IT-95-5/18-PT
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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-95-05/18-PT
		Date:	22 July 2009
		Original:	English

CHAMBER CONVENED BY ORDER OF THE VICE-PRESIDENT

Before: **Judge Kevin Parker, Presiding**
Judge Carmel Agius
Judge Christine Van Den Wyngaert

Registrar: **Mr John Hocking**

Decision: **22 July 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION TO DISQUALIFY JUDGE PICARD AND REPORT TO THE VICE-PRESIDENT PURSUANT TO RULE 15(B)(ii)

The Office of the Prosecutor:

Mr Alan Tieger
Ms Hildegard Uertz-Retzlaff

The Accused:

Mr Radovan Karadžić

I. BACKGROUND

1. Pursuant to Rules 15(B)(ii) and 21 of the Rules of Procedure and Evidence ("Rules"), Judge Kwon, exercising the powers of the President of the Tribunal, appointed this Chamber ("Chamber") to report to him its decision on the merits of Radovan Karadžić's "Motion to Disqualify Judge Picard" ("Motion"), requesting the disqualification of Judge Michèle Picard from all further proceedings in his case.[1]

2. The Motion was filed on 1 May 2009.[2] On 7 May 2009, the Presiding Judge in the case, after conferring with Judge Picard, presented the President of the Tribunal with a report in relation to the Motion[3] in accordance with Rule 15(B)(i). On 8 May 2009, the President withdrew and assigned the Vice-President, pursuant to Rule 21 of the Rules, to consider the Report of the Presiding Judge in his place.[4] On 12 May 2009, the Prosecution filed a response to the Motion.[5] On 18 May 2009, the Vice-President rendered his decision finding that it was not necessary to appoint a panel of three judges pursuant to Rule 15(B)(ii) of the Rules and dismissing the Motion on the basis that Radovan Karadžić had failed to establish any actual bias or the appearance of bias on the part of Judge Picard.[6]

3. On 29 May 2009, Radovan Karadžić filed an "Appeal from Decision on Motion to Disqualify Judge Picard", and the Prosecution filed its response on 5 June 2009.[7] The Appeals Chamber issued its decision on 26 June 2009 by which it referred the application to the President to appoint a panel of three judges to determine the original Motion.[8] Hence, pursuant to Rule 21, the Vice-President issued the "Order Pursuant to Rule 15" on 30 June 2009, appointing this Chamber to determine the Motion.

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[1] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Order Pursuant to Rule 15, 30 June 2009.
[2] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Disqualify Judge Picard, 1 May 2009 ("Motion").
[3] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Report by Presiding Judge to President on Motion to Disqualify Judge Picard, 7 May 2009.
[4] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Order Assigning Motion to Vice-President, 8 May 2009.
[5] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution Response to Motion to Disqualify Judge Picard, 12 May 2009.
[6] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Motion to Disqualify Judge Picard, 18 May 2009, para 23.
[7] Prosecution Response to Karadžić's Appeal from Decision on Motion to Disqualify Judge Picard, 5 June 2009.
[8] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR15.1, Decision on Appeal from Decision on Motion to Disqualify Judge Picard, 26 June 2009, para 8.

II. SUBMISSIONS

A. Radovan Karadžić's Motion

4. In the Motion, Radovan Karadžić submits that Judge Picard's decisions and public statements while she was President of the Human Rights Chamber of Bosnia and Herzegovina ("HRC") from 1997 to 2003 "reflect an unacceptable appearance of bias, such that a reasonable observer, properly informed, would reasonably apprehend bias".[9]

5. He first contends that the fact that Judge Picard served for seven years on a body created by the General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in Dayton, Ohio, and signed in Paris on 14 December 1995 ("Dayton Framework Agreement") indicates a bias towards the legitimacy of this Agreement and those who engineered it, which is a fact that will be at issue in the trial and in a preliminary motion on the so-called "Holbrooke Agreement".[10]

6. Secondly, Radovan Karadžić argues that Judge Picard's decisions as a member of the HRC raise a reasonable apprehension of bias. In particular, he submits that certain portions of the HRC's *Selimović* or "Srebrenica Cases" Decision of 7 March 2003,[11] amount to a "*prima facie* finding of responsibility against Republika Srpska and Dr. Karadžić..." with regard to the events at Srebrenica which "creates a reasonable apprehension of bias".[12] He contends that the issues to be dealt with in his case and the substantive matters that were dealt with in the "Srebrenica Cases" Decision are analogous, and that Judge Picard has already decided on these matters "beyond any doubt".[13] He further points to two other decisions of the HRC, the *Smajić*[14] and *Mujić*[15] Decisions, rendered on 22 December 2003 and 5 December 2003 which deal with the events in Višegrad and Bratunac respectively, as containing similar findings on the responsibility of Republika Srpska.[16]

