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**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-03-67-T
Date: 28 August 2013
Original: English

CHAMBER CONVENED BY ORDER OF THE VICE-PRESIDENT

Before: Judge Bakone Justice Moloto, Presiding
Judge Liu Daqun
Judge Burton Hall

Registrar: Mr John Hocking

Decision of: 28 August 2013

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON DEFENCE MOTION FOR
DISQUALIFICATION OF JUDGE FREDERIK HARHOFF AND
REPORT TO THE VICE-PRESIDENT**

Office of the Prosecutor
Mr Matthias Marcussen

Counsel for Vojislav Šešelj
Self-represented

I. PROCEDURAL HISTORY

1. On 9 July 2013, Vojislav Šešelj ("Defence") filed a motion ("Motion") seeking the disqualification of Judge Frederik Harhoff ("Judge Harhoff") from all further proceedings in his case.¹ On 17 July 2013, the Prosecution filed its response to the Motion ("Response").² On 23 July 2013, the President of the Tribunal withdrew and assigned the Vice-President, pursuant to Rule 22(A) of the Rules of Procedure and Evidence ("Rules"), to consider the Motion in his place.³ On 25 July 2013, pursuant to Rules 15(B)(ii) and 21 of the Rules, the Vice-President appointed this Chamber ("Chamber") to decide on the Motion and to report that decision to him.⁴

II. SUBMISSIONS OF THE PARTIES

2. The Defence seeks Judge Harhoff's disqualification on the basis of a letter that he wrote dated 6 June 2013 ("Letter").⁵ The Defence contends that on the basis of the Letter there is a "reasonable fear" of bias on the part of Judge Harhoff in the current proceedings.⁶ The Defence submits that the Letter shows a strong inclination on the part of Judge Harhoff to convict accused persons of Serbian ethnicity.⁷ In particular, the Defence underlines the sections of the Letter in which Judge Harhoff criticises a departure from the previous "set practice" of convicting military commanders.⁸ The Defence further contends that the Letter amounts to contempt of court for which proceedings should be initiated against Judge Harhoff.⁹ The Defence also submits that the past judgements in which Judge Harhoff deliberated show a pattern of convicting Serbs and thus demonstrate further prejudice and bias on his part.¹⁰

3. The Prosecution submits, as a preliminary matter, that the Motion is in excess of the word limit.¹¹ The Prosecution further submits that the Motion does not meet the high standard required for disqualification. It contends that the allegation of bias is "speculative" and is not founded on sufficient evidence.¹² The Prosecution suggests that the Letter was "private", circulated to a group

¹ Professor Vojislav Šešelj's Motion for Disqualification of Judge Frederik Harhoff, 9 July 2013.

² Prosecution's Response to Motion for Disqualification of Judge Frederik Harhoff, 17 July 2013.

³ Order Assigning a Motion to a Judge, 23 July 2013.

⁴ Order Pursuant to Rule 15, 25 July 2013.

⁵ Motion, para. 3; Response, Appendix B, Letter of Judge Harhoff, 6 June 2013.

⁶ Motion, para. 3.

⁷ Motion, para. 23.

⁸ Motion, paras 22-23.

⁹ Motion, para. 7.

¹⁰ Motion, paras 29-47.

¹¹ Response, para. 1.

¹² Response, paras 3-4.

of friends and, in criticising recent jurisprudence, was no different from many other public statements disagreeing with the jurisprudence of the Tribunal.¹³ The Prosecution also argues that as the Letter does not contain any specific references to the Accused in the present case, it cannot substantiate allegations of bias in relation to this particular Accused.¹⁴

III. APPLICABLE LAW

4. The Statute of the Tribunal ("Statute") guarantees an accused a "fair and expeditious" trial "with full respect for the rights of the accused".¹⁵ Article 13 of the Statute enshrines an additional element of the right to fair trial as it requires judges of the Tribunal to be "persons of high moral character, impartiality and integrity". This principle is embodied in Rule 15 of the Rules, which provides that:

(A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

(B) (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. If the decision is to uphold the application, the President shall assign another Judge to sit in the place of the Judge in question.

