



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: 4 June 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: 4 June 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON TOLIMIR REQUEST FOR CERTIFICATION TO APPEAL
SUBPOENA DECISION**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Zdravko Tolimir

Mr. Aleksandar Gajić

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 “Request to the Trial Chamber to Suspend the Subpoena to Allow Tolimir to File an Appeal Against the Decision on the Accused’s Motion to Subpoena Zdravko Tolimir and Against the Subpoena”, filed by Zdravko Tolimir on 15 May 2013 (“Request”), and hereby issues its decision thereon

I. Background and Submissions

1 On 9 May 2013, the Chamber issued its “Decision on Accused’s Motion to Subpoena Zdravko Tolimir” (“Decision”), in which it found that the requirements for the issuance of a subpoena, pursuant to Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), compelling the testimony of Tolimir had been met and accordingly issued a subpoena compelling him to testify in this case.¹

2. Tolimir requests that the Chamber suspend the Subpoena and grant him “leave to file an appeal against the Decision”.² He argues that the decision to subpoena “a person with regard to whom proceedings have not yet been completed” raises serious legal issues that are significant to the development of the Tribunal’s jurisprudence and should be considered by the Appeals Chamber.³ He states that his appeal would cover issues related to (i) the jurisdiction of a trial chamber to issue a subpoena to “persons accused in other cases before the [Tribunal]”, (ii) the right of an accused person to refuse to testify in another case before the Tribunal until the end of his proceeding; and (iii) the “right of an accused person to refuse to be examined by another accused or the Office of the Prosecutor about events relating to the charges against him”.⁴

3 On 23 May 2013, the Chamber requested the parties to file a response, if they so wish, on the issue of whether a witness has standing to challenge a subpoena.⁵ On 23 May 2013, the Accused filed a “Memorandum on Standing of Witness to Seek Leave to Appeal Subpoena Decision”, stating his position that a witness has standing to seek leave to appeal a decision

¹ Decision on Accused’s Motion to Subpoena Zdravko Tolimir, 9 May 2013 (“Decision”), paras. 21, 23, Subpoena Ad Testificandum, 9 May 2013 (“Subpoena”).

² Request, paras. 1, 6.

³ Request, paras. 2, 4.

⁴ Request, para. 3.

⁵ T-38688–38689 (23 May 2013).

subpoenaing him to testify.⁶ However, the Accused does not take a position as to whether the Request meets the requirements for certification to appeal.⁷

4 On 24 May 2013, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Submission Regarding Tolimir Request to Suspend Subpoena and to Appeal Decision on Accused’s Motion to Subpoena Zdravko Tolimir” stating that given the decisions of the Trial Chamber and Appeals Chamber in the case of *Prosecutor v. Radoslav Brđanin* (“Brđanin case”), the Tribunal appears to have “implicitly accepted that a person affected by a subpoena has standing to challenge a decision relating to the issuance of that subpoena”.⁸ While the Prosecution takes no position on the relief requested, it notes that an early resolution of the question as to whether “a person in Tolimir’s position can be compelled to testify in proceedings concerning another accused before this Tribunal, may advance the efficient administration of justice” and also notes that this issue may arise again in both this case and other ongoing cases.⁹

II. Applicable Law

5 Decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.¹⁰ Under Rule 73(B) of the Rules, a Trial Chamber may grant certification to appeal if the said decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

6 A request for certification is “not concerned with whether a decision was correctly reasoned or not”.¹¹ Furthermore, it has previously been held that “even when an important point of law is raised [. . .], the effect of Rule 73(B) is to preclude certification unless the party seeking certification

⁶ Memorandum on Standing of Witness to Seek Leave to Appeal Subpoena Decision, 23 May 2013 (“Accused Submission”) paras. 1–2.

⁷ Accused Submission, para. 3.

⁸ Prosecution Submission Regarding Tolimir Request to Suspend Subpoena and to Appeal Decision on Accused’s Motion to Subpoena Zdravko Tolimir, 24 May 2013 (“Prosecution Submission”), para. 4.

⁹ Prosecution Submission, para. 6.

¹⁰ See Rule 72(B), 73(C) of the Rules.

¹¹ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-I, Decision on Lukić Motion for Reconsideration of Trial Chamber’s Decision on Motion for Admission of Documents from Bar Fable and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para. 42; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-I, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98 bis Decision, 14 June 2007, para. 4; *Prosecutor v. Popović et al.*, Case No. IT-05-88-I, Decision on Nikolić and Beara Motions for Certification of the Rule 92 quater Motion, 19 May 2008, para. 16; *Prosecutor v. Popović et al.*, Case No. IT-05-88-I, Decision on Motion for Certification of Rule 98 bis Decision, 15 April 2008, para. 8; *Prosecutor v. S. Milošević*, Case No. IT-02-54-I, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Von Dine* Proceeding, 20 June 2005, para. 4.

establishes that both conditions are satisfied”¹² Under Rule 73(C), requests for certification must be filed within seven days of when the decision was filed or delivered

III. Discussion

7. As a preliminary matter, the Chamber notes that Rules 73(A) and (C) limits motions for relief and requests for certification to appeal to parties to a proceedings and that Rule 2 sets out a restrictive interpretation of “parties”¹³ However, the Chamber recalls that in the *Brđanin* case, the Trial Chamber hearing that case granted Jonathan Randal’s application for certification to appeal the decision subpoenaing him¹⁴ and the Appeals Chamber reversed the decision and set aside the subpoena¹⁵ Furthermore, in the specific circumstances of the Request, the Chamber considers that Tolimir is an accused person before the Tribunal whose case is currently pending on appeal and he has been subpoenaed to testify in this case¹⁶ As an accused person before the Tribunal, Tolimir has unique rights and minimum guarantees that must be afforded to him under Article 21 of the Statute of the Tribunal (“Statute”)¹⁷ Accordingly, the Chamber finds, by majority, Judge Morrison dissenting, that Tolimir properly filed the Request and will consider the arguments therein

