



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-T
Date: 31 July 2014
Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 31 July 2014

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION TO DISQUALIFY JUDGES
KWON, MORRISON, BAIRD, AND LATTANZI**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL 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 (“Tribunal”) is seised of the “Motion to Disqualify Judges Kwon, Morrison, Baird & Lattanzi”, filed on 17 July 2014 (“Motion”), and hereby issues its decision thereon.

I. Submissions

1. In the Motion, the Accused moves, pursuant to Rule 73 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), for an order disqualifying Judges Kwon, Morrison, Baird, and Lattanzi (“*Karadžić* Judges”) from continuing to serve on his case as their four-year terms of office have expired.¹ In support, the Accused submits that *Karadžić* Judges have not been re-elected by the United Nations General Assembly (“General Assembly”) as is required by Articles 13 *bis* and 13 *ter* of the Tribunal’s Statute (“Statute”) since 16 July 2010.² Instead, their mandates were extended by the United Nations Security Council (“Security Council”)—through the Resolution 2130 issued on 18 December 2013—even though, according to the Accused, the Security Council lacks the authority to extend the Tribunal’s Judges’ mandates, a power that is exclusively under the General Assembly’s domain.³ Thus, according to the Accused, the “purported extension of the terms of the office by the Security Council violated the express terms of the [Tribunal’s] Statute.”⁴ In addition, the Accused argues that the extension also violated the United Nations Charter (“UN Charter”) as the Security Council, when issuing Resolution 2130, stated that it was acting pursuant to Chapter VII of the UN Charter even though there was no threat to peace, breach of peace, or act of aggression in the territories of the former Yugoslavia at that time.⁵ Finally, the Accused argues that the Security Council’s extension of the *Karadžić* Judges’ mandate “unlawfully infringed upon the power of the [General Assembly]”.⁶

2. Shifting his focus to the *ad litem* Judges, namely Judges Baird and Lattanzi, the Accused submits that their continued service “suffers from a second and independent defect” in that, pursuant to Article 13 *ter* (2) of the Statute, the Tribunal’s *ad litem* Judges are appointed to a specific Trial Chamber by the Secretary-General for “a cumulative period of up to, but not

¹ Motion, paras. 1–3.

² Motion, paras. 2–4, 6–7, referring to A/64/PV.107, General Assembly 64th Session, 107th Plenary Meeting, 16 July 2010.

³ Motion, paras. 5–8.

⁴ Motion, para. 9.

⁵ Motion, paras. 10–15.

⁶ Motion, paras. 16–22.

including, three years” and, since Judges Baird and Lattanzi were appointed to this case on 31 August 2009 and the Secretary-General took no steps to extend those appointments, their terms on the case have also expired.⁷

3. Finally, while acknowledging that the Motion is not filed under Rule 15 of the Rules, the Accused nevertheless requests that it be referred to the President of the Tribunal for appointment of a three-Judge panel as “it would not be proper for the members of the Trial Chamber to rule on their own terms of service.”⁸

4. On 24 July 2014, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Response to the Accused’s Motion to Disqualify Judges Kwon, Morrison, Baird & Lattanzi” (“Response”), arguing that the Motion should be denied.⁹ In support, the Prosecution relies on the Appeals Chamber’s decision in the *Prosecutor v. Krajišnik* case which held that the Security Council can extend the terms of office of the Judges of the Tribunal beyond the time limits in the Statute by passing a resolution.¹⁰ In addition, the Prosecution notes that there has been no infringement on the power of the General Assembly, as argued by the Accused, because the General Assembly has in fact approved extensions of the terms of office of the *Karadžić* Judges, as well as the *ad litem* Judges’ ability to sit on the present case beyond the three-year limit found in Article 13 *ter* (2) of the Statute.¹¹ Finally, the Prosecution argues that the Chamber should reject the Accused’s submission that the Security Council could not have extended the mandate of the *Karadžić* Judges acting under Chapter VII of the UN Charter because the Accused’s focus on the situation in 2013 is misplaced as the Security Council—having properly acted under Chapter VII when it established the Tribunal—is entitled to use the same authority when enacting subsequent resolutions relating to the Tribunal.¹²

⁷ Motion, paras. 23–27, 29–30. The Accused acknowledges that the Secretary-General indicated in his letters that the appointments of Judges Baird and Lattanzi would be for the period of the term of their office or the completion of the trial, if that is sooner. He claims, however, that to the extent that this letter “sought to confer an appointment to the *Karadžić* case of longer than three years, the Secretary-General was unauthorized to do so” under Article 13 *ter* (2) because that Article contains no provision for extension or re-appointment of *ad litem* Judges. Motion, paras. 25, 28–29.

