



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-T
Date: 21 November 2017
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 21 November 2017

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON MOTION TO RECONSIDER DECISION ON
URGENT DEFENCE MOTIONS OF 10 NOVEMBER 2017 OR
IN THE ALTERNATIVE MOTION FOR CERTIFICATION TO
APPEAL**

Office of the Prosecutor
Mr Peter McCloskey

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Dragan Ivetić

I. PROCEDURAL HISTORY

1. Between 30 October and 9 November 2017, the Defence filed several motions requesting, *inter alia*, provision of medical records of the Accused, postponement of the delivery of the Judgment, and initiation of contempt proceedings against Registry personnel (“Defence Motions”).¹ The Chamber dismissed the Defence Motions on 10 November 2017 (“Impugned Decision”).²

2. On 17 November 2017, the Defence requested reconsideration or certification to appeal the Impugned Decision (“Motion”).³ On 20 November 2017, the Prosecution responded to the Motion (“Response”).⁴

II. SUBMISSIONS OF THE PARTIES

3. The Defence submits that the Chamber reached the Impugned Decision based on clear errors of reasoning and without regard for relevant new information and arguments from the Defence.⁵ Specifically, it submits that the Chamber’s clear errors of reasoning relate to (i) its reliance on the opinion of the medical officer of the United Nations Detention Unit (“UNDU”) as opposed to on the Defence’s arguments on ‘medical science’; (ii) its conclusion that it has no authority over contempt of court matters since 1 July 2013; and (iii) its conclusion that the administrative process must first be exhausted before the Chamber can intervene on fair trial grounds.⁶ In addition, it submits that there have been a number of filings made before the President, which contain information that was not available to the Chamber at the time of the Impugned Decision.⁷ With regard to its alternative request, the Defence submits that the health and ‘capacity’ of the Accused is a central issue and that the Judgment could be rendered null and void or the

¹ Third Additional Submission in Support of Urgent Motion to Compel Registrar and United Nations Detention Unit to Compel Registrar and United Nations Detention Unit to Provide Medical Records; and Motion to Vacate Judgment, 30 October 2017 (Public with Confidential Annexes A and B); Supplement to Third Additional Submission in Support of Urgent Motion to Compel Registrar and United Nations Detention Unit to Compel Registrar and United Nations Detention Unit to Provide Medical Records; and Motion to Vacate Judgment, 3 November 2017 (Public with Confidential Annexes A and B); Urgent Motion for a Hearing to Decide on Pending Urgent Filings and for Issuance of an Order of Contempt or Hearing upon Issuance of a Rule to Show Cause Against UNDU Medical Officer ([...]), 6 November 2017; Motion for a Binding Order to be Issued Against CMSS and the Registry to Enjoin them from Further Obstruction with Defence Public Filings, 9 November 2017 (Public with Confidential Annexes A and B).

² Decision on Urgent Defence Motions, 10 November 2017.

³ Motion to Reconsider Decision on Urgent Defence Motions of 10 November 2017 or in the Alternative Motion for Certification to Appeal, 17 November 2017. *See also* Addendum to Motion to Reconsider Decision on Urgent Defence Motions of 10 November 2017 or in the Alternative Motion for Certification to Appeal, 20 November 2017.

⁴ Prosecution Response to Defence Motion to Reconsider or Certify the Chamber’s Decision to Proceed with Judgement as Scheduled, 20 November 2017.

⁵ Motion, para. 1.

⁶ Motion, paras 11, 18, 22-24.

⁷ Motion, para. 12.

