IT-95-5/18-PT
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18 MAY 2009

15852

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-95-5/18-PT

Date: 18 May 2009

Original: English

THE VICE-PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: **Judge O-Gon Kwon, Vice-President**

Registrar: **Mr. John Hocking**

Decision of: **18 May 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION TO DISQUALIFY JUDGE PICARD

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

I, O-Gon Kwon, Vice-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 ("International Tribunal"), acting pursuant to Rules 15 and 21 of the Rules of Procedure and Evidence ("Rules"), render the following decision in relation to the "Motion to Disqualify Judge Picard" ("Motion"), filed by Radovan Karadžić ("Karadžić") on 1 May 2009 before Judge Iain Bonomy, the Presiding Judge of Trial Chamber III ("Presiding Judge").

I. BACKGROUND

1. In the Motion, Karadžić requests the disqualification of Judge Michèle Picard from all further proceedings in this case.[1] On 7 May 2009, the Presiding Judge, after conferring with Judge Picard, presented the President of the International Tribunal with a report in relation to the Motion in accordance with Rule 15(B)(i) of the Rules ("Report of the Presiding Judge"),[2] which 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 report to the President.

On 8 May 2009, in accordance with Rule 15(A) of the Rules, the President withdrew from considering the Report of the Presiding Judge on the basis that his prior role as Presiding Judge of Karadžić's pre-trial bench gives rise to a conflict of interest. Accordingly, the President assigned me, pursuant to Rule 21 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), to consider the Report of the Presiding Judge in his place.[3] On 12 May 2009, the Prosecution filed a response to the Motion ("Response").[4]

II. APPLICABLE LAW

2. Rule 15(A) of the Rules 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.

[1] Motion, paras 1 and 27.
[2] Report by Presiding Judge to President on Motion to Disqualify Judge Picard, 7 May 2009 ("Report of the Presiding Judge"). The Report is attached as Annex A to this Decision.
[3] Order Assigning Motion to Vice-President, 8 May 2009.
[4] Prosecution Response to Motion to Disqualify Judge Picard, 12 May 2009 ("Response").

The Appeals Chamber has held that "a Judge is not impartial if it is shown that actual bias exists." An unacceptable appearance of bias exists if:

> 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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> the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[5]

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 judicial 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."[6]

3. The Appeals Chamber has also emphasized that there is an assumption of impartiality that attaches to a Judge.[7] Accordingly, the party who seeks the disqualification of a Judge bears the burden of adducing sufficient evidence that the Judge is not impartial, and there is a high threshold to rebut the presumption of impartiality.[8] The party must demonstrate "a reasonable apprehension of bias by reason of prejudgement" which is "firmly established."[9] The Appeals Chamber has explained that this high threshold is required because "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 is the real appearance of bias itself."[10]

III. SUBMISSIONS

4. In the Motion, Karadžić asserts that the disqualification of Judge Picard is warranted due to decisions and public statements that she issued while President of the Human Rights Chamber of Bosnia and Herzegovina ("HRC") from 1997 to 2003, which "reflect an unacceptable appearance of

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[5] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Motion for Disqualification, 12 January 2009 ("*Lukić and Lukić* Decision"), para. 2; *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008 ("*Blagojević* Decision"), para. 2; *Prosecutor v. Vojislav Šešelj*, Decision on Motion for Disqualification, 16 February 2007 ("*Šešelj* Decision"), para. 4; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeals Judgement"), para. 189.

[6] *Lukić and Lukić* Decision, para. 2; *Blagojević* Decision, para. 2; *Šešelj* Decision, para. 5; *Furundžija* Appeals Judgement, para. 190.

[7] *Lukić and Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Šešelj* Decision, para. 5; *Furundžija* Appeals Judgement, para. 196.

[8] *Lukić and Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Šešelj* Decision, para. 5; *Furundžija* Appeals Judgement, para. 197.

[9] *Lukić and Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Furundžija* Appeals Judgement, para. 197; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeals Judgement"), para. 707.