5. The Appeals Chamber has observed in respect of Rule 15 that:

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹⁶

6. With respect to the "reasonable observer" prong of this test, the Appeals Chamber has held that the "reasonable person must be an informed person, with knowledge of all the relevant

¹³ Response, para. 5.

¹⁴ Response, para. 6.

¹⁵ The Statute, Article 20(1); *Prosecutor v. Karadžić*, Case No. IT-95-05/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), 22 July 2009, para. 14.

¹⁶ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement"), para. 189.

circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.”¹⁷ As to the “circumstances” that may lead to a disqualification, the Appeals Chamber has held that “a Judge should not only be subjectively free from bias, but there should also be nothing in the surrounding circumstances which objectively gives rise to an appearance or a reasonable apprehension of bias”.¹⁸

7. The Appeals Chamber has further held that there is a presumption of impartiality which attaches to any judge of the Tribunal and which cannot be easily rebutted.¹⁹ Thus, it is for the appealing party alleging bias to adduce reliable and sufficient evidence to rebut that presumption.²⁰ No Judge may be disqualified on the basis of sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality.²¹

IV. DISCUSSION

8. As a preliminary matter, the Chamber notes that the Motion is in excess of the permitted word limit and that the Defence has not made an application for an extension of that limit. However, the Chamber will consider the Motion in its entirety, since it is in the interests of judicial economy and expeditiousness of the proceedings.

9. The Majority, Judge Liu dissenting, does not consider the Defence’s submissions regarding Judge Harhoff’s previous adjudications at the Tribunal to be relevant to, or probative of, the issue of disqualification. It will therefore limit its considerations to the content of the Letter.

10. On 6 June 2013, Judge Harhoff circulated the Letter to 56 people. While the Prosecution contends that the Letter was a “private letter to a group of friends”, the Chamber notes that it

¹⁷ *Furundžija* Appeal Judgement, para. 190.

¹⁸ *Furundžija* Appeal Judgement, para. 189; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelibići* Appeal Judgement”), para. 682.

¹⁹ *Prosecutor v. Renzaho*, Case No. ICTR-97-31-A, Judgement, 1 April 2011 (“*Renzaho* Appeal Judgement”), para. 21; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (“*Nahimana et al.* Appeal Judgement”), para. 48; *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 41; *Prosecutor v. Akayesu*, Case No. ICTR-96-04, Judgement, 1 June 2001, para. 91; *Čelibići* Appeal Judgement, para. 707; *Furundžija* Appeal Judgement, paras 196, 197.

²⁰ *Renzaho* Appeal Judgement, para. 23; *Prosecutor v. Karera*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para. 254; *Nahimana et al.* Appeal Judgement, para. 48; *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, para. 45. See also *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 (“*Rutaganda* Appeal Judgement”), para. 42; *Furundžija* Appeal Judgement, para. 197.

²¹ *Renzaho* Appeal Judgement, para. 23; *Rutaganda* Appeal Judgement, para. 43; *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement, 7 July 2006, para. 135.

subsequently became openly available both in print and on the Internet.²² In the Letter, Judge Harhoff criticises a number of recent Appeals Chamber and Trial Chamber Judgements of the Tribunal which he contends have diluted the doctrine of Joint Criminal Enterprise (“JCE”). In doing so, Judge Harhoff states that it was “more or less set practice” at the Tribunal until autumn 2012 to convict military commanders for crimes committed by their subordinates.²³

11. Judge Harhoff further alleges that what he perceives as the change in the doctrine of JCE has come about as a result of pressure being exerted by the President of the Tribunal on his colleagues in deliberations, which Judge Harhoff suggests may form part of a broader American/Israeli plan to curtail JCE and other forms of responsibility.²⁴ He states that he had always “presumed that it was right to convict leaders for the crimes committed with their knowledge ...” and concludes the Letter by stating that he is confronted by “a deep professional and moral dilemma not previously faced”.²⁵

12. The Chamber does not consider that a specific reference to the accused is required to substantiate the conclusion that an unacceptable appearance of bias exists. Nor does the Chamber accept the Prosecution’s submission that the Letter is not any different from public statements made by other Judges regarding the jurisprudence of the Tribunal. The Majority, Judge Liu dissenting, considers that the Letter differs from other public statements in that Judge Harhoff refers to what he perceives as a “set practice” of convicting military commanders and makes clear his dissatisfaction with his perceived change in the Tribunal’s direction in this regard. With regard to Judge Harhoff’s reference to military commanders, the Chamber notes that the accused is charged with participating in a JCE by *inter alia* directing paramilitary forces including a group known as “Šešelj’s men”.²⁶