Accused be found medically unfit to 'endure the same and remain alive' if certification was not granted.⁸

4. The Prosecution submits that the Motion should be dismissed as meritless.⁹ The Prosecution argues that doctors who have actually examined the Accused confirm that while he has health issues, his health is stable.¹⁰ The medical history of the Accused reflects that he is competent to participate in the pronouncement of judgment and does not suggest that his participation would create health risks.¹¹

III. APPLICABLE LAW

5. The Chamber recalls and refers to the applicable law governing reconsideration of decisions, as set out in a previous decision.¹² The Chamber further recalls and refers to the applicable law governing certification to appeal pursuant to Rule 73 (B) of the Tribunal's Rules of Procedure and Evidence ("Rules"), as set out in a previous decision.¹³

6. Pursuant to Rule 77 (C) of the Rules, when a chamber has reason to believe that a person may be in contempt of the Tribunal, it may: (i) direct the Prosecutor to investigate the matter [...]; (ii) [...], direct the Registrar to appoint an *amicus curiae* to investigate the matter [...]; or (iii) initiate proceedings itself.

IV. DISCUSSION

7. Considering that the Impugned Decision dealt with a number of motions and separate issues, the Chamber will address each of the issues separately in relation to the applicable law on reconsideration and certification to appeal.

Reconsideration

8. In relation to the Defence's claimed error of reasoning by relying on the medical opinion of the UNDU's medical officer, it is unclear to the Chamber how it can be 'clearly erroneous' to rely on the opinion of medical officers who have seen the Accused over many years. Its suggestion that more weight should be given to the opinion of medical doctors they have consulted is phrased in rather general terms, relies on opinions of doctors who have not examined the Accused, and is

⁸ Motion, paras 9, 25.

⁹ Response, para. 3.

¹⁰ Response, para. 2.

¹¹ *Ibid.*

¹² Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012, para. 10.

unsubstantiated and inconclusive with regard to establishing an error of reasoning. Mere disagreement on the part of the Defence with the Impugned Decision does not constitute a valid basis for reconsideration.

9. In relation to the Defence's claimed error of reasoning by refusing to assume jurisdiction over the judicial review of the alleged fair trial violations by the Registrar, the Chamber notes that the Defence relies on a decision by then-President Pocar of 25 April 2007. The Defence is silent on the case-law previously invoked by the Chamber to decline jurisdiction. This case-law stems from 2008,¹⁴ hence more recent than that invoked by the Defence, and discusses the jurisdictional situation in more detail. Under these circumstances, the Chamber is not convinced that the Defence has demonstrated that the Chamber committed a clear error of reasoning.

10. In relation to the Defence's claimed error of reasoning by holding that the Chamber has no authority over contempt of court matters since 1 July 2013, the Chamber notes that the Defence misstates the Impugned Decision. The Chamber did not state that it was not competent to make a determination on whether there was reason to believe that contempt of court may have been committed. In fact, both the Tribunal and the Mechanism for International Criminal Tribunals ("MICT") have the competence over such determinations. In the Impugned Decision, the Chamber reasoned, however, that considering the circumstances, including that the MICT would be the competent institution to conduct any contempt proceedings, it was appropriate for the MICT to also make this initial determination. There is nothing contradictory or erroneous in this reasoning.

11. With regard to the Defence's submission of new circumstances justifying reconsideration to avoid injustice, the Chamber notes that the new circumstances submitted by the Defence mainly relate to matters concerning the Defence's request to have the Accused medically examined prior to the Judgment rendering by medical professionals from Serbia. These 'new circumstances' do not impact on any of the Chamber's findings in the Impugned Decision.

12. The Chamber notes, however, that on 20 November 2017, a MICT Single Judge decided that given the Chamber's organic familiarity with the ongoing proceedings in the instant case, it is most appropriate for the Chamber to 'make the threshold determination as to whether there are "reasons to believe" that Dr Flake [sic]' may have committed contempt of court.¹⁵ Given that the Single Judge's decision prevents the Defence from having recourse to having its motion considered

¹³ Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Turić, 15 July 2015, para. 4.

