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-95-5/18-AR73.11

Date: 13 November 2013

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Patrick Robinson
Judge Liu Daqun
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar: **Mr. John Hocking**

Decision of: **13 November 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON APPEAL AGAINST THE DECISION ON THE ACCUSED'S MOTION TO SUBPOENA ZDRAVKO TOLIMIR

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Zdravko Tolimir:

Mr. Zdravko Tolimir

The Accused:

Mr. Radovan Karadžić

Standby Counsel for the Accused:

Mr. Richard Harvey

1. The Appeals 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 ("Appeals Chamber" and "Tribunal", respectively) is seised of the "Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir" filed on 11 June 2013 ("Appeal") by Zdravko Tolimir ("Tolimir") in which he requests that the Appeals Chamber reverse the "Decision on Accused's Motion to Subpoena Zdravko Tolimir" issued on 9 May 2013 ("Impugned Decision") by Trial Chamber III in *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T ("Trial Chamber" and "*Karadžić* case", respectively) and set aside the *Subpoena ad Testificandum* ("Subpoena") which the Trial Chamber issued against him on the same day.[1] Radovan Karadžić ("Karadžić") filed a response to the Appeal on 17 June 2013.[2] The Office of the Prosecution ("Prosecution") filed a submission on the Appeal on 20 June 2013.[3] An English translation of Tolimir's reply to the Prosecution Submissions on the Appeal was filed on 12 August 2013.[4]

I. PROCEDURAL HISTORY

2. On 12 March 2013, Karadžić filed a motion requesting that the Trial Chamber issue a subpoena, pursuant to Rule 54 of the Tribunal's Rules of Procedure and Evidence ("Rules"), ordering Tolimir to testify in the *Karadžić* case on 7 May 2013.[5] Karadžić submitted that Tolimir is in possession of information that could materially assist Karadžić's case and that reasonable attempts to obtain Tolimir's voluntary testimony had failed.[6] Karadžić further argued that should Tolimir, during the course of his testimony in the *Karadžić* case refuse to answer questions posed due to concerns about self-incrimination, Karadžić would request that the Trial Chamber compel a response pursuant to Rule 90(E) of the Rules, which would provide Tolimir with immunity from

[1] Appeal, Conclusion, para. 1.
[2] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Karadzic [*sic*] Brief on Appeal of Zdravko Tolimir, 17 June 2013 ("Response to the Appeal").
[3] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Prosecution's Submissions on Tolimir's Appeal, 20 June 2013 ("Prosecution Submissions on the Appeal").
[4] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Reply to Prosecution's Submissions on Tolimir's Appeal, 12 August 2013 ("Reply to the Prosecution Submissions on the Appeal"). Article 3 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, IT/155 Rev.4, 4 April 2012, provides that, in cases concerning an interlocutory appeal, where an appellant chooses to file a reply, the reply must be filed "within four days of the filing of the response". Tolimir submits that a B/C/S translation of the Prosecution Submissions on the Appeal was delivered to him on 2 August 2013 (Reply to the Prosecution Submission on the Appeal, n. 1). Tolimir submitted his Reply to the Prosecution Submissions on the Appeal in B/C/S on 6 August 2013. In these circumstances and recalling in particular that Tolimir is self-represented and is not known to have a command of the English language, the Appeals Chamber accepts Tolimir's Reply to the Prosecution Submissions on the Appeal as validly filed.
[5] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion for Subpoena to General Zdravko Tolimir, 12 March 2013 ("Subpoena Request"), paras 1, 20.
[6] Subpoena Request, paras 4-17.

prosecution in his own case concerning any potentially self-incriminating information emerging during his testimony in the *Karadžić* case.[7]

3. On 19 March 2013, the Trial Chamber ordered Karadžić's legal advisor to contact Tolimir's legal advisor for final confirmation as to whether Tolimir was still unwilling to testify in the *Karadžić* case.[8] On 8 April 2013, Tolimir filed a response to the Subpoena Request in which he argued that since the proceedings against him before the Appeals Chamber had not yet concluded, he retained the right not to answer questions about the facts of his case.[9] He further contended that the topics on which his testimony was being sought by Karadžić were directly related to his case and therefore subject to his right to refuse to answer questions relating thereto.[10] Tolimir contended that "the warning under Rule 90(E) [of the Rules] itself represents a violation of the presumption of innocence" as it compels an accused person "to testify on issues which directly relate to his own case and regarding which he has an absolute right to remain silent", and that this constitutes "a compulsion to make a statement which might be of a self-incriminating nature".[11] Tolimir also submitted, *inter alia*, that the Trial Chamber lacked jurisdiction to subpoena him on the basis that, as this issue potentially impacted upon his rights as an accused before the Tribunal, the appropriate forum for its determination was the chamber seised of his own case.[12]

4. On 22 March 2013, the Prosecution filed a submission concerning the Subpoena Request in which it: (i) confirmed that it would not respond to the Subpoena Request;[13] (ii) indicated the Prosecution's neutral position on the relief requested in the Subpoena Request;[14] and (iii) outlined in a confidential annex "additional considerations" not contained in the Subpoena Request, which it considered of possible relevance to the Trial Chamber's analysis.[15]

5. In the Impugned Decision, the Trial Chamber granted the Subpoena Request.[16] The Trial Chamber reasoned that the circumstances detailed in the Subpoena Request satisfied the requirements for the issuance of a subpoena, as the information in Tolimir's possession would be of material assistance to Karadžić's case and was unobtainable through other means aside from

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[7] Subpoena Request, para. 18.
[8] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, T. 19 March 2013 pp. 35554-35555.
[9] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Motion to the Trial Chamber to Admit a Response and Response to Karadžić's Motion for Subpoena, 8 April 2013 ("Response to Subpoena Request"), para. 11.
[10] Response to Subpoena Request, paras 7-12, 19, 21-22.
[11] Response to Subpoena Request, paras 15-16. *See also* Response to Subpoena Request, paras 13-14.
[12] Response to Subpoena Request, paras 25-26.
[13] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution Submission Regarding Motion for Subpoena to General Zdravko Tolimir, 22 March 2013 ("Prosecution Submission on Subpoena Request"), para. 1. The Prosecution previously indicated that it would not file a response to the Subpoena Request in an e-mail sent to the Trial Chamber on 12 March 2013. *See* Prosecution Submission on Subpoena Request, n. 3.
[14] Prosecution Submission on Subpoena Request, para. 2.
[15] Prosecution Submission on Subpoena Request, para. 3.
[16] Impugned Decision, para. 23(B).

