

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-09-92-T

IN TRIAL CHAMBER I

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

Registrar: Mr. John Hocking

Date Filed: 11 July 2016

THE PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**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**

The Office of the Prosecutor:

Mr. Peter McCloskey
Mr. Alan Tieger

Counsel for the Accused:

Mr. Branko Lukić
Mr. Miodrag Stojanović

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

PROSECUTOR

v.

RATKO MLADIĆ

Case No: IT-09-92-T

PUBLIC

**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**

The Accused, **RATKO MLADIĆ**, by and through his counsel of record, hereby files the instant Motion, seeking reconsideration or, in the alternative, certification to appeal the Trial Chamber's *Decision on the Defence Motion for a Fair Trial and the Presumption of Innocence or in the Alternative, a Mistrial*, and states as follows:

1. A Chamber has the discretion to reconsider its own decisions if the requesting party has demonstrated the existence of a clear error of reasoning or that particular circumstances, which can be new facts or arguments, justify its reconsideration in order to prevent an injustice.¹ The primary focus of this Motion is to seek reconsideration, in light of clear errors or reasoning in the Chamber's *Decision on Defence Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial*² (the "Impugned Decision").

¹ *Prosecutor v Seselj*, Case No. IT-03-67-AR72.1, Decision on Motion for Reconsideration of the "Decision on the Interlocutory Appeal Concerning Jurisdiction Dated 31 August 2004, 15 June 2006, para. 9; *Prosecutor v Delic*, Case No. IT-04-83-PT, Decision on the Prosecution Motion for Reconsideration, 23 August 2006, p. 3; *Prosecutor v Milutinovic et al*, Case No. IT-05-87-T, Decision on Prosecution Motion Requesting Reconsideration of Trial Chamber "Decision on Evidence Tendered Through Witness K-82" Issued 3 October 2006 and Leave to Recall Witness K-82, 13 March 2007, para. 14.

² 4 July 2016.

2. In the alternative, pursuant to Rule 73(B) of the ICTY Rules of Procedure and Evidence (the “Rules”), Ratko Mladić (“the Accused”), by and through Counsel, respectfully requests certification to appeal the *Decision on the Defence Motion for a Fair Trial and the Presumption of Innocence or in the Alternative, a Mistrial* of 4 July 2016 (the “Impugned Decision”).
3. The Defence seeks reconsideration of, or in the alternative, certification to appeal, the Impugned Decision as it relates to the following:
 - a. The Impugned Decision did not address the Accused’s main concern, that is, that his right to be presumed innocent has been violated, and the Trial Chamber did not provide a reasoned decision on this issue.
 - b. The Trial Chamber’s finding that “a judge’s impartiality [will not be doubted] unless the judge had 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 offence”³ is unreasonable.
 - c. The Trial Chamber’s assertion that findings in the Karadzic case did not “establish the criteria to constitute a criminal offence [or] make findings on the criminal responsibility of the Accused”⁴ is incorrect.

I. APPLICABLE LAW

i. Reconsideration

4. Reconsideration is an inherent power of a Trial Chamber.⁵ It is appropriate where a “clear error of reasoning” exists.⁶

³ Impugned Decision, para. 24.

⁴ Impugned Decision, para. 24.

⁵ See, footnote 1, *supra*.

⁶ *Prosecutor v. Ratko Mladic*, Case No. IT-09-92-T, Decision on Defence Motion for Reconsideration, 29 June 2012, para. 10.

ii. Certification to Appeal

5. Certification to appeal is the alternative remedy sought herein. Under Rule 73(B), a Trial Chamber “may grant... certification [to appeal] if the decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”⁷
6. A request for certification to appeal must show that these two cumulative conditions have been met, and need not show that a decision was incorrectly reasoned.⁸ The party moving for certification must prove that both conditions are satisfied.⁹

II. SUBMISSIONS ON RECONSIDERATION

7. The Defence respectfully requests the Trial Chamber to reconsider the Impugned Decision. The Defence derives from the Impugned Decision that the Trial Chamber has made clear errors of reasoning with regard to the standard of bias applied the Judges in the present case and the corresponding factual findings, as listed above.¹⁰

i. Unreasonable Standard for Judicial Bias

8. The Impugned Decision defines an unreasonable standard for judicial impartiality. In finding that “a judge’s impartiality [will not be doubted] unless the judge had 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 offence,”¹¹ the Trial Chamber has asserted an unreasonable standard for judicial bias.

