

UNITED
NATIONS



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-56-A

Date: 15 May 2020

Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Prisca Matimba Nyambe (Presiding)
Judge Seymour Panton
Judge Gberdao Gustave Kam
Judge Aminatta Lois Runeni N’gum
Judge Elizabeth Ibanda-Nahamya

Registrar: Mr. Olufemi Elias

Date: 15 May 2020

PROSECUTOR

v.

RATKO MLADIĆ

Public with Confidential Annex A and Public Annex B

**DEFENCE SUBMISSION IN COMPLIANCE WITH THE “ORDER SCHEDULING
A STATUS CONFERENCE,” ISSUED 11 MAY 202**

Office of the Prosecutor:

Ms. Laurel Baig
Ms. Barbara Goy

Counsel for Ratko Mladić:

Mr. Branko Lukić
Mr. Dragan Ivetić

Office of the Registrar:

Mr. Olufemi Elias, Registrar

THE INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS**PROSECUTOR****v.****RATKO MLADIĆ***Public with Confidential Annex A and Public Annex B*

**DEFENCE SUBMISSION IN COMPLIANCE WITH THE “ORDER SCHEDULING A
STATUS CONFERENCE,” ISSUED 11 MAY 2020**

RATKO MLADIĆ by and through his counsel of record, (hereinafter "Mr. Mladić" or "Defence"), hereby submits the Instant SUBMISSION:

I. Introductions and Background

1. On 11 May 2020 the Appeals Chamber issued a public scheduling order (hereinafter “Status Order”) setting the case for a status conference on 29 May 2020 (subject to the tentative and conditional consents referenced in footnote 7 of that order). The Status Order requested the Defence to file any submissions relative on the issue of privileged communications related to the status conference within 2 days of the submissions of the Registrar.

2. On 13 May 2020, the Registrar filed their submissions, publicly (hereinafter “Registrar Submissions”). As a preliminary matter, the Registrar Submissions do not comply with the tentative/conditional consents referenced in footnote 7 of the Status Order. A copy of the relevant emails (redacted) are attached hereto as Confidential Annex A. Additionally, the Registrar Submissions seems to indicate a current inability on its part to facilitate an Appeals Hearing in a manner foreseen under the Rules for 16-17 June 2020,¹ which were not part of the submissions sought by the Status Order.² Nevertheless, this raises questions about the practicability of the Appeals Hearing schedule, especially given that Defence team have

¹ Registrar Submissions, paras. 3, 7.

² The Defence considers the Registry Submissions irrelevant as to Appeals Hearings. Among other things - unlike Status conferences, **there is no legal basis for “remote” Appeals Hearings** and any such proposition is contrary to the existing IRMCT Rules.

to begin arranging travel and several are unable to confirm such plans without great difficulty and uncertainty. If the Registrar Submissions is to be understood as stating that a physical hearing on the Appeals is not feasible for the 16-17 June 2020 dates, but by way of video-link only, and that counsel will not be able to meaningfully engage in attorney-client preparations at the UNDU prior to the Appeals Hearing, as seemingly indicated by the Registrar³, then it would perhaps be prudent and promote judicial economy to vacate those dates now, **before** defence team members (and presumably judges), and family of Mr. Mladić undertake to expending their resources on costly travel and lodging arrangements to comply with 14 day quarantine requirements upon arrival in The Netherlands (if even permitted to travel).

3. To make abundantly clear, the Defence herein publicly makes submissions as requested by the Status Order and responds to that part of the Registrar Submissions that relates to the status conference. We reserve our right to further address the Appeals Hearing at an appropriate time, except to note what we have indicated in the foregoing paragraph. The Defence opposes the Registrar Submissions for the reasons set out below, and cannot accept to participate in a status conference in a manner other than as foreseen by the Rules and as consented to by the client and Defence in its communication to the Chamber.⁴ It is the Defence position that a status conference without a waiver of the accused, without a consent to proceed in the manner foreseen by the Registrar Submissions, and without a meaningful ability of the Defence counsel to meet in a privileged attorney-client manner with and prepare with their client for the status hearing is contrary to the Rules, violates the fair trial and due process rights afforded to the Appellant and thus we cannot proceed in that manner.

4. We also note that the filing yesterday of the “Defence Notice” as to a Complaint to the Registrar under the UNDU Regulations pertaining to the medical issues recently admitted by the Registry Medical Officers at the UNDU might have further impact on all of this.

II. Submissions and Arguments

A. Applicable Law

5. IRMCT Rule 69 (B) and (C) are applicable to the instant matter and dictate that –

(B) The Appeals Chamber or an Appeals Chamber Judge shall convene a status conference, within one hundred and twenty days of the filing of a notice of appeal and thereafter within one hundred and twenty days after

³ Registrar Submissions, paras. 3, 7.