[10] *Lukić and Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Čelebići* Appeals Judgement, para. 707.

bias, such that a reasonable observer, properly informed, would reasonably apprehend bias."[11] In support of his contention, he relies on a decision over which Judge Picard presided in what are known as the "Srebrenica Cases", which was issued by the HRC on 7 March 2003 ("Srebrenica Decision").[12] He also cites decisions issued by the HRC in the *Mujić* and *Smajić* cases upon which Judge Picard sat ("*Mujić* Decision and *Smajić* Decision, respectively"),[13] a letter from Judge Picard to the High Representative of Bosnia and Herzegovina sent on 14 October 2003 ("Letter to the High Representative"),[14] an article that Judge Picard co-authored in 2007 ("Article"),[15] and statements made by Judge Picard in HRC Annual Reports and newspaper articles.[16]

5. Karadžić submits that in the Srebrenica Decision, Judge Picard "described the events in Srebrenica as 'the largest and most horrific mass execution of civilians in Europe in the second half of the twentieth century'" and concluded that: (a) the "authorities of the [Republika Srpska] had within their 'possession or control' information about the Bosniak men from Srebrenica who where [*sic*] captured and then executed"; (b) "there had been 'attempts by the RS Army to cover up or destroy information about the Srebrenica events'"; and (c) "there still must have been some information accessible after 14 December 1995 for the authorities of the Republika Srpska to draw upon to respond to the requests for information from the families of the missing Bosniak Men from Srebrenica."[17] He submits that in support of these statements, Judge Picard cited publicly disclosed material accompanying the indictment in his case ("Indictment").[18]

6. Karadžić asserts that the Srebrenica events are of significant importance to the Prosecution's case, which is demonstrated by the fact that the Indictment contains allegations regarding his "significant [contributions] to achieving the objective of eliminating the Bosnian Muslims in Srebrenica" and that "[t]he Srebrenica events are contained in a separate count of genocide."[19] Karadžić also asserts that in the Srebrenica Decision, Judge Picard pre-judged the issue of "his connection to the formation of the Republika Srpska and to the acts of its authorities and the armed forces", which was raised in the Indictment.[20] He further argues that Judge Picard's conclusion in

[11] Motion, para. 1.
[12] Motion, paras 7 and 9-14 (citing *Selimović et al. v. Republika Srpska*, Case Nos. CH/01/8365 et al., Decision on Admissibility and Merits, 7 March 2003 ("Srebrenica Decision")).
[13] Motion, paras 15-16 (citing *Mujić et al. v. Republika Srpska*, Case Nos. CH/02/10235 et al., 22 December 2003 ("*Mujić* Decision"); *Smajić et al. v. Republika Srpska*, Case Nos. CH/02/8879 et al., 5 December 2003, para. 1 ("*Smajić* Decision")).
[14] Motion, para. 18.
[15] Motion, para. 17.
[16] Motion, para. 18.
[17] Motion, paras 9-11.
[18] Motion, para. 11.
[19] Motion, para. 12.
[20] Motion, para. 13.

the Srebrenica Decision that "the authorities of the Republika Srpska were *directly involved*" in the Srebrenica events amounts to a *prima facie* finding of his responsibility for such events, creating a reasonable apprehension of bias.[21]

7. Karadžić submits that the *Mujić* Decision and the *Smajić* Decision involve events in two municipalities, Bratunac and Višegrad, where he is alleged in the Indictment to be responsible for crimes.[22] He submits that the HRC found in each Decision that the authorities of the Republika Srpska failed "to clarify the fate and whereabouts of the presumed victims" and "were *directly involved* in the disappearances." He further submits that "[i]n finding the Republika Srpska liable for violations of the applicants' rights to information about their missing family members, the Chamber described the reaction of the 'authorities of the Republika Srpska' as 'complacen[t] or indifferen[t]'."[23]

