

THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

Case No. MICT-13-56-A

BEFORE THE PRESIDENT

Before the Honourable: Judge Theodor Meron, Presiding

Registrar: Mr. Olufemi Elias

Date Filed: 18 June 2018

THE PROSECUTOR

v.

RATKO MLADIĆ

Public

**DEFENCE MOTION RESPECTFULLY SEEKING THE DISQUALIFICATION
OF JUDGE THEODOR MERON FOR ACTUAL OR APPARENT BIAS**

The Office of the Prosecutor:

Ms. Laurel Baig
Ms. Barbara Goy
Ms. Katrina Gustafson

Counsel for the Accused:

Mr. Branko Lukić
Mr. Dragan Ivetić

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The Appellant/Movant, **RATKO MLADIĆ**, by and through his counsel of record, respectfully submits the instant **MOTION**, and in support thereof states as follows:

INTRODUCTION

1. On 19 December 2017, the Honourable Judge Theodor Meron was appointed to the Appeals Chamber hearing the Appellant's appeal from his trial judgment.¹ This motion is brought before the President pursuant to Rule 18(B)(i) of the *Rules of Procedure and Evidence*, on the basis that Judge Liu's statements in a previous judgments give rise to an unacceptable appearance of bias that would lead a reasonable observer properly informed to reasonably apprehend bias. The Appellant submits that Judge Meron should be disqualified from sitting on the appeal.

PROCEDURAL HISTORY

¹ *Prosecutor v. Ratko Mladić*, Case No. MICT-15-56-A, [Order Assigning Judges to a Case Before the Appeals Chamber](#) (19 December 2017).

2. During the Appellant’s trial, issues related to trial fairness and presumption of innocence,² including issues specific to scheduling,³ were litigated before the Trial Chamber. Both matters came before the Appeals Chamber after certification was granted. On 6 October 2016, five judges, including Judge Meron, were assigned to hear the Appellant’s interlocutory appeals on these matters.⁴

3. Judge Meron was impugned in separate litigation about systemic bias which was, at the time, awaiting a decision on certification.⁵ The Appellant filed motions in both interlocutory appeals seeking his disqualification.⁶ The Appellant’s requests in both appeals were rejected by Judge Liu,⁷ who is the subject of a corollary, separate motion for disqualification, due to word count limitations.

4. On 19 December 2017, Judges Meron and Liu (along with Judge Carmel Agius) were assigned to the Appeals Chamber hearing the Appellant’s appeal.

APPLICABLE LAW

² *Prosecutor v. Mladić*, Case No. IT-09-92-T, [Motion for a fair trial and the presumption of innocence or, in the alternative, a mistrial](#) (19 May 2016) [“Fair Trial Motion”]; ultimately culminating in *Prosecutor v. Mladić*, Case No. IT-09-92-AR.73.6, [Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defence Motion for a Fair Trial and the Presumption of Innocence](#) (4 October 2016) and the [Decision on Interlocutory Appeal Against Decision on Defence Motion for a Fair Trial and the Presumption of Innocence](#) (27 February 2017).

³ *Prosecutor v. Mladić*, Case No. IT-09-92, [Defence Motion Requesting 7 December 2016 for the Final Brief and 12 January 2017 for Closing Arguments](#) (23 June 2016) [“Motion for Time”]; ultimately culminating in *Prosecutor v. Mladić*, Case No. IT-09-92-AR.73.7, [Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defence Motion Regarding Scheduling Order](#) (5 October 2016) and the Decision on Interlocutory Appeal Against Scheduling Order (2 December 2016) (confidential).

⁴ *Prosecutor v. Mladić*, Case No. IT-09-92-AR73.6, [Order Assigning Judges to a Case Before the Appeals Chamber](#) (6 October 2016); *Prosecutor v. Mladić*, Case No. IT-09-92-AR73.7, [Order Assigning Judges to a Case Before the Appeals Chamber](#) (6 October 2016).