Tolimir testifying in the *Karadžić* case.[17] The Trial Chamber also held that any self-incriminating evidence, if given by Tolimir after having been compelled to do so by the Trial Chamber in the course of his testimony in the *Karadžić* case, could not be used against him in his own case, pursuant to Rule 90(E) of the Rules.[18] Finally, the Trial Chamber emphasised that it maintained the discretion under Rule 90(E) of the Rules to compel a witness to either answer a question or to refrain from doing so, and that "in exercising its discretion in this particular instance", it would be cognisant of Tolimir's involvement in ongoing proceedings before the Appeals Chamber, and would "ensure that his rights are safeguarded".[19]

6. On 15 May 2013, Tolimir filed a motion before the Trial Chamber requesting, *inter alia*, leave to appeal the Impugned Decision and the suspension of the Subpoena.[20] On 23 May 2013, the Trial Chamber invited submissions from Karadžić and the Prosecution on the standing of witnesses to challenge subpoenas.[21] On 23 May 2013, Karadžić filed a submission in which he: (i) stated that a witness has standing to seek leave to appeal a decision issuing a subpoena against him; and (ii) declined to take a position on whether the specific instance before the Trial Chamber satisfied the requirements for certification to appeal.[22] In its submission filed on 24 May 2013, the Prosecution, citing the *Brđanin* Appeal Decision, asserted that 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".[23] The Prosecution also declined to take a position on Tolimir's Request for Certification to Appeal.[24]

7. On 4 June 2013, the Trial Chamber, Judge Morrison dissenting, granted Tolimir's Request for Certification to Appeal, pursuant to Rules 54 and 73 of the Rules, and stayed the execution of the Impugned Decision as well as the Subpoena pending the determination of the Appeal.[25]

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[17] Impugned Decision, paras 19-21.
[18] Impugned Decision, para. 22.
[19] Impugned Decision, para. 22.
[20] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, 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, 15 May 2013 ("Request for Certification"), paras 1, 6.
[21] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, T. 23 May 2013 pp. 38688-38689.
[22] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Memorandum on Standing of Witness to Seek Leave to Appeal Subpoena Decision, 23 May 2013 ("*Karadžić* Submission on Tolimir's Standing to Appeal the Impugned Decision"), paras 1-3.
[23] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution Submission Regarding Tolimir Request to Suspend Subpoena and to Appeal Decision on Accused's Motion to Subpoena Zdravko Tolimir, 24 May 2013 ("Prosecution Submissions on Tolimir's Request to Appeal the Impugned Decision"), para. 4, *citing, inter alia, Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-AR73.9, Decision on Interlocutory Appeal, 11 December 2002 ("*Brđanin* Appeal Decision").
[24] Prosecution Submissions on Tolimir's Request to Appeal the Impugned Decision, para. 6.
[25] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Tolimir Request for Certification to Appeal Subpoena Decision, 4 June 2013 ("Decision on Certification"), para. 11.

II. ADMISSIBILITY OF THE APPEAL

8. While neither Karadžić nor the Prosecution contest Tolimir's standing, the Appeals Chamber considers it necessary to address this preliminary matter as it pertains to its jurisdiction to consider the Appeal.

9. Rule 73(C) of the Rules, pursuant to which this appeal is brought, entitles a "party" to appeal a trial chamber's decision after having requested and obtained certification. Rule 2 of the Rules defines "parties" as "[t]he Prosecutor and the Defence". The Impugned Decision was issued in the *Karadžić* case and Tolimir is neither part of the Prosecution nor the Defence in that case. Thus, *sensu stricto*, he is not entitled to use Rule 73(C) of the Rules to bring an interlocutory appeal.

10. However, the Appeals Chamber recalls the *Milošević* Appeal Decision[26] in which it decided to consider an interlocutory appeal filed by *amici curiae* in that case.[27] The Appeals Chamber determined that, although *amici curiae* operate in proceedings "solely as assistants" to the court and not as actual parties, it would nonetheless adjudicate the *amici curiae*'s interlocutory appeal on the basis that, in the circumstances of the particular case, consideration of the appeal served the interests of justice.[28] Additional factors underlying the Appeals Chamber's decision to adjudicate the matter included: (i) the existence of an alignment of interests between the *amici curiae* and the accused in that case; (ii) the fact that consideration of the appeal would not infringe the accused's interests; (iii) that there was no "danger of unfairness to the Prosecution"; and (iv) that the Prosecution did not oppose consideration of the appeal and in fact expressed "its willingness to accept the *amici* as a party for these purposes".[29] The Appeals Chamber also notes the *Brđanin* Appeal Decision in which it adjudicated an interlocutory appeal, filed by a non-party to the proceedings, against a subpoena decision.[30]

11. The Appeal raises concerns regarding, *inter alia*, Tolimir's right against self-incrimination under Article 21(4)(g) of the Statute of the Tribunal ("Statute").[31] Neither Karadžić nor the Prosecution have objected to the filing of the Appeal and in fact both have indicated their

[26] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 ("*Milošević* Appeal Decision").
[27] *Milošević* Appeal Decision, para. 5.
[28] *Milošević* Appeal Decision, paras 4-5.
[29] *Milošević* Appeal Decision, para. 5.
[30] *Brđanin* Appeal Decision, paras 1-3, 6, 8-56.
[31] Appeal, paras 9-36.

willingness to accept Tolimir as having standing to appeal the Impugned Decision.[32] Thus, neither the interests of Karadžić nor the Prosecution stand to be compromised by adjudication of the Appeal. In these circumstances and emphasising in particular that the Appeal raises concerns about a fundamental right of an accused before the Tribunal, the Appeals Chamber finds that consideration of the Appeal serves the interests of justice.

12. Accordingly, the Appeals Chamber will consider the Appeal.

III. SUBMISSIONS

A. Appeal

13. Tolimir presents two alternative grounds of appeal. Under the first ground, Tolimir asserts that he should be granted testimonial privilege and thus immunity from *subpoena ad testificandum*. Specifically, he contends that the Trial Chamber erred by failing to recognise an accused's right not to testify in other cases before the Tribunal prior to the complete resolution of his own case before the Tribunal ("Assertion of Testimonial Privilege").[33] Under the second ground of appeal Tolimir submits that the Trial Chamber lacked the jurisdiction to subpoena him ("Jurisdictional Challenge").[34] He requests that the Appeals Chamber reverse the Impugned Decision and set aside the Subpoena, or, in the alternative, clarify the procedure for issuing subpoenas.[35]

14. Regarding the Assertion of Testimonial Privilege, Tolimir submits that the power to issue subpoenas pursuant to Rule 54 of the Rules is not limitless, but has to be determined on a case-by-case basis and that the Tribunal has previously exempted certain classes of individuals from being subjected to a subpoena.[36]