⁷ Rules of Procedure and Evidence, as amended 8 July 2015.

⁸ *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-PT, Decision on Prosecution’s Request for Certification to Appeal the Trial Chamber’s Decision on Protective Measures of 13 September 2007, 7 November 2007, para.3.

⁹ *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Prosecution Request for Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend, 14 July 2006, para.2.

¹⁰ See para. 3, *supra*.

¹¹ Impugned Decision, para. 24.

9. The Defence respectfully submits that this standard is erroneous and conflicts with the very standard quoted by the Trial Chamber earlier in the Impugned Decision. The Impugned Decision notes *Furundzija*'s holding that a reasonable and firmly established apprehension of bias must be demonstrated to disqualify a judge,¹² and that "judges should not only be subjectively free from bias, but there should be nothing which objectively gives rise to an appearance of bias."¹³ This is a very different standard than that the Trial Chamber elucidates later in the Impugned Decision, which amounts to a requirement for an Accused to be placed in double jeopardy before a finding of bias will be made.
10. Remarkably, even this unreasonable standard would be met in this case. The Chamber stated that the Impugned Staff and judges in the present case did not make any such findings in the *Karadzic* case.¹⁴ As will be shown below, this is incorrect.

ii. Incorrect Statements as to Legal Findings in Karadzic

11. The Impugned Decision makes incorrect factual assertions regarding the contents of the *Karadzic* judgment and the legal findings related to the Accused therein. In the Impugned Decision, the Trial Chamber cited jurisprudence from the ECHR, quoting the *Poppe*¹⁵ case:

The mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not, in itself, sufficient to cast doubt on that judge's impartiality in a subsequent case. **It is, however, a different matter if the earlier judgments contain findings that actually prejudice the question of the guilt of an accused in such subsequent proceedings.**¹⁶ [emphasis added]

12. Contrary to the Trial Chamber's statement that the findings related to the Accused in the *Karadzic* case did not "establish the criteria to constitute a criminal offence [or]

¹² *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000, para. 197, referenced in the Impugned Decision, para. 9.

¹³ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000, para. 189, referenced in the Impugned Decision, para. 9.

¹⁴ Impugned Decision, para. 24.

¹⁵ *Poppe v. The Netherlands*, Judgment on Application No. 322271/04, 24 March 2009.

¹⁶ *Poppe v. The Netherlands*, Judgment on Application No. 322271/04, 24 March 2009, paras. 22-23, quoted in the Impugned Decision, para. 11.

make findings on the criminal responsibility of the Accused,”¹⁷ the *Karadzic* case contains numerous statements of the Accused’s guilt that would meet the standard elucidated in *Poppe*. Two of the *Karadzic* paragraphs cited in the original Defence Motion¹⁸ make explicit legal findings that the Accused’s participation in a joint criminal enterprise (“JCE”) was proven “beyond reasonable doubt.”¹⁹ A number of others that were not explicitly referenced in the interests of brevity make further findings regarding the criminal liability of the Accused to a “beyond reasonable doubt” standard.²⁰ Numerous other findings do not incorporate the phrase “beyond reasonable doubt,” but instead use words like “satisfied,”²¹ “in the [*Karadzic*] Chamber’s view,”²² or simply that the Chamber “found” specific legal and factual issues.²³ These go well beyond the passing mentions of an accused that were referenced in *Poppe*.²⁴

13. Similarly, in the *Miminoshvili* and *Khodorkovskiy* cases cited in the Impugned Decision, the applicants were never directly incriminated as perpetrators or co-offenders.²⁵ This distinguishes these cases from the situation at hand, in which explicit legal findings of guilt beyond a reasonable doubt have been made by a Trial Chamber in the same court with jurisdiction over the Accused.