7. Thirdly, the Accused submits that an article Judge Picard co-authored in 2007, which discusses the "Srebrenica Cases" Decision and the report issued by Republika Srpska in 2004 in relation to these events, also shows a bias on the part of Judge Picard due to the fact that, as well as

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[9] Motion, para 1.
[10] Motion, para 8.
[11] Case No. CH/01/8365 *et al.*, *Selimović et al.* ("Srebrenica Cases" (49 applications)), Decision on Admissibility and Merits of 7 March 2003 ("'Srebrenica Cases' Decision").
[12] Motion, paras 9-13.
[13] Motion, para 26.
[14] Case No. CH/02/8879 et al., *Smajić et al.*, Decision on Admissibility and Merits of 5 December 2003 ("*Smajić* Decision").
[15] Case No. CH/02/10235 et al, *Mujić et al.*, Decision on Admissibility and Merits of 22 December 2003 ("*Mujić* Decision").
[16] Motion, paras 15-16.

summarising the findings of the HRC, the article is "overwhelmingly critical of Republika Srpska".[17]

8. Fourthly, Radovan Karadžić points to a letter sent by Judge Picard to Mr Ashdown, the High Representative of Bosnia and Herzegovina, dated 14 October 2003, in which she reportedly expressed her criticism of Republika Srpska in its failure to contact any families about the fate or whereabouts of missing relatives.[18] He also alleges an apprehension of bias by reason of statements made by Judge Picard in the Annual Reports of the HRC which contain statements critical of Republika Srpska, and were published in the media,[19] and a public statement in 2002, in which Judge Picard reportedly praised Bosnia and Herzegovina for its implementation of the HRC's decisions, while criticising Republika Srpska for only implementing them "when it wants, which means from time to time".[20] In the view of the Accused, such statements and Judge Picard's urging of Republika Srpska to properly investigate the events at Srebrenica and admit responsibility "can reasonably be perceived as advocacy on behalf of the victims".[21]

9. The Accused contends that Judge Picard's "longstanding championing of the rights of the Bosniak victims and criticism of Republika Srpska creates an apprehension of bias" since "she is now called upon to judge those same events and the responsibility of Dr. Karadžić".[22] He cites in support a recent decision of the Trial Chamber in the *Hartmann* case, in which two Judges were disqualified as a result of their "direct, constant and multi-faced involvement ... with many aspects of [the] investigation and prosecution" of the case.[23] He also refers to a decision of the Appeals Chamber of the Special Court for Sierra Leone, in which it was found that Justice Geoffrey Robertson should be disqualified from the Appeals Chamber in the *Sesay* case since his prior writings about the events which were the subject of the case on which he was sitting gave rise to a reasonable apprehension of bias.[24] He further cites a case of the European Court of Human Rights, in which the Court found a violation of Article 6(1) of the Convention where a judge had in prior

[17] Motion, para 17. The said article is Michèle Picard and Asta Zinbo, "Sur le rapport du government de la Republika Srpska", *Cultures et Conflits*, No. 65 (Spring 2007) p 103 ("Picard and Zinbo article").
[18] Motion, para 18. The letter is apparently reported in Beth Kamschror, "Ashdown Sets Deadline for Republika Srpska's Srebrenica Commission", *Southeast European Times*, 31 October 2003.
[19] Motion, para 18.
[20] Motion, para 19. The statement was apparently reported in BBC Monitoring Europe, "Bosnian Human Rights Chamber president produces annual report", 7 June 2002 and ONASA News Agency, "BIH Human Rights Chamber Publishes Report for 2001", 7 June 2002.
[21] Motion, para 20.
[22] Motion, para 23.
[23] Motion, para 23, referring to *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Decision on Motion for Disqualification, 18 February 2009, at 1.
[24] Motion, para 22, referring to *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 ("*Sesay* Decision").

decisions effectively found a *prima facie* case of guilt against the accused.[25] In addition, he cites two French cases which he claims affirm the principle that it is improper for a judge or judicial organ who or which has already decided the merits of the underlying issue to sit in the subsequent determination of the same events.[26] In Radovan Karadžić's submission, "Judge Picard has already determined some of the same facts that are in issue in the Karadzic [*sic*] case".[27]

