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<b>CASE/AFFAIRE NO.</b>	IT-95-5/18-T (R. KARADŽIĆ)	<b>DATE</b>	14 January 2014
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0 Appeals Chamber/Chambre d'appel	<input checked="" type="checkbox"/> Case Manager/Commis aux affaires	<input checked="" type="checkbox"/> Self-representing Accused/ Accusé assurant lui-même sa défense <b>MR. R. KARADŽIĆ (1)</b>	
0 Trial Chamber I/Chambre de 1ère instance I		<input checked="" type="checkbox"/> Legal Advisers/ Conseillers juridiques <b>MR. P. ROBINSON</b> <b>MR. M. SLADOJEVIĆ</b> <b>MR. A. STEVANOVIĆ</b> <b>MR. A. VUJIĆ</b>	
0 Trial Chamber II/Chambre de 1ère instance II			
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0 Embassy/Ambassade			
<input checked="" type="checkbox"/> Pro Se Legal Liaison Officer/Juriste chargé de la liaison avec l'accusé <b>MS. V. TASEVA</b>			
<input checked="" type="checkbox"/> Other/Autre <b>Mr Branko Lukic/Mr Miodrag Stojanovic (Defence Counsel Mr R. Mladic)</b>			
<input checked="" type="checkbox"/> Registrar/Deputy Registrar/Greffier/Greffier adjoint	<input checked="" type="checkbox"/> VWS Coordinator/Coordinateur de la SVT		
<input checked="" type="checkbox"/> Senior Legal Officer/Juriste hors-classe <b>MS. N. GUIBERT</b>	<input checked="" type="checkbox"/> UNDU /QPNU		
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IT-95-5/18-T  
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14 January 2014

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**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

Case No. IT-95-5/18-T

**BEFORE 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

**Date Filed:** 13 January 2014

**THE PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

*Public with Confidential Annex A*

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**MLADIĆ URGENT MOTION FOR RECONSIDERATION OF DECISION ON  
MOTION FOR CERTIFICATION TO APPEAL**

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**KARADŽIĆ:**  
Office of the Prosecutor  
Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

**The Accused**  
Radovan Karadžić

**Standby Counsel**  
Richard Harvey

**MLADIĆ:**  
Office of the Prosecutor  
Mr. Dermot Groome  
Mr. Peter McCloskey

**Counsel for the Accused**  
Mr. Branko Lukic  
Mr. Miodrag Stojanovic

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**PROSECUTOR**

**v.**

**RATKO MLADIĆ**

*PUBLIC with CONFIDENTIAL ANNEX A*

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**MLADIĆ URGENT MOTION FOR RECONSIDERATION OF DECISION ON  
MOTION FOR CERTIFICATION TO APPEAL**

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The Accused, **RATKO MLADIĆ**, by and through his counsel of record, hereby files the instant Motion:

**I. INTRODUCTION & BRIEF BACKGROUND**

1. On the 18<sup>th</sup> of April 2013 the Karadzic Defence filed a “Motion for Subpoena: General Ratko Mladic.” (hereinafter “Karadzic Motion”) Said Karadzic Motion sought to compel via subpoena the testimony of Mr. Mladic in the Karadzic trial.

2. On 24 April 2013 Mladic Defence Counsel filed a motion with the Karadzic Chambers, seeking leave to respond to the Karadzic Motion. Said leave was granted orally by the Karadzic Chamber and on 14 May 2013 the Mladic Defence filed their Response. (hereinafter “Mladic Response”) This Mladic Response attached medical documentation relating to the Accused Mladic. Neither the Karadzic Prosecution nor Defence filed responses to the Mladic Response.

3. The Mladic Response set forth the following grounds of objection –

A. The Subject Motion Should be Denied as Ratko Mladic is accused of the same events as he would be forced to testify on: The

Mladic Response clearly states that there is an absolute right to remain silent and as both indictments, Mr. Karadzic's and Mr. Mladic's are in essence and form almost identical and due to the similarity the Accused would be forced to testify on the essential elements of his indictments and in detriment against himself.<sup>1</sup>

B. Forcing Mladic to testify would be contrary to judicial economy as the areas of questioning would not result in usable evidence, but would result in assertion of objections and the right to silence: The Pre-Trial Chamber has already considered the discretionally power over granting or not a request to compel the testimony of the Accused in other proceedings. The potential overlap of the subject matter of these proceedings and the charges brought against him allow the Accused not to answer the set of questions resulting in no probative value of his testimony. He could not answer questions that could be posed violating his rights since these questions relate directly towards his indictment and modes of liability.<sup>2</sup>

C. The poor health of Mr. Mladic prevents his ability to assist testify in any other proceeding: It has been established that the health of Mr. Mladic is greatly compromised and in a deteriorated state which makes participation in his own trial a trying task. His health issues also limit the time and capacity to work with his counsel.<sup>3</sup>

4. On 5 July 2013 the Karadzic Chamber informed the parties that it would postpone the determination of the motion until such a time as the Appeals Chamber issued its decision on the pending interlocutory appeal of Zdravko Tolimir (an ICTY appellant) in relation to a subpoena issued by the Karadzic Chamber for him to appear to testify as a defence witness in the Karadzic proceedings. (hereinafter "Tolimir Appeal")

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<sup>1</sup> Mladic Response, para. 5-7.

