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**UNITED
NATIONS**



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-09-92-AR73.3

Date: 22 October 2013

Original: English

IN THE APPEALS CHAMBER

Before: Judge Arlette Ramaroson, Presiding
Judge William H. Sekule
Judge Patrick Robinson
Judge Fausto Pocar
Judge Liu Daqun

Registrar: Mr. John Hocking

Decision of: 22 October 2013

PROSECUTOR

v.

RATKO MLADIĆ

CONFIDENTIAL

**DECISION ON MLADIĆ'S INTERLOCUTORY APPEAL
REGARDING MODIFICATION OF TRIAL SITTING
SCHEDULE DUE TO HEALTH CONCERNS**

The Office of the Prosecutor:

Mr. Dermot Groome
Mr. Peter McCloskey

Counsel for the Accused:

Mr. Branko Lukić
Mr. Miodrag Stojanović

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1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Defence Interlocutory Appeal Brief Against the Trial Chamber Decision on Second Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused” filed publicly with a confidential annex by Ratko Mladić (“Mladić”) on 29 August 2013 (“Motion”), in which he submits that Trial Chamber I of the Tribunal (“Trial Chamber”) erred in its “Decision on Second Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused” filed on 12 July 2013, denying Mladić’s request for an adjustment of the trial sitting schedule due to health reasons.¹ The Appeals Chamber is further seised of the “Prosecution Request for Leave to File Beyond the Time Limits the Prosecution Response Brief to Defence Interlocutory Appeal Brief Against the Trial Chamber Decision on Second Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused” filed by the Office of the Prosecutor (“Prosecution”) on 11 September 2013 (“Request to File Response”), in which the Prosecution sought leave to file a response beyond the deadline and appended the response in the event that leave is granted.²

I. BACKGROUND

2. On 6 December 2011, the Registrar of the Tribunal (“Registrar”) filed, in accordance with Rule 33(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and pursuant to an order of the Trial Chamber, a report by a medical expert who had examined Mladić and concluded that “in his current state, he is deemed to be perfectly capable of being present during Tribunal activity involving him”.³ On 29 August 2012, the Registry of the Tribunal assigned, upon Mladić’s request, Dr. Ratko Kovačević, a neuro-psychiatrist (“Kovačević”), and Dr. Bojana Dimitrijević, a psychologist (“Dimitrijević”), as defence experts to conduct a medical examination of Mladić and review his medical records.⁴

3. On 15 January 2013, Mladić filed a motion before the Trial Chamber seeking an adjustment of the trial sitting schedule due to health concerns and attached a medical report provided by

¹ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Second Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 12 July 2013 (confidential) (“Impugned Decision”), paras 1, 19.

² Request to File Response, paras 1, 3.

³ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Registrar’s Submission of Medical Report, 6 December 2011 (confidential), paras 1-2, Annex 1 (English translation of the French original annex filed on 8 December 2011), p. 6.

⁴ Letter from the Head of the Office for Legal Aid and Detention Matters of the Tribunal to Counsel for Mladić, dated 29 August 2012, appended as Annex A to *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 15 January 2013 (confidential) (“First Motion”).

Kovačević and Dimitrijević (“Report”).⁵ The Report is based on clinical examinations and interviews carried out by Kovačević and Dimitrijević on 31 October and 1-2 November 2012 at the United Nations Detention Unit (“UNDU”).⁶ The Report includes the recommendation that:

[Mladić’s] appearance at trial hearings should take account of his health, including both his physical and mental capacities. In our opinion[,] hearings should last no longer than four hours in a single day. Each two four-hour working days should always be followed by a day of rest. In the event that even this regime results in an emotional crisis or a Transient Ischemic Attack (TIA), [Mladić] should be excused from attending the trial and then given a day’s rest. We consider that this working regime would allow the [T]ribunal to bring proceedings to a conclusion and give [Mladić] a realistic chance of enduring to the end of the trial.⁷

