

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: 14 January 2014

IN THE TRIAL CHAMBER III

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

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC WITH CONFIDENTIAL APPENDIX A

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

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The Accused:

Mr. Radovan Karadžić

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Mr. Richard Harvey

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

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

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v.

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I. Introduction

1. The Prosecution requests that the Trial Chamber reconsider its decision denying Ratko Mladić certification to appeal the Trial Chamber’s decision requiring him to testify in the *Karadžić* trial.¹ The Chamber made two clear errors in its Decision: by finding that the Appeals Chamber decision compelling Tolimir to testify in the *Karadžić* trial was dispositive of the issue; and by failing to consider relevant factors in concluding that appellate review would not materially advance the *Karadžić* proceedings. Reconsideration is also necessary to prevent a potential injustice.

2. The conflict between Karadžić’s right to examine witnesses under Article 21(4)(e) of the Statute and Mladić’s Article 21(4)(g) right against self-incrimination differs from the conflict in the Tolimir situation in at least two ways. Mladić is

¹ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Mladić Request for Certification to Appeal Subpoena Decision, 23 December 2013 (“Decision”). The Prosecution notes that Mladić has also

currently on trial under an indictment almost identical to the Karadžić indictment. In contrast, Tolimir's trial had concluded long before he was compelled to testify, and the *Tolimir* and *Karadžić* cases do not overlap to the same extent as that of *Karadžić* and *Mladić*. The Appeals Chamber has not directly addressed the present legal dilemma. Interlocutory appellate review will definitively determine whether Mladić's fair trial rights justify his refusal to testify and thus both materially advance these proceedings and ensure that a potential injustice is prevented.

II. Applicable Law

3. A party to a proceeding may request a trial chamber to reconsider a prior decision. A chamber possesses the inherent authority to reconsider its own decisions if the moving party satisfies it that there has been a clear error of reasoning, or if the particular circumstances justify reconsideration in order to prevent an injustice.²

III. Discussion

4. Although the Chamber, by majority, found that Mladić's application was proper under Rule 73(B) and that the first prong of the Rule 73(B) test had been met, the Chamber found that he had failed the second prong by failing to demonstrate that resolution by the Appeals Chamber would materially advance the proceedings.³

5. The Trial Chamber rested its conclusion on two factors: (i) the end of the presentation of Defence evidence in the *Karadžić* trial was imminent and review by the Appeals Chamber would potentially delay the scheduled conclusion of the Defence case; and (ii) "the Appeals Chamber has already ruled on the very topic Mladić now wishes to bring before the Appeals Chamber."⁴

6. The Chamber made two clear errors in reasoning. First, the Chamber erred in finding that the *Tolimir* Decision had decided the issues raised by the *Mladić* Defence.

sought reconsideration of the Decision. See, *Prosecutor v. Karadžić*, IT-95-5/18-T, Mladić Urgent Motion for Reconsideration of Decision on Motion for Certification to Appeal, 14 January 2014.

² See, e.g., *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Motion for Reconsideration and Request to Withdraw Evidence of KDZ486, 23 October 2013, para.7 (internal citations omitted).

³ Decision, paras.10-12.

⁴ Decision, para.12 (citing *Prosecutor v. Karadžić*, IT-95-5/18-T-AR73.11, Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013 ("*Tolimir* Decision"), paras.36, 45, 50).

Second, the Chamber erred in placing undue weight on the fact that the presentation of the Defence case in the *Karadžić* trial was nearing its end while failing to consider other relevant factors.

A. The Chamber erred in finding that the *Tolimir* Decision fully disposed of the issues raised by Mladić.

7. The *Tolimir* Decision was not dispositive of the issues presented by the *Mladić* Defence, a point confirmed by Judge Tuzmukhamedov in his separate opinion:

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 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.*⁵

The Appeals Chamber did not decide whether an accused *currently on trial* could be compelled as a witness in another trial, and did not decide on the issue in relation to the particular circumstances of Mladić providing evidence in the *Karadžić* trial.

8. Although language in the *Tolimir* Decision indicates that “an accused” may be compelled as a witness in another case,⁶ this does not translate into a blanket rule that any accused, in any circumstances, is a compellable witness in another case. Indeed, the Appeals Chamber cited jurisprudence from at least one national jurisdiction which makes clear that there may be circumstances that warrant a witness's exemption from the compulsion to testify, even where safeguards exist to prevent the subsequent use of self-incriminating testimony.⁷ Furthermore, because the issue was not before it, the

⁵ *Tolimir* Decision, Separate Opinion of Judge Tuzmukhamedov, para. 5 (emphasis added).

⁶ *Tolimir* Decision, paras. 43, 45, 48.

