tUNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case no.: MICT-13-56-A

Date: 3 September 2018

Original: French

SENIOR JUDGE

Before: **Judge Jean-Claude Antonetti, Senior Judge**

Registrar: **Mr Olufemi Elias**

Decision of: **3 September 2018**

THE PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC DOCUMENT

DECISION ON DEFENCE MOTIONS FOR DISQUALIFICATION OF JUDGES THEODOR MERON, CARMEL AGIUS AND LIU DAQUN

The Office of the Prosecutor

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1. I, Jean-Claude Antonetti, Judge of the International Residual Mechanism for Criminal Tribunals ("Mechanism") and Senior Judge in this case,[1] have been seised of motions seeking the disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun for reasons of bias, actual or apparent, filed by the Accused Ratko Mladić on 18 June 2018.[2] The Prosecution filed a consolidated response on 28 June 2018.[3]

I. INTRODUCTION

2. *In limine*, I recall that, following the filing of the Motions and in accordance with Rules 18 (B) (iv) and 22 (B) of the Rules, the President of the Mechanism withdrew and assigned me to consider the Motions in his place.[4] In accordance with the Order of Precedence, as I am the Senior Judge after President Meron, the Motions come under my remit.[5] Pursuant to Rule 18 (B) (ii) of the Rules, I am ruling in this capacity on the said motions by way of a consolidated decision.

3. I realise the importance of the task incumbent upon me as the Motions relate to the fundamental right to be tried by an impartial court. The right to be tried by an impartial tribunal is in itself an essential component of the right to a fair trial,[6] which is generally recognised as "an absolute right not subject to any exception".[7] The principle of the impartiality of judges implies that a judge cannot hear a case in which he has a personal interest or with which he has or has had any sort of connection that might compromise or appear to compromise his impartiality. In that case, he must withdraw, or else one of the parties may request his disqualification. The requirement of

[1] Rules 18 (B) (iv) and 22 (B) of the Rules of Procedure and Evidence of the Mechanism ("Rules").
[2] "Defence Motion Respectfully Seeking the Disqualification of Judge Theodor Meron for Actual or Apparent Bias", 5 July 2018 (original English version filed on 18 June 2018) ("Motion against Judge Meron") (*see* Annex A); "Defence Motion Respectfully Seeking the Disqualification of Judge Carmel Agius for Actual or Apparent Bias", 5 July 2018 (original English version filed on 18 June 2018) ("Motion against Judge Agius") (*see* Annex B); "Defence Motion Respectfully Seeking the Disqualification of Judge Liu Daqun for Actual or Apparent Bias", 5 July 2018 (original English version filed on 18 June 2018) ("Motion against Judge Liu" and collectively "Motions") (*see* Annex C). The Motions were initially filed before the Appeals Chamber which dismissed them on the ground that they should have been filed before the President of the Mechanism in accordance with Rule 18 (B) of the Rules of Procedure and Evidence. *See* "Defence Motion Respectfully Seeking the Disqualification of Judge Theodor Meron for Actual or Apparent Bias", 12 June 2018; "Defence Motion Respectfully Seeking the Disqualification of Judge Carmel Agius for Actual or Apparent Bias", 12 June 2018; "Defence Motion Respectfully Seeking the Disqualification of Judge Liu Daqun for Actual or Apparent Bias", 12 June 2018; "Decision on Three Motions to Disqualify Judges of the Appeals Chamber for Actual or Apparent Bias", 18 June 2018.
[3] "Prosecution Consolidated Response to Defence Motions Seeking the Disqualification of Judges Theodor Meron, Liu Daqun and Carmel Agius for Actual or Apparent Bias", 10 July 2018 (original English version filed on 28 June 2018) ("Response").
[4] "Decision on Mladić's Motions for Disqualification of Judges", 20 June 2018 ("Decision of 20 June 2018"), pp. 1 and 2.
[5] Order of Precedence available on the Mechanism's website (http://www.irmct.org/en/about/judges).
[6] Article 14 (1) of the International Covenant on Civil and Political Rights, 16 December 1966 ("International Covenant"), United Nations Treaty Series, Vol. 999, p. 171; Manfred Nowak, "U.N. Covenant on Civil and Political Rights: CCPR Commentary", 2nd ed., 2005, p. 312, para. 27.
[7] General Comment No. 32: *Right to Equality before Courts and Tribunals and to Fair Trial*, Human Rights Committee, UN document No. CCPR/C/GC/32, 23 August 2007, para. 19.

impartiality is violated not only when a judge has an actual bias but also in cases of an unacceptable appearance of bias.[8] This requirement rests on the famous maxim of Lord Hewart CJ, namely that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[9]

4. The situation becomes more delicate when a judge must rule on the allegations of bias brought against other judges, particularly when those other judges are distinguished colleagues whose integrity and professionalism are irreproachable. In such cases, it is necessary nevertheless to exercise objectivity, courage and determination so that the interest of justice may prevail over all other considerations.

5. As under Rule 18 of the Rules it falls to me to decide on the Motions, I have examined my own impartiality and, in particular, my appearance of impartiality. I notably heard Case No. IT-05-88/2-A, *The Prosecutor v. Zdravko Tolimir* ("*Tolimir* Case"),[10] which was tried before the International Criminal Tribunal for the former Yugoslavia ("ICTY"), and as stated in my separate and partially dissenting opinion,[11] I mentioned the name Ratko Mladić about a dozen times, without ever providing an opinion on his responsibility.[12] Therefore, I deemed that I could issue a fully independent and impartial ruling on the Motions. Moreover, in the past I have withdrawn from cases where I believed that there was a risk that my impartiality could be brought into question.[13]

6. I also wish to point out that my research and thinking, vital prerequisites to considering the Motions, were guided by the relevant case-law of the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"). I also considered the rules governing the disqualification and withdrawal of judges that were adopted by other international and internationalised criminal tribunals, as well as the relevant case-law of the European Court of Human Rights ("ECHR"). Furthermore, I consulted

[8] *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000 ("Appeal Judgement of 21 July 2000"), para. 189. *See* also, Rule 17 (A) of the Rules (Annex D).
[9] *The Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-A, Appeal Judgement, 30 June 2016, para. 43.
[10] *See The Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, "Judgement", 8 April 2015 ("*Tolimir* Appeal Judgement").
[11] Furthermore, I vehemently opposed the theory of the Joint Criminal Enterprise, and the separation of cases relating to Srebrenica. *See* for example, "Separate and Partially Dissenting Opinion of Judge Jean-Claude Antonetti enclosed with the *Tolimir* Appeal Judgement" ("Opinion of Judge Antonetti"), pp. 8 and 9, 84 to 101.
[12] There was a possibility that I would be assigned to the Mladić Appeal Chamber, in its initial composition. Had that been the case, I would have accepted the assignment while mentioning that I had previously been assigned to the *Tolimir* Case. I would have, however, pointed out that I had not in that case taken a position on the responsibility of Ratko Mladić, as is evident from the Opinion of Judge Antonetti. In order to ensure transparency, I would have disclosed my response to Ratko Mladić and his counsel, as well as to the Prosecution, for their information.
[13] *See*, for example, *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T ("*Šešelj* Case"), "Separate Opinion of Presiding Judge Antonetti Regarding the Motion of the Accused Vojislav Šešelj to Discontinue the Proceedings", 29 September 2011, pp. 8 and 9. In this opinion I explained that, with respect to the issue of contempt of court raised by the Accused, "I have made an unequivocal decision to withdraw from all related proceedings in order to gain time and prevent the Chamber from being contaminated by having to deal with them". *See* also, *The Prosecutor v. Milan Lukić*, Case No. MICT-13-52-R.1, "Judge Jean-Claude Antonetti's Letter of Withdrawal to the President of the Mechanism for International Criminal Tribunals Pursuant to Rule 18 (A) of the Rules of Procedure and Evidence", 19 August 2015.

the rules applicable under the main national legal systems, particularly common law and civil law systems.

7. It should be noted that there are only a few cases where the facts linked to an accused's role in the crimes – which are the subject of an ongoing trial – had already been considered and where the judges had sought to find out if previously reached findings were likely to have an impact on the criminal responsibility of the accused. For example, in the past, the Accused Ratko Mladić had requested the withdrawal of Judge Alphons Orie on account of his previous findings in Cases Nos IT-98-29-T, *The Prosecutor v. Stanislav Galić*, and IT-00-39-T, *The Prosecutor v. Momčilo Krajišnik*. Due to insufficient grounds, the President of the ICTY ruled the motion seeking the disqualification of Judge Orie to be unfounded and decided not to form a Special Panel. However, the President did not rule on whether findings reached previously could have an impact on the criminal responsibility of Ratko Mladić.[14] The same scenario repeated itself when the Accused Ratko Mladić subsequently called for the disqualification of Judge Orie due to his findings in Case No. IT-03-69-T, *The Prosecutor v. Jovica Stanišić and Franko Simatović*, and of Judge Christoph Flügge due to his findings in Case No. IT-05-88/2-T, *The Prosecutor v. Zdravko Tolimir*.[15]

8. Ratko Mladić also sought the disqualification of Judge Agius due to his findings in previous judgements and because, as Mladić claims, they show the existence of bias with regard to his responsibility. However, the Vice-President of the ICTY deemed that the issues brought to the attention of the judges concerned matters of procedure and not matters of criminal responsibility. Consequently, the Vice-President of the ICTY denied the motion without ruling on its merits.[16]

