

**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 Nos. IT-09-92-AR73.6
IT-09-92-AR73.7
Date: 26 October 2016
Original: English

THE PRESIDENT OF THE TRIBUNAL

Before: Judge Liu Daqun, Acting President

Registrar: Mr. John Hocking

Decision of: 26 October 2016

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON RATKO MLADIĆ'S MOTION FOR
DISQUALIFICATION OF JUDGE THEODOR MERON**

Counsel for Ratko Mladić:

Mr. Branko Lukić
Mr. Miodrag Stojanović

The Office of the Prosecutor:

Mr. Peter McCloskey
Mr. Alan Tieger

1. **I, Liu Daqun**, Acting President 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 (“Tribunal”), am seised of the “Appellant’s Motion Pursuant to Rule 15(B) Seeking Disqualification of Judge Theodor Meron from the Appeals Chamber”, filed by Ratko Mladić (“Mladić”) in Cases Nos. IT-09-92-AR73.6 & IT-09-92-AR73.7, on 10 October 2016 (“Motion”).

I. BACKGROUND

2. On 4 July 2016, Trial Chamber I of the Tribunal (“Trial Chamber”) issued a decision rejecting Mladić’s allegations that his fair trial rights have been violated by the integration of Chambers staff who previously worked for the trial chamber seized of the case of *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, and denying his request for information or materials related to Chambers personnel or, alternatively, for a declaration of mistrial.¹

3. On 9 September 2016, the Trial Chamber issued a scheduling order setting 25 October 2016 as the date for the filing of final trial briefs by Mladić and the Office of the Prosecutor (“Prosecution”).²

4. The Trial Chamber granted certification to appeal the Decision of 4 July 2016 and the Scheduling Order on 27 September 2016³ and 28 September 2016,⁴ respectively. On 4 October 2016, Mladić filed the “Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defence Motion for a Fair Trial and Presumption of Innocence”, and on 5 October 2016, Mladić filed the “Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defence Motion Regarding Scheduling Order” (together, “Mladić’s Interlocutory Appeals”).⁵

¹ *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 (“Decision of 4 July 2016”), paras 1, 26-27.

² *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Scheduling Order, 9 September 2016 (“Scheduling Order”), p. 4.

³ *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, para. 16.

⁴ *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, para. 13.

⁵ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.6, Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defense Motion for a Fair Trial and Presumption of Innocence, 4 October 2016; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.7, Interlocutory Appeal Brief Challenging the Decision of the Trial Chamber on the Defense Motion Regarding Scheduling Order, 5 October 2016.

5. On 6 October 2016, the President of the Tribunal assigned a bench of the Appeals Chamber of the Tribunal (“Appeals Chamber”) to hear each of Mladić’s Interlocutory Appeals, both benches including Judge Theodor Meron (“Judge Meron”).⁶

6. On 13 October 2016, following the filing of the Motion, the President of the Tribunal withdrew, pursuant to Rule 15(A) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), from considering the Motion and assigned me to consider it in his place both as Presiding Judge and President of the Tribunal for the purpose of Rule 15(B) of the Rules.⁷

7. The Motion seeks the voluntary withdrawal or the disqualification of Judge Meron from the Mladić’s Interlocutory Appeals on the grounds of an alleged appearance of bias by reason of prejudgement.⁸ On 11 October 2016, the Prosecution filed a response arguing that the Motion should be dismissed.⁹ On 17 October 2016, Mladić requested leave to file a reply and attached his reply to the request.¹⁰

II. APPLICABLE LAW

8. Article 21(3) of the Statute of the Tribunal (“Statute”) guarantees that an accused shall be presumed innocent until proven guilty. In addition, the Statute and the Rules guarantee an accused’s right to be tried by impartial judges.¹¹ Rule 15(A) of the Rules specifically 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. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

⁶ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.6, Order Assigning Judges to a Case before the Appeals Chamber, 6 October 2016, p. 1; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.7, Order Assigning Judges to a Case before the Appeals Chamber, 6 October 2016, p. 1.