13. By referring to a “set practice” of convicting accused persons without reference to an evaluation of the evidence in each individual case, the Majority, Judge Liu dissenting, considers that there are grounds for concluding that a reasonable observer, properly informed, would reasonably apprehend bias on the part of Judge Harhoff in favour of conviction. This includes for the purposes of the present case. This appearance of bias is further compounded by Judge Harhoff’s statement that he is confronted by a professional and moral dilemma, which in the view of the Majority, is a clear reference to his difficulty in applying the current jurisprudence of the Tribunal.

²² Response, para. 5; Sections of the Letter were published in the Danish newspaper *Berlingske* on 13 June 2013. The Letter is now widely available on the internet.

²³ The Letter, p. 1.

²⁴ The Letter, pp. 2-3.

²⁵ The Letter, p. 3.

²⁶ Third Amended Indictment, 7 December 2007, paras 8, 10.

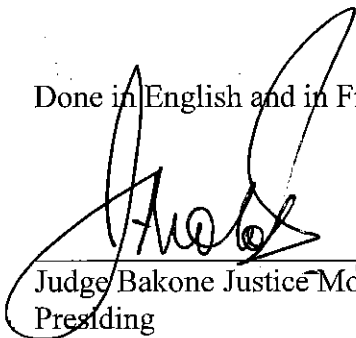
In the circumstances, the Majority considers that the Letter, when read as a whole, rebuts the presumption of impartiality.

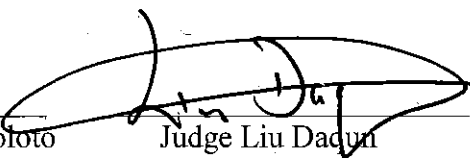
V. REPORT TO THE VICE-PRESIDENT

14. The Majority, Judge Liu dissenting, finds that in the Letter Judge Harhoff has demonstrated a bias in favour of conviction such that a reasonable observer properly informed would reasonably apprehend bias. As such an unacceptable appearance of bias exists. Therefore, the Majority, Judge Liu dissenting, finds that the presumption of impartiality has been rebutted. Accordingly, the Majority finds that the allegation of bias against Judge Harhoff is founded.

15. For the foregoing reasons, pursuant to Rule 15(A) of the Rules, the Majority, Judge Liu dissenting, **UPHOLDS** the application.

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


Judge Bakone Justice Moloto
Presiding


Judge Liu Daqun


Judge Burton Hall

Dated this twenty-eighth day of August 2013.
At The Hague
The Netherlands

[Seal of the Tribunal]

I. DISSENTING OPINION OF JUDGE LIU

1. In this Decision, the Majority upholds Šešelj's application and finds that, pursuant to Rule 15(A) of the Rules, the allegation of an unacceptable appearance of bias against Judge Harhoff is founded.¹ This finding is based solely on the evidence of the Letter of Judge Harhoff dated 6 June 2013, in which he *inter alia* criticises the recent jurisprudence of the Tribunal and specifically the recent acquittals of several accused.² The Majority finds that the content of the Letter creates a reasonable apprehension of bias on the part of Judge Harhoff in favour of conviction of accused before the Tribunal.³ I respectfully disagree with the Majority's reasoning and its conclusion in this regard.

2. At the outset, I note that my dissent from the Majority in the present decision in no way reflects an approval on my part of Judge Harhoff's Letter or the views expressed therein. To the contrary, I consider a letter of this kind to be undoubtedly improper in various respects for a judge in his position. In the Letter, Judge Harhoff sets forth an inarticulate critique of the recent jurisprudence of the Tribunal based on unsubstantiated speculations and insinuations of improper conduct by other colleagues in a fashion that is unbefitting of a Judge. I believe that Judge Harhoff should have used the proper channels available to him and present any criticism of the recent jurisprudence in this manner. However, whether or not the Letter sufficiently demonstrates an appearance of bias as to warrant his disqualification in the Šešelj case is a separate matter in which my view differs from that of the Majority.