8. Karadžić submits that in the Article, Judge Picard discusses the Srebrenica Decision as well as a report that the Republika Srpska submitted in response to that Decision.[24] Karadžić contends that the Article contains statements that criticize the Republika Srpska for failing to make efforts to find missing persons and for minimizing the seriousness of crimes committed in Srebrenica.[25]

9. Karadžić asserts that in the Letter to the High Representative, Judge Picard "express[ed] her criticism that the Republika Srpska had not contacted any families about the fate or whereabouts of missing relatives."[26] He also cites HRC Annual Reports and newspaper articles in which Judge Picard criticized the Republika Srpska and a public statement made by Judge Picard in 2002, in which she praised the Republic of Bosnia and Herzegovina for its implementation of HRC decisions while criticizing the Republika Srpska for its sporadic implementation of such decisions.[27]

10. Finally, Karadžić asserts that "[t]he fact that Judge Picard served for seven years on a body created solely by the Dayton Agreements indicates a bias towards the legitimacy of those agreements and those who engineered them – a fact which will be very much at issue in the present trial as well as in a preliminary motion concerning the 'Holbrooke Agreement'."[28]

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[21] Motion, para. 13.
[22] Motion, para. 15.
[23] Motion, para. 16.
[24] Motion, para. 17.
[25] Motion, para. 17.
[26] Motion, para. 18.
[27] Motion, paras 18-19.
[28] Motion, para. 8.

11. In its Response, the Prosecution asserts that the Motion should be dismissed because "[a] reasonable observer, properly informed of all the relevant circumstances, including the nature of the [HRC] and its decisions, would not apprehend bias on the part of Judge Picard."[29] In support of its assertion, the Prosecution submits that the HRC's jurisdiction was temporally and materially distinct from the proceedings against Karadžić before the International Tribunal. The Prosecution explains that its jurisdiction was temporally limited to events after 14 December 1995, which postdates the time relevant to the Indictment, and that its material jurisdiction was limited to allegations of violations by parties to the General Framework Agreement for Peace in Bosnia and Herzegovina ("Agreement") and did not include individual responsibility.[30] The Prosecution concludes that "Judge Picard's involvement in a jurisdiction temporally and materially distinct from the Tribunal's jurisdiction does not raise an apprehension of bias."[31]

12. In terms of the HRC decisions cited in the Motion, the Prosecution submits that the Srebrenica Decision did not concern crimes committed in July 1995 but rather the Republika Srpska's failure to provide information to the families of victims of Srebrenica after 14 December 1995,[32] while the *Mujić* Decision and *Smajić* Decision concerned the Republika Srpska's failure to provide information to families of missing persons from Bratunac and Višegrad, respectively after 14 December 1995.[33]

13. The Prosecution also submits that the background facts in the Srebrenica Decision, as well as statements regarding Republika Srpska's involvement in and knowledge of the July 1995 disappearances, were based on findings in the *Prosecutor v. Krstić* trial judgement ("*Krstić* Trial Judgement").[34] Furthermore, the Prosecution asserts that the characterization of the Srebrenica events as the "largest and most horrific mass execution of civilians in Europe in the second half of the twentieth century" reflected the tenor of that Judgement.[35] Similarly, the Prosecution asserts that the background facts in the *Mujić* Decision are based on the sentencing judgement in the case of *Prosecutor v. Plavšić* ("*Plavšić* Sentencing Judgement") and ICTY Indictments related to Plavšić, while the background facts in the Smajić Decision are based on the *Prosecutor v. Vasiljević* trial judgement ("*Vasiljević* Trial Judgement").[36]

[29] Response, para. 2.
[30] Response, para. 3.
[31] Response, para. 13.
[32] Response, para. 5.
[33] Response, para. 8.
[34] Response, para. 6.
[35] Response, para. 7.
[36] Response, para. 8.

