

**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-09-92-AR73.6
Date: 27 February 2017
Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding
Judge Liu Daqun
Judge Fausto Pocar
Judge Theodor Meron
Judge Burton Hall

Registrar: Mr. John Hocking

Decision of: 27 February 2017

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON INTERLOCUTORY APPEAL AGAINST
DECISION ON DEFENCE MOTION FOR A FAIR TRIAL AND
THE PRESUMPTION OF INNOCENCE**

The Office of the Prosecutor:

Mr. Peter McCloskey
Mr. Alan Tieger

Counsel for the Accused:

Mr. Branko Lukić
Mr. Dragan Ivetić

1. The Appeals Chamber of the 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of an appeal filed by Ratko Mladić (“Mladić”) on 4 October 2016¹ against the “Decision on Defence Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial” issued by Trial Chamber I of the Tribunal (“Trial Chamber”) on 4 July 2016.² The Office of the Prosecutor (“Prosecution”) filed a response on 11 October 2016.³ Mladić filed a reply on 17 October 2016.⁴

I. BACKGROUND

2. On 24 March 2016, Trial Chamber III of the Tribunal, composed of Judges O-Gon Kwon, Presiding, Howard Morrison, Melville Baird, and Flavia Lattanzi, Reserve Judge, issued the Trial Judgement in the case of *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T (“*Karadžić* case”).⁵

3. On 19 May 2016, Mladić filed a motion before the Trial Chamber submitting that his rights to a fair trial and the presumption of innocence had been compromised by the engagement in his case of staff members who had previously worked on the *Karadžić* case and participated in the drafting of the *Karadžić* Trial Judgement (“Impugned Staff”).⁶

4. On 4 July 2016, the Trial Chamber issued the Impugned Decision, whereby it: (i) rejected Mladić’s allegation that his rights had been violated by the Trial Chamber’s engagement of the Impugned Staff; and (ii) denied his request for certain information and material related to Trial Chamber personnel or, in the alternative, for a declaration of mistrial.⁷

5. In particular, the Trial Chamber first addressed Mladić’s allegations of bias on the part of the Impugned Staff because of their role in the *Karadžić* case and found that the assistance provided by the Impugned Staff did not influence the decision-making ability of the Judges and that their

¹ Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defence Motion for a Fair Trial and Presumption of Innocence, 4 October 2016 (“Appeal”).

² *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, 4 July 2016 (“Impugned Decision”).

³ Prosecution Response to Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defence Motion for a Fair Trial and Presumption of Innocence, 11 October 2016 (“Response”).

⁴ Reply in Support of the Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defence Motion for a Fair Trial and Presumption of Innocence, 17 October 2016 (“Reply”).

⁵ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016, 24 March 2016 (“*Karadžić* Trial Judgement”).

⁶ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, 19 May 2016 (“19 May 2016 Motion”), paras 1-2, 7, 28.

⁷ Impugned Decision, paras 26-27.

previous work on the *Karadžić* case was irrelevant to the Judges' impartiality.⁸ The Trial Chamber then turned to Mladić's allegations of bias on the part of the Judges in this case and found that their presumption of impartiality had not been rebutted on the basis that the Impugned Staff had worked on the overlapping *Karadžić* case in which factual findings were made in relation to Mladić.⁹ It concluded that since there was "neither actual bias nor an objective appearance of bias with respect to the Impugned Staff or judges in the present case", there had been no violations of Mladić's "fair trial or other rights".¹⁰

6. On 27 September 2016, the Trial Chamber denied Mladić's request for reconsideration of the Impugned Decision but granted his request for certification to appeal it.¹¹ Mladić filed the present Appeal on 4 October 2016.¹²

7. On 10 October 2016, Mladić filed motions seeking the respective disqualification of Judges Carmel Agius, Fausto Pocar, and Theodor Meron in relation to two interlocutory appeals, including the present Appeal.¹³ On 13 October 2016, the President of the Tribunal, Judge Carmel Agius, assigned Vice-President Liu Daqun to consider the Disqualification Motions in place of himself.¹⁴ On 26 October 2016, Judge Liu Daqun denied Mladić's Disqualification Motions.¹⁵

II. STANDARD OF REVIEW

8. The Trial Chamber's determination of whether the engagement of certain staff would lead to actual bias or the appearance of bias is a discretionary decision to which the Appeals Chamber must accord deference.¹⁶ In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that party.¹⁷ The Appeals Chamber will only overturn a trial chamber's discretionary decision where it

⁸ Impugned Decision, para. 20. See also Impugned Decision, paras 18-19.

⁹ Impugned Decision, para. 26. See also Impugned Decision, paras 21-25.

¹⁰ Impugned Decision, para. 26.

¹¹ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Reconsideration or Certification to Appeal Decision on Motion for a Fair Trial or a Mistrial, 27 September 2016 ("Certification Decision"), paras 11, 14-16.

¹² See *supra*, para. 1.