B. Prosecution's Response

10. The Prosecution responds that the Motion fails to rebut the presumption of impartiality attaching to judges at the Tribunal and that "a reasonable observer would not apprehend that Judge Picard was biased against Karadžić in relation to his criminal responsibility for the allegations in the Indictment".[28] It submits that "when read in their proper context", the decisions of the HRC and Judge Picard's public statements do not provide grounds for disqualification.[29]

11. In particular, the Prosecution points out that the jurisdiction of the HRC was limited to events after 14 December 1995, the date of the signing of the Dayton Framework Agreement, "which postdates the crimes for which Karadžić is charged with responsibility".[30] It notes that the "Srebrenica Cases" Decision did not concern the crimes committed in July 1995 in Srebrenica, but rather dealt with the failures of Republika Srpska after 14 December 1995 to provide information to families and victims of the events at Srebrenica.[31] It submits that the crimes committed at Srebrenica were merely discussed as part of the section of the decision on "Historical Context" and the discussion was limited to facts found in the *Krstić* Trial Judgement (those facts not subject to appeal) and the *Erdemović* Sentencing Judgement.[32] Similarly, it contends that the background facts in the HRC's *Mujić* Decision are based on the *Plavšić* Sentencing Judgement and the ICTY Indictments relating to Plavšić, while the background facts in the HRC's *Smajić* Decision are based on the *Vasiljević* Trial Judgement.[33] The Prosecution also emphasises that the jurisdiction of the HRC did not pertain to individual criminal responsibility, but rather concerned alleged violations by the parties to the Agreement on Human Rights.[34]

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[25] Motion, para 9, referring to *Hauschildt v. Denmark*, Judgment of 24 May 1989, Eur. Ct. H. R., Series A, No. 154 ("*Hauschildt* Judgement").
[26] Motion, paras 24-25, citing *Le Stum v. France*, No. 179971/02, Judgement of 4 October 2007 and *Habib Bank Limited*, Section du contentieux, No. 180122, Séance du 6 octobre 2000, lecture du 20 octobre 2000.
[27] Motion, para 25.
[28] Response, para 1.
[29] *Ibid.*
[30] Response, para 3.
[31] Response, para 5.
[32] *Ibid.*
[33] Response, para 8.
[34] Response, para 3.

12. The Prosecution submits that Judge Picard's other public statements referred to in the Motion "should be read in their proper context", which is the HRC's mandate over human rights violations after 14 December 1995, and merely recount the "Srebrenica Cases" Decision; they do not "constitute any form of advocacy or activism relevant to the current proceedings against Karadžić".[35] It further contends that some statements actually weigh against the allegation of bias.[36]

13. The Prosecution also submits that the jurisprudence of the Tribunal does not support Karadžić's claim of apparent bias, noting the holding of the Appeals Chamber in *Furundžija* that a reasonable observer would take into account a judge's sworn duty and tradition of impartiality[37] and that a judge's experience in human rights law is one of the possible qualifications for election to the Tribunal.[38] It further contends that Judge Picard's connection to events referred to in the Indictment is "more tangential than the involvement in a previous criminal trial on similar facts", which suggests *a fortiori* that it cannot be a basis for her disqualification since judges will not be disqualified merely because they sit on two cases arising out of the same events,[39] even where the constituent elements of crimes facing an accused applying for their disqualification were established in fact and law in the judge's previous case.[40] In addition, it submits that in both *Furundžija* and *Čelebići*, the Appeals Chamber rejected arguments that a reasonable apprehension of bias would be created by judges' memberships in human rights oriented organisations.[41] Moreover, in its view, the *Hartmann* decision is distinguishable on the facts, since in that case the disqualified Judges had been directly involved in some aspects of the investigation and prosecution of the accused.[42] Finally, the Prosecution contends that Judge Picard's connection with the criminal proceedings facing Karadžić is "more attenuated than the other cases referred to in the Motion" and