Regarding the risk of TIAs, the Report concludes that there exists a serious danger that Mladić could fall into a state of heightened emotional tension during trial proceedings, which could lead to a new brain stroke with fatal consequences.⁸ On 13 March 2013, the Trial Chamber considered but rejected the Report as unpersuasive and denied the First Motion.⁹

4. The medical staff of the UNDU have submitted frequent reports on the health of Mladić and have consistently maintained their recommendation that a four-day court schedule be implemented with Wednesdays as rest days.¹⁰ Specifically, the medical staff of the UNDU reasoned that “the [Psycho Medical Overview] advises to reduce the [c]ourt schedule by one day, Wednesdays preferably, to prevent exhaustion”,¹¹ and that a four-day court schedule is recommended so as “to optimise Mr. Mladić’s [*sic*] ability both to withstand, and also to participate effectively in, the trial process”.¹² Additionally, the medical staff of the UNDU endorsed the view that a four-day

⁵ First Motion, para. 29, p. 8, Annex C.

⁶ Report, pp. 1, 3, 7-8, 10.

⁷ Report, p. 9. TIA is described as “an interruption of the flow of blood to the brain”. See Report, p. 9. The UNDU Medical Officer described a TIA as “only temporary loss of abilities and definitely not more than 24 hours”. See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, T. 12059.

⁸ Report, p. 9.

⁹ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion Seeking Adjustment [*sic*] of Modalities of Trial, 13 March 2013 (confidential) (“First Decision”), paras 7-12, 14.

¹⁰ See, e.g., *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 2 April 2013 (confidential) (“Medical Report of 2 April 2013”), Annex, para. 3; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 8 April 2013 (confidential) (“Medical Report of 8 April 2013”), Annex, para. 4; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 12 April 2013 (confidential), Annex, para. 4; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 31 May 2013 (confidential), Annex, para. 6; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 3 June 2013 (confidential), Annex, para. 7; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 10 June 2013 (confidential) (“Medical Report of 10 June 2013”), Annex, para. 6; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 14 June 2013 (confidential) (“Medical Report of 14 June 2013”), Annex, para. 6; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 20 June 2013 (confidential), Annex, para. 8; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 27 June 2013, Annex, para. 6; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 5 July 2013 (confidential), Annex, para. 5; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Registrar’s Submission of Medical Report, 11 July 2013 (confidential), Annex, para. 6.

¹¹ Medical Report of 2 April 2013, Annex, para. 3.

¹² Medical Report of 10 June 2013, Annex, para. 6; Medical Report of 14 June 2013, Annex, para. 6.

schedule would give Mladić more rest and make him feel better,¹³ and noted that the advice on the trial schedule was primarily a preventive measure.¹⁴

5. On 16 April 2013, Mladić filed a new motion seeking an adjustment of the trial sitting schedule due to health concerns.¹⁵ On 4 June 2013, the medical officer of the UNDU (“UNDU Medical Officer”) appeared in court to answer questions posed by the Trial Chamber and the parties regarding the medical basis for the recommendation to limit the trial hearing schedule.¹⁶ The UNDU Medical Officer stated that he disagreed with the conclusions in the Report with regard to the risk of brain strokes, but agreed with the recommendation for a reduced trial hearing schedule based on the risk of burn-out due to extreme fatigue.¹⁷ The Trial Chamber issued the Impugned Decision, denying the Second Motion, on 12 July 2013,¹⁸ and granted on 22 August 2013 Mladić’s request for certification to appeal the Impugned Decision.¹⁹ On 29 August 2013, Mladić filed the Motion, to which he attached the Report. The Registrar filed a submission before the Appeals Chamber on 2 September 2013.²⁰

II. PRELIMINARY ISSUE: REQUEST TO FILE RESPONSE

6. The Appeals Chamber observes that the Motion was filed on 29 August 2013, and consequently the deadline for filing a response was on 9 September 2013.²¹ The Prosecution filed its response on 11 September 2013, two days after the time-limit prescribed, acknowledging that it did not have good cause for the late filing.²² The Prosecution nevertheless requests that the Appeals Chamber accept its response in the interests of justice, because: (i) Mladić’s health and the number of sitting days impact upon the continuation of the trial proceedings and the presentation of the Prosecution’s case; (ii) the Prosecution’s position may reasonably assist the Appeals Chamber in deciding the Motion; and (iii) the response is brief and concise.²³

¹³ Medical Report of 31 May 2013, Annex, para. 6.

