



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: 27 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: 27 September 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON DEFENCE MOTION FOR
RECONSIDERATION OR CERTIFICATION TO APPEAL
DECISION ON MOTION FOR A FAIR TRIAL OR A MISTRIAL**

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 19 May 2016, the Defence filed a motion, alleging that the fair trial rights of the Accused had been violated by the integration of staff (“Impugned Staff”) who previously worked for the trial chamber seised of the case of *Prosecutor v. Radovan Karadžić* into the present case, and requesting certain information or, in the alternative, that the Chamber declare a mistrial (“Original Motion”).¹ On 4 July 2016, the Chamber issued a decision, denying the Original Motion (“Impugned Decision”).² On 11 July 2016, the Defence filed a motion, requesting that the Chamber reconsider or, alternatively, grant certification to appeal the Impugned Decision (“Motion”).³ On 25 July 2016, the Prosecution responded, opposing the Motion (“Response”).⁴ On 27 July 2016, the Defence requested leave to reply (“Request to Reply”),⁵ attaching its reply as an annex (“Reply”).⁶

II. SUBMISSIONS OF THE PARTIES

A. Reconsideration

2. The Defence submits that the Chamber committed a number of clear errors of reasoning in the Impugned Decision.⁷ First, the Defence submits that the Impugned Decision did not provide a reasoned decision on the issue of whether the Accused’s right to the presumption of innocence had been violated.⁸ Second, the Defence argues that the Chamber made clear errors of reasoning with regard to the standard of bias applied to the judges in the present case.⁹ Specifically, the Defence submits that the Chamber asserted an unreasonable standard for judicial bias in the Impugned Decision, namely that “a judge’s impartiality [will not be doubted] unless the judge has found the Accused’s participation fulfilled all the relevant criteria necessary to constitute a criminal offence, and then had found the Accused guilty beyond a reasonable doubt of having committed that

¹ Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, 19 May 2016.

² Decision on Defence Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, 4 July 2016.

³ 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.

⁴ Prosecution Response to 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, 25 July 2016.

⁵ Defence Request for Leave to Reply in Support of 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, 27 July 2016.

⁶ Request to Reply, Annex A: Defence Reply in Support of 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.

⁷ Motion, paras 1, 3, 7-15.

⁸ Motion, para. 3(a).

⁹ Motion, paras 3(b), 7-8.

offence”.¹⁰ The Defence argues that this standard is erroneous and conflicts with the standard laid down in the *Furundžija* Appeal Judgement.¹¹ Third, the Defence submits that, even under the unreasonable standard laid down in the Impugned Decision, the standard of bias is met in the present case, as the Chamber’s assertion that findings in the *Karadžić* Trial Judgement did not “establish the criteria to constitute a criminal offence [or] make findings on the criminal responsibility of the Accused” is incorrect.¹² The Defence argues that the *Karadžić* Trial Judgement contains numerous findings regarding the criminal liability of the Accused.¹³ The Defence also submits that these findings demonstrate that the Tribunal regards the Accused as guilty in the present case which, in accordance with the jurisprudence of the European Court of Human Rights (“ECHR”), constitutes a violation of the right to the presumption of innocence.¹⁴

3. The Prosecution submits that the Defence has failed to demonstrate the existence of a clear error of reasoning in the Impugned Decision or of particular circumstances justifying its reconsideration.¹⁵ First, it submits that the Chamber rightly found that the only substantive argument concerning the right to the presumption of innocence made by the Defence in the Original Motion concerned impartiality, and that the Chamber fully addressed this argument.¹⁶ Second, the Prosecution submits that the Defence’s arguments regarding the Chamber’s standard for judicial impartiality and the findings made in the *Karadžić* Trial Judgement are irrelevant to reconsideration, as the issue at stake in the Impugned Decision concerns the question of whether the transfer of the Impugned Staff affects the impartiality of the Chamber in the present case.¹⁷ As neither the judges nor the staff in the present case have made any findings in the *Karadžić* Trial Judgement, the discussion concerning the standard for the impartiality of judges in the context of findings made in previous judgements is tangential, at best, to the issue at hand.¹⁸ Third, the Prosecution submits that the Defence repeats arguments put forward in the Original Motion regarding the transfer of the Impugned Staff, which were addressed by the Chamber in the Impugned Decision.¹⁹

¹⁰ Motion, paras 3(b), 8, referring to Impugned Decision, para. 24.

¹¹ *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000.

¹² Motion, paras 3(c), 10-12, referring to Impugned Decision, para. 24.

¹³ Motion, paras 12-13, 15.

¹⁴ Motion, paras 12-15, with specific reference to Council of Europe/European Court of Human Rights, *Guide on Article 6 of the Convention – Right to a fair trial (criminal limb)*, 2014, para. 216.

¹⁵ Response, paras 1, 4-7, 14.

¹⁶ Response, para. 5.

¹⁷ Response, paras 4, 6.