8. The first limb of the Rule 73(B) test for certification is whether the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial The issue at stake here is whether the Chamber may issue a subpoena compelling a witness to testify when the witness is an accused person currently involved in proceedings before Tribunal and as such, is entitled to preserve his right against self-incrimination enshrined in Article 21(4)(g) of the Statute The Chamber has held that Tolimir’s prospective testimony is relevant to the Accused’s case and will be of material assistance to him¹⁸ In addition, the Chamber found that the information contained in one document that the Accused wished to

¹² *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 12 January 2005, p. 1

¹³ Rule 2 defines parties and the Prosecutor and the Defence, see *Prosecutor v. Haradinaj et al.*, Decision on Purported Motion for Certification to Appeal Trial Chamber Decision Concerning Subpoenaed Witness, 14 September 2007, para. 3

¹⁴ *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-1, Decision to Grant Certification to Appeal the Trial Chamber’s “Decision on Motion to Set Aside Confidential Subpoena to Give Evidence”, 19 June 2002 Jonathan Randal was a war correspondent for *The Washington Post* who was subpoenaed by the *Brđanin* Trial Chamber to give evidence about an interview he conducted during the conflict

¹⁵ *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 The Appeals Chamber held there was a general public interest in the work of war correspondents and that compelling them to testify would adversely affect their ability to carry out their work

¹⁶ The Chamber recalls that Tolimir was convicted and sentenced to life imprisonment, see *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgement, 12 December 2012

¹⁷ Article 21(4)(g) of the Statute includes the right against self-incrimination

¹⁸ Decision, paras. 16, 17–19

discuss with Tolimir was not obtainable through other means¹⁹ The Chamber notes that pursuant to Article 21(4)(e) of the Statute, the Accused has the right to “obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him” It is also the obligation of this Chamber to ensure that trials are fair, expeditious, and conducted with due regard for the protection of victims and witnesses²⁰ Given the importance of Tolimir’s prospective testimony to the Accused’s case, the resolution of this issue would significantly affect the fair and expeditious conduct of this proceeding and the outcome of this trial Thus, the Chamber finds that the first limb of this test has been met.

9. With respect to the second limb of the test for certification, the Chamber must assess whether a resolution by the Appeals Chamber of the issue of whether the Chamber may issue a subpoena compelling a witness to testify when the witness is an accused person currently involved in proceedings before the Tribunal, would materially advance the proceedings As the Chamber has found previously, the prospective evidence of Tolimir is relevant to the Accused’s case and will be of material assistance to him²¹ Furthermore, given that Tolimir’s continued unwillingness to comply with the Subpoena may result in contempt proceeding being initiated against him, the Chamber finds that an immediate resolution of this issue by the Appeals Chamber now, rather than at the end of time-consuming contempt proceedings, would materially advance the proceedings in this case Therefore, the second limb of the test for certification has been met

10 The Chamber finds that both of the requirements have been met for the test for certification pursuant to Rule 73(B)

¹⁹ Decision, para 20

²⁰ Article 20(1) of the Statute, *see also Prosecutor v Haradinaj et al*, Case No IT-04-84-A, Judgement, 19 July 2010, para 35

²¹ Decision, para 16

IV. Disposition

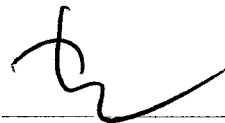
11 Accordingly, the Chamber, by majority, Judge Morrison dissenting, pursuant to Rules 54 and 73 of the Rules, hereby.

(a) **GRANTS** the Application, and

(b) **STAYS** the execution of the Decision and the Subpoena pending resolution of the issue in the Request by the Appeals Chamber

Judge Morrison appends a dissenting opinion to this decision.

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



Judge O-Gon Kwon
Presiding

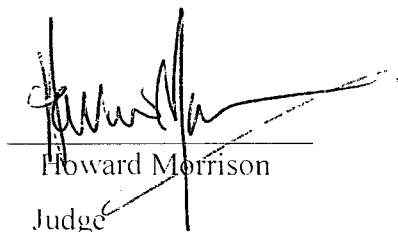
Dated this fourth day of June 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE HOWARD MORRISON

1 My divergence from the Majority's finding that Tolimir properly filed the Request stems from my understanding of the exact Rules that the Majority rely upon in granting the Request. As the Majority acknowledges, Rule 2 allows no room for interpretation of the term "parties".²² The "parties" are restricted to those who participate in on-going criminal proceedings before the Tribunal, namely, the Prosecutor and the Defence, or the Accused in this case. The certification procedure envisaged in Rule 73 (A) and (C) is limited in its application, as rightly pointed out by the Trial Chamber in the *Haradinaj et al.* case, to "either party" to the proceedings.²³ In this light, even taking into account the specific circumstances of the Request, I would not grant Tolimir's request for certification to appeal the Decision as, in my judgement, he has no standing in this instance.

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



Howard Morrison
Judge

Dated this fourth day of June 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

²² See *supra* para 7.

²³ See *supra* para 7, In 13.