⁷ *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.6, Order Assigning Motions to a Judge, 13 October 2016, p. 2; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.7, Order Assigning Motions to a Judge, 13 October 2016, p. 2.

⁸ Motion, paras 1, 19-25.

⁹ *Prosecutor v. Ratko Mladić*, Case Nos. IT-09-92-AR73.6 & IT-09-92-AR73.7, Consolidated Prosecution Response to Mladić’s Motions pursuant to Rule 15(B) Seeking disqualification of Judges Carmel Agius, Theodor Meron and Fausto Pocar, 11 October 2016 (“Response”), paras 1, 7.

¹⁰ *Prosecutor v. Ratko Mladić*, Case Nos. IT-09-92-AR73.6 & IT-09-92-AR73.7, Appellant’s Motion for Leave to Reply in Support of Motions Pursuant to Rule 15(B) seeking disqualification of Judges Carmel Agius, Theodor Meron, and Fausto Pocar, 17 October 2016 (“Motion for Leave to Reply”); Annex A, Appellant’s Reply in Support of Motions Pursuant to Rule 15(B) Seeking Disqualification of Judges Carmel Agius, Theodor Meron, and Fausto Pocar, 17 October 2016 (“Reply”).

¹¹ See Article 13 of the Statute; Rule 14(A) of the Rules. See also *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 16 May 2008 (original French version filed on 28 November 2007) (“*Nahimana et al. Appeal Judgement*”), para. 47; *Édouard Karemera et al.*, Case No. ICTR-98-44-AR75.15, Decision on Joseph Nzirorera’s Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge’s Written Assessment of a Member of the Prosecution Team, 5 May 2009 (“*Karemera 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. 16.

9. The Appeals Chamber has held that “there is a general rule 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.”¹² On this basis, the Appeals Chamber has considered that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge’s disqualification from the case is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹³

10. With respect to the reasonable observer prong of this test, 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 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.”¹⁴

11. The Appeals Chamber has also emphasised that there is a presumption of impartiality that attaches to any judge of the Tribunal and considered that, in the absence of evidence to the contrary, it must be assumed that the judges of the Tribunal “can disabuse their minds of any irrelevant personal beliefs or predispositions.”¹⁵ Accordingly, the party who seeks the disqualification of a judge bears the burden of adducing sufficient evidence that the judge is not impartial.¹⁶ In this respect, the Appeals Chamber has consistently held that there is a high threshold to reach to rebut the presumption of impartiality.¹⁷ The party must demonstrate that “there is a reasonable

¹² *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”), para. 189.

¹³ *Furundžija* Appeal Judgement, para. 189. See also, e.g., *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), paras 682-683; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgment, 23 November 2001 (original French version filed on 1 June 2001) (“*Akayesu* Appeal Judgement”), para. 203; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 (“*Galić* Appeal Judgement”), para. 39; *Nahimana et al.* Appeal Judgement, para. 49.

¹⁴ *Furundžija* Appeal Judgement, para. 190. See also, e.g., *Čelebići* Appeal Judgement, para. 683; *Galić* Appeal Judgement, para. 40; *Nahimana et al.* Appeal Judgement, para. 50.

¹⁵ *Furundžija* Appeal Judgement, paras 196-197. See also, e.g., *Akayesu* Appeal Judgement, paras. 91, 269; *Galić* Appeal Judgement, para. 41; *Nahimana et al.* Appeal Judgement, para. 48; *Karempera et al.* Appeal Decision, para. 11; *Hategekimana* Appeal Judgement, para. 16.

¹⁶ *Furundžija* Appeal Judgement, para. 197. See also, e.g., *Akayesu* Appeal Judgement, para. 91; *Galić* Appeal Judgement, para. 41; *Nahimana et al.* Appeal Judgement, para. 48; *Hategekimana* Appeal Judgement, para. 16.

