



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: 26 September 2016
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 26 September 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR
RECONSIDERATION OF OR, ALTERNATIVELY,
CERTIFICATION TO APPEAL THE
DECISION ON CLOSURE OF THE DEFENCE CASE**

Office of the Prosecutor
Mr Peter McCloskey
Mr Alan Tieger

Counsel for Ratko Mladić
Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 16 August 2016, the Chamber issued an oral decision establishing that the Defence case was closed (“Closure Decision”).¹ On 23 August 2016, the Chamber dismissed the Defence’s request for a reasoned decision regarding the closure of the Defence case, *inter alia* clarifying that in the Closure Decision it had erroneously referred to certification motions as evidentiary matters (“Clarification Decision”).² On 30 August 2016, the Defence filed a motion (“Motion”), requesting that the Chamber reconsider the Closure Decision or, alternatively, grant certification to appeal.³ On 2 September 2016, the Prosecution responded (“Response”), opposing the Motion.⁴ On 9 September 2016, the Defence requested leave to reply (“Request”),⁵ and attached its reply.

II. SUBMISSIONS OF THE PARTIES

A. Reconsideration

2. The Defence bases its request for reconsideration on three main grounds. First, it submits that the Chamber failed to provide a reasoned legal and factual basis for closing the Defence case.⁶ The Defence further contends that the Clarification Decision did not provide any additional explanation or reasoning and therefore did not cure the Closure Decision’s lack of reasoning.⁷ Specifically, the Defence submits that the Chamber did not address how it could close the Defence case while a witness still remained on the Defence’s witness list and while the Defence still had approximately 30 hours of trial time remaining.⁸ Second, the Defence submits that the Chamber’s pending decision pertaining to fair trial rights (“Fair Trial Motion”)⁹ may significantly affect the proceedings and that the decision to close the Defence case on the basis that any pending motions are not of suspensive effect is erroneous.¹⁰ Finally, the Defence contends that the Chamber has yet to consider that the Defence still has approximately 30 hours of trial time remaining and that it

¹ T. 44319.

² Decision on Defence Request for Reasoned Decision Regarding Closure of Defence Case, 23 August 2016, paras 6, 8.

³ Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal the Decision on Defence Request for Reasoned Decision Regarding Closure of Defence Case, 30 August 2016.

⁴ Prosecution Response to Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal the Decision on Defence Request for Reasoned Decision Regarding Closure of Defence Case, 2 September 2016.

⁵ Defence Motion for Leave to Reply in Support of Motion for Reconsideration or, in the Alternative, Certification to Appeal the Decision on Defence Request for Reasoned Decision Regarding Closure of Defence Case, 9 September 2016.

⁶ Motion, paras 2, 10.

⁷ Motion, para. 11.

⁸ *Ibid.*

⁹ Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal the Decision on the Defence Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, 11 July 2016.

¹⁰ Motion, paras 2, 13-14.

wishes to call further witnesses, specifically Hakija Meholjić.¹¹ The Defence submits that neglecting to address these issues constitutes a clear error of reasoning on the part of the Chamber.¹²

3. The Prosecution responds that the Chamber sufficiently explained both the procedural background and the legal analysis that led to its decision to close the Defence case, in the Clarification Decision.¹³ Accordingly, the Prosecution characterises the Defence submission as a mere disagreement with the Clarification Decision, rather than there having been a failure to provide a reasoned decision.¹⁴ The Prosecution also submits that the Defence cannot base its request for reconsideration on another pending motion.¹⁵ The Prosecution further responds that the Chamber properly considered the potential testimony of Meholjić and rejected the Defence's request in this regard, thereby resolving the matter before the closure of the Defence case.¹⁶ With regard to the pending reconsideration motion on this issue ("Meholjić Motion"),¹⁷ the Prosecution submits that the Chamber has already established that this constitutes a non-evidentiary matter without suspensive effect.¹⁸ Finally, the Prosecution submits that the Defence having 30 hours left to present its case is irrelevant.¹⁹

B. Certification to Appeal

4. In the alternative, the Defence submits that both, the Closure and Clarification Decision, significantly affect the fair and expeditious conduct of the proceedings.²⁰ Specifically, the Defence considers that the Closure Decision lacks reasoning and that therefore the closure of its case is unfair, in particular because Meholjić remains on the Defence's witness list and because the Defence still has 30 hours left of trial time remaining.²¹ The Defence further contends that the decision to close its case is unfair given that the Chamber has not yet issued a decision 'that could change everything', namely, on the Defence's Fair Trial Motion.²² In addition, the Defence submits that the Clarification Decision significantly affects the outcome of the trial because the Defence has witnesses left to call.²³ The Defence argues that Meholjić's testimony could have a particularly

¹¹ Motion, paras 2, 12.

¹² Motion, para. 11.

¹³ Response, para. 4.

¹⁴ *Ibid.*

¹⁵ Response, para. 5.

¹⁶ Response, para. 6.

¹⁷ Defence Motion for Reconsideration or, in the Alternative, Certification to Appeal Decision on Defence Request to Vary the Deadline for Presenting Witnesses, 22 August 2016 (Confidential).

¹⁸ Response, para. 6.

¹⁹ Response, para. 7.

²⁰ Motion, paras 16-17.

²¹ Motion, para. 17.

²² Motion, para. 18.

