



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-95-5/18-T

Date: 19 April 2013

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 19 April 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE DEPUTY REGISTRAR'S FURTHER SUBMISSION ON MEDICAL
RECORDS PERTAINING TO MILAN BABIĆ**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the 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 (“Tribunal”) is seised of the “Deputy Registrar’s Further Submission Regarding Medical Records Pertaining to Milan Babić”, filed on 28 March 2013 (“Further Submission”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 18 March 2013, the Accused filed his “Motion for Disclosure of Records Pertaining to Milan Babić”, (“Motion”) wherein he requested, pursuant to Rule 54 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and pursuant to Rule 34 (D)(ii) of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal (“Rules of Detention”) to be given access to the records of Milan Babić’s psychological evaluations.¹ Babić took his life while detained at the United Nations Detention Unit (“UNDU”) during his testimony in the *Milan Martić* case, and portions of his testimony in that case, as well as in other cases before this Tribunal, have been admitted into evidence in this case pursuant to Rule 92 *quater* of the Rules.² The Accused argued in the Motion that Babić’s psychological evaluations were relevant and necessary for the Chamber’s evaluation of Babić’s credibility, and in support submitted that Milan Martić, an upcoming witness in this case, told him that Babić had been diagnosed with a personality disorder which would undermine his credibility.³ Both the Office of the Prosecutor (“Prosecution”) and the Registry opposed the Motion.⁴

2. On 22 March 2013, in light of Martić’s upcoming testimony, the Chamber issued an oral decision (“Decision”), ruling that it was in the interests of justice and the good administration of the trial that the psychological evaluations of Babić be disclosed first to the Chamber for an *in camera* inspection so that it can determine whether they contain any information that may be relevant to the Accused’s case.⁵ Explaining its reasons, the Chamber stated as follows:

In coming to this conclusion, the Chamber considered the fact that Babić's evidence was admitted under Rule 92 *quater* and that, therefore, the accused was devoid of an opportunity to cross-examine him. The Chamber was also not persuaded by the main crux of the Prosecution’s and the Registry’s responses to the effect that, by relying on Martić, the accused has made no genuine effort to demonstrate that Babić’s medical

¹ Motion, para. 1.

² Motion, paras. 4–7.

³ Motion, paras. 1, 8.

⁴ See Prosecution Response to Motion for Disclosure of Records Pertaining to Milan Babić, 20 March 2013; The Deputy Registrar’s Submission Regarding the Accused’s Motion for Disclosure of Records Pertaining to Milan Babić, 20 March 2013.

⁵ Hearing, T. 35853–35855 (22 March 2013).

information would be relevant and necessary to his case. Given the highly confidential nature of the medical documentation sought, it is not clear to the Chamber how the accused could have obtained more information or done more to support this motion.⁶

Thus, the Chamber ordered the Registry to provide it with “copies of any reports or information on the psychological state of Milan Babić while at the detention unit”.⁷ It also postponed its ruling on the Motion until such time as it inspected the medical documentation sought by the Accused.⁸

3. The Deputy Registrar now brings to the Chamber’s attention “an issue affecting the implementation of the Decision” and proposes “an alternative solution that would serve the purpose of providing the Trial Chamber with the information necessary to dispose of the Motion.”⁹ Alternatively, if the Chamber considers the Further Submission to be a request for reconsideration of the Decision, the Registry submits that reconsideration is warranted to prevent an injustice.¹⁰

4. The Registry proposes that, instead of being provided with the medical records themselves, the Chamber receive a written report from the “Reporting Medical Officer”, containing information relevant to the consideration of the Motion.¹¹ It submits that this is necessary in order to protect medical confidentiality and the patient-doctor relationship at the UNDU and expresses concern that by requiring the Medical Officer¹² to disclose Babić’s medical information, the detainees’ confidence in and their relationship with the Medical Officer may be eroded. Additionally, the Decision may give rise to further requests for access to medical records by other detainees or their legal representatives.¹³

5. In support of its argument, the Registry cites to Article 8 of the European Convention on Human Rights (“Convention”) and the related European Court of Human Rights (“ECHR”) jurisprudence on the confidentiality of medical information, noting that the primary safeguard of this confidentiality is the requirement that the patient’s consent be obtained before disclosure of his or her medical information.¹⁴ The Registry concedes that, according to the ECHR jurisprudence, the requirement for the patient’s consent can be overridden in certain

⁶ Hearing, T. 35854 (22 March 2013).

⁷ Hearing, T. 35854–35855 (22 March 2013).

⁸ Hearing, T. 35855 (22 March 2013).

⁹ Further Submission, para. 2.

¹⁰ Further Submission, para. 3.

¹¹ Further Submission, paras. 8, 11.

¹² According to the Registry, while the Medical Officer at the UNDU provides medical treatment and is the custodian of the detainees’ medical files, the Reporting Medical Officer only provides medical reporting services. *See* Further Submission, para. 8.