9. Cases of withdrawal of a judge are rare in international and internationalised criminal tribunals. The few existing cases concern judges who have expressed personal opinions outside their official functions. For example, Judge Frederik Harhoff was disqualified from the *Šešelj* Case due to a letter wherein he alluded to a "set practice" of the ICTY of convicting military commanders and expressed his displeasure with the change of direction that the Tribunal seemed to be adopting. A panel of ICTY judges found, by a majority, that this reference to a set practice of convicting accused persons "without reference to an evaluation of the evidence in each individual

[14] *The Prosecutor v. Ratko Mladić*, 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", President of the ICTY, 15 May 2012 ("Order of 15 May 2012"), p. 3.
[15] *See The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, "Decision Concerning Defence Motions to Exceed Word Count and Defence Motion Pursuant to Rule 15 (B) Seeking Disqualification of Judge Christoph Flügge", 22 January 2014 ("Decision of 22 January 2014"), p. 3.
[16] *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, "Decision on Ratko Mladić's Motion for Disqualification of Judge Carmel Agius", 26 October 2016, paras 23 to 26. Mladić also filed a motion seeking the disqualification of Judge Meron which was denied in 2016. This motion, however, was not based on the examination of earlier findings

case" would lead a reasonable observer, properly informed, to apprehend bias on the part of the judge "in favour of conviction" in the case in question.[17]

10. Likewise, the Appeals Chamber of the Special Tribunal for Sierra Leone disqualified Judge Geoffrey Robertson from adjudicating on matters involving the Revolutionary United Front ("RUF") due to a book that he had published wherein he stated that the rebels and their chiefs were guilty of having committed atrocities on a scale that amounted to crimes against humanity. The Appeals Chamber judges found, by a majority, that these allusions to crimes against humanity would lead a reasonable observer to fear that Judge Robertson lacked impartiality regarding matters involving the RUF.[18]

11. It is in this context and taking into account the specific case of which I have been seised that I will analyse the arguments of the Accused Ratko Mladić.

II. PROCEDURAL BACKGROUND

12. On 22 November 2017, Trial Chamber I of the ICTY found the Accused Ratko Mladić guilty of genocide, persecution, extermination, murder, expulsion and other inhumane acts (through forcible transfer) constituting crimes against humanity, as well as murder, terror, unlawful attacks against civilians and the taking of hostages, constituting violations of the laws or customs of war, for having participated, as the Chief of Staff of the Army of the Serbian Republic of Bosnia, in four joint criminal enterprises in Bosnia and Herzegovina between May 1992 and November 1995, and sentenced him to life imprisonment.[19]

13. On 19 December 2017, the President of the Mechanism assigned an Appeals Chamber of the Mechanism, presided over by Judge Meron and comprising Judges Agius and Liu, to hear the appeals lodged by the Accused Ratko Mladić and by the Prosecution against the Judgement of 22 November 2017.[20]

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regarding the criminal responsibility of the Accused. *See The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, "Decision on Ratko Mladić's Motion for Disqualification of Judge Theodor Meron", 26 October 2016.

[17] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President", 9 September 2013 (original English version filed on 28 August 2013), paras 12 and 13 (Annex E).

[18] *The Prosecutor v. Issa Hassan Sesay*, Case No. SCSL-2004-15-AR15,"Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber", 13 March 2004, paras 14 to 18.

[19] *See The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, "Judgment", 22 November 2017 (public document with confidential annex) ("Judgement of 22 November 2017"), paras 4612, 4688, 4893, 4921, 5098, 5128, 5130, 5131, 5156, 5163, 5188 to 5193 and 5214.

[20] "Order Assigning Judges to a Case before the Appeals Chamber", 16 July 2018 (original English version filed on 19 December 2017), p. 1.

14. On 22 March 2018, following an extension of time, the parties filed their respective notices of appeal against the Judgement of 22 November 2017.[21]

15. On 20 June 2018, following the filing of the Motions and in accordance with Rules 18 (B) (iv) and 22 (B) of the Rules, the President of the Mechanism withdrew and referred the Motions to me for consideration.[22] In response to my memorandum dated 25 June 2018, Judges Meron, Agius and Liu presented their written observations on the Motions.[23] In response to my memorandum dated 7 August 2018, Judges Meron, Agius and Liu agreed to have their observations enclosed in an annex to this decision.[24]

16. On 6 August 2018, the parties filed their respective appeal briefs against the Judgement of 22 November 2017.[25]

III. APPLICABLE LAW

17. The right to a fair trial implies the right to be tried by an independent and impartial tribunal.[26] In accordance with the Statute of the Mechanism ("Statute"), trials before the Mechanism shall be "fair and expeditious", "with full respect of the rights of the accused".[27] The Statute and the Code of Professional Conduct of the Mechanism reinforce the right of an accused to receive a fair trial in that the Judges are required to be "persons of high moral character, impartiality and integrity".[28] This principle is enshrined in Rule 18 (A) of the Rules, which reads as follows:

[21] "Notice of Appeal of Ratko Mladić", 22 March 2018 (public document with public and confidential annexes) ("Notice of Appeal"); "Prosecution's Notice of Appeal", 22 March 2018. Regarding the extension of time, *see* "Decision on Motion for Extension of Time to File Notice of Appeal", 21 December 2017, p. 2. *See* also "Decision on a Further Motion for an Extension of Time to File a Notice of Appeal" 16 July 2018 (original English version filed on 9 March 2018), p. 3; "Decision on Ratko Mladić's Motions for Reconsideration", 16 March 2018, pp. 3 and 4.
[22] Decision of 20 June 2018, pp. 1 and 2.
[23] Internal memorandum, "*Mladić* Case: Request for Observations on Defence Motions Seeking Disqualification of Judges", 25 June 2018 (strictly confidential), paras 2 and 4; "Statement on Mladić Defence Motion for My Disqualification", 13 July 2018 (strictly confidential) ("Observations of Judge Agius"); Internal memorandum, *Mladić* Case: "Observations on Defence Motion Seeking Disqualification", 20 July 2018 (original English version filed on 16 July 2018) (confidential) ("Observations of Judge Meron"); Email from Judge Liu received on 22 July 2018 ("Observations of Judge Liu") (*see* Annexes F, G, H, I).
[24] Internal memorandum, "*Mladić* Case: Request to Disclose Observations on Defence Motions Seeking Disqualification of Judges", 7 August 2018 (strictly confidential), paras 3 and 4; Internal memorandum from Judge Agius, 7 August 2018, para. 2; Email from Judge Liu received on 7 August 2018; Internal memorandum from Judge Meron, 8 August 2018, para. 1 (*see* Annexes F, G, H, I).
[25] "Appeal Brief on Behalf of Ratko Mladić", 6 August 2018 (confidential); "Prosecution Appeal Brief", 6 August 2018 (confidential).
[26] Article 14 (1) of the International Covenant.
[27] Statute, Article 18 (1) (Annex J); *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, "Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15 (B) (ii)", 22 July 2009 ("Decision of 22 July 2009"), para. 14.
[28] Statute, Article 9; "Code of Professional Conduct for the Judges of the Mechanism", 11 May 2015, MICT/14, Articles 3 and 4 (*see* Annex K).

> 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.

18. The ICTY Appeals Chamber found that as a general rule "a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to bias".[29] On the basis of this, the ICTY Appeals Chamber found that the following principles should guide it in interpreting and applying the impartiality requirement:

> A. A judge is not impartial if it is shown that actual bias exists.
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> B. There is an unacceptable appearance of bias if:
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> i) a Judge is 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;
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> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[30]

19. With respect to the "reasonable observer" discussed above, the ICTY Appeals Chamber specified that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality […] and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold".[31]

20. The ICTY Appeals Chamber also recalled that there is a presumption of impartiality which attaches to a judge and considered that in the absence of evidence to the contrary, it must be assumed that the judges "can disabuse their minds of any irrelevant personal beliefs or predispositions".[32] Consequently, it is for the applicant seeking the disqualification of a judge to adduce sufficient evidence to show that the judge is not impartial.[33] In this respect, the ICTY Appeals Chamber has consistently held that a high threshold is required in order to rebut the

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[29] "Appeal Judgement of 21 July 2000", para. 189.
[30] "Appeal Judgement of 21 July 2000", para. 189. *See* also, for example, *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001 ("Appeal Judgement of 20 February 2001"), paras 682 and 683; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001 ("Appeal Judgement of 1 June 2001"), para. 203; *The Prosecutor v. Stanislav Galić*, Case No. ICTR-98-29-A, Appeal Judgement, 30 November 2006 ("Appeal Judgement of 30 November 2006"), para. 39; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007 ("Appeal Judgement of 28 November 2007"), para. 49.
[31] "Appeal Judgement of 21 July 2000", para. 190. *See* also, for example, "Appeal Judgement of 20 February 2001", para 683; "Appeal Judgement of 30 November 2006", para. 40; "Appeal Judgement of 28 November 2007", para. 50.
[32] "Appeal Judgement of 21 July 2000", paras 196 and 197. *See* also, for example, "Appeal Judgement of 1 June 2001", paras 91 and 269; Appeal Judgement, 30 November 2006, para. 41; "Appeal Judgement of 28 November 2007", para. 48; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-A, Appeal Judgement, 8 May 2012, ("Appeal Judgement of 8 May 2012"), para. 16.
[33] "Appeal Judgement of 21 July 2000", para. 197. *See* also, for example, "Appeal Judgement of 1 June 2001", para. 91; Appeal Judgement, 30 November 2006, para. 41; "Appeal Judgement of 28 November 2007", para. 48; "Appeal Judgement of 8 May 2012", para. 16.

presumption of impartiality.[34] The applicant must in fact show that "there is reasonable apprehension of bias by reason of prejudgement […] firmly established".[35] The reason for this is that "just as any real appearance of bias on the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias".[36]

21. The other international and internationalised criminal tribunals also adopted similar rules on the disqualification and withdrawal of judges.[37] Consequently, a judge cannot hear a case in which he has a personal interest or with which he has or has had any sort of connection that might compromise or appear to compromise his impartiality. In that case, he must withdraw, or else one of the parties may request his disqualification. The decision to disqualify a judge from a case is taken, depending on the case, by a panel of three judges designated by the President of the Tribunal,[38] by an absolute majority of the judges[39] or by the chamber in which the judge in question is sitting,[40] after having given the judge in question the opportunity to make his observations.