²³ Motion, para. 20.

significant effect on the trial's outcome because he has important evidence regarding the allegation of genocide in Srebrenica.²⁴ The Defence also submits that an immediate resolution by the Appeals Chamber will materially advance the proceedings.²⁵

5. The Prosecution responds that the Defence has not demonstrated how the alleged failure to provide a reasoned decision would significantly affect the fairness or outcome of the trial, or how an immediate resolution would materially advance the proceedings.²⁶ The Prosecution submits that the Defence merely disagrees with the conclusion of the Clarification Decision and has cited irrelevant factors and matters which are the subject of other motions pending before the Chamber.²⁷

C. Request for Leave to Reply

6. The Defence submits that its leave to reply should be granted to allow the Defence to address certain arguments raised in the Response, in particular to show that the Response is based on a false assertion and that the Prosecution implicitly acknowledges the merit of the Defence's request for a reasoned decision.²⁸

III. APPLICABLE LAW

7. The Chamber recalls and refers to the applicable law governing reconsideration of decisions, as set out in a previous decision.²⁹ 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.³⁰

IV. DISCUSSION

A. Request for Leave to Reply

8. The Defence submits that it will reply to issues newly raised in the Response. The Chamber therefore considers that the Defence has shown good cause for its request and will grant the requested leave.

²⁴ *Ibid.*

²⁵ Motion, para. 21.

²⁶ Response, para. 8.

²⁷ *Ibid.*

²⁸ Request, paras 2-4.

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

³⁰ Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Tutić, 15 July 2015, para. 4.

B. Reconsideration

9. The Defence's claim that the Chamber failed to provide a reasoned decision for closing the Defence case is without merit. The Chamber clearly established in the Closure Decision that no further evidentiary matters remained.³¹ The Chamber moreover reiterated and clarified that any remaining matters are non-evidentiary and have no suspensive effect.³² The Chamber therefore finds that there was no clear error of reasoning on this point and that the Defence's continued disagreement with the Closure Decision constitutes no basis for reconsideration. With regard to the Defence's submissions concerning the issues surrounding the Fair Trial Motion and the Meholjić Motion, the Chamber notes that both matters are currently pending before it and will be decided upon in due course. Accordingly, these matters cannot be grounds for reconsideration. Moreover, the Chamber finds that the Defence's submission regarding the time remaining in its case is irrelevant as there are no evidentiary matters remaining in the Defence case. The Defence did not demonstrate a clear error of reasoning justifying reconsideration in this regard. The Defence further did not argue, and the Chamber does not find, that a particular circumstance exists which would justify reconsideration in order to avoid injustice.

10. Considering the above, the Chamber will deny the Defence's request for reconsideration.

C. Certification to Appeal

11. As a preliminary observation, the Chamber recalls that pursuant to Rule 73 (C) of the Rules requests for certification to appeal must be filed within seven days of the filing of the impugned decision. The Defence's submissions on certification to appeal turn primarily on the Closure Decision.³³ In the Clarification Decision, the Chamber stated that it had erroneously referred to certification motions as evidentiary matters in the Closure Decision. The rationale underlying Rule 73 (C) of the Rules leads the Chamber to accept that the time limit for the Defence to file the Motion starts from 23 August 2016, the day on which the Defence was fully acquainted with the reasoning of the Closure Decision.³⁴

12. With regard to the first prong of Rule 73 (B) of the Rules, the Defence identifies three issues that the Defence alleges significantly affect the fair and expeditious conduct of the proceedings or that would affect the outcome of the trial, namely: (i) the lack of reasoning in the Closure Decision, (ii) the pending decision on the Fair Trial Motion, and (iii) the lack of a ruling as to the Defence's

³¹ T. 44319.

³² Clarification Decision, paras 2, 6-7.

³³ Motion, para. 17.

³⁴ The Motion was filed in the evening of 30 August 2016. It therefore meets the deadline of Rule 73 (C) of the Rules in light of Article 21 (5) of the Directive on Judicial Records (IT/280) of 16 February 2015.

remaining witnesses and time remaining in its case. As to the first issue, the Defence failed to demonstrate how, nor does the Chamber find that, the alleged lack of reasoning in the Closure Decision, in itself or as a component of a broader issue raised, significantly affects the fairness and expeditious conduct of the proceedings or the outcome of the trial. With regard to the second and third issues raised by the Defence, the Chamber again notes that it is currently seized of the Fair Trial Motion and the Meholjić Motion and that the Defence's submissions on these matters cannot meet the first prong of Rule 73 (B) of the Rules. Finally, the Chamber finds that the Defence's argument regarding the time it has remaining to present its case is irrelevant.

13. As the test under Rule 73 (B) of the Rules is cumulative and the first prong of the test has not been satisfied, the Chamber will not address the second prong of the test.

14. Considering the above, the Chamber will deny the Defence's request for certification to appeal.

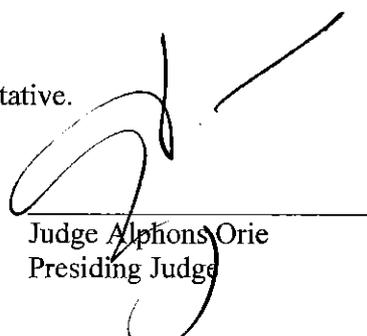
V. DISPOSITION

15. For the foregoing reasons, pursuant to Rule 73 (B) of the Rules, the Chamber

GRANTS leave to Reply, and

DENIES the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-sixth day of September 2016
At The Hague
The Netherlands

[Seal of the Tribunal]