¹⁸ Motion, para. 6.

¹⁹ Response, paras 4, 7.

B. Certification to Appeal

4. The Defence submits that the Impugned Decision significantly affects the fair and expeditious conduct of the proceedings.²⁰ The Defence argues that the Chamber's promulgation of an unreasonable standard for bias, incorrect factual findings, and failure to provide reasoning for its assertion that the Accused's right to the presumption of innocence has not been violated, significantly affect the fairness of the proceedings.²¹ With regard to expeditiousness, it argues that, as these critical issues are certain to be dealt with on appeal, it would be more expedient to address them at the current stage of the proceedings.²² The Defence further submits that the Impugned Decision would significantly affect the outcome of the trial, as a decision sustaining a violation of the very rights on which a fair trial is based would, by definition, affect its outcome.²³ It further argues that the outcome of the trial will also be affected by the Impugned Staff's "pre-conceived ideas" as to the guilt of the Accused, as the Impugned Staff prepare drafts on which the final judgement against the Accused will be based.²⁴ Finally, the Defence submits that as the right to a fair trial and to the presumption of innocence go to the very core of legal proceedings, "[a]n immediate resolution by the Appeals Chamber is required to materially advance any proceedings in which such fundamental rights are impugned".²⁵

5. The Prosecution submits that the Defence has not demonstrated that an immediate resolution of the issues arising from the Impugned Decision may materially advance the proceedings.²⁶ The Prosecution argues that at the current stage of the proceedings, it would be more beneficial to proceed to judgement and allow any issues to be raised on appeal, as any granting of certification is likely to delay, rather than materially advance, the proceedings.²⁷

6. The Defence submits that it should be allowed to reply in order to address certain arguments raised by the Prosecution, in particular its assertion that "it would be more beneficial for all parties and the accused to proceed to judgement and allow any issues to be raised on appeal after judgement is rendered".²⁸ In its Reply, the Defence submits that the Prosecution articulates an overly narrow and incorrect interpretation of the term "proceedings", which in fact comprises not only the trial stage, but also the appellate stage, and engages concepts such as the interests of

²⁰ Motion, paras 17-19, 26.

²¹ Motion, paras 17-18.

²² Motion, paras 3, 17-19, 26.

²³ Motion, paras 20-21, 26.

²⁴ Motion, para. 21.

²⁵ Motion, paras 23, 26.

²⁶ Response, paras 1, 8-13, 14.

²⁷ Response, paras 9-12.

²⁸ Request to Reply, para. 2, referring to Response, para. 9.

justice.²⁹ The Defence argues that an immediate resolution by the Appeals Chamber would materially advance the proceedings by preventing the nullification of the trial judgement and that it is in the interests of justice to consider these matters now, as opposed to following an appeal of the trial judgement.³⁰

III. APPLICABLE LAW

7. The Chamber recalls and refers to the applicable law governing reconsideration of decisions, as set out in a previous decision.³¹ 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.³²

IV. DISCUSSION

A. Request to Reply

8. As the Response raises the new issue of whether certification to appeal may materially advance the proceedings at the current, advanced stage of the case, the Chamber finds that the Defence has shown good cause for its Request to Reply and will grant the requested leave.

B. Reconsideration

9. At the outset, the Chamber notes that in its Original Motion, the Defence argued that the Accused's fair trial rights, specifically, his right to the presumption of innocence, had been violated by the integration of the Impugned Staff into the present case and did not put forward any arguments concerning other alleged violations of the Accused's right to the presumption of innocence.³³ The Chamber finds that, contrary to the Defence's assertion, the Chamber in fact provided a reasoned decision on the issue of whether the Accused's right to the presumption of innocence had been violated in the way alleged by the Defence in its Original Motion.³⁴ As to the

²⁹ Reply, para. 1.

³⁰ Reply, paras 2-3.

³¹ Reasons for Decision on Defence Motion for Reconsideration, 29 June 2012, para. 10.

³² Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Tutorić, 15 July 2015, para. 4.

³³ See Original Motion, paras 7, 28. The Chamber notes paragraph 25 of the Original Motion, which states that "The Accused in the instant case was for all intents and purposes convicted in the *Karadžić* judgment. [...] [W]ord limits and common sense mitigate against a full accounting of all the ways in which the presumption of innocence of the Accused in the instant case was violated [...]" after which the Defence lists a number of findings made in the *Karadžić* case which refer to the Accused. The Chamber understood the references to the *Karadžić* Trial Judgement to be in support of the Defence's submission that, due to their involvement in the *Karadžić* case and the conclusions drawn therein, the Impugned Staff are no longer impartial towards the Accused in the present case. See further Impugned Decision, para. 2.

³⁴ Impugned Decision, paras 18-26.