⁵ *Prosecutor v. Mladić*, Case No. IT-09-92-T (cross-filed in Case No. MICT-13-56), [Defence Motion for Stay of Proceedings for Systemic Bias](#) (19 July 2016) [“Systemic Bias Motion”]; outstanding at the time was *Prosecutor v. Mladić*, Case No. IT-09-92-T, [Defence Motion for certification to appeal Decision on Defence Motion for stay of proceedings for systemic bias or, in the alternative, a mistrial \(a protest against Trial Chamber I’s “Insert Defence acknowledgment here” decision-making process\)](#) (29 September 2016) [“Systemic Bias Certification Motion”].

⁶ *Prosecutor v. Mladić*, Case Nos. IT-09-92-AR73.6 and IT-09-92-AR73.7, [Appellant’s Motion Pursuant to Rule 15\(B\) Seeking Disqualification of Judge Carmel Agius from the Appeals Chamber](#) (10 October 2016).

⁷ *Prosecutor v. Mladić*, Case Nos. IT-09-92-AR73.6 and IT-09-92-AR73.7, [Decision on Ratko Mladić’s Motion for Disqualification of Judge Carmel Agius](#) (26 October 2016).

Qualifications of Judges

5. Article 9(1) of the *Statute of the Mechanism for International Criminal Tribunals* states, in relevant part, that judges “shall be persons of high moral character, impartiality and integrity”.⁸ Judges must positively affirm that they will perform their duties and exercise their powers “honourably, faithfully, impartially and conscientiously” under Rule 17(A) of the *Rules of Procedure and Evidence*.⁹

Disqualification of Judges

6. The MICT provisions largely mirror those found in the Rules and Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), with minor textual alterations (such as the elimination of the female pronoun in reference to judges throughout). At the ICTY, where moral character, impartiality, or integrity were called into question, a judge may have been required to withdraw or be disqualified under its *Rules of Procedure and Evidence*.¹⁰ Given the substantively identical wording, due to the MICT’s direct inheritance of the ICTY’s functions, and in the interests of justice, the Appellant submits that the same procedures apply before the MICT.

7. Rule 18(A) of the MICT Rules provides that:

A Judge may not sit in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

Under this Rule, judges have an obligation to independently examine whether circumstances would disclose an appearance of bias, and if so, to withdraw *proprio motu*.¹¹

8. Where a judge does not withdraw voluntarily, Rule 18(B)(i) provides that a party may apply to the President for disqualification. After the Presiding Judge confers with the impugned judge, s/he will decide the application or appoint a three-judge panel

⁸ http://www.unmict.org/sites/default/files/documents/101222_sc_res1966_statute_en.pdf

⁹ <http://www.unmict.org/sites/default/files/documents/160926-rules-rev2-en.pdf>

¹⁰ *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-PT, [Decision on Blagojević’s Application Pursuant to Rule 15\(B\)](#) (19 March 2003), para. 10.

¹¹ See ICTY jurisprudence dealing with the that tribunal’s nearly identical Rule: *Prosecutor v. Furundzija*, No. IT-95-17/1-A, [Judgment](#) (21 July 2000), para. 175 [“Furundzija Appeal”].

to make a determination. Another judge will be assigned in the impugned judge's place if application is accepted.

9. The Appeals Chamber at the ICTY set the following test to guide considerations of judicial bias:

- i. A Judge is not impartial if it is shown that actual bias exists.
- ii. There is an unacceptable appearance of bias if:
 - i. A Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
 - ii. The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹²

The Appellant submits that this test continues to operate before the MICT.

10. A judge enjoys a rebuttable presumption of impartiality.¹³ A party seeking disqualification must demonstrate "a reasonable apprehension of bias by reason of prejudgement" that is "firmly established."¹⁴ The party must show that "[t]he circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".¹⁵

11. Judges of the ICTY and MICT are involved in cases dealing with overlapping events and joint criminal enterprises. It is established that "a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases."¹⁶ However, a prior judgment or decision can be capable of rebutting the presumption of impartiality where it constitutes findings of individual criminal responsibility of the accused.¹⁷ In the case of *Poppe v The Netherlands*, the European Court of Human Rights (ECtHR) makes the crucial distinction as follows:

¹² *Ibid.*, para. 189.

¹³ *Ibid.*, para. 196

¹⁴ *Ibid.*, para. 197, citing Mason J, in *Re JRL; Ex parte CJL* (1986) CLR 343 at 352. Adopted in the subsequent Australian High Court decision in *Re Polities; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448.