15. Tolimir further submits that the Trial Chamber failed to consider "whether the accused has a right not to testify in other cases before the Tribunal", particularly within the context of his right against self-incrimination.[37] He also asserts that Rule 90(E) of the Rules does not provide complete protection against self-incrimination, arguing in particular that a statement given in the belief that it is not self-incriminatory would not fall under the protection of Rule 90(E) of the Rules, and that a trial chamber which is not seised of the case of an accused would not be in a position to provide full

[32] Response to the Appeal, paras 25-31; Prosecution Submissions on Tolimir's Request to Appeal the Impugned Decision, paras 4-6; Karadžić Submission on Tolimir's Standing to Appeal the Impugned Decision, paras 1-3.
[33] Appeal, para. 9.
[34] Appeal, para. 9.
[35] Appeal, Conclusion, paras 1-2.
[36] Appeal, paras 12-14.
[37] Appeal, para. 18.

and adequate protection of his rights when he testifies as a witness.[38] He contends that the Trial Chamber misinterpreted his submission that the warning under Rule 90(E) of the Rules itself represents a violation of the presumption of innocence.[39]

16. Tolimir also states that the Trial Chamber's decision to subpoena him, as a person involved in ongoing proceedings before the Tribunal, is unprecedented in the Tribunal's history.[40] He asserts that no trial chamber has ever subpoenaed accused in other proceedings, and that no such measure has ever been requested before, which in his view is reflective of a tacit and binding Tribunal policy.[41]

17. Tolimir further argues that the statutes and rules of procedure and evidence of other international criminal tribunals, in particular the Rome Statute of the International Criminal Court ("Rome Statute" and "ICC", respectively), do not provide for the compulsion of accused persons in ongoing cases to testify in other cases before those international tribunals.[42]

18. Tolimir further contends that he may be exposed to cross-examination by the Prosecution in the *Karadžić* case concerning issues relevant to his own case, and that this constitutes "a gross violation" of his right to refuse to answer questions posed by the Prosecution, whether in his own case or in other cases before the Tribunal.[43] In this context, Tolimir refers to the impermissibility of issuing subpoenas against co-accused in multi-accused cases before the Tribunal and, citing the principle of equality in Article 21(1) of the Statute, argues that the exemption applied in multi-accused cases should be equally applied to single-accused cases.[44] In these circumstances, Tolimir also asserts that if the Prosecution is unable to subpoena him to testify in his own case, then this right should not be granted to an accused in another case before the Tribunal, as to do so would violate the principle of equality of arms.[45]

19. Tolimir also submits that to subpoena accused in other cases before the Tribunal will not serve the interests of justice, and may be used as a "very dangerous tool" through which either the Prosecution or the Karadžić defence may obtain information from an accused other than through

[38] Appeal, paras 19-20.
[39] Appeal, para. 16.
[40] Appeal, paras 21-22.
[41] Appeal, paras 23, 27.
[42] Appeal, para. 24.
[43] Appeal, paras 25-26, 29.
[44] Appeal, paras 30-31.
[45] Appeal, para. 25.

voluntary cooperation.[46] Tolimir contends that the Tribunal's case law clearly indicates that an accused is not obliged to cooperate with the Prosecution in the absence of a plea agreement.[47]

20. Tolimir further submits that a subpoena ordering him to testify in the *Karadžić* case places him at the risk of prosecution for contempt of the Tribunal should he fail to comply with the subpoena, and thus constitutes a violation of his right under Article 21(4)(g) of the Statute.[48]

21. Regarding the Jurisdictional Challenge, Tolimir submits that the Trial Chamber acted *ultra vires* in issuing the Subpoena.[49] Tolimir argues that, as the question of whether a subpoena may be issued against him may impact upon his own case and his rights as an accused before the Tribunal, only the chamber seised of his case could have considered the matter.[50]

B. Response to the Appeal

22. Karadžić requests that the Impugned Decision be affirmed.[51] He submits that neither Rule 54 of the Rules nor the Tribunal's case law support Tolimir's assertion that persons involved in ongoing proceedings before the Tribunal may not be subpoenaed to testify in other cases.[52] Karadžić also contends that Tolimir's concerns regarding his right against self-incrimination are "premature and unfounded",[53] that there is no reason to believe that the immunity from criminal prosecution guaranteed under Rule 90(E) of the Rules would not be respected by the chamber seised of Tolimir's case,[54] and that the Trial Chamber "has undertaken to be vigilant in protecting General Tolimir's right against self-incrimination" by using the means available to it to do so.[55]

23. Karadžić further submits that Tolimir's jurisdictional challenge "is without merit" and unsupported by the Rules and jurisprudence.[56] He argues that as the decision whether to issue a subpoena involves an assessment of the relevance and necessity of the testimony sought, the trial chamber presiding over the proceedings to which the proposed testimony relates is best suited to

[46] Appeal, para. 36.
[47] Appeal, para. 28, *citing Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-ES, Decision of the President on Early Release of Vidoje Blagojević, 3 February 2012 (confidential) ("*Blagojević* Decision"), para. 24. *See also* Reply to Prosecution Submissions on the Appeal, para. 10.
[48] Appeal, para. 35. *See also* Appeal, paras 32-34.
[49] Appeal, para. 37.
[50] Appeal, paras 38-40.
[51] Response to the Appeal, paras 2, 45.
[52] Response to the Appeal, para. 32.
[53] Response to the Appeal, para. 34.
[54] Response to the Appeal, para. 37.
[55] Response to the Appeal, para. 39, *citing* the Impugned Decision, para. 22.
[56] Response to the Appeal, paras 41-43.

determine the issue.[57] Karadžić thus submits that the Subpoena was properly issued by the Trial Chamber.[58]

C. Prosecution Submissions on the Appeal

24. The Prosecution submits that the Trial Chamber properly issued the Subpoena against Tolimir as Article 21(4)(g) of the Statute is limited to protecting an accused from testifying against himself concerning charges laid against him and does not extend to granting an accused the right to refuse to testify in other cases before the Tribunal.[59] The Prosecution contends that since the *Karadžić* case does not involve the adjudication of any charges against Tolimir, no conviction can be entered against him, thereby making him "both competent and compellable to testify" in that case.[60] The Prosecution further asserts that, as a convicted person, before the Tribunal, Tolimir does not retain the right to the presumption of innocence under Article 21 of the Statute[61] and that Rule 90(E) of the Rules adequately protects Tolimir against self-incrimination.[62]

25. The Prosecution also contends that Tolimir's assertion that the Prosecution has never requested to subpoena an accused "ignores the factors such as reliability, credibility and necessity, which inform the decision to call an accused or convicted person to testify in the trial of another accused".[63] The Prosecution emphasises that the issue is not whether subpoenas compelling convicted persons to testify in other cases before the Tribunal have ever been issued, but whether subpoenas can be issued in such instances.[64]