14. The Prosecution contends that the other statements by Judge Picard cited in the Motion "concern the [HRC's] mandate over human rights violations occurring after 14 December 1995 and/or recount the Srebrenica Decision discussed above. They do not constitute any form of advocacy or activism relevant to the current proceedings against Karadžić."[37]

15. The Prosecution also argues that Karadžić's claim of apparent bias is not supported by the jurisprudence of the International Tribunal, noting that Judges of the International Tribunal "will not be disqualified merely because they sit on two cases arising out of the same events".[38] It further claims that the other cases upon which Karadžić relies in support of his Motion are not analogous to the present case.[39]

IV. DISCUSSION

16. In the Report of the Presiding Judge, the Presiding Judge concludes that, after conferring with Judge Picard with regard to the issues raised in the Motion:

> [...] I have been unable to identify a basis on which a reasonable observer, properly informed, would reasonably apprehend bias on her part in the case of the Accused.[40]

17. Likewise, upon consideration of the Report of the Presiding Judge and the submissions of the parties, I am not satisfied that Karadžić has established bias or the appearance of bias on the part of Judge Picard. Karadžić has not adduced any evidence capable of establishing a personal interest on the part of Judge Picard in this case or any association that affects her impartiality. Accordingly, Karadžić has failed to rebut the strong presumption of impartiality that attaches to Judges of the International Tribunal.

18. With regard to Karadžić's argument that statements in decisions rendered by the HRC reflect an unacceptable appearance of bias on behalf of Judge Picard, I note that, as pointed out in the Report of the Presiding Judge, the jurisdiction of the HRC was temporally limited to the period after 14 December 1995, which postdates the Indictment period.[41] Accordingly, the HRC was not competent to consider Karadžić's culpability for the crimes alleged in the Indictment.[42] I also note

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[37] Response, para. 9.
[38] Response, paras 11-13.
[39] Response, para. 14.
[40] Report of the Presiding Judge, para. 17.
[41] Report of the Presiding Judge, para. 7.
[42] *See* Srebrenica Decision, para. 146 (stating that "the Chamber is not competent to consider any possible violations of the human rights of the Bosniak men missing as a result of the Srebrenica events, as those violations necessarily would have occurred during the period of 10-19 July 1995). *See also* Smajić Decision and Mujić Decision, paras 79 and 51, respectively (stating that "the Chamber is not competent *ratione temporis* to consider whether events occurring before the entry into force of the Agreement on 14 December 1995 gave rise to violations of human rights).

that the HRC decisions did not concern allegations of individual responsibility; rather, in each decision, the HRC explicitly noted that due to its jurisdiction under the Agreement, it was only considering "the rights of family members to be informed about the fate and whereabouts of their missing loved ones".[43]

19. I also observe that the statements from the Srebrenica Decision referred to in the Motion do not reflect findings made by the HRC but rather findings made by the International Tribunal in the *Krstić* Trial Judgement,[44] as the HRC indicated when it stated that:

> As the *Krstić* judgement contains a comprehensive description of the historical context and underlying facts of the Srebrenica events, established after long adversarial proceedings conducted by a reputable international court, the Chamber will utilise this judgment to set forth the historical context and underlying facts important for a full understanding of the applications considered in the present decision.[45]

Similarly, I observe that the statements referred to in the Motion from the Mujić Decision were based on the indictment against Momčilo Krajišnik and Biljana Plavšić, the indictment against Slobodan Milošević, and the *Plavšić* Sentencing Judgement,[46] while the statements referred to from the Smajić Decision reflected factual findings from the trial judgement in the *Vasiljević* Trial Judgement.[47]

20. In light of the foregoing, I find no merit in Karadžić's contention that in the Srebrenica Decision, Judge Picard pre-judged issues related to his Indictment or made a *prima facie* finding of responsibility for any events alleged therein.[48] Rather, I concur with the conclusion in the Report of the Presiding Judge that:

> There is [...] no basis for an informed observer to apprehend that Judge Picard will not determine issues in the present case on the basis of the facts and legal arguments presented in this case.[49]

21. I also note that the statements made by Judge Picard in her Article, the Letter to the High Representative, HRC Annual Reports, and other newspaper articles, which are referred to in the Motion, are related to HRC decisions and do not include any reference to the individual responsibility of Karadžić for the crimes alleged in the Indictment. As regards Karadžić's argument