⁸ Motion, para. 1, footnote 1. The Accused relies in this regard on paragraph 11 of Judge Guey’s *Decision on Radovan Karadžić’s Motion to Recuse Judge Melville Baird* of 30 September 2009.

⁹ Response, para. 1.

¹⁰ Response, paras. 1–2, relying on *Prosecutor v. Krajišnik*, Case No. IT-00-39-AR73.2, “Decision on Krajišnik’s Appeal Against the Trial Chamber’s Decision Dismissing the Defense Motion for a Ruling that Judge Canivell is Unable to Continue Sitting in this Case”, 15 September 2006 (“*Krajišnik* Appeal Decision”), paras. 17–19, 24.

¹¹ Response, paras. 1, 3.

¹² Response, para. 4, relying on *Prosecutor v. Karemera*, Case No. ICTR-98-44-R73, “Decision on Renewed Motion to Dismiss for Lack of Jurisdiction: United Nations Charter, Chapter VII Powers”, 5 August 2005, para. 5 and *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, “Decision on Defence Motion for a Ruling that His Honour Judge Canivell is Unable to Continue Sitting in this Case”, 16 June 2006 (“*Krajišnik* Trial Decision”), para. 20.

5. Finally, with respect to the Accused's request that the Chamber refer the Motion to the President of the Tribunal under Rule 15 of the Rules, the Prosecution argues that it should be denied as the Motion deals with a question of jurisdiction rather than disqualification.¹³

II. Applicable Law

6. Articles 13 *bis* and 13 *ter* of the Statute provide, in relevant parts, as follows:

Article 13 *bis*

Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") in accordance with article 12 *bis* of the Statute of that Tribunal;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

[...]

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

¹³ Response, para. 1, footnote 2, relying on *Krajišnik* Trial Decision, para. 14.

Article 13 *ter*

Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.

(e) The *ad litem* judges shall be elected for a term of four years. They shall be eligible for re-election.

2. During any term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

7. Rule 15 of the Rules deals with disqualification of the Judges of the Tribunal and provides in relevant part that a Judge may not sit on a trial or appeal in a case in which he or she has a personal interest or concerning which he or she has or has had any association that might affect his or her impartiality.¹⁴ A party may apply to the presiding Judge of a Chamber for the disqualification and the withdrawal of a Judge from that Chamber on those grounds, and the presiding Judge shall confer with the Judge in question and report to the President of the Tribunal.¹⁵ Following the receipt of the report, the President shall, if necessary, appoint a panel

¹⁴ Rule 15(A) of the Rules.

¹⁵ Rule 15(B)(i) of the Rules.

of three Judges drawn from other Chambers to consider the merits of the application for disqualification.¹⁶

III. Discussion

8. Turning first to the Accused's request that the Motion be referred to the President of the Tribunal for appointment of a three-Judge panel, the Chamber notes that the Accused is not claiming that any of the *Karadžić* Judges have, or have had, a personal interest or association in this case that may have affected their impartiality. Instead, he is simply challenging this bench's mandate to continue sitting on his case. As such, the issue he raises is one of jurisdiction rather than of disqualification of the *Karadžić* Judges under Rule 15.¹⁷ Accordingly, the Chamber has decided to deal with the merits of the Motion itself and will not use the provisions of Rule 15 to send this matter to the President.

9. Looking at the merits of the Motion, the Chamber notes that the Judges of the Tribunal, both permanent and *ad litem*, are elected by the General Assembly and, according to Articles 13 *bis* and 13 *ter* of the Statute, are "eligible for re-election".¹⁸ Neither Article specifies, however, who should take charge of "re-electing" the Judges. In addition, with respect to *ad litem* Judges, Article 13 *ter* (2) provides that they will be appointed to a specific Trial Chamber by the Secretary-General for one or more trials for a cumulative period of up to three years. However, it contains no provision for the extension of that term.