¹³ Appellant's Motion Pursuant to Rule 15(B) Seeking Disqualification of Judge Carmel Agius from the Appeals Chamber, 10 October 2016; Appellant's Motion Pursuant to Rule 15(B) Seeking Disqualification of Judge Fausto Pocar from the Appeals Chamber, 10 October 2016; Appellant's Motion Pursuant to Rule 15(B) Seeking Disqualification of Judge Theodor Meron from the Appeals Chamber, 10 October 2016 (collectively, "Disqualification Motions").

¹⁴ Order Assigning Motions to a Judge, 13 October 2016, p. 2.

¹⁵ Decision on Ratko Mladić's Motion for Disqualification of Judge Carmel Agius, 26 October 2016, para. 26; Decision on Ratko Mladić's Motion for Disqualification of Judge Fausto Pocar, 26 October 2016, para. 25; Decision on Ratko Mladić's Motion for Disqualification of Judge Theodor Meron, 26 October 2016, para. 24.

¹⁶ *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR-73.8, Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer, 17 December 2009 ("*Bizimungu et al.* Appeal Decision"), para. 4.

¹⁷ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.7, Decision on Interlocutory Appeal Against Scheduling Order, 2 December 2016 (confidential) ("*Mladić* Appeal Decision of 2 December 2016"), para. 14; *Prosecutor v.*

is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.¹⁸ The Appeals Chamber will consider whether the trial chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹⁹

III. APPLICABLE LAW

9. The Appeals Chamber recalls that legal officers assisting Judges at the Tribunal are not subject to the same standards of impartiality as the Judges of the Tribunal, and that judicial decision-making is the sole purview of the Judges.²⁰ Legal officers merely provide assistance to the Judges in legal research and preparing draft decisions, judgements, opinions, and orders in conformity with the instructions given to them by the Judges.²¹

10. Notwithstanding the above, in some cases, a prospective staff member's statements or activities may be so problematic as to either impugn the perceived impartiality of the Judges or the appearance thereof, or, even if this were not the case, the Tribunal's fundamental guarantees of fair trial.²² In this respect, the Appeals Chamber recalls in particular, that an unacceptable appearance of bias exists, *inter alia*, where the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.²³ The Appeals Chamber further recalls that there is a presumption of impartiality which attaches to the Judges of the Tribunal and which cannot be easily rebutted.²⁴

Goran Hadžić, Case No. IT-04-75-AR73.1, Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of Proceedings, 4 March 2016 ("*Hadžić* Appeal Decision"), para. 6; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.5, Decision on Interlocutory Appeal Against the 27 March 2015 Trial Chamber Decision on Modality for Prosecution Re-Opening, 22 May 2015 ("*Mladić* Appeal Decision of 22 May 2015"), para. 6.

¹⁸ *Mladić* Appeal Decision of 2 December 2016, para. 15; *Hadžić* Appeal Decision, para. 6; *Mladić* Appeal Decision of 22 May 2015, para. 6.

¹⁹ *Mladić* Appeal Decision of 2 December 2016, para. 15; *Hadžić* Appeal Decision, para. 6; *Mladić* Appeal Decision of 22 May 2015, para. 6.

²⁰ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015 ("*Nyiramasuhuko et al.* Appeal Judgement"), para. 273, referring to, *inter alia*, *Bizimungu et al.* Appeal Decision, para. 9, *Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 ("*Hategekimana* Appeal Judgement"), para. 20.

²¹ *Nyiramasuhuko et al.* Appeal Judgement, para. 273; *Bizimungu et al.* Appeal Decision, para. 9.

²² *Bizimungu et al.* Appeal Decision, para. 11.

²³ See, e.g., *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Judgement, 30 June 2016 ("*Stanišić and Župljanin* Appeal Judgement"), para. 43 and references cited therein.

²⁴ See, e.g., *Stanišić and Župljanin* Appeal Judgement, para. 44 and references cited therein; *Nyiramasuhuko et al.* Appeal Judgement, para. 273; *Hategekimana* Appeal Judgement, para. 16.

IV. SUBMISSIONS

11. As a preliminary matter, Mladić submits that the Appeal is “closely related to other outstanding matters” and that it would be more efficient to consider it together with his interlocutory appeal on the scheduling order for the filing of the parties’ final trial briefs and closing arguments,²⁵ and another potential appeal against the Trial Chamber’s decision regarding allegations of systemic bias,²⁶ for which a request for certification to appeal was pending before the Trial Chamber at the time the Appeal was filed.²⁷

12. In relation to the standard of review applicable to the present Appeal, Mladić asserts that the denial of a motion relating to the presumption of innocence is a non-discretionary decision since the right to the presumption of innocence is absolute.²⁸ He argues that the applicable standard of review is “whether the Trial Chamber committed an error of law invalidating the decision, or an error of fact occasioning a miscarriage of justice.”²⁹

