

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-55
Date: 16 July 2020
Original: English

THE PRESIDENT

Before: Judge Carmel Agius, President

Registrar: Abubacarr Tambadou

THE PROSECUTOR

v.

RADOVAN KARADZIC

Public

REQUEST FOR REVIEW OF PRESIDENT'S
REFUSAL TO DISQUALIFY HIMSELF

The Office of the Prosecutor:
Laurel Baig
Barbara Goy

Counsel for Radovan Karadzic:
Peter Robinson

1. Radovan Karadzic respectfully requests that the President’s refusal to disqualify himself in his *Decision on Radovan Karadzic’s Motion for Disqualification and Reconsideration of the Dismissal of Notice of Sentencing Appeal* (14 July 2020)(the “Impugned Decision”) be reviewed, as it impacts on the fairness of the proceedings.

Procedural History

2. On 24 March 2016, an ICTY Trial Chamber convicted President Karadzic of genocide in Srebrenica in 1995, war crimes, and crimes against humanity. It acquitted him of genocide in the municipalities of Bosnia in 1992. President Karadzic was sentenced to 40 years imprisonment.¹

3. On 20 March 2019, a bench of the Mechanism’s Appeals Chamber affirmed President Karadzic’s convictions and acquittal. A 3-2 Majority of judges increased his sentence to life imprisonment.²

4. On 28 March 2019, President Karadzic filed his *Notice of Sentencing Appeal* before the Appeals Chamber. He contended that the Majority erred in increasing his sentence to life imprisonment, rather than remanding to the Trial Chamber for re-sentencing, as this deprived him of his right to appeal his sentence. He further contended that if allowed to appeal his sentence, he had seven other grounds for demonstrating that the Majority erred in imposing a life sentence.

5. Five days later, the President, without waiting for a response from the Prosecution, dismissed President Karadzic’s sentencing appeal *sua sponte*.³

6. On 5 April 2019, President Karadzic sent his *Motion to Reconsider Dismissal of Notice of Appeal and to Disqualify Judges Agius and Meron* to the Registry for filing.⁴

7. The Registrar refused to file the motion because it listed Judge Jean-Claude Antonetti at the top, as the most Senior Judge able to act.⁵ The Registrar also refused to file a subsequent order from Judge Antonetti.⁶

8. On 11 April 2019, President Karadzic filed a motion with the President to

¹ *Prosecutor v Karadzic*, No. IT-95/5-18-T, *Judgement* (24 March 2016)

² *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019)

³ *Decision on Radovan Karadzic’s Notice of Sentencing Appeal and the Related Motion for Assignment of Counsel and Extension of Time* (2 April 2019)

⁴ *Motion to Compel the Registrar to file Karadzic Motion* (11 April 2019), Annex A

⁵ *Id.*, Annex B.

⁶ *Id.*, Annexes C and D.

compel the Registrar to file the *Motion*.⁷

9. After a delay of almost five months, on 3 September 2019, the President denied the *Motion to Compel*.⁸

10. The next day, President Karadzic re-filed his motion before the President.⁹

11. On 6 September 2019, the President retained jurisdiction over the reconsideration aspect of the motion but referred the disqualification aspect to a three-Judge panel he selected.¹⁰

12. On 8 September 2019, President Karadzic challenged the jurisdiction of the Three-Judge Panel, contending that pursuant to the text of Rule 18(B)(iv), the President had no authority to appoint his own three-Judge panel to decide on his own disqualification, and that it was up to the most Senior Judge able to act (Judge Jean-Claude Antonetti) to either decide on the disqualification of the President or appoint a Three-Judge Panel.¹¹

13. The Prosecution responded to this motion on 18 September 2020,¹² President Karadzic replied on 20 September 2019.¹³

14. On 28 October 2019, the Three Judge Panel held that it was indeed without jurisdiction to decide on the disqualification of the President.¹⁴

15. After a delay of more than eight months, on 14 July 2020, the President issued the Impugned Decision denying the Motion for Disqualification and the underlying Motion for Reconsideration.¹⁵

The Impugned Decision

16. In the Impugned Decision, the President held that he could not be disqualified from deciding whether his *sua sponte* dismissal of President Karadzic's *Notice of Sentencing Appeal* was within the powers of the President because the dismissal was an

⁷ *Id.*

⁸ *Decision on the Motion to Compel the Registrar to file a Motion* (3 September 2019)

⁹ *Motion to Reconsider Dismissal of Notice of Appeal and to Disqualify Judges Agius and Meron* (4 September 2019)

¹⁰ *Order Assigning a Three-Judge Panel* (6 September 2019)

¹¹ *Motion Challenging Jurisdiction* (8 September 2019)

¹² *Prosecution Response to Motion Challenging Jurisdiction* (18 September 2019)

¹³ *Reply Brief: Motion Challenging Jurisdiction* (20 September 2019)

¹⁴ *Decision on Motion for Disqualification and Motion Challenging Jurisdiction* (28 October 2019)

¹⁵ *Decision on Radovan Karadzic's Motion for Disqualification and Reconsideration of the Dismissal of Notice of Sentencing Appeal* (14 July 2020)

“administrative decision”.¹⁶

17. The President went on to hold that “Karadzic’s submissions do not raise any concerns that would warrant me recusing myself *proprio motu*.”¹⁷ He then declined to reconsider his decision to dismiss President Karadzic’s *Notice of Sentencing Appeal*.¹⁸

Right to Review

18. A decision not to recuse himself or the propriety of any given administrative decision taken by the President is reviewable where it impacts on the fairness of a proceeding.¹⁹ President Karadzic has a right to review of the Impugned Decision if it impacts on the fairness of the proceedings in his case.

