

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No: MICT-13-55-A

Date: 25 October 2018

Original: English

THE PRESIDENT OF THE MECHANISM

Before: President Theodor Meron

Registrar: Mr. Olufemi Elias

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PROSECUTION MOTION TO DISQUALIFY
JUDGE JEAN-CLAUDE ANTONETTI**

The Office of the Prosecutor:

Laurel Baig
Barbara Goy
Katrina Gustafson

Counsel for Radovan Karadžić:

Peter Robinson
Kate Gibson

1. Judge Antonetti has no jurisdiction over Karadžić’s Motion¹ to further disqualify President Meron and to disqualify Judge Sekule.² However, in the event the Appeals Chamber determines that he does,³ the Prosecution moves, under Mechanism Rule 18, to disqualify Judge Antonetti from deciding the Motion. Because Judge Antonetti has insisted that he will adjudicate the Motion despite the pending Appeals Chamber decision,⁴ the Prosecution is bringing this request now in order to preserve its position.

2. Judge Antonetti’s personal interest in cementing the novel disqualification standard he originated in *Mladić* (the “Antonetti Test”⁵), his insistence on adjudicating the Motion despite the open question as to his jurisdiction and the President’s request that he suspend action, and his history of disregarding precedent to the prejudice of the Prosecution—including in relation to the very issue raised in the Motion—demonstrate Judge Antonetti’s actual bias in relation to the Motion or at the very least give rise to a reasonable apprehension of bias.

3. For the part of the Motion relating to President Meron, additional factors reinforce Judge Antonetti’s lack of impartiality, or the reasonable apprehension of such. Judge Antonetti has already pre-judged the issue at the heart of Karadžić’s disqualification request and has made statements reflecting his animosity towards President Meron, including personal criticisms about President Meron’s exercise of the same judicial appointment power that is at issue in the Motion. Moreover, Judge Antonetti is not just willing—but determined—to adjudicate the Motion even though he would be disqualified from doing so based on his own Antonetti Test.

A. Judge Antonetti’s conduct demonstrates actual bias or a reasonable apprehension of bias

4. Judge Antonetti has a personal interest in promoting the Antonetti Test, an interest that is illustrated by his forging ahead to decide the Motion even though his power to do so is currently pending before the Appeals Chamber and the President has requested that he stay his decision.

¹ Second Motion to Disqualify Judge Theodor Meron, Motion to Disqualify Judge William Sekule, and for Related Orders, 12 October 2018 (“Motion”).

² See Prosecution Motion to Strike Karadžić’s Second Motion to Disqualify Judge Theodor Meron, Motion to Disqualify Judge William Sekule, and for Related Orders, 15 October 2018.

³ See Order Assigning Judges to the Appeals Chamber to Consider a Matter, 17 October 2018 (“17 October 2018 Order”).

⁴ See Decision in Relation to the Order Assigning the Appeals Chamber to Consider a Matter of 17 October 2018, 18 October 2018 (“18 October 2018 Decision”); Order on Defence Motion for Disqualification of Judges Theodor Meron and William Sekule and for Related Orders, 17 October 2018.

⁵ See *below*, para.5.

5. Judge Antonetti recently rejected binding Appeals Chamber precedent on the disqualification standard for judges⁶ in favour of the new Antonetti Test.⁷ The Prosecution has challenged the decision containing the Antonetti Test and that challenge remains outstanding.⁸ The current uncertainty surrounding the validity of the Antonetti Test gives rise to a personal motive—or perceived motive—on the part of Judge Antonetti to re-apply the Antonetti Test in an effort to cement his preferred standard. That Judge Antonetti has insisted on adjudicating the Motion even though his power to do so is pending before the Appeals Chamber—and in the face of the President’s request that he stay his decision⁹—evidences this personal interest in promoting his own test.

6. Moreover, Judge Antonetti has declared that he does not consider himself bound by precedent¹⁰ and has repeatedly rejected settled Appeals Chamber law to the prejudice of the Prosecution. For instance, in *Šešelj*, Judge Antonetti refused to apply the settled ICTY Rule 98*bis* standard, instead imposing a “higher” standard on Prosecution evidence.¹¹ He has also repeatedly declared his opposition to, and has refused to apply, joint criminal enterprise liability—the primary mode of liability alleged by the Prosecution in most ICTY cases.¹² And, in relation to the very same issue raised in this Motion, Judge Antonetti discarded settled law in favour of the Antonetti Test. His decision not only resulted in the grant of a disqualification request that the Prosecution had opposed, but also impugned the integrity of prior ICTY convictions secured by the Prosecution¹³ and has threatened to derail the *Karadžić* appeal proceedings. Given this track-record, the Prosecution is unable to receive—or a reasonable observer would apprehend that the Prosecution is unable to receive—a fair and impartial hearing based on established legal rules before Judge Antonetti, particularly in judicial disqualification matters.

