

IT-09-92-R75 bis. 1  
D 61 - D 56  
21 December 2011

61  
43.

**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-09-92-R75 bis.1  
Date: 21 December 2011  
Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Alphons Orie, Presiding  
Judge Bakone Justice Moloto  
Judge Christoph Flügge

**Registrar:** Mr John Hocking

**Decision of:** 21 December 2011

**PROSECUTOR**

**v.**

**RATKO MLADIĆ**

***PUBLIC***

**SECOND DECISION ON REQUEST FOR ASSISTANCE FROM  
THE COURT OF BOSNIA AND HERZEGOVINA PURSUANT  
TO RULE 75 BIS**

**Applicant**

Judge Mira Smajlović, Presiding Judge, Court of Bosnia and Herzegovina

**Office of the Prosecutor**

Mr. Dermot Groome  
Mr. Peter McCloskey

**Counsel for the Defence**

Mr. Branko Lukić

## I. PROCEDURAL HISTORY

1. On 1 August 2011, the President assigned this Chamber to consider a request for assistance pursuant to Rule 75 *bis*, submitted by Presiding Judge Mira Smajlović (“Applicant”) of the Court of Bosnia and Herzegovina (“Court of BiH”), filed confidentially and *ex parte* on 27 July 2011 (“Request”).<sup>1</sup> On the same day, acting pursuant to Rule 28 of the Rules of Procedure and Evidence (“Rules”), the Duty Judge lifted the *ex parte* status of the Request and ordered the Prosecution and the Defence of Ratko Mladić (“Defence”) to file submissions on the Request, if any, by 4 p.m. on Friday, 5 August 2011.<sup>2</sup> Both the Prosecution and the Defence filed submissions in compliance with this order.<sup>3</sup>

2. On 19 August 2011, the Chamber issued a confidential decision on the Request (“First Decision”) whereby it decided that to enable the Chamber to “come to a final conclusion on the merits of the Request”, it required additional information from the Applicant, and invited submissions accordingly.<sup>4</sup> On 17 November 2011, the Applicant submitted the additional information as requested (“Additional Information”). This submission was filed publicly before the Chamber on 25 November 2011. On 29 November 2011, the Chamber ordered the Prosecution and the Defence to file submissions on the Additional Information, if any, by 2 December 2011.<sup>5</sup> The Defence filed a submission on this date (“Defence Submission on the Additional Information”).<sup>6</sup> The Chamber has received no further submissions from the Prosecution.

## II. APPLICABLE LAW

3. Rule 75 *bis* of the Rules provides as follows:

- (A) A Judge or Bench in another jurisdiction or parties in another jurisdiction authorised by an appropriate judicial authority (“Requesting Authority”) may request the assistance of the Tribunal in obtaining the testimony of a person under the authority of the Tribunal in ongoing proceedings in the jurisdiction of the Requesting Authority involving violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

<sup>1</sup> Order Assigning a Chamber to Consider an Application by the Court of Bosnia and Herzegovina Pursuant to Rule 75 *bis*, 1 August 2011 (confidential and *ex parte*).

<sup>2</sup> Order for Submissions on Request for Assistance from the Court of Bosnia and Herzegovina, 1 August 2011 (confidential).

<sup>3</sup> Prosecution’s Response to Confidential Request for Assistance from the Court of Bosnia and Herzegovina, 4 August 2011 (confidential) (“Prosecution Response”); Ratko Mladić’s Submission in Response to Request for Assistance from the Court of Bosnia and Herzegovina, 5 August 2011 (confidential) (“Defence First Submission”).  
<sup>4</sup> First Decision, paras 11-12.

<sup>5</sup> Order for Submissions on Additional Information Provided by the Court of Bosnia and Herzegovina, 29 November 2011.

<sup>6</sup> Defence Submission pursuant to Order of 29 November 2011, 2 December 2011 (confidential).