<sup>2</sup> Mladic Response para. 8-11.

<sup>3</sup> Mladic Response para. 12-14.

5. On 13 November 2013 the Appeals Chamber issued its Decision on the Tolimir Appeal, affirming the issuance of the subpoena and denying Tolimir's Appeal from the same. (hereinafter "Tolimir Appeal Decision")

6. In pertinent parts the Tolimir Appeal Decision states that neither the Rome Statute nor the ICC Rules expressly grant testimonial privilege to accused persons in the other ongoing cases before the ICC. In this sense, they indicate that 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, except for false testimony, so the Assertion of Testimonial Privilege on the basis of the right against self- incrimination fails and the Rule 90 (E) of the Rules adequately safeguarded the Appellant Tolimir.<sup>4</sup> The Appeals Chamber denied the submission in respect to the violation of principle of equality of arms given that there is a permissibility of distinguishing between an accused's own case and the case of other accused persons for the purposes of compelling an accused's testimony. Lastly, the separate opinion of the Tolimir Appeal Decision calls into question what the result would be where an accused with ongoing first instance proceedings before the Tribunal is called to testify in another case.<sup>5</sup>

7. On 11 December 2013 the Karadzic Trial Chamber issued its Decision on the Karadzic Motion, essentially granting the same over the objections raised. (hereinafter "Mladic Decision") Of note, this Mladic Decision stated:

- a. In exercising its discretion under Rule 90(E) to compel or not compel answers to certain questions the Karadzic Chamber will ensure that the rights of Mladic as an accused currently on trial are safeguarded.<sup>6</sup>
- b. It does not consider the health concerns of Mr. Mladic rise to such a level as to not issue the subpoena, since he has been deemed fit to attend his trial 4 days a week.<sup>7</sup>

<sup>4</sup> Tolimir Appeal Decision, para. 42-44, 51.

<sup>5</sup> Tolimir Appeal Decision, Separate Opinion of Judge Tuzmukhamedov, para. 5

<sup>6</sup> Mladic Decision para. 23

<sup>7</sup> Mladic Decision, para. 24-25 [emphasis added]

8. On 18 December 2013 the Mladic Defence filed a Motion with the Karadzic Chamber seeking certification to appeal the Mladic Decision. (hereinafter "Certification Motion") This Certification Motion set forth among other things that granting appeal would affect the fair and expeditious conduct of proceedings or ultimate outcome of trial because:

- a. The Mladic Decision used the incorrect standard from the Tolimir Appeal Decision, relating to an Appellant, rather than the open issue of an accused that was in the midst of first instance proceedings under the same indictment.<sup>8</sup>
- b. The Mladic Decision failed to assess the medical condition of Mladic sufficiently under the appropriate standard to see if he is able to testify, since the analysis of being able to attend trial is not the same, and that the medical documentation demonstrated problems that prevented him from being able to testify.<sup>9</sup>

9. On 19 December 2013, the Accused Karadzic filed a response not objecting to the Certification Motion, and the next day the Prosecution likewise filed a response asking for the Certification Motion to be granted as both prongs certification test were met.

10. On 23 December 2013 the Karadzic Trial Chamber denied the Certification Motion. (hereinafter "Denial Decision") In denying the same that Chamber said:

- a. The first prong for certification is met.<sup>10</sup>
- b. The second prong for certification has not been met, because any appeal would delay the conclusion of the Karadzic proceedings, and that Chamber's view that the Tolimir Appeal Decision covers the issues raised in the Certification Motion.

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<sup>8</sup> Certification Motion, para. 11-12

<sup>9</sup> Certification Motion para. 13

<sup>10</sup> Denial Decision para. 11

11. This Motion is filed on an urgent basis as time is of the essence. Mr. Mladic has been scheduled to testify on 28 January 2014.

## II. SUBMISSIONS & ARGUMENTS

12. This Motion is brought before the Karadzic Trial Chamber insofar as the Trial Chamber is supposed to ensure that the rights afforded to the Accused under the Statute and Rules are protected, and that justice is properly administered.