¹⁴ Medical Report of 8 April 2013, Annex, para. 4.

¹⁵ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Second Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 16 April 2013 (confidential) (“Second Motion”), paras 2, 27, p. 10.

¹⁶ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, T. 12017-12072.

¹⁷ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, T. 12030, 12032-12034, 12037, 12062-12066.

¹⁸ Impugned Decision, para. 19.

¹⁹ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motions for Reconsideration and Certification to Appeal the Decision on Defence Motion Seeking Adjustment of the Trial Schedule, 22 August 2013, para. 8.

²⁰ Registrar’s Submission Regarding Defence Interlocutory Appeal Dated 29 August 2013, 2 September 2013 (confidential) (“Registrar’s Submission”), para. 1.

²¹ See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, Doc. IT/155 Rev. 4, 4 April 2012 (“Practice Direction”), paras 10, 16. See also Rule 126 of the Rules.

²² Request to File Response, para. 1.

²³ Request to File Response, paras 2-3.

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7. According to paragraph 10 of the Practice Direction, a response to an interlocutory appeal shall be filed within ten days of the filing of the interlocutory appeal. The Appeals Chamber recalls that, pursuant to Rule 127(A)(ii) and (B) of the Rules, “good cause” must be shown to recognise a late filing as validly done.²⁴ The Appeals Chamber notes that the Prosecution submits that it did not have good cause for the late filing. However, in the circumstances of the present case, the Appeals Chamber exceptionally accepts the filing as validly done, considering: (i) that the delay in filing was only two days; (ii) that Mladić has suffered no prejudice from the late filing; and (iii) the importance of the issue being litigated.²⁵

III. SUBMISSIONS

8. Mladić submits that the Trial Chamber committed a discernible error by rejecting the Report as well as the repeated medical opinion of the UNDU medical staff, which recommended a reduction in the number of sitting days to facilitate his endurance and prevent ill effects from fatigue and exhaustion.²⁶ Mladić argues that, beyond some general conclusions, the Trial Chamber failed to provide a reasoned opinion in rejecting this medical advice.²⁷ In this regard, Mladić further argues that the Trial Chamber did not rely on any contrary medical opinion, but merely adopted its own untrained medical opinion.²⁸ According to Mladić, the Impugned Decision may have been based on considerations of trial efficiency, which however pose a threat to his life and health.²⁹ For these reasons, Mladić requests the Appeals Chamber to vacate urgently the Impugned Decision, and remand the matter to the Trial Chamber, directing it to change the trial schedule in accordance with the recommendations of the Report and the UNDU medical staff, *i.e.* four sitting days per week, Wednesday being a non-sitting day, and the total sitting time per day not exceeding four hours.³⁰

9. The Registrar submits that he stands by the recommendation of the UNDU Medical Officer, who advised a four-day court schedule instead of five.³¹

10. The Prosecution submits that it shares the Defence’s concerns regarding Mladić’s health and supports adopting a four-day hearing schedule, with Wednesdays off, for the remainder of the

²⁴ See also, *e.g.*, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 7.

²⁵ *Cf. Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Application and Proposed *Amicus Curiae* Brief, 14 February 2012 (“*Gotovina Decision*”), para. 5.

²⁶ Motion, paras 15, 21, 25, 29-30. See also Motion, paras 16-19.

²⁷ Motion, paras 15, 20-22, 24.

²⁸ Motion, paras 20-22, 24, 26-28, 31. See also Motion, paras 29-30.

²⁹ Motion, paras 25, 31.

³⁰ Motion, paras 14, 25, p. 10.

