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CASE/AFFAIRE NO.	IT-95-5/18-AR73.11 (R. KARADŽIĆ)	DATE	17 June 2013
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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-AR73.11

IN THE APPEALS CHAMBER

Before: A Bench of the Appeals Chamber
Registrar: Mr. John Hocking
Date: 17 June 2013

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

KARADZIC BRIEF ON APPEAL
OF ZDRAVKO TOLIMIR

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

Appellant:
Zdravko Tolimir

The Accused:
Radovan Karadzic

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1. Dr. Radovan Karadzic hereby responds to the *Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir* (11 June 2013).

2. Dr. Karadzic contends that (1) General Tolimir has standing to bring this appeal, (2) there is no immunity from process by persons accused at the Tribunal; (3) General Tolimir's right against self-incrimination is fully respected by Rule 90(E); and (4) the Trial Chamber had jurisdiction to issue the subpoena. He respectfully requests that the Impugned Decision be affirmed.

Procedural History

3. On 12 March 2013, after unsuccessfully trying to persuade General Tolimir to testify voluntarily, Dr. Radovan Karadzic filed his *Motion for Subpoena: General Zdravko Tolimir*.

4. In his motion, Dr. Karadzic indicated that General Tolimir was expected to testify that (1) he never informed Dr. Karadzic orally or in writing that prisoners from Srebrenica would be, were being, or had been executed; (2) about the telegram he sent on 9 July 1995 in which Dr. Karadzic authorized the VRS to enter the town of Srebrenica and full protection was to be ensured to UNPROFOR and the Muslim civilian population, with the civilian population and war prisoners being treated in accordance with the Geneva Conventions;¹ and (3) at that time there was no plan or expectation that Bosnian Muslims would be forcibly transferred or harmed in any way.²

5. Dr. Karadzic maintained that the information from General Tolimir was necessary for his defence to rebut the prosecution's claim that Dr. Karadzic had numerous sources from which he could have learned of the execution of prisoners from Srebrenica, including General Tolimir.³

6. Dr. Karadzic pointed out that the prosecution had introduced evidence that the Republic Communications Center log for 13-17 July 1995 indicated that every day the VRS security organ, of which General Tolimir was Chief, sent reports to the President. None of these reports were ever located.⁴ Dr. Karadzic contended that it was essential that he obtain the testimony of General Tolimir which would describe the nature and

¹ P2276

² *Motion for Subpoena: General Zdravko Tolimir* (12 March 2013) at paras. 10-11

³ *Motion for Subpoena: General Zdravko Tolimir* (12 March 2013) at para. 13

⁴ T27613; P2989

content of their oral and written contacts and establish that General Tolimir never informed him, orally or in writing, of the execution of prisoners from Srebrenica.⁵

7. On 22 March 2013, the prosecution filed a pleading in which it took no position on the motion for subpoena.⁶

8. On 8 April 2013, General Tolimir sought leave to file a response to the motion. In his response filed with his leave application, General Tolimir confirmed that he never informed Dr. Karadzic orally or in writing that prisoners from Srebrenica would be, were being, or had been executed.⁷ However, he objected to testifying on the grounds that as an accused whose case was pending on appeal, he could not be compelled to testify.⁸

9. On the same day, Dr. Karadzic requested that the Trial Chamber entertain the response of General Tolimir,⁹ and the prosecution indicated that it had no objection to the Chamber granting Tolimir leave to respond.¹⁰

10. On 9 May 2013, after granting leave to Tolimir to file his response, the Trial Chamber issued the Impugned Decision granting Dr. Karadzic's motion to subpoena General Tolimir.¹¹

11. On 15 May 2013, General Tolimir applied for leave to appeal the decision.¹²

12. The Trial Chamber solicited the views of the parties on whether General Tolimir had standing to seek certification to appeal.¹³ Both Dr. Karadzic¹⁴ and the prosecution¹⁵ took the position that General Tolimir had standing to appeal the decision.

13. On 4 June 2013, the Trial Chamber granted Tolimir certification to appeal. Judge Morrison dissented on the ground that Tolimir lacked standing to appeal because he was not a "party".¹⁶

⁵ *Motion for Subpoena: General Zdravko Tolimir* (12 March 2013) at paras. 13-15

⁶ *Prosecution Submission Regarding Motion for Subpoena to General Zdravko Tolimir* (22 March 2013).

