

**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-95-05/18-
AR15.1
Date: 26 June 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision of: 26 June 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON APPEAL FROM DECISION ON MOTION TO
DISQUALIFY JUDGE PICARD**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

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1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Appeal from Decision on Motion to Disqualify Judge Picard” (“Appeal”), filed by Radovan Karadžić (“Appellant”) on 29 May 2009 appealing the “Decision on Motion to Disqualify Judge Picard”, rendered by the Vice-President on 18 May 2009 (“Impugned Decision”).¹

I. PROCEDURAL BACKGROUND

2. On 1 May 2009, the Appellant filed a motion requesting the disqualification of Judge Michèle Picard from all further proceedings in his case.² On 7 May 2009, the Presiding Judge in the case, after conferring with Judge Picard, presented the President of the Tribunal with a report in relation to the Motion (“Report of the Presiding Judge”)³ in accordance with Rule 15(B)(i) of the Rules of Procedure and Evidence (“Rules”). On 8 May 2009, the President withdrew and assigned the Vice-President, pursuant to Rule 21 of the Rules, to consider the Report of the Presiding Judge in his place.⁴ On 12 May 2009, the Prosecution filed a response to the Motion.⁵ On 18 May 2009, the Vice-President rendered the Impugned Decision finding that it was not necessary to appoint a panel of three judges pursuant to Rule 15(B)(ii) of the Rules and dismissing the Motion on the basis that the Appellant had failed to establish any actual bias or the appearance of bias on the part of Judge Picard.⁶

3. On 29 May 2009, the Appellant filed his Appeal and the Prosecution filed its response on 5 June 2009 (“Response”).⁷

II. SUBMISSIONS

4. The Appellant sets out four grounds of appeal. First, he submits that the Impugned Decision is appealable as a matter of right under Rule 15(B)(iii) of the Rules and as such the Appeal is admissible before the Appeals Chamber.⁸ Second, he argues that the Vice-President erred in failing to appoint a three-judge panel to consider the Motion as a result of misconstruing the term “if

¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Motion to Disqualify Judge Picard, 18 May 2009.

² *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion to Disqualify Judge Picard, 1 May 2009 (“Motion”).

³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Report by Presiding Judge to President on Motion to Disqualify Judge Picard, 7 May 2009 (“Report of the Presiding Judge”).

⁴ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Order Assigning Motion to Vice-President, 8 May 2009.

⁵ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution Response to Motion to Disqualify Judge Picard, 12 May 2009.

⁶ Impugned Decision, para. 23.

⁷ Prosecution Response to Karadžić’s Appeal from Decision on Motion to Disqualify Judge Picard, 5 June 2009.

necessary” in Rule 15(B)(ii) of the Rules.⁹ Third, he contends that the Vice-President erred in fact by finding that the competence of the Human Rights Chamber did not overlap with the indictment period.¹⁰ Fourth, he submits that the Vice-President’s finding that no reasonable person could apprehend bias on the part of Judge Picard was unreasonable.¹¹ The Appellant requests that the Appeals Chamber should (1) find the appeal admissible; (2) find that the Vice-President erred in not referring the matter to a panel of three judges; and (3) remand the matter for the appointment of such a panel.¹² In the alternative, if the Appeals Chamber finds that the Vice-President had the discretion to decide the matter himself, the Appellant submits that the Appeals Chamber should nevertheless reverse his decision on the merits.¹³

5. The Prosecution responds that there is no interlocutory appeal from decisions made pursuant to Rule 15(B)(ii) of the Rules and the matter should be referred to a panel of three judges.¹⁴ The Prosecution notes that under the previous version of Rule 15(B) of the Rules, if the President’s decision was challenged, the matter was referred to the Bureau. The Prosecution submits that while a panel of three judges has replaced the Bureau in the current version of the Rules, the same procedure should be followed.¹⁵

III. DISCUSSION

6. The Appeals Chamber recalls that Rule 15(B) of the Rules sets out the procedure to be followed when a party seeks the disqualification of a judge. It states:

(i) 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.