¹⁴ See Decision on Urgent Defence Motion to Compel Registrar and United Nations Detention Unit to Provide Medical Records, 20 October 2017, fn. 6.

on the merits, the Chamber considers that this development constitutes a relevant new circumstance justifying reconsideration to avoid injustice.¹⁶

Consideration of contempt request on the merits

13. The Chamber closely followed the litigation over the recent weeks, including the one before the President of the Tribunal. It is clear that the Defence is frustrated with the Registry in relation to its requests for medical documents and visits by doctors of the Accused's choice. The alleged contemptuous behaviour of the UNDU's medical officer relates to an alleged conversation between the medical officer and the Accused prior to 3 November 2017, wherein the medical officer allegedly 'implied that no doctor visit of Serbian doctors was going to ever take place' for the Accused.¹⁷ Given this very scant information, combined with the additional information relayed by the Registry in relation to the scheduling of medical visits to the Accused, the Chamber is not satisfied that on this basis there are reasons to believe that the UNDU medical officer may have committed contempt of court.

Certification to appeal

14. In relation to the Defence's alternative request for certification to appeal the Impugned Decision, the Chamber notes that the Defence fails to properly define the issue at hand for the first prong of certification to appeal. It merely gives a generic reference to the health of the Accused as a 'central' issue. The Chamber recalls that the Impugned Decision dealt with several issues.¹⁸ First, whether an administrative decision by the Registrar requires to be reviewed first by the President before a chamber can consider any impact on fair trial rights does not affect fair and expeditious conduct of the proceedings or the outcome of the trial. Secondly, what the Defence calls an issue of 'health and capacity' is in fact the alleged inability of the Accused to attend the hearing of the pronouncement of the Judgment. The basis for the right to be present for the pronouncement of the Judgment pursuant to Rule 98 *ter* (A) of the Rules is different than the more general right to be tried in one's presence stemming from Article 21 of the Tribunal's Statute. During trial, an accused's participation is often important, for example for purposes of pleading to charges or instructing

¹⁵ *Prosecutor v. Mladić*, Case No. MICT-13-56, Decision on Motion for Contempt Proceedings and Related Orders, 20 November 2017.

¹⁶ The Single Judge relied on *Prosecutor v. Karadžić*, Case Nos MICT-13-55-R90.3 & IT-95-5/18-T, paras 13-21, referencing the Chamber's organic familiarity with the ongoing proceedings in the instant case. However, the cited decision also states that 'I consider it established jurisprudence that I, as specially appointed Single Judge, can rule on the matter in the event that the Karadžić Trial Chamber declines to do so', para. 22. In the instant situation, the Chamber declined to make the 'reason to believe' determination.

¹⁷ Urgent Motion for a Hearing to Decide on Pending Urgent Filings and for Issuance of an Order of Contempt or Hearing upon Issuance of a Rule to Show Cause Against UNDU Medical Officer ([...]), 6 November 2017, para. 6.

¹⁸ Given that the Chamber reconsidered the part of the Impugned Decision relating to contempt of court, it is not seized of a request for certification to appeal in this respect.

counsel during the examination of witnesses. The hearing pronouncing the Judgment does not require any participation from the Accused. The basis for the right to be present under Rule 98 *ter* (A) of the Rules is that an accused should hear the verdict against him first and directly from the Judges. In virtually all situations, this *rationale* can be ensured, for example through video-conference link provisions. Accordingly, the issue of the Accused's alleged inability to attend the hearing of the pronouncement of the Judgment also does not affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In light of the foregoing, the Defence has failed to establish that the first prong of Rule 73 (B) of the Rules is met. As the test under Rule 73 (B) of the Rules is cumulative and the first prong has not been met, the Chamber finds no need to determine whether the second prong has been satisfied.

V. DISPOSITION

15. For the foregoing reasons, the Chamber, pursuant to Rule 77 (C) of the Rules,

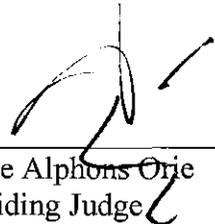
GRANTS the Motion **IN PART**;

RECONSIDERS the Impugned Decision with regard to the appropriateness of the Chamber making a determination on whether there are reasons to believe that the UNDU medical officer committed contempt of court;

DECIDES that there are no reasons to believe that the UNDU medical officer committed contempt of court; and

DENIES the remainder of the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-first day of November 2017
At The Hague
The Netherlands

[Seal of the Tribunal]