26. The Prosecution further submits that where the Tribunal has exempted certain limited classes of persons from being subpoenaed, it has done so either to safeguard the public interest or to preserve the confidentiality, neutrality and impartiality of International Committee of the Red Cross ("ICRC") workers.[65] The Prosecution thus asserts that due to the existing protection afforded to Tolimir by Rule 90(E) of the Rules, no additional safeguard in the form of an exemption from being subpoenaed to testify is necessary.[66]

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[57] Response to the Appeal, para. 42.
[58] Response to the Appeal, para. 44.
[59] Prosecution Submissions on the Appeal, para. 2.
[60] Prosecution Submissions on the Appeal, paras 2-3.
[61] Prosecution Submissions on the Appeal, paras 5-6.
[62] Prosecution Submissions on the Appeal, para. 6.
[63] Prosecution Submissions on the Appeal, para. 4.
[64] Prosecution Submissions on the Appeal, para. 4.
[65] Prosecution Submissions on the Appeal, para. 7, *citing Brdanin* Appeal Decision, paras 35-38 and *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-PT, Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999 ("*Simić* Decision"), para. 72.
[66] Prosecution Submissions on the Appeal, para. 7.

27. Finally, the Prosecution contends that Tolimir's challenge to the Trial Chamber's jurisdiction to subpoena him is erroneous as trial chambers are best suited "to manage their own proceedings, including questions regarding whether to call witnesses."[67]

D. Reply to the Prosecution Submissions on the Appeal

28. In his Reply to the Prosecution Submissions on the Appeal, Tolimir submits, *inter alia*, that under Article 21(4)(g) of the Statute he has the right to refuse to testify in any proceedings before the Tribunal, emphasising that: (i) the issues arising in the *Karadžić* case are the same as in the case against him;[68] (ii) in his domestic jurisdiction, a witness is not required to answer a question if this would likely expose the witness to prosecution;[69] (iii) Rule 90(E) of the Rules would not apply to all of his expected evidence;[70] (iv) the Prosecution's submission that its decision whether to call an accused to testify is informed by factors such as reliability, credibility and necessity does not take into account that witnesses are liable for contempt if they give false testimony;[71] and (v) Article 67 of the Rome Statute provides the minimum rights of an accused that he cannot be compelled to testify or confess guilt.[72] Tolimir also argues that the Prosecution's submission that as a convicted person he no longer enjoys the presumption of innocence is without merit.[73]

IV. STANDARD OF REVIEW

29. The Appeals Chamber recalls that Rule 54 of the Rules allows a judge or a trial chamber, at the request of either party or *proprio motu*, to issue such orders as may be necessary for the purposes of an investigation or the preparation or conduct of trial. An interlocutory appeal of such orders is not a *de novo* review of the trial chamber's order, but is limited to establishing whether the trial chamber has abused its discretion by committing a "discernible error".[74] The Appeals Chamber will grant relief with respect to a discretionary decision only where it is found to be: (i) based on an

[67] Prosecution Submissions on the Appeal, para. 8.
[68] Reply to the Prosecution Submissions on the Appeal, para. 2.
[69] Reply to the Prosecution Submissions on the Appeal, para. 4.
[70] Reply to the Prosecution Submissions on the Appeal, para. 6. *See also* Reply to the Prosecution Submissions on the Appeal, paras 19-20, 22.
[71] Reply to the Prosecution Submissions on the Appeal, para. 7. *See also* Reply to the Prosecution Submissions on the Appeal, paras 8-10.
[72] Reply to the Prosecution Submissions on the Appeal, para. 5.
[73] Reply to the Prosecution Submissions on the Appeal, paras 12-18.
[74] *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.5, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, 14 February 2011 ("*Gotovina* Appeal Decision"), para. 14; *Prosecutor v. Ramush Haradinaj et al*, Case No. IT-04-84*bis*-AR73.1, Decision on Haradinaj's Appeal on Scope of Partial Retrial, 31 May 2011 ("*Haradinaj* Appeal Decision"), para. 8.

incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[75]

V. DISCUSSION

A. Jurisdictional Challenge

30. The Appeals Chamber notes Tolimir's contention that only the chamber seised of his case[76] could have considered whether he may be subpoenaed to testify in another case before the Tribunal.[77] In this regard, the Appeals Chamber recalls that Rule 54 of the Rules provides, *inter alia*, that a trial chamber may, at the request of either party or *proprio motu*, issue a subpoena where it is "necessary for the purposes of an investigation or for the preparation or conduct of the trial". In exercising its discretion to determine whether an applicant for a subpoena has satisfied the necessary evidentiary threshold, a chamber must consider whether the information the applicant seeks to subpoena "is necessary for the preparation of his case and whether this information is obtainable through other means".[78] The Appeals Chamber has held that "[t]he background principle informing both considerations is whether, as Rule 54 requires, the issuance of a subpoena is necessary 'for the preparation or conduct of the trial'"[79] and that the focus is not only on the usefulness of the information to the applicant, but the "overall necessity [of the information] in ensuring that the trial is informed and fair".[80]

31. The discretion to determine whether an applicant has satisfied the evidentiary threshold for the issuance of a subpoena implicitly requires an intimate knowledge of the applicant's case. Thus, where a party to a case applies for a subpoena, the chamber seised of that case is best suited to determine whether the subpoena request should be granted. This is due to the fact that this chamber is most closely acquainted with the ongoing developments in the case, the evidentiary details of the case, what may be necessary for the preparation of the applicant's case, and what may be necessary for the preparation or conduct of the trial. The Appeals Chamber therefore considers that the Trial Chamber was best positioned to determine whether the information that Karadžić sought to elicit from Tolimir was necessary for the preparation of Karadžić's defence case and to ensure that the proceedings in the *Karadžić* case are informed and fair.

[75] *Gotovina* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 8.
[76] *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A.
[77] Appeal, paras 37-40; Reply to the Prosecution Submissions on the Appeal, para. 23.
[78] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, 21 June 2004 ("*Halilović* Appeal Decision"), paras 6-7. *See also Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, paras 10-12.
[79] *Halilović* Appeal Decision, para. 7.
[80] *Halilović* Appeal Decision, para. 7. *See also Brđanin* Appeal Decision, para. 31.

32. Accordingly, the Jurisdictional Challenge fails.

B. Assertion of Testimonial Privilege

33. The gravamen of the Appeal lies in Tolimir's Assertion of Testimonial Privilege on the basis of the right against self-incrimination under Article 21(4)(g) of the Statute, and his contention that, contrary to the assertions of Karadžić[81] and the Prosecution,[82] Rule 90(E) of the Rules would not adequately protect him against self-incrimination should he be compelled to testify in the *Karadžić* case.[83] Article 21(4)(g) of the Statute provides that "[i]n the determination of any charge" against an accused before the Tribunal, the accused shall "not [...] be compelled to testify against himself or to confess guilt". Rule 90(E) of the Rules provides that:

> A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony.

