

**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-03-67-R77.5
Date: 2 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: 2 November 2017

IN THE CASE AGAINST

**PETAR JOJIĆ
AND
VJERICA RADETA**

PUBLIC

DECISION RETURNING CASE TO PRESIDENT

Amicus Curiae Prosecutor
Ms Diana Ellis, QC

I. PROCEDURAL HISTORY

1. On 30 October 2012, an order in lieu of indictment was issued, charging, *inter alios*, Petar Jojić, Jovo Ostojić, and Vjerica Radeta (collectively “Accused”) with contempt of the Tribunal for having threatened, intimidated, offered bribes to, or otherwise interfered with witnesses in the cases of *Prosecutor v. Vojislav Šešelj* (case numbers IT-03-67-T and IT-03-67-R77.3).¹ On 5 December 2014, a revised order in lieu of indictment was issued.² On 19 January 2015, warrants of arrest and orders for surrender were issued for the Accused (“Arrest Warrants”).³

2. On 7 April 2015, the President of the Tribunal assigned the instant case to this Chamber.⁴ On 25 August 2015 and 14 September 2016, the Chamber advised the President of the Tribunal that the lack of action by Serbia can only be interpreted as harbouring an unwillingness to execute the Arrest Warrants and that Serbia’s continued non-compliance with its obligations obstructs the course of justice.⁵ On 30 September 2016, the Chamber requested the *amicus curiae* Prosecutor to make submission on the Tribunal’s jurisdiction over the instant case.⁶ On 19 October 2016, the *amicus curiae* Prosecutor made submissions in response to the Chamber’s request (“Jurisdiction Submission”).⁷

3. On 10 July 2017, the *amicus curiae* Prosecutor requested the Chamber to conduct a trial *in absentia* (“Motion”).⁸ On 17 August 2017, following his death, the Chamber terminated all proceedings with respect to Jovo Ostojić and issued a revised order in lieu of indictment.⁹

¹ Decision Issuing Order in Lieu of Indictment, 30 October 2012 (Confidential and *ex parte*).

² Further Decision on Order in Lieu of Indictment, 5 December 2014 (Confidential and *ex parte*), Annex B. A public redacted version of the order was filed on 1 December 2015.

³ Warrant of Arrest and Order for Surrender of Petar Jojić, 19 January 2015 (Confidential and *ex parte*); Warrant of Arrest and Order for Surrender of Jovo Ostojić, 19 January 2015 (Confidential and *ex parte*); Warrant of Arrest and Order for Surrender of Vjerica Radeta, 19 January 2015 (Confidential and *ex parte*). Public redacted versions of the Arrest Warrants were filed on 1 December 2015.

⁴ Order Reassigning a Case to a Trial Chamber, 7 April 2015 (Confidential and *ex parte*).

⁵ Decision Advising the Tribunal’s President of the Republic of Serbia’s Continued Failure to Cooperate with the Tribunal, 14 September 2016, p. 2; Decision Advising the President of the Tribunal of the Republic of Serbia’s Failure to Cooperate with the Tribunal, 25 August 2015 (Confidential and *ex parte*), p. 2.

⁶ Request for Submissions, 30 September 2016 (Confidential and *ex parte*).

⁷ Submissions from the *Amicus Curiae* Prosecutor on the Issue of Jurisdiction, 19 October 2016 (Confidential and *ex parte*).

⁸ Note from the *Amicus Curiae* Prosecutor re: Proceedings for Contempt of Court, 10 July 2017 (Confidential and *ex parte*), paras 1, 43.

⁹ Revised Order in Lieu of Indictment, 17 August 2017.

II. SUBMISSIONS

4. The *amicus curiae* Prosecutor submits that the integrity of the Tribunal is threatened by its inability to administer justice in the instant case.¹⁰ Having exhausted all available means to have the allegations considered under standard trial procedures, the *amicus curiae* Prosecutor submits that it is appropriate to commence proceedings *in absentia*.¹¹ The *amicus curiae* Prosecutor relies on a holding in the case of *Prosecutor v. Tihomir Blaškić* in support of its argument that trials *in absentia* are appropriate in certain exceptional situations.¹²

5. In the Jurisdiction Submission, the *amicus curiae* Prosecutor argued that jurisdiction over the instant case lies unambiguously with the Tribunal according to Article 4(1) of the Transitional Arrangements attached to the United Nations Security Council resolution which established the Mechanism for International Criminal Tribunals (“Transitional Arrangements” and “MICT”, respectively).¹³ She argued that had the Security Council intended to make a jurisdictional exception for contempt of court fugitives, as was done in Article 1(4) of the Transitional Arrangements, it would have done so.¹⁴