- (B) Requests pursuant to paragraph (A) shall be submitted to the President of the Tribunal, who shall refer the application to a specially appointed Chamber composed of three Judges of the Tribunal ("Specially Appointed Chamber").
- (C) Requests under paragraph (A) shall not be granted if granting the request may prejudice ongoing investigations or proceedings before the Tribunal.
- (D) The Specially Appointed Chamber, having heard the parties to the proceedings before the Tribunal, may grant a request pursuant to paragraph (A) after having verified that:
  - (i) granting the request will not prejudice the rights of the person under the authority of the Tribunal;
  - (ii) provisions and assurances are in place for observing any protective measures granted by the Tribunal to the person under its authority;
  - (iii) granting the request will not pose a danger or risk to any victim, witness, or other person; and
  - (iv) no overriding grounds oppose granting the request.
- (E) The assistance will be rendered by way of video-conference link. If legal provisions in the jurisdiction of the Requesting Authority do not allow for the testimony to be received by way of video-conference link, the Specially Appointed Chamber may consider to render the assistance by way of granting the Requesting Authority access to the person to be heard on the premises of the Tribunal or the transfer of the person under Rule 75 *ter*.
- (F) Upon order of the Specially Appointed Chamber, the Registrar shall coordinate the arrangements for the video-conference link and be present during the hearing.
- (G) A Judge of the Specially Appointed Chamber shall be present during the hearing and shall ensure that Rule 75 *bis* (D)(i)-(iii) is respected.
- (H) The questioning of the person to be heard shall be conducted directly by, or under the direction of, the Requesting Authority in accordance with its own laws.
- (I) For purposes of this Rule, "person under the authority of the Tribunal" means an accused or convicted person detained on the premises of the detention unit of the Tribunal.
- (J) No decision taken under this Rule or Rule 75 *ter* is subject to appeal.
- (K) The President may in all cases request any document or additional information from the Requesting Authority.

### III. SUBMISSIONS

3. The Chamber recalls that in the First Decision, it invited the Applicant (i) to set out the law relating to the questioning of witnesses before the Court of BiH, addressing in particular the issue of allowing a witness to invoke his right not to answer a question, where such a question may yield an answer that would result in self-incrimination; and (ii) to indicate the anticipated areas of questioning of Mr. Mladić so as to enable the Chamber to assess to what extent the questions can reasonably be expected to result in objections on the basis of the protection against self-incrimination.<sup>7</sup>

---

<sup>7</sup> First Decision, paras 10, 12.

4. In the Additional Information, the Applicant sets out the legal framework relating to the questioning of witnesses as requested. It submits that Article 84 of the Criminal Procedure Code of Bosnia and Herzegovina ("CPC of BiH") contains the right of a witness not to answer questions if a truthful response to such questions might incriminate the witness.<sup>8</sup> In such situations, pursuant to the same Article, the Court appoints legal counsel to the witness if the witness does not already have defence counsel to ensure that this right is protected.<sup>9</sup> Pursuant to Article 89 of the CPC of BiH, Applicant submits, persons suspected or accused of the same event that they are asked to testify about do not have to take the oath.<sup>10</sup> The Applicant submits that the charges against Mr. Mladić as an accused before the Tribunal include, *inter alia*, the events that are the subject of the criminal proceedings in the case against Franc Kos *et al.* before the Court of BiH, and that it is therefore reasonable to expect that Mr. Mladić's knowledge of events is relevant to that case, yet also incriminating in his own trial.<sup>11</sup> The Applicant assures that the legal framework before the Court of BiH aims to observe all rights of the persons testifying in the capacity of a witness as well as in the capacity of a suspect or accused.<sup>12</sup> Finally, the Applicant submits a list of 20 questions that the defence of Franc Kos intends to ask Mr. Mladić.<sup>13</sup>

5. The Chamber recalls and refers to the parties' submissions on the Request as outlined in paragraphs 2 to 4 of the First Decision, and will consider these submissions, where relevant, for the purposes of this decision. To the extent that the Defence Submission on the Additional Information deals with the same arguments as in the Defence First Submission, the Chamber will not outline them here in detail again. In short, the Defence arguments repeated in both submissions concern the Accused's right to remain silent, his right to be protected from self-incrimination, the fact that the Defence does not have enough information about the proceedings against the accused in the case of Franc Kos *et al.*, and Mr. Mladić's health state which prevents counsel from meeting him and disabling him from giving testimony.<sup>14</sup>

6. Additional arguments submitted by the Defence concern the utility of Mr. Mladić's possible testimony. The Defence submits that Mr. Mladić would object to answering the questions intended

<sup>8</sup> Additional Information, p. 2.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Additional Information, pp. 2-3.

<sup>13</sup> Additional Information, p. 5.