⁴ Confidential Annex A.

the last status conference, to allow any person in custody pending appeal the opportunity to raise issues in relation thereto, including the mental and physical condition of that person.

*(C) With the **written consent of the accused, given after receiving advice from his Counsel**, a status conference under this Rule may be conducted:*

*(i) in the presence of the accused, **but with his Counsel participating either via teleconference or video-conference**; or*

*(ii) in the absence of the accused, **but with his participation via teleconference if he so wishes and/or participation of his Counsel via teleconference or video-conference.***⁵

6. Based on the foregoing parameters of the Rule, the Defence communicated to the Appeals Chamber and all parties⁶ as recognized by the Status Order that it **exceptionally** would accommodate and be flexible to allow only this status conference to take place with the Presiding Judge participating video-conference, and with the preference that Mr. Mladić appear in the courtroom with counsel, or in the alternative, under Rule 69(C)(ii) – if appearance of our client was to be via remote video-link that **we would request that counsel be present at the same location as our client** so as to be able to fulfil our role and consult with him as to issues that may arise during the Status Conference.

7. In either of the above circumstances it was understood that they were contingent on a prior meaningful ability for Mr. Mladić to meet and prepare with counsel in person at UNDU.

8. Likewise the Defence clearly and unequivocally stated “*Mr. Mladic **does not consent** to a status conference where he is not permitted a meaningful in-person interaction and privileged preparation with counsel for the same, nor does he consent to counsel appearing remotely unless counsel is appearing remotely from the same location as Mr. Mladic to permit and assist in the understanding and consultations as to matters that may arise during the status hearing. At the same time, Defence is not in a position to perform core of its professional duties towards client and to act towards preservation of integrity of proceedings without possibility of meaningful in vivo consultations with its client, including having full insight in his current medical condition.*”

⁵ IRMCT Rule 69 (B) & (C).

⁶ See, Confidential Annex A.

9. The Defence position is clearly in accord with the rights afforded and set by the foregoing Rule, and even exceptionally consented to the remote participation of the Presiding Judge. The Defence has been fair and complied with the Rule.

10. The Registrar Submissions promotes a mode of participation that is untenable and contrary to the Rule.

B. Registry Submissions as to access/exit from Detention are Unsupported.

11. The Registrar claims COVID-19 restrictions put in place by the “Netherlands’ Custodial Institutions Agency, the United Nations Detention Unit (“UNDU”), in consultation with the UNDU’s Medical Officer, implemented a number of measures in line with those adopted by the Custodial Institutions Agency, aimed at preventing the occurrence of COVID-19 in the UNDU prevent attorney-client in person meetings at the UNDU and presumably the transport of Mr. Mladić to the IRMCT Courthouse.⁷ No citations have been provided to support this position nor demonstrate that the Registrar has inquired of any of the named institutions to make an exception to allow this status conference to be conducted in accord with the Status Order and Rules.

12. Defence Counsel has agreed to wear PPE (ventilator mask, gloves) and engage in social distancing during the attorney-client visits. Counsel agrees to be tested @ UNDU if so desired. Defence Counsel has no intention nor interest in harming his client nor others at UNDU.

13. News and official Dutch Government sources seem to indicate that Dutch Attorneys have been able to visit their clients in Detention, that clients have been able to leave Detention to attend hearings, and when the participation of their clients in hearings is curtailed, that counsel have been permitted to refuse to participate in proceedings, on the basis that “these measures do not allow confidential consultation between the lawyer and the client and therefore there can be no fair trial.”⁸ Official Dutch Ministry of Justice information provides that “As of May 11, more hearing **in the presence of the parties in the proceeding will take place**. Matters related to criminal and family law will have priority.

⁷ Registry Submission paras. 2-3.

⁸https://nos.nl/artikel/2333507-advocaten-weigeren-naar-zitting-ridouan-taghi-te-komen.html?fbclid=IwAR3tsB1_JbrKB0k7a_45ixg0vnmFZoOAZUDQPzKQbiRTs6YOayPbiGGCXDU
[Translation is Public Annex B].