34. The Appeals Chamber recalls that "[s]ubpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of criminal sanction".[84] Thus, the prerequisites for subpoena issuance, embodied in the evidentiary threshold, safeguard against the potentially oppressive deployment of subpoenas generally. However, the proposed use of subpoenas against accused persons and appellants raises the additional consideration of possible self-incrimination relative to their status as individuals with ongoing proceedings before the Tribunal. The question therefore is whether an accused or appellant compelled by subpoena to testify in another case before the Tribunal is in effect exposed, in relation to his own case, to the possibility of compelled self-incrimination in the form of either: (i) inadvertent self-incrimination, whereby the accused or appellant unwittingly makes self-incriminating statements; or (ii) deliberate self-incrimination whereby a Chamber may compel self-incriminating statements from the accused or appellant pursuant to Rule 90(E) of the Rules.

35. The critical issue is whether Rule 90(E) of the Rules adequately protects an accused or appellant from the direct and indirect use against him of any compelled self-incriminating information, arising as a result of deliberate or inadvertent self-incrimination. In this regard, the Appeals Chamber notes Tolimir's contention that Rule 90(E) of the Rules "is not a complete protection from self-incrimination",[85] and that compelling him to testify pursuant to Rule 90(E) of

[81] Response to the Appeal, para. 37.
[82] Prosecution Submissions on the Appeal, para. 6.
[83] Appeal, paras 19-20.
[84] *Brđanin* Appeal Decision, para. 31.
[85] Appeal, para. 19. *See also* Appeal, paras 15-20, 25-29; Reply to the Prosecution Submissions on the Appeal, para. 6.

the Rules would constitute a violation of his right against self-incrimination under Article 21(4)(g) of the Statute.[86]

36. The Appeals Chamber notes that the *chapeau* to Article 21(4) of the Statute relates the rights listed thereunder to "the determination of any charge" against an accused. Thus, whereas Article 21(4)(g) of the Statute operates to prohibit the compulsion of an accused's testimony in his own proceedings, it does not, *sensu stricto*, preclude the possibility of an accused being compelled to testify in other proceedings, which do not involve the determination of charges against him. Thus, Article 21(4)(g) of the Statute does not as such operate to prohibit the compulsion of Tolimir's testimony in the *Karadžić* case.[87]

37. The Appeals Chamber further notes that the right against self-incrimination is a universally recognized guarantee comprising part of the right to a fair trial which is enshrined in international human rights treaties.[88] The underlying purpose of this right is to protect an accused from forced self-exposure to criminal prosecution.[89] However, under national laws and the jurisprudence of international judicial bodies, the right against self-incrimination does not translate into an indiscriminate immunity from *subpoena ad testificandum*. Thus, the European Court of Human Rights ("ECHR") has held that the rationale for the right against self-incrimination "lies, *inter alia*, in protecting the 'person charged' against improper compulsion by the authorities."[90] A person, therefore, may not refuse to take the witness oath on the basis of his fears of self-incrimination if it is open to him to specifically refuse to answer potentially self-incriminating questions.[91] Civil law

[86] Appeal, paras 17, 30-31. *See also* Reply to the Prosecution Submissions on the Appeal, para. 2.

[87] The Appeals Chamber notes that the issue of whether an accused or appellant may be compelled to testify in other proceedings has not to date arisen before it for consideration. Certain trial chambers of the International Criminal Tribunal for Rwanda ("ICTR") have declined the requests of accused to compel the testimony of other accused involved in different proceedings before that tribunal. *See Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Postpone or Compel the Testimony of Augustin Ngirabatware, 3 May 2010, paras 7-8; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion to Postpone or Compel the Testimony of Casimir Bizimungu, 7 April 2010, paras 6-7; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9 March 1998, p. 3; *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on a Motion for Summonses and Protection of Witnesses Called by the Defence, 17 February 1998, pp. 2-3 (collectively "ICTR trial decisions"). The Appeals Chamber recalls, however, that neither the Appeals Chamber nor the Trial Chamber is bound by the ICTR trial decisions. *See Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 114 ("decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other"). Furthermore and in any event, the Appeals Chamber does not consider the ICTR trial decisions to be persuasive in determination of the issues presently before it, particularly in view of the limited analysis presented therein. *Cf. Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 24. *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR98*bis*.1, Judgement, 11 July 2013, para. 94.

[88] *See* Article 14(3)(g) of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights; Article 8(2)(g) of the American Convention on Human Rights.

[89] *See Case of Jalloh v. Germany*, ECHR, Application No. 54810/00, Judgment, 11 July 2006 ("*Jalloh* Judgement"), para. 100.

[90] *Serves v. France*, ECHR, Application No. 82/1996/671/893, Judgment, 20 October 1997 ("*Serves* Judgement"), para. 46.

[91] In the *Serves* case, the applicant was called as a witness in proceedings in which he had initially been charged as an accused. He declined to take the oath as a witness on the basis that some of his evidence might be self-incriminating and

countries have accepted that accused persons may be called and compelled to appear as witnesses in criminal proceedings which do not involve criminal charges against them, but are entitled to testimonial privilege; specifically, they may not be compelled to answer self-incriminating questions.[92] In common law jurisdictions accused may be compelled to appear and give evidence in criminal proceedings against other accused being tried separately.[93] Whereas witnesses may be compelled to answer potentially self-incriminating questions, some countries have strictly limited the scope of this compulsion,[94] while other countries have excluded the use against the witnesses of any potentially self-incriminating evidence adduced during the proceedings, known in these jurisdictions as use immunity.[95]

38. Thus, for example, in Australia and the UK, the ability to invoke the privilege against self-incrimination is contingent upon the existence of a real and appreciable danger to the witness and not one of an imaginary or insubstantial character. Specifically, a mere statement by a witness that the answer may tend to incriminate him/herself is not sufficient to support the claim for privilege against self-incrimination; the court must be satisfied that there is reasonable ground and that the

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was fined. The ECHR found that as it would have been admissible for the applicant to refuse to answer potentially incriminating questions from the judge and as the purpose of the fine was to ensure that his statements were truthful, rather than to force him to give evidence, there was no violation of his right against self-incrimination. *Serves* Judgement, paras 43-47.