<sup>14</sup> See *e.g.*, Defence First Submission, paras 8-9 and Defence Submission on Additional Information, paras 4-6 (in relation to the Accused's right to remain silent and protection against self-incrimination); Defence First Submission, para. 9 and Defence Submission on Additional Information, paras 12-13 (in relation to having received insufficient information on the precise nature of the charges against the accused in the case of Franc Kos *et al.*); Defence First Submission, paras 5-6 and Defence Submission on Additional Information, paras 14-15 (in relation to Mr. Mladić's deteriorated state of health and the fact that this prevents him from meeting with counsel, or being able to give testimony in the first place).

to be put to him by the Defence of Franc Kos, on the basis that all but two of them relate directly to the alleged crimes in Srebrenica, Mr. Mladić's knowledge of these crimes, his orders to subordinates who allegedly participated in the crimes, and efforts to discipline the perpetrators of the crimes.<sup>15</sup> As a result of objections to these questions, the Defence asserts, his testimony would be of little value.<sup>16</sup> The Defence further asserts that the case against Mr. Mladić and the case against Franc Kos "is in essence the same case, dealing with the same events wherein Mladić is viewed as an accused, just proceedings in another court".<sup>17</sup> According to the Defence, therefore, Mr. Mladić is not being asked to testify as a witness in another, unrelated proceeding, but as a "co-suspect for the same crimes as Kos".<sup>18</sup> Given that Mr. Mladić would not have to take the oath as a result of this status, the Defence submits, his testimony on the two questions that do not give rise to a risk of self-incrimination, would have no probative value.<sup>19</sup> The Defence maintains that Mr. Mladić should be permitted to assert his "absolute right to remain silent".<sup>20</sup> Finally, the Defence submits that under Bosnian law, it is Defence counsel who has the "final and absolute word as to asserting and maintaining the right not to answer questions" and that given that the Defence has already stated it would object to Mr. Mladić answering any of the questions, "there is absolutely no reason" for the Chamber to order Mr. Mladić to testify.<sup>21</sup>

#### IV. DISCUSSION

7. On the basis of the legal framework set out by the Applicant, the Chamber is satisfied that the CPC of BiH contains legal provisions aiming to ensure that the rights of a person who is testifying in the capacity of a witness, but who also has the status of a suspect or accused, are protected. This, however, does not affect the Chamber's duty, pursuant to Rule 75 *bis* (D) of the Rules to ensure that granting the Request does not prejudice Mr. Mladić's rights, or its duty pursuant to Rule 75 *bis* (G) of the Rules that after having granted the Request, his rights are not prejudiced during his testimony.

8. The Chamber reiterates that the Defence's repeated argument that the Request should be denied, *inter alia*, because Mr. Mladić has a right to remain silent pursuant to Article 21 (4) (g) of the Statute of the Tribunal,<sup>22</sup> is legally flawed.<sup>23</sup> The fact that the charges against Mr. Mladić in the

<sup>15</sup> Defence Submission on the Additional Information, para. 9.

<sup>16</sup> Defence Submission on the Additional Information, paras 7-9.

<sup>17</sup> Defence Submission on the Additional Information, para. 5.

<sup>18</sup> Defence Submission on the Additional Information, paras 5, 10.

<sup>19</sup> Defence Submission on the Additional Information, para. 10.

<sup>20</sup> Defence Submission on the Additional Information, para. 5.

<sup>21</sup> Defence Submission on the Additional Information, para. 11.

<sup>22</sup> Defence First Submission, paras 8-9; Defence Submission on Additional Information, paras 4-6.

<sup>23</sup> See also First Decision, paras 8, 10.

case before the Tribunal include events that are also the subject of the charges against the accused in the case of Franc Kos *et al.* in the proceedings before the Court of BiH, do not make Mr. Mladić, as argued by the Defence, a “co-accused” of Franc Kos. Article 21 (4) (g) of the Statute provides that an accused may not be compelled to testify against himself or to confess guilt; this applies only to the proceedings against that accused. Mr. Mladić’s testimony pursuant to the Request is being sought in his capacity as a witness. Equally, the fact that Mr. Mladić will not be required to give an oath, as submitted by Applicant, cannot be taken to mean that he is viewed by the Applicant as a co-accused, as suggested by the Defence. Article 89 of the CPC of the BiH provides that there is no requirement to take an oath for individuals for whom there is a grounded suspicion that they have committed or participated in the commission of an offense for which they are being examined. This provision is not limited to co-accused persons.

9. The Chamber, in the First Decision, held that the Defence’s objection to the Request – albeit on the basis of a flawed argument as explained above – would entail that any questions put to Mr. Mladić, given the potential overlap of subject matter between his case and that of Franc Kos *et al.*, “may well result in receiving no answers from Mr. Mladić to the questions put to him”, if an objection to any such question is likely to be sustained.<sup>24</sup> Having reviewed the list of questions submitted by the Applicant on behalf of the Defence of Franc Kos, the Chamber concludes that the majority of the questions relate to events and issues of chain of command that are also the subject of charges against Mr. Mladić before the Tribunal. They pertain directly to the knowledge of Mr. Mladić of these events, and are equally relevant to the modes of liability Mr. Mladić is charged with vis-à-vis those events.<sup>25</sup> It is clear, as submitted by the Applicant, that there is a significant overlap of subject matter between the charges against Mr. Mladić in the case against him before the Tribunal and the charges against the accused in the case of Franc Kos *et al.* before the Court of BiH.

