UNITED NATIONS

Mechanism for International Criminal Tribunals

Case No.: MICT-13-56-A

Date: 8 June 2018

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Carmel Agius
Judge Liu Daqun
Judge Prisca Matimba Nyambe
Judge Seymour Panton

Registrar: **Mr. Olufemi Elias**

Decision of: **8 June 2018**

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC (REDACTED)

PUBLIC REDACTED VERSION OF THE "DECISION ON A MOTION TO VACATE THE TRIAL JUDGEMENT AND TO STAY PROCEEDINGS" FILED ON 30 APRIL 2018

The Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig
Ms. Barbara Goy
Ms. Katrina Gustafson

Counsel for Mr. Ratko Mladić:

Mr. Branko Lukić
Mr. Dragan Ivetić

THE APPEALS CHAMBER of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively);[1]

NOTING the judgement issued in this case by Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia ("Trial Chamber" and "ICTY", respectively), on 22 November 2017 ("Trial Judgement");[2]

BEING SEISED OF a confidential motion, filed on 31 January 2018, in which Mr. Ratko Mladić ("Mladić") requests that: (i) all further proceedings be stayed "until [Mladić's] health has been adjudicated to be stable with capacity to meaningfully and competently participate";[3] and (ii) the Trial Judgement be vacated, as Mladić was not fit to meaningfully participate in and understand the trial proceedings, and the Trial Judgement was "entered during a period of time when the [REDACTED] of the Accused was compromised";[4]

NOTING that arguments in the Motion are based on the findings of [REDACTED];[5]

NOTING the response, filed on 12 February 2018, wherein the Office of the Prosecutor of the Mechanism ("Prosecution") submits that the Motion fails to substantiate that Mladić was unfit during trial or that he is unfit to participate in appeal proceedings;[6]

NOTING the confidential reply filed by Mladić on 19 February 2018;[7]

NOTING that, on 21 February 2018, the Registrar filed a confidential submission stating, *inter alia*, that [REDACTED];[8]

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[1] Order Assigning Judges to a Case Before the Appeals Chamber, 19 December 2017, p. 1.
[2] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Judgement, 22 November 2017 (public with confidential annex).
[3] Defence Motion to Vacate Judgment and Impose Stay of Proceedings, 31 January 2018 (confidential with public and confidential annexes) ("Motion"), para. 32, p. 10. A public redacted version of the Motion was filed on the same date. *See also* Motion, paras. 24, 26-29.
[4] Motion, p. 10. *See also* Motion, paras. 3, 8, 9, 17, 19, 21-25, Annex 2 (confidential), Annex 3 (confidential).
[5] Motion, paras. 9, 19-29, Annex 3 (confidential), Registry Pagination ("RP.") 111, Annex 4 (public), RP. 147.
[6] Prosecution Response to Defence Motion to Vacate Judgement and Impose Stay of Proceedings, 12 February 2018 (public with confidential annex) ("Response"), paras. 1, 8-16, 16 *bis*. The Appeals Chamber notes that there are two paragraphs numbered as "16" in the Response. The second paragraph 16 shall be referred to herein as 16 *bis*. [REDACTED].
[7] Defence Reply to Prosecution Response to Defence Motion to Vacate Judgment and Impose Stay of Proceedings, 19 February 2018 (confidential with confidential annexes) ("Reply"). A public redacted version of the Reply was filed on the same date. Given that the Response was distributed by the Registry on 13 February 2018, the time-limit to file the Reply was calculated from that date. The Reply is therefore validly filed. *See* Practice Direction on Filings Made Before the Mechanism for International Criminal Tribunals, MICT/7/Rev.2, 24 August 2016, Article 11(3); *Prosecutor v. Jean Uwinkindi*, Case No. MICT-12-25-AR14.1, Decision on Prosecution's Request to File a Consolidated Response and Variation of the Time Limit, 11 July 2016, pp. 1, 2, n. 6.
[8] Registrar's Submission in Relation to Defence Motions, 21 February 2018 (confidential with confidential annexes) ("Registrar's Submission of 21 February 2018"), paras. 13, 14. The public redacted version of the Registrar's Submission of 21 February 2018 was filed on 8 March 2018.

