



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

Case No. IT-95-5-D
Date: 16 May 1995
Original: English and French

IN THE TRIAL CHAMBER

Before: Judge Karibi-Whyte, Presiding
Judge Odio Benito
Judge Jorda

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 16 May 1995

**IN THE MATTER OF A PROPOSAL FOR
A FORMAL REQUEST FOR DEFERRAL
TO THE COMPETENCE OF THE TRIBUNAL
ADDRESSED TO
THE REPUBLIC OF BOSNIA AND HERZEGOVINA
IN RESPECT OF
RADOVAN KARADZIC, RATKO MLADIC AND MICO STANISIC**

DECISION

The Office of the Prosecutor:

**Mr. Richard J. Goldstone
Mr. Graham Blewitt
Mr. Grant Niemann**

Amicus Curiae

Ms. Vasvija Vidovic - Republic of Bosnia and Herzegovina

THE TRIAL CHAMBER

Considering the Application dated 21 April 1995 ("the Application"), filed by the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("the International Tribunal"),

Noting that the Trial Chamber has been designated by the President of the International Tribunal pursuant to Rule 9 of the Rules of Procedure and Evidence ("the Rules") of the International Tribunal to determine the Application,

Having read and considered the Application and the Schedule ("the Schedule") annexed thereto,

Having granted leave to the representative of the Government of the Republic of Bosnia and Herzegovina to appear as *amicus curiae*, and having read and considered the submission of such representative,

Having heard both the Prosecutor and the representative of the Government of the Republic of Bosnia and Herzegovina at a public sitting held at The Hague on 15 May 1995,

HEREBY ISSUES ITS DECISION.

I - The Application

1. This is an application by Richard J. Goldstone, Prosecutor of the International Tribunal, made pursuant to Article 9(2) of the Statute of the International Tribunal in accordance with Rule 9 (iii) of the Rules. The Application is for the issue of a formal request from this Trial Chamber to the Government of the Republic of Bosnia and Herzegovina for the deferral to the competence of the International Tribunal of all investigations and criminal proceedings involving Radovan Karadzic, Ratko Mladic and Mico Stanisic being conducted by the Government of the Republic of Bosnia and Herzegovina in the territory of the former Yugoslavia since 1991, pursuant to Rule 10 of the Rules.
2. The Prosecutor states, and the Government of the Republic of Bosnia and Herzegovina has confirmed in both its written and oral submissions, that it is currently conducting investigations into war crimes and violations of the criminal laws of the Republic of Bosnia and Herzegovina. Criminal proceedings have been instituted by the Government of the Republic of Bosnia and Herzegovina against Radovan Karadzic, the Bosnian Serb leader; Ratko Mladic, the military commander of the Bosnian Serb armed forces; and Mico Stanisic, in charge of Bosnian Serb internal affairs, in respect of alleged war crimes and violations of Articles 141, 142 and 151 of the Criminal Law of the Socialist Federal Republic of Yugoslavia as recognised by the Republic of Bosnia and Herzegovina, which include genocide, war crimes against the civilian population, and destruction of cultural and historic monuments.

3. Various documents cited in the Prosecutor's Application and mentioned at the hearing (documents dated 12 June 1992, 17 August 1992, 26 December 1992 and 20 September 1993) indicate that, one, the Higher Public Prosecutor's Office in Sarajevo submitted a request to the Higher Court in Sarajevo for the opening of an investigation in respect of these suspects, and secondly, the District Military Prosecutor's Office also lodged a request for an investigation involving the same individuals to a District Military Court relating to alleged offences which are within the jurisdiction of the Tribunal. The Prosecutor furthermore stated that contacts between the Ministry of Justice of the Republic of Bosnia and Herzegovina and the Prosecutor of the International Tribunal have enabled the investigative steps regarding the suspects to be outlined. It was confirmed at the hearing that national arrest warrants have been issued by the Government of the Republic of Bosnia and Herzegovina.
4. The Prosecutor states in the Schedule, and it was confirmed at the hearing, that he is conducting investigations into a wide range of violations which are within the jurisdiction of the Tribunal, in particular genocide, crimes against civilians, and the destruction of cultural and historical monuments. It was also confirmed at the hearing that those violations are identical to those in respect of which investigations are being carried out on Bosnian territory. A significant focus of these investigations relates to persons in positions of authority who are or were responsible for serious violations of international humanitarian law in the former Yugoslavia. The Prosecutor's view is that the matter of the individual criminal responsibility of the three persons in political, military or police leadership positions must be examined.
5. The Prosecutor has also initiated an investigation into the criminal responsibility of Radovan Karadzic, Ratko Mladic and Milo Stanisic