10. The Defence maintains its position that Mr. Mladić would object to answering questions that give rise to a risk of self-incrimination.<sup>26</sup> Pursuant to Article 84 of the CPC of BiH, Mr. Mladić may be compelled to answer a question even when he has invoked his right not to answer it on the ground that a truthful answer may result in self-incrimination. Should Mr. Mladić be compelled to answer such a question, immunity may be granted by decision of the Prosecutor of the Court of BiH.<sup>27</sup> It is unclear, however, to what extent this immunity would be effective beyond the

<sup>24</sup> First Decision, para. 10.

<sup>25</sup> See e.g. Additional Information, p. 5, questions 3-11 and 15-17. In view of the Chamber, answers to the remaining questions also have the potential to be self-incriminatory.

<sup>26</sup> Defence Submission on Additional Information, paras 8-9.

<sup>27</sup> According to Article 84 (2) of the CPC of the BiH, a witness may be compelled to answer a question put to him if immunity is granted. Article 84 (3) provides that such immunity may be granted by decision of the Prosecutor.

jurisdiction of the Court of BiH. It may be that a prosecuting authority in a different jurisdiction initiates a case against Mr. Mladić based on, *inter alia*, his compelled testimony before the Court of BiH, something which the Chamber has no influence on. The Prosecution of the Tribunal, moreover, may seek to admit into evidence the compelled testimony of Mr. Mladić in the case against him before the Tribunal, and has in fact already expressed an intention to do so.<sup>28</sup> While it would be open to the Chamber deciding on a request for admission of the compelled testimony of Mr. Mladić to exclude it pursuant to Rule 89 (D) of the Rules, this rule does not guarantee exclusion.

11. The Chamber therefore takes the position that were it to grant the Request, in order to fully ensure that the rights of Mr. Mladić are not prejudiced pursuant to Rule 75 *bis* (G) of the Rules, it would be on the condition that a Judge of the Chamber has the ultimate word about whether an objection to answering a question on the ground of a risk of self-incrimination is sustained or not, and whether Mr. Mladić would be compelled to answer such a question.

12. Having considered 1) the overlap of subject matter between the charges in the Mladić case and the questions submitted by the Applicant on behalf of the Defence of Franc Kos, 2) the position taken by the Defence that it would object to Mr. Mladić answering all but two of the questions, 3) the condition specified in the previous paragraph, and the fact that the Chamber is inclined to sustain objections to answering the questions on the basis that they may lead to self-incrimination, the Chamber concludes that if the Request were to be granted, Mr. Mladić's examination as a witness before the Court of BiH would yield very little, if any, testimony. The Chamber must conclude, in the specific circumstances of this case, that the principle of judicial economy requires it to deny the Request, on the basis that there are overriding grounds opposing it, pursuant to Rule 75 *bis* (D) (iv) of the Rules.

---

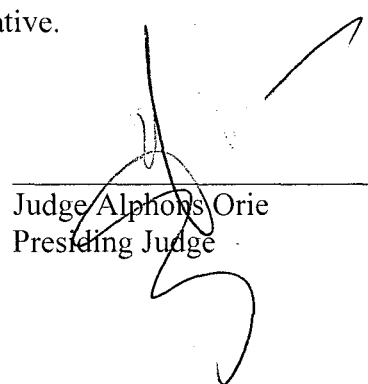
Finally, Article 84 (4) of the CPC of the BiH provides that a witness who has been granted immunity and is testifying as a result of the granted immunity shall not be prosecuted except in case of false testimony.

<sup>28</sup> In its Response to the Request, the Prosecution submitted that it reserves its right to tender Mr. Mladić's testimony given before the Court of BiH, in the proceedings against him or in any other proceedings before the Tribunal. See Prosecution Response, para. 2 (b).

## V. DISPOSITION

13. For the foregoing reasons and pursuant to Rule 75 *bis* of the Rules, the Chamber **DENIES** the Request.

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



---

Judge Alphons Orie  
Presiding Judge

Dated this twenty-first day of December 2011  
At The Hague  
The Netherlands

[Seal of the Tribunal]