⁶ See e.g. *Renzaho v. Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011, para.22; *Karera v. Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para.378; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para.78; *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para.44.

⁷ *Prosecutor v. Mladić*, Case No. MICT-13-56-A, Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun (“*Mladić* Disqualification Decision”), 3 September 2018, paras.81-84.

⁸ See *Prosecutor v. Mladić*, Case No. MICT-13-56-A, Order Assigning a Bench of the Appeals Chamber, 18 October 2018 (constituting a bench of the Appeals Chamber to rule on the Prosecution’s 19 September 2018 Appeal of Acting President’s Decision Denying Request to Appoint a Panel of Three Judges to Determine Mladić’s Disqualification Applications).

⁹ 17 October 2018 Order; 18 October 2018 Decision.

¹⁰ See e.g. *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Opinion of Presiding Judge Jean-Claude Antonetti Attached to the Judgement, 31 March 2016 (“*Šešelj* Opinion”), p.138; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Judgement, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti, 29 May 2013 (*Prlić* Dissent”), p.100.

¹¹ *Prosecutor v. Šešelj*, Case No. IT-03-67-T, T.16907. Also T.16923 (requiring “indisputable or compelling evidence” linking the crimes to the accused); T.16985 (finding the Prosecution did not establish aiding and abetting “beyond any reasonable doubt”).

¹² See e.g. *Prlić* Dissent, pp.154-155, 173; *Šešelj* Opinion, pp.378-379.

¹³ See *Mladić* Disqualification Decision, para.82.

B. Additional factors reflect bias in relation to the request to disqualify President

Meron

7. Additional factors reinforce the existence of bias or reasonable apprehension of bias in relation to Karadžić's request to disqualify President Meron. In particular, Judge Antonetti has already pre-judged the issue at the heart of the Motion, has a personal interest in granting the Motion and has made statements reflecting his animosity towards President Meron on the very issue raised in the Motion. Moreover, Judge Antonetti is proceeding to decide the Motion even though, based on his own Antonetti Test, he would be disqualified from adjudicating President Meron's impartiality and should therefore have recused himself.

8. Judge Antonetti cannot bring an independent and impartial mind to Karadžić's Motion to disqualify President Meron from appointing his own replacement because he has already decided this issue and because he stands to gain an appointment power that he has expressed a wish to exercise. Judge Antonetti has already held that President Meron "lack[s] [...] jurisdiction" to appoint his own replacement in *Karadžić* and that it instead should fall to Judge Antonetti to exercise this function.¹⁴ As President Meron's jurisdiction over this judicial appointment is at the core of Karadžić's disqualification request,¹⁵ Judge Antonetti has pre-judged this aspect of the Motion. Moreover, granting Karadžić's Motion would allow Judge Antonetti to exercise the appointment power that he has already claimed as his own and unsuccessfully sought to exercise.¹⁶

9. Judge Antonetti has also made statements reflecting animosity towards President Meron. For instance he has speculated that it is "impossible" for President Meron to fulfil both his Presidential and judicial duties, and on that basis has implied that his legal team is "doing the work for him" and that President Meron must be "neglecting a case".¹⁷ Judge Antonetti has also criticised both President Meron's ability to assign judges to cases and the manner in which he has exercised this power—the very same issue that is at the heart of the Motion.¹⁸ And Judge Antonetti has resolved to adjudicate President Meron's impartiality despite the pending Appeals Chamber decision on his power to do so and in the face of a request by the President to delay

¹⁴ Order on Motion to Disqualify Judge Theodor Meron, 2 October 2018, p.2.

¹⁵ See Motion, paras.8, 10-12.

¹⁶ President Meron has declined Judge Antonetti's invitation to withdraw President Meron's order appointing his replacement in *Karadžić*. See Decision in Response to Order on Motion to Disqualify, 3 October 2018.

¹⁷ *Prosecutor v. Milan Lukić*, Case No.MICT-13-52-R.1, Second Part of the Dissenting Opinion of Judge Jean-Claude Antonetti Attached to the Decision of 7 July 2015, 1 October 2015 ("*Lukić* Dissent"), pp.7-8.