14. The ECHR itself has stated that

[t]he presumption of innocence will be violated if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty. A

¹⁷ Impugned Decision, para. 24.

¹⁸ Defence Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, 19 May 2016 (“Defence Motion”).

¹⁹ See *Karadzic* para. 3462 (cited at footnote 39 to para. 25 of the Defence Motion) and para. 5962 (cited at footnote 42 to para. 25 of the Defence Motion). Footnote 11029 to para. 3462 further specifies that “[t]he Chamber finds that Ratko Mladić was a member of the Overarching JCE from 12 May 1992.”

²⁰ See, for example, *Karadzic* paras. 4680, 4892, 5814 (referencing “other members of the JCE,” which per the preceding paragraphs includes the Accused); and 5830 (with the slightly different wording of “the only reasonable inference”).

²¹ *Karadzic* para. 5739, cited in Defence Motion para. 25, footnote 43 (stating the Chamber is “satisfied” that the Accused possessed specific intent).

²² See, for example, *Karadzic* para. 4674.

²³ See, for example, *Karadzic* paras. 5996-5999 (cited in footnotes 36-39 of the Defence Motion).

²⁴ *Poppe v. The Netherlands*, Judgment on Application No. 322271/04, 24 March 2009, para. 28.

²⁵ *Miminoshvili v. Russia*, Judgment on Application No. 20197/03, 28 June 2011, para. 118; *Khodorkovskiy and Lebedev v. Russia*, Judgment on Application Nos. 11082/06 and 13772/05, 25 July 2013, para. 549.

premature expression of such an opinion by the tribunal itself will inevitably fall foul of this presumption.²⁶ [citations omitted]

15. The Defence submits that the paragraphs referenced in *Karadzic* (among others) demonstrate, if not an opinion, reasoning suggesting that the court regards the Accused as guilty in this case. According to the very court on which the Trial Chamber has relied, the *Karadzic* Trial Chamber's pre-judgment of the Accused is sufficient to show that the Accused is not presumed innocent before this Tribunal.

III. SUBMISSIONS ON CERTIFICATION TO APPEAL

16. If the Trial Chamber declines to reconsider the Impugned Decision, the Defence respectfully requests certification to appeal. The Defence notes that the seven-day deadline for certification to appeal, as set forth in ICTY Rule 73(C), has not expired, and that this instant Motion is brought in a timely manner.

A. The Decision Significantly Affects the Fair and Expeditious Conduct of the Proceedings

17. The Defence submits that the Impugned Decision affects the fairness of the proceedings for the reasons detailed elsewhere.²⁷ The promulgation of an unreasonable standard for bias and incorrect factual findings, as described above, is by definition unfair.
18. In the Impugned Decision, the Trial Chamber fails to provide its reasoning for its assertion that the Accused's right to a presumption of innocence has not been violated. The Defence argued in its original motion that the findings of guilt of the Accused in the *Karadzic* judgment violated the presumption of innocence.²⁸ However, the Impugned Decision only addressed the issue of impartiality and did not make any findings on the Defence submission of a violation on the presumption of innocence. As before the ECHR, Accused appearing before the ICTY "shall be presumed innocent

²⁶ Council of Europe/European Court of Human Rights, *Guide on Article 6 of the Convention – Right to a fair trial (criminal limb)*, 2014, at para. 216.

²⁷ See paras. 3, 8-15.

²⁸ Defence Motion, para. 25.

until proven guilty.”²⁹ Anything less is unfair. Furthermore, even according the case law of the very court cited by the Trial Chamber, the Accused’s right to be presumed innocent has been violated.

19. Finally, because these issues are so critical to the rights of the Accused, they are certain to be dealt with on appeal. Therefore, the Defence submits that it is expedient to resolve them now.