(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 [...].

(iii) The decision on the panel of three Judges shall not be subject to interlocutory appeal. [...]

While the rule is clear that there is no interlocutory appeal from a decision by the panel of three judges, it does not clearly set out what avenues, if any, are available should a party wish to challenge the finding of the President (or Vice-President, as in the instant case).

⁸ Appeal, paras 13(A), 15-20.

⁹ Appeal, paras 13(B), 21-30.

¹⁰ Appeal, paras 13(C), 31-38.

¹¹ Appeal, paras 13(D), 39-45.

¹² Appeal, para. 47.

¹³ Appeal, para. 48.

¹⁴ Response, para. 1.

¹⁵ Response, paras 2-3.

7. The Appeals Chamber notes that the previous version of Rule 15(B) of the Rules did not provide for the appointment of a panel of three judges but rather for referral to the Bureau; however, in other respects the prior version set out a procedure similar to the current one. The previous version of Rule 15(B) of the Rules states:

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 if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.¹⁶

In interpreting the previous version of the Rule, the Appeals Chamber in *Prosecutor v. Galić* found that the Presiding Judge could determine that it was not necessary to refer the matter to the Bureau and decide the matter himself; however, if the party seeking disqualification challenged the Presiding Judge's decision, it did become "necessary" to refer the matter to the Bureau within the language of Rule 15(B) of the Rules. Therefore, while there was no interlocutory appeal from decisions of either the Presiding Judge or the Bureau, there was in effect a second level of review by the Bureau in the case of the Presiding Judge deciding the matter alone.¹⁷ In circumstances where an application for disqualification was referred to the Bureau, it would undertake a *de novo* review.¹⁸

8. The procedure in the current version of Rule 15(B) of the Rules differs in that it is the President, rather than the Presiding Judge, who either makes the decision on his own or refers it on for decision. Further, in the latter case, the President refers it not to the Bureau but to a panel of three judges drawn from other Chambers. However, beyond these differences, the language and general procedure of Rule 15(B) of the Rules in the two versions is broadly similar. Both provide that the matter may be decided by a lone judge (be it the Presiding Judge or the President) or "if necessary" by a panel of judges (be it a panel of three judges from other Chambers or the Bureau). Therefore, the Appeals Chamber considers that the reasoning in *Galić* to the extent that where a decision of the Presiding Judge acting on his own is challenged it becomes "necessary" to refer the matter to the Bureau, would equally apply to the new procedure under Rule 15(B) of the Rules. Therefore, under the current Rule 15(B) of the Rules, where the President (or, as in the instant case, the Vice-President) has determined that it is not necessary to refer the matter to a panel of judges and decided the matter himself, and that decision is challenged, it becomes "necessary" to refer the

¹⁶ IT/32/Rev. 34, 22 February 2005.

¹⁷ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR54, Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge, 13 March 2003 ("*Galić* Appeal Decision"), para. 8. Note that while there was no interlocutory appeal from a decision pursuant to Rule 15(B) of the Rules, the matter can be raised in an appeal against conviction, see *ibid.*; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement"), para. 31).

¹⁸ *Galić* Appeal Judgement, para. 31.



matter to a panel of three judges. Accordingly, the Appeals Chamber finds that it is not properly seised of this matter as it should be referred to a panel of three judges.

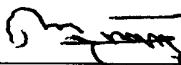
IV. DISPOSITION

For the foregoing reasons, the Appeals Chamber

REFERS the application to the President to appoint a panel of three judges to determine the original application made by the Appellant, namely, the “Motion to Disqualify Judge Picard” filed on 1 May 2009.

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

Dated this 26th day of June 2009
At The Hague
The Netherlands



Judge Mehmet Güney
Presiding

[Seal of the Tribunal]