⁷ *Motion to the Trial Chamber to Admit a Response and Response to Karadzic's Motion for Subpoena* (1 April 2013) at para. 18

⁸ *Motion to the Trial Chamber to Admit a Response and Response to Karadzic's Motion for Subpoena* (1 April 2013) at para. 24

⁹ T36793

¹⁰ T36827-28

¹¹ *Decision on Accused's Motion to Subpoena Zdravko Tolimir* (9 May 2013)

¹² *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 and Against the Subpoena* (15 May 2013)

¹³ T28688-89

¹⁴ *Memorandum on Standing of Witness to Seek Leave to Appeal Subpoena Decision* (23 May 2013)

¹⁵ *Prosecution Submission Regarding Tolimir Request to Suspend Subpoena and to Appeal Decision on Accused's Motion to Subpoena Zdravko Tolimir* (24 May 2013)

14. General Tolimir filed his appeal on 11 June 2013.¹⁷

The Impugned Decision

15. In the Impugned Decision, the Trial Chamber set forth the requirements for the issuance of a subpoena. The Trial Chamber recognized that Dr. Karadzic bore the burden of establishing that a legitimate forensic purpose existed for the issuance of a subpoena.¹⁸ It also recognized that Dr. Karadzic was required to demonstrate that the information was not available through other means and that he had made reasonable attempts to obtain General Tolimir's voluntary cooperation.¹⁹

16. The Trial Chamber acknowledged that subpoenas should not be issued lightly and should be a method of last resort.²⁰

17. The Trial Chamber then went on to determine if Dr. Karadzic had satisfied these requirements. It found that he had made reasonable efforts to obtain General Tolimir's cooperation.²¹ It further found that General Tolimir had information that was relevant to the issue of Dr. Karadzic's knowledge of the crimes that were committed after the fall of Srebrenica.²²

18. The Trial Chamber also found that the information possessed by General Tolimir as to what was reported by his organ of the VRS to the President was not available through other means. It noted that General Tolimir was Chief of the Sector of Intelligence and Security Affairs and as such he received and transmitted information between the VRS Main Staff and the operations in Srebrenica in July 1995. It found that General Tolimir was uniquely situated to give information about the flow of information between him and the Accused, particularly because his written reports sent to the Presidency had not been located.²³

19. General Tolimir does not challenge any of these findings.

20. The Trial Chamber also said the following:

¹⁶ *Decision on Tolimir Request for Certification to Appeal Subpoena Decision* (4 June 2013)

¹⁷ *Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir* (11 June 2013)

¹⁸ Impugned Decision at para. 9-10

¹⁹ Impugned Decision at para. 11

²⁰ Impugned Decision at para. 12

²¹ Impugned Decision at para. 15

²² Impugned Decision at para. 16

²³ Impugned Decision at paras. 19-20

Lastly, with respect to Tolimir's argument that Rule 90(E) is in and of itself a violation of his right to self-incrimination, the Chamber finds that this argument is without merit. While an accused person cannot be compelled to testify in his own trial or compelled to answer questions by virtue of his fundamental right pursuant to Article 21(4)(g) of the Tribunal's Statute "not to be compelled to testify against himself or confess guilt", the purpose of Rule 90(E) is to allow a witness, albeit a witness who is also an accused person, to testify in another trial without the fear that his testimony will be used against him in a subsequent proceeding. Thus, contrary to Tolimir's submissions, the very existence of Rule 90(E) protects his right against self-incrimination by limiting the use of potentially incriminating evidence so that this evidence, if given by Tolimir after having been compelled to do so by the Chamber during the course of his testimony in this case, may not be used against him in his own appeals proceeding. Finally, the Chamber emphasizes that it maintains the discretion under Rule 90(E) to compel a witness to answer a question or not to do so. In exercising its discretion in this particular instance, the Chamber will be cognizant of the fact that Tolimir is currently involved in appeals proceedings before the Appeals Chamber and will ensure that his rights are safeguarded.²⁴

21. With those protections, the Trial Chamber granted the motion to subpoena General Tolimir.

Standard of Review

22. The standard of review for a decision concerning the issuance of a subpoena is one of abuse of discretion. The Appeals Chamber will only overturn the Trial Chamber's exercise of its discretion where it is found to be (i) based upon an incorrect interpretation of governing law; (ii) based upon a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.²⁵ The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has

²⁴ Impugned Decision at para. 22

²⁵ *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 399; *Decision on Radovan Karadzic's Appeal of the Decision on Commencement of Trial* (13 October 2009) at para. 6; *Decision on Appeal from Decision on Motion for Further Postponement of the Trial* (31 March 2010) at para. 13

failed to give weight or sufficient weight to relevant considerations in reaching its decision.²⁶

Argument

I. A Witness has Standing to Seek Certification to Appeal a Decision Granting a Subpoena

25. The Appeals Chamber has never addressed the issue of whether a witness who is the subject of a subpoena has standing to appeal.²⁷ Although Dr. Karadzic believes that General Tolimir does have standing, he believes that it is important to the general jurisprudence of the Tribunal, particularly in light of Judge Morrison's dissent, for this issue to be decided by the Appeals Chamber.