¹⁷ *Furundžija* Appeal Judgement, para. 197. See also, e.g., *Čelebići* Appeal Judgement, para. 707; *Galić* Appeal Judgement, para. 41.

apprehension of bias by reason of prejudgement” that is “firmly established”.¹⁸ The Appeals Chamber has explained that this high threshold is required because, “just as any real appearance of bias o[n] 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”.¹⁹

12. Furthermore, Rule 15(B)(i) of the Rules provides that:

Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question and prepare a report which shall include any comments or material provided by the challenged Judge. The Presiding Judge shall present this report to the President.

III. DISCUSSION

A. Submissions of the parties

13. Mladić submits that Judge Meron should be disqualified from the benches that were composed to determine Mladić’s Interlocutory Appeals because a reasonable observer would reasonably apprehend bias on his part.²⁰ Mladić argues that Judge Meron, as then-President of the Tribunal, made prejudicial statements indicating prejudgement of Mladić’s guilt.²¹ To support his claim, Mladić points to: (i) a statement of 6 August 2003, in which Judge Meron, as then-President of the Tribunal, is quoted by a news agency as saying: “[...] the tribunal will not consider its work done until [Radovan] Karadžić and Mladić are brought to justice”; and (ii) Judge Meron’s address to the Security Council of the United Nations (“Security Council”) of 9 October 2003 where he stated that “the mission of the Tribunal has not been to try all those who have committed violations of international humanitarian law, but those most responsible for major atrocities. That mission will not be completed until we have tried, in particular, Mladić and [Radovan] Karadžić.”²²

¹⁸ *Furundžija* Appeal Judgement, para. 197. See also, e.g., *Čelebići* Appeal Judgement, para. 707.

¹⁹ *Čelebići* Appeal Judgement, para. 707.

²⁰ Motion, paras 17, 25.

²¹ Motion, paras 19, 23. In this respect, Mladić contends that while judges in domestic context do not normally comment on the cases before them, the role assumed by the President in international tribunals is incompatible with such guardedness and that the approach to the presidency mixing quasi-diplomatic activities with pure judicial functions makes the Mechanism President vulnerable to actual or reasonably apprehended bias. See Motion, para. 22.

²² Motion, paras 20-21, referring to “President Meron calls the continuing run of Karadžić and Mladić a disgrace”, “News and Archives & categories” on the Tribunal Intranet, 6 August 2003 (“Statement of 6 August 2003”), “Address Of Judge Theodor Meron, President Of The International Criminal Tribunal For The Former Yugoslavia, To The United Nations General Assembly”, Press Release, JL/P.I.S./789-e, 10 October 2003 (“Statement of 9 October 2003”) (together, “Statements”).

14. Mladić further contends that Judge Meron, as now President of the International Residual Mechanism for Criminal Tribunals (“Mechanism”), demonstrated a reasonable apprehension of bias by violating his procedural rights.²³ Mladić takes issue with a decision from Judge Meron denying his request for access to confidential materials from another case, despite the fact that the time for him to request leave to reply had not expired, which he argues constitutes a violation of his procedural rights and provides evidence of a reasonable apprehension of bias.²⁴

15. Mladić requests the voluntary withdrawal or the disqualification of Judge Meron from Mladić’s Interlocutory Appeals and the assignment of another Judge in his place, or in the alternative, the assignment of the Motion to the Bureau pursuant to Rule 15 of the Rules.²⁵

16. The Prosecution responds that the Motion should be dismissed as Mladić does not show that a reasonable observer, properly informed, would reasonably apprehend bias by the Statements made by Judge Meron.²⁶ The Prosecution submits that the Statements simply provide updates on the pending judicial work of the Tribunal and were made subsequent to the indictment of Mladić.²⁷ It further argues that, read in the context of the President of the Tribunal’s role and the fora in which the Statements were made, a reasonable observer would know that the Statements reflect an institutional perspective and do not evidence the attribution of responsibility for crimes to Mladić.²⁸ The Prosecution further submits that Judge Meron’s denial of Mladić’s request for access to confidential materials before the expiry of time to request leave to reply does not suggest a predisposition in relation to Mladić’s guilt or innocence.²⁹

17. Mladić replies, *inter alia*, that neither the Statute nor the Rules state that the President of the Tribunal’s role involves public commentary on cases, or potential cases before the Tribunal.³⁰

²³ Motion, para. 24.