The last updates were announced on 1 May 2020.”⁹ The official Dutch Judiciary website as to criminal cases states “[...] where a detained suspect cannot be heard via video conference and **does not waive his right to attend the hearing**, the judge (commissioner) can exceptionally decide that the suspect is taken to the courthouse and has a physical hearing in his presence. takes place.”¹⁰ Thus it would seem that the Registrar’s Submissions are incomplete, inaccurate or have not fully investigated the actual situation as to either attorney-client visits or the ability for Mr. Mladić to exit the UNDU to participate in person. We note in this regard that the Registrar fails to remember that he transported Mr. Mladić outside UNDU for a surgical procedure on 28 March 2020, well after the restrictions that have been elaborated by the Registrar. Additionally, as we have made very clear, Mr. Mladić has not waived his right to be present in person, and only conditionally agreed to a video-link appearance if counsel was present at the same location.

14. Given the foregoing it seems unreasonable that Defence Counsel not be permitted to meet with his client at the UNDU and appear via video-link with his client from the UNDU for purposes of having a meaningful status conference.

C. Telephonic Consultations are not a Suitable alternative nor can Counsel Meaningfully use same to engage in Attorney-Client preparations as necessary for a status conference.

15. Nevertheless, irrespective of the nature/extent of restrictions relating to entry/exit from the UNDU (and potential exceptions recognized by the Dutch authorities), the manner of telephonic consultations proposed by the Registrar’s Submissions¹¹ does not permit a meaningful lengthy and substantive discourse nor privileged communication between the attorney and client so as to prepare adequately for the status conference that is meant to discuss any complaints of treatment or medical issues, in addition to other concerns. The Defence remains available to keep the Appeals Chamber apprised of this matter, so that it may take into account the same when assessing the medical condition and recover of Mr. Mladić based on a fuller, completer and more reliable picture of the pertinent facts. The

⁹<https://www.simmons-simmons.com/en/publications/ck865qv6q15r40a740f0fw17b/dutch-enforcement-authorities-and-the-covid-19-crisis>; and [https://www.rechtspraak.nl/coronavirus-\(COVID-19\)/Paginas/COVID-19-Algemene-regeling-zaaksbehandeling-Rechtspraak.aspx](https://www.rechtspraak.nl/coronavirus-(COVID-19)/Paginas/COVID-19-Algemene-regeling-zaaksbehandeling-Rechtspraak.aspx).

¹⁰[https://www.rechtspraak.nl/coronavirus-\(COVID-19\)/Paginas/COVID-19-Algemene-regeling-zaaksbehandeling-Rechtspraak.aspx#59967d5d-d5f9-494e-a4c4-f1e360209dbfa32b6908-c069-45db-a355-94c5665ca9a930](https://www.rechtspraak.nl/coronavirus-(COVID-19)/Paginas/COVID-19-Algemene-regeling-zaaksbehandeling-Rechtspraak.aspx#59967d5d-d5f9-494e-a4c4-f1e360209dbfa32b6908-c069-45db-a355-94c5665ca9a930)

¹¹ Registrar Submissions, para. 4.

telephonic communications can be used only for short communications and are unsuitable for going over documents.

16. The Defence would highlight that alleged attorney-client privileged communications via telephone at the UNDU take 2 forms.

- a. By calling the UNDU number known to counsel, if counsel is recognized and, on the list, a call-back connects the client and counsel in the regular telephone room (standing).
- b. By making arrangements in advance with the UNDU to use the newly equipped Room at UNDU where a table, chair and speakerphone have been installed.¹²

17. So far, while the Counsel had an opportunity to communicate with the Appellant in UNDU (as referred in Registrar's Submissions) via telephone line, such communication demonstrated that proposed mode of Attorney-client communication is not acceptable, from both technical and substantial obstacles which cannot be cured in proposed manner.

18. As to mode "a" above, the following issues and problems prevent that from being used as a reliable and suitable alternative to a meaningful attorney-client meeting in person. Due to COVID-19 restrictions at UNDU the staffing is minimal. Multiple calls result in the following experiences:

- a. Persons answering who do not know how to verify if I am counsel, nor how to eventuate privileged call-back.
- b. Multiple calls over several days with no call-back from the client.¹³ This frustrates the ability to plan and accomplish matters of importance.

¹² The Registrar submission makes it seem this has been used multiple times, but in fact we only used it once, with the help and assistance of the UNDU staff, as indicated in my communication to the Chamber and parties, wherein multiple persons were present in the Room to ensure it even functioned. To counsel's knowledge that has been the **only** use of that method for IRMCT. The problems with the same were reported. (see confidential annex A, pg. 1-2).