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[43] Srebrenica Decision, paras 3 and 172; Smajić Decision, paras 1-2; Mujić Decision, paras 1-2.
[44] Report of the Presiding Judge, para. 13.
[45] Srebrenica Decision, para. 16.
[46] Mujić Decision, para. 7.
[47] Smajić Decision, paras 8-9 and para. 93 (stating that "[...] according to the ICTY, the authorities of the Republika Srpska were directly involved in the disappearances in Višegrad).
[48] *See infra*, para. 6.
[49] Report of the Presiding Judge, para. 13.

that Judge Picard's criticism of the Republika Srpska in those statements raises a reasonable apprehension of bias, I concur with the conclusion in the Report of the Presiding Judge that:

> The extensive reliance of the Accused on criticism of Republika Srpska authorities by the HRC is equally unconvincing to me as a basis for apprehending bias, particularly since the essence of the criticism relates to the post 14 December 1995 period and there is not contained in it any indication of any view about the individual responsibility of the Accused.[50]

22. Furthermore, I find no merit in Karadžić's argument that Judge Picard's service on a body created by the Dayton Agreements indicates a bias toward the legitimacy of those agreements and those who engineered them.[51] Rather, I agree with the statement in the Report of the Presiding Judge that:

> Assuming, for the benefit of the present argument, that the legitimacy of the Agreements will be in issue, I can think of no reason why an informed observer would believe that an experienced judge committed to the principle of impartiality, such as Judge Picard, would contemplate resolving any such issue other than on the basis of the facts and legal argument presented before her in the current case, simply because of her involvement in the HRC.[52]

V. DISPOSITION

23. Rule 15(B)(ii) of the Rules provides that following the report of the Presiding Judge, if necessary, a panel of three Judges shall be appointed to report on the merits of an application for disqualification. In the present Motion, for the reasons indicated, I find that Karadžić has failed to tender any evidence capable of warranting the appointment of a panel to consider the Motion. Karadžić has not established any actual bias or the appearance of bias on the part of Judge Picard. Accordingly, it is not necessary to appoint a panel of three Judges.

24. On the basis of the foregoing, the Motion is **DISMISSED**.

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

Done this 18th day of May 2009,
At The Hague,
The Netherlands.

Judge O-Gon Kwon
Vice-President

[50] Report of the Presiding Judge, para. 14.
[51] *See supra*, para. 10.
[52] Report of the Presiding Judge, para. 12.

ANNEX A

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-95-5/18-PT

Date: 7 May 2009

Original: English

IN THE TRIAL CHAMBER III

Before: **Judge Iain Bonomy, Presiding**

Acting Registrar: **Mr. John Hocking**

Report of: **7 May 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

REPORT BY PRESIDING JUDGE TO PRESIDENT ON MOTION TO DISQUALIFY JUDGE PICARD

The Office of the Prosecutor:
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:
Radovan Karadžić

1. I am seized of an application by the Accused in terms of Rules 15 and 73 of the Rules of Procedure and Evidence ("Rules"), for the disqualification of Judge Michèle Picard from all further proceedings in this case, filed on 1 May 2009 ("Motion"). I have conferred with Judge Picard as required by Rule 15(B)(i) and now report to you.

2. It is the contention of the Accused that decisions and public statements made by Judge Picard, while 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". In support of this submission the Accused relies in particular on a decision by the HRC on 7 March 2003 in relation to what are commonly called the "Srebrenica Cases" over which Judge Picard presided ("Decision"), and the terms of an article she wrote in 2007 in a philosophical magazine entitled "*Cultures et Conflits*", entitled "*Sur le rapport du gouvernement de la Republika Srpska*".