[35] Response, para 9.
[36] Response, para 10 (noting that one article refers to the HRC refusing to hear 1,800 claims from family members at Srebrenica and that in the article which Judge Picard co-authored with Asta Zinbo, she expressed the hope that the "Srebrenica Cases" Judgement would promote the establishment of a non-criminal and non-polemic public commission on the Srebrenica events, and praised, cautiously, the efforts of the authorities of Republika Srpska in this regard).
[37] Response, para 11, citing *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeals Judgement"), para 190.
[38] Response, para 11, referring to *Furundžija* Appeals Judgement, para 205 and *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeals Judgement"), para 702.
[39] Response, para 12, citing *Prosecutor v. Kordić*, Case No.IT-95-14-T, Bureau Decision on Motion for Disqualification, 4 May 1998 ("*Kordić* Decision"), p 2; *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana* Appeals Judgement"), para 78; *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003 ("*Krajišnik* Decision"), para 15; *Prosecutor v. Brđanin*, Case No. IT-99-36-PT, Decision on Application by Momir Talić for Disqualification and Withdrawal of a Judge, 18 May 2000 ("*Brđanin* Decision"), para 19.
[40] Response, para 12, citing *Nahimana* Appeals Judgement, para 83.
[41] Response, para 13, citing *Furundžija* Appeals Judgement, paras 192-215 (concerning Judge Mumba's membership in the United Nations Commission on the Status of Women) and *Čelebići* Appeals Judgement, paras 694-708 (concerning Judge Odio Benito's membership in the Victims of Torture Fund).
[42] Response, para 13.

that none of the elements decisive to disqualification of judges in those cases are present in Judge Picard's situation.[43]

III. APPLICABLE LAW

14. The Statute of the Tribunal ("Statute") guarantees an accused a "fair and expeditious" trial "with full respect for the rights of the accused".[44] Among these rights are the right to a "fair and public hearing" and to be "presumed innocent until proved guilty".[45] The judges of the Tribunal are required to be "persons of high moral character, impartiality and integrity" as well as appropriately qualified.[46] These principles are embodied in Rule 15 of the Rules, which provides that "[a] Judge may not sit on a trial or appeal 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 or her impartiality".

15. It is well established that 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 an appearance of bias.[47] The Appeals Chamber has observed in respect of Rule 15 that:

> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
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> i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
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> ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[48]

16. The second prong of the second principle recalls the well known maxim of Lord Hewart CJ that it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[49] With regard to the test of the "reasonable observer", the Appeals Chamber has held that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality

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[43] Response, para 14.
[44] Article 20(1) Statute.
[45] Article 21(2) and (3) of the Statute respectively.
[46] Article 13 Statute.
[47] *Furundžija* Appeals Judgement, para 189. Both common law and civil law systems, as well as the European Court of Human Rights, have adopted the two part test. For a discussion of relevant case law, *see Talić* Decision, paras 9-14.
[48] *Furundžija* Appeals Judgement, para 189. In the *Talić* Decision, it was found that the test on this prong is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge in question]... might not bring an impartial and unprejudiced mind" (para. 15).
[49] *R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at p 259.

that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."[50]

17. There is an assumption of impartiality that attaches to a judge.[51] It is for the party who seeks the disqualification of a judge to adduce sufficient evidence that the judge is not impartial.[52] There is a high threshold to reach in order to rebut the presumption of impartiality, and therefore to disqualify a judge, the reasonable apprehension of bias must be "firmly established".[53] A high threshold is required as it is as much of a threat to the interests of the impartial and fair administration of justice for judges to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias, as the real appearance of bias itself.[54]

IV. DISCUSSION

18. The Chamber must determine whether the perception of the hypothetical fair-minded observer, with sufficient knowledge of the circumstances to make a reasonable judgement,[55] would be that Judge Picard might not bring an impartial and unprejudiced mind to the issues arising in the case.[56]

19. For the purpose of the present case, such a hypothetical fair-minded informed observer would know that the jurisdiction of the HRC differed in significant ways from that of this Tribunal. While the former dealt with applications from any Party to the Agreement on Human Rights, annexed to the Dayton Framework Agreement, individuals, non-governmental organizations or groups of individuals claiming to be the victims of violations of human rights committed post 14 December 1995,[57] the International Tribunal is concerned with prosecuting persons for serious

[50] *Furundžija* Appeals Judgement, para 190, quoting *R.D.S. v. The Queen* (1997) Can. Sup. Ct., delivered 27 September 1997. *See* also *Čelebići* Appeals Judgement, para 697.
[51] *Prosecutor v. Blagojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008 ("*Blagojević* Decision"), para 3; *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 16 February 2007 ("*Šešelj* Decision"), para 5; *Furundžija* Appeals Judgement, para 196.
[52] *Blagojević* Decision, para 3.
[53] *Furundžija* Appeals Judgement, para 197; *Čelebići* Appeals Judgement, para 707; *Blagojević* Decision, para 2; *Šešelj* Decision, para 5; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Decision on Motion for Disqualification, 12 January 2009, 3; *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5, Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, 25 March 2009 ("*Hartmann* Decision"), para 25.
[54] *Čelebići* Appeals Judgement, para 707; *Brdanin* Decision, para 8; *Blagojević* Decision, para 3.
[55] *See Talić* Decision, para 10. Judge Liu, in *Krajišnik* Decision, at para 14 noted that "[t]he 'hypothetical fair-minded observer', by implication, is someone from outside who, as an observer (and not a party) recognizes and understands the circumstances well enough to tell whether or not the public sense of Justice would be challenged by the presence of a particular Judge on the Bench in the case at hand".
[56] *See Čelebići* Appeals Judgement, para 697; *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeals Judgement"), para 44.
[57] The Human Rights Chamber had jurisdiction to consider allegations of violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, as well as alleged or apparent discrimination in the enjoyment of any of the rights and freedoms provided for in the

violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[58] Therefore, the nature and subject-matter of proceedings before the two bodies are separate and distinct: the HRC, as a human rights court, being concerned with the responsibility of the State for failure to abide by its human rights obligations; the Tribunal, as a criminal court, dealing with the criminal responsibility of individuals accused of serious violations of international humanitarian law. A fair-minded informed observer would therefore know that the determination of specific facts and the application of legal tests by the Tribunal to ascertain the individual criminal responsibility of Radovan Karadžić would be materially and fundamentally different from the necessary findings and determinations of State responsibility for human rights violations by the Human Rights Chamber.

20. Moreover, a fair-minded informed observer would recognise that the specific factual and legal issues in the cases of the HRC decisions cited in the Motion were evidently distinct from the issues of Karadžić's individual criminal liability as outlined in the Third Amended Indictment.[59] As clearly stated by the HRC in the "Srebrenica Cases" Decision, "the Chamber is considering only whether or not the authorities in Republika Srpska have violated the human rights of the family members of the missing persons of the Srebrenica events by failing to inform them, since 14 December 1995, about the fate and whereabouts of their missing loved ones".[60] The findings of the HRC were based upon evidence of the violations of Article 8 (right to respect for private and family life) and Article 3 (prohibition of inhuman or degrading treatment or punishment) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The HRC interpreted Article 8 as including the right to access to information – a rights which was found to be violated by reason of the failure of the authorities of Republika Srpska to provide any information to the complainants about the fate of their family members.[61] Article 3 was interpreted by the HRC as entailing the right to know the truth, since the relatives of missing persons were considered to have suffered extreme anxiety by their lack of knowledge of what happened to their loved ones.[62] By contrast, the evidence to be considered by the Tribunal in the *Karadžić* trial will pertain to the alleged commission of war crimes, crimes against humanity and genocide in various locations in the former Yugoslavia from October 1991 to at least 30 November 1995, as well as evidence going to Karadžić's alleged liability under Article 7(1) and 7(3) of the Statute.

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international agreements listed in the Appendix to Annex 6 of the Dayton Agreement. Dayton Framework Agreement, Annex 6, Agreement on Human Rights, Articles II(2) and VIII.

[58] Article 1 Statute.

[59] *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009 ("Third Amended Indictment").

[60] "Srebrenica Cases" Decision, para 146.

[61] "Srebrenica Cases" Decision, paras 173-181

[62] "Srebrenica Cases" Decision, paras 182-191.

21. Karadžić bases much of his argument that Judge Picard has prejudged matters of his responsibility upon the assumption that findings by the HRC on the responsibility of the government of Republika Srpska or of officials or agents thereof necessarily involved or gave rise to an adverse finding on his own individual criminal responsibility since he was President and the Supreme Commander of the armed forces.[63] Such an argument is misconceived. It is not only incorrect in law – since the Tribunal's jurisprudence has clearly affirmed that command responsibility is not a form of strict liability but must be based on specific evidence of knowledge[64] – but a fair-minded informed observer would reject this simplistic conclusion and recognise that a mere finding on the responsibility of State officials or a particular government for human rights violations, without more, does not necessarily entail a finding on the criminal responsibility of any one individual member of that government, including the President or the Supreme Commander of the armed forces.

22. This is so, even taking into account that there may be a limited temporal overlap between the jurisdiction of the HRC to consider violations of human rights after 14 December 1995 and the temporal scope of the Third Amended Indictment. In this respect, on a first reading, the Indictment suggests that the alleged scope of Karadžić's liability continued only until 30 November 1995.[65] However, on a closer reading, the Indictment may be open to the contention that insofar as it alleges criminal responsibility under Article 7(3) the conduct of Karadžić is in issue until he left office on 19 July 1996.[66] Even so, the decision made by the HRC as to the failure of Republika Srpska to properly investigate the events at Srebrenica entailing a violation of Articles 8 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, do not expressly or by inference constitute findings on the individual criminal responsibility of Karadžić himself under Article 7(3), which would require further specific evidence not adduced or investigated by the HRC. Hence, the submission that Judge Picard has made a *prima facie* finding on the responsibility of Karadžić and which gives rise to a reasonable apprehension of bias, must be rejected.

