



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: 22 January 2014

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: 22 January 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON URGENT MOTIONS FOR RECONSIDERATION OF DECISION
DENYING MLADIĆ REQUEST FOR CERTIFICATION TO APPEAL SUBPOENA
DECISION**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Ratko Mladić

Mr. Branko Lukić
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The Accused

Mr. Radovan Karadžić

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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 “Mladić Urgent Motion for Reconsideration of Decision on Motion for Certification to Appeal” filed by counsel for Ratko Mladić on 14 January 2014 (“Mladić Motion”) and of the “Urgent Prosecution Motion for Reconsideration of Decision on Mladić Request for Certification to Appeal Subpoena Decision” filed by the Office of the Prosecutor (“Prosecution”) on 15 January 2015 (“Prosecution Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. The Accused filed the “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 persons pursuant to Article 21(4) of the Tribunal’s Statute (“Statute”), does not preclude the possibility of accused persons 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 the “Decision on Accused’s Motion to Subpoena Ratko Mladić” (“Subpoena 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

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 Subpoena Decision, para. 23.

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 the said subpoena.⁴

4. On 23 December 2013, the Chamber issued the “Decision on Mladić Request for Certification to Appeal Subpoena Decision” (“Certification Decision”), wherein it denied Mladić’s request for certification for leave to appeal the Subpoena Decision.⁵ While satisfied that the Subpoena Decision involved an issue that would significantly affect the fair and expeditious conduct of these proceedings or the outcome of this trial,⁶ the Chamber did not consider that a resolution by the Appeals Chamber at that stage of the case would materially advance the proceedings against the Accused and ruled as follows:

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, 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. Accordingly, the Chamber does not consider that a resolution by the Appeals Chamber at this stage would materially advance the proceedings against the Accused.⁷

5. In the Mladić Motion, Mladić requests that the Chamber reconsider the Certification Decision arguing that it was based on a “clear error of reasoning” and that “its enforcement would be perceived as an injustice.”⁸ In support, Mladić argues that his mental health does not permit him to testify and that, at the very least, a medical examination is warranted.⁹ He also argues that the Chamber’s focus on the delay in the conclusion of the proceedings in the *Karadžić* case unduly and erroneously places the rights of the Accused ahead of his rights.¹⁰ Finally, Mladić argues that the Tolimir Appeal Decision does not apply to the case of an accused who is currently involved in first instance proceedings.¹¹

6. In the Prosecution Motion, the Prosecution argues that the Chamber made two legal errors in the Certification Decision warranting its reconsideration to prevent a potential injustice.¹² The

⁴ Subpoena Decision, para. 24.

⁵ Certification Decision, para. 14.

⁶ Certification Decision, para. 11.

⁷ Certification Decision, para. 12 (footnotes omitted).

⁸ Mladić Motion, para. 15.

⁹ Mladić Motion, paras. 18, 20.

¹⁰ Mladić Motion, para. 21.

¹¹ Mladić Motion, paras. 22–23.

¹² Prosecution Motion, para. 1.

Prosecution first submits that the Chamber erred in finding that the Tolimir Appeal Decision was dispositive of the situation in which an accused currently on trial could be compelled as a witness in another trial and of Mladić's situation specifically.¹³ In this respect, the Prosecution contends that there are "significant differences" between Mladić's and Tolimir's situations and that the Appeals Chamber may decide on a different outcome with respect to the former or, at the very least, should clarify the scope of the protections Mladić may benefit from during his testimony in these proceedings.¹⁴ Second, the Prosecution submits that the Chamber erred in placing undue weight on the potential delay interlocutory review would have on the conclusion of the Accused's defence case. In this regard, the Prosecution argues that interlocutory review would not necessarily delay the trial and, on the contrary, may materially advance these proceedings by avoiding time-consuming contempt proceedings.¹⁵ The Prosecution further submits that "[g]iven 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".¹⁶ This, the Prosecution submits, will prevent an injustice and ensure Mladić's rights are protected.¹⁷

7. On 16 January 2014, the Chamber requested the parties to file their respective responses no later than 17 January 2014.¹⁸ The Accused filed his "Response to Motions for Reconsideration of Decision on Certification to Appeal Mladić Subpoena" on 16 January 2014 ("Accused Response"), wherein he does not oppose the Mladić Motion or the Prosecution Motion but reiterates that he wishes to testify as the last witness in his trial.¹⁹ The Prosecution filed the "Prosecution Response to Mladić Urgent Motion for Reconsideration of Decision on Motion for Certification to Appeal" on 17 January 2014 ("Prosecution Response"), wherein it does not oppose the Mladić Motion but clarifies that it does not agree with all the arguments therein, in particular those related to Mladić's health, and that reconsideration on this basis is therefore unwarranted.²⁰

II. Applicable Law

8. Rule 89(B) of the Rules provides, in relevant part, that "a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law."

¹³ Prosecution Motion, paras. 7–8.

¹⁴ Prosecution Motion, paras. 9–11.

¹⁵ Prosecution Motion, paras. 12–14.

¹⁶ Prosecution Motion, para. 16.