¹⁸ See *Prosecutor v. Tolimir*, Case No.IT-05-88/2-A, Judgement, Separate and Partly Dissenting Opinion of Judge Antonetti, 8 April 2015, pp.5-7; *Šešelj* Opinion, p.384; *Lukić* Dissent, p.7.

action.¹⁹ This reflects—or would lead a reasonable person to apprehend—a personal motivation on the part of Judge Antonetti to curtail President Meron’s power to assign judges and a corresponding motive to grant Karadžić’s Motion.

10. Judge Antonetti’s personal interest in deciding the Motion in relation to President Meron is further evidenced by his insistence on deciding it even though his own Antonetti Test would disqualify him from doing so. The Prosecution’s position is that the Antonetti Test is wrong. Nevertheless, that Judge Antonetti has disqualified other judges on the basis of a test he will not apply to himself demonstrates bias or a reasonable apprehension of bias.

11. In the *Mladić* Disqualification Decision, Judge Antonetti found that President Meron had an unacceptable “appearance of bias” warranting disqualification²⁰ based on the same grounds now set forth by Karadžić to disqualify President Meron, including President Meron’s participation in many of the same prior cases.²¹ Under the Antonetti Test, references by a judge in a prior decision to the responsibility of a person disqualify the judge from adjudicating that person’s responsibility in a later decision.²² By analogy, under this standard, Judge Antonetti would have to recuse himself from deciding the Motion in relation to President Meron, given his prior adjudication of President Meron’s purported bias based on overlapping allegations in a closely related proceeding.

12. Moreover, in the past Judge Antonetti has voluntarily withdrawn from matters where “there was a risk that [his] impartiality could be brought into question”,²³ including where he would be required to adjudicate two connected matters, in order to guard against his own potential biases²⁴ and so as “not to leave room for any criticism.”²⁵ Judge Antonetti is not only moving forward to adjudicate allegations in relation to President Meron that overlap with ones that he has already ruled on, he is doing so despite having already ruled on the matter raised in the Motion. His determination to forge ahead in these circumstances, after having held himself up

¹⁹ 18 October 2018 Decision; 17 October 2018 Order.

²⁰ *Mladić* Disqualification Decision, paras.81-84.

²¹ Compare Motion to Disqualify Judge Theodor Meron, 25 September 2018 (“*Karadžić* First Motion to Disqualify”), paras.6, 22-27, 30 with *Prosecutor v. Mladić*, Case No.MICT-13-56-A, Defence Motion Respectfully Seeking the Disqualification of Judge Theodor Meron for Actual or Apparent Bias, 18 June 2018, paras.15-17, 20. Also *Karadžić* First Motion to Disqualify, paras.10-21, 28. In his Motion, Karadžić has incorporated by reference the arguments from *Karadžić* First Motion to Disqualify. See Motion, fn.17.

²² *Mladić* Disqualification Decision, paras.81-84.

²³ See e.g. *Mladić* Disqualification Decision, fn.13 citing *Prosecutor v. Šešelj*, Case No.IT-03-67-T, Separate Opinion of Presiding Judge Antonetti Regarding the Motion of the Accused Vojislav Šešelj to Discontinue the Proceedings, 29 September 2011, pp. 8 and 9; *Prosecutor v. Lukić*, Case No.MICT-13-52-R.1, Judge Jean-Claude Antonetti’s Letter of Withdrawal to the President of the Mechanism for International Criminal Tribunals Pursuant to Rule 18 (A) of the Rules of Procedure and Evidence, 19 August 2015 (“*Lukić* Letter”).

²⁴ See *Prosecutor v. Šešelj*, Case No.IT-03-67-T, T.10807.

²⁵ *Lukić* Letter, p.3.

to an enhanced impartiality standard, is yet another indication of his lack of impartiality or appearance thereof in this case.

C. Relief sought

13. Should the Appeals Chamber find that Judge Antonetti has jurisdiction over the Motion, the Prosecution requests that he be disqualified from deciding the Motion.

14. The Prosecution recognises that, as one of the subjects of the Motion for which the Prosecution is requesting Judge Antonetti's disqualification, the President would not be able to adjudicate this disqualification request. However, as set out in Rule 18(B)(i), the Prosecution places this matter before the President to determine the appropriate decision-maker under Rule 18.

Word Count: 2035



Katrina Gustafson
Senior Appeals Counsel

Dated this 25th day of October 2018
At The Hague, The Netherlands



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