26. Rule 73 provides in pertinent part:

- (A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber.
- (B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the 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.
- (C) Requests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless
 - (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
 - (ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

²⁶ *Prosecutor v Prlic et al*, No. IT-04-74-AR73.7, *Decision on Defendants Appeal against "Decision Portant Attribution du temps a la Defense pour la Presentation des Myens a Decharge"* (1 July 2008) at para. 15

²⁷ The Appeals Chamber has entertained an appeal by a witness of an order for subpoena, but did not discuss the standing of the witness to bring such an appeal. *Prosecutor v Brdjanin*, No. 99-36-AR73.9, *Decision on Interlocutory Appeal* (11 December 2002)

If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify. (emphasis added)

27. Rule 2 defines “parties” as “The Prosecutor and the Defence”.

28. Rule 73(B) contains nothing on its face that limits certification to appeal a decision to parties. While Rule 73(A) refers to a party, it applies only to those who may file a motion in a case. References to a party in Rule 73(C) do not indicate that certification to appeal is limited to parties. Therefore, the definition of parties contained in Rule 2, which was relied upon by Judge Morrison in his dissent, does not limit those who can seek certification to appeal a decision.

29. Likewise, the decision of the Trial Chamber in the *Haradinaj* case, which denied certification to a witness to appeal a subpoena decision, relied upon the distinction between the civil rights of a witness and the criminal sanction faced by an accused.²⁸ Such a distinction is inapposite. The fact that a witness has no right to appeal does not preclude a Trial Chamber from granting a witness certification to appeal when the criteria of Rule 73(B) have been met.

30. The right of a witness to challenge a subpoena is well established in national jurisdictions.²⁹ It would be unfair and inefficient to require a witness to refuse to testify and defend him or herself in contempt proceedings at this Tribunal in order to have the merits of a challenge to the subpoena adjudicated.

31. Therefore, the Appeals Chamber should hold that a witness who is subpoenaed has standing to challenge the subpoena, including by seeking certification to appeal. It should proceed to adjudicate the merits of General Tolimir’s appeal.

II. An Accused is not Exempt from a Subpoena

32. General Tolimir cites no authority for the blanket exemption of an accused in another case from a subpoena. Nothing in Rule 54, nor the jurisprudence of this or any other court, supports the proposition that an accused in one case cannot be subpoenaed to

²⁸ *Prosecutor v Haradinaj*, No. IT-04-84-T, *Decision on Purported Motion for Certification to Appeal Trial Chamber Decision Concerning Subpoenaed Witness* (14 September 2007) at para. 5

²⁹ See i.e. *Cobbledick v United States*, 309 U.S. 323 (1940); *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (Canada)

testify in another case.³⁰ Rather, like any other person, an accused is subject to a subpoena. Whether he may be compelled to answer a particular question is another issue.

33. Dr. Karadzic regrets that he has to seek the testimony of General Tolimir while General Tolimir's case is pending. However, General Tolimir's case is not expected to be decided by the Appeals Chamber until 2015, while Dr. Karadzic will be expected to close his defence case at the end of 2013.³¹ Therefore, Dr. Karadzic has no alternative but to seek General Tolimir's testimony before the Appeals Chamber issues its judgement in his case.

III. General Tolimir's Right Against Self-Incrimination is Protected

34. General Tolimir's concerns about his right to self-incrimination are premature and unfounded. His rights are fully protected by Rule 90(E). That Rule provides:

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.

35. When called as a witness at Dr. Karadzic's trial, General Tolimir may object to answering a question if he believes that the answer to that question might incriminate him. At that stage, the Trial Chamber would have to balance the need for that answer against the right of General Tolimir not to give it. If the Trial Chamber decides that the information is not necessary, it will not require General Tolimir to answer. If it decides that the information is necessary, it can require General Tolimir to answer, but will guarantee that General Tolimir's answer will not be used against him in his appeal proceedings. Therefore, this approach allows Dr. Karadzic to obtain important evidence for his defence while protecting General Tolimir from having that evidence being used against him if it is incriminating.