III. APPLICABLE LAW

6. The Appeals Chamber in the *Blaškić* case held that “generally speaking, it would not be appropriate to hold *in absentia* proceedings against persons falling under the primary jurisdiction of the International Tribunal (i.e., persons accused of crimes provided for in Articles 2-5 of the Statute). [...] By contrast, *in absentia* proceedings may be exceptionally warranted in cases involving contempt of the International Tribunal, where the person charged fails to appear in court, thus obstructing the administration of justice”.¹⁵

7. Article 4(1) of the Transitional Arrangements states that “[t]he ICTY and ICTR shall have competence to conduct, and complete, all proceedings for contempt of court and false testimony for which the indictment is confirmed prior to the commencement date of the respective branch of the Mechanism”.

¹⁰ Motion, para. 1.

¹¹ Motion, para. 5.

¹² Motion, paras 28, 42.

¹³ Jurisdiction Submission, paras 1, 17-19, 21.

¹⁴ Jurisdiction Submission, paras 15, 18-19.

¹⁵ *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 59.

8. Article 1(4) of the Transitional Arrangements, which applies to trial proceedings, states that “[i]f a fugitive indicted by the ICTY or ICTR is arrested [...] on or after the commencement date of the respective branch of the Mechanism, the Mechanism shall have the competence over such person in accordance with Article 1 of its Statute”.

IV. DISCUSSION

9. The portion of the *Blaškić* decision relied upon by the *amicus curiae* Prosecutor states that *in absentia* proceedings may be exceptionally warranted in cases involving contempt of the Tribunal. This leaves the Chamber with a wide margin of discretion to determine whether such an exceptional situation exists in the instant case. The *amicus curiae* Prosecutor’s request to conduct *in absentia* proceedings was filed in July 2017. As further set out below, the Tribunal’s judicial activity will cease on 30 November 2017. These circumstances do not leave sufficient time to hear the case even if the Chamber had determined that *in absentia* proceedings were appropriate in this case.

10. The Tribunal will close down before the instant case can be heard.¹⁶ Serbia’s non-compliance with the Tribunal’s orders in this case leaves open two possibilities for this case’s future: termination or transfer to another forum. Terminating the case would be contrary to the purpose of the Tribunal’s existence, *i.e.* combatting impunity, and would in effect reward Serbia’s non-compliance with its international obligations and disregard for the rule of law. The MICT as the Tribunal’s successor institution would be the logical forum to hear the case. As the President of the Tribunal assigned the Chamber to hear this case, the Chamber considers it most appropriate to return the case to him under the current circumstances, but urges the President to refer the case to the MICT President for further processing.

11. Whether the MICT can assume jurisdiction to hear the case will be for a MICT single Judge to determine once the case is transferred. While never called upon to decide this issue, the Chamber assumed jurisdiction in this case on the basis of Article 4(1) of the Transitional Arrangements given that the initial order in lieu of indictment was issued on 30 October 2012, prior to the commencement date of the Hague branch of the MICT on 1 July 2013. However, the Chamber allows for reasonable alternative interpretations on the question of jurisdiction in this case. For example, it could be argued that in analogy to Article 1(4) of the Transitional Arrangements, jurisdiction in a case of contempt of the Tribunal fugitives is determined by the date of arrest, not

¹⁶ See United Nations Security Council Resolution 2329 (2016) deciding on the *final* extensions of the Judges’ terms of office until 30 November 2017.

the date of the order in lieu of indictment. As the accused in this case have not been apprehended, jurisdiction would lie with the MICT.

12. As a final matter, the Chamber notes that many filings in this case, in particular at a time when the existence of this case was still confidential, were distributed pursuant to the Registry's sensitive filings procedure.¹⁷ This procedure represents a heightened form of confidentiality through limited hard copy-only distribution. With the 1 December 2015 issuing of public redacted versions of the then-order in lieu of indictment and the Arrest Warrants, the justification for such sensitivity has disappeared. Accordingly, the Chamber will instruct the Registry to remove the 'sensitive filings' classification from all filings in this case. After this removal, the filings will be connected to the Tribunal's internal judicial database but keep their status of 'confidential' or 'confidential and *ex parte*'.

V. DISPOSITION


13. For the foregoing reasons, the Chamber

DENIES the Motion;

INSTRUCTS the Registry to remove the sensitive filing classification from all affected filings in this case; and

DECIDES, *proprio motu*, to return the case to the President.

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



Judge Alphons Orie
Presiding Judge

Dated this Second day of November 2017
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁷ See Directive on Judicial Records, IT/280, 16 February 2015, Art. 3.