²⁴ Motion, para. 24 referring to *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Request for Access to Confidential Materials from [REDACTED], 9 September 2016 (confidential) (“Mechanism Decision of 9 September 2016”), p. 3.

²⁵ Motion, para. 30.

²⁶ Response, paras 1, 7.

²⁷ Response, paras 4-5.

²⁸ Response paras 4-5.

²⁹ Response, para. 6. The Prosecution also argues that procedural irregularities would be a matter for a request for reconsideration rather than for disqualification and that Mladić has actually filed such a request that is currently pending before the Mechanism. Response, para. 6, referring to *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Defense Request for Reconsideration for the Request to Access to Confidential Materials from [REDACTED] or in the Alternative for the Matter to be Transferred to a Panel of Judges under Rule 18(B), 16 September 2016 (confidential) (“Request for Reconsideration of the Mechanism Decision of 9 September 2016”).

³⁰ Reply, para. 7. I consider that I would benefit from submissions in reply on the issue to adjudicate the Motion. Therefore, pursuant to Rule 126*bis* of the Rules, I grant the Motion for Leave to Reply and accept the Reply attached as an annex to the Motion for Leave to Reply as validly filed.

B. Analysis

18. On 17 October 2016 and pursuant to Rule 15(B) of the Rules, I consulted with Judge Meron regarding the Motion.³¹ Judge Meron considers that there is no merit in Mladić's request for his disqualification from Mladić's Interlocutory Appeals. In Judge Meron's view, the Statements do not demonstrate any bias or lead to a reasonable apprehension of bias by reason of prejudgement. Rather, the Statements made while he was President of the Tribunal, reflected the opinion that Radovan Karadžić and Mladić should be arrested and tried before the Tribunal, in accordance with the Rules. Judge Meron further indicates that his reference to the Tribunal's mission to try those individuals who are the most "responsible for" major atrocities was simply a reference to the scope of the jurisdiction of the Tribunal as defined in Article 1 of the Statute. As for the Mechanism Decision of 9 September 2016, Judge Meron expresses the view that the fact that it was issued before Mladić requested a leave to reply does not demonstrate bias on his part as to the merit of Mladić's case.

19. I find that Mladić misrepresents the Statements he relies on to support his claim and ignores the context in which they were made.³² I consider that a reasonable observer would know that the Statements were made by Judge Meron in his capacity as President of the Tribunal and for the Statement of 9 October 2003 in the context of his reporting obligations to the Security Council as required by the Statute.³³ Furthermore, a reasonable observer would also know that the Statements were made while Mladić was still at large, after an indictment against Mladić was confirmed and an international arrest warrant had been issued.³⁴ In these circumstances, a reasonable observer would understand the Statement of 6 August 2003 as referring to the commitment of the Tribunal, in accordance with the relevant rules, to apprehend Mladić and to *try* him in a court of law on the counts of the indictment, rather than referring to Mladić's guilt. Such an interpretation is supported

³¹ I recall that when the Presiding Judge and the President of the Tribunal is the same person, the requirement of Rule 15(B)(i) of the Rules that the Presiding Judge report to the President of the Tribunal becomes inapplicable. See *Prosecutor v. Micó Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Decision on Motion Requesting Recusal, 3 December 2013, para. 21; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Decision on Motion for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings, 2 December 2009, para. 3; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Decision on Motion for Disqualification, 6 November 2009, para. 5.

³² In relation to the Statement of 6 August 2003, I note that Mladić merely is pointing to the "News and Archives & categories" section of the Tribunal intranet which summarizes for internal purposes a dispatch from the news service *Agence France Presse* without referring to the actual press article quoting Judge Meron. Nevertheless, I considered Mladić's argument regarding the Statement of 6 August 2003 on the merit.

