

THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

Case No. MICT-13-56-A

BEFORE THE PRESIDENT

Before the Honourable: Judge Theodor Meron, President

Registrar: Mr. Olufemi Elias

Date Filed: 18 June 2018

THE PROSECUTOR

v.

RATKO MLADIĆ

Public

**DEFENCE MOTION SEEKING WAIVER OF IMMUNITY AS TO
IMPUGNED OFFICIALS (UNDU MEDICAL OFFICER; UNDU DEPUTY
MEDICAL OFFICER; AND UNDU COMMANDING OFFICER)**

The Office of the Prosecutor:

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Mr. Dragan Ivetić

THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS**PROSECUTOR****v.****RATKO MLADIĆ****Public**

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MEDICAL OFFICER; AND UNDU COMMANDING OFFICER)**

The Movant, Ratko Mladić, by and through his counsel of record, files the Motion before the President of the Mechanism and in support thereof states:

I. Procedural Background

1. On 31 January 2018, the Movant filed his “Renewed Motion for Contempt of Court against UNDU Staff from their Obstruction with Provision of Medical Records and Rule 31 Visit.”¹ (hereinafter “Renewed Motion”) This Renewed Motion was filed concurrently with 2 other Motions, one for Provisional Release and one for a Stay of Proceedings and to Vacate Judgment.
2. On 12 February 2018 the Prosecution filed their Response to the Renewed Motion (hereinafter: “*OTP Response*”).²
3. On 19 February 2018 the Movant filed a Reply as to the Renewed Motion, addressing the OTP First Response. (hereinafter: “*Reply*”)³

¹ Public with Public and Confidential Annexes.

² Public.

³ Public

4. On 21 February 2018 the Registry filed its “Registrar's Submission in Relation to Defence Motions”⁴ relating to the Renewed Motion and other Filings. [hereinafter: “*First Registry Submission*”]
5. On 5 March 2018 the Movant filed a Response to the First Registry Submission.⁵ [hereinafter: “*Movant Response*”]
6. On 20 March 2018 the Registry filed their “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’.”⁶ [hereinafter “*Second Registry Submission*”]
7. On 3 April 2018 Movant filed their “Response to the Second Registry Submission.”⁷ [hereinafter: “*Movant Second Response*”]
8. On 15 May 2018 the Appeals Chamber issued a Decision on the Renewed Motion [hereinafter: “*Decision*”] which stated that any request for waiver of immunity should be made before the President in a separate filing.⁸
9. On 22 May 2018 the Movant filed his “Motion for reconsideration on Renewed Motion for Contempt”⁹ addressing the Decision as it related to the Appeals Chamber. [hereinafter: “*Contempt Reconsideration Motion*”]
10. On 30 May 2018 the Prosecution filed their Response to the Contempt Reconsideration Motion.¹⁰
11. On 4 June 2018 the Movant filed his Reply in support of the Contempt Reconsideration Motion.¹¹

⁴ Confidential with Confidential Annexes; Public redacted version filed on 8 March 2018

⁵ Confidential with Confidential Annexes; Public redacted version filed on 9 March 2018

⁶ Confidential with Confidential Annexes; Public redacted version filed on 10 April 2018

⁷ Confidential with Confidential Annexes; Public redacted version filed on 9 April 2018

⁸ Decision, pages 2 and 4

⁹ Public with Confidential Annex

¹⁰ Public with Confidential Annex

12. On 8 June 2018 the Registrar filed its “Registrar's Submission in Relation to Defence Motions for Reconsideration”¹² which dealt with the Contempt Reconsideration Motion and one other Reconsideration Motion filed by Movant. [hereinafter: “*Third Registrar Submission*”]
13. On 15 June 2018 Movant filed its Response to the Third Registrar Submission¹³
14. On 12 June 2018 the Movant also filed 3 separate, Public, Motions to Disqualify Judges Meron, Aguis and Liu for actual or apparent bias.
15. Accordingly, given the pending Motions to Disqualify include the President, the interests of justice and fairness dictate that neither he nor any other judges against whom such motions are pending should render a decision on the instant filing, and they should recuse themselves from same, to avoid the appearance of impropriety. This Motion thus should be decided upon by the next ranking Judge in order of precedence who is not impugned by a pending Motion to Disqualify.