¹⁷ Prosecution Motion, para. 17.

¹⁸ T. 45430–45431 (17 January 2014).

¹⁹ Accused Response, paras. 1–2.

²⁰ Prosecution Response, paras. 1–6.

9. As the Chamber has stated on a number of occasions, there is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions.²¹ However, the Appeals Chamber has articulated the legal standard for reconsideration of a decision as follows: "[A] Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice'".²² Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.²³

III. Discussion

10. The Chamber first recalls the position it adopted, by majority, in the "Decision on Tolimir Request for Certification to Appeal Subpoena Decision" ("Tolimir Certification Decision") issued on 4 June 2013, and in the 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 and Mladić had properly requested certification before it.²⁴ The Chamber adopts the same position in relation to the Mladić Motion and accordingly finds, by majority, Judge Morrison dissenting on this point, that Mladić properly filed the Mladić Motion before the Chamber.

11. The Chamber will now consider the arguments set forth in the Mladić Motion and the Prosecution Motion and assess whether they establish a clear error of reasoning in the Certification Decision or whether particular circumstances exist justifying reconsideration of this decision in order to prevent an injustice.

A. The existence of a clear error of reasoning

²¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("Prlić Decision on Reconsideration"), p. 2.

²² *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); *see also* *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

²³ *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *see also* *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić Decision on Reconsideration*, p. 3.

²⁴ Tolimir Certification Decision, para. 7; Dissenting opinion of Judge Howard Morrison; Certification Decision, para. 10; Separate opinion of Judge Howard Morrison.

12. Both Mladić and the Prosecution argue that the Chamber erred in finding that the Tolimir Appeal Decision was dispositive of Mladić's situation as to whether or not the Chamber could issue a subpoena compelling him to testify in these proceedings.²⁵

13. In the Certification Decision, in relation to the second prong of the certification test and whether a resolution by the Appeals Chamber at this stage would materially advance the proceedings, the Chamber considered that the "Appeals Chamber has already ruled on the very topic Mladić now wishes to bring before the Appeals Chamber".²⁶ When it issued the Tolimir Certification Decision, which led to the issuance of the Tolimir Appeal Decision, this Chamber did not limit the issue at stake to Tolimir's specific situation but considered that "[t]he issue at stake here is whether the Chamber may issue a subpoena compelling a witness to testify when the witness is an accused person currently involved in proceedings before the Tribunal and as such, is entitled to preserve his right against self-incrimination enshrined in Article 21(4)(g) of the Statute".²⁷ In the Tolimir Appeal Decision, the Appeals Chamber summarises the issue before it as follows:

[T]he proposed use of subpoenas against *accused persons and appellants* raises the additional consideration of possible self-incrimination relative to their status as individuals with ongoing proceedings before the Tribunal. The question therefore is whether *an accused or appellant* compelled by subpoena to testify in another case before the Tribunal is in effect exposed, in relation to his own case, to the possibility of compelled self-incrimination in the form of either: (i) inadvertent self-incrimination, whereby the accused or appellant unwittingly makes self-incriminating statements; or (ii) deliberate self-incrimination whereby a Chamber may compel self-incriminating statements from the accused or appellant pursuant to Rule 90(E) of the Rules.

35. The critical issue is whether Rule 90(E) of the Rules adequately protects *an accused or appellant* from the direct and indirect use against him of any compelled self-incriminating information, arising as a result of deliberate or inadvertent self-incrimination.²⁸

14. The Appeals Chamber went on to rule that Article 21(4)(g) of the Statute operates to prohibit the compulsion of an accused's testimony in his own proceedings, which involve the determination of charges against him,²⁹ but 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".³⁰

²⁵ Mladić Motion, paras. 22–23; Prosecution Motion, paras. 7–11.

²⁶ Certification Decision, para. 12.

²⁷ Tolimir Certification Decision, para. 8.

²⁸ Tolimir Appeal Decision, paras. 34–35 (emphasis added).

²⁹ Tolimir Appeal Decision, para. 36.

³⁰ Tolimir Appeal Decision, para. 50 (emphasis added).

15. The terminology used by the Appeals Chamber indicates that the applicability of the Tolimir Appeal Decision is broader than Tolimir himself. The Chamber is not persuaded by the argument of the Prosecution that the separate opinion of Judge Tuzmukhamedov³¹ and the reference to one domestic jurisdiction by the Appeals Chamber indicate that the Tolimir Appeal Decision is not applicable to accused persons currently involved in trial proceedings before the Tribunal. Furthermore, the Chamber is not satisfied that the practical difficulties foreseen by the Prosecution in “protecting Mladić’s right against self-incrimination” and “ensuring that no ‘derivative or indirect use’ be made of Mladić’s compelled testimony in his own trial while its evidentiary phase is ongoing”,³² some of which stem from “the connections between the two trial teams”,³³ warrant reconsidering the Chamber’s position that the Tolimir Appeal Decision ruled on the issue at stake in relation to all accused before the Tribunal, including Mladić.