36. There is no reason to believe that the protection of Rule 90(E) would not be honored by the Appeals Chamber hearing General Tolimir's case. The professional

³⁰ See *Prosecutor v Mladic*, No. IT-09-92-R75bis.1, *Second Decision on Request for Assistance from the Court of Bosnia and Herzegovina Pursuant to Rule 75 bis* (21 December 2011) at para. 8; *R v Primeau*, 2 S.C.R. 60, 70-71 (1995) where the Supreme Court of Canada held that an accused in one case may be compelled to testify in the case of his co-accused; *Goldberg v United States*, 472 F.2d 513 (2nd Cir. 1973) involving compelled testimony of an accused with a pending case.

³¹ *President's Assessment and Report to UN Security Council* (23 May 2013) at para. 49

Judges hearing General Tolimir's appeal would not be influenced by General Tolimir's testimony in the *Karadzic* case even if they learned of it through the news media and it could certainly not be cited in any pleadings or submissions in his case. To the extent that the Trial Chamber believed it to be necessary, any compelled testimony could be given in private session to further protect against dissemination of General Tolimir's testimony.³²

37. Rule 90(E) provides use immunity—testimony compelled under that Rule cannot be used against the witness in any criminal proceeding. This procedure fully guarantees that the right against self-incrimination will be respected,³³ while at the same time making crucial evidence available to the Trial Chamber hearing the case of Dr. Karadzic.

38. It may well be that during his evidence, General Tolimir's right against self-incrimination is not even implicated. Dr. Karadzic wishes to ask him only whether he informed Dr. Karadzic in writing or orally that prisoners from Srebrenica would be, were being, or had been executed.³⁴ General Tolimir has already asserted that he had no knowledge of the execution of prisoners and therefore could not have informed President Karadzic about something which he was unaware.³⁵

39. While the prosecution's cross-examination may include questions in which the issue of self-incrimination arises, the Trial Chamber has undertaken to be vigilant in protecting General Tolimir's right against self-incrimination.³⁶ It can do so by either declining to require General Tolimir to answer a question or if it does require an answer, ordering that the answer not be used against him in any criminal proceedings. The Trial Chamber would also allow General Tolimir to be represented by counsel during his testimony and for that counsel to intervene if s/he believes that General Tolimir's right to self-incrimination is implicated in any question put to him.³⁷

³² *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Prosecution Motion for an Advance Ruling on the Scope of Permissible Cross-Examination* (12 June 2009) at para. 21

³³ *Kastigar v United States*, 406 U.S. 441 (1972)

³⁴ *Motion for Subpoena: General Zdravko Tolimir* (12 March 2013) at para. 10

³⁵ *Motion to the Trial Chamber to Admit a Response and Response to Karadzic's Motion for Subpoena* (1 April 2013) at para. 18

³⁶ *Impugned Decision* at para. 22

³⁷ *Decision on Accused's Motion to Subpoena Radivoje Miletic* (9 May 2013) at para. 18

40. General Tolimir's contention that his right against self-incrimination would be violated if the subpoena were granted is therefore unpersuasive.

IV. The Karadzic Trial Chamber was Competent to Issue the Subpoena

41. General Tolimir's contention that the *Karadzic* Trial Chamber lacked jurisdiction to issue a subpoena to him, and that only the Chamber before whom his case is pending had such jurisdiction, is without merit.

42. General Tolimir cites no rule or jurisprudence in support of his argument. Given that the issuance of a subpoena requires an evaluation of the relevance and necessity of the testimony, the Trial Chamber presiding over the trial in which the testimony is to be offered is in a unique position to make such an assessment. It is difficult to see what role the Chamber before whom the witness' case is pending can play in such a determination. Indeed, the premise of Rule 90(E) is that the Chamber hearing the witness' case would not become aware of the substance of any compelled testimony.

43. When the Judges of this Tribunal have determined that there is a need for consultation with a Chamber seised of the case of an Accused, it has specifically provided for it in the Rules.³⁸ No such provision has been made in the case of a subpoena.

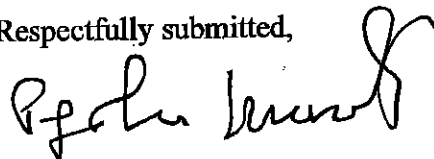
44. Therefore, the subpoena was properly issued by the *Karadzic* Trial Chamber.

Conclusion

45. For all of the above reasons, it is respectfully contended that the Trial Chamber did not abuse its discretion in granting the Motion to Subpoena General Zdravko Tolimir. The Impugned Decision should be affirmed.

Word count: 3557

Respectfully submitted,



Radovan Karadzic³⁹

³⁸ Rules 75(I) and 124, for example

³⁹ The assistance of Legal Intern Igor Petrovich of Georgetown Law School (USA) in the research for this brief is gratefully acknowledged.