NOTING Mladić's confidential response, filed on 5 March 2018, to the Registrar's submission;[9]

NOTING that, on 20 March 2018, the Registrar filed further submissions containing, *inter alia*, the medical report [REDACTED];[10]

NOTING that, following an extension of the time-limit, Mladić and the Prosecution filed their respective notices of appeal against the Trial Judgement on 22 March 2018;[11]

NOTING Mladić's confidential response, filed on 3 April 2018, to the Registrar's Submission of 20 March 2018;[12]

CONSIDERING that the determination of Mladić's request for a stay of the proceedings rests on the determination of his [REDACTED] fitness;[13]

CONSIDERING that fitness to participate in proceedings is related to Article 19(4)(b) of the Statute of the Mechanism ("Statute"), which stipulates that an accused shall be entitled to, *inter alia*, "*communicate* with counsel of his or her own choosing";[14]

RECALLING that the standard of fitness is that of meaningful participation, allowing the accused to exercise his or her fair trial rights to such a degree as to be able to participate effectively in and

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[9] Response to "Registrar's Submission in Relation to Defence Motions", 5 March 2018 (confidential with confidential annexes) ("Response to Registrar's Submission of 21 February 2018"). Mladić filed a public redacted version on 9 March 2018. The Appeals Chamber recalls that it has rejected Mladić's argument that the Registrar's Submission of 21 February 2018 should be dismissed or struck from the record because it was filed after the expiry of the time-limit for filing responses to his various motions. The Registry is not a party to proceedings and thus, its submissions filed pursuant to Rule 31(B) of the Rules of Procedure and Evidence are not subject to the time-limits that apply to parties. *See* Decision on a Motion for Provisional Release on Humanitarian Grounds, 12 April 2018 (confidential) ("Provisional Release Decision of 12 April 2018"), paras. 5, 6. *See also* Response to Registrar's Submission of 21 February 2018, para. 1.

[10] Registrar's Submission of Independent Medical Experts' Reports and Further Submission in Relation to Defence Motions and "Response to 'Registrar's Submission in Relation to Defence Motions'", 20 March 2018 (confidential with confidential annexes) ("Registrar's Submission of 20 March 2018"), Annex 1. A public redacted version of the Registrar's Submission of 20 March 2018 was filed on 10 April 2018.

[11] Notice of Appeal of Ratko Mladić, 22 March 2018 (public with public and confidential annexes) ("Notice of Appeal"); Prosecution's Notice of Appeal, 22 March 2018. With respect to the extension of time, *see* Decision on Motion for Extension of Time to File Notice of Appeal, 21 December 2017, p. 2. *See also* Decision on a Further Motion for an Extension of Time to File a Notice of Appeal, 9 March 2018; Decision on Ratko Mladić's Motions for Reconsideration, 16 March 2018.

[12] Response to "Registrar's Submission of Independent Medical Experts' Reports and Further Submission in Relation to Defence Motions and 'Response to Registrar's Submission in Relation to Defence Motions'", 3 April 2018 (confidential with confidential annexes). A public redacted version of this document was filed on 9 April 2018. *See* Notice of Filing of Redacted Version of Recent Filing, 9 April 2018, Annex A.

[13] *See Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Public Redacted Version of 30 November 2012 Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero, 16 January 2013 ("*Popović et al.* Decision of 16 January 2013"), paras. 21-30.

[14] *See* Article 19(4)(b) of the Statute (emphasis added). In this regard, the accused's ability to participate is clearly contingent upon whether he or she possesses the mental capacity to understand the proceedings and the mental and/or physical capacity to communicate, and thus consult, with his or her counsel. *Prosecutor v. Vujadin Popović et al.*, Case

understand the essentials of the proceedings, and that an accused's fitness should turn on whether his or her capacities, "viewed overall and in a reasonable and commonsense manner, are at such a level that it is possible for him or her to participate in the proceedings (in some cases with assistance) and sufficiently exercise the identified rights" ("Standard of Fitness");[15]

RECALLING that the Standard of Fitness applies *mutatis mutandis* to appeal proceedings as it involves an appellant's fitness to exercise his or her right to consult with counsel concerning the preparation of appellate submissions;[16]

CONSIDERING that processing the wealth of complex information inherent in international criminal proceedings is the role of defence counsel, in order to advise their clients;[17]

CONSIDERING that an appellant claiming to be unfit to participate in proceedings bears the burden of so proving by a preponderance of the evidence;[18]

CONSIDERING the arguments in the Motion, based on [REDACTED];[19]

CONSIDERING, however, that despite submissions on [REDACTED], the Motion does not demonstrate that Mladić's ability to, *inter alia*, communicate, consult with his counsel, and/or understand the essentials of the proceedings has been impaired;[20]

CONSIDERING ALSO that, according to [REDACTED];[21]

No. IT-05-88-A, Public Redacted Version of 13 December 2010 Decision on Motion by Counsel Assigned to Milan Gvero Relating to his Present Health Condition, 16 May 2011 ("*Popović et al.* Decision of 16 May 2011"), para. 11.