22. Many of the decisions rendered by international and internationalised criminal tribunals relating to the disqualification of a judge concern different points, namely: (i) whether an armed conflict existed;[41] (ii) the credibility of certain key witnesses;[42] (iii) facts which are extraneous to the conduct of the accused;[43] or (iv) the role of the accused in the regime alleged to be behind the

[34] "Appeal Judgement of 21 July 2000", para. 197. *See* also, for example, "Appeal Judgement of 20 February 2001", para. 707; "Appeal Judgement of 30 November 2006", para. 41.
[35] "Appeal Judgement of 21 July 2000", para. 197. *See* also "Appeal Judgement of 20 February 2001", para. 707.
[36] *See* "Appeal Judgement of 20 February 2001", para. 707.
[37] Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 15; Rules of Procedure and Evidence of the Special Tribunal for Lebanon ("Rules of the STL"), Rule 25; Internal Rules of the Extraordinary Chambers in the Courts of Cambodia ("Rules of the ECCC"), Rule 34; Rome Statute of the International Criminal Court ("Statute of the ICC"), Article 41; Rules of Procedure and Evidence of the International Criminal Court ("Rules of the ICC"), Rules 34 and 35.
[38] Rules of the STL, Rules 25 (B) and (C).
[39] Statute of the ICC, Article 41 (2) (c).
[40] Rules of the ECCC, Rule 34 (5).
[41] *See*, for example, *The Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36-T, "Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge", 2 June 2000 (original English version filed on 18 May 2000) ("Decision of 18 May 2000"), para. 15.
[42] *See*, for example, *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, "Decision on the Defence Application for Withdrawal of a Judge from the Trial", 22 January 2003, para. 6; *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3504-Anx, "Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the Disqualification of Judge Christine Van Den Wyngaert from the *Case of The Prosecutor v. Germain Katanga*", 22 July 2014, para. 18.
[43] *See*, for example, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Bureau Decision, 4 May 1998, pp. 2 and 3; "Appeal Judgement of 28 November 2007", paras 78 and 79; *The Prosecutor v. Issa Hassan Sesay et al.*, "Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole from the RUF Case", Case No. SCSL-04-15-T, para. 55; "Decision of 22 July 2009", para. 21.

crimes being prosecuted.[44] International and internationalised criminal tribunals also considered that a judge may sit in two separate trials arising out of the same series of events even if the cases involve overlapping questions of fact or law,[45] provided that the tribunal has not shown unacceptable prejudice regarding the accused's culpability in a connected case.[46]

23. Article 6 of the European Convention on Human Rights provides that everyone is entitled to be heard by "an independent and impartial tribunal established by law". The ECHR defines impartiality as the absence of prejudice or bias.[47] The ECHR interpreted Article 6 as requiring the disqualification of a judge either in the case of subjective impartiality (the existence of bias), or in the case of a lack of objective impartiality (apprehension of bias). In the first case, the personal conviction or interest of a given judge in a particular case should be ascertained; in the second case, it should be ascertained whether the apprehension of bias is objectively justified, or whether the judge in question has offered sufficient guarantees to exclude any legitimate doubt.[48]

24. The ECHR expressly warned against general considerations when ruling on allegations of a violation of the requirement of impartiality, and insisted that a case-by-case examination was necessary, taking into account the specific circumstances of each case.[49] In doing so, the ECHR considered that the mere fact that a judge has already ruled on similar but unrelated charges, or that he has already tried a co-accused in a separate criminal case, does not in itself cast doubt on his impartiality in a subsequent case.[50] However, the ECHR found that it is a different matter if the

[44] *Nuon Chea et al*., Case No. 002/19-09-2007/ECCC/TC, "Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony", para. 15.

[45] *See*, for example, "Decision on Khieu Samphan's Immediate Appeal against the Trial Chamber's Decision on Additional Severance of Case 002 and Scope of Case 002/02", Doc. No. E301/9/1/1/3, 29 July 2014 ("Decision of 29 July 2014"), para. 83; "Decision on Ieng Thirith, Nuon Chea and Ieng Sary's Applications for Disqualification of Judges Nil Nonn, Silvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony", Doc. No. E55/4, 23 March 2011 ("Decision of 23 March 2011"), para. 15.

[46] *See*, for example, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, "Decision on Galić's Application Pursuant to Rule 15 (B)", 28 March 2003, para. 16; "Decision of 22 July 2009", para. 21; *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, "Decision on Motion for Disqualification of Judges", 8 February 2011, paras 13, 17 and 18; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, "Decision on Motion for Disqualification of Judge Fausto Pocar", 2 October 2012 ("Decision of 2 October 2012"), para. 15. *See* also "Decision of 29 July 2014", para. 85; "Decision of 23 March 2011", para. 20. Furthermore, *see The 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, p. 3.

[47] *See* Case of *Kyprianou v. Cyprus*, Application No. 73797/01, ECHR, Judgement, 15 December 2005 ("Judgement of 15 December 2005"), para. 118. *See* also Case of *Micallef v. Malta*, Application No. 17056/06, ECHR, Judgement, 15 October 2009, para. 93.

[48] *See* "Judgement of 15 December 2005", para. 118. *See* also Case of *Grieves v. United Kingdom*, Application No. 57067/00, ECHR, Judgement, 16 December 2003, para. 69; Case of *Piersack v. Belgium*, Application No. 8692/79, ECHR, Judgement, 1 October 1982, para. 30.

[49] *See* Case of *Poppe v. The Netherlands* , Application No. 32271/04, ECHR, Judgement, 24 March 2009 (final version dated 24 June 2009) ("Judgement of 24 June 2009"), para. 23.

[50] *See* Case of *Kriegisch v. Germany*, Application No. 21698/06, ECHR, "Decision as to the Admissibility of Application No. 21698/06 by Klaus-Peter Kriegisch against Germany", ECHR, 23 November 2010, p. 10; Case of

earlier judgements contain findings that actually prejudge the question of the guilt of the accused in such subsequent proceedings.[51]

25. ECHR case-law has at times been interpreted as requiring that the impugned judge has ruled on "all the relevant criteria necessary to constitute a criminal offence" in order to be disqualified.[52] In my opinion, the reference by the ECHR to all the relevant criteria necessary to constitute a criminal offence[53] is illustrative and does not constitute a determining factor to establish the existence of bias.[54] I recall that the key to determining the existence of apparent bias is to establish whether it would lead a reasonable observer, properly informed, to reasonably apprehend bias. Furthermore, the ECHR found that the right to an impartial tribunal was violated in a certain number of cases wherein the judges had already ruled on the role of the applicant in the commission of crimes as the subject of the ongoing trial, without however ruling on all the relevant criteria necessary to constitute the criminal offence.[55]

26. I would like to point out the relevance of the Judgement of 16 February 2001 rendered by the ECHR. In this case, the applicant, accused of belonging to a criminal organisation, alleged that two of the judges hearing his case had already ruled on his guilt in a previous case involving one of his co-accused.[56] The ECHR stated:

> Under the [objective test], it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubt as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held objectively justified.
>
> The Court notes that in the case at hand, the apprehension of bias stems from the fact that the Judgement of 6 July 1993 delivered by the Milan court against M.A. contained numerous references to the Applicant and to his role within the criminal organisation of which he is alleged to have been a member. In particular, several paragraphs refer to the Applicant as having organised and facilitated the traffic of narcotics between Italy and Latin America. Two of the judges who had delivered the Judgement of 6 July 1993 – notably Ms M and Ms B – were

Khodorkovskiy and Lebedev v. Russia, Applications Nos 11082/06 and 13772/05, ECHR, Judgement, 25 July 2013 (final version dated 25 October 2013), para. 544.

[51] *See* "Judgement of 24 June 2009", para. 26.

[52] *See* "Decision of 22 January 2014", Annex B, paras 29 and 36; "Order of 15 May 2012", "Judge Orie Report Pursuant to Rule 15 (B)", Annex, public redacted version, para. 30.

[53] *See* "Judgement of 24 June 2009", para. 28.

[54] In this respect, I agree fully with the partially dissenting opinion of Judge Downing as published in the attachment to the decision rendered by the Extraordinary Chambers in the Courts of Cambodia, Case No. 002/19-09-2007/ECCC/TC, "Reasons for Decision on Applications for Disqualification", 30 January 2015, Partially Dissenting Opinion from Judge Rowan Downing, para. 16.

[55] *See* Case of *Rojas Morales v. Italy*, Application No. 39676/98, ECHR, Judgement, 16 November 2000 (final version dated 16 February 2001) ("Judgement of 16 February 2001") (Annex L), paras 29, 33 and 34; Case of *Ferrantelli and Santangelo v. Italy*, Application No. 19874/2, ECHR, Judgment, 7 August 1996, para. 59. *See*, *a contrario*, Case of *Schwarzenberger v. Germany*, Application No. 75737/01, ECHR, Judgement, 10 August 2006 (final version dated 10 November 2006), para. 43.