Argument

19. The President’s “administrative decision” to refuse to assign judges to the Appeals Chamber to consider President Karadzic’s *Notice of Sentencing Appeal* and dismissing that appeal impacted on the fairness of the proceedings because it completely terminated those proceedings.

20. The decision was not some interlocutory step in the proceedings, nor a procedural issue that could later be reviewed. It operated as a final decision preventing any review of the issues raised in the appeal.

21. The issues raised in the *Notice of Sentencing Appeal* were not vexatious nor frivolous. The life sentence challenged in the notice was imposed by a bare 3-2 majority of the Appeals Chamber. Judge Fausto Pocar had long advocated the view an Appeals Chamber violated the rights of an accused when it increased a sentence.²⁰

22. President Karadzic contended that the availability of many more judges to hear an appeal at the Mechanism (25) than at the ICTY (5) provided a reason for the

¹⁶ Impugned Decision, p. 3

¹⁷ *Id.*

¹⁸ *Id.*, p. 4

¹⁹ *Decision on Motion for Disqualification and Motion Challenging Jurisdiction* (28 October 2019), para. 11; *Decision on Prosecution Motion to Strike Karadzic's Second Motion to Disqualify Judge Theodor Meron, Motion to Disqualify Judge William Sekule, and for Related Orders*, (1 November 2018), para. 10; *Prosecutor v. Mladic*, No. MICT-13-56-A, *Decision on Prosecution Appeal of the Acting President's Decision of 13 September 2018* (4 December 2018), para. 12; *In Re. Andre Ntagerura*, No. ICTR-99-46-A28, *Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008* (11 September 2008), paras. 12, 13; *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, *Decision on Hassan Ngeze's Motion to Set Aside President Meso's Decision and Request to Consummate his Marriage* (6 December 2005) p. 4.

²⁰ See, i.e. *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006), Partially Dissenting Opinion of Judge Pocar

Mechanism not to follow the ICTY's *Galic* precedent,²¹ and that the IRMCT's *Seselj* decision dismissing an effort to appeal an Appeals Chamber judgement was distinguishable because it involved a challenge to the conviction itself, for which the review procedure was available, rather than a challenge to the sentence, for which no review was available.²² These are bona fide arguments that deserved to be heard and decided on their merits by an Appeals Chamber bench.

23. The President's *sua sponte* dismissal of President Karadzic's *Notice of Sentencing Appeal* therefore impacted on the fairness of the proceedings because it completely prevented President Karadzic from having those issues decided on the merits and blocked any further review of his sentence.

24. While all cases in which a President's administrative decision has been considered for review have involved cases then pending before an Appeals Chamber,²³ it cannot be the case that the availability of review of a President's decision on his own disqualification depends upon the existence of a Chamber actively seised of the case. To hold that the fairness of the proceedings are dependent on the existence of a bench that the President has refused to assign is completely circular. A President can thereby avoid review of a motion to disqualify him simply by refusing to assign judges to a bench, as President Agius did in this case.

25. Thus the Three Judge Panel's observations that "the proceedings have concluded" cannot preclude review of a disqualification decision.²⁴ The fact that there is no Chamber currently seised of President Karadzic's proceedings is solely the result of President Agius' refusal to appoint one.

26. Therefore, President Karadzic is entitled to a review of President Agius' decision on his own disqualification. He respectfully requests the President to refer this

²¹ *Motion for Assignment of Counsel and Extension of Time* (28 March 2019), para. 4

²² *Id.*

²³ *Motion to Disqualify Judge William Sekule, and for Related Orders*, (1 November 2018), para. 10; *Prosecutor v. Mladic*, No. MICT-13-56-A, *Decision on Prosecution Appeal of the Acting President's Decision of 13 September 2018* (4 December 2018), para. 12; *In Re. Andre Ntagerura*, No. ICTR-99-46-A28, *Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008* (11 September 2008), paras. 12, 13; *Prosecutor v. Nahimana et al.*, No. ICTR-99-52-A, *Decision on Hassan Ngeze's Motion to Set Aside President Meso's Decision and Request to Consummate his Marriage* (6 December 2005) p. 4

²⁴ *Decision on Motion for Disqualification and Motion Challenging Jurisdiction* (28 October 2019), para.

matter to the most Senior Judge able to act to decide whether he would conduct such a review, or whether he would appoint a Three Judge Panel to do so.

Word count: 1656

Respectfully submitted,

A handwritten signature in black ink, reading "Peter Robinson". The signature is written in a cursive style with large, rounded letters.

PETER ROBINSON

Pro Bono Counsel for Radovan Karadzic



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