arising out of indictments already issued by the International Tribunal against various named individuals for genocide, murder, rape, mistreatment of civilians, torture, and other offences allegedly committed in the running of detention camps.

6. Finally, the Prosecutor mentioned a significant investigation concerning the prolonged siege of Sarajevo (including attacks, considered unlawful, against civilian members of humanitarian organizations, United Nations peace-keeping forces and humanitarian-aid convoys).

7. The Prosecutor's investigations place the main focus on the positions of authority held by the three suspects who are allegedly guilty of serious violations of international humanitarian law in the territory of the former Yugoslavia. In the Schedule the involvement of Radovan Karadzic, Ratko Mladic and Mico Stanisic is described, as was confirmed by the representative of the Government of the Republic of Bosnia and Herzegovina at the hearing, as follows:

"Radovan Karadzic is one of the main architects of the [Serbian Democratic Party] political programme, involving extreme nationalist and ethnic policies and objectives. Radovan Karadzic became the first president of the Bosnian Serb administration in Pale. The constitution of this administration provides that the president commands its armed forces. Radovan Karadzic exercises his power and control from Pale, a town near Sarajevo. Radovan Karadzic has acted as and been dealt with internationally as the president of the Bosnian Serb administration in Pale. In that capacity, Radovan Karadzic has, *inter alia*, participated in international negotiations and has personally made agreements on such

matters as cease-fires and humanitarian relief that have been implemented.

Ratko Mladic . . . is a career military officer . . . In the summer of 1991, he was appointed to command the 9th Corps of the Yugoslav People's Army (JNA) in Knin in the Republic of Croatia. Subsequently, he assumed command of the forces of the Second Military District of the JNA which effectively became the Bosnian Serb army. In that capacity he has negotiated, *inter alia*, cease-fire and prisoner exchange agreements that have been implemented.

[. . .]

Mico Stanisic . . . was the first minister of internal affairs of the Bosnian Serb administration in Pale. In that capacity, he was, *inter alia*, responsible for the regular and special police forces at the regional and local level in the territory under Bosnian Serb control. It is alleged that those forces were actively involved in organising a campaign of terror against the non-Serbian population of Bosnia and Herzegovina."

8. The legal basis for these investigations by the Prosecutor is Article 7 of the Statute of the International Tribunal concerning individual criminal responsibility, a concept discussed in paragraphs 55 and 56 of the Report of the Secretary-General of the United Nations dated 3 May 1993.
9. Notwithstanding that national courts are vested with concurrent jurisdiction by Article 9 of the Statute of the International Tribunal, the Prosecutor, relying on Rule 9, is proposing that a formal request be issued to the Republic of Bosnia and Herzegovina, pursuant to Rule 10 of the

Rules, to defer its investigations and criminal proceedings in respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic, to the competence of the International Tribunal, and to provide the Prosecutor with all information concerning its investigations.

10. The Prosecutor states that the continuation by the Government of the Republic of Bosnia and Herzegovina of investigations similar to those being conducted by the Prosecutor could have significant implications for those investigations, as set out in the Schedule.

11. In particular, the Prosecutor refers to a number of matters which may have implications for his investigations or any subsequent prosecutions. Matters involving significant factual questions include:

- (i) witnesses may be exposed to greater risks as their identities and evidence will already have been made public;
- (ii) witnesses may be unwilling or unable to testify for a second time;
- (iii) critical evidence stored in war zones in the Republic of Bosnia and Herzegovina could be damaged or lost before use by the International Tribunal;
- (iv) witnesses may become confused as to the scope and authority of the two investigations;
- (v) the International Tribunal is not a party to the conflict in the Republic of Bosnia and Herzegovina and has a better ability to obtain evidence worldwide;
- (vi) deferral of these investigations may encourage Governments and other sources to furnish additional information to the International Tribunal that has thus far not been provided.