13. The obligation vested in the Trial Chamber to ensure the proper administration of justice cumulatively entails that any steps which the Trial Chamber takes are discretionary and in its overarching interest and commitment to ensuring that in the case of the accused, justice is not only done, but justice is seen to be done, including by the accused himself.<sup>11</sup>

14. The Trial Chamber has the inherent power to reconsider its own decisions if the requesting party demonstrates to the Chamber the existence of a clear error of reasoning in the decision, rendering its enforcement an injustice, or if the decision contains an error of law.<sup>12</sup>

15. Respectfully the Denial Decision needs to be reconsidered as its enforcement would be perceived as an injustice, as it is based on a clear error of reasoning.

16. Thus we believe in the instant case the Karadzic Trial Chamber needs to reconsider the Denial Decision, to protect the rights of Mr. Mladic and proper administration of justice as to Mr. Mladic.

17. The standard of an accused being deemed medically competent and fit to stand trial is not the same standard as to determine if a witness is competent to testify at trial. Under the relevant jurisprudence of the Tribunal, What is required from an accused to be deemed fit to stand trial is a standard of overall capacity allowing for a meaningful participation in the trial, provided that he or she is duly represented by counsel.<sup>13</sup>

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<sup>11</sup> *Prosecutor v Popovic*, No. IT-05-88-T, *Decision on the Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletic* (20 February 2007) at p. 3

<sup>12</sup> *Prosecutor v. Prlic, et al.* No. It-04-74-T, *Decision on the Stojic Defence Request for Reconsideration* (4 November 2008) p. 2

<sup>13</sup> *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 60

18. It is respectfully submitted that the medical documentation attached to the Mladic Response sets forth various indicators that Mr. Mladic's mental health is not such to permit him to testify as a witness, and that at the very least a medical examination of him is required.

19. Specifically, the Defence would highlight the following from the medical records contained in the Mladic Response (see **Confidential Annex A**)

20. Respectfully, the cumulative effect of these medical conditions renders Mr. Mladic unfit to testify as a witness in these proceedings.

21. The Denial Decision's focus on the delay in the conclusion of the Karadzic trial proceedings unduly and in error places the rights of Mr. Karadzic ahead of the rights of Mr. Mladic. Under the Statute of the Tribunal all accused are supposed to be equal. Mr. Mladic is entitled to Appellate review, and that right should not be curtailed or sacrificed due to mere expediency or inconvenience to the trial schedule of the Karadzic Proceedings.

22. Respectfully the Denial Decision errs as to the applicability of the Tolimir Appeal Decision to cases of an accused who is currently in the process of his first instance proceedings, such as Mr. Mladic. This matter is not settled under law. The error is best illustrated by the Separate Decision of the Tolimir Appeal Decision, which in pertinent part states –

“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.”<sup>14</sup>

23. Respectfully such an important issue, with such serious ramifications to the rights of Mr. Mladic and his health and own trial proceedings, should not be made based on a

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<sup>14</sup> Tolimir Appeal Decision, Separate Opinion of Judge Tuzmukhamedov, para. 5



Appeal Decision that itself demonstrates how unsettled and open the issue is. This is to the knowledge of counsel the first ever time that an accused is being forced to appear to testify in the identical case as his own, while his own trial is underway. Mr. Mladic could not be compelled to testify in his own proceedings, and the same protection should be applied in identical proceedings in the Karadzic trial chamber.

24. In addition, the final determination of whether Mr. Mladic is capable of testifying as a witness in these proceedings should be deferred until an appropriate examination by medical experts can be undertaken to assess his mental health and ability to testify, as well as the potential medical complications that could result to him from being forced to testify.

**III. CONCLUSION**

**WHEREFORE**, for the foregoing arguments, the Defence respectfully requests that the Chamber issue an order:

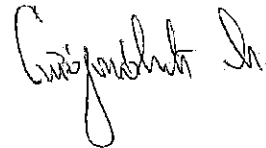
- a) Reconsidering the Denial Decision; and
- b) Deferring the testimony of Mr. Mladic until an appropriate medical expert examination can be conducted to determine his ability to testify, and the ramifications of forcing him to testify on his medical condition; and
- c) Certifying the matter for an immediate appeal so that the Appeals Chamber can decide the issue;

*Word Count: 2999*

**RESPECTFULLY SUBMITTED BY:**



Branko Lukić  
*Lead Counsel for Ratko Mladić*



Miodrag Stojanović  
*Co-Counsel for Ratko Mladić*

Dated this 13<sup>th</sup> of January 2014

**THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA**

**Case No. IT-95-5/18-T**

**BEFORE 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

**Date Filed:** 10 January 2014

**THE PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

**CONFIDENTIAL**

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**Annex A**

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17(1). The following are medical conditions the Defence believes would affect the ability of the Accused to testify as a witness:

**From the November 2011 examination of the Accused**

- a. "The neuropsychiatrist concludes that the patient suffers from vascular subcortical dementia and recommends further treatment to prevent ischemic illness of the brain."<sup>15</sup>

**From the October/November 2012 examination of the Accused<sup>16</sup>**

- a. "Verbal contact with the interviewee can be established for a moment but is difficult to maintain. The interviewee comes up with his own monologues, which, during exploration, he departs from with difficulty, and he tries to impose subjects of conversation on the interviewers. While doing so he verbalizes a multitude of current associations related to his own life, as well as associations that have nothing to do with the subject of conversation or the interview. The interviewee is tidy in appearance and his psychomotor functioning is slow. His attention is weak in terms of tenacity and vitality. The Interviewee cannot keep his attention focused on one subject or actively shift his attention from one subject to another. The impression is that his attention occasionally escapes control."<sup>17</sup>
- b. "his thinking is vague and accompanied by the presenting of a multitude of ideas, most of which are thematically linked to the interviewees life. He cannot stick to a given topic and he abandons and quickly loses the ideas he takes up. Sometimes he goes back to the initial idea, but not usually. Overall, the thoughts are rigid, interspersed with blockades and specific. The interviewee verbalizes his own theme and reacts with fury and anger when the interviewer tries to lead him back to the set theme. He tries to interview the interviewers and to give them tasks. His speech is loud, curt and rigid with clear neurological sequelae such as motor dysphasia and dysarthria. When he disagrees with the interviewer he reacts emotionally and bangs his hand on the table. The thought contents reveal a diffused mistrust which permeates the interviewee's entire mental activity. He believes that they wanted to kill him during the war and his closest

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<sup>15</sup> Mladic Response, Annex A, page 3

<sup>16</sup> By a different set of medical experts

<sup>17</sup> Mladic Response, Annex A, page 4

collaborators warned him about that. [...] These suspicions clearly indicate interpretive leanings which do not yet have the quality of insane ideas, although the interviewee is attached to them emotionally and to him they are reality. These convictions affect the interviewee's current behaviour and his plans: "I will establish who planned and who carried out the murder of my daughter Ana."<sup>18</sup>

- c. "Memory is reduced and memorization in particular has been weakened. Long-term recollection is good. The interviewee refers to numerous events from his youth and middle age and gives the names of places where they occurred, the persons involved and the dates. However, he cannot recall events which took place a day or a few days ago and, when he tries to do so, he becomes visibly emotionally tense. He cannot reproduce events of the recent past with precision and so offers invented events. For example: he talks of invented events linked to his arrest."<sup>19</sup>
- d. "In the domain of emotional reactions, there are turbulent and sudden reactions of the "short circuit" type with a lower tolerance to frustration and a tendency to react "here and now" accompanied by a lower ability to defer impulses and to control them rationally. In terms of psychological and organic functioning he correctly and instantly reproduces perceived material when he does not need to remember it. His visual functioning and perception is impaired and is based on memorizing and delayed reproduction. His Benton test shows that there is localized damage to the left hemisphere, since there is a significant disproportion (R:L=10:4) between left and right mistakes, which is reflected not only in the right side of the body but also in the efficiency of activities linked to the left hemisphere."<sup>20</sup>
- e. "The interviewee has suffered two cerebral vascular incidents and one infarct, and for years he has been suffering from diabetes and hypertension. Such severe physical pathology has undoubtedly affected the mental state the interviewee. Particular attention should be given to the second cerebral vascular incident, which occurred in 2008 when the

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<sup>18</sup> Mladic Response, Annex A, page 5

<sup>19</sup> Mladic Response, Annex A, page 5

<sup>20</sup> Mladic Response, Annex A, page 7

interviewee was 66, following which he did not receive adequate medical treatment.”<sup>21</sup>

- f. “This emotional reaction had all the qualities of a temporary mental disorder. The interviewee is thus not able to accept and distinguish the contents of the indictment at the emotional level. The attempt to confront him with the indictment was discontinued because of the serious risk that the same emotional reaction would be repeated and lead to a Transient Ischemic Attack (TIA). Given this emotional state, we consider that every appearance at trial causes the interviewee serious emotional stress. During the trial the interviewee can fall into a state of heightened emotional tension, as has happened on a number of occasions already. This is precisely the condition described during interviews with the interviewee and confrontation with the contents of the indictment. This emotional state is accompanied by physical symptoms, above all, a sharp rise in blood pressure, which could lead to a Transient Ischemic Attack (TIA), i.e. an interruption of the flow of blood to the brain. This could be the first phase of a new brain stroke that would certainly have more serious consequences than the previous one and possibly result in death.”<sup>22</sup>

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<sup>21</sup> Mladic Response, Annex A, page 8

<sup>22</sup> Mladic Response, Annex A, page 9