⁷ For example, in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 (cited in footnote 93 of the *Tolimir* Decision), at p.16, the majority of the Supreme Court of Canada held that if a witness can show any significant prejudice that may arise from the testimony (other than the possible subsequent use, which is protected by use and derivative use immunity) “such that his right to a fair trial will be jeopardized, then the witness should not be compellable.” It is evident that whether such prejudice can be shown will depend upon the particular circumstances. In another Supreme Court of Canada case, *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 3 (“*R v. S. (R.J.)*”), (cited in footnote 93 of the *Tolimir* Decision), at pp.469-470 Lamer J. held that the protections against the subsequent direct or indirect use of the testimony against the witness may not always be sufficient and that “courts retain the discretion to exempt witnesses from being compelled to testify, in appropriate circumstances.” This involves a balancing of interests and requires the person claiming the exemption to establish that in the circumstances, the prejudice to his or her interests overbears the necessity of obtaining the evidence. In the same case, Sopinka J. reached a similar conclusion, and identified a non-exhaustive list of factors relevant to determining whether an exemption from compulsion to testify is warranted (at pp.630-631).

Appeals Chamber did not address whether the particular circumstances of an accused involved in ongoing trial proceedings may justify a delay in the timing of his testimony in another case, in order to minimize the risk of prejudice arising from his compelled testimony.⁸

9. In this regard, there are significant differences between the *Tolimir* and *Mladić* situations. In light of the stage of the *Tolimir* proceedings, the Appeals Chamber was only concerned with ensuring that the Prosecution “would be prohibited from attempting, 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.”⁹ This is a relatively straightforward exercise, given the narrow scope of evidence permitted under Rule 115, and its infrequent invocation by the Prosecution. Unlike Tolimir, Mladić would be required to testify in a parallel case before (i) the close of the Prosecution case in his own trial; (ii) a decision under Rule 98bis; (iii) the defence case; and (iv) any Prosecution rebuttal. These differences require individual consideration on two levels: whether a subpoena should be issued, and, if it is, whether answer to questions involving a self-incriminatory statement should be compelled. Only the first difference is relevant to this motion.¹⁰

10. The Appeals Chamber could well find that the complexities of ensuring that no “derivative or indirect use”¹¹ be made of Mladić’s compelled testimony in his own trial while its evidentiary phase is ongoing requires a different balancing of the rights of the respective accused than the one it struck in the *Tolimir* Decision. In this regard the Prosecution does not agree with the *Mladić* Defence assertion that any “knowledge gained” by the Prosecution of any self-incriminating testimony by Mladić

⁸ One of the factors identified by Sopinka J. in *R v. S. (R.J.)* relevant to determining whether a witness should be exempted from being compelled to testify was whether the trial against that witness could reasonably be held before he or she is called to testify. *R v. S. (R.J.)*, at p.631.

⁹ *Tolimir* Decision para. 45.

¹⁰ See, e.g., *R. v. S (R.J.)*, at p.618 (Sopinka J. noting the distinction between the compellability of a witness versus the right of a witness to refuse to answer questions once in the witness box). The Prosecution notes that, if certification is denied, the same issues raised in this motion regarding whether or not Mladić should be compelled to testify in light of the particular circumstances, and the scope of his protections against self-incrimination are likely to arise in the context of determining the separate, but related question, of whether or not the Trial Chamber should compel Mladić to answer questions that may incriminate him pursuant to Rule 90(E).

¹¹ *Tolimir* Decision, para.43.

would result in “irreversible” damage to Mladić’s rights.¹² However, the combination of factors in this instance, including the fact that the *Mladić* and *Karadžić* trials are proceeding concurrently, the extent to which the allegations against the two Accused overlap, and the connections between the two trial teams, raise issues not present in the *Tolimir* scenario, and which could result in a different outcome. The Appeals Chamber could decide, for example, that Mladić should not be required to testify in the *Karadžić* case,¹³ or that his testimony should be delayed until the presentation of evidence in his case has concluded.¹⁴

11. The difficulties in protecting Mladić’s right against self-incrimination in these circumstances are exacerbated by the uncertain scope of Mladić’s self-incrimination protections. In the *Tolimir* Decision, the Appeals Chamber found that in the circumstances, “particularly” the fact that “Tolimir is a self-represented appellant,” the Chamber applied the protections against self-incriminating testimony not only to testimony specifically compelled pursuant to Rule 90(E), but also to any self-incriminating testimony Tolimir “inadvertently provided.”¹⁵ Even assuming for the sake of argument that the *Tolimir* Decision disposed of the general question of whether Mladić is a compellable witness in the *Karadžić* case, it is unclear whether this residual protection against self-incrimination applies to Mladić’s testimony. The already complex exercise of preserving Mladić’s right against self-incrimination in the circumstances of his ongoing trial is rendered virtually impossible without clarification from the Appeals Chamber as to the scope of those protections prior to his testimony.

B. The Chamber erred by placing undue weight on the fact that the presentation of Defence evidence in the *Karadžić* case was nearing its end.

12. In its Decision, the Chamber also demonstrated a clear error of reasoning by placing undue weight on a potential delay to the conclusion of the presentation of Defence evidence in the *Karadžić* case arising from interlocutory review¹⁶ while ignoring the possible delay resulting from a lack of immediate resolution by the

¹² *Prosecutor v. Karadžić*, IT-95-5/18-T, Motion of Ratko Mladić for Certification to Appeal Decisions of 11 December 2013 by Karadžić Chamber, 18 December 2013 (“Certification Motion”), para.15.

