

**UNITED
NATIONS**



International Residual Mechanism for
Criminal Tribunals

Case No: MICT-13-56-A

Date: 28 June 2018

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Jean-Claude Antonetti, Acting President

Registrar: Mr. Olufemi Elias

THE PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**PROSECUTION CONSOLIDATED RESPONSE TO DEFENCE
MOTIONS SEEKING THE DISQUALIFICATION OF JUDGES
THEODOR MERON, LIU DAQUN AND CARMEL AGIUS FOR
ACTUAL OR APPARENT BIAS**

The Office of the Prosecutor:

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

Counsel for Ratko Mladić:

Mr. Branko Lukić
Mr. Dragan Ivetić

1. Mladić's Motions¹ seeking the disqualification of three members of the Appeals Chamber in this case—Judges Theodor Meron, Liu Daqun and Carmel Agius—should be dismissed. Mladić fails to rebut the “strong assumption” of judicial impartiality or to “firmly establish” a reasonable apprehension of bias in relation to the Judges concerned.² In particular, Mladić does not demonstrate that a reasonable observer, properly informed, would reasonably apprehend bias³ based on conclusions made in other cases with similar crime bases.

I. MLADIĆ FAILS TO ESTABLISH ACTUAL OR APPARENT BIAS

2. Mladić fails to meet “the burden of adducing reliable and sufficient evidence” to rebut the strong presumption of impartiality afforded to the Judges.⁴ Although he alleges actual bias in the title of the Motions, these allegations remain unsubstantiated. Mladić fails to put forward any evidence of actual bias on the part of the Judges in question.

3. Mladić's argument that there is an unacceptable appearance of bias,⁵ should also be dismissed. According to well-settled ICTY and ICTR jurisprudence, Judges' conclusions reached in other cases relating to a Defendant's role or knowledge do not amount to an appearance of bias. Mladić merely repeats his unsuccessful attempts at trial to have judges disqualified based on findings they made in other cases, including findings that he was a member of a joint criminal enterprise.⁶

¹ Defence Motion Respectfully Seeking the Disqualification of Judge Theodor Meron for Actual or Apparent Bias, 18 June 2018 (“Judge Meron Motion”); Defence Motion Respectfully Seeking the Disqualification of Judge Liu Daqun for Actual or Apparent Bias, 18 June 2018 (“Judge Liu Motion”); Defence Motion Respectfully Seeking the Disqualification of Judge Carmel Agius for Actual or Apparent Bias, 18 June 2018 (“Judge Agius Motion”) (“Motions”).

² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Decision on Motion for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings, 2 December 2009, para.7 citing to *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“Čelebići AJ”), para.707; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“Furundžija AJ”), para.197.

³ See *Furundžija AJ*, para.189.

⁴ See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T (“Mladić”), Decision on Defence Motion Seeking to Disqualify the Honourable Judge Alphons Orie and the Honourable Judge Christoph Flügge, 26 August 2016 (public with public and public redacted annexes) (“26 August 2016 Mladić Decision”), p.3 citing to *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Judgement, 30 June 2016, para.44.

⁵ Judge Meron Motion, paras.15-21; Judge Liu Motion, paras.15-18; Judge Agius Motion, paras.15-22.

⁶ See *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.7, Decision on Ratko Mladić's Motion for Disqualification of Judge Fausto Pocar, 26 October 2016; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.7, Decision on Ratko Mladić's Motion for Disqualification of Judge Carmel Agius, 26 October 2016; 26 August 2016 Mladić Decision; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings, 15 May 2012 (public with public redacted annex). In none of those cases did the President find it necessary to appoint a panel of three Judges to consider the motions. Mladić also tried and failed at trial to have

4. The ICTR and ICTY Appeals Chambers have consistently held that in criminal trials arising out of the same series of events—absent evidence to the contrary—a reasonable observer would presume that judges rule fairly on the issues before them by virtue of their training and experience,⁷ deciding each case exclusively on the basis of the evidence heard by the Chamber in relation to that particular case.⁸ Consequently, the mere fact that Judges Liu and Agius sat on trials where similar facts and evidence were at issue does not lead to an appearance of bias. Likewise, the fact that Judge Meron has previously participated in appeals which addressed similar facts and evidence⁹ does not show an appearance of bias.¹⁰ Any allegations of appearance of bias regarding Judge Meron’s conclusions in the *Karadžić* appeal are in any event extraneous as the Appeal Judgement in that case has not yet been issued.¹¹