16. Accordingly, the Chamber does not consider that it committed a clear error of reasoning when considering that the Appeals Chamber has already ruled on the very topic that Mladić now wishes to bring before the Appeals Chamber.

17. The Prosecution further argues that the Chamber committed a legal error in placing undue weight on the fact that the presentation of the Accused’s case in these proceedings was close to completion and in failing to consider the potentially adverse impact of the Certification Decision on Mladić fundamental rights.³⁴ This argument is also raised by Mladić.³⁵ However, the Prosecution and Mladić here confuse the first prong of the certification test, namely whether there exists an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, with the second prong, as considerations of fairness, including those related to the protection of fundamental rights, are part of the former, which the Chamber deemed to have been met in this specific instance.³⁶ In relation to the second prong, the Chamber considered two factors: i) the fact that the Accused is scheduled to complete the presentation of his defence case at the end of February 2014; and ii) the fact that the Appeals Chamber has already ruled on the very topic Mladić wishes to bring before the Appeals Chamber.³⁷ Given that the Appeals Chamber had already ruled on the issue at stake, the Chamber did not consider that potentially delaying the scheduled conclusion of the Accused’s defence case for an unknown period was warranted and therefore that doing so would materially advance these proceedings. The Chamber therefore does

³¹ The Chamber notes that Mladić also raises this point, *see* Mladić Motion, para. 22.

³² Prosecution Motion, paras. 10–11.

³³ Prosecution Motion, para. 10.

³⁴ Prosecution Motion, para. 12.

³⁵ Mladić Motion, para. 21.

³⁶ Certification Decision, para. 11.

³⁷ Certification Decision, para. 12.

not consider that it placed undue weight on the fact that the presentation of the defence case in this trial was coming to an end.

18. The Prosecution also contends that the Chamber failed to consider the potential delay caused by a lack of immediate resolution by the Appeals Chamber, which may result for instance from time-consuming contempt proceedings.³⁸ The Chamber recalls that, after 1 July 2013, the Tribunal no longer has jurisdiction for the prosecution or conduct of contempt proceedings, which was not the case when the Chamber issued the Tolimir Certification Decision and therefore considered potential contempt proceedings in its assessment of the second limb of the certification test for Tolimir.³⁹ Therefore, any contempt proceedings which may arise out of Mladić's refusal to testify will not cause any delay to this trial.

19. Accordingly, the Chamber does not consider that it committed a clear error of reasoning in considering, as part of its assessment of the second prong of the certification test, that potentially delaying the scheduled conclusion of the Accused's defence case for an unknown period was warranted in the circumstances.

B. The existence of particular circumstances justifying reconsideration of the Certification Decision to prevent an injustice?

20. Mladić argues that his mental health renders him unfit to testify as a witness and that the Certification Decision must therefore be reconsidered to prevent an injustice.⁴⁰ The Chamber recalls that in its Subpoena Decision, it was "not persuaded that the medical reports attached in the Response show that Mladić will necessarily be unable to give meaningful testimony before this Chamber".⁴¹ The excerpts of medical reports attached in confidential Annex A to the Mladić Motion are extracts from the same medical reports that were before the Chamber when it issued the Subpoena Decision. Having already considered these reports when it issued the Subpoena Decision, the Chamber is also not satisfied that Mladić's ill health rises to such level that it should reconsider its Certification Decision on this basis.

21. Finally, both the Prosecution and Mladić submit that reconsideration of the Certification Decision is necessary to ensure Mladić's fundamental rights.⁴² In the Subpoena Decision, the Chamber undertook to safeguard Mladić's rights and recalled that it maintains its discretion under

³⁸ Prosecution Motion, paras. 12, 14.

³⁹ Statute of the International Residual Mechanism for Criminal Tribunals, S/RES/1966 (2010), Article 1(4)(a); Annex A, Transitional Arrangements, Article 4(2); *see* Tolimir Certification Decision, para. 9.

⁴⁰ Mladić Motion, paras. 15–20.

⁴¹ Subpoena Decision, para. 25.

⁴² Prosecution Motion, para. 17; Mladić Motion, paras. 16, 23.

Rule 90(E) to compel or not compel Mladić to answer certain questions and that, in doing so, it will be cognisant of the fact that Mladić is currently on trial.⁴³ The Chamber further stated that it was prepared to make accommodations in the schedule of Mladić's testimony such that his health concerns would be addressed.⁴⁴ In so holding, the Chamber considered Mladić's specific circumstances and undertook to safeguard his rights as a witness in these proceedings. The Chamber is therefore not satisfied that reconsidering the Certification Decision is warranted to prevent an injustice in order to safeguard Mladić's rights.

22. For all of the foregoing reasons, the Chamber does not consider that it committed a legal error in issuing the Certification Decision or that particular circumstances exist justifying reconsideration of this decision to prevent an injustice.

IV. Disposition

23. Accordingly, the Chamber, pursuant to Rule 54 of the Rules, hereby **DENIES** the Mladić Motion and the Prosecution Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-second day of January 2014
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴³ Subpoena Decision, para. 23.

⁴⁴ Subpoena Decision, para. 25.