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[63] *See*, e.g., Motion, para 10 ("Judge Picard and the HRC were unequivocal in noting that 'the authorities of [Republika Srpska] were *directly involved* in the disappearances and in the destruction of evidence of those disappearances.' Dr. Karadžić was one of those authorities."); para 16 ("In each decision, the Chamber found that the authorities of Republika Srpska 'ha[d] done nothing to clarify the fate and whereabouts of the presumed victims,' but further that the authorities of Repbulika Srpska were *directly involved* in the disappearances.").

[64] *Čelebići* Appeals Judgement, paras 226 and 239 ("...command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them.") *See* also *ibid*, paras 223 and 241.

[65] Third Amended Indictment, paras 6, 9 and 20.

[66] *Ibid*, paras 2, 3, 4, 33 and 35.

23. The Chamber also considers as significant the fact that the HRC did not make any factual or legal findings on events prior to 14 December 1995, which it is not mandated to do.[67] Instead, in order to provide a credible historical background to the situation pertaining after the Dayton Framework Agreement with regard to alleged victims of human rights violations, it made reference to the uncontested factual findings of the Tribunal with respect to the relevant locations and time periods. Thus, in the "Srebrenica Cases" Decision, it referred to factual findings – only those not subject to appeal – in the *Krstić* Trial Judgement[68] and the *Erdemović* Sentencing Judgement.[69] These findings were not contested by the authorities of Republika Srpska in the "Srebrenica Cases". In the *Mujić* Decision, concerning victims stemming from events at Bratunac in May and October 1992, the HRC referred to findings made in the *Plavšić* Sentencing Judgement and the ICTY Indictments relating to Plavšić.[70] In the *Smajić* Decision, which dealt with the complaints of victims from the town of Višegrad with respect to events in May and June 1992, the HRC referred to factual findings in the *Vasiljević* Trial Judgement.[71] The fair-minded informed observer would recognise that the HRC's careful references to such findings made by the Tribunal for the sole reason of providing a historical background to its applications underlined the HRC's cognizance of its temporal and human rights mandate,[72] and further reinforces the fact that the HRC had no jurisdiction over those events underlying the crimes at issue in the *Karadžić* trial. The findings that were made by the HRC, for instance, that "the applicants have suffered as a result of the Srebrenica events and the resultant loss of their loved ones under such conditions" were based not on the findings of the Tribunal, but were "apparent from the applications"[73] or were situated clearly within the mandate of the HRC.[74]

24. Even if it were accepted that some of the findings of the HRC concerned matters of some relevance in the *Karadžić* trial, this would not entail a reasonable apprehension of bias on the part of Judge Picard. The reasonable observer would know that the judges of the Tribunal are professional judges, who are called upon to try a number of cases arising out of the same events, and that they may be relied upon to apply their mind to the evidence in the particular case before

[67] Case No. CH/96/1, *Matanović*, Decision on admissibility of 13 September 1996, at section IV, Decisions on Admissibility and Merits, March 1996-December 1997; "Srebrenica Cases" Decision, para 146.
[68] *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001.
[69] *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996. *See* "Srebrenica Cases" Decision, paras 15-28.
[70] *Mujić* Decision, para 7, referring to *Prosecutor v. Krajišnik and Plavšić*, Case Nos IT-00-39 and 40, Consolidated Indictment, 7 March 2002; *Prosecutor v. Milošević*, Case No. IT-01-51, Indictment, 22 November 2001; *Prosecutor v. Plavšić*, Case Nos IT-00-39 and 40, Sentencing Judgement, 27 February 2003.
[71] *Smajić* Decision, paras 8-9, referring to *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgement, 29 November 2002.
[72] "Srebrenica Cases" Decision, para 15.
[73] "Srebrenica Cases" Decision, para 187.
[74] "Srebrenica Cases" Decision, para 189.