¹³ Further Submission, paras. 5–6, 10.

¹⁴ Further Submission, para. 6.

circumstances, when outweighed by more compelling interests,¹⁵ and notes that the threshold varies in different national and international jurisdictions, it being extremely strict in The Netherlands.¹⁶ Finally, the Registry turns to Rule 34(D)(ii) of its Rules of Detention which allows for a judicial order for disclosure of medical records without the detainee's consent on the condition that there be a consultation with the Medical Officer at the UNDU, as well as proof that the access to medical files is sought in the interests of justice and the good administration of trial.¹⁷

6. The Registry further submits that if the relief sought in the Further Submission is granted, the Reporting Medical Officer could first address whether the records sought actually exist and, should that be the case, he could then address specific questions from the Chamber relating to the relevance of these reports to the credibility of Milan Babić.¹⁸ According to the Registry, while the Reporting Medical Officer also requires the detainee's consent for the disclosure of medical information, he is in certain situations able to respond adequately to questions from the Chamber without divulging confidential information, usually by giving his opinion without sharing the underlying medical information.¹⁹

7. On 2 April 2013, the Accused filed his "Response to Registrar's Further Submission Regarding Medical Records of Milan Babić" ("Response"), in which he submits that "the Registrar's request for reconsideration is unfounded" and opposes the relief sought.²⁰ The Accused draws an analogy to Rule 54 *bis* of the Rules pursuant to which even most highly sensitive material, such as that involving national security of states, can be reviewed by a Chamber *in camera* and thus sees no reason why "confidential records of the Tribunal's own Registrar should not be made available in the same way."²¹ He further argues that parties have the right to an independent review of such material by the Chamber, rather than relying on declarations of interested parties as to its content.²² The Accused also submits that the medical records sought in the Motion were made available to Judge Parker and his staff when conducting an inquiry into Babić's suicide in 2006 and notes that the Registry offers no explanation as to

¹⁵ Further Submission, para. 7; *see also* footnote 6.

¹⁶ Further Submission, para. 7, footnote 8.

¹⁷ Further Submission, para. 7.

¹⁸ Further Submission, para. 11.

¹⁹ Examples where the Reporting Medical Officer provided his opinion in such manner include an opinion that a detainee is not fit to be transported to court on a particular day, that the court schedule should be adjusted, or that the modalities of detainee's transportation outside the UNDU should be amended. *See* Further Submission, para. 9.

²⁰ Response, paras. 1–2, 8.

²¹ Response, para. 3, citing to Rule 54 *bis* of the Rules.

²² Response, para. 4.

why the same records cannot be made available to other Judges of the Tribunal.²³ Finally, the Accused argues that the Trial Chamber, rather than a medical officer at the UNDU, is best placed to appreciate the relevance of the medical records sought to the issue of Babić's credibility.²⁴

II. Applicable Law

8. The Chamber recalls that there is no provision in the Rules for requests for reconsideration. Such requests are the product of the Tribunal's jurisprudence and are permissible only under certain conditions.²⁵ The standard for reconsideration of a decision set forth by the Appeals Chamber is that "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice'".²⁶ Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.²⁷

9. Rule 34(C) of the Rules of Detention provides that information related to the physical and mental health of detainees shall be kept confidential by the Registrar. Rule 34(D) and (E) then states as follows

D. Information contained in the detainee's medical records may be consulted or disclosed:

- (i) for medical reasons only with the consent of the detainee, or
- (ii) in the interests of justice and the good administration of trial, by order of a Judge or a Chamber of the Tribunal, after consultation with the medical officer.

E. The Judge or Chamber ordering disclosure of medical records shall respect the confidentiality of the information and guard against further disclosure.

²³ Response, para. 5.

²⁴ Response, para. 7.

²⁵ See *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

²⁶ Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, para. 12, citing *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

²⁷ *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; see also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2–3.

III. Discussion

10. The Chamber considers the Further Submission to be a request for the reconsideration of the Decision and thus will consider it in light of the Registry's submission that the Decision should be reconsidered in order to prevent an injustice.²⁸

11. The Chamber does not consider that a reconsideration of the Decision in order to prevent an injustice is necessary, for a number of reasons. First, while the Registry relies on Article 8 of the Convention and the related ECHR jurisprudence to show the importance of medical confidentiality, it also concedes that Article 8 allows for medical confidentiality to be overridden even without the patient's consent, including when necessary "for the protection of rights and freedoms of others".²⁹ Indeed, the disclosure of personal medical information without the consent of UNDU detainees is explicitly provided for in Rule 34(D)(ii) of the Rules of Detention under certain conditions. It is particularly pertinent in cases such as this where the UNDU detainee in question is deceased and thus cannot provide consent to the medical information sought, and where the material sought relates to the Accused's right to examine the witnesses against him, as enshrined in Article 21(4)(e) of the Statute of the Tribunal. While the Chamber acknowledges the Registry's submission that Dutch law on medical confidentiality is strict,³⁰ the Tribunal does not operate under Dutch law but within its own set of Rules, including the Rules of Detention.³¹