10. Addressing the Accused's first submission, namely that the Security Council lacked the authority to extend the *Karadžić* Judges' terms of office, the appellate jurisprudence of this Tribunal clearly disposes of that argument. In the *Krajišnik* case, the defence challenged Judge Canivell's ability to continue sitting in that case beyond the three-year limit imposed on *ad litem* Judges by Article 13 *ter* (2) of the Statute despite the fact that his term on the case was extended beyond the three years by the Security Council via Resolution 1668.¹⁹ The defence argued *inter alia* that the Security Council was usurping judicial functions by extending Judge Canivell's term, and that it could only extend his term by amending the Statute.²⁰ The *Krajišnik* Trial Chamber rejected this argument, stating that Resolution 1668 was a mere administrative act

¹⁶ Rule 15(B)(ii) of the Rules.

¹⁷ See *Krajišnik* Trial Decision, para. 14. The Chamber notes that while the issue is one of jurisdiction of the Judges to continue sitting in this case, the Motion has been properly filed under Rule 73 because it is not a "preliminary motion" as defined under Rule 72 of the Rules. See *Prosecutor v. Joseph Nzirorera*, Case No. ICTR-98-44-AR72, Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on Validity of Appeal of Joseph Nzirorera Regarding Chapter VII of the Charter of the United Nations, 10 June 2004, paras. 8–11. See also Decision on the Accused's Holbrooke Agreement Motion, 8 July 2009, paras. 39–43.

¹⁸ See Article 13 *bis* (1)(d) and (3) and Article 13 *ter* (1)(e) of the Statute.

¹⁹ See Security Council Resolution 1668 (10 April 2006).

allowing the Chamber to complete the case without undue delay and that, as such, it did not interfere with the Tribunal's judicial functions.²¹ The matter was appealed by the defence and the Appeals Chamber confirmed the decision of the Trial Chamber, stating as follows:

15. The Appeals Chamber recalls that the UN Security Council, *acting under Chapter VII of the UN Charter* as a legislator, has adopted the Statute and established the Tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintaining of peace in the former Yugoslavia. While the UN Security Council is not a judicial organ and is not provided with judicial powers, it exercises, *in discharge of its functions*, both decision-making and executive powers, *including those related to the mandates of the Tribunal's Judges*.

16. Without assuming competence to adjudicate on the validity of a resolution passed by the Security Council, the Appeals Chamber considers that the UN Security Resolution 1668/2006 was directed to administrative matters and did not interfere with the Tribunal's judicial function.

17. The Appeals Chamber notes that the Security Council is not required to amend the Tribunal's Statute in order to reflect all its resolutions. Contrary to what the Appellant appears to submit, the Security Council can address an administrative matter either by amending the Tribunal's Statute or by simply adopting a resolution - as it did. *Thus, the ability to decide on a case by case basis whether to extend an ad litem judge's mandate and/or the three year cumulative service limitation falls within the Security Council's discretionary powers*. The Appeals Chamber accordingly sees no merit in the Appellant's arguments in this respect.²²

11. In sum, the Appeals Chamber found that the Security Council has the right to extend an *ad litem* Judge's mandate *and/or* the three year appointment on a specific case. The Chamber considers that, by analogy, this ruling must apply also to the terms of office of the permanent Judges and their "re-election" under Article 13 *bis*.²³ Accordingly, the Accused's argument that the Security Council lacked authority to extend the *Karadžić* Judges' terms of office through Resolution 2130 must fail.²⁴

12. Furthermore, as submitted by the Prosecution,²⁵ the Accused's claim that the General Assembly has last "re-elected" the *Karadžić* Judges four years ago, on 16 July 2010, is plainly incorrect. The General Assembly has issued subsequent decisions similar to the decision of 16

²⁰ *Krajišnik* Trial Decision, para. 8.

²¹ *Krajišnik* Trial Decision, paras. 17–20.

²² *Krajišnik* Appeal Decision, paras. 15–17 (emphasis added, footnotes omitted).