3. The Accused relies also on the terms of a letter sent on 14 October 2003 by Judge Picard to the Bosnia and Herzegovina High Representative "expressing her criticism that the Republika Srpska had not contacted any families about the fate or whereabouts of missing relatives". The Accused further relies on statements made by Judge Picard as President of the HRC in annual reports that were critical of the Republika Srpska, as well as a public statement in 2002 in which she "paid tribute to the Bosnia-Herzegovina Federation for its implementation of the Chamber's decisions", and criticised the Government of Republika Srpska, saying "The RS implements our decisions when it wants, which means from time to time".

4. The Accused contends that these various statements would cause any informed observer to apprehend bias on the part of Judge Picard when it comes to dealing with elements of the Third Amended Indictment in this case ("Indictment"), in particular the allegation that the Accused made "significant [contributions] to achieving the objective of eliminating the Bosnian Muslims in Srebrenica". The Accused also founds on decisions in two other cases of the HRC on which Judge Picard sat involving events in Bratunac and Visegrad, both municipalities where it is alleged in the Indictment that the Accused is responsible for the commission of crimes.

5. Rule 15 provides in relevant part:

> (A) 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.

(B) (i) Any party may apply to the Presiding Judge of a Chamber for 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 report to the President.

(ii) Following the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers to report to him its decision on the merits of the application. ...

6. It has been established in prior cases at this Tribunal that "there is a presumption of impartiality which attaches to a Judge"[1] and "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgement and this must be 'firmly established'."[2] In addition, "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 give rise to an appearance of bias."[3] There is an unacceptable appearance of bias (i) if a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or (ii) 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, or (iii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[4]

7. In the present case, it is important to note various things at the outset. Firstly, the jurisdiction of the HRC, established under the Dayton Agreements to secure peace in Bosnia signed on 14 December 1995, relates only to the period after that date. The findings of the cases referred to by the Accused relate to failures after 14 December 1995 to investigate and report on the fate of persons who had allegedly disappeared, albeit their disappearance occurred prior to 14 December 1995. The findings of violations of certain Articles of the European Convention on Human Rights were thus findings relating to conduct which post-dated the Indictment period, and the comments critical of the Republika Srpska generally related to that period.

[1] *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeals Judgement"), para. 196.
[2] *Furundžija* Appeals Judgement, para. 197, quoting Mason J, in *Re JRL; Ex parte CJL* (1986) CLR 343 at 352.
[3] *Furundžija* Appeals Judgement, para. 189. *See also*, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, paras. 8–14.
[4] *Furundžija* Appeals Judgement, para. 189.

8. Secondly, I can find nowhere in the material relied upon in the Motion any reference to the individual criminal responsibility of the Accused. In addition I have noted no reference to genocide apart from references to relevant treaties and "the alleged perpetrators of genocide" at Srebrenica.[5]

9. Thirdly, I note that the findings in fact made by the HRC in relation to events in and around Srebrenica in July 1995 and the surrounding period were based on the findings of the ICTY Trial Chamber in *Krstić*, which were not challenged in the grounds of the appeal which was outstanding when the "Srebrenica Cases" were decided.

10. And, fourthly, Judge Picard has drawn my attention to occasions when the HRC with her as President was equally critical of the authorities of the Federation of Bosnia and Herzegovina. For example, in a decision of 5 December 2003, the HRC found that the Federation of Bosnia and Herzegovina had violated the human rights of Boško Jovanović by failing to clarify the fate and whereabouts of his missing wife.[6] Similarly, on 22 December 2003, the HRC found that soldiers of the RBiH army had arrested Nikola Savić in October 1995, but the authorities of the Federation of Bosnia and Herzegovina never provided his wife and son any information about the circumstances of his subsequent death, nor any official information about his fate. The HRC held, therefore, that the Federation of Bosnia and Herzegovina had violated the rights of the applicants.[7] In both these cases the victims were of Serb ethnic origin. Judge Picard has also advised me that as President of the HRC she was often critical of the Federation of Bosnia and Herzegovinva and the state of Bosnia and Herzegovina, as well as the Republika Srpska. All of this demonstrates even-handed treatment of all parties.