12. Second, the Chamber notes the Registry's submission that the Reporting Medical Officer will provide his opinion on the issues relevant to the Motion, without disclosing the underlying medical information. The Registry then refers to examples of cases where the Reporting Medical Officer has done this in the past, involving mainly the detainees' fitness to be transported into court on a specific day and/or issues related to the court scheduling.³² However, these issues are not comparable to the circumstances here, which involve the assessment of relevance of medical records to the credibility of one of the deceased witnesses in this trial. The

²⁸ Further Submission, para. 3.

²⁹ Further Submission, para. 6, footnote 6. Indeed, in the ECHR case cited to by the Registry, namely *Z v. Finland*, of 25 February 1997, the court held that the forced testimony of a number of applicant's doctors in a manslaughter trial, as well as disclosure of applicant's medical records to the prosecution, and their use in a manslaughter trial, was in line with Article 8 of the Convention.

³⁰ Further Submission, footnote 8.

³¹ The Chamber notes that, while stating that Dutch law is strict on the issue of medical confidentiality, the Registry makes no attempt to address the question as to why its own medical records would be subject to Dutch law in this regard.

³² Further Submission, para. 9.

Chamber considers that it is not for the Reporting Medical Officer to make that assessment but rather for the Chamber itself.

13. Third, while the Registry submits that the Reporting Medical Officer in his reporting capacity still needs to obtain the consent of the detainee,³³ it ignores the fact that the detainee in question here is deceased and cannot provide such consent under any circumstance. In other words, the implication of the Further Submission's focus on the need to protect the confidentiality of medical records in general, rather than on the circumstances of this case, is that in cases where the medical records of deceased detainees are being sought, neither the applicant nor the Chamber should or would ever have access to them. Instead, the Reporting Medical Officer will always be the necessary conduit, as the consent for the disclosure will naturally not be forthcoming. This, however, is contrary to Article 8 of the Convention and Rule 34(D)(ii) of the Rules of Detention, both of which allow for disclosure of medical information without the patient's consent in certain circumstances. In addition, the Chamber notes that these particular records have already been accessed by a number of individuals after Babić's death and therefore without his consent. The Chamber refers here to Judge Parker's report to the President following his inquiry into the death of Milan Babić, filed publicly on 8 June 2006 ("Report"). As correctly submitted by the Accused, it is clear from the Report that when conducting this inquiry Judge Parker and his staff had access to all medical records relating to Babić, some of which were even quoted from verbatim.³⁴ The Registry makes no mention of the Report in the Further Submission, nor does it address the procedure which was followed when these were disclosed to Judge Parker. Instead the Registry submits that the Reporting Medical Officer's report would first address the issue of whether such medical records even exist.³⁵

14. Fourth, the Chamber does not consider that the effect of the Decision is such that it will erode the detainees' relationship, or their confidence in their relationship, with the UNDU medical officers. If anything, the Chamber's order to inspect the medical records *in camera*, before deciding whether they should be disclosed to the Accused shows that it was not only cognisant of the confidentiality and sensitivity of the information at issue, but also of the fact that fair trial rights of detainees can override the necessity for consent to disclosure of medical information if the interests of justice so demand. Furthermore, the possibility that other

³³ Further Submission, para. 9.

³⁴ Report, pp. 1, 7–8, 13.

³⁵ Further Submission, para. 11. *See also* Report, pp. 7–8, which indicates that psychological evaluations of Milan Babić were conducted at various times at the UNDU.

detainees may make similar requests for confidential medical records in the future cannot justify the Chamber disregarding the fair trial right of the Accused in this case.

15. Accordingly, for all the reasons outlined above, the Chamber is not satisfied that its Decision to review, *in camera*, the medical records of Milan Babić leads to an injustice and therefore has to be reconsidered. To the contrary, the Decision strikes a balance between safeguarding the Accused's right to a fair trial, as guaranteed by Article 21 of the Statute, and preserving the confidentiality of Babić's medical records, as provided for by Rule 34(E) of the Rules of Detention.

IV. Disposition

16. For all the reasons outlined above, the Trial Chamber, pursuant to Rule 54 of the Rules, hereby **DENIES** the request for reconsideration contained in the Further Submission and instructs the Registry to comply with the Decision by 26 April 2013.³⁶

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



Judge O-Gon Kwon
Presiding

Dated this nineteenth day of April 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

³⁶ The Chamber notes that Milan Martić is scheduled to testify in this case in early May of 2013, necessitating a short deadline for disclosure. Once the Chamber receives the material in question it shall proceed to dispose of the Motion.