II. Arguments and Submissions

16. Article II Section 2 of the “Convention on the Privileges and Immunities of the United Nations” [hereinafter “*CPIUN*”] permits waiver of immunity. Likewise under Section 20 of the CPIUN, there exists the right to waive the immunity of any UN official. It has been argued by legal scholars, including Wilfred Jenks that the failure to exercise this option can constitute abuse of immunity.¹⁴
17. It should be noted, that there are instances in which the UN has already been found liable for tortuous acts. Thus, in 1966 the Secretary General made a lump-sum payment to the Belgian government for the settlement of all disputes of its nationals relating to the UN

¹¹ Public with Confidential Annex and Public with Public-Redacted Annex filed same day

¹² Confidential; Public redacted version filed 13 June 2018

¹³ Confidentially, with a Public redacted version.

¹⁴ C.WILFRED JENKS, *INTERNATIONAL IMMUNITIES*, 41-45 (1961)

Organization in the Congo.¹⁵ The basis behind the same was the stated position (of the Secretary General) that the UN “would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties.”¹⁶

18. Likewise, from a fairness standpoint, injury or loss of life for the victims of UN Action is not less grievous when caused by the UN than by any other tortfeasor.¹⁷ The European Court of Human Rights has considered that while immunities of international organizations might pursue a legitimate aim that would result to a court being restrained, this should not be absolute.¹⁸ The UN Charter Provisions, including Articles 1(3), 55, and 56 also require the UN to respect human rights. Legal scholars such as Jordan J. Paust have deemed that the position that the UN has immunity even where that would violate human rights would be “counterintuitive.”¹⁹ It has been held by both the OUNHCR and WHO, the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.²⁰ The 1948 Universal Declaration of Human Rights also mentioned health as part of the right to an adequate standard of living (art. 25). The right to health was again recognized as a human right in the 1966 International Covenant on Economic, Social and Cultural Rights. The UN Commission on Human Rights Resolutions 2002/31 and 2003/28 stress the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

19. Accordingly, to the extent the aforesaid filings directly impact upon allegations of neglect and harm that interfere with the basic human right of Mr. Mladić to enjoy the highest attainable standard of health and access to healthcare, waiver of immunity is necessary to

¹⁵ Treaty No. 7780 United Nations and Belgium “Exchange of letters constituting an agreement relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals. New York, 20 February 1965”

¹⁶ Ibid. page 2

¹⁷ “The United Nations as Good Samaritan: Immunity and Responsibility” Chicago Boon, Kristen (2016) Journal of International Law: Vol. 16: No. 2, article 2. Page 344

¹⁸ ECtHR App. No. 28934/95, *Beer and Reagan v. Germany*, 33 EHRR (2001) 54, at para 58 [Dealing with EU Immunity]

¹⁹ Paust, “The UN is Bound by Human Rights: Understanding the Full Reach of Human Rights, Remedies and Nonimmunity”, 51 Harvard Int’l LJ (2010) p, at 9

²⁰ GE.08-41061–June 2008–13,600 Fact Sheet. 31 “The Right to Health”, June 2008, at page 1 [<https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>]

further and protect his human rights. Failure to give a waiver would be an abuse of immunity and would go against the very principles of the UN.

20. Per the substantive arguments and medical opinions that are referenced in the aforesaid filings, including mandatory Medical Guidelines that have been conceded or proven not to have been followed by UNDU Medical Staff, the suggestion of medical negligence and/or malpractice is implicated in the treatment of Mr. Mladić. Dutch persons detained in the same facility but different premises of the Scheveningen Facility likewise have made and pursued complaints based on negligence and disciplinary proceedings against Dutch doctors for medical treatment within the host prison.²¹ Mr. Mladić and similarly situated UNDU detainees should have the same rights to seek independent investigation and/or civil actions and/or disciplinary proceedings against Medical personnel, whether these personnel are Dutch physicians or employed by the United Nations. It is in the interests of everyone for the very serious allegations against the UNDU Medical Officer and his Deputy (and others) to be investigated in a transparent and independent manner. Thus, a waiver of liability is supported in the instant case.