[56] Judgement of 16 February 2001, paras 8 to 12 and 27.

> subsequently called to rule on the merits of the charges brought against the Applicant, which related, at least in part, to the same facts for which M.A. was convicted.
>
> The Court deems that these elements are sufficient to consider the Applicant's apprehension of bias on the part of the Milan court as being objectively justified.[57]

27. The ECHR judgement rendered in the case of *Mancel and Branquart v. France* is also interesting.[58] In this case, the apprehension of bias was due to the fact that seven of the nine judges sitting in the Criminal Division of the French *Cour de cassation*, which had ruled on the appeal lodged by the applicants against the sentencing judgement, had previously sat in the chamber that had ruled on the appeal lodged by the general prosecutor of the Amiens Court of Appeal against the decision to acquit. The ECHR found that, considering the particular circumstances set out in the decision, there were objective reasons to fear that the *Cour de cassation* showed bias or prejudice in regard to the decision it had to render on the second appeal lodged by the applicants.[59]

28. The criteria governing the disqualification of a judge appear to be the same in both the common law and civil law systems.[60] In fact, a judge may be disqualified not only if actual bias exists, but also if the parties reasonably suspect the existence of bias.[61] In the United States for example, both the Constitution and the case-law of the Supreme Court guarantee the right to a fair trial. In order to disqualify a judge for lacking impartiality it must be demonstrated that a reasonable person, knowing the circumstances of the case, would expect the judge to be partial.[62] If this proves to be the case, the judge must withdraw.[63] He must also withdraw when the impugned evidence is derived from an extra-judicial source.[64] In this case, applications for the disqualification of judges or jurors are common and if there is reasonable doubt as to impartiality, the judge in question must withdraw, whereas if a juror is in question, a specific hearing will be held to examine the possibility of disqualifying the juror.[65] Each situation is assessed on a case-by-case basis with a view to guaranteeing, as far as possible, a fair trial.

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[57] Judgement of 16 February 2001, paras 32 to 34 (internal quotations omitted).
[58] *See* Case of *Mancel and Branquart v. France*, Application No. 22349/06, ECHR, Judgement, 24 June 2010 (final version dated 22 November 2010) ("Judgement of 22 November 2010") (Annex M).
[59] "Decision of 22 November 2010", paras 36 to 40.
[60] *See* Decision of 18 May 2000, paras 8 to 12 and 14, and references cited.
[61] *See* Decision of 18 May 2000, paras 8 and 14, and references cited.
[62] *See* 28 U.S.C. § 455 (2002). *See* also *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 859-60 (1988).
[63] *See* 28 U.S.C. § 455 (2002).
[64] See *U.S. v. Winston*, 613 F.2d 221, 223 (9th Cir. 1980). An extrajudicial source is a source that does not derive from evidence or the conduct of parties during the course of the trial or other judicial proceedings.
[65] *See* Fed. R. Evid. 606 (b). *See* also, for example, *Whitten v. Allstate Ins. Co*., 447 So. 2d 655, 660 (Ala. 1984).

IV. SUBMISSIONS OF THE PARTIES

29. The Accused Ratko Mladić requests that Judges Meron, Agius and Liu withdraw or be disqualified on the ground that certain circumstances could lead a reasonable observer, properly informed, to reasonably apprehend bias.[66] In particular, the applicant submits that: (i) the findings related to him in the judgements issued by the ICTY Appeals Chamber seised of Case No. IT-98-33-A *The Prosecutor v. Radislav Krstić*, ("*Krstić* Case")[67] and the *Tolimir* Case, presided over by Judge Meron who did not dissent or provide a separate opinion, give rise to an unacceptable perception of bias;[68] (ii) the Appeals Chamber seised of Case No. MICT-13-55-A, *The Prosecutor v. Radovan Karadžić*, ("*Karadžić* Case"), presided over by Judge Meron will be making specific findings on his criminal responsibility on the basis of findings made by the ICTY Trial Chamber and arguments presented on appeal, and this will unacceptably prejudice the merits of his appeal;[69] (iii) the findings related to him in the judgement issued by the ICTY Trial Chamber seised of Case No. IT-05-88-T *The Prosecutor v. Vujadin Popović et al.*, ("*Popović et al.* Case"),[70] presided over by Judge Agius who did not dissent or provide a separate opinion, give rise to an unacceptable appearance of bias;[71] and (iv) the findings related to him in the judgement issued by the ICTY Trial Chamber seised of Case No. IT-02-60-T, *The Prosecutor v. Vidoje Blagojević and Dragan Jokić* ("*Blagojević and Jokić* Case"),[72] presided over by Judge Liu, who did not dissent or provide a separate opinion give rise to an unacceptable perception of bias.[73]

30. The Accused Ratko Mladić further submits that there is a link between the findings made in the judgements and appeal judgements cited above and the grounds of appeal that he has set out since he filed his appeal against the Judgement of 22 November 2017, in particular with regard to the findings whereby he participated in joint criminal enterprises, contributed to them significantly, and had knowledge of the crimes committed.[74]

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[66] "Motion against Judge Meron", para. 1; "Motion against Judge Agius", para. 1; "Motion against Judge Liu", para. 1. Despite the title of the Motions, Mladić does not appear to imply that Judges Meron, Agius and Liu should be disqualified from the case for "actual" bias. Therefore, the question of whether there is evidence of actual bias on the part of the judges will not be dealt with in the context of this decision. *See* "Motion against Judge Meron", paras 1 and 15 to 23; "Motion against Judge Agius", paras 1 and 15 to 24; "Motion against Judge Liu", paras 1 and 15 to 20.
[67] *See The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").
[68] "Motion against Judge Meron", paras 15 to 17.
[69] "Motion against Judge Meron", para. 18. *See* also "Motion against Judge Meron", paras 19 and 21.
[70] *See The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 13 May 2014 (public redacted version) (original English version filed on 10 June 2010) ("*Popović et al.* Judgement").
[71] "Motion against Judge Agius", paras 15 to 19.
[72] *See The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005 ("*Blagojević and Jokić* Judgement").
[73] "Motion against Judge Liu", paras 15 and 16.
[74] "Motion against Judge Meron", para. 19; "Motion against Judge Agius", paras 17 and 21; "Motion against Judge Liu", para. 17.

31. The Prosecution submits that the Motions should be dismissed on the ground that the Accused Ratko Mladić seeks to obtain the disqualification of judges as he has tried – in vain – to do in the past, but fails to "adduce reliable and sufficient evidence" to rebut the "strong presumption of impartiality" afforded to the Judges of the Mechanism.[75] The Prosecution argues that contrary to the applicant's claims, no findings of criminal responsibility were made against him in other cases, and that the findings on 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.[76] With specific regard to the *Karadžić* Case, the Prosecution submits that the allegations of bias against Judge Meron are unfounded since the Appeal Judgement has not yet been issued.[77]

[75] Response, paras 1 to 3 and 7. The Prosecution also submits that although allegations of actual bias have been made against Judges Meron, Agius and Liu, these have not been substantiated by any evidence. *See* Response, para. 2.
[76] Response, para. 5.
[77] Response, para. 4.

V. DISCUSSION

32. As a preliminary matter, it should be noted that the Accused Ratko Mladić is implicated in the indictments in the *Krstić*, *Tolimir, Popović et al.*, and *Blagojević and Jokić* Cases.[78] As set out in the body of this decision, the judges sitting in these case, whether during trial or appeal proceedings, had knowledge of much incriminating evidence against the accused in relation to the commission of crimes, his participation in which he is contesting in the context of the appeal.[79] Ratko Mladić has appealed the responsibility inferred to him in the context of crimes committed in Srebrenica and the findings of the ICTY Trial Chamber whereby he participated in joint criminal enterprises, contributed to them significantly, and had knowledge of the crimes committed.[80] In my opinion, this could lead a reasonable observer, properly informed, to apprehend bias.

33. I shall now examine whether the observations and findings of fact made by the Appeals Chamber presided over by Judge Meron in the *Krstić* and *Tolimir* Appeal Judgements, by the Trial Chamber presided over by Judge Agius in the *Popović et al.* Judgement, and by the Trial Chamber presided over by Judge Liu in the *Blagojević and Jokić* Judgement are sufficient to establish that this apprehension is reasonable. Consequently, I shall examine the arguments tendered by the Accused Ratko Mladić whereby certain points of fact would be prejudged, as well as, on my own initiative, additional points of fact where this is appropriate. Indeed, it is important to consider the allegations not in isolation, but rather in the more general context of the judgement in which they were formulated,[81] while taking into account the actual circumstances of each case.[82]

[78] *See*, respectively, regarding *Krstić*, Amended Indictment, 18 April 2000 (original English version filed on 27 October 1999), paras 6, 7, 9 to 11 and 14.3; regarding *Tolimir*, Third Amended Indictment, 10 December 2009 (original English version filed on 4 November 2009 and issued publicly on 9 December 2009), paras 2, 5, 12, 18, 23, 25, 29, 37, 41, 43 to 45 and 47, Attachment A, para. 71, Attachment B, para. 75; regarding *Popović al.*, Indictment, 26 October 2006 (original English version filed on 4 August 2006), paras 12, 21, 27, 32, 34, 38, 40, 41, 51, 55, 57 to 59, 61 and 78, Attachment A, para. 97, Attachment B, para. 101; regarding *Blagojević and Jokić*, Amended Joinder Indictment, 26 May 2003, paras 20, 32, 33, 37, 39 and 41.

[79] I also emphasise that the Prosecution's main witnesses in the *Mladić* Case were also heard in the context of the cases in which the three impugned judges sat. *See* Witness List, Annex N.

