

UNITED
NATIONS

IT-98-29-T
D 8860 - D 8854
03 February 2003

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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: IT-98-29-T

Date: 3rd February 2003

Original: English

IN TRIAL CHAMBER I

Before: Judge Liu Daqun, Presiding
Registrar: Mr. Hans Holthuis
Decision of: 3rd February 2003

THE PROSECUTOR

vs.

STANISLAV GALIĆ

DECISION ON THE DEFENCE MOTION FOR WITHDRAWAL OF JUDGE ORIE

The Office of the Prosecutor:

Mr. Mark Ierace

Defence Counsel:

Ms. Mara Pilipović
Mr. Stéphane Piletta-Zanin

I, Liu Daqun, Presiding Judge of Trial Chamber I at the 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, have been seized of a Motion submitted by the Defence on 23rd January 2003 for the Withdrawal of Judge Alphons Orié from the Bench in this case (“the Motion”).

1. The Filing of the Motion

1. Under Rule 15(B) of the Tribunal’s Rules of Procedure and Evidence (“the Rules”), motions for disqualification and withdrawal of Judges are to be addressed to the Presiding Judge of the Trial Chamber. The Motion, accordingly, should have been addressed to me in my capacity as Presiding Judge of Trial Chamber I. It was, however, erroneously directed to Section B of the Trial Chamber but will be dealt with as if it had been correctly addressed.

2. According to the norms laid down in Pt. 5 in the Tribunal’s Practice Direction on the Length of Briefs and Motions,¹ dated 5 March 2002, motions should normally not exceed 10 pages. In this instance, however, the Motion is 12 pages long and I feel impelled to remind the Defence counsel of the standards applicable to the filing of briefs and motions.

2. The Submissions of the Defence

3. In its Motion, the Defence submits that Judge Orié must be withdrawn from the Chamber in the case against *Stanislav Galić* (“the Accused”) as a consequence of the fact that Judge Orié confirmed, on 8th November 2002, the amended indictment against Ratko Mladić, in which Mladić is charged with crimes which are related to the case against the Accused.² By confirming this indictment, Judge Orié obviously relied on the facts and circumstances alleged in the amended indictment and the supporting material against Mladić. However, as some of these same facts and circumstances are *disputed* in the case against the Accused, the Defence argues, Judge Orié is no longer, and cannot be, an impartial judge in the trial against the Accused because he has acknowledged, *prima facie*, the veracity of these facts and circumstances.

¹ “Practice Direction on the Length of Briefs and Motions, (original: French), IT/184 Rev.1

² See *The Prosecutor vs. Ratko Mladić*, IT-95-5/18-I, “Order Granting Leave to File An Amended Indictment and Confirming the Amended Indictment”, issued by Judge Alphons Orié on 8th November 2002.

4. What the Defence asserts, to be specific, is:
- (a) that Mladić is held to be criminally liable under Article 7(1) of the Statute for having participated in a “*joint criminal enterprise*” together with, *i.a.*, the Accused, but that the Accused himself is *not* charged with such participation;
 - (b) that Mladić is accused of *genocide* and *complicity in genocide* under Article 3 of the Statute, of having *persecuted* the civilian population on political, racial and religious grounds under Article 5(h) of the Statute, and of being responsible for *extermination* and *murder* under Article 3 of the Statute, altogether with, *i.a.*, the Accused, while the Accused himself is *not* charged with any of these crimes;
 - (c) that Mladić is charged with crimes committed in the context of the take-over of the municipality of *Vogosca* in the vicinity of Sarajevo, for which the Accused has not been charged;
 - (d) that by accepting a *prima facie* case against Mladić on these charges, Judge Orić cannot possibly bring an impartial and unprejudiced mind to the determination of the *facts* and *circumstances* in the case against the Accused to the extent in which Judge Orić has already accepted these essentials by confirming the indictment against Mladić; and finally
 - (e) that, in more general terms, a Judge’s confirmation of an indictment in *another* case in which the facts are (partly) the same as in the present case, should disqualify that Judge from hearing the present case because he or she has confirmed these facts publicly and without any possibility for the Defence to argue against their recognition and without any access for the two other Judges to verify these facts. This interpretation is clear from the wording of Rule 15(C), which would have been formulated differently if it intended *not* to disqualify a Judge who confirms an indictment in a related case.³