21. Implicated in the aforesaid filings are violations of Medical ethics on the part of purported IMEs that have been retained by the Registrar of the ICTY and the MICT, as well as presentation of false and contradictory filings by the same that have gone unpunished by the Registry, Appeals Chamber and by the President, as has the contemptuous and tortious conduct of UNDU medical officials and their proxies in the failure to acknowledge/diagnose and treat Mr. Mladić in accord with international Medical Standards and Guidelines for the conditions he is suffering from. Mr. Mladić thus has exhausted the legal remedies at the ICTY/MICT and it would be inequitable and unjust and unfair to not grant a waiver of immunity to allow him to pursue investigation and adjudication of his claims elsewhere.

²¹ <https://www.ad.nl/binnenland/tenoacute-ch-medische-dossiers-zoek-in-gevangenisziekenhuis-af73bed7/>

22. The actions of the UNDU CO and UNDU Medical Officer, particularly (but not limited to) as to the 23 April 2018 medical incident that is subject to the new information presented as part of the Motion for Reconsideration of the Contempt Decision demonstrate the great lengths to which certain UN MICT personnel have gone to try and interfere in the rights of the Movant and his family and lawyers to have accurate and timely information about serious health concerns. The minimization of these same concerns in Registry and UNDU Medical Officer filings made to the Appeals Chamber are likewise of a serious nature. The fact that the Registrar of the MICT is unwilling to take action and in essence makes filing after filing mis-representing facts and changing their position to try and excuse/obscure the behaviour of these officials, while smearing the Movant and his attorneys, is demonstrative that the Movant cannot receive the appropriate relief for his complaints within the UN MICT administrative disciplinary regime. The failure of the Appeals Chamber to even address or consider serious medical issues and this mis-conduct likewise demonstrates that the UN MICT is not a viable legal arena for these claims to be adequately and fairly adjudicated. Leaving the Movant without a venue for pursuing his legitimate and good-faith claims against Impugned UN staff would be unjust and unfair. Accordingly, issuance of a waiver of immunity is justified and appropriate in the instant case.

23. At the most recent UN Security Council Meeting relating to the UN MICT, the presiding member, Russia expressed serious concerns for abuses against the rights of Accused and likewise raised the issue of medical treatment and access to documentation at the UNDU, which was echoed by the Serbian Minister of Justice.²² Accordingly, there is sufficient cause to assert that a neutral venue for investigation and adjudication of these claims, including disciplinary or civil relief is appropriate to clear the tarnish that has already been placed upon the UN MICT by its own actions and those of its staff. Issuance of the waiver of immunity sought would thus allow such a procedure that would wash away tarnish and allegations from the institution and allow individuals to be investigated and

²² <http://webtv.un.org/watch/security-council-1-libya-8275th-meeting.-2-letter-of-ukraine-8276th-meeting.-3-international-residual-mechanism-for-criminal-tribunals-8277th-meeting/5794436245001/>

an appropriate assertion made as to their conduct that would not blemish the further work of the UN MICT.

III. Conclusion

24. Thus, the Movant re-iterates its request that has already made, for the President to issue a waiver of immunity as to impugned UN officials and their proxies, including, but not limited to²³: a) the UNDU Medical Officer; b) the UNDU Deputy Medial Officer; and c) the UNDU Commanding Officer.

Word count:1939

RESPECTFULLY SUBMITTED BY:



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²³ The Movant would request that the waiver cover any other individuals discovered by way of the subsequent investigation to have been involved in a tort against Movant to be subject to a waiver, to the extent covered by any immunities from the UN.



**TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH THE
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I - FILING INFORMATION / INFORMATIONS GÉNÉRALES

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Case Name/ Affaire :	Prosecutor vs. Ratko Mladic	Case Number/ Affaire n° :	MICT-13-56-A
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		No. of Pages/ Nombre de pages :	8
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