²³ Indeed, paragraph 15 of the *Krajišnik* Appeal Decision cited above, particularly the reference to the "Tribunal's Judges", is general enough to encompass the terms of office of both *ad litem* and permanent Judges.

²⁴ The Accused's argument that the Security Council had no authority to act under Chapter VII of the UN Charter when extending the *Karadžić* Judges' mandates must also fail. The Appeals Chamber has already held that, aside from examining the legality of its own establishment, the Tribunal cannot "[review] the acts of the other organs of the United Nations, particularly those of the Security Council". *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 18–20. Accordingly, whether or not the Security Council can continue to issue resolutions relating to this Tribunal under Chapter VII is not for this Chamber to determine. In any event, paragraph 15 of the *Krajišnik* Appeal Decision seems to imply that the Security Council's authority to issue decisions regarding the Tribunal Judges' mandates does in fact stem from Chapter VII of the UN Charter.

²⁵ Response, para. 3.

July 2010 relied upon by the Accused, ending with the most recent decision from 2013 wherein it confirmed the Security Council Resolution 2130 extending the *Karadžić* Judges' terms of office until 31 December 2014.²⁶ Accordingly, the Accused's argument that the Security Council infringed on the powers of the General Assembly must also fail.

13. With respect to Judges Baird's and Lattanzi's appointments to the *Karadžić* case, the Accused argues that they have not been validly extended and are, in any event, not even subject to extension under Article 13 *ter* (2).²⁷ As noted above, the Appeals Chamber has ruled that *ad litem* Judges' case-specific appointments may be extended beyond the original three years and that this may be done by the Security Council.²⁸ In holding so, the Appeals Chamber noted that the three-year limitation was motivated primarily by budgetary considerations and should thus be interpreted in light of that purpose. It also held that preventing Judge Canivell from continuing to sit on the *Krajišnik* case would be detrimental to Krajišnik's right to be tried without undue delay.²⁹ Similarly, the Chamber considers that accepting the Accused's argument that the three-year limitation cannot be overcome in case of Judges Baird and Lattanzi would in fact undermine the purpose of Article 13 *ter* (2) and would also be detrimental to the Accused's right to be tried without undue delay.³⁰

14. Further, the Chamber notes that the Security Council issued Resolution 1931 on 29 June 2010 wherein it decided to allow *ad litem* Judges Baird and Lattanzi, among others, to serve at the Tribunal beyond the cumulative period of service provided for under Article 13 *ter* (2) of the Statute.³¹ This extension was confirmed by the General Assembly on 16 July 2010, when it adopted a draft decision to that effect as submitted by the President of the General Assembly.³² Accordingly, the Accused's argument that the appointments of Judges Baird and Lattanzi to the *Karadžić* case have not been extended must also fail.

²⁶ See A/68/PV.72, General Assembly 68th Session, 72nd Plenary Meeting, 23 December 2013, p. 3, adopting A/68/L.35, the draft decision on the extensions of the *Karadžić* Judges submitted by the President of the General Assembly. See also A/67/PV.62, General Assembly 67th Session, 62nd Plenary Meeting, 21 December 2012, p. 19, adopting A/67/L.52, the draft decision on the extensions of the *Karadžić* Judges submitted by the President of the General Assembly; A/65/PV.109, General Assembly 66th Session, 109th Plenary Meeting, 19 July 2011, p. 5, adopting A/65/L.83, the draft decision on the extensions of the *Karadžić* Judges submitted by the President of the General Assembly.

²⁷ See Motion, para. 27.

²⁸ See *supra* para. 10.

²⁹ See *Krajišnik* Appeal Decision, para. 18.

³⁰ See Article 21(4)(c) of the Statute.

³¹ Security Council Resolution 1931 (29 June 2010), para. 7.

³² See A/64/PV.107, General Assembly 64th Session, 107th Plenary Meeting, 16 July 2010, p. 4. See also A/64/L.59, Draft Decision Submitted by the President of the General Assembly, 13 July 2010, para. (g).

IV. Disposition

15. For all the reasons outlined above, the Chamber, pursuant to Rule 54 of the Rules and Article 21(4) of the Statute, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this thirty first day of July 2014
At The Hague
The Netherlands

[Seal of the Tribunal]