[92] In German law an accused may give evidence in criminal proceedings other than against himself. Pursuant to section 55(1) of the German Code of Criminal Procedure (*Strafprozeßordnung* (*StPO*)) the accused testifying in such proceedings may reject giving testimony, if, *inter alia*, he or she would incriminate himself or herself. The German Federal Supreme Court has clarified that a co-accused cannot be heard as a witness on the acts of another accused in the same criminal proceedings. *See* German Federal Supreme Court in Criminal Matters (*Bundesgerichtshof in Strafsachen* (*BGHSt*)) volume 10, p. 8. Similarly, pursuant to Articles 118 and 120 of the Bulgarian Penal Procedure Code, last amended SG. 13/11 Feb 2011, an accused may be called and compelled to appear as a witness in criminal proceedings, but, pursuant to Article 121 of the Penal Procedure Code he or she shall not be compelled to answer self-incriminating questions. *See also* Criminal-Procedure Code of the Russian Federation, No.174-FZ of December 18, 2001, Article 56(3), (4), (6), and (7).

[93] In English law, pursuant to section 1 of the Criminal Evidence Act 1898 "[a] person charged in criminal proceedings shall not be called as a witness in the proceedings except upon his own application". The Criminal Evidence Act was subsequently amended with the addition of section 76(A) in the Police and Criminal Evidence Act 1984, inserted by section 128(1) of the Criminal Justice Act 2003. In commenting on this amendment the case of *R. v. Finch* [2007] EWCA Crim 36, para. 16 states the following: "[...] The new rule, and for that matter the decision in *Myers*, were designed to meet the problem faced by defendant A who, if charged in the same trial as B, could not call B into the witness box because section 1 of the 1898 Act prevents B from being called except on his own application. That obstacle, however, does not exist except where A and B are tried together. It does not exist once B has pleaded guilty. A can then call B and B is compellable". In Australia, the Evidence Acts of Victoria, Tasmania, and New South Wales provide that "[a]n associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant". *See* Evidence Act, Victoria (No. 47 of 2008), section 17(3); Evidence Act, Tasmania (No. 76 of 2001), section 17(3); Evidence Act, New South Wales (No. 25), section 17(3). Furthermore, the Canadian Supreme Court has held that, provided the preponderant purpose of subpoenaing such persons to testify is *not* to obtain self-incriminating information for subsequent use against them, persons separately charged with an offence are compellable as witnesses at the preliminary inquiries and criminal trials of other persons charged with the same offence, as they would be entitled to the available immunity from the subsequent use against them of any self-incriminating information emerging in those proceedings. *See R. v. Jobin* [1995] 97 C.C.C. (3d) 97 (S.C.C.), paras 36-37; *R. v. Primeau* [1995] 97 C.C.C. (3d) 1 (S.C.C.), paras 20-21. *See R. v. Papadopoulos* [2006] CanLII 49055 (ON SC), paras 9-12; *R. v. S. (R.J.)* [1995] 1 R.C.S. 451, pp. 452, 566, 617, 630-632. *See also Columbia Securities Commission v. Branch* [1995] 2 RCS 3, pp. 14-16.

[94] *See infra*, para. 38.

[95] *See infra*, paras 39-40.

objection is taken *bona fide*, however, once so satisfied it must uphold the privilege.[96] The proper procedure in a claim for privilege is to object to each question as it is asked.[97]

39. In the United States, the Fifth Amendment to the Constitution of the United States provides in relevant part that "[n]o person shall be [...] compelled in any criminal case to be a witness against himself".[98] The U.S. Federal Immunity Statute provides that:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to–
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> (1) a court or grand jury of the United States,
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> [...]
>
> and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no other testimony compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[99]

In this context, the Supreme Court of the United States of America ("US Supreme Court") has concluded that the compulsion of self-incriminating information is not invalidated by the overarching Fifth Amendment right against self-incrimination once adequate legislative provisions are in place to afford the compelled witness a degree of protection commensurate with that which the witness would have received had he been able to invoke testimonial privilege.[100] The US Supreme Court held that in order to meet this standard, the legislative provision must guarantee the witness immunity from direct use, as well as indirect or derivative use, of the compelled incriminating information against him in subsequent criminal proceedings.[101]

40. Canada has adopted a similar approach. Under Section 5 of the Canada Evidence Act, a witness may not be excused from answering a question on the ground that the answer may tend to incriminate him, but the answer so given shall not be used or admissible in evidence against him in

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[96] *Den Norske Bank A.S.A. v. Antonatos* [1999] Q.B. 271 ("*Den Norske* Judgement"), pp. 285-287; *Accident Insurance Mutual Holdings Ltd. v. McFadden* (1993) 31 N.S.W.L.R. 412, pp. 420-423. The UK House of Lords approvingly cites the *Den Norske* Judgement in *Coogan v. News Group Newspapers Ltd.* [2012] EWCA Civ. 48, pp. 856-857.
[97] *Den Norske* Judgement, p. 287.
[98] U.S. Const. amend. V ("Fifth Amendment").
[99] United States Code, 2006 Edition, Supplement 4, Title 18 – Crimes and Criminal Procedure, section 6002 ("18 USC 6002").
[100] *Kastigar v. United States* (1972) 406 U.S. 441 ("*Kastigar* Judgement"), pp. 450-451 (internal quotation marks omitted). *See also Gardner v. Borderick* (1968) 392 U.S. 273 ("*Gardner* Judgement"), p. 276.
[101] *Kastigar* Judgement, pp. 453-454. *See also Gardner* Judgement, p. 276. *See also Counselman v. Hitchcock*, (1892) 142 US 547, pp. 585-586.

any criminal trial or other criminal proceeding taking place thereafter, other than a prosecution for perjury or for giving contradictory evidence.[102]

41. The ECHR has determined that the right against self-incrimination is not solely concerned with the self-incriminating nature of the information *per se*, but rather the purpose for which such information is being sought or the use to which such information is ultimately put.[103] Specifically, the purposive focus of the right is to ensure that self-incriminating information is not compelled from a witness for subsequent use against that witness in criminal proceedings.[104] Accordingly, there would be no violation of the right against self-incrimination once adequate legislative safeguards exist against the use of such information against the compelled witness in subsequent criminal proceedings.[105]

42. The Appeals Chamber also notes that the Rome Statute and the ICC's Rules of Procedure and Evidence ("ICC Rules") possess provisions similar in effect to Article 21(4)(g) of the Tribunal's Statute, and Rules 54, 77, and 90(E) of the Tribunal's Rules. Thus, Article 67(1)(g) of the Rome Statute is in *pari materia* with the Article 21(4)(g) of the Tribunal's Statute. Rule 65 of the ICC Rules provides that witnesses appearing before the ICC are compellable to testify unless they fall within the categories of persons granted testimonial privilege under the Rome Statute or ICC Rules. The ICC Rules expressly confer testimonial privilege in relation to privileged communication and information,[106] and upon the spouses, children, and parents of an accused.[107] However, neither the Rome Statute nor the ICC Rules expressly grant testimonial privilege to accused persons in other ongoing cases before the ICC. Furthermore, Rule 74(3) of the ICC Rules allows a chamber to require a witness to answer potentially self-incriminating questions after assuring him that the information provided (i) will be kept confidential and not disclosed to the public; and (ii) will not be used directly or indirectly against him in any subsequent prosecution except for false testimony and contempt.[108] Thus, similar to Rule 90(E) of the Rules, Rule 74(3) of the ICC Rules allows for the compulsion of potentially self-incriminating witness testimony with the expressed prohibition against its direct and indirect use in any subsequent prosecution of that witness.