3. Discussion

5. In my reading, the Motion fails to appreciate the fundamental difference between the judicial functions of a Judge who *confirms an indictment* and a Judge who *sits at trial*. In the first instance, the confirming Judge is required to assess whether, on the basis of the material submitted *ex parte* by the Prosecutor, there is (a) sufficient material to show that the suspect may have committed the crimes for which he is charged and (b) a fairly high probability (in the mind of a reasonable trier of fact) that the suspect will eventually be con-

victed for those crimes, if brought to trial.⁴ Should the confirming Judge conclude that these requirements are *not* met, then he or she is obliged to refuse the indictment so as to save the person – still presumed to be innocent – from the harassment of being forced through a criminal trial.

6. Although the confirming Judge's assessment of the material submitted by the Prosecutor needs to be both thorough and careful, however, the Judge is certainly not at this stage engaged in a process of fully *verifying* the material or the facts included therein. As the Defence has rightly pointed out in the Motion,⁵ the confirmation procedure lacks the fundamental trait of *contradiction* and it cannot, therefore, be relied upon as a basis for establishing for sure that certain events took place. By its very nature, the confirmation of an indictment can never provide more than a presumption that the facts alleged in the indictment *may* very well have occurred, but certainly not that they *did* occur; whether this is the case or not remains a matter to be proved at trial. The confirming Judge is obviously not bound in any way to accept the validity of facts alleged in the indictment, be it in this or in any other trial. Confirmation, in other words, is not adjudication, and even the strongest of assertions *prima facie* can never amount to a full verification of the fact in question. If this were the case, there would be no need at all for a trial.

7. For the Judge who sits at trial, in contrast, the assessment of facts is entirely different. During trial, each party has the right to contest a factual allegation and may bring evidence to show that is either true or false, while the other party may bring evidence to the contrary. Only under these circumstances can a Judge determine the facts of the case and properly establish whether they are true or false.

8. The Judges of this Tribunal are professional Judges with solid experience in handling information in the criminal legal context and notably in distinguishing between facts established during trial and facts derived from elsewhere. To suggest that Judge Orić may confuse the facts alleged in the indictment against Mladić with the facts established during the trial against the Accused, is to insinuate that Judge Orić is incapable of performing his duties as a Judge in a strictly professional manner. This, however, appears to be wholly unfounded and I fail to see just how Judge Orić's confirmation of the indictment against

³ The Motion, on page 8, erroneously quotes Rule 15(C) as Rule 15(B).

⁴ See *The Prosecutor vs. Milosević et al.*, Decision of 29 June 2001 on Application to Amend Indictment and on Confirmation of Amended Indictment, IT-99-37-I.

Mladić may have damaged or jeopardized the rights of the Accused to a fair trial. The Trial Chamber presided by Judge Orić cannot and certainly will not decide the case based on facts which have not been either proved or taken judicial notice of during the trial against him.

9. The Accused is charged with certain crimes raised in the indictment against him and these charges have been the focus of this trial all along. In the Motion, however, the Defence alleges that the charges raised against Mladić will spill over on the Accused and that the Accused will somehow be held responsible in this trial for crimes which are not included in the indictment against him. There is nothing to suggest that the Accused will be or indeed is in danger of being held responsible for crimes he has not even been charged with. In both Common Law and Civil Law, and certainly also in the international legal system of which this Tribunal is a part, the Prosecution is in control of the charges raised against an accused and carries the burden to prove his guilt. The Judges, however, have neither any interest in nor judicial powers to determine that the accused can be held responsible for crimes other than those charged in the indictment.