³¹ Registrar’s Submission, para. 1.

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Prosecution’s case.³² The Prosecution argues that it expects to conclude the presentation of its evidence in November 2013, and that the four-day sitting schedule for the remainder of the Prosecution’s case would not cause any significant delay in the trial.³³ Finally, the Prosecution argues that the reduced trial schedule would likely reduce Mladić’s fatigue and ensure his full participation in the trial.³⁴

IV. STANDARD OF REVIEW

11. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in relation to the management of the proceedings before them.³⁵ Decisions concerning the scheduling of trials and their modalities are discretionary decisions to which the Appeals Chamber accords deference.³⁶ In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that party.³⁷ The Appeals Chamber will only overturn a trial chamber’s discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber’s discretion.³⁸ The Appeals Chamber will also consider whether the trial chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.³⁹

V. DISCUSSION

12. The Appeals Chamber recalls that Article 20(1) of the Statute of the Tribunal provides that trial chambers “shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the [Rules], with full respect for the rights of the accused”.

³² Prosecution Response to Defence Interlocutory Appeal Brief Against the Trial Chamber Decision on Second Defence Motion Seeking Adjustment of the Trial Sitting Schedule Due to the Health Concerns of the Accused, 11 September 2013 (“Response”), *appended as Annex A* to Request to File Response, paras 1-2, 4-5.

³³ Response, paras 3-4.

³⁴ Response, para. 4.

³⁵ See, e.g., *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012 (“*Lukić and Lukić Appeal Judgement*”), para. 17; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 (“*Krajišnik Appeal Judgement*”), para. 81.

³⁶ See, e.g., *Lukić and Lukić Appeal Judgement*, para. 17; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.8, Decision on Appeal from Order on the Trial Schedule, 19 July 2010 (“*Karadžić Decision*”), para. 5; *Krajišnik Appeal Judgement*, para. 81.

³⁷ See, e.g., *Lukić and Lukić Appeal Judgement*, para. 17; *Karadžić Decision*, para. 5; *Krajišnik Appeal Judgement*, para. 81.

³⁸ See, e.g., *Lukić and Lukić Appeal Judgement*, para. 17; *Krajišnik Appeal Judgement*, para. 81.

³⁹ See, e.g., *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.10, Decision on Appeal from Decision on Duration of Defence Case, 29 January 2013, para. 7; *Lukić and Lukić Appeal Judgement*, para. 17; *Krajišnik Appeal Judgement*, para. 81.

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13. The Appeals Chamber is not convinced by the Trial Chamber's reasoning that "the medical opinion offered by the [UNDU Medical Officer] was of a subjective nature" as a basis for rejecting Mladić's request for a modified sitting schedule.⁴⁰ The Appeals Chamber is of the view that the Trial Chamber's rejection of the relevant medical advice on the basis of its subjective character, in light of the information contained in both the Report and that given by the UNDU medical staff, is particularly unconvincing. With respect to Mladić's contention that the Trial Chamber adopted its own "untrained" medical opinion rather than relying on a contrary medical opinion, the Appeals Chamber agrees that, had the Trial Chamber found the medical opinion provided insufficient "so as to be dispositive of the matter",⁴¹ the Trial Chamber should have ordered an independent medical examination, as requested by the Prosecution. The Appeals Chamber recalls that the Trial Chamber, in its First Decision, considered that "the risk of [Mladić] suffering from a TIA can only be made by an appropriately qualified medical specialist such as a cardiologist or arteriologist".⁴² Accordingly, to the extent that the risk of Mladić suffering from a TIA was an important factor when considering his request, the Trial Chamber's rejection thereof without seeking further specialised medical advice was unreasonable.