¹³ Reasons are unknown and irrelevant, although one time it was explained "they are very busy." [First example = 11 May 2020, Counsel calls at 13:03h, no call-back, calls again at 15:25h, told "sorry, busy", call-back at 15:29] [Second example = 12 May 2020, Counsel calls at 16:05h, promised call-back does not occur that day; counsel calls again 13 May 2020, at 11:00h, call-back at 11:10 for 4 minute discussion with client]

- c. Counsel was connected and in the middle of a telephonic privileged call with my client on 1 April 2020 starting at 17:58h (Hague time) while discussing his health post-surgery, the client announced that an individual (the UNMO, Dr. [REDACTED]) had entered the privileged area and began addressing my client and having him sign paperwork. The client handed the phone to the UNMO Dr. [REDACTED] to talk with me. At the time the health and well-being of my client was of primary concern so no formal complaint was made, but it was distracting from the work trying to be undertaken, and a clear violation of the assurances of privileged telephonic communications being implemented and active. Given what we now know about the worsening of Mr. Mladić and the inadequate reporting and health measures relating to the same UNMO Dr. [REDACTED] and his subordinates, the possibility of medical staff interrupting a privileged call cannot be excluded and is detrimental to the preparations for a meaningful status conference.
- d. Due to standing and his health – most calls on this line are a few minutes in length and Mr. Mladić does not have access to paperwork, especially paperwork that is only in counsel’s possession, yet necessary to review for purposes of the status conference.

19. Due to the foregoing it is impossible to even plan and effectively use the time to prepare meaningfully for a status conference due to the inconsistency of the telephone usage under mode “a.”

20. As to mode “b” – the problems encountered have been detailed in Confidential Annex A. It took 30 minutes just to obtain conditional consent upon the request of Chambers for the status conference. Things had to be repeated multiple times as the speaker phone was crackling, cutting out or unintelligible to Mr. Mladic. As indicated in the Annex, on that occasion 3 persons were present at the time I had been advised that a “privileged” communication had commenced. Knowing that this was a first try and they were there to see if worked and I was being cautious, I ascertained that it was not a privileged conversation – and again after pleasantries were exchanged, these persons left. However, in the future the

same issues of privileged and meaningful communication by this means can arise, namely, but not included to:

- a. Unknown persons being in the room, unannounced, interfering or pressuring the responses of Appellant and/or by their mere presence destroying the privileged nature of any communication;
- b. Unknown persons being outside the room but able to hear the speakerphone;¹⁴
- c. The inability to discuss meaningfully any documentation as neither party has what the other party has in their possession and neither party can know what is being looked at so as to efficiently discuss and use same for preparations. Other major disadvantage is inability of both Counsel and the Appellant to meaningfully and jointly review and comment any document. While they might refer to some document or issue, neither cannot be sure on other's position or to reach final conclusion during such telephone conversation;
- d. Continued mis-understanding due to the quality of telephone connection and speaker.

21. Adding to the problems with both “a” and “b” modes of telephonic communication – the Commanding Officer of UNDU has advised on 13 May 2020 that at some in the near future medical documentation shall be provided to counsel via secure method. That documentation (as with others) is in a language not spoken/read by the client, and must be translated to be shown to the client for his understanding. This can only be accomplished via an in-person meeting at the UNDU.

D. Physical Separation of Attorney-Client at Status Conference Negatively Affects the Rights of Accused and Meaningful Participation in Same.

22. The precondition of arranging the Status Conference per the Status Order is to inter alia enable meaningful and privileged communication between Counsel and Appellant, as one of the most important safeguards of the Appellant's right to a fair trial.

¹⁴ For those unfamiliar with the layout of the UNDU, and without revealing too much to cause a security concern, suffice to say the room outfitted for mode “b” communications is near a well-travelled hallway, and near a large interior common area.

23. Pre COVID-19 studies into remote criminal hearings consistently highlighted the disadvantage at which virtual hearings put defendants. Virtual hearings impair a defendant's access to counsel because lawyers and defendants are not in the same place, which leads to a "disconnect" in the relationship between the lawyer and the client.¹⁵ Studies have also highlighted the¹⁶ detrimental effect on the defendants themselves, noting that "sitting in a remote video link facility for a lengthy period could be mentally exhausting and alienating"

24. This may be because virtual hearings in criminal cases risk incompatibility with the right of the accused to a public trial; to have adequate time and facilities for the preparation of the defence; to be tried in his or her presence,¹⁷ and are "likely to have an impact on [a defendant's] ability to participate fully and effectively in their own criminal proceedings."¹⁸

25. Other problems arise specific to a virtual hearing where Mr. Mladić and Counsel are forced to use a telephone and video-link at the status conference¹⁹ namely:

- a. Due to travel restrictions, only ONE team member (Co-Counsel) is able to attend. He cannot both talk on the phone and follow the Courtroom proceedings simultaneously. If at the same location,²⁰ He is cued to the client's reactions and can ask for a short pause to consult.
- b. As to dedicated telephone line for privileged communications during status conference does not enable prompt and simulations communication, nor can replace regular situation and attendance of both Counsel and the Appellant in the courtroom. Attention of both Counsel and the Appellant will be naturally

¹⁵ P. Gibbs, [Defendants on video – conveyor belt justice or a revolution in access?](#) (2017), p.33: "The hidden story of virtual justice is of the harm the disconnect does to the relationship between lawyer and client. The rigid timetable leads to "stopwatch" justice, in which lawyers try to beat the clock to get instructions from their clients, many of whom have challenges understanding the basics of the criminal justice process". D. Tait, B. McKimmie, R. Sarre, D. Jones, L. W. McDonald, K. Gelb, [Towards a distributed courtroom](#), (2017) Western Sydney University, p.17: "Defendants' access to counsel might be impaired by being located away from their lawyer."

¹⁶ 32 D. Tait, B. McKimmie, R. Sarre, D. Jones, L. W. McDonald, K. Gelb, [Towards a distributed courtroom](#), (2017) Western Sydney University, p.17.

¹⁷ All enshrined in IRMCT Statute Art. 19.

¹⁸ [Fair Trials, Safeguarding the right to a fair trial during the Coronavirus pandemic: remote criminal justice proceedings](#), 30 March 2020, p.20.

¹⁹ Registrar Submissions, para. 5.

²⁰ Courtroom or video-link from UNDU or elsewhere together.

constantly directed towards the Appeals Chamber, so this physical distance is not acceptable, even in case of existing separate telephone line between Counsel and the Appellant. In such situation, rights of the Appellant cannot be efficiently safeguarded, let alone lack of any waiver as to Appellant's personal absence to such conference.

- c. Counsel cannot intervene to explain things to Mr. Mladic or seek clarification from Mr. Mladić if he is on his feet and speaking on video-link and requires to be advised or go into confidential session or some other important fact is missed.
- d. Again- the issue of reference to documents and the inability to know what documents are being cited, which deprives the Appellant of his right to meaningfully follow and engage in proceedings.
- e. This telephonic system has (to the knowledge of counsel) **never** been tested in practice and therefore other issues may arise.

III. Conclusion

26. For the foregoing reasons the Defence must oppose the Registrar's Submission.

WHEREFORE we re-affirm all the conditions set forth in the communications in Confidential Annex A, and respectfully ask that the Appeals Chamber order that Counsel be permitted access to meet with Mr. Mladić at UNDU well prior to the status conference and if Mr. Mladić participates via video-link that Counsel be physically present and participating from the same location.

Word Count: 3499

RESPECTFULLY SUBMITTED BY:



Branko Lukić

Lead Counsel for Ratko Mladić



Dragan Ivetic

Co-Counsel for Ratko Mladić

Dated this 15th of May 2020

Belgrade, Serbia &

The Hague, Netherlands

**UNITED
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Public

Annex B

https://nos.nl/artikel/2333507-advocaten-weigeren-naar-zitting-ridouan-taghi-te-komen.html?fbclid=IwAR3tsBl_JbrKB0k7a_45ixg0vnmFZoOAZUDQPzKQbiRTs6YOayPbiGGCXDU

NOS News, In Country

Monday 11 May 2020 13:13

Lawyers refuse to attend Ridouan Taghi

Five lawyers refuse to come to a hearing in the Amsterdam court next week in the Ridouan Taghi case. That report [NRC](#) and [EenVandaag](#) . The lawyers feel that they cannot do their job properly.

The court imposed restrictions because of the corona crisis. For example, the suspects may not be physically present at the interim hearing in the case. They are only allowed to dial in via a video connection while handling their own case. They receive an hour at most from the prisons.

According to the lawyers, these measures do not allow confidential consultation between the lawyer and the client and therefore there can be no fair trial.

Court summarizes pleading note

The lawyers may also not argue in the usual way. They must inform the court well in advance what they want to say and the court will summarize it at the hearing. Otherwise, individual cases cannot be dealt with within an hour.

The five lawyers say that the measures were taken without consultation with their office and that this is against the law.

The court has said that at the next hearing, in August, everything will be done to ensure that the suspects can then be present themselves.

However, the lawyers do not consider this commitment sufficient and therefore refuse to come to the Amsterdam court next week, also because the Public Prosecution Service is simply present. They point to another hearing in the case of Ridouan Taghi, of the court in Utrecht. The suspects were allowed

to be there personally. "It is incomprehensible to us that this is not possible in a similar case at the Amsterdam court," write the lawyers in their letter.



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