³³ See Article 34 of the Statute.

³⁴ *Prosecutor v. Radovan Karadžić & Ratko Mladić*, Cases No. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, p. 58. See also *Prosecutor v. Ratko Mladić*, Case No. IT-95-5/18-I, Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 11 November 2002. Mladić has remained at large until his arrest in the Republic of Serbia on 26 May 2011 and was transferred to the seat of the Tribunal on 31 May 2011. *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-I, Order for Detention on Remand, 31 May 2011, p. 2.

by a plain reading of the Statement of 9 October 2003 in which Judge Meron explicitly stated that the mission of the Tribunal “will not be completed until we have *tried*, in particular, Mladić and Karadžić”³⁵

20. Similarly, I cannot detect any apprehension of bias in the Statement of 9 October 2003. Judge Meron’s reference to “those most responsible for major atrocities” merely reflects Article 1 of the Statute which states that the Tribunal “shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute” and the Tribunal’s completion’s strategy to focus on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the Tribunal’s jurisdiction.³⁶ In my view, this cannot be interpreted as a prejudgement of the individual criminal responsibility of Mladić.

21. Accordingly, I find, in light of the circumstances in which they were pronounced, that the Statements do not provide any indication that Judge Meron expressed a prejudgement in favour of Mladić’s conviction. Therefore, there is no support for Mladić’s argument that a reasonable observer, properly informed, would reasonably apprehend bias on the part of Judge Meron on the basis of the Statements.

22. Regarding the Mechanism Decision of 9 September 2016, I recall that while the possibility is not ruled out that decisions rendered by a judge or a chamber could suffice to establish bias, it has been held that this would be “truly extraordinary”.³⁷ I find that Mladić has failed to substantiate his contention that Judge Meron, in his capacity as the now President of the Mechanism, disclosed bias against him on the basis that Judge Meron issued a decision before the expiration of the time for Mladić to request a leave to reply. Assuming, *arguendo*, that the Mechanism Decision of 9 September 2016 would constitute a procedural irregularity,³⁸ Mladić merely speculates that this irregularity is attributable to a predisposition in relation to his guilt or innocence without rebutting the presumption of impartiality on the part of Judge Meron.

23. In light of the foregoing, I consider that the strong presumption of impartiality of Judge Meron has not been rebutted and that the Motion is without merit. Because Mladić has failed to

³⁵ Statement of 9 October 2003 (emphasis added).

³⁶ See Security Council Resolution 1503 (2003), UN Doc. S/RES/1503(2003), 28 August 2003, p. 1.

³⁷ *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015, para. 407; *Ferdinand Nahimana v. The Prosecutor*, Case No. ICTR-99-52B-R, Decision on Request for Disqualification of Judge Pocar, 6 June 2012, para. 17, referring to *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-PT, Decision on Blagojević’s Application Pursuant to Rule 15(B), 19 March 2003, para. 14.

³⁸ I note that the Mechanism Decision of 9 September 2016 was issued by the Mechanism and that there is a pending request for reconsideration filed by Mladić regarding this issue. See Request for Reconsideration of the Mechanism Decision of 9 September 2016.

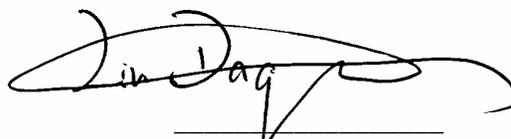
substantiate any of his claims that a reasonable, informed observer would reasonably apprehend bias on basis of a prejudgement of guilt against Mladić from Judge Meron, I consider that it is not necessary to appoint a panel of three judges pursuant to Rule 15(B) of the Rules to consider the Motion.

IV. DISPOSITION

24. For the foregoing reasons and pursuant to Rule 15 of the Rules, I hereby **DENY** the Motion.

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

Dated this twenty sixth day of October 2016,
at The Hague,
The Netherlands.



Judge Liu Daqun

[Seal of the Tribunal]