14. Turning to Mladić's submission that the Impugned Decision was motivated by trial efficiency considerations, rather than his medical situation, the Appeals Chamber recalls the following relevant holding of the Trial Chamber in the Impugned Decision:

Moreover, while ensuring that [Mladić]'s fair trial rights are fully respected and his medical necessities fully met, the Chamber must balance matters of [Mladić]'s comfort and well-being not rising to the level of medical necessity with the international community's interests in the reasonably expeditious resolution of cases before the Tribunal.⁴³

The Trial Chamber further noted that it would "continue to closely monitor [Mladić]'s health and will reassess the trial sitting schedule if needed in the future, including whether or to what extent the trial should adjourn to allow [Mladić] to recover from any medical emergency".⁴⁴ While the Appeals Chamber acknowledges that the Trial Chamber attempted to strike a balance between an expeditious trial and the well-being of Mladić not rising to the level of medical necessity, it nonetheless considers that the circumstances of the present case point to several serious indicators warranting a modified sitting schedule in order to safeguard his medical welfare.

15. The Appeals Chamber is troubled by the existence of a number of factors, which combined warranted a modified trial sitting schedule. First, the Appeals Chamber observes that apart from the

⁴⁰ See Impugned Decision, para. 17.

⁴¹ Impugned Decision, para. 15.

⁴² First Decision, para. 12.

⁴³ Impugned Decision, para. 17.

⁴⁴ Impugned Decision, para. 18.

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Report, the Trial Chamber noted that, during his appearance in court, the UNDU Medical Officer identified a risk that Mladić could suffer from burn-out due to extreme fatigue.⁴⁵ In this regard, the UNDU Medical Officer also recommended a reduction in the trial schedule to decrease the risk of adverse medical conditions.⁴⁶ In addition, the Appeals Chamber observes that the UNDU medical staff repeatedly recommended a four-day court schedule.⁴⁷ The Appeals Chamber further observes that the UNDU Medical Officer noted an improvement regarding Mladić's fatigue when the sitting schedule was in fact reduced.⁴⁸ Second, the Appeals Chamber recalls that the Registrar also expressed his support for the above recommendation.⁴⁹ Third, the Prosecution also expressed its support for a reduced sitting schedule, to ensure Mladić's full participation in the trial.⁵⁰ Finally, the Appeals Chamber agrees with the Prosecution that a four-day sitting schedule for the remainder of the Prosecution's case, rather than a five-day sitting schedule, will only cause a minimal delay overall.

16. In light of the foregoing, the Appeals Chamber considers that the Trial Chamber erred by failing to attribute sufficient weight to the information contained in the Report and the advice provided by the UNDU medical staff as well as the submissions in support of the reduced sitting schedule of the Registrar and the Prosecution. Accordingly, the Appeals Chamber finds that the Trial Chamber abused its discretion in rejecting Mladić's request for a modified sitting schedule and therefore committed a discernible error.

VI. DISPOSITION

17. For the foregoing reasons, the Appeals Chamber:

GRANTS the Request to File Response and **ACCEPTS** the Response as validly filed;

GRANTS the Motion;

REVERSES the Impugned Decision;

ORDERS the Trial Chamber to adopt a four-day sitting schedule for the remainder of the Prosecution's case and **DIRECTS** the Trial Chamber to reassess the matter at the beginning of the Defence case;

⁴⁵ See *supra*, para. 5.

⁴⁶ See Impugned Decision, para. 9, referring to the UNDU Medical Officer's appearance in court. See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, T. 12033 ("I still agree with my team and I still believe in the advice we gave for a reduction in the court schedule"). See also *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, T. 12032, 12034.

⁴⁷ See *supra*, para. 4.

⁴⁸ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, T. 12065.

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INVITES Mladić and the Prosecution to indicate within seven (7) days of the filing of the present decision what portions thereof should, in their submission, remain confidential; and

ORDERS the Registrar, if and only if no submission is filed in a timely manner pursuant to the invitation above, to lift the confidentiality of the present decision in its entirety.

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



Judge Arlette Ramaroson
Presiding

Dated this twenty-second day of October 2013,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

⁴⁹ See *supra*, para. 9.

⁵⁰ See Impugned Decision, para. 10. See also Response, paras 1-2, 4-5.