13. On the merits, Mladić submits that the Trial Chamber committed errors of fact and law in the Impugned Decision that individually and cumulatively result in a violation of his right to a fair trial and to the presumption of innocence.³⁰ He requests the Appeals Chamber to indicate the “proper test for judicial impartiality” and to grant him the relief sought before the Trial Chamber in the 19 May 2016 Motion.³¹

²⁵ Appeal, para. 3, referring to *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion Seeking Reconsideration of or Certification to Appeal Scheduling Order, 28 September 2016; Reply, para. 3. The Trial Chamber issued its scheduling order for the filing of the parties’ final trial briefs and closing arguments on 9 September 2016 (*Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Scheduling Order, 9 September 2016 (“Scheduling Order”). On 5 October 2016, Mladić filed his appeal against the Scheduling Order (*Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.7, Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defence Motion Regarding Scheduling Order, 5 October 2016 (public with confidential and public redacted annexes) (“Scheduling Order Appeal”).

²⁶ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Stay of Proceedings for Systemic Bias or, in the Alternative, a Mistrial, 22 September 2016 (“Systemic Bias Decision”).

²⁷ Appeal, para. 3, referring to *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Motion for Certification to Appeal Decision on Defence Motion for Stay of Proceedings for Systemic Bias or, in the Alternative, a Mistrial (a Protest Against Trial Chamber I’s “Insert Defence Acknowledgment Here” Decision-Making Process), 29 September 2016; Reply, para. 3.

²⁸ Appeal, para. 14. Mladić adds that the “imperative language” in Article 21(3) of the Statute of the Tribunal (“Statute”) that the accused “shall” be presumed innocent until proven guilty means that the right to the presumption of innocence is absolute and that “it would violate all precepts of justice if a trial could be found to be unfair but continue anyway” (Appeal, paras 13-14).

²⁹ Appeal, para. 14.

³⁰ Appeal, paras 16, 43.

³¹ Appeal, para. 43, referring to the 19 May 2016 Motion, paras 30-31. In his 19 May 2016 Motion, Mladić requested *inter alia*: (i) copies of any written undertakings that the Impugned Staff signed prior to taking up their duties on his case; and (ii) a detailed description of all other efforts that the Trial Chamber had undertaken to protect his rights to a fair trial and to be presumed innocent (19 May 2016 Motion, para. 30). In the alternative, Mladić requested a mistrial on the basis that all three Judges in his case may have already relied on the Impugned Staff’s work (19 May 2016 Motion, para. 31).

14. Mladić submits that, despite his extensive submissions, the Trial Chamber failed to address and to provide a reasoned decision on his primary concern that allowing the Impugned Staff to work on his case violates his right to be presumed innocent.³² He contends that the Trial Chamber did not examine the presumption of innocence in its analysis.³³ Mladić adds that, instead, the Trial Chamber focused on the presumption of impartiality attached to Judges, although his reason to raise this issue was to show that the “presumption of innocence could be engaged at a level below the standard [...] for judicial impartiality”.³⁴

15. Mladić further argues that the Trial Chamber erred in determining “that the biases of the Impugned Staff did not affect his right to be presumed innocent.”³⁵ Mladić asserts that by merely denying that the Judges’ impartiality was affected, the Trial Chamber implicitly acknowledged that its staff members may have pre-conceived ideas and that such a lack of impartiality of staff members is acceptable.³⁶ In particular, Mladić considers it unreasonable to believe that the Impugned Staff would completely re-analyze the evidence without relying on pre-conceived conclusions reached through their work on the *Karadžić* case, and stresses that they are not professional Judges.³⁷

16. Moreover, Mladić submits that the Trial Chamber erred by introducing and applying an incorrect standard for judicial impartiality.³⁸ He contends that the Trial Chamber’s statement that a Judge’s impartiality will not be doubted “unless the judge had found [that Mladić’s] participation fulfilled all the relevant criteria necessary to constitute a criminal offence, and then had found [him] guilty beyond a reasonable doubt of having committed that offence” is unreasonable and incorrect.³⁹ Mladić submits that this is a new standard derived from jurisprudence of the European Court of Human Rights (“ECtHR”), which has not been part of the Tribunal’s jurisprudence so far, and was misconstrued by the Trial Chamber.⁴⁰ In addition, Mladić considers that even if this

³² Appeal, paras 16(a), 17-18. See also Appeal, para. 19.

³³ Appeal, para. 18.

³⁴ Appeal, para. 19.

³⁵ Appeal, para. 23.

³⁶ Appeal, para. 22.

³⁷ Appeal, para. 21. Mladić emphasises in this respect that, while the *Karadžić* case is based on largely identical facts, the case history, certain crucial procedural matters notably in relation to the scope of the indictment, the admitted evidence, and the legal strategy are different (Appeal, para. 20).

³⁸ Appeal, paras 16(b), 24, 26, 34.

³⁹ Appeal, paras 16(b), 24, referring to Impugned Decision, para. 24.

⁴⁰ Appeal, paras 25-28, referring to, *inter alia*, *Poppe v. The Netherlands*, ECtHR, Application No. 32271/04, Judgment, 24 March 2009 (“ECtHR *Poppe* Judgement”), para. 28, *Mimoshvili v. Russia*, ECtHR, Application No. 20197/03, Judgment, 28 June 2011 (“ECtHR *Mimoshvili* Judgement”), para. 118, *Khodorkovskiy and Lebedev v. Russia*, ECtHR, Application Nos. 11082/06 and 13772/05, Judgment, 25 July 2013 (“ECtHR *Khodorkovskiy* Judgement”), para. 549. Mladić submits that the ECtHR jurisprudence cited by the Trial Chamber is fact-specific and his own case is distinguishable on the facts (Appeal, paras 27-29). Specifically, he contends that the ECtHR *Poppe* Judgement did not contain legal findings as to the applicant’s guilt, as the applicant’s name was merely mentioned in passing and that, in the ECtHR *Mimoshvili* Judgement and ECtHR *Khodorkovski* Judgement, the applicants were never directly incriminated as perpetrators or co-offenders (Appeal, paras 27-28). Furthermore, Mladić submits that a

standard for judicial impartiality would be applicable, the Trial Chamber erred in stating that the findings made in the *Karadžić* Trial Judgement did not “establish the criteria to constitute a criminal offence [or] make findings on the criminal responsibility of [Mladić]”.⁴¹

17. Finally, Mladić contends that while the Impugned Decision also sets out the appropriate reasonable observer test for judicial impartiality, the Trial Chamber erred in its application, and the Trial Chamber’s conclusions in this regard lack sufficient reasoning.⁴² Mladić argues in particular that a reasonable observer would consider that the Impugned Staff’s previous work on a closely-related case influences the Judges’ impartiality.⁴³

18. The Prosecution responds that the Appeal should be dismissed as the Trial Chamber reasonably concluded that Mladić’s fair trial rights were not infringed by the prior work assignments of the Impugned Staff now assigned to assist the Trial Chamber.⁴⁴ In response to Mladić’s argument that the Trial Chamber failed to address whether the assignment of the Impugned Staff violated Mladić’s right to be presumed innocent, the Prosecution submits that the Trial Chamber: (i) “dedicated its entire analysis to determining whether [his] fair trial rights had been infringed”; (ii) “examined the impact that the conduct of staff members has on judicial impartiality because [Mladić] presented [his] presumption of innocence argument in this way”; and (iii) “expressly concluded [that] there was no fair trial violation”.⁴⁵

19. The Prosecution further submits that Mladić makes inconsistent arguments and fails to show that the Trial Chamber erred in: (i) concluding that decision-making remains exclusively within the Judges’ domain and that staff members do not influence their decision-making ability; and (ii) relying on jurisprudence confirming that the conduct of staff assisting Judges is irrelevant to their impartiality.⁴⁶ Finally, the Prosecution submits that, in light of the Trial Chamber’s findings on the roles played by staff and Judges, Mladić fails to show that findings in the *Karadžić* Trial

more general statement made by the ECtHR actually supports his argument that his right to be presumed innocent has been violated in the present case (Appeal, para. 29, referring to ECtHR, Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal Limb), 2014, para. 216).

⁴¹ Appeal, paras 16(c), 36. See also Appeal, paras 35, 40. Mladić argues that the *Karadžić* Trial Judgement contains a number of findings that “go directly to the criminal responsibility of [Mladić] for crimes he is charged with in his own case” and “explicit legal findings that [his] participation in a JCE was proven ‘beyond reasonable doubt’” (Appeal, para. 38. See Appeal, paras 35-37, 39). In particular, Mladić considers that “statements made in the *Karadžić* judgment represent findings of guilt on specific elements of the crimes of which [Mladić] is accused” and that findings that he was a member of four different joint criminal enterprises are findings on his criminal responsibility (Appeal, para. 30).

⁴² Appeal, paras 31-33. Mladić submits that the Trial Chamber fails to explain why a reasonable observer would “unquestioningly” accept the proposition that Judges of the Tribunal will frequently be faced with evidence relating to the same facts which, as highly professional Judges, will not affect their impartiality (Appeal, para. 32).

⁴³ Appeal, para. 33. See also Appeal, paras 30, 37.

⁴⁴ Response, paras 1, 5.

⁴⁵ Response, para. 2.

⁴⁶ Response, para. 3.

Judgement, which were made by different Judges, have an impact on the Trial Chamber Judges' impartiality.⁴⁷

20. Mladić replies that because he “has recently learned” that a staff member of the Trial Chamber “claims on a social-networking site to be drafting the judgment in [his] case”, he is concerned that the Trial Chamber is drafting the trial judgement in his case before the submission of the parties' final trial briefs.⁴⁸

V. ANALYSIS

A. Preliminary Matters

21. In relation to Mladić's argument that the Appeal should be considered together with “other outstanding matters”,⁴⁹ the Appeals Chamber observes that, on 21 October 2016, the Trial Chamber denied Mladić's request for certification to appeal the Systemic Bias Decision.⁵⁰ Accordingly, any request to address this matter jointly with the present Appeal has become moot. Moreover, the Appeals Chamber notes that Mladić did not make a similar argument in his Scheduling Order Appeal,⁵¹ and that it dismissed the Scheduling Order Appeal on 2 December 2016.⁵²

22. Regarding Mladić's allegation that he is concerned that the Trial Chamber is drafting the trial judgement in his case before the submission of the parties' final trial briefs,⁵³ the Appeals Chamber recalls that a brief in reply must be limited to arguments in reply to the response brief and therefore should not contain new arguments.⁵⁴ The Appeals Chamber considers that Mladić's allegation in reply constitutes a new argument. In addition, the Appeals Chamber finds that this argument does not relate to the issues raised by the Impugned Decision and goes beyond the scope of the Appeal.⁵⁵ The Appeals Chamber therefore declines to consider this submission.

⁴⁷ Response, para. 4.

⁴⁸ Reply, para. 2.

⁴⁹ See *supra*, para. 11.

⁵⁰ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Defence Motion for Certification to Appeal Decision on Motion for a Stay of Proceedings or a Mistrial, 21 October 2016.

⁵¹ See Scheduling Order Appeal; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.7, Reply in Support of the Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defence Motion Regarding Scheduling Order, 14 October 2016. The Appeals Chamber notes that these submissions were filed after the present Appeal.

⁵² *Mladić* Appeal Decision of 2 December 2016, paras 36-37.

⁵³ See *supra*, para. 20.

⁵⁴ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Prosecution's Motion to Strike and on Appellant's Motion for Leave to File Response to Prosecution Oral Arguments, 5 March 2007, para. 13; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 30 May 2001 (Public Redacted Version), para. 70.

⁵⁵ See Certification Decision, para. 14.

23. Turning to the submissions on the standard of review, the Appeals Chamber disagrees with Mladić's proposition that the Impugned Decision was of a non-discretionary nature because it denied a motion that contained submissions relating to the presumption of innocence. The Appeals Chamber considers that the Impugned Decision concerns the engagement of staff to assist the Trial Chamber and recalls that a trial chamber's determination in this respect is a discretionary decision to which the Appeals Chamber must accord deference.⁵⁶ However, the Appeals Chamber emphasizes that trial chambers must exercise their discretion consistently with Articles 20 and 21 of the Statute, which require trial chambers to ensure that a trial is fair and expeditious.⁵⁷

B. Whether the Trial Chamber Failed to Provide a Reasoned Opinion

24. The Trial Chamber summarized Mladić's arguments as follows: (i) because of their involvement in the *Karadžić* case and participation in the drafting of the *Karadžić* Trial Judgement, the Impugned Staff were no longer impartial; (ii) the Impugned Staff's influence on the Trial Chamber's Judges is an association that may affect the Judges' impartiality; and (iii) Mladić's fair trial rights have therefore been violated.⁵⁸ Before turning to the merits of Mladić's submissions, the Trial Chamber noted that Mladić's substantive arguments appear to be based on allegations of bias or at least possible bias on the part of the Judges, as well as an appearance of bias resulting from allegedly prejudiced staff assisting those Judges.⁵⁹ It decided that, in order to determine whether there is cause to issue a decision to protect Mladić's fair trial rights, it would first consider the role of the Impugned Staff and whether they influence the Judges and then the allegations of judicial bias.⁶⁰ Having conducted this analysis and having found that the presumption of impartiality of the Judges in this case had not been rebutted, the Trial Chamber concluded that there had been "no violations of [Mladić's] fair trial or other rights".⁶¹

25. The Appeals Chamber is not convinced that the Trial Chamber failed to address Mladić's submissions in relation to the presumption of innocence. Even though the Trial Chamber did not expressly mention the presumption of innocence when reaching its conclusion on Mladić's fair trial rights,⁶² the Appeals Chamber recalls that the right to be presumed innocent is part of an accused's

⁵⁶ *Bizimungu et al.* Appeal Decision, para. 4. See also *supra*, para. 8.

⁵⁷ See *Nyiramasuhuko et al.* Appeal Judgement, para. 138; *Ildéphonse Nizeyimana v. The Prosecutor*, Case No. ICTR-00-55C-A, Judgement, 29 September 2014, para. 286; *Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 22.

⁵⁸ Impugned Decision, para. 2. The Trial Chamber also summarized Mladić's argument in reply that the Prosecution has ignored its main argument about the impact of the alleged staff bias on his presumption of innocence (Impugned Decision, para. 5).

⁵⁹ Impugned Decision, para. 17.

⁶⁰ Impugned Decision, para. 17.

⁶¹ Impugned Decision, para. 26. See also Impugned Decision, paras 18-25.

⁶² Impugned Decision, para. 26.

fair trial rights.⁶³ The Appeals Chamber recalls further that, while a trial chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning and to discuss each submission.⁶⁴ The Appeals Chamber finds that the Trial Chamber’s conclusion that there had been “no violations of [Mladić’s] fair trial or other rights”⁶⁵ encompassed Mladić’s submission that his presumption of innocence had been violated.

26. Moreover, having reviewed the 19 May 2016 Motion, the Appeals Chamber observes that, as correctly summarized by the Trial Chamber,⁶⁶ Mladić’s submissions were that the Impugned Staff’s work on the *Karadžić* case had an impact on their and on the Judges’ impartiality resulting in a violation of his fair trial rights, including the presumption of innocence.⁶⁷ The Appeals Chamber considers that the Trial Chamber gave due consideration to these arguments when it examined the role of the Impugned Staff and whether they influence the Judges⁶⁸ and the Judges’ impartiality,⁶⁹ in order to ultimately determine whether to issue a decision to protect Mladić’s fair trial rights.⁷⁰ Mladić’s submission that the Trial Chamber failed to provide a reasoned decision on his primary concern, the violation of his right to be presumed innocent, and focused instead on the presumption of impartiality attached to Judges is without merit.

27. Finally, the Appeals Chamber observes that Mladić’s argument that the presumption of innocence could be engaged at a level below the standard for judicial impartiality was not explicitly raised as such before the Trial Chamber. In so far as Mladić refers to his arguments that his

⁶³ See, e.g., Article 21 of the Statute.

⁶⁴ *Nyiramasuhuko et al.* Appeal Judgement, para. 105 and references cited therein. See also *Prosecutor v. Radovan Karadžić*, Cases Nos. IT-95-5/18-AR72.1, IT-95-5/18-AR72.2, IT-95-5/18-AR72.3, Decision on Radovan Karadžić’s Motions Challenging Jurisdiction (Omission Liability, JCE-III – Special Intent Crimes, Superior Responsibility), 25 June 2009, para. 30.

⁶⁵ Impugned Decision, para. 26. See also Impugned Decision, paras 18-25.

⁶⁶ See *supra*, para. 24.

⁶⁷ The Appeals Chamber observes that Mladić’s main argument in his 19 May 2016 Motion was that engaging the Impugned Staff raised concerns “about the ability of the Trial Chamber to respect the presumption of innocence, and the impact on judicial impartiality” and that the situation “has impacted the ability of the Judges to determine his case impartially, and, that his right to a fair trial has been compromised” (19 May 2016 Motion, paras 2, 7). Mladić then brought detailed arguments aimed at showing that the Impugned Staff was not impartial because they participated in the drafting of the *Karadžić* Trial Judgement which contains findings on Mladić’s guilt and that this bias of the Impugned Staff affects the impartiality of the Judges in this case (19 May 2016 Motion, paras 14-26. See also 19 May 2016 Motion, paras 10-13). In conclusion, Mladić submitted that the involvement of the Impugned Staff in the closely related *Karadžić* case creates an appearance of bias or an actual bias and that “therefore” his “rights to a fair trial and presumption of innocence have been compromised” (19 May 2016 Motion, paras 27-28. See also 19 May 2016 Motion, para. 30(b)). The Appeals Chamber observes that, in his reply, even though Mladić underlined that the Prosecution ignored that his central argument was about his right to be presumed innocent, he once more linked this argument with submissions on judicial impartiality (*Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defence Request for Leave to Reply in Support of Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial, 7 June 2016, Annex A (“Reply in Support of Motion for a Fair Trial and the Presumption of Innocence or, in the Alternative, a Mistrial”), paras 6-7).

⁶⁸ Impugned Decision, paras 17-20.

⁶⁹ Impugned Decision, paras 17, 21-26.

⁷⁰ Impugned Decision, paras 17, 26.

presumption of innocence was violated due to the Impugned Staff's prior involvement in drafting the *Karadžić* Trial Judgement,⁷¹ the Appeals Chamber considers that, in clarifying the role of staff in the decision-making process,⁷² the Trial Chamber provided sufficient reasoning for rejecting Mladić's arguments on this matter.

28. In light of the foregoing, the Appeals Chamber finds that Mladić has not demonstrated that the Trial Chamber failed to address, and to provide a reasoned opinion on, Mladić's allegation that his right to be presumed innocent had been violated.

C. Whether the Trial Chamber Erred in its Assessment of the Role of Staff

29. Turning to Mladić's submissions that the Trial Chamber erred in determining that bias of the Impugned Staff would not affect his right to be presumed innocent and implicitly acknowledged that a lack of impartiality of staff would be acceptable,⁷³ the Appeals Chamber considers that Mladić misunderstands the applicable law and the relevant findings of the Trial Chamber.

30. The Appeals Chamber is of the view that the Trial Chamber correctly recalled that the Impugned Staff provides assistance to the Judges while the decision-making remains entirely in the Judges' purview and that neither the Rules of Procedure and Evidence of the Tribunal nor the related jurisprudence provide for the disqualification of the Impugned Staff.⁷⁴ In doing so, the Trial Chamber did not acknowledge that a lack of impartiality of staff was acceptable, as Mladić suggests. Rather, the Trial Chamber considered that Mladić's submissions were based on the incorrect assumption that legal officers assisting Judges are subject to the same standards of impartiality as the Judges of the Tribunal, and that Mladić's submission was therefore ill-founded and irrelevant.⁷⁵ Moreover, the Appeals Chamber observes that the Trial Chamber did not limit itself to assess the question whether the standard of judicial impartiality was applicable to staff members but specifically examined the role of Impugned Staff in the Judges' decision-making process. Having considered the tasks allocated to the Impugned Staff in the present case, the Trial Chamber concluded that the assistance the Impugned Staff provides does not influence the decision-making ability of the Judges.⁷⁶ Recalling that legal officers merely provide assistance to the Judges in legal research and preparing draft decisions, judgements, opinions, and orders in

⁷¹ 19 May 2016 Motion, paras 24-26.

⁷² Impugned Decision, paras 18-20.

⁷³ See *supra*, para. 15.

⁷⁴ Impugned Decision, para. 18. See also Impugned Decision, para. 14, referring to *Bizimungu et al.* Appeal Decision, paras 5, 9; *Nyiramasuhuko et al.* Appeal Judgement, para. 273; *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, 27 March 2009 (public redacted version), para. 54.

⁷⁵ See Impugned Decision, paras 18, 20.

⁷⁶ Impugned Decision, para. 20.

conformity with the instructions given to them by the Judges and that the judicial decision-making is the sole purview of the Judges,⁷⁷ the Appeals Chamber sees no error in the Trial Chamber's approach. Mladić's argument that the Impugned Staff may have reached conclusions on the evidence tendered in the *Karadžić* case and may rely on these conclusions in the present matter merely shows disagreement with the Trial Chamber's assessment but falls short of demonstrating any error in the Trial Chamber's conclusion that Mladić's fair trial rights were not violated.⁷⁸

31. In light of the above, the Appeals Chamber finds that Mladić has failed to demonstrate an error in the Trial Chamber's assessment of the Impugned Staff's role.

D. Whether the Trial Chamber Erred by Introducing and Applying an Incorrect Standard for Judicial Impartiality

32. When addressing the "Bias of the Judges in the Present Case",⁷⁹ the Trial Chamber found:

[I]n accordance with the *Poppe*, *Miminošvili*, and *Khodorkovskiy* cases, the Chamber considers that even if a legal finding had been made in the *Karadžić* case related to the Accused, this would not be sufficient to cast doubt on a judge's impartiality unless the judge had found that the Accused's participation fulfilled all the relevant criteria necessary to constitute a criminal offence, and then had found the Accused guilty beyond a reasonable doubt of having committed that offence. The Chamber notes in this respect that not only did the Impugned Staff and judges in the present case not make any findings in the *Karadžić* case, the findings referenced by the Defence as having "convicted" the Accused neither establish the criteria to constitute a criminal offence, nor make findings on the criminal responsibility of the Accused.⁸⁰

33. Regarding Mladić's argument that the Trial Chamber erred by introducing and applying an incorrect legal standard for judicial impartiality,⁸¹ the Appeals Chamber observes that the ECtHR jurisprudence relied upon by the Trial Chamber relates to the impartiality of Judges sitting in overlapping criminal proceedings involving co-accused.⁸² However, none of the Judges in this case were members of the bench that delivered the *Karadžić* Trial Judgement. Accordingly, even if the Appeals Chamber were to consider this ECtHR jurisprudence authoritative, it would be of no relevance when assessing the impartiality of the Judges in the present case. Furthermore, since legal officers assisting Judges are not subject to the same standards of impartiality as the Judges of the Tribunal and that judicial decision-making is the sole purview of the Judges,⁸³ the jurisprudence at issue is not applicable to the Impugned Staff.

⁷⁷ See *supra*, para. 9.

⁷⁸ See Impugned Decision, para. 26.

⁷⁹ Impugned Decision, p. 8.

⁸⁰ Impugned Decision, para. 24.

⁸¹ See *supra*, para. 16.

⁸² See Impugned Decision, paras 11, 13.

⁸³ See *supra*, para. 9.

34. Nevertheless, the Trial Chamber effectively applied the ECtHR jurisprudence to findings made in the *Karadžić* Trial Judgement. Indeed, the Trial Chamber found that “the findings referenced by the Defence as having ‘convicted’ [Mladić] neither establish the criteria to constitute a criminal offence, nor make findings on [his] criminal responsibility”.⁸⁴ The Appeals Chamber considers that the Trial Chamber’s application of this jurisprudence was unnecessary to address the question whether the engagement of the Impugned Staff impacted on the impartiality of the Judges in this case and whether Mladić’s fair trial rights were violated. Whether the Trial Chamber was correct in its interpretation and application of the ECtHR jurisprudence would therefore have no impact on the outcome of the Impugned Decision. Accordingly, given that the question whether or not the ECtHR jurisprudence is applicable at the Tribunal and has been correctly applied by the Trial Chamber does not have the potential to cause the Impugned Decision to be reversed or revised,⁸⁵ the Appeals Chamber finds it unnecessary to address the merits of this argument.

35. For the same reasons, the Appeals Chamber finds it unnecessary to address on the merits Mladić’s submissions aimed at demonstrating that, even if the standard for judicial impartiality derived from the ECtHR jurisprudence would be applicable, the Trial Chamber erred in its application to the facts of this case.⁸⁶

36. In light of the foregoing, the Appeals Chamber finds that Mladić fails to demonstrate an error of the Trial Chamber, warranting the Appeals Chamber’s intervention, in relation to the legal standard for impartiality applied by the Trial Chamber.

E. Whether the Trial Chamber Erred in its Application of the Reasonable Observer Test

37. When addressing whether the impartiality of the Judges in this case could be affected by the Impugned Staff’s involvement in the *Karadžić* case, the Trial Chamber found that, even though “there is a considerable degree of overlap between the *Karadžić* case and the present case”, “a properly informed and reasonable observer would not consider [...] that the judges in the present case ha[ve] failed to maintain the high degree of integrity and impartiality to which they are sworn, even if they or the Impugned Staff had worked on both cases.”⁸⁷ It added that a properly informed and reasonable observer would not expect that the Judges in this case would do anything other than rule fairly on the issues before them, relying exclusively on the evidence adduced in the present case, even if they or their staff had been exposed to evidence in both cases.⁸⁸ The Trial Chamber

⁸⁴ Impugned Decision, para. 24.

⁸⁵ See, e.g., *Stanišić and Župljanin* Appeal Judgement, para. 24; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Judgement, 8 April 2015, para. 13; *Nyiramasuhuko et al.* Appeal Judgement, para. 34.

⁸⁶ See *supra*, para. 16.

⁸⁷ Impugned Decision, para. 22.

⁸⁸ Impugned Decision, para. 23.

concluded that the presumption of impartiality attached to the Judges in this case had not been rebutted on the basis that the Impugned Staff had worked on an overlapping case in which factual findings were made in relation to Mladić.⁸⁹

38. With respect to Mladić's argument that the Trial Chamber failed to sufficiently reason its conclusions relating to the application of the reasonable observer test,⁹⁰ the Appeals Chamber considers that Mladić's arguments effectively amount to a challenge to how the reasonable observer test has been interpreted in the case law. The Appeals Chamber is of the view that Mladić's argument reflects his disagreement with the jurisprudence relied upon by the Trial Chamber and set out in detail in the applicable law section of the Impugned Decision,⁹¹ as well as with the Trial Chamber's reliance on this jurisprudence when assessing whether the Impugned Staff's involvement in the *Karadžić* case could lead to an appearance of bias of the Judges in this case⁹² without explaining how the Trial Chamber erred in following this case law. The Appeals Chamber finds that Mladić fails to demonstrate an error in the Trial Chamber's reasoning.

39. Moreover, the Appeals Chamber recalls that “‘mere assertions to the effect that a staff member may influence a Judge during deliberations or the adjudication process are not a sufficient basis, in and of themselves’, to create in the mind of a reasonable observer, properly informed, an appearance of bias or to rebut the presumption of impartiality of judges.”⁹³ Accordingly, the Appeals Chamber does not consider that a staff's previous work on an overlapping case is, in and of itself, sufficient to impugn the Judges' impartiality or the appearance thereof. The Appeals Chamber therefore finds no merit to Mladić's argument that a reasonable observer would consider that the fact that the Impugned Staff previously worked on the closely-related *Karadžić* case, is sufficient to rebut the impartiality of the Judges in this case.

40. In light of the above, the Appeals Chamber finds no merit to Mladić's argument that the Trial Chamber insufficiently reasoned and erred in its application of the reasonable observer test for judicial impartiality.

⁸⁹ Impugned Decision, para. 26.

⁹⁰ See *supra*, para. 17.

⁹¹ Impugned Decision, paras 9-10.

⁹² Impugned Decision, paras 22-23.

⁹³ *Hategekimana* Appeal Judgement, para. 20, quoting *Bizimungu et al.* Appeal Decision, para. 10.

VI. DISPOSITION

41. For the foregoing reasons, the Appeals Chamber:

DISMISSES the Appeal.

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

Dated this twenty-seventh day of February 2017,
At The Hague,
The Netherlands.



Judge Carmel Agius
Presiding Judge

[Seal of the Tribunal]