Defence's argument that the findings made in the *Karadžić* case, in accordance with ECHR jurisprudence, constitute a violation of the Accused's rights to the presumption of innocence, the Chamber notes that this issue was not raised by the Defence in its Original Motion and was therefore not decided upon by the Chamber in the Impugned Decision. The Chamber therefore finds that this argument is irrelevant for the purposes of reconsideration.

10. With respect to the Defence's argument that the Chamber has asserted an unreasonable standard for judicial bias, the Chamber recalls that it correctly set forth and applied the standard as articulated in the *Furundžija* Appeal Judgement when analysing whether the presumption of impartiality attached to the judges in the present case had been rebutted as a consequence of the transfer of the Impugned Staff.³⁵ The Chamber's statement that a judge's impartiality will not be doubted unless the judge has found the Accused's participation fulfilled all the relevant criteria necessary to constitute a criminal offence did not affect its application of the standard laid down in the *Furundžija* Appeal Judgement to the judges in the present case. The Chamber's statement relates to the situation where a judge has made findings that prejudice the question of the guilt of an accused in subsequent proceedings, which is not the situation in the present case. As pointed out by the Chamber in the Impugned Decision and undisputed by the Defence, neither the judges in the present case nor the Impugned Staff have made any findings in the *Karadžić* case.³⁶ In light of the foregoing, the Defence's argument that the Chamber was incorrect in asserting that the *Karadžić* Trial Judgement does not contain findings regarding the criminal liability of the Accused is irrelevant for the purposes of reconsideration.

11. Considering the above, the Chamber finds that the Defence has failed to demonstrate the existence of a clear error of reasoning in the Impugned Decision and will deny the Defence's request for reconsideration.

C. Certification to Appeal

12. At the outset, the Chamber notes that decisions on motions for certification to appeal an impugned decision should not analyse the merits of the impugned decision; instead, the merits are to be dealt with in any interlocutory appeal itself. However, in assessing whether the two criteria for certification to appeal, contained in Rule 73 (B) of the Rules have been met, it is necessary for the Chamber to identify the issue at stake in the impugned decision. In carrying out this analysis, the Chamber must necessarily consider some aspects of the merits of the impugned decision. A balance

³⁵ Impugned Decision, paras 9, 21-23.

³⁶ Impugned Decision, paras 18, 24.

must be struck between not repeating the reasoning of the impugned decision on the one hand, and, not being oblivious to it on the other hand, so as to justifiably define the issue at stake.

13. The Chamber further notes that in its submissions concerning certification to appeal, the Defence repeats and refers back to some of its arguments concerning alleged errors of reasoning made by the Chamber in the Impugned Decision.³⁷ The Chamber reminds the Defence that the appropriate forum for arguments concerning alleged judicial errors in an impugned decision are in a motion for reconsideration and/or in an appeal itself, and not in a motion for certification to appeal.³⁸ Accordingly, in carrying out an analysis as to whether the test for certification has been met, the Chamber will not further consider the Defence's submissions alleging the existence of judicial errors in the Impugned Decision.

14. With respect to the first prong of Rule 73 (B) of the Rules, the Chamber considers that the Impugned Decision deals with the issue of whether the integration of the Impugned Staff, who assist the judges in all matters pertaining to the case, into the present case, affects the Accused's fair trial rights, more specifically the right to the presumption of innocence. The Chamber notes that the right to the presumption of innocence, reflected in Article 21 (3) of the Tribunal's Statute, is one of the cornerstones of the right to a fair trial. In light of the foregoing, the Chamber considers that the issue at stake in the Impugned Decision significantly affects the fair and expeditious conduct of the proceedings and therefore finds that the first prong of Rule 73 (B) of the Rules has been satisfied.

15. With respect to the second prong of Rule 73 (B) of the Rules, the Chamber considers that the scope and importance of the matter dealt with in the Impugned Decision, and its potential impact on the overall proceedings, is such that an immediate resolution by the Appeals Chamber may materially advance the proceedings. Based on the foregoing, the Chamber finds that the second prong of Rule 73 (B) of the Rules has also been satisfied.

V. DISPOSITION

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

GRANTS the Request to Reply;

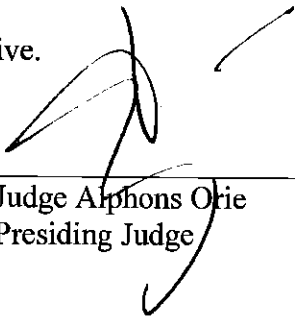
GRANTS the Motion in part;

DENIES the request for reconsideration of the Impugned Decision; and

³⁷ See Motion, paras 17-18, referring to Motion, paras 3, 8-15.

GRANTS certification to appeal the Impugned Decision.

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



Judge Alphons Orie
Presiding Judge

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

[Seal of the Tribunal]

³⁸ *See, e.g.,* Decision on Defence Motion for Certification to Appeal Decision on Forty-Fifth Motion to Admit Evidence Pursuant to Rule 92 *bis*, 30 June 2015, para. 5.