Those involving significant legal issues include:

- (vii) issues relating to the principle of *non-bis-in-idem*;
- (viii) there is the potential inadvertently to create inconsistent sworn evidence;
- (ix) issues relating to possible trials *in absentia* which may be held in the Republic of Bosnia and Herzegovina;
- (x) it would be undesirable and not in the interest of justice if the decisions of a national court and of the International Tribunal were to conflict.

12. The Government of the Republic of Bosnia and Herzegovina, appearing as *amicus curiae*, has indicated in both its written and oral submissions that it does not oppose the issue of a formal request by the Trial Chamber for the deferral of all investigations and criminal proceedings in respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic.

II - Discussion

13. Article 8 of the Statute of the International Tribunal extends its territorial jurisdiction to the territory of the former Socialist Republic of Yugoslavia, including its land surface, airspace and territorial waters, beginning on 1 January 1991. Article 9 of the Statute provides as follows:

- "1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

However, the right to primacy can only be exercised on a formal request to the national court to defer to the competence of the International Tribunal. The Rules provide the modus for the exercise of the right.

14. Rule 9 of the Rules provides as follows:

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

- (i) . . .
- (ii) . . .

- (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.

- 15. To comply with the enabling provisions for grant of the Application, the Prosecutor must therefore establish that:

- (a) national investigations or criminal proceedings have been instigated by the Republic of Bosnia and Herzegovina in respect of suspects including Radovan Karadzic, Ratko Mladic and Mico Stanisic;
- (b) investigations are currently being conducted by the Prosecutor into crimes within the jurisdiction of the International Tribunal, including the individual criminal responsibilities of persons in political, military and police leadership positions, including Radovan Karadzic, Ratko Mladic and Mico Stanisic;
- (c) what is in issue in the national investigations or criminal proceedings is closely related to, or otherwise involves, significant factual or legal questions which may have implications for the investigations of the Prosecutor and any subsequent proceedings before the International Tribunal.

- 16. The Trial Chamber notes that Radovan Karadzic, Ratko Mladic and Mico Stanisic are the subject of investigations instituted by the Government of the Republic of Bosnia and Herzegovina into the same alleged offences

being investigated by the Prosecutor and that the investigations and any criminal proceedings that may be instituted by the national courts of the Republic of Bosnia and Herzegovina in respect of the matters listed in paragraphs 2 and 3 hereof, relate to the same issues. The Government of the Republic of Bosnia and Herzegovina does not contest these points.

17. The Trial Chamber further notes that the Prosecutor is investigating a wide range of allegations covering offences within the competence of the Tribunal including genocide, offences against civilians and destruction of cultural and historical monuments and that he is examining the individual criminal responsibilities of persons in political, military and police leadership positions, including Radovan Karadzic, Ratko Mladic and Mico Stanisic. It does indeed appear from the Application that the three named persons hold such positions of authority.
18. A reading of the Schedule clearly supports the claim that the investigations and proceedings instituted by the Government of the Republic of Bosnia and Herzegovina in respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic involve significant factual or legal questions which have an impact on the investigations instituted by the Prosecutor in respect of serious violations of international humanitarian law in the territory of the former Yugoslavia. The Trial Chamber refers in particular to paragraphs 3.1 and 3.2 of the Schedule.
19. These issues are not disputed by the Government of the Republic of Bosnia and Herzegovina.
20. Consequently, the Trial Chamber is satisfied that the Prosecutor has shown that the investigations being carried out by the Prosecutor and by

the Government of the Republic of Bosnia and Herzegovina in respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic involve the same alleged crimes, in particular, genocide, offences against civilians and destruction of cultural and historical monuments and that the issues in any criminal proceedings that may be instituted by the Government of the Republic of Bosnia and Herzegovina in respect of such crimes would involve significant factual or legal questions which may have implications for investigation or prosecutions before the International Tribunal.