11. Against the background of these four factors, I turn now to address the specific submissions made by the Accused.

12. While it does not appear to be a major plank of his case, the Accused submits that "the fact that Judge Picard served for seven years on a body created solely by the Dayton Agreements indicates a bias towards the legitimacy of those agreements and those who engineered them – a fact which will be very much at issue in the present trial as well as in a preliminary motion concerning the 'Holbrooke Agreement'". Assuming, for the benefit of the present argument, that the legitimacy of the Agreements will be in issue, I can think of no reason why an informed observer

[5] Decision, para. 190.
[6] Human Rights Chamber for Bosnia and Herzegovina, *Boško and Mara Jovanović v. the Federation of Bosnia and Herzegovina*, Case No. CH/02/9180, Decision on Admissibility and Merits, 5 December 2003, para. 95.
[7] Human Rights Chamber for Bosnia and Herzegovina, *Angelina, Dragan and Nikola Savić v. the Federation of Bosnia and Herzegovina*, Case No. CH/99/2688, Decision on Admissibility and Merits, 22 December 2003, paras 65–68.

would believe that an experienced judge committed to the principle of impartiality, such as Judge Picard, would contemplate resolving any such issue other than on the basis of the facts and legal argument presented before her in the current case, simply because of her involvement in the HRC. Challenges to the legitimacy of the jurisdiction of a court are not uncommon and are regularly determined by that court with appropriate objectivity.

13. The Accused refers to statements in the Decision that Srebrenica was "the largest and most horrific mass execution of civilians in Europe in the second half of the twentieth century", that "the authorities of Republika Srpska were directly involved in the disappearances and in the destruction of evidence of those disappearances", that these were "attempts by the RS Army to cover up or destroy information about the Srebrenica events", and the conclusion that "the authorities of the Republika Srpska were directly involved" in the events of Srebrenica, as the main support for his contention that there is a basis for reasonable apprehension of bias on the part of Judge Picard. In fact each of these is simply a reference to findings made in *Krstić* which were not actually contested by the authorities of the Republika Srpska in the "Srebrenica Cases". While the Republika Srpska authorities contested the jurisdiction of the HRC, they did not contest the merits of the case. There is, in my opinion, in these circumstances no basis for an informed observer to apprehend that Judge Picard will not determine issues in the present case on the basis of the facts and legal arguments presented in this case.

14. The extensive reliance of the Accused on criticism of Republika Srpska authorities by the HRC is equally unconvincing to me as a basis for apprehending bias, particularly since the essence of the criticism relates to the post 14 December 1995 period and there is not contained in it any indication of any view about the individual responsibility of the Accused.

15. The article "*Sur le rapport du gouvernement de la Republika Srpska*" is in two parts, the first of which was written by Judge Picard. That part simply outlines the determination made in the Srebrenica Cases. It is followed by an analysis of a June 2004 report by the Republika Srpska in part response to the Judgement in the Srebrenica Cases decision, written by the *Directrice du Département des initiatives pour la societé civile de la Commission international pour les personnes portées disparues (ICMP) et travaille sur l'ex-Yougoslavie depuis 1998.* The comments of Judge Picard simply reflect the decision as a prelude to the second part of the article recording action taken and reported upon following the decision. The reference to "these uncontestable facts" was made in the context of reliance upon the findings made in the case of *Krstić* following a lengthy trial.

16. I have found little or no assistance in the authorities cited by the Accused. The case of Florence Hartmann relates to quite different circumstances where judges could be said to have participated in the earlier investigation and prosecution determinations, and the case of Geoffrey Robertson relates to firmly and publicly expressed personal opinions which had a direct bearing on the issues which he would be required to determine. The cases of *Le Stum* and that of the French *Conseil d'État* relate to circumstances quite different from the present.

17. Having conferred with Judge Picard on all the issues reviewed in this Report, I have been unable to identify a basis on which a reasonable observer, properly informed, would reasonably apprehend bias on her part in the case of the Accused.

Iain Bonomy
Presiding Judge