5. Contrary to Mladić’s claims, no findings of criminal responsibility were made against him in other cases.¹² Mladić’s argument that a prior decision can be capable of rebutting the presumption of impartiality where it constitutes findings of individual criminal responsibility of the accused¹³ has no merit here. Findings of criminal responsibility made in a case before the Tribunal or the Mechanism are binding only on the accused in that case.¹⁴ Findings regarding the existence and membership of a joint criminal enterprise do not constitute findings of criminal responsibility on the part of any persons not charged or convicted in that particular case.¹⁵

judges disqualified for other reasons: *see e.g. Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.6, Decision on Interlocutory Appeal Against Decision on Defence Motion for a Fair Trial and the Presumption of Innocence, 27 February 2017; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.7, Decision on Ratko Mladić’s Motion for Disqualification of Judge Theodor Meron, 26 October 2016; *Mladić*, Decision on Defence Motion for Stay of Proceedings for Systemic Bias or, in the Alternative, a Mistrial, 22 September 2016; *Mladić*, Decision on Defence Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, 4 July 2016.

⁷ *Tharcisse Renzaho v. Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011, para.22; *François Karera v. Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para.378; *Ferdinand Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (“*Nahimana AJ*”), para.78; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para.44.

⁸ *Nahimana AJ*, para.78.

⁹ *See* Judge Meron Motion, paras.15-17.

¹⁰ *See Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Motion for Disqualification of Judge Fausto Pocar, 2 October 2012, para.20.

¹¹ *Contra* Judge Meron Motion, paras.18, 20-21.

¹² *Contra* Judge Meron Motion, para.15; Judge Liu Motion, para.15; Judge Agius Motion, paras.15, 21.

¹³ *See* Motions, paras.11-12.

¹⁴ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Decision on Application by the Republic of Croatia for Leave to Appear as *Amicus Curiae* and to Submit *Amicus Curiae* Brief, 18 July 2016 (“*Prlić Decision*”), para.9 *citing to* *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgement, 27 January 2014 (“*Đorđević AJ*”), para.142.

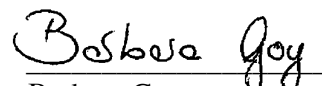
¹⁵ *Prlić Decision*, para.9. *Contra* Judge Meron Motion, para.18; Judge Liu Motion, paras.16-17; Judge Agius Motion, paras.16, 18.

6. Mladić's arguments based on the jurisprudence of the European Court of Human Rights (ECtHR) should also be dismissed.¹⁶ The Appeals Chamber is not bound by the jurisprudence of other courts, including the ECtHR.¹⁷ In any event, the test for appearance of bias set out by the ECtHR in *Poppe*¹⁸ would not be met in this case.¹⁹ The ECtHR in the *Poppe* Judgment stated that there is a "legitimate reason to fear that a particular judge lacks impartiality" when earlier judgements contain findings that actually prejudge the question of guilt of an accused in later proceedings.²⁰ Since Mladić's criminal responsibility was not prejudged in the cases on which Judges Meron, Liu and Agius sat at trial or on appeal, their involvement in those cases does not lead to an appearance of bias.

II. CONCLUSION

7. Mladić has failed to rebut the strong presumption of impartiality afforded to Judges Meron, Liu and Agius, or to establish a reasonable apprehension of bias in relation to them. His Motions should be dismissed.

Word Count: 1,293


Barbara Goy
Senior Appeals Counsel

Dated this 28th day of June 2018
At The Hague, The Netherlands

¹⁶ *Contra* Motions, paras.11-13.

¹⁷ *See Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Judgment, 29 November 2017, para.3329; *Dordević* AJ, para.83; *Čelebići* AJ, para.24.

¹⁸ *Case of Poppe v. The Netherlands*, Application No. 32271/04, ECtHR, Judgment (Merits), 24 March 2009 ("*Poppe* Judgment").

¹⁹ *Contra* Motions, para.13.

²⁰ *Poppe* Judgment, para.26. *Cf. Case of Rojas Morales v. Italy*, Application No. 39676/98, ECtHR, Judgment, 16 November 2000.



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