[15] *See Popović et al.* Decision of 16 January 2013, para. 21; *Popović et al.* Decision of 16 May 2011, para. 11; *Strugar* Appeal Judgement, paras. 41, 55.

[16] *See Popović et al.* Decision of 16 January 2013, para. 21; *Popović et al.* Decision of 16 May 2011, para. 11.

[17] *See Popović et al.* Decision of 16 January 2013, para. 22. *See also Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement"), paras. 55, 60. The ICTY Appeals Chamber in the *Strugar* case emphasized that "fitness to stand trial should be distinguished from fitness to represent oneself. An accused represented by counsel cannot be expected to have the same understanding of the material related to his case as a qualified and experienced lawyer. Even persons in good physical and mental health, but without advanced legal education and relevant skills, require considerable legal assistance, especially in cases of such complex legal and factual nature as those brought before the Tribunal". *See Strugar* Appeal Judgement, para. 60. *See also Popović et al.* Decision of 16 May 2011, para. 13, where the ICTY Appeals Chamber considered that counsel may file a notice of appeal on the appellant's behalf, on the basis that a variation of the grounds of appeal might be sought later in light of the appellant's alleged present incapacity.

[18] *See Popović et al.* Decision of 16 January 2013, para. 21. *See also Strugar* Appeal Judgement, para. 56.

[19] Motion, paras. 26-28, Annex 3 (confidential), Annex 4 (public); Reply, paras. 7, 16, 21, Annex A (confidential), para. 1, Annex B (confidential).

[20] *See Popović et al.* Decision of 16 January 2013, paras. 22, 23; *Strugar* Appeal Judgement, para. 61, where the ICTY Appeals Chamber stated that "medical diagnoses alone, no matter how numerous, do not suffice to assess a person's competency to stand trial".

[21] Registrar's Submission of 20 March 2018, Annex 1, RP. 2882-2880. [REDACTED].

CONSIDERING FURTHER that, as recently as 14 February 2018, Mladić communicated with his lead counsel and handwrote a statement explicitly challenging portions of a medical report in relation to another motion filed on 19 February 2018;[22]

CONSIDERING that, viewed overall, neither the circumstances of this case nor the submissions in the Motion demonstrate that Mladić is unable to communicate and/or consult with his counsel, or that he is otherwise incapable of understanding the proceedings;

FINDING therefore that the Motion does not satisfy the burden of demonstrating that Mladić is unfit to effectively participate in and understand the essentials of the appeal proceedings;

FINDING that a stay of proceedings is not warranted;

CONSIDERING submissions in the Motion, based primarily on [REDACTED], that the Trial Judgement should be vacated as [REDACTED] during a significant part of the trial proceedings and the rendering of the Trial Judgement;[23]

RECALLING the considerations above that [REDACTED] do not demonstrate an impairment of Mladić's ability to communicate, consult with counsel, or understand the proceedings;[24]

CONSIDERING FURTHER that, following the conclusion of the trial proceedings, the means to address an alleged violation of a procedural right – including matters related to fitness to participate in trial proceedings[25] – is an appeal from judgement;[26]

CONSIDERING that Mladić's [REDACTED] fitness during trial proceedings has been raised in the Notice of Appeal;[27]

FINDING therefore that, in the present circumstances, granting the request to vacate the Trial Judgement is not warranted;

FOR THE FOREGOING REASONS,

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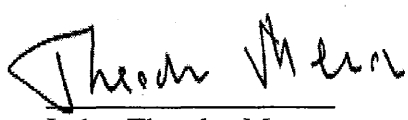
[22] *See* Motion to Strike from the Record the "Registrar's Submission of Medical Report" Dated 15 Feb. 2018, 19 February 2018 (confidential with confidential annexes), paras. 3-6, 8, Annex B, wherein lead counsel "presented and translated" for Mladić a medical report dated 14 February 2018 "to question him as to the accuracy" of the contents, and following this, Mladić handwrote a statement [REDACTED].
[23] *See* Motion, paras. 17, 19, 21-25, p. 10. [REDACTED].
[24] *See supra*, p. 3.
[25] *See supra*, n. 14.
[26] *Cf. Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement, 2 April 2014, paras. 21,

HEREBY DISMISSES the Motion in its entirety.

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

Done this 8th day of June 2018,
At The Hague,
The Netherlands



Judge Theodor Meron
Presiding Judge

[Seal of the Mechanism]

26, 33. *See also Strugar* Appeal Judgement, paras. 25-64, where the ICTY Appeals Chamber adjudicated the issue of Pavle Strugar's fitness during trial in the appeal judgement.
[27] Notice of Appeal, para. 82.

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