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[102] Canada Evidence Act, R.S.C., 1985, c. C-5 ("Canada Evidence Act").
[103] *See Jalloh* Judgement, paras 100-101; *Saunders v. United Kingdom*, ECHR, Application No. 19187/91, Judgment, 17 December 1996 ("*Saunders* Judgement"), para. 71. *See also Saunders* Judgement, paras 67-70, 72-76.
[104] *Saunders* Judgement, paras 67-76.
[105] *O'Halloran and Francis v. United Kingdom*, ECHR, Application Nos 15809/02, 25624/02, Judgment, 29 June 2007, paras 53-62. *See also Jalloh* Judgement, paras 100-101.
[106] *See* Rule 73 of the ICC Rules.
[107] *See* Rule 75 of the ICC Rules.
[108] *See* Articles 70 and 71 of the Rome Statute.

43. The immunity from prosecution guaranteed under Rule 90(E) of the Rules clearly prohibits the subsequent direct use of any self-incriminating statements compelled under the provision against the witness in criminal proceedings other than those concerned with false testimony. Thus, where an accused or appellant is compelled to make self-incriminating statements under Rule 90(E) of the Rules, the Prosecution is prohibited from directly relying on such statements in the accused's or appellant's own case. Furthermore, in view of the fact that the underlying purpose of the immunity under Rule 90(E) of the Rules is to protect a witness from the subsequent use of such statements against him, and considering that the laws of various national and international jurisdictions reflect that incriminating statements may be compelled from a witness only where adequate safeguards exist against the subsequent use of such statements against the witness, the Appeals Chamber finds that the immunity under Rules 90(E) of the Rules must be interpreted also as a prohibition against the derivative or indirect use of the compelled statements in any subsequent prosecution of the witness other than for false testimony. Testimony compelled under Rule 90(E) of the Rules therefore cannot be used by the Prosecution as a basis for subsequent investigations from which other incriminating evidence may be derived and then used against the accused or appellant.

44. Furthermore, regarding the issue of inadvertent self-incrimination, the Appeals Chamber emphasizes that in the Impugned Decision the Trial Chamber expressed that it "will be cognisant of the fact that Tolimir is currently involved in appeals proceedings before the Appeals Chamber and will ensure his rights are safeguarded."[109] Moreover, in the interests of justice in this particular case, particularly in view of the fact that Tolimir is a self-represented appellant, any self-incriminating testimony inadvertently provided during Tolimir's testimony in the *Karadžić* case shall not be used as evidence during his appeal or any subsequent proceedings against him, except for false testimony.

45. Accordingly, as previously discussed,[110] considering that national and international jurisdictions have recognised that the right against self-incrimination is adequately protected if adequate immunity from prosecution for compelled self-incriminating statements is provided and taking into account the nature of the protection provided by Rule 90(E) of the Rules, the Appeals Chamber finds that the compulsion of an accused's or appellant's testimony under Rule 90(E) of the Rules in another case before the Tribunal is not inconsistent with the right against self-incrimination under Article 21(4)(g) of the Statute. Any self-incriminating information potentially emerging during Tolimir's testimony in the *Karadžić* case, therefore, could not be used directly or indirectly against Tolimir in his own case. Thus the Prosecution would be prohibited from attempting,

[109] Impugned Decision, para. 22.
[110] *Supra*, paras 37-42.

pursuant to Rule 115 of the Rules, to tender into evidence in the *Tolimir* case any self-incriminating information derived from Tolimir's testimony in the *Karadžić* case, or any evidence derived therefrom. The Appeals Chamber therefore finds that Tolimir's Assertion of Testimonial Privilege on the basis of the right against self-incrimination fails.

46. The Appeals Chamber notes Tolimir's Assertion of Testimonial Privilege on the basis of the presumption of innocence, specifically, that the Trial Chamber misinterpreted his argument that "the warning under Rule 90(E) itself represents a violation of the presumption of innocence", that the presumption of innocence applies until his guilt is confirmed by a final judgement, and that the Trial Chamber failed to consider whether he had a right not to testify in other cases before the Tribunal.[111] In light of its finding made above that the compulsion of an accused's or appellant's testimony under Rule 90(E) of the Rules in another case before the Tribunal is not inconsistent with the right against self-incrimination under Article 21(4)(g) of the Statute,[112] the Appeals Chamber finds that these submissions are moot.

47. The Appeals Chamber also notes Tolimir's assertion that the fact that no accused in an ongoing case before the Tribunal has ever been subpoenaed to testify in another case before the Tribunal, and the fact that neither the Prosecution nor any of the defence teams in any of the cases in the Tribunal's history has ever made such a request, is indicative of a binding Tribunal policy against the measure.[113] The unprecedented nature of a proposed measure does not *per se* equate to a policy of binding abstention from that measure. The decision whether to call a witness to testify is contingent upon a range of considerations, which may or may not result in a witness being called. This is equally applicable to the measure of summoning an accused or convicted person to testify in another case before the Tribunal. As the Prosecution submits, Tolimir's argument "ignores the factors such as reliability, credibility and necessity, which inform the decision to call an accused or convicted person to testify in the trial of another accused".[114]

48. The Appeals Chamber further notes Tolimir's Assertion of Testimonial Privilege on the basis that subpoenaing him to testify in the *Karadžić* case would place him at risk of contempt proceedings, as well as the risk of prosecution for false testimony under Rule 90(E) of the Rules. The Appeals Chamber emphasises that, as discussed earlier,[115] Tolimir's special interests as an appellant involved in ongoing proceedings before the Tribunal are properly safeguarded by Rule 90(E) of the Rules. Consequently, no reason exists to provide Tolimir with protection against

[111] Appeal, paras 16-18; Reply to the Prosecution Submissions on the Appeal, paras 12-18.
[112] *Supra*, para. 45.
[113] Appeal, paras 21-23; Reply to the Prosecution Submissions on the Appeal, paras 7-10.
[114] Prosecution Submissions on the Appeal, para. 4.
[115] *Supra*, paras 34-35, 43-45.

charges for contempt or false testimony exceeding that of other witnesses before the Tribunal. Accordingly, this submission fails.

49. The Appeals Chamber also notes Tolimir's submission that to subpoena him to testify in the *Karadžić* case contravenes the Tribunal's case law, which clearly states that an accused is not obliged to cooperate with the Prosecution in the absence of a plea agreement.[116] The Appeals Chamber notes that as a subpoena is an order of the court, compliance with a subpoena constitutes compliance with an order of the court, not cooperation with the Prosecution. The Appeals Chamber therefore finds that this submission is without merit.

50. The Appeals Chamber further notes Tolimir's Assertion of Testimonial Privilege on the basis that compelling him to testify in the *Karadžić* case constitutes a violation of the principle of equality of arms.[117] In this context, Tolimir maintains that (i) if the Prosecution is unable to subpoena him to testify in his own case, Karadžić should not be allowed such a measure in the *Karadžić* case; and (ii) if he were a party to a multi-accused case his co-accused would be unable to subpoena him and accordingly that benefit should not be made available to an accused in another case.[118] As indicated earlier in this decision,[119] international law and the laws of various national jurisdictions indicate the permissibility of distinguishing between an accused's own case and the cases of other accused persons for the purposes of compelling an accused's testimony. The Appeals Chamber emphasises that an accused or appellant may be compelled to testify in other cases before the Tribunal due to the fact that any self-incriminating information elicited in those proceedings cannot be directly or derivatively used against him in his own case. By contrast, an accused or appellant is not compellable in his own case, whether at the request of his co-accused or the Prosecution, as this may violate his right under Article 21(4)(g) of the Statute. Accordingly, this submission fails.

51. Finally, the Appeals Chamber recalls that in certain limited instances testimonial privilege and immunity from subpoena, have been granted to specific classes of persons.[120] However, in such instances, the grant of testimonial privilege was justified either as a matter of law[121] or because the

[116] Appeal, para. 28, *citing Blagojević* Decision, para. 24. *See also* Reply to Prosecution Submissions on the Appeal, para. 10.
[117] Appeal, paras 25, 30-31.
[118] Appeal, paras 25, 30-31.
[119] *Supra*, paras 37-42.
[120] *See e.g., Brđanin* Appeal Decision, paras 29-55.
[121] It has been held in particular that ICRC has, under customary international law, a confidentiality interest and a claim to non-disclosure in judicial proceedings of information relating to its work in possession of ICRC employees. *Simić* Decision, paras 72-74.

necessity of testimonial privilege for the protection of some critical interest was demonstrated.[122] However, in the instant case, Tolimir has failed to demonstrate that such immunity is necessary, particularly in view of the fact that Rule 90(E) of the Rules adequately safeguards him, through the immunity guaranteed under this Rule, from the adverse consequences of any potentially self-incriminating statements that he might make while testifying in the *Karadžić* case.

VI. DISPOSITION

52. For the foregoing reasons, the Appeals Chamber **DENIES** the Appeal, and **UPHOLDS** the Impugned Decision.

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

Done this 13th day of November 2013,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding

[Seal of the Tribunal]

[122] In the *Brđanin* Appeal Decision, the Appeals Chamber granted immunity from subpoena to war correspondents on the basis that compulsion of their testimony could compromise the public interest. *Brđanin* Appeal Decision, paras 29-55. The Appeals Chamber determined that subpoenaing war correspondents could significantly "impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern", and that the Appeals Chamber would "not unnecessarily hamper the work of professions that perform a public interest". *Brđanin* Appeal Decision, para. 44.

SEPARATE OPINION OF JUDGE TUZMUKHAMEDOV

1. While I support the outcome of this decision, I wish to make a statement regarding the relationship between Article 21(4)(g) of the Statute and Rule 90(E) of the Rules as well as their respective scope.

2. In light of the wording contained in the *chapeau* to Article 21(4) of the Statute that an accused's rights enshrined in this provision are guaranteed "[i]n the determination of any charge" against him, I agree with the conclusion in the present decision that Article 21(4)(g) of the Statute does not as such preclude compelling an accused to appear and testify as a witness in other proceedings.[123] However, as previously observed in ICTR trial chamber decisions, requiring an accused engaged in his own proceedings to appear as a witness in another case may affect his fundamental right not to be forced to testify against himself.[124] This is particularly evident if the second sentence of Rule 90(E) of the Rules is applied, which allows chambers to compel a witness to make self-incriminating statements.

3. In my view, it would therefore have been open to the Appeals Chamber to find that this rule should not apply to an accused with pending proceedings before the Tribunal who is called as a witness in another case. However, I accept and generally support the alternative approach adopted in the present decision, according to which Rule 90(E) of the Rules is applied in such situations and interpreted broadly to preclude any direct and indirect use of compelled self-incriminating statements against the accused except for false testimony.[125] While this interpretation may go beyond the strict wording of the third sentence of Rule 90(E) of the Rules, it demonstrates a defendant-friendly understanding of the rule and provides proper safeguards to ensure that self-incriminating testimony, which is compelled from an accused who appears as a witness in another case, cannot under any circumstances be used against him in his own proceedings before the Tribunal.

4. The present decision further acknowledges that, regardless of the second sentence of Rule 90(E) of the Rules, those accused whose proceedings are pending before the Tribunal are in a unique position and may also harbour legitimate concerns about "inadvertent" self-incrimination when appearing as witnesses in other cases. The third sentence of Rule 90(E) of the Rules cannot apply here as it only prohibits the subsequent use of self-incriminating witness statements where

[123] *See* Decision, para. 36.
[124] *See* references provided in fn. 87 of the Decision. While ICTR trial jurisprudence may not be binding on this Appeals Chamber, the propriety of attaining judicial harmony with the sister institution may call for considerate attitude towards its pronouncements on relevant matters.
[125] *See* Decision, para. 43.

such statements have been *compelled*. The present decision solves this dilemma by finding that, in the interests of justice and particularly in view of the fact that Tolimir is self-represented, even self-incriminating evidence inadvertently provided by him during his testimony in the *Karadžić* case shall not be used against him except for false testimony.[126]

5. I support this outcome because it again demonstrates a defendant-friendly approach to the issue at hand, albeit one that arguably transcends not only the limits of Rule 90(E) of the Rules, but also the protection envisaged by other domestic laws and international norms as discussed in the present decision.[127] However, I note that the present decision concerns an accused whose proceedings are currently pending before the Appeals Chamber. It is therefore appropriate that the Appeals Chamber assure Tolimir that nothing that he may say during his testimony in the *Karadžić* case will be used in the appeals proceedings against him. In my view, however, this leaves open the question of how to resolve cases in which an accused with ongoing first instance proceedings before the Tribunal is called to testify in another case.

Judge Bakhtiyar Tuzmukhamedov

Dated this 13th day of November 2013,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

[126] *See* Decision, para. 44.
[127] *See* Decision, paras 37-42.