3. Rule 15(A) of the Rules, governing the disqualification of judges, provides that a "Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality". In particular, a Judge must withdraw from a case if it is shown that actual bias exists or if there is an unacceptable appearance of bias in that, *inter alia*, the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁴

4. The Appeals Chamber has defined a reasonable observer as "an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form part of the background and apprised also of the fact that impartiality is one of the duties

¹ Decision, para. 15.

² Decision, paras 10-11.

³ Decision, para. 13.

⁴ *Furundžija* Appeal Judgement, para. 189; *Nahimana et al.* Appeal Judgement, para. 49; *Akayesu* Appeal Judgement, para. 203; *Prosecutor v. Radovan Karadžić*, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), 22 July 2009 ("Karadžić Decision"), para. 15.

that Judges swear to uphold.”⁵ There is a strong presumption of impartiality that attaches to a judge – a presumption that has been consistently upheld and emphasized in the Tribunal’s jurisprudence.⁶ Consequently, the party moving for disqualification bears the burden to adduce sufficient and reliable evidence that the judge is not impartial.⁷ Accordingly, there is a high threshold to reach in order to rebut the presumption of impartiality, and therefore to disqualify a judge, the reasonable apprehension of bias must be “firmly established”.⁸ This high threshold is required as “while any real or apparent bias on the part of a Judge undermines confidence in the administration of justice, so too would disqualifying Judges on the basis of unfounded allegations of bias.”⁹

5. The Majority finds that “the Letter, *when read as a whole*, rebuts the presumption of impartiality”.¹⁰ However, the Majority relies only on the following three specific statements made by Judge Harhoff in the Letter in support of its finding of apparent bias:¹¹

Right up until autumn 2012, it has been a more or less set practice at the court that military commanders were held responsible for war crimes that their subordinates committed [...].¹²

[...] I have always presumed that it was right to convict leaders of the crimes committed with their knowledge within a framework of a common goal.¹³

The latest judgements here have brought me before a deep professional and moral dilemma, not previously faced.¹⁴

The Majority considers that these statements in themselves demonstrate an appearance of bias on the part of Judge Harhoff in favour of conviction, especially as although he refers to convicting accused, he does not at the same time refer to the “evaluation of the evidence in each individual case.”¹⁵ The Majority consequently concludes that from the Letter, “a reasonable observer, properly informed, would reasonably apprehend bias on the part of Judge Harhoff in favour of conviction.”¹⁶

6. I respectfully disagree with the Majority’s reasoning. As an initial matter, I note that the disqualification of a judge is not a step to be undertaken lightly. This consideration is evident in the high threshold that must be satisfied in order to rebut the presumption of impartiality which attaches

⁵ *Furundžija* Appeal Judgement, para. 190; *Čelebići* Appeal Judgment, para. 697; *Karadžić* Decision, para. 16.

⁶ See, e.g., *Furundžija* Appeal Judgement, para. 189; *Karadžić* Decision, para. 16.

⁷ *Renzaho* Appeal Judgement, para. 23; *Karera* Appeal Judgement, para. 254; *Nahimana et al.* Appeal Judgement, para. 48; *Niyitegeka* Appeal Judgement, para. 45. See also *Rutaganda* Appeal Judgement, para. 42; *Furundžija* Appeal Judgement, para. 197.

⁸ *Furundžija* Appeal Judgement, para. 197.

⁹ *Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera’s Motion for Disqualification of Judge Byron and Stay of the Proceedings, ICTR-98-44-T, 20 February 2009, para. 6. See also *Karadžić* Decision, para. 17.

¹⁰ Decision, para. 13 (emphasis added).

¹¹ Decision, paras 10-13, referring to Letter, pp. 1-3.

¹² Letter, p. 1.

¹³ Letter, p. 2.

¹⁴ Letter, p. 3.

¹⁵ Decision, para. 13.

¹⁶ Decision, para. 13.

to a judge – a threshold necessary to safeguard the interests of the sound administration of justice.¹⁷ I am therefore concerned with the cursory approach taken by the Majority in assessing the issue of whether the Letter would lead an informed person, with knowledge of all the relevant circumstances, to reasonably apprehend bias on the part of Judge Harhoff in favour of conviction of accused before the Tribunal.

