his shorthand notes. It would be unfair to have admitted General Mladic's notebooks without the benefit of explanations of what was in fact said and meant on these occasions. If he testifies, General Mladic can offer explanations which contradict the inferences argued by the prosecution that the Bosnian Serb side was engaged in expelling Muslims from Serb areas in the municipalities, as well as other topics addressed at the meetings reflected in the notebooks.

14. Therefore, there are reasonable grounds to believe that General Mladic has information which can materially assist Dr. Karadzic's case.

15. The information from General Mladic is also necessary to the defence. General Mladic was Chief of the Main Staff of the VRS and the highest ranking military officer in Republika Srpska. His testimony is necessary to rebut the prosecution's claim that Dr. Karadzic had numerous sources from which he could have learned of the execution of prisoners from Srebrenica, including General Mladic, that there was an agreement and plan between Dr. Karadzic and General Mladic to commit the crimes alleged in the indictment, and to explain in detail their personal one-on-one conversations, in person and on the telephone, as well as the meaning of the entries in his notebooks. There is no one else who can give this testimony.

16. Therefore, Dr. Karadzic has demonstrated that the testimony of General Mladic is necessary for a fair determination of the issues being tried in his case.

17. General Mladic is currently on trial before another Trial Chamber. His trial, or even the prosecution's case, will not be completed before Dr. Karadzic's defence case is concluded. Therefore, to the extent that General Mladic may decline to answer a specific question on the basis of his privilege against self incrimination, Dr. Karadzic would request that the Trial Chamber compel General Mladic to answer those questions and provide him with the protections against self-incrimination contained in Rule 90(E).

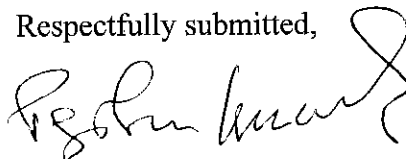
18. Dr. Karadzic is willing to keep the focus of his examination of General Mladic as narrow as possible to elicit the evidence referred to above. He also is prepared to agree to any accommodations in the schedule necessary to provide for the health of General Mladic, including hearing his evidence for one trial session per day, while calling other witnesses during the other two sessions.

Procedural Matters

19. A subpoena should designate the place and time for the person to appear to testify. Dr. Karadzic requests that General Mladic be subpoenaed to testify on Monday, 29 July 2013.

Word count: 1286

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Radovan Karadzic', with a large, stylized flourish at the end.

Radovan Karadzic

ANNEX "A"

13 April 2013

Dear Branko and Danny,

I am writing on behalf of President Karadzic to request that General Mladic testify as a defence witness in our trial. We would like General Mladic to testify during the week of 29 July when his trial is in recess and ours is not.

Can you please advise me at your earliest convenience whether General Mladic is willing to testify?

Thank you for your consideration.

Your friend,

Peter

16 April 2013

Peter:

We are in receipt of your email dated 13 April 2013, requesting that our client, Ratko Mladic, testify in Mr. Karadzic's trial in July.

Unfortunately, after having discussed the matter with our client and giving it due consideration, we respectfully will have to decline your request, as Mr. Mladic is not able to testify for the following reasons.

First and foremost, Mr. Mladic is currently on trial, under an almost identical indictment to that which Mr. Karadzic is defending himself against. An Accused has the protected right to remain silent and not testify or be forced to testify so as to potentially incriminate himself, and no adverse inference can be drawn from the exercise of this right.^[1] Indeed Article 21(4)(g) of the Statute provides that an accused shall be entitled to the right "not to be compelled to testify against himself or to confess guilt", and has been held by the Appeals Chamber to include a guarantee that such silence will not be used against them.^[2]

Respectfully the same rights apply to Mr. Mladic, at this stage of the proceedings, from being forced to testify against his will in other criminal proceedings against someone else for virtually the same indictment, when such testimony could then be sought to be admitted in these proceedings to his detriment. It should be noted that in a similar request made by the Bosnian Judiciary, the ICTY Prosecutor has already gone on record stating that he would seek to introduce any testimony by Mladic as evidence against him in his ICTY case. Thus the prospect of Mr. Mladic testifying before the Karadzic trial in essence would result in him being forced to testify to his detriment against himself in the ICTY proceedings, thus violating the benefit of Article 21(4)(g) and the protections developed by ICTY jurisprudence.

Respectfully this is not a request to testify in another, unrelated proceeding, but is in essence the same case, dealing with the same events wherein Mladic is viewed as an accused, just proceeding before another Chamber. The absolute right to remain silent as foreseen by Article 21(4)(g) of the Statute of the Tribunal is thus appropriate. Mr. Mladic has advised us to convey to you that he does not wish to testify in Mr. Karadzic's case, and thus asserts his rights as foreseen by Article 21(4)(g) of the Statute.

Thus, we respectfully would have to decline your request that Mr. Mladic testify during the pendency of his proceedings before the ICTY.

Secondly, as you know, the health, both physically and mentally, of our client is severely deteriorated and not well. He barely is able to endure the trial against him, and even that is not always successful. His deteriorated health, along with the pace of his own trial, make no possibility for preparation with counsel for any such testimony as you seek. Thus, although you propose a period when there are no trial proceedings, the health of our client would still make it impossible to adequately prepare for such testimony. Every break from his own trial is spent recovering physically and mentally from the exhaustion and fatigue that he experiences on an accumulated basis from his own trial. Thus, forcing him to endure preparation for

and testimony in Karadzic's case would impede and impair the health and ability of Mr. Mladic to continue his own proceedings after the break.

For all the foregoing reasons, we must therefore decline your request for Mr. Mladic to testify at Mr. Karadzic's trial as outlined by your email.

Regards,

Branko Lukic (Lead Counsel)
Miodrag Stojanovic (Co-Counsel)
Dragan Ivetic (Legal Consultant)

[1] see - *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motion for the Admission into Evidence of the Testimony of Milivoj Petkovic Given in Other Cases Before the Tribunal* (17 October 2007); *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 783; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 19; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para.11; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 16; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 22

[2] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 783