¹³ In the *Tolimir* Decision the Appeals Chamber raised this as a possibility, but found that immunity from subpoena was not necessary to adequately protect Tolimir’s rights. *Tolimir* Decision, para.51.

¹⁴ *See, supra*, fn 8.

¹⁵ *Tolimir* Decision, para.44.

Appeals Chamber, and failing to consider the potentially adverse impact of the Decision on Mladić's fundamental rights.

13. First, even if interlocutory review were to cause a delay in the conclusion of the presentation of the defence case, this would not necessarily delay the trial. If this matter were still pending before the Appeals Chamber at the conclusion of the remainder of the Defence case, the parties could proceed with their final submission preparations, and later incorporate any evidence emanating from Mladić's testimony should the Appeals Chamber find he is a compellable witness. As Mladić's testimony, although potentially important, represents a tiny fraction of the massive volume of evidence in this case, this trial need not be put on hold for the duration of any delay in hearing this evidence.

14. Moreover, interlocutory review may materially advance the *Karadžić* proceedings by avoiding time-consuming contempt proceedings, as the Trial Chamber itself found in light of Tolimir's continued refusal to comply with a subpoena:

Furthermore, given that Tolimir's continued unwillingness to comply with the Subpoena may result in contempt proceeding being initiated against him, the Chamber finds that an immediate resolution of this issue by the Appeals Chamber now, rather than at the end of time-consuming contempt proceedings, would materially advance the proceedings in this case.¹⁷

Once the issue was resolved by the Appeals Chamber, Tolimir testified and contempt proceedings were unnecessary. Although the present circumstances are similar,¹⁸ the Trial Chamber did not explain why it did not follow the same reasoning with respect to Mladić. The *Karadžić* trial is nearing its end. Nevertheless, its proceedings are materially advanced by appellate review of the Decision, especially given that Mladić's circumstances are different and more complicated than those of Tolimir.

15. Furthermore, the Chamber's exclusive focus on the impact of interlocutory review in the *Karadžić* proceedings fails to take into account the potential adverse impact of the Decision on Mladić's fundamental rights and the fairness of Mladić's

¹⁶ Decision, para.12.

¹⁷ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Tolimir Request for Certification to Appeal Certification Decision, 4 June 2013, para. 9.

own trial. Whether or not a strict interpretation of the language of Rule 73(B) indicates that the effect of the Decision on another ICTY trial is not a relevant consideration, the Chamber should not ignore the unique impact of this Decision on the fundamental rights of another ICTY accused in his own trial.

16. The Decision results in a situation in which Mladić is denied appellate review of a matter which, if it had arisen in his own case, would clearly meet the certification test. This is contrary to the spirit, if not the letter, of Rule 73(B). Furthermore, Mladić has now sought relief from the *Mladić* Trial Chamber seeking, *inter alia*, a protective order preventing him from being compelled to testify in the *Karadžić* case and an immediate appeal of the issue of his compellability in the *Karadžić* trial.¹⁹ The procedural uncertainty and potential delay arising from this motion and any resulting decision of the *Mladić* Trial Chamber further support the need for a definitive resolution of this issue by the Appeals Chamber. Given the fundamental nature of the rights at stake for both Accused, which are now potentially in conflict, the Appeals Chamber is the proper forum in which to resolve this matter now.

C. Reconsideration of the Decision is necessary in order to prevent an injustice and ensure Mladić's fundamental rights are protected.

17. In light of the fundamental rights Mladić seeks to protect, reconsidering the Decision to allow certification and Appeals Chamber direction will prevent a possible injustice from an erroneous decision. As the Appeals Chamber pointed out in the *Tolimir* Decision:

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.²⁰

Allowing the Appeals Chamber to consider Mladić's unique situation will similarly serve the interests of justice.

¹⁸ See, Confidential Appendix A.

¹⁹ *Prosecutor v. Mladić*, IT-09-92-T, Urgent Defence Motion Seeking that the Trial Chamber Intervene to Protect the Rights of the Accused in Relation to the Subpoena Issued by the Karadžić Chamber, 14 January 2014, para.14, Conclusions (a) and (c).

²⁰ *Tolimir* Decision, para. 11

IV. Relief Requested

18. The Prosecution requests the Trial Chamber to reconsider its Decision and for the reasons stated herein grant Mladić's Certification Motion.

Word Count (including Confidential Appendix A): 2691

A handwritten signature in black ink, reading "H. Uertz-Retzlaff". The signature is written in a cursive style with a horizontal line underneath.

Hildegard Uertz-Retzlaff
Senior Trial Attorney

Dated this 14th day of January 2014
The Hague, Netherlands

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CONFIDENTIAL APPENDIX A

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1. Upon service of the subpoena issued by the *Karadžić* Trial Chamber, Mladić stated that he was unwilling to appear to provide testimony.²¹

²¹ *Prosecutor v. Karadžić*, IT-95-5/18-T, Confidential Memorandum of Service, 12 December 2013.