7. I consider that in assessing the Letter, the Majority failed to properly contextualize the statements made by Judge Harhoff which it found supported the finding of a reasonable apprehension of bias. In this respect, it did not take into account that the Letter is of a highly informal nature directed at the audience of his close friends and associates. Taking into account this context, I am not convinced that Judge Harhoff's failure to refer to "an evaluation of the evidence in each individual case"¹⁸ creates the appearance that he is reluctant to apply the Tribunal's law and rules of procedure and evidence or that he is in favour of conviction of accused before the Tribunal. Such an interpretation fails to take into account, or at least acknowledge, the consideration that the Judges of the Tribunal are professional, experienced judges and that they may be relied upon to bring an impartial and unprejudiced mind to the evidence and issues arising in the case before them. Similarly, I cannot concur with the Majority's conclusion that Judge Harhoff's reference to being confronted with "a professional and moral dilemma" reflects a difficulty on his part to apply the current jurisprudence of the Tribunal.

8. Additionally, in applying the test of a "reasonable observer", the Majority fails to adequately take into account and address *all of the surrounding circumstances* that an informed observer is assumed to know in order to assess whether there is a reasonable apprehension of bias. In my view, an evaluation of the relevant circumstances in the present case is crucial to a proper interpretation of the Letter and its contents. Such circumstances include, for example, the high eligibility standard for Judges of the Tribunal as embodied in Article 13 of the Statute,¹⁹ the oath taken by judges to exercise their powers "honorably, faithfully, impartially and conscientiously",²⁰ and a judge's professional experience.

9. In the instant case, the Majority at no point mentions or indicates that it took into account Judge Harhoff's experience as a Judge of the Tribunal and a professor of law. In my view, the

¹⁷ See, e.g., *Prosecutor v. Vojislav Seselj*, Case No. IT-03-67-R77.3, Decision on Vojislav Šešelj's Motion to Disqualify Judge Alphons Orie, 7 October 2010, para. 11; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on the Motion for Disqualification, 12 January 2009, para. 3; *Prosecutor v. Blagojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008, para. 3; *Čelebići Appeal Judgment*, para. 707.

¹⁸ Decision, para. 13.

¹⁹ Article 13 of the Statute. In particular, Article 13 of the Statute requires that judges be "persons of high moral character, impartiality and integrity" as well as appropriately qualified.

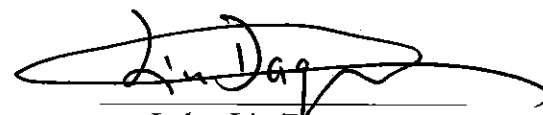
²⁰ Rule 14 of the Rules.

Majority should have taken into consideration such circumstances in evaluating the Letter and its contents as to determine whether a reasonable, informed observer would apprehend bias based on it. In my view, had the Majority considered these circumstances, it would have found that Judge Harhoff's statements do not demonstrate an appearance of bias towards conviction of accused before the Tribunal as to overcome the presumption of impartiality.

10. Finally, I find the Defence's remaining arguments regarding the appearance of bias to be unpersuasive. In this respect, the Defence's request to initiate contempt proceedings against Judge Harhoff²¹ is without merit and reflects a misunderstanding of the applicable law of this Tribunal. Likewise unconvincing is the Defence's reference to previous judgements in which Judge Harhoff deliberated²² as it fails to show how these judgements may be considered as sufficient and reliable evidence to rebut the presumption of impartiality of Judge Harhoff.

11. For the foregoing reasons, I am not persuaded in the present circumstances that a reasonable, informed observer would reasonably apprehend bias on the part of Judge Harhoff in favour of conviction based on the Letter. Accordingly, I believe that the Defence has not rebutted the presumption of impartiality, and therefore I consider the allegation of bias against Judge Harhoff to be unfounded.

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


Judge Liu Daqun

Dated this twenty-eighth day of August 2013.
At The Hague
The Netherlands

[Seal of the Tribunal]

²¹ Motion, para. 7.

²² Motion, paras 29-47.