21. The Government of the Republic of Bosnia and Herzegovina has also made clear its intent to pursue its investigations of Radovan Karadzic, Ratko Mladic and Mico Stanisic and to proceed to trial in the absence of a formal request for deferral.
22. Proceedings in respect of persons in positions of authority before the International Tribunal derive expressly from Article 7 of the Statute of the International Tribunal and more particularly, from paragraphs 1, 2 and 3 thereof.
23. The punishment for the crimes allegedly committed by such individuals is also based on the general principles of international humanitarian law, and derives in particular from the precedents laid down by Nuremberg and Tokyo; furthermore, the principle of individual criminal responsibility of persons in positions of authority has been reaffirmed in a number of decisions taken by national courts, and adopted in various national and international legal instruments.

24. It follows from the above principle that the official capacity of an individual even *de facto* in a position of authority - whether as military commander, leader, or as one in government - does not exempt him from criminal responsibility and would tend to aggravate it; and, moreover, it is that position of authority which would have enabled the suspects to plan, instigate, or order the crimes in respect of which the above-mentioned investigations have been conducted, or given them the means to prevent the said crimes, or at the least to punish their perpetrators.
25. Accordingly, more so than those just carrying out orders, they would thus undermine international public order; and therefore the International Tribunal established by the international community to restore that order is particularly well-founded to invoke its primacy over national courts, as acknowledged in Article 9 (2) of the Statute of the International Tribunal.
26. The Trial Chamber has already concluded in paragraph 20 that the Prosecutor has established the grounds laid down in Rule 9(iii). In addition, the Trial Chamber notes that the International Tribunal is the appropriate forum to try the persons responsible for the kinds of crimes covered by the investigations currently being conducted by the Government of the Republic of Bosnia and Herzegovina in respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic and to examine the individual criminal responsibilities of persons in political, military and police leadership positions. Indeed, it could be stated that it is one of the fundamental purposes of the International Tribunal to exercise its primacy in such cases.
27. The Trial Chamber is satisfied that deferral of the investigations and proceedings which are the subject of this Application is appropriate and,

pursuant to Article 9 of the Statute and Rules 9 and 10, issues a formal request for deferral to the Government of the Republic of Bosnia and Herzegovina as hereinafter set forth.

III - Decision

THE TRIAL CHAMBER

BASED ON THE FOREGOING DETERMINES AS FOLLOWS:

considering all the matters before it and addressed in the public hearing, and
considering the requirements contained in Rule 9(iii) of the Rules,

the Trial Chamber consisting of Judge Karibi-Whyte, as Presiding Judge, Judge Odio Benito and Judge Jorda, being seized of the Application made by the Prosecutor,

HEREBY GRANTS the said Application,

FORMALLY REQUESTS the Government of the Republic of Bosnia and Herzegovina, in respect of serious violations of international humanitarian law over which the International Tribunal has jurisdiction, as specified in Articles 2 to 5 of the Statute of the International Tribunal, that the courts of the Republic of Bosnia and Herzegovina defer to the competence of the International Tribunal in regard to their investigations and criminal proceedings involving Radovan Karadzic, Ratko Mladic and Mico Stanasic,

INVITES the Government of the Republic of Bosnia and Herzegovina to take all necessary steps, both legislative and administrative, to comply with this Formal Request and to notify the Registrar of the International Tribunal of the steps taken to comply with this Formal Request, and

REQUESTS that the Government of the Republic of Bosnia and Herzegovina forward to the International Tribunal the results of its investigations and a copy of the records and judgement, if any, of its national courts.

The Trial Chamber requests the Registrar of the International Tribunal to notify the Government of the Republic of Bosnia and Herzegovina of this its Decision and Formal Request.

Dated this sixteenth day of May 1995

The Hague

The Netherlands



Adolphus G. Karibi-Whyte

Presiding Judge

[Seal of the Tribunal]