them.[75] The Tribunal has already on several occasions confirmed that its judges are not disqualified from hearing a case by virtue of having dealt with witnesses or evidence related to the same facts in other cases.[76] As noted in the jurisprudence, "the judges are frequently, and increasingly so as the trials devolve, faced with parts of the ever growing body of adjudicated facts before this Tribunal; this is exactly the background for the provision in Rule 94(B) and there is no ground for turning this development into an argument for disqualification of Judges."[77] While the "Srebrenica Cases" Decision does make reference to the Trial Chamber's oral Decision pursuant to Rule 61 of 11 July 1996 which confirmed the majority of counts of the Indictments of Karadžić and Mladić and issued arrest warrants[78] as support for its finding that there must have been some information accessible after 14 December 1995 for the authorities of Republika Srpska to draw upon to respond to the requests for information from the families of the missing Bosniak men from Srebrenica,[79] this does not indicate any predetermination of Karadžić's criminal guilt by the HRC. Such decisions confirming indictments are not based on the criminal standard of beyond reasonable doubt, but merely require a Chamber to find that there are "reasonable grounds" for believing that an accused has committed the crimes.[80] Not only does the HRC also cite the *Erdemović* Sentencing Judgements of 7 October 1997 and of 5 March 1998 in support of its conclusion, but more importantly, mere reference to such a decision can hardly be grounds for disqualification since the Appeals Chamber has held that serving as a confirming judge on an indictment in a case with evidence that overlaps with the evidence in the case against an accused is not a ground for disqualification.[81]

25. The Chamber finds no merit in the submission that Judge Picard's service in the HRC indicates a bias towards the legitimacy of the Dayton Framework Agreement, which established that body. Even if this were to be an issue in the trial, the argument is undeveloped and

[75] *Talić* Decision, para 17; *Krajišnik* Decision, para 15 .
[76] *Galić* Appeals Judgement, para 41; *Krajišnik* Decision, para 19; *Kordić* Decision, p 2; *Šešelj* Decision, para 25. *See* also *Nahimana* Appeals Judgement, para 78.
[77] *Krajišnik* Decision, para 17.
[78] *Prosecutor v. Karadžić and Mladić*, Case Nos. IT-95-5-R61 and IT-95-18-R61, Transcript in English of 11 July 1996, 918-993, at 992. *See* also T 975.
[79] "Srebrenica Cases" Decision, para 178.
[80] *See* Rule 61(C) of the Rules, providing that "[i]f the Trial Chamber is satisfied that on that evidence [...] there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine". *See* also Article 19(1) of the Statute providing that "[i]f [a judge] is satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment."
[81] *Galić* Appeals Judgement, para 42; *Hartmann* Decision, para 44. The Appeals Chamber in *Galić*, found that this argument "failed to appreciate the fundamental difference between the functions of a Judge who confirms an indictment and a Judge who sits at trial... Because these tasks involve different assessments of the evidence and different standards of review, the confirmation of an indictment does not involve any improper pre-judgement of an accused's guilt". This is embodied in Rule 15(C) which provides that a judge who reviews an indictment against an accused shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused, or for sitting as a member of the Appeals Chamber to hear any appeal in that case. While Rule 61 concerns the procedure in case of a failure to execute a warrant, it also entails a decision by the Trial Chamber that on the evidence, there are reasonable grounds for believing that an accused has committed all or any of the crimes charged in the indictment. *See* Rule 61(C).

unsubstantiated. In respect to the preliminary motion on the so-called "Holbrooke Agreement", the Chamber fails to see how Judge Picard's involvement in the HRC would have any bearing on her approach to the issue since this "Agreement" did not in any case form part of the Dayton Framework Agreement.[82]

26. In regard to the article co-authored by Judge Picard, the Chamber notes that the part of the article written by the Judge merely summarises the "Srebrenica Cases" Decision. No passage of the article indicates any bias against Republika Srpska, let alone any opinion on the criminal guilt of Radovan Karadžić. Indeed, the article in several passages confirms the clear distinction between the mandates and objectives of the HRC and the jurisdiction of this Tribunal and underlines the fact that the HRC was not tasked with, nor interested in, making findings on individual criminal responsibility.[83]

27. With respect to the other examples of public statements submitted by the Accused as indications of the bias allegedly held by Judge Picard towards Republika Srpska and of her "championing of the rights of the Bosniak victims", the Chamber notes that all were made in the context of her role as President of the HRC with respect to the implementation of the HRC's decisions, and do not evidence any personal bias on the part of Judge Picard. Her statements in the HRC Annual Reports or about those reports cannot be characterised as activism on behalf of the victims in any proper sense of the term. It pays to recall that the Statute of the Tribunal, by requiring that the "experience of the judges in criminal law, international law, including humanitarian law and human rights law"[84] be taken into account in composing the Chambers, clearly anticipated that a number of the judges of the Tribunal would have been members of human rights bodies or would have worked in the human rights field.[85] As the Appeals Chamber has noted, it would be an odd result if the fulfillment of the qualification requirements of Article 13 were to operate as a disqualifying factor on the basis that it gives rise to an inference of bias.[86] Moreover, the alleged criticisms of Republika Srpska made by Judge Picard were made years after Karadžić left office and can have no bearing on the allegations in the Indictment against him.