B. The Decision Significantly Affects the Outcome of the Trial

20. In addition to its affect on the fair and expeditious conduct of the proceedings as detailed above, the Impugned Decision will significantly affect the outcome of the trial by legitimizing certain incorrect assumptions on which the eventual judgment will be based. A decision sustaining a violation of the very rights on which a fair trial is based will, by definition, significantly affect its outcome.
21. The fact that a number of individuals who worked on the *Karadzic* trial judgment (not to mention prior related judgments) now work with the Chamber judging the Accused³⁰ will have a significant effect on the outcome of the Accused’s trial. These individuals are not professional judges; in fact, the Trial Chamber asserts that “those assisting judges are not subject to the same standards of impartiality [as judges are].”³¹ The Trial Chamber has not indicated what standards, if any, might therefore apply to Chambers staff. Given that these individuals perform the legal research and prepare drafts on which the final judgment against the Accused will be based, their pre-conceived ideas about the guilt of the Accused will necessarily affect the outcome of the trial.
22. The Defence has it upon information and belief that the initial concerns of Chambers officials upon the filing of the original Defence motion were not whether the issues were raised by the Defence were legitimate, but how the Defence came to know about

²⁹ Article 21(3), *Updated Statute of the International Criminal Tribunal for the former Yugoslavia*, September 2009.

³⁰ Two staff members who previously worked on the *Karadzic* judgment are now engaged on the case of the Accused, according to para. 18 of the Impugned Decision. This is in addition to at least two interns who moved from the *Karadzic* to the *Mladic* case following the release of the judgment in the former case.

³¹ Impugned Decision, para. 14.

the situation.³² The Defence takes this to mean that at least some individuals within Chambers understand that the situation is problematic. The Defence submits that such guileful conduct is indicative of a serious issue that will significantly affect the outcome of the trial.

C. An Immediate Resolution is Required to Materially Advance the Proceedings

23. The right to a fair trial and the presumption of innocence go to the very core of legal proceedings. Fair and just proceedings should not – cannot – exist without them. An immediate resolution is required to materially advance any proceedings in which such fundamental rights are impugned.
24. The Defence notes that the importance of these issues has been recognized in the past. In a case cited in the Impugned Decision,³³ a Chambers staff member was excluded from the drafting process where there was thought to be a possibility of a conflict of interest.³⁴

IV. CONCLUSION

25. In conclusion, with all due respect to the Trial Chamber, the Impugned Decision is in error for the reasons set out above. The Defence submits that reconsideration is necessary to prevent any further injustice to the Accused. As previously stated, the cases of *Karadzic* and *Mladic* are so closely related, with virtually identical indictments, that there is a high risk of an appearance of bias.³⁵ For these reasons, reconsideration is appropriate.
26. If the Trial Chamber does not find reconsideration to be appropriate, the Defence requests, in the alternative, certification to appeal. The Impugned Decision significantly affects the fairness and expeditiousness of the proceedings and will have serious ramifications for the outcome of the trial, satisfying the first prong of Rule

³² The Defence notes that the official listing of Chambers staff assignments was not updated on Tribenet until after the Defence Motion was filed.

³³ Para. 14.

³⁴ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-A, Judgement, 17 December 2015.

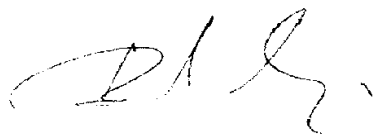
³⁵ Defence Motion, paras. 24-25.

73(B). Further, given the serious issues and the state of uncertainty surrounding their resolution, an immediate resolution by the Appeals Chamber will materially advance the proceedings, thus satisfying the second and final prong of Rule 73(B). As both conditions of Rule 73(B) are met, certification to appeal the Impugned Decision should be granted.

WHEREFORE, the Defence respectfully requests reconsideration or, in the alternative, certification to appeal the Impugned Decision on the issues set forth herein.

Word Count: 2,729

RESPECTFULLY SUBMITTED:



Branko Lukić
Lead Counsel for Mr. Ratko Mladić



Miodrag Stojanović
Co-Counsel for Mr. Ratko Mladić