[80] "Motion against Judge Meron", para. 19; Motion against Judge Agius, paras 17 and 21; "Motion against Judge Liu", para. 17.

[81] *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Appeal Judgement, 26 May 2003 ("Appeal Judgement of 26 May 2003"), paras 52, 53, 55, 81 and 83; Decision of 2 October 2012, para. 16.

[82] *See* "Judgement of 24 June 2009", para. 23.

A. MOTION AGAINST JUDGE MERON

34. I have decided to dismiss outright the arguments of the Accused Ratko Mladić regarding Judge Meron's lack of impartiality in the *Karadžić* Case.[83] This case is currently under deliberation and the arguments formulated against Judge Meron are, at this stage, hypothetical and premature.

35. The Accused Ratko Mladić submits that in the *Krstić* and *Tolimir* Appeal Judgements, the Appeals Chamber, presided over by Judge Meron who did not dissent or provide a separate opinion, made explicit findings regarding his role in the crimes, his contribution to them and the knowledge he had of them, as well as regarding his responsibility, giving rise to an unacceptable appearance of bias that would lead a reasonable observer, properly informed, to reasonably apprehend bias in the context of his appeal.[84]

36. In his observations, Judge Meron finds that none of the examples relating to the *Krstić* and *Tolimir* Appeal Judgements cited by the Accused Ratko Mladić in his motion strictly speaking constitute "findings" by the Appeals Chamber, nor findings that would give rise to an unacceptable appearance of bias on his part.[85] Instead Judge Meron submits that these examples refer either to certain findings drawn by the Trial Chamber, or to the Appeals Chamber's description and assessment of the reasonableness of the Trial Chamber's evaluation of the evidence, or to the approach of the Appeals Chamber with regard to the modes of liability of the accused.[86] According to Judge Meron, these textual passages taken either individually or cumulatively do not constitute a conviction, nor do they give rise to an unacceptable appearance of bias.[87]

37. I wish to recall that, although the Appeals Chamber has a different role from that of a Trial Chamber, the Appeals Chamber may nevertheless intervene in those findings of a Trial Chamber where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous.[88] It appears in practice that the Appeals Chamber is not always satisfied to rely on the findings of a Trial Chamber, and may on occasion substitute itself for the Trial Chamber to

[83] "Motion against Judge Meron", paras 18, 20, 21 and 23.
[84] "Motion against Judge Meron", paras 1, 15 to 17, 20 and 23, referring to the *Krstić* Appeal Judgement, paras 87, 98, 135 and footnote 250, and to the *Tolimir* Appeal Judgement, paras 214, 317 and 340.
[85] Observations of Judge Meron, paras 3 to 6 and 8 to 10.
[86] Observations of Judge Meron, paras 4 to 6, 9 and 10.
[87] Observations of Judge Meron, paras 3 to 6, 8 to 10, 17, 18, 20, 21 and 23. In addition, Judge Meron finds that the other references cited by Ratko Mladić in the *Krstić* and *Tolimir* Appeal Judgements do not justify his disqualification. Observations of Judge Meron, paras 7 and 11.
[88] *See The Prosecutor v. Élizaphan Ntakirutimana and Gérard Ntakirutimana,* Case Nos ICTR-96-10-A and ICTR-96-17-A, Appeal Judgement, 24 June 2010 (original English version filed on 13 December 2004), para. 12. The Decision of 2 December 2003 in the *Krstić* Case is illustrative because it shows the power of the Appeals Chamber judges to summon a witness *proprio motu*. *See The Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, "Decision to Summon a Witness *proprio motu*", 2 December 2003 (original English version filed on 19 November 2003), p. 2.

reverse or confirm the latter's findings and assume these findings. The Appeals Chamber therefore occasionally plays the role of a court of cassation[89] and a second-instance chamber.

38. It is acknowledged that the description, recall, summary and evaluation by the Appeals Chamber of the reasonableness of the assessment of evidence by a Trial Chamber regarding a person in an appeal judgement relating to another person is not in and of itself a sufficient basis for a disqualification.[90] However, it is a different matter if certain formulations by the Appeals Chamber would lead a reasonable observer, properly informed, to think that its Judges had an unacceptable bias regarding the guilt of an accused in a connected case.

39. The examples presented in paragraph 16 (i), (ii) and (iii) of the Motion against Judge Meron relating to the *Krstić* Appeal Judgement do not appear to me to overturn the strong presumption of impartiality in the sense that they refer explicitly to the Trial Chamber's findings. In these examples, reference is made to the Trial Chamber's findings regarding Ratko Mladić's genocidal intent to execute the Bosnian Muslims.[91] The Appeals Chamber also made reference to the fact that "the criminal activity [which followed the fall of Srebrenica] was being directed by some members of the VRS [Bosnian Serb Army] Main Staff under the direction of General Mladić".[92]

40. In addition to these examples, the *Krstić* Appeal Judgement makes reference to the Trial Chamber's findings and to the evidence admitted regarding General Mladić's genocidal intent and to the fact that he was "the main figure behind the killings" and that he was present at some execution sites.[93]

41. The stated purpose of these references is to examine whether the Trial Chamber erred by finding that Krstić shared the genocidal intent of a joint criminal enterprise to exterminate the Muslims of Srebrenica and that he was complicit in genocide.[94] Bearing in mind the particular context of the appeals procedure and the fact that a "reasonable observer" is a well-informed person, aware of all the relevant circumstances,[95] I cannot conclude that these examples, despite their strong incriminating potential, of themselves establish the existence of bias because they do not constitute findings of the Appeals Chamber.

[89] *See* above, para. 27.
[90] Decision of 2 October 2012, paras 18 to 20; *Dominique Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, "Decision on Motion for Disqualification of Judges", 8 February 2011, paras 15 to 19.
[91] "Motion against Judge Meron", para 16 (i) and (ii), referring to the *Krstić* Appeal Judgement, paras 87 and 98.
[92] *See* "Motion against Judge Meron", para. 16 (iii), referring to the *Krstić* Appeal Judgement, para. 135.
[93] *See*, for example, the *Krstić* Appeal Judgement, paras 83, 84 and 136.
[94] *Krstić* Appeal Judgement, paras 79 and 135.
[95] *See* above, para. 19 and the references cited.

42. The example cited in paragraph 16 (iv) of the Motion against Judge Meron is a different matter, making reference to footnote 250 in the *Krstić* Appeal Judgement.[96] The relevant passage merits being cited below:

> The most [Krstić] could have done as a Commander was to report the use of his personnel and assets, in facilitating the killings, to the VRS Main Staff and to his superior, General Mladić, the very people who ordered the executions and were active participants in them. Further, although General Krstić could have tried to punish his subordinates for their participation in facilitating the executions, it is unlikely that he would have had the support of his superiors in doing so […].

43. I do not share the position of Judge Meron whereby all references made to the Accused Ratko Mladić in the *Krstić* Appeal Judgement actually constitute findings of the Trial Chamber and not findings of the Appeals Chamber. For example, the reference to General Mladić being one of the people who "ordered the executions and were active participants in them" falls outside the analysis of the Trial Chamber's assessment of the evidence. Instead, this reference clearly implies the attribution of criminal responsibility to the Accused Ratko Mladić for crimes being contested on appeal. It constitutes proof of unacceptable bias regarding the Accused's guilt.

44. In addition, in paragraph 12 of the *Krstić* Appeal Judgement, the Appeals Chamber provides a detailed definition of genocidal intent as required under Article 4 of the Statute of the ICTY. However, it is my opinion that paragraph 32 of the *Krstić* Appeal Judgement constitutes a finding of the Appeals Chamber Judges on the genocidal intent of members of the VRS Main Staff. In the absence of a footnote or explicit reference to the Trial Chamber, it seems to me that these findings are indeed those of the Appeals Chamber.

45. Paragraph 32 of the *Krstić* Appeal Judgement reads as follows:

> In determining that genocide occurred at Srebrenica, the cardinal question is whether the intent to commit genocide existed. While this intent must be supported by the factual matrix, the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent. The international attention focused on Srebrenica, combined with the presence of the UN troops in the area, prevented those members of the VRS Main Staff who devised the genocidal plan from putting it into action in the most direct and efficient way. Constrained by the circumstances, they adopted the method which would allow them to implement the genocidal design while minimizing the risk of retribution.

46. A reading of this paragraph is liable to lead a reasonable observer, properly informed, to reasonably apprehend the bias of Judge Meron against members of the VRS Main Staff, including its Commander, the Accused Ratko Mladić.

47. With regard to the excerpts from the *Tolimir* Appeal Judgement presented by the Accused Ratko Mladić in paragraph 17 of the Motion against Judge Meron, I recall that the Appeals

[96] "Motion against Judge Meron", para. 16 (iv), referring to the *Krstić* Appeal Judgement, footnote 250.

Chamber found that the Trial Chamber did not err by taking into account General Mladić's address to the departing civilian population that their lives were given to them as a gift, given the circumstances in which the words were spoken and that they imparted a threat of violence designed to intimidate those in the buses.[97] Further, the Appeals Chamber referred to the Trial Chamber's findings whereby the Accused Ratko Mladić explicitly gave Tolimir command of the VRS operations in Žepa and that the latter, who was the most senior VRS officer in the field after General Mladić, was in charge of the operation to forcibly remove the Muslim population from Žepa.[98]

48. Further in the *Tolimir* Appeal Judgement, the Appeals Chamber found that the Trial Chamber had not erred by inferring Tolimir's genocidal intent from his close relationship with General Mladić, insofar as this finding formed part of the relevant facts and circumstances from which genocidal intent could be inferred.[99] The Appeals Chamber also confirmed the Trial Chamber's finding whereby on 14 July 1995, Tolimir conveyed Ratko Mladić's order to the Drina Corps Command about the presence of an unmanned aircraft so that the murder operation would be carried out without being detected.[100] Finally, the *Tolimir* Appeal Judgement, which contains multiple references to Ratko Mladić,[101] confirmed Tolimir's place in the VRS military command structure as well as his role in the crimes committed in the Srebrenica and Žepa enclaves. It is difficult to believe that these findings regarding a direct subordinate of Ratko Mladić do not have an impact on the latter.