¹⁵ Furundzija Appeal, para. 189.

¹⁶ *Nahimana et al v The Prosecutor*, Case No. ICTR-99-52-A, Judgment, 28 November 2007, para.78

¹⁷ See the 'Discussion' section of *Prosecutor v Karadzic*, Case No. IT-95-05/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), 22 July 2009.

“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 prejudge the question of the guilt of an accused in such subsequent proceedings.**” (Emphasis added).¹⁸

12. A Judge seized of a motion on such grounds is therefore required to assess the findings of the relevant prior judgments in order to determine whether the guilt of the accused has been prejudged. In *Poppe*, the ECtHR adopts an approach that can be distilled as follows:

- i. Do the findings regarding the accused fulfill all the relevant criteria necessary to constitute a criminal offence?
- ii. If so, was the accused found guilty of having committed such an offence beyond reasonable doubt?¹⁹

13. If each limb of this test can be answered affirmatively, the ground of bias is established and the absolute right of the accused to a fair trial is violated.²⁰

14. In any assessment of the appearance of bias, the well-known maxim that it is of “fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” is relevant.²¹

SUBMISSIONS

15. The Appellant submits that the findings made against him in the *Krstić* Appeal Chamber judgement, a case that Judge Meron presided over without dissent or providing a Separate Opinion,²² and in the *Tolimir* Appeal Judgement that again Judge Meron presided over without dissent or providing a Separate Opinion,²³ give rise to an

¹⁸ *Poppe v Netherlands*, [2009] Application No. 32271/04, ECHR, para. 26

¹⁹ *Ibid.*, para. 28

²⁰ *Ferrantelli and Santangelo v Italy*, 19874/92 [1996] ECHR 29 (7 August 1996), para.s 59 and 60; *Rojas Morales v. Italy*, Application No. 39676/98, [2000] ECHR, paragraph 35.

²¹ *R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at p. 259.

²² *Prosecutor v. Krstić*, No. IT-98-33-A, [Judgment](#) (19 April 2004) [“Krstić Appeal”].

²³ *Prosecutor v Tolimir*, No. IT-05-88/2, Appeal Judgement (8 April 2015) [“Tolimir Appeal”].

unacceptable appearance of bias that would lead a reasonable observer, properly informed, to apprehend bias in the context of his appeal.²⁴

16. The *Krstić* Appeals Chamber, presided over by Judge Meron, made explicit findings about the Appellant's role, contribution and knowledge of the crimes, as well as his responsibility. These aspects of the Appellant's conviction are now subject to appeal. Examples of this include:

- i. Stating that the Appellant intended "to execute the Bosnian Muslim civilians who were to be transferred."²⁵
- ii. Referring again to the Appellant's "intention" to execute Bosnian Muslims.²⁶
- iii. Stating that "evidence strongly suggested" the Appellant's subordinates were directing criminal acts under the Appellant's direction.²⁷
- iv. Referring to the Appellant as one of "the very people who ordered the [Srebrenica] executions and were an active participant in them."²⁸

17. In *Tolimir*, the Appeals Chamber, presided over by Judge Meron, made findings on the Appellant's individual criminal responsibility. Examples include:

- i. Findings that the Appellant knew or had reason to know that his subordinate Tolimir was implementing the illegal operation to forcibly transfer the Bosnian Muslim population out of Žepa, as well as his superior authority over him;²⁹
- ii. That there was evidence that he had the requisite *mens rea* for forcible transfer from Žepa.³⁰

²⁴ *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, [Trial Judgment](#) (17 January 2005) ["Blagojević Trial Judgment"].

²⁵ *Ibid.*, para. 87.

²⁶ *Ibid.*, para. 98.

²⁷ *Ibid.*, para. 135.

²⁸ *Ibid.*, FN 250.

²⁹ *Tolimir Appeal*, paras.317, 410.

³⁰ *Ibid.*, para.214.