10. The Defence also asserts that Rule 15(C) should be interpreted so as to imply that the confirming Judge in another case should be disqualified from sitting as a member of the Trial Chamber in a new case if there is any (substantial) overlap between the facts and merits of the two cases. This interpretation, however, fails to take into account the legal history of Rule 15(C). As may be recalled, the original system in both Tribunals was that a confirming Judge could *not* sit subsequently as a member of the Trial Chamber to hear the same case. The disqualification of the confirming Judge from the Trial was abolished years later to avoid the possible deadlock of having most of the Tribunals' Judges disqualified from sitting in any trial. This amendment was found to be consistent with the provision in Article 21(4) of the Statute as well as the practice of the European Court of Human Rights.⁶ Rule 15(C), accordingly, was included to ensure that the confirming Judge could indeed sit during the Trial. By including this new Rule, however, *no position* was taken regarding the disqualification of confirming Judges in *other* cases. For those other Judges, the *only* applica-

⁵ See at page 8 of the Motion.

⁶ See *European Court of Human Rights* the decision of 22 April 1994 in *de Carvalho vs. Portugal*, ECHR 14/1993/409/488, at par. 18-40; the decision of 7 August 1996 in the case *Farrantelli & Santangelo vs. Italy*, ECHR 48/1995/554/640, at par. 53-60; see also most recently the decision of 16 November 2000 in *Rojas Morales vs. Italy*, ECHR 39676/98 at par. 22-40

ble Rule relating to their disqualification was the main Rule contained Rule 15(A), according to which a Judge may not sit in a Trial in which he or she has a personal interest or in which he or she has had an association which might affect that Judge's impartiality. To assume, in line with the Motion, that Rule 15(C) includes a presumption for disqualification of a confirming Judge in another case by the mere fact that there is a partial overlap of the subject matter in the two cases, is to introduce an unwarranted restriction in that Rule. The *only* possible basis for disqualifying Judge Orić from the Trial Chamber in this case is if the Defence could establish, according to Rule 15(A), that Judge Orić either entertained a personal interest in the outcome of this case or otherwise had brought himself into an association which might affect his impartiality (*subjectively*), or that indeed there might be a fear of such bias perceived by a fair-minded observer (*objectively*). The arguments brought by the Defence in this respect are purely speculative and there is nothing to support that Judge Orić is unable to apply his mind in an unprejudiced and impartial manner to the merits of this case, or that any reasonable fear about his impartiality could be maintained.

11. There is another element which disturbs me in relation to the Motion, which I would like to raise at this point, namely the fact that two and a half months have gone by since the amended indictment against Mladić was confirmed by Judge Orić on 8th November 2002, before the Defence filed its Motion on 24 January 2003. Although neither the Statute nor the Rules provide any time-limits for the filing of motions during trial, both parties are certainly under a general obligation to act swiftly in order to ensure that the Accused can be tried expeditiously. Were Judge Orić to be disqualified from this trial, two and half extra months of trial would have been sacrificed for absolutely no purpose, which seems to me to be an irresponsible manner of participation in the trials, not only in respect of the Accused but also with regard to the limited time and money available to the Tribunal.

12. Based on these considerations and having given full weight to the Motion, I have not been satisfied that Judge Orić's confirmation of the indictment against Ratko Mladić has or indeed could have affected Judge Orić's impartiality in the case against the Accused and there is therefore no ground for disqualifying him from the Trial Chamber in this case. I find the Motion to be unfounded and unwarranted on the whole.

13. I have, as I am required to do under Rule 15(B), consulted Judge Orić on the Motion, and he has confirmed that he does not have any interest in the outcome of the case against the Accused or otherwise entertains any bias which might affect his impartiality. For the

reasons lined out above, I have not found it necessary to refer the matter to the Bureau or to call a hearing on the matter.

14. The Motion, finally, seeks to obtain in advance leave to appeal in case the Motion is dismissed. The question of whether or not leave to appeal should be granted cannot, of course, be decided independently of the grounds advanced for appeal in each single case and I cannot commit the Chamber under Rule 73(B) to grant leave to appeal in advance.

4. Disposition

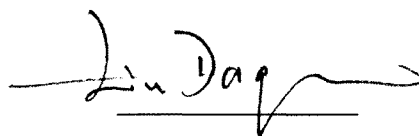
FOR ALL OF THE REASONS,

15. The Motion is denied in its entirety.

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

Dated on this third day of February, 2003,

At The Hague,
The Netherlands

A handwritten signature in black ink, appearing to read 'Liu Daqun', written over a horizontal line.

Liu Daqun, Presiding

(Seal of the Tribunal)