49. Although these extremely incriminating references regarding the Accused Ratko Mladić do not directly constitute findings of the Appeals Chamber, their accumulation in two separate appeal judgements presents a problem. In addition to the reference in the *Krstić* Appeal Judgement to the Accused Ratko Mladić having been one of those who "ordered the executions and actively took part in them", an impression of bias with regard to him emerges from an analysis of numerous other references to the Accused in the *Krstić* and *Tolimir* Appeal Judgements. The Appeals Chamber Judges, including Judge Meron, were confronted intensively by the evidence admitted by and the findings of the Trial Chamber regarding General Mladić's genocidal intent, his belonging to a joint criminal enterprise and even his central role in the planning and commission of a crime which he is contesting on appeal. Reference is made to his individual criminal responsibility and to his criminal responsibility as a superior on numerous occasions. Consequently, it is difficult to imagine how

[97] *Tolimir* Appeal Judgement, para. 214.
[98] *See* "Motion against Judge Meron", para. 17 (i), referring to the *Tolimir* Appeal Judgement, paras 317 and 340. Although the reference is to paragraph 317 of the *Tolimir* Appeal Judgement, it is actually paragraph 371.
[99] *Tolimir* Appeal Judgement, para. 563.
[100] *Tolimir* Appeal Judgement, para. 569.

Judge Meron could apprehend the appeal filed by the Accused Ratko Mladić without being influenced by the incriminating evidence that he analysed against him and by his own previous findings.

50. It appears that on at least two occasions while presiding over the Appeals Chamber, Judge Meron has had to examine the indictments filed in the *Krstić* and *Tolimir* Cases and the Appeal Briefs based on alleged errors of fact and law and that, ultimately, Generals Krstić and Tolimir were found guilty, primarily for their role in the chain of command.

51. Lastly, although this argument was not raised in the Motion against Judge Meron, he sat in the Appeals Chamber in the *Blagojević and Jokić* and *Nikolić* Cases, all subordinates of the Accused Ratko Mladić.[102] It is my opinion that there is a risk in terms of appearance where the superior officer of the persons mentioned above is being tried, even on appeal, by the judge who found his subordinates guilty.

52. Considering the preceding, an analysis of the incriminating references against Ratko Mladić, taken cumulatively, tends to show that there is a reasonable apprehension of bias. Consequently, I believe that there are reasons to consider that a reasonable observer, properly informed, could apprehend bias on the part of Judge Meron against the Accused Ratko Mladić.

B. MOTION AGAINST JUDGE AGIUS

53. Ratko Mladić submits that the findings relating to him in the judgement of the ICTY Trial Chamber seised of the *Popović et al.* Case, presided over by Judge Agius, who did not dissent or provide a separate opinion, would appear to a reasonable observer, properly informed, to show unacceptable bias.[103]

[101] *See*, for example, *Tolimir* Appeal Judgement, paras 127, 160, 162, 165, 166, 192, 213, 216, 288, 305, 308, 309, 318, 328, 356, 371, 373, 383, 385, 405, 410, 422, 437, 443 to 445, 505, 537, 563 and 569.
[102] Judge Meron was part of the Appeals Chamber which issued its judgement on 9 May 2007 in the *Blagojević* and *Jokić* Case, which contained incriminating references relating to Ratko Mladić. *See The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Appeal Judgement, 10 July 2009 (original English version filed on 9 May 2007) ("Appeal Judgement of 10 July 2009"), paras 53, 85, 86, 115, 273. Furthermore, Judge Meron was part of the Appeals Chamber which issued its judgement on sentencing appeal on 9 March 2006 in *The Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, which contains incriminating references relating to Ratko Mladić. *See*, for example, *The Prosecutor v. Momir Nikolić,* Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006, para. 30.
[103] "Motion against Judge Agius", paras 1, 15 to 19, 21 to 24 and footnote 29, referring to the *Popović et al.* Judgement, paras 351 to 361, 408 to 414, 421 to 445, 456, 457, 460 to 463, 475 to 524, 527 to 550, 584 to 589, 597 to 600, 618, 791, 794, 859, 990, 1050, 1064, 1066, 1069, 1071, 1074, 1075, 1079 to 1082, 1105, 1106, 1110, 1112, 1116, 1124 to 1134, 1141, 1143 to 1152, 1169, 1226, 1259, 1276, 1279, 1282, 1285, 1300, 1303, 1350, 1351, 1359 to 1366, 1370 to 1372, 1375, 1390 to 1393, 1402, 1407 to 1409, 1418, 1421, 1425 to 1427, 1454 to 1461, 1514 to 1540, 1547 to 1550, 1554, 1556 to 1563, 1569, 1571, 1574 to 1576, 1580, 1582 to 1589, 1592 to 1597, 1641, 1725, 1734, 1828, 1829, 1880 to 1883, 1889, 1890, 1965, 2016 to 2018, 2043, 2165, 2178, 2182 to 2187.

54. In his observations, Judge Agius considers that the late filing of the motion for his disqualification is wholly inappropriate.[104] Judge Agius contends that none of the examples relating to the *Popović et al.* Judgement cited by the Accused Ratko Mladić in his motion rebuts the strong presumption of impartiality attached to him, insofar as the findings entered by the Trial Chamber are intended solely for assessing the guilt of Popović and his co-accused.[105] Judge Agius recalls the applicable case-law whereby the threshold in matters of disqualification is very high.[106] He also notes that judges are not automatically disqualified from sitting in two or more criminal trials and/or appeals which arise out of the same series of events or cover overlapping issues.[107] He emphasises the professionalism of the judges and their experience which permits them to rule fairly on the issues before them, relying solely on the evidence adduced in a particular case.[108]

55. Judge Agius also submits that none of the findings in the *Popović et al.* Judgement referred to by the Defence could lead a reasonable observer, properly informed, to reasonably apprehend bias against Ratko Mladić or that the acts or descriptions therein decidedly constitute criminal conduct.[109] He acknowledges that paragraphs 1071 and 1412 of the *Popović et al.* Judgement could be construed as incriminating the Accused Ratko Mladić, but is nevertheless of the opinion that no reasonable observer, properly informed, would conclude that these limited statements amount to a pre-judgement of the accused's ultimate criminal responsibility for the allegations contained in his indictment.[110] Furthermore, he recalls the standard of appellate review that the judges do not rule *de novo* on the allegations against Ratko Mladić, but rather on the propriety of the Trial Chamber's assessment.[111]

56. As a preliminary matter, I share the opinion of Judge Agius regarding the lateness of the Motions. It is true that several domestic jurisdictions require that motions for recusal be filed *in limine litis*, i.e. at the outset of the proceedings, before any substantive matter, in view of their potential consequences for the trial process. On the other hand, the Rules do not envisage such an obligation or provide for a time-frame for filing such motions; these are therefore not subject to any statute of limitations.[112] However, this procedure should be regulated in the future.

[104] Observations of Judge Agius, pp. 1 and 2 (estimating that there has been a delay of at least six months).
[105] Observations of Judge Agius, p. 2.
[106] Observations of Judge Agius, pp. 2 and 3.
[107] Observations of Judge Agius, p. 3.
[108] Observations of Judge Agius, p. 3.
[109] Observations of Judge Agius, p. 3.
[110] Observations of Judge Agius, p. 4.
[111] Observations of Judge Agius, pp. 3 and 4.
[112] *The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, "Decision on the Defence Motion for the Disqualification of the Judges of the Trial Chamber", 25 January 2011, para. 9.

57. The examples in paragraphs 16 (iv) and 18 in the Motion against Judge Agius do not seem to me sufficient to rebut the strong presumption of impartiality attached to him since they arise from an erroneous interpretation of the *Popović et al.* Judgement and are not directly incriminating. In these examples, reference is made to the fact that Colonel Ljubiša Beara, Chief of Security in the VRS Main Staff, cloaked with the authority of Ratko Mladić, abused his power to orchestrate the crimes.[113] Reference is also made to evidence whereby Karadžić was supposed to discuss with the Accused Ratko Mladić the matter of the prisoners and, further on in the judgement, the fact that General Radivoje Miletić, with Mladić's authorisation, ordered that units be dispatched.[114]

58. The example cited in paragraph 16 (ii) of the Motion against Judge Agius is a different matter, which recalls that in paragraph 1071 of the *Popović et al.* Judgement,[115] the Trial Chamber found as follows regarding the joint criminal enterprise relating to executions:

> […] what is clear from the evidence before the Trial Chamber is that such an operation [the execution of able-bodied Muslim men from Srebrenica in July 1995], 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 VRS Commander Mladić. 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 Mladić was a central, driving force behind the plan to murder and its implementation.

59. This statement on its own constitutes an unacceptable appearance of bias. Moreover, I have a difficult time understanding how the finding that "Mladić was a central, driving force behind the plan to murder and its implementation" was only made as part of evaluating the criminal responsibility of Popović and his co-accused.

