

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 RESPECTFULLY SEEKING THE DISQUALIFICATION
OF JUDGE CARMEL AGIUS FOR ACTUAL OR APPARENT BIAS**

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THE MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS**PROSECUTOR****v.****RATKO MLADIĆ****Case No. MICT-13-56-A***Public*

**DEFENCE MOTION RESPECTFULLY SEEKING THE
DISQUALIFICATION OF JUDGE CARMEL AGIUS FOR ACTUAL OR
APPARENT BIAS**

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 Carmel Agius 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 Agius' statements in a previous judgment 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 Agius should be disqualified from sitting on the appeal.

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

PROCEDURAL HISTORY

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 Agius, were assigned to hear the Appellant's interlocutory appeals on these matters.⁴

3. Judge Agius 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 Agius and Liu (along with Judge Theodor Meron) were assigned to the Appeals Chamber hearing the Appellant's appeal from his trial judgment.⁸

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. Mladic*, 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 Mladic's Motion for Disqualification of Judge Carmel Agius](#) (26 October 2016).

⁸ *Prosecutor v. Ratko Mladić*, Case No. MICT-15-56-A, [Order Assigning Judges to a Case Before the Appeals Chamber](#) (19 December 2017).

APPLICABLE LAW

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”.⁹ 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*.¹⁰

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*.¹¹ 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*.¹²

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

⁹ http://www.unmict.org/sites/default/files/documents/101222_sc_res1966_statute_en.pdf

¹⁰ <http://www.unmict.org/sites/default/files/documents/160926-rules-rev2-en.pdf>

¹¹ *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.

¹² 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”].

with the impugned judge, s/he will decide the application or appoint a three-judge panel 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.¹³

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

10. A judge enjoys a rebuttable presumption of impartiality.¹⁴ A party seeking disqualification must demonstrate “a reasonable apprehension of bias by reason of prejudgement” that is “firmly established.”¹⁵ The party must show that “[t]he circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias”.¹⁶

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.”¹⁷ 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.¹⁸ In the case

¹³ *Ibid.*, para. 189.

¹⁴ *Ibid.*, para. 196

¹⁵ *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.

¹⁶ Furundzija Appeal, para. 189.

¹⁷ *Nahimana et al v The Prosecutor*, Case No. ICTR-99-52-A, Judgment, 28 November 2007, para.78

¹⁸ 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.

of *Poppe v The Netherlands*, the European Court of Human Rights (ECtHR) makes the crucial distinction as follows:

“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).¹⁹

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?²⁰

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.²¹

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.²²

¹⁹ *Poppe v Netherlands*, [2009] Application No. 32271/04, ECHR, para. 26

²⁰ *Ibid.*, para. 28

²¹ *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.

²² *R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at p. 259.

SUBMISSIONS

15. The Appellant submits that the findings made against him in *Popović et al.* Trial Chamber judgment, a case that Judge Agius presided over and did not dissent or provide a Separate Opinion in,²³ give rise to an unacceptable appearance of bias that would lead a reasonable observer, properly informed, to apprehend bias in the context of his appeal.²⁴

16. The *Popović* Trial Chamber made explicit findings about the Appellant's role, contribution and knowledge of the crimes. Examples of this include:

- i. Finding statements by the Appellant to have been “deliberate lies.”²⁵
- ii. Stating it was “inconceivable” that the Appellant was not involved in an alleged “murder enterprise,” and that in fact he was a “central, driving force” behind it:

what is clear from the evidence before the Trial Chamber is that such an operation [the alleged killing of Bosnian Muslim men from Potocari], on a massive scale, involving the participation of a multitude of VRS members from the Main Staff down, could not have been undertaken absent the authorisation and order of [the Appellant]. **Given his role in the military structure and his acts and words at the time, including his direct involvement in critical components of the operation, any alternative conclusion is inconceivable. His imprint—through rhetoric, threats, speeches, orders and physical presence—appears on an ongoing basis at critical junctures of this murder enterprise. The Trial Chamber is satisfied that [the Appellant] was a central, driving force behind the plan to murder and its implementation.**²⁶

- iii. Finding that the Appellant had issued “patently illegal” orders to commit genocide:

[The accused Drago Nikolic] was aware that this was an operation being conducted pursuant to the orders of the [Appellant]. Of course, these were patently illegal orders and there can be no doubt that Nikolic was

²³ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, [Trial Judgment](#) (10 June 2010) [“Popovic Trial Judgment”].

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

²⁵ *Ibid.*, para. 1259.

²⁶ *Ibid.*, para. 1071 [emphasis added].

obligated to refuse to carry them out. However, in terms of assessing his personal intent to destroy a group, it is relevant to place his participation in the context in which it clearly occurred.²⁷

- iv. Finding that Beara’s position as “Chief of Staff in the VRS Main Staff, cloaked with the authority of [the Appellant]” was an “aggravating factor” in Beara’s sentencing.²⁸

17. Further, the *Popović* Trial Chamber made findings in relation to all of the Srebrenica Scheduled Incidents charged in the Appellant’s Indictment.²⁹ The Appellant now seeks to appeal his responsibility in relation to these same incidents.³⁰ These include the responsibility of military actors and the combatant status of the alleged victims.³¹

18. Furthermore, the *Popović* Trial Chamber frequently referenced the Appellant’s involvement or orders, his membership in the alleged JCE’s, to prove his subordinates’ membership therein. Calls between former Bosnian Serb President Radovan Karadžić and the Appellant were used to prove the accused Beara’s involvement in a “murder operation.”³² The *Popović* Trial Chamber also stated he was “satisfied that... under [the

²⁷ *Ibid.*, para. 1412.

