

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

**Case No. IT-95-5/18-T
(Prosecutor v. Karadzic)**

BEFORE TRIAL CHAMBER III

Before: Judge O-Gon Kwon, Presiding
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve

Registrar: Mr. John Hocking

Date Filed: 18 December 2013

THE PROSECUTOR

v.

RADOVAN KARADZIC

PUBLIC

**MOTION OF RATKO MLADIC FOR CERTIFICATION TO APPEAL DECISIONS OF
11 DECEMBER 2013 BY KARADZIC CHAMBER**

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

The Accused:
Mr. Radovan Karadzic

Counsel for Ratko Mladic:
Mr. Branko Lukić
Mr. Miodrag Stojanović

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I. INTRODUCTION

1. On 18 April 2013 the Accused Radovan Karadzic filed their “Defense Request for Leave to Respond to Motion for Subpoena: General Ratko Mladic” (hereinafter “Subject Motion”). The Karadzic Trial Chamber gave leave for the Defense of Ratko Mladic to Respond, and on 13 May 2013 a Response and objection to the Subject Motion was filed. (hereinafter “Mladic Response”)
2. On 11 December 2013, the Karadzic Trial Chamber issued the following (hereinafter collectively “11 December 2013 Decisions”):
 - a. Decision on Accused’s Motion to Subpoena Ratko Mladic; and
 - b. Subpoena Ad Testificandum.
3. The 11 December 2013 Decisions effectively granted the Subject Motion over the objections of the Mladic Response and purport to compel Mladic to appear to testify in the Karadzic proceedings at a future date to be determined.

4. Ratko Mladic (hereinafter “Mladic”) by and through his counsels, hereby respectfully requests certification to appeal the 11 December 2013 Decisions pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Tribunal (hereinafter “Rules”). Mladic contends that appellate resolution of the 11 December 2013 Decisions on an interlocutory basis is appropriate for the reasons set out further below, insofar as the most sacrosanct of rights and privileges afforded to an accused is at issue.

II. APPLICABLE LAW

5. Under ICTY Rule 73(B), a Trial Chamber “may grant ... certification [for appeal] if the decision:
- a. involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and,
 - b. for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”
6. “[T]he purpose of a request for certification to appeal is not to show that an impugned decision is incorrectly reasoned but rather to demonstrate that the two cumulative conditions set out in Rule 73(B) have been met.”¹ The party moving for certification must prove that both conditions are satisfied.² However, even “in a case where they are satisfied, certification remains in the discretion of the Trial Chamber.”³
7. In considering this motion, the Karadzic Trial Chamber should only consider whether the two factors of Rule 73(B) have been satisfied.

¹ *Prosecutor v. Stanišić & Simatović*, IT-03-69-PT, Decision on Prosecution’s Request for Certification to Appeal the Trial Chamber’s Decision on Protective Measures of 13 September 2007, 7 November 2007, p.3.

² *Prosecutor v. Delić*, IT-04-83-PT, Decision on Prosecution Request for Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend, 14 July 2006, p.2.

³ *Id.*

III. DISCUSSION

A. Granting Certification to Appeal will significantly Affect the Fair and Expeditious Conduct of the Proceedings or the Ultimate Outcome of the Trial.

8. At the outset, the Defence notes that the seven day deadline for filing of this motion, under Rule 73(c) has not expired and the motion is brought on a timely basis.
9. The Defense contends that the Karadzic Trial Chamber should grant immediate certification to appeal the 11 December 2013 Decisions, which significantly affect the fair and expeditious conduct of the proceedings and/or ultimate outcome of the trial. To delay would materially affect the proceedings as the outcome could have an impact on ability of the Accused to be compelled to testify and potentially inadvertently or otherwise incriminate himself, thus disenfranchising him from the protections that are afforded to him under the Statute of the Tribunal in his own trial proceedings, under the same Indictment, before the same Tribunal, as this potentially forces him to be a witness against himself.
10. Further, as the 11 December 2013 Decisions and the matters complained of affect the fundamental fairness of the proceedings, and affect the overall outcome of the trial, this matter is one that the Appeals Chamber must consider at this juncture in order to materially advance the proceedings.
11. If request for certification is granted, the Defense respectfully submits that its arguments will prevail in the Appeals Chamber, as it appears that the Karadzic Trial Chamber has used the incorrect analysis and standard in granting the Subject Motion, and has misapplied the guidance of the Appeals Chamber as to the recent Decision on Tolimir's Appeal of a Subpoena issued by the Karadzic Chamber.⁴ While the aforesaid Tolimir decision defined the issue as to persons with pending appeals, it left open the question of

⁴ *Prosecutor v. Karadzic*, IT-95-5/18-AR73.11 "Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir" 13 November 2013.

how to resolve cases in which an accused with ongoing first instance proceedings before the Tribunal is called to testify in another case.⁵

12. By using the same standard as in regards to Tolimir, the Karadzic Trial Chamber applied a standard that does not take adequately into account the unprecedented compulsion of a co-accused under the original indictment of Karadzic, can be compelled to testify while his own case is pending before another chamber of the Tribunal on an indictment essentially the same, and whether the provision of the 11 December 2013 Decisions that the Karadzic Chamber will safeguard Mladic's rights interferes with the obligation of the Mladic Chamber to safeguard his rights and ensure he is subjected to a fair trial.
13. Further, it is submitted the Karadzic Trial Chamber failed to assess the medical condition of Mladic sufficiently under the appropriate standard to see if he is able to testify, insofar as the analysis relied on findings he is able to stand trial in his own case, which is not the same thing. The Defense respectfully submits that the Karadzic Trial Chamber did not adequately examine the findings of the medical experts, attached as confidential and ex-parte Annex A to the Mladic Response, as it would relate to him testifying. Respectfully several parts demonstrate that Mladic would not be capable to testifying, due to his medical conditions.

B. An Immediate Resolution by the Appeals Chamber May Materially Advance the Proceedings.

14. Granting interlocutory appeal could prevent a miscarriage of justice and potential mistrial if the Karadzic Trial Chamber is ultimately found to have violated the rights of the Accused not to incriminate himself and be forced to testify against himself.
15. Further, if Mladic 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 Karadzic case.

⁵ *Id.*, separate opinion of Judge Tuzmukhamedov, para. 5

16. For the foregoing reasons it is submitted that a resolution on an interlocutory bases would avoid these consequences and the administration of justice would benefit from an appellate assessment of the Trial Chamber decision.

IV. RELIEF REQUESTED

17. WHEREFORE, for the foregoing arguments, the Defense respectfully requests certification to appeal the *11 December 2013 Decisions*, and to stay enforcement of the *Subpoena Ad Testificandum*.

Word Count: 862

RESPECTFULLY SUBMITTED:



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Co-Counsel for Mr. Ratko Mladic