60. Furthermore, as set out in paragraph 16 (iii) of the Motion against Judge Agius, the Trial Chamber also found that Ratko Mladić had issued patently illegal orders for the execution of a large number of prisoners in the Zvornik area.[116] This reference does not appear to be a review of the evidence admitted, but rather a finding made by the Trial Chamber about the responsibility of the Accused Ratko Mladić.

61. As indicated in paragraph 17 of the Motion against Judge Agius, the Trial Chamber made findings in the *Popović et al.* Judgement on the commission of crimes in Srebrenica. Mladić was

[113] "Motion against Judge Agius", para. 16 (iv), referring to the *Popović et al.* Judgement, para. 2165.
[114] "Motion against Judge Agius", para. 18, referring to the *Popović et al.* Judgement, paras 1300 and 1641.
[115] "Motion against Judge Agius", para. 16 (ii), referring to the *Popović et al.* Judgement, para. 1071. The example cited in paragraph 16 (i) of the "Motion against Judge Agius" reporting Mladić's "deliberate lies" to the prisoners detained at Sandići Meadow, referring to paragraph 1259 of the *Popović et al.* Judgement, which itself refers to paragraph 1071. *Popović et al.* Judgement, paras 1071 and 1259.
[116] "Motion against Judge Agius", para. 16 (iii), referring to the *Popović et al.* Judgement, para. 1412.

charged with these crimes in relation to the objective of eliminating the Muslims of Srebrenica and they are listed in Schedule E ("Srebrenica Killings") in the indictment filed against him.[117]

62. Similarly, the Trial Chamber made a finding that "the acts of murder, cruel and inhumane treatment, terrorising civilians and forcible transfer were committed against the Bosnian Muslims with a discriminatory intent" and that "they constitute persecution".[118]

63. Further, in the judgement the Trial Chamber found that the only inference that could reasonably be made in view of the evidence was that "at least by 13 July 1995, members of the Bosnian Serb Forces, including members of the VRS Main Staff and Security Organs entered into an agreement and thus a conspiracy to commit genocide".[119] In reaching this finding, the Trial Chamber noted that "the murder operation was being coordinated at a high level of the Bosnian Serb Forces, including the VRS Main Staff and Security Organs".[120] In particular, the Trial Chamber took into consideration the fact that in the evening of 13 July 1995, Ratko Mladić issued an order which suggests that members of the Bosnian Serb Forces were hoping to conceal all information regarding the prisoners from the outside world and that there were discussions concerning where the mass executions should be carried out.[121]

64. The Trial Chamber further noted that the Bosnian Serb Forces had created a climate of fear and oppression in Potočari,[122] and insisted on the fact that: "Mladić's own words perhaps best evidence the deliberate intent to terrify when he commented to the Bosnian Muslims that they could 'either survive or disappear'".[123] The Trial Chamber was convinced that "the detention, execution and burial of the Bosnian Muslim men in the area of Zvornik had been conducted pursuant to the orders of the Main Staff, particularly Mladić and the Security Branch".[124]

65. The Trial Chamber found that the plan to forcibly displace the Bosnian Muslim population was already in existence and action had been taken by the VRS to execute it before the actual

[117] *Compare The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Fourth Amended Indictment, 2 October 2015 (*see* Schedule E), with the *Popović et al.* Judgement, *inter alia*, paras 351 to 361, 408 to 414, 421 to 445, 456, 457, 460 to 463, 475 to 524, 527 to 550, 584 to 589, 597 to 600, 618, 791, 794, 859, 990, 1050, 1064, 1066, 1069, 1074, 1075, 1079 to 1082, 1105, 1106, 1110, 1112, 1116, 1124 to 1134, 1141, 1143 to 1152, 1169, 1226, 1259, 1276, 1279, 1282, 1285, 1300, 1303, 1350, 1351, 1359 to 1366, 1370 to 1372, 1375, 1390 to 1393, 1402, 1407 to 1409, 1418, 1421, 1425 to 1427, 1454 to 1461, 1514 to 1540, 1547 to 1550, 1554, 1556 to 1563, 1569, 1571, 1574 to 1576, 1580, 1582 to 1589, 1592 to 1597, 1641, 1725, 1734, 1828, 1829, 1880 to 1883, 1889, 1890, 1965, 2016 to 2018, 2043, 2178, 2182 to 2187.
[118] *Popović et al.* Judgement, para. 1004. *See* "Motion against Judge Agius", para. 19, referring to the *Popović et al.* Judgement, para. 1004.
[119] *Popović et al.* Judgement, para. 886.
[120] *Popović et al.* Judgement, para. 884. *See* also *Popović et al.* Judgement, paras 1065 and 1072.
[121] *Popović et al.* Judgement, paras 885 and 1060.
[122] *Popović et al.* Judgement, paras 917 and 918.
[123] *Popović et al.* Judgement, para. 997. *See* also *Popović et al.* Judgement, para. 290.
[124] *Popović et al.* Judgement, para. 2063.

bussing of the Bosnian Muslim women, children and the elderly in Potočari took place.[125] The Trial Chamber found that the circumstances of 12 and 13 July were a culmination of this plan and that the Accused Ratko Mladić's words on 12 July captured this clearly: "we'll evacuate them all – those who want to [go] and those who don't want to".[126]

66. In the *Popović et al.* Judgement, the Trial Chamber, presided over by Judge Agius, made a number of findings relating to the basis of the individual criminal responsibility of the Accused Ratko Mladić and his criminal responsibility as the superior. The Trial Chamber ruled specifically on these issues which are currently the subject of the appeal filed against the Judgement of 22 November 2017.

67. In my opinion, it is difficult to imagine how Judge Agius could apprehend the appeal of the Accused Ratko Mladić without being influenced by the incriminating evidence against him which he analysed, and by the findings which he himself had previously made. In view of the preceding, I believe that there are reasons to consider that a reasonable observer, properly informed, could reasonably apprehend bias on the part of Judge Agius against the Accused Ratko Mladić.

C. MOTION AGAINST JUDGE LIU

68. The Accused Ratko Mladić submits that in the *Blagojević and Jokić* Judgement, the Trial Chamber, presided over by Judge Liu, who did not append either a dissenting or separate opinion, made explicit findings regarding his role in the crimes, his contribution to them and the knowledge he had of them, which give rise to a perception of bias that would lead a reasonable observer, properly informed, to reasonably apprehend bias in the context of his appeal.[127] The Accused Ratko Mladić adds that these findings relating to his criminal responsibility in the form of joint criminal enterprises go to the crux of his appeal.[128]

69. In his observations, Judge Liu opposes the Motion and notes that the jurisprudence of the ICTY and ICTR has established a very high threshold for the disqualification of judges.[129] He also recalls that judges are not disqualified from hearing two or more criminal trials and/or appeals which arise out of the same series of events or cover overlapping issues.[130] He emphasises the

[125] *Popović et al.* Judgement, para. 915. *See* also *Popović et al.* Judgement, paras 762 to 775 and 1085 to 1087.
[126] *Popović et al.* Judgement, para. 915.
[127] "Motion against Judge Liu", paras 1, 15 to 20, referring to the *Blagojević and Jokić* Judgement, paras 151, 182, 191, 241, 321, 708 and 709.
[128] "Motion against Judge Liu", para. 17.
[129] Observations of Judge Liu.
[130] Observations of Judge Liu.

professionalism of the judges and their experience which permits them to rule fairly on the issues before them, relying solely on the evidence adduced in a particular case.[131]

70. Some of the passages cited by the Accused Ratko Mladić are not sufficient to rebut the strong presumption of impartiality attached to Judge Liu. This is the case with the example cited in paragraph 16 (vii) of the Motion against Judge Liu which makes reference to the fact that, in the Trial Chamber's opinion, General Mladić ordered General Krstić to prepare an attack against Žepa.[132] However, this example does not contain a reference to the judgement and, taken out of context, prevents a determination of whether it is a finding of the Trial Chamber that has an impact on the Accused Ratko Mladić's criminal responsibility.

71. Other examples presented by the Accused Ratko Mladić actually constitute more of a presentation of evidence rather than findings by the Trial Chamber. This is the case with the example provided in paragraph 16 (iv) of the Motion against Judge Liu, which refers to the threats made against Colonel Karremans, a member of the DutchBat delegation, during a meeting that took place on 11 July 1995 at the Hotel Fontana in Bratunac.[133] In this example, the Trial Chamber refers to the evidence, but makes no finding regarding the Accused Ratko Mladić.

72. The same is true of the example presented in paragraph 16 (vi) of the Motion against Judge Liu in which the Trial Chamber simply recalled the content of evidence according to which the VRS refused to adhere to an agreement to evacuate first the injured Bosnian Muslims, for the reason that, according to Mladić, the VRS would determine the organisation of the transport.[134] The same reasoning applies to the example presented in paragraph 16 (v) of the Motion against Judge Liu in which the Trial Chamber cites evidence whereby pursuant to instructions from the Accused Ratko Mladić, the Ministry of the Interior ("MUP") played a primary role in the transport of Bosnian Muslim refugees out of Potočari on 13 July 1995.[135]

73. The situation is identical with regard to the example in paragraph 16 (iii) of the Motion against Judge Liu in which the Trial Chamber noted that the Accused Ratko Mladić was present during the ill-treatment of prisoners at Sandići meadow.[136] The Trial Chamber also took into consideration the testimony of Drago Nikolić, chief of security of the Zvornik Brigade who was in

[131] Observations of Judge Liu.
[132] "Motion against Judge Liu", para. 16 (vii).
[133] "Motion against Judge Liu", para. 16 (iv), referring to the *Blagojević and Jokić* Judgement, para. 151.
[134] "Motion against Judge Liu", para. 16 (vi), referring to the *Blagojević and Jokić* Judgement, para. 182.
[135] "Motion against Judge Liu", para. 16 (v), referring to the *Blagojević and Jokić* Judgement, para. 191.
[136] "Motion against Judge Liu", para. 16 (iii), referring to the *Blagojević and Jokić* Judgement, para. 241.

charge of the Muslim men detained in Orahovac, according to whom General Mladić had ordered the execution of a large number of prisoners transported from Bratunac to Zvornik municipality.[137]

74. These examples alone demonstrate that a large amount of evidence against Ratko Mladić was presented to the Trial Chamber and that it, at the very least, considered that the Accused Ratko Mladić was implicated in the events in Srebrenica. While these references to the Accused Ratko Mladić, by their nature highly incriminating, are sufficient to cause the apprehension of bias on the part of the judges, they are not, however, necessarily sufficient to establish that this apprehension is reasonable inasmuch as they do not constitute findings made by the Trial Chamber.