²⁸ *Ibid.*, para. 2165.

²⁹ See, *inter alia*, the following paragraphs from the [Popović Trial Judgment: Prosecutor v. Mladić](#) Scheduled Incident E.1.1: paras. 408-9, 794(3), 859, 1074 ; E.2.1: paras. 410-414, 794(3), 859, 1074; E.3.1: paras. 424-445, 618, 794(5), 859, 1050, 1074, 1402, 1454-1461, 1514-1540, 1547-1550, 1554, 1556-1559, 1560-1563, 1569, 1571, 1574-1576, 1580, 1582-1589, 1592-1597, 2182-2187 [continue]; E.4.1: paras. 421-423, 794(3), 859, 1259 (in which the Accused is referenced as having been present at the location of the incident), 1402; E.5.1: paras. 351-353, 794(3), 859, 1074; E.6.1: paras. 475-480, 794(8), 859, 1050, 1066, 1075, 1105-1106, 1110, 1112, 1141, 1276, 1300, 1350-1351, 1361-1365, 1390-1392, 1407-1409, 1418, 1421, 1880-1883, 1889-1890, 1965, 2017-2018, 2178; E.6.2: paras. 475-492, 794(8), 859, 1050, 1066, 1075, 1105-1106, 1110, 1112, 1141, 1276, 1300, 1350-1351, 1361-1365, 1390-1392, 1407-1409, 1418, 1421, 1880-1883, 1889-1890, 1965, 2017-2018, 2178; E.7.1: paras. 493-498, 501-503, 600, 791, 794(9), 1050, 1081-1082, 1169, 1279, 1303, 1366, 1393, 1409, 1425-1427, 1725, 1734, 1828-1829, 1883, 1965; E.7.2: paras. 499-500, 501-503, 600, 794(10), 859, 1050, 1064, 1066, 1075, 1116, 1409, 1881, 1883, 1965; E.8.1: paras. 504-516, 521-524, 1069, 1282, 1370; E.8.2: paras. 504-524, 1069, 1282, 1370-1371, 1375, 1390, 1409, 1421; E.9.1: paras. 527-531, 794(12), 859, 1075, 1124-1125, 1134, 1226, 1282, 1285, 1359-1360, 1372, 1390; E.9.2: paras. 532-539, 542-550, 584-589, 791, 794(13), 859, 1075, 1124-1134, 1965, 2016, 2043; E.10.1: paras. 540-550, 794(13), 859, 1075, 1124, 1132 (finding that VRS soldiers were ordered to execute detainees), 1133, 1285; E.12.1: paras. 1143-1152; E.13.1: 597-599, 794(18), 990, 1079-1080; E.14.1: paras. 354-359; E.14.2: paras. 360-361, 794(2); E.15.1: paras. 460-463, 794(7); and E.15.3: paras. 456-457 (finding that the individual was killed by VRS soldiers and military police); 794(4).

³⁰ Notice of Appeal, para.51-60.

³¹ *Ibid.*

³² See fn 29 above. *Ibid.*, para. 1300.

Appellant]’s authority, Miletić ordered the dispatch of units” to kill non-Serbs in Srebrenica.³³

19. It also made findings about the Appellant’s *mens rea*. The *Popović* Trial Chamber concluded that “[the Appellant’s] own words perhaps best evidence the deliberate intent to terrify.”³⁴ It referenced the Appellant’s statements as revealing his “discriminatory intent” in Srebrenica.³⁵

20. The Appellant notes that his requests to disqualify Judge Agius from hearing his interlocutory appeals were ultimately rejected by Judge Liu.³⁶ Judge Liu indicated that his reasons for denying the disqualification were based on the lack of a sufficient link between the substantive issues raised in the *Popović* Trial Judgment and those raised in the interlocutory appeals.³⁷ While the *Popović* Trial Judgment dealt with substantive criminal charges related to Srebrenica, Judge Liu noted that the issues raised in the interlocutory appeals related to the presumption of innocence and fair trial rights.³⁸ This was the reason he held that the presumption of impartiality was not rebutted.³⁹

21. In this instance, there is a direct link between the findings made in the *Popović* judgement and the Appellant’s grounds of appeal. The Appellant’s 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).⁴⁰ The examples of findings made about the Appellant’s participation, role and knowledge above go to the crux of his appeal. In effect, factual and legal findings about the Appellant’s criminal responsibility have already been made by Judge Agius in the *Popović* judgment.

³³ *Ibid.*, para. 1641.

³⁴ *Ibid.*

³⁵ *Ibid.*, para.1004.

³⁶ *Prosecutor v. Mladić*, Case No. IT-09-92-AR73.6 (cross-filed in Case No. IT-09-92-AR73.7), [Decision on Ratko Mladić’s Motion for Disqualification of Judge Carmel Agius](#) (26 October 2016).

³⁷ *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).

³⁸ *Ibid.* at paras. 20-23.

³⁹ *Ibid.*, at para. 24.

⁴⁰ Defence Notice of Appeal, paras.33-76.

22. The Appellant submits that, in the circumstances, a reasonable observer, properly informed about the issues being raised on appeal, would reasonably apprehend bias. The robust statements made in the *Popović* judgement about the Appellant's role and responsibility for the crimes give rise to an unacceptable appearance of bias that rebuts Judge Agius's impartiality. Judge Agius will, in effect, be considering the Appellant's appeal on matters that he has already pre-judged. The Appellant respectfully requests that Judge Agius withdraw or be disqualified from the benches determining the Appellant's appeal as a result.

CONCLUSION

23. 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.

24. 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 Agius has already determined in the *Popović* case, 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 Carmel Agius 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: 2987

RESPECTFULLY SUBMITTED BY:



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