28. The Chamber finds no support for the Motion in the cases referred to therein. The *Hartmann* Decision is clearly distinguishable on the facts since the disqualification of the Judges in that case was based on their "active involvement" in directing the "course and parameters of the investigation

[82] According to Karadžić, this Agreement was made during the evening and into the early morning hours of 18 and 19 July 1996, whereas the Dayton Framework Agreement was signed on 14 December 1995. *Prosecutor v. Karadžić*, Case No. IT-95-5/19-PT, Decision on the Accused's Holbrooke Agreement Motion, 8 July 2009, para 9.
[83] Picard and Zinbo article, pp 104, 110.
[84] Article 13 Statute.
[85] *Čelebići* Appeals Judgement, para 702, citing Article 13 of the Statute.
[86] *Furundžija* Appeals Judgement, para 205; *Čelebići* Appeals Judgement, para 702.

against Ms. Hartmann beyond the extent of giving general, generic or purely administrative instructions".[87] Similarly, the facts of the House of Lords' *Pinochet* Decision are evidently discernible from the present case. In that case, the disqualification of Lord Hoffman was based on the fact that he was connected to Amnesty International, an intervenor in the earlier proceedings, in other words a party to the litigation. As noted by the House of Lords, where a judge is party to litigation or has a relevant interest in its outcome, he or she is automatically disqualified from hearing the case. Lord Browne-Wilkinson, who gave the principal reasons for the judgement, found that Lord Hoffman's circumstances fell within this category of automatic disqualification.[88] The disqualification of Justice Robertson by the Special Court for Sierra Leone was based on his explicit and robust condemnation of the criminal acts perpetrated by the RUF and its leadership in his book *Crimes Against Humanity*. Significantly, Justice Robertson's comments expressed his horror at the acts of the accused and not merely the underlying events.[89] The *Hauschildt* Judgment of the European Court of Human Rights also dealt with a completely different circumstance, in which the presiding judge of the trial of the accused had relied upon a particular provision of Danish law to prolong the accused's detention on remand both prior to and during the trial, which required him to be satisfied of a "particularly confirmed suspicion" that the accused had committed the crimes with which he was charged.[90] Neither are the French cases pertinent since they are factually distinct and concern a completely different subject-matter and type of jurisdiction.[91]

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29. The Chamber finds that a hypothetical fair-minded observer, properly informed, would recognise that Judge Picard's role, function and decisions in the HRC and public statements and published work pertaining to those cases neither represented a prejudgement of Radovan Karadžić's guilt nor prevents her from assessing the evidence presented during the course of the pre-trial proceedings with an open mind. A fair-minded informed observer would not be led to doubt Judge Picard's impartiality because she participated in the HRC cases. Therefore, her presumption of

[87] *Hartmann* Decision, para 53.
[88] *Pinochet* Decision, p 284. *See* also Lord Goff of Chieveley at p 286: "[...] we have to consider Lord Hoffmann [...] as a person who is, as a director and chairperson of AICL, closely connected with AI which is, or must be treated as, a party to the proceedings".
[89] *Sesay* Decision, para 2.
[90] *Hauschildt* Judgment, paras 51-53. The Court noted that this was a special circumstance warranting its conclusion, whereas generally, "the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality".
[91] In *Le Stum*, the judge-commissaire issued orders for the liquidation of a company and presided over the court which relied upon his own report as juge-commissaire to impute mismanagement to the director of his company. In *Habib Bank Limited*, the French Conseil d'Etat found a reasonable apprehension of bias where the Banking Commission indicated in a letter to an enterprise that it had committed a number of infractions prior to commencing a disciplinary procedure against the same enterprise.

impartiality has not been rebutted. Accordingly, the Chamber finds that the allegation of apprehension of bias against Judge Picard is unfounded.

30. For the foregoing reasons, the Motion is **DISMISSED**.

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

Dated this twenty-second day of July 2009
At The Hague
The Netherlands

Judge Kevin Parker Presiding	Judge Carmel Agius	Judge Christine Van Den Wyngaert

[Seal of the Tribunal]