75. However, I believe that a combined reading of paragraphs 708 and 709 of the *Blagojević and Jokić* Judgement, as illustrated in the example in paragraph 16 (i) of the Motion against Judge Liu is more problematic, since it could lead to the inference that the Trial Chamber found that the Accused Ratko Mladić, Head of the VRS, was part of a joint criminal enterprise to forcibly transfer women and children from the Srebrenica enclave on 12 and 13 July.[138]

76. Bearing in mind that the allegations of bias must be assessed in the light of the general context in which the impugned paragraphs were formulated,[139] it seems clear to me that an analysis of the judgement in its entirety tends to show that the apprehension of bias is reasonable and that there is a perception of bias if a judge who has sat on the *Blagojević and Jokić* Judgement were to rule on the appeal filed by the Accused Ratko Mladić.

77. For example, the Trial Chamber reached the conclusion that "the widespread and systematic attack against the Bosnian Muslim population in Srebrenica was carried out on the basis of the ethnic, national and religious affiliation of the population" and recalled the words of General Mladić's announcement that "the time has come for us to take revenge upon the Turks in this region".[140]

78. Echoing the reasoning of the Appeals Chamber in the *Krstić* Appeal Judgement, the Trial Chamber found again that the Accused Ratko Mladić was one of "the very people who ordered the executions and were active participants in them".[141] Furthermore, the judgement contains numerous

[137] "Motion against Judge Liu", para. 16 (ii), referring to the *Blagojević and Jokić* Judgement, para. 321.
[138] "Motion against Judge Liu", para. 16 (i), referring to the *Blagojević and Jokić* Judgement, paras 708 and 709.
[139] *See* "Appeal Judgement of 26 May 2003", paras 52, 53, 55, 81 and 83; Decision of 2 October 2012, para. 16.
[140] *Blagojević and Jokić* Judgement, para. 619.
[141] *Blagojević and Jokić* Judgement, footnote 2253.

other references to the Accused Ratko Mladić in connection with the commission of crimes against the Muslims.[142]

79. It is clear to me that a reasonable observer could only conclude that there is an abundance of incriminating references made against the Accused Ratko Mladić. It must also be noted that the references go beyond general facts and contextual references necessary to establish the guilt of Vidoje Blagojević and Dragan Jokić.

80. For the foregoing reasons, an analysis of the incriminating references made against the Accused Ratko Mladić, taken cumulatively, tends to show that there are reasonable grounds for apprehension of bias. Consequently, I believe that there are reasons to consider that a reasonable observer, properly informed, could apprehend bias on the part of Judge Liu against the Accused Ratko Mladić.

V. CONCLUSION

81. For the reasons set forth, I hereby grant the Motions for the disqualification of Judges Meron, Agius and Liu from the appeal filed by the Accused Ratko Mladić and by the Prosecution against the Judgement of 22 November 2017 due to the appearance of bias. These judges have already made findings in the context of the *Krstić*, *Tolimir*, *Popović et al.* and *Blagojević and Jokić* Cases on the guilt of the Accused Ratko Mladić for crimes contested in his appeal. It is my opinion that in these judgements and appeal judgements, the findings made by these judges constitute sufficient ground for a reasonable observer, properly informed, to reasonably apprehend bias.

82. By allowing certain judges to hear two separate trials arising from the same series of facts, and where the cases involve overlapping questions of fact or law, the international criminal tribunals took risks in the matter of impartiality. The judges involved in a first trial were confronted, frequently from the indictment stage, with incriminating evidence against a person other than the accused and essentially judged this other person in the context of a different trial. These judges read the parties' briefs, heard witnesses, analysed documents and made findings on facts relevant to the

[142] *See Blagojević and Jokić* Judgement, para. 226 ("At a meeting on 13 July, General Mladić informed the MUP that the VRS resumed with the military operation towards Žepa and was 'leaving all other work to the MUP'. These tasks included 'evacuation of the remaining civilian population from Srebrenica to Kladanj (about 15,000) by bus', 'killing of about 8,000 Muslim soldiers […] blocked in the woods around Konjević Polje' and 'security of all essential facilities in the town of Srebrenica'"), para. 650 ("Next, the Bosnian Muslims watched helplessly as Potočari was overrun – and essentially over taken – by Bosnian Serb forces, including General Mladić. As the brutal separation began under the watchful eye of the Bosnian Serb forces and the abuse of the population became more widespread, particularly during the 'night of terror', the Bosnian Muslims were terrified – and helpless […] Rather, this displacement was a critical step in achieving the ultimate objective of the attack on the Srebrenica enclave to eliminate the Bosnian Muslim population from the enclave."). *See* also *Blagojević and Jokić* Judgement, paras 106, 133, 152, 154 to 156, 158 to 160, 177, 178, 254, 277, 320, 418, 452, 672, 674 to 677.

case of this other person. Although in appellate proceedings the standard of review is different, the judges must have in-depth knowledge of the case. Judges can therefore also be involved in analysing incriminating evidence and in making findings relevant to another person's responsibility, on which they have ruled in the context of a different trial.

83. In the past, this situation was difficult to avoid given that the international criminal tribunals were seised of cases which were grouped together and that the number of judges was limited.[143] However, in addition to this practice being criticised by the ECHR at a national level,[144] I believe that it is no longer justified in the current context of the Mechanism. The Mechanism in fact currently has at its disposal a roster of 24 independent judges originating from the ICTY, ICTR and domestic jurisdictions.[145] It should therefore be possible to avoid appointing judges who have sat in the *Krstić*, *Tolimir*, *Popović et al.* and *Blagojević* and *Jokić* cases, which are linked from the outset to the Accused Ratko Mladić by the territorial scope they cover, by the links in the chain of command between the various protagonists, and by the modes of responsibility including the mode of commission by a joint criminal enterprise. This risk could have been averted by the appointment of three other judges who have never ruled on facts relevant to the case of the Accused Ratko Mladić.[146]

84. It is for this reason that I have decided to replace Judges Meron, Agius and Liu with three judges drawn from a shortlist of judges who constitute no risk of prejudice with regard to the Accused Ratko Mladić as they have not previously sat in cases dealing with the same series of facts related to the trial of Ratko Mladić. The appointment of these three judges will be done by way of an order that will be filed as soon as possible in order to ensure the continuity of international criminal justice and to enable, at any time, referral to the Appeals Chamber by the parties.[147]

85. I did not envisage my own appointment as a replacement judge due to ethical reasons and reasons of integrity. It was important to me that it be clear that this decision has been driven by the

[143] *See*, for example, "Appeal Judgement of 28 November 2007", para. 78.
[144] *See*, for example, "Judgement of 24 June 2009", para. 23 (in which the ECHR recalled that it is incumbent upon States Parties to arrange their judicial systems in such a way as to enable them to meet the requirements of Article 6, paragraph 1.)
[145] *See* the roster of Judges on the Mechanism website (http://www.irmct.org/en/about/judges).
[146] I emphasise that it can be difficult to conceive that the same judge could have a different opinion regarding the credibility of the same witness in two different cases concerning the same facts. With regard to important Prosecution witnesses, there is a risk that the accused's case will be at issue with judges who have previously taken a position on the credibility of witnesses which could convince the judges about the responsibility of the accused. This is all the more true in the context of trials relying largely on testimonial evidence. In this regard, it is enough to consult the list of Prosecution witnesses in the *Mladić* Case (*see* Annex N) to realise that several important Prosecution witnesses have been assessed previously by the impugned judges.
[147] The judges concerned will be informed as soon as this decision has been filed. It will be necessary to ensure that these judges have no reason to withdraw from the *Mladić* Case pursuant to Rule 18 of the Rules and that they will be available to conduct the work inherent to the case. An order assigning new judges to the Appeals Chamber will be issued following receipt of responses from the judges concerned.

desire to serve the interests of justice and to guarantee to the Accused Ratko Mladić that he will be judged without the perception of bias. I hope that the hearings to come will be conducted in a calm atmosphere.

86. Finally, I am satisfied that this decision will not in any way delay the work of the Mechanism because the appeal is at a preliminary stage seeing as the parties have only just filed their respective appeal briefs.

VI. DISPOSITON

87. For the foregoing reasons, pursuant to Rule 18 (B) (ii) and (iv) of the Rules, I hereby grant the Motions to disqualify Judges Meron, Agius in Liu from the appeal filed by the Accused Ratko Mladić and by the Prosecution against the Judgement of 22 November 2017 for reasons of apparent bias.

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

Done this third day of September 2018 Senior Judge

At The Hague (The Netherlands)

/signed/
Jean-Claude Antonetti

[Seal of the Mechanism]

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