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-08-91-A
		Date:	2 April 2014
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Carmel Agius, Presiding**
Judge William H. Sekule
Judge Patrick Robinson
Judge Liu Daqun
Judge Arlette Ramaroson

Registrar: **Mr. John Hocking**

Decision of: **2 April 2014**

PROSECUTOR

v.

MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN

PUBLIC

DECISION ON MIĆO STANIŠIĆ'S MOTION REQUESTING A DECLARATION OF MISTRIAL AND STOJAN ŽUPLJANIN'S MOTION TO VACATE TRIAL JUDGEMENT

The Office of the Prosecutor
Ms. Laurel Baig

Counsel for Mićo Stanišić
Mr. Slobodan Zečević and Mr. Stéphane Bourgon

Counsel for Stojan Župljanin
Mr. Dragan Krgović and Ms. Tatjana Čmerić

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 "Stojan [Ž]upljanin's Motion to Vacate Trial Judgement" filed by Stojan Župljanin ("Župljanin") on 21 October 2013 ("Motion to Vacate"), and the "Motion on Behalf of Mićo Stanišić Requesting a Declaration of Mistrial" filed by Mićo Stanišić ("Stanišić") on 23 October 2013 ("Motion for Mistrial")[1] (collectively, "the Motions"). The Office of the Prosecutor ("Prosecution") filed a consolidated response to both motions on 25 October 2013.[2] Župljanin and Stanišić ("the Applicants") filed replies on 28 and 29 October 2013, respectively.[3]

I. BACKGROUND

2. On 27 March 2013, Trial Chamber II of the Tribunal ("Trial Chamber"), composed of Judges Burton Hall (presiding) ("Judge Hall"), Guy Delvoie and Frederik Harhoff ("Judge Harhoff"), issued its judgement in the case of *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T ("Trial Judgement"). The Trial Chamber convicted Stanišić pursuant to Article 7(1) of the Tribunal's Statute ("Statute") on the basis of joint criminal enterprise ("JCE") liability of persecutions as a crime against humanity, and murder and torture as violations of the laws or customs of war,[4] and convicted Župljanin pursuant to Article 7(1) of the Statute on the basis of JCE liability of persecutions and extermination as crimes against humanity, and murder and torture as violations of the laws or customs of war.[5] The Trial Chamber sentenced both Župljanin and Stanišić to 22 years' imprisonment.[6] The Trial Judgement was decided unanimously.

3. Stanišić, Župljanin and the Prosecution filed Notices of Appeal on 13 May 2013.[7] On 2 July 2013, Stanišić filed a motion under Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules") seeking the admission of additional evidence on appeal consisting of extracts of a letter written by Judge Harhoff dated 6 June 2013 and published in a Danish newspaper on 13

[1] Stanišić originally filed the Motion for Mistrial before the Appeals Chamber with Judge Carmel Agius as the Presiding Judge on 14 October 2013. He re-filed it before the correctly constituted Appeals Chamber on 23 October 2013.
[2] Prosecution Consolidated Response to Stanišić's Motions for Mistrial and Provisional Release, and Župljanin's Motions to Vacate Trial Judgement, for Recusal of Judge Liu and Provisional Release, 25 October 2013 ("Consolidated Response").
[3] Stojan Župljanin's Reply to Prosecution's Response to Motions to Vacate Trial Judgement, Provisional Release and for Recusal of Judge Liu Daqun, 28 October 2013 ("Župljanin Reply"); Consolidated Reply on Behalf of Mićo Stanišić to Prosecution Consolidated Response with Confidential Annexes A & B, 29 October 2013 (public with confidential annexes) ("Stanišić Reply").
[4] Trial Judgement, vol. 2, para. 955. *See* Trial Judgement, vol. 2, paras 729-781.
[5] Trial Judgement, vol. 2, para. 956. *See* Trial Judgement, vol. 2, paras 489-530.
[6] Trial Judgement, vol. 2, paras 955-956.
[7] Notice of Appeal on Behalf of Mićo Stanišić, 13 May 2013; Notice of Appeal on Behalf of Stojan [Ž]upljanin, 13 May 2013; Prosecution Notice of Appeal, 13 May 2013.

June 2013 ("Letter").[8] Stanišić also filed a motion seeking leave to amend his Notice of Appeal, *inter alia*, to add a ground of appeal claiming a violation of his right to a fair trial by a competent, independent and impartial tribunal.[9] Stanišić, Župljanin and the Prosecution filed Appeal Briefs on 19 August 2013.[10] On 28 August 2013, a Chamber convened by Order of the Vice-President of the Tribunal in the *Prosecutor v. Vojislav Šešelj* case ("Special Panel") found by majority that in the Letter Judge Harhoff "demonstrated a bias in favour of conviction such that a reasonable observer properly informed would reasonably apprehend bias" ("*Šešelj* Decision").[11] On 9 September 2013, Župljanin requested leave to amend his Notice of Appeal and supplement his Appeal Brief, *inter alia*, to add a ground of appeal asserting a violation of his right to a fair trial by reason of an actual or reasonable apprehension of bias on the part of Judge Harhoff, which in his submission, was supported by the *Šešelj* Decision.[12] On 7 October 2013, the Special Panel by majority denied a request by the Prosecution for reconsideration of the *Šešelj* Decision ("*Šešelj* Reconsideration Decision" and, collectively with the *Šešelj* Decision, "*Šešelj* Decisions").[13]

4. By Orders of 22 and 25 October 2013, President Theodor Meron ("Judge Meron") withdrew himself from considering the Motions and referred them to Judge Carmel Agius ("Judge Agius") for appropriate action.[14] On 28 November 2013, Judge Agius assigned Judge William H. Sekule to replace Judge Meron on the Bench for the purposes of considering the Motions.[15]

5. On 21 October 2013, Župljanin filed a motion requesting the recusal of Judge Liu Daqun ("Judge Liu") from considering the Motion to Vacate.[16] This motion was denied on 3 December 2013 by Judge Agius in his capacity as Acting President.[17] On 13 December 2013, Župljanin filed a

[8] Rule 115 Motion on Behalf of Mićo Stanišić Seeