



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: 23 December 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: 23 December 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

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

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Ratko Mladić

Mr. Branko Lukić
Mr. Miodrag Stojanović

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 “Motion of Ratko Mladić for Certification to Appeal Decisions of 11 December 2013 by Karadžić Chamber” filed by counsel for Ratko Mladić on 18 December 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. The Accused filed his “Motion for Subpoena: General Ratko Mladić” on 18 April 2013 (“Mladić Subpoena Motion”). On 5 July 2013, the Chamber informed the parties that it would postpone the determination of the Mladić Subpoena Motion until such time as the Appeals Chamber issued its decision on Zdravko Tolimir’s appeal of this Chamber’s decision compelling Tolimir to testify in the present case.¹

2. On 13 November 2013, the Appeals Chamber issued its “Decision on Appeal Against the Decision on the Accused’s Motion to Subpoena Zdravko Tolimir” (“Tolimir Appeal Decision”), in which it denied Tolimir’s appeal and held that the protection against self-incrimination, afforded to the Tribunal’s accused pursuant to Article 21(4) of the Tribunal’s Statute (“Statute”), does not preclude the possibility of accused being compelled to testify in proceedings which do not involve the determination of the charges against them.²

3. On 11 December 2013, the Chamber issued its “Decision on Accused’s Motion to Subpoena Ratko Mladić” (“Decision”), wherein it found that the requirements for the issuance of a subpoena to Mladić had been met.³ The Chamber further considered that Mladić’s submissions relating to his ill health and his commitments to his own case did not rise to such a level that the Chamber should exercise its discretion against issuing a subpoena to Mladić.⁴

¹ See Hearing, T. 40841–40842 (5 July 2013). See also Decision on Accused’s Motion to Subpoena Zdravko Tolimir, 9 May 2013; Decision on Tolimir Request for Certification to Appeal Subpoena Decision, 4 June 2013 (“Tolimir Certification Decision”).

² Tolimir Appeal Decision, para. 36. See also Tolimir Appeal Decision, para. 50: “[...] 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.”

³ Decision, para. 23.

⁴ Decision, para. 24.

4. In the Motion, Mladić moves for certification to appeal the Decision and the corresponding “Supboena ad Testificandum” also issued on 11 December 2013 (“Subpoena”).⁵ He first argues that the Decision and the Subpoena significantly affect the fair and expeditious conduct of the proceedings in which Mladić is involved and/or the outcome of his trial.⁶ In that respect, Mladić argues that i) the Decision and the Subpoena potentially force him to be “a witness against himself”, ii) the Chamber applied an incorrect analysis and standard in the Decision, iii) the issue of an accused involved in first instance proceedings being subpoenaed to testify is still unresolved; and iv) the Chamber failed to sufficiently consider Mladić’s health situation in deciding that he should be compelled to testify.⁷ Mladić further contends that an immediate resolution by the Appeals Chamber may materially advance the proceedings against him.⁸ In that regards, Mladić submits that if he “is compelled to testify and inadvertently incriminates himself, the damage would be done and would be irreversible, as the two proceedings are so interrelated, with prosecution counsel common to both cases, that the knowledge gained could not be contained to the Karadžić case”.⁹

5. On 19 December 2013, the Chamber orally requested expedited responses from the parties by 20 December 2013.¹⁰

6. The Accused filed the “Response to Application of General Ratko Mladić for Certification to Appeal Subpoena Decision” on 19 December 2013 (“Accused Response”). He states that while he does not oppose the Motion in principle, he requests that the Chamber take into consideration the fact that he wishes to testify as the last witness in his trial.¹¹

7. The Office of the Prosecutor (“Prosecution”) filed its “Prosecution Response to ‘Motion of Ratko Mladić for Certification to Appeal Decisions of 11 December 2013 by Karadžić Chamber’” on 20 December 2013 (“Prosecution Response”). The Prosecution submits that the Motion should be granted in that both prongs of the certification test are met.¹² In particular, the Prosecution argues that, given the significant overlap between the Third Amended Indictment and the indictment against Mladić, the Decision may implicate fair trial rights, in particular, the right of an

⁵ Motion, para. 4.

⁶ Motion, para. 9.

⁷ Motion, paras. 9–13.

⁸ Motion, para. 14.

⁹ Motion, para. 15.

¹⁰ T. 45425–45426 (19 December 2013).

¹¹ Response, paras. 1–2.

¹² Prosecution Response, para. 2.

accused not to testify against himself, and that, unlike the subpoena in relation to Tolimir, which was issued after Tolimir's own trial had closed, trial proceedings against Mladić are ongoing.¹³

II. Applicable Law

8. Decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.¹⁴ 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”.

9. A request for certification is “not concerned with whether a decision was correctly reasoned or not”.¹⁵ 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 establishes that both conditions are satisfied”.¹⁶ Under Rule 73(C), requests for certification must be filed within seven days of when the decision was filed or delivered.

III. Discussion

10. The Chamber first recalls its “Decision on Tolimir Request for Certification to Appeal Subpoena Decision” issued on 4 June 2013 (“Tolimir Certification Decision”), wherein it found that accused persons before the Tribunal have unique rights and minimum guarantees afforded to them under Article 21 of the Statute and therefore considered, by majority, Judge Morrison dissenting, that Tolimir had properly requested certification before the Chamber.¹⁷ The Chamber adopts the same position in relation to the Motion and accordingly finds, by majority, Judge Morrison dissenting on this point, that Mladić properly filed the Motion before the Chamber.

¹³ Prosecution Response, para. 2.

¹⁴ See Rule 72(B), 73(C) of the Rules.

¹⁵ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber's Decision on Motion for Admission of Documents from Bar Table 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-T, 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-T, 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-T, Decision on Motion for Certification of Rule 98 *bis* Decision, 15 April 2008, para. 8; *Prosecutor v. S. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 4.

¹⁶ *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.

¹⁷ Tolimir Certification Decision, para. 7; Dissenting opinion of Judge Howard Morrison.

11. The first prong of the Rule 73(B) test for certification is whether the Decision and the Subpoena involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial against the Accused. The main issue at stake here is whether the Chamber may issue a subpoena compelling Mladić to testify when he is an accused person currently involved in trial proceedings before the Tribunal. Given the importance of the above issue and Mladić's prospective testimony to the Accused's defence case, the Chamber is satisfied that the Decision involves an issue that would significantly affect the fair and expeditious conduct of these proceedings or the outcome of this trial. The Chamber therefore considers that the first prong of the test for certification has been met.

12. With respect to the second prong of the certification test, the Chamber must assess whether a resolution by the Appeals Chamber would materially advance these proceedings. However, the Chamber is of the view that any resolution by the Appeals Chamber at this stage would not materially advance these proceedings. Given that the Accused is scheduled to complete the presentation of his defence case at the end of February 2014,¹⁸ the Chamber is of the view that resolution by the Appeals Chamber at this stage would potentially delay the scheduled conclusion of the Accused's defence case for an unknown period. Further, the Appeals Chamber has already ruled on the very topic Mladić now wishes to bring before the Appeals Chamber.¹⁹ Accordingly, the Chamber does not consider that a resolution by the Appeals Chamber at this stage would materially advance the proceedings against the Accused.

13. For the foregoing reasons, the Chamber does not consider that the test for certification has been met.

¹⁸ T. 44385–44386 (3 December 2013); T. 45187 (16 December 2013).

¹⁹ Tolimir Appeal Decision, paras. 36, 45, 50.

IV. Disposition

14. Accordingly, the Chamber, pursuant to Rules 54 and 73 of the Rules, hereby **DENIES** the Motion.
15. Judge Morrison appends a separate opinion to this decision.

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



Judge O-Gon Kwon
Presiding


Dated this twenty-third day of December 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE HOWARD MORRISON

1. I reiterate that my divergence from the Majority's finding that Mladić properly filed the Motion stems from my understanding of Rules 2, 73(A) and 73(C) of the Rules. As the Majority had acknowledged in the Tolimir Certification Decision, Rule 2 allows no room for interpretation of the term "parties".²⁰ 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.²¹ In this light, while I agree with the Majority's ruling not to grant Mladić's request for certification to appeal the Decision and the Subpoena, I would have denied it on the basis that he has no standing in this instance.

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



Judge Howard Morrison

Dated this twenty-third day of December 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁰ See Tolimir Certification Decision, para. 7.

²¹ See Tolimir Certification Decision, para. 7, fn. 13, referring to *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.