18. Moreover, Judge Meron is the Presiding Judge in the *Karadžić* appeal. This appeal has reached the stage where the Appeals Chamber are deliberating. The Appellant's indictment started off as being the same indicting instrument as Karadžić. Initially they were co-accused. The separate indictments remained almost identical in substance. Amongst the various grounds of appeal, Karadžić specifically appeals the Trial Chamber's findings that he was part of the joint enterprises with the Appellant.³¹ The *Karadžić* Trial Chamber made direct findings on the Appellant's role and criminal responsibility as part of its assessment of Karadžić's role and criminal responsibility, give the Prosecution's case on the joint criminal enterprises.³² In the appeal hearing itself, the mantra that a "conspiracy of silence" existed between Karadžić and his subordinates was relied on to negate his responsibility for the crimes, and the purported liability of Mladić was alluded to and directly referenced by both sides in advancing their appellate arguments.³³ It follows that the Appeals Chamber will have to make findings on the Appellant's role to determine whether Karadžić was in fact part of the JCE's and, importantly, his knowledge of the situation in the military. While the Appeals Chamber limits itself to determining whether the Trial Chamber erred in convicting Karadžić, the basis on which Karadžić appeals still requires affirmative findings on the Appellant's role. For this reason, Judge Meron will be making specific findings on the Appellant's responsibility. The Appeals Chamber would be unable to address Karadžić's grounds of appeal without adjudicating on this.

19. The Appellant's notes that the notice of appeal identifies that he intends to appeal the Trial Chamber's findings that he participated in the joint enterprises, that he significantly contributed to them and that he had knowledge of the crimes (amongst other grounds).³⁴

³¹ *Prosecutor v Karadžić*, Case No. IT-13-55-A, Defence Appeal Brief (23 December 2016) for example p.127-153.

³² *Prosecutor v Karadžić*, Case No. IT-95-5/18-T, Trial Chamber Judgement (24 March 2016), see for example pp.1182-1194, 1233-1235, 1909-1922, 1923-1934.

³³ See, e.g. *Prosecutor v Karadžić*, Case No. IT-13-55-A, 23 April 2018 - T.113:21-118:6, and T.180:1-183:14 [as to Defence References to Mladić]; T222:10-T:225:11 [as to Prosecution references alleging the relationship with Mladić and evidence of Mladić's purported guilt that make it untenable that Karadžić was not complicit]; 24 April 2018 – T.260:1-261:8 [as to a "conspiracy of silence" in the army]; T.244:20-245:5, and T.250:11-T.255:10, and T.257:15-23, and T.258:14-17, and T.260:20-T.261:7 [As to references of the relationship with Mladić and Karadžić's knowledge and responsibility]

³⁴ Defence Notice of Appeal, paras.33-76.

20. Individually or cumulatively, Judge Meron's findings in previous cases and the grounds of appeal he must consider in *Karadžić*, gives rise to an unacceptable appearance of bias. The Appellant submits that, in the circumstances, a reasonable observer, properly informed about the issues being raised on appeal, would reasonably apprehend bias. This rebuts Judge Meron's impartiality.

21. As a result of the *Karadžić* case in particular, Judge Meron will be making findings on the Appellant's responsibility which now form the basis of the Appellant's appeal. In effect, Judge Meron will have pre-determined the merits of his appeal in the *Karadžić* case. It would be impossible to properly adjudicate on Karadžić's appeal without doing so. The Appellant respectfully requests that Judge Meron withdraw or be disqualified from the benches determining the Appellant's appeal as a result.

CONCLUSION

22. Rule 18(A) is clear that "[a] Judge may not sit in any case" where his or her impartiality "might" be affected. In the present case, there is evidence that gives rise to a perception of bias.

23. The Appellant's right to have his appeal heard by a fair and independent judiciary is a fundamental one. Given that the issues raised on appeal are directly linked to those that Judge Meron has already determined as the *Krstić* and *Tolimir* cases and will be required to determine in *Karadžić*, the Appellant submits that there is an unacceptable appearance of bias and that the presumption of impartiality has been rebutted.

WHEREFORE the Appellant respectfully requests the following relief:

- (a) VOLUNTARY WITHDRAWAL or, in the alternative, DISQUALIFICATION of Judge Theodor Meron under Rule 18, and
- (b) APPOINTMENT of an impartial and independent judge in his place to hear the appeal from judgment under Rule 18(B).

Word Count:2625

RESPECTFULLY SUBMITTED BY:



Branko Lukić
Lead Counsel for Ratko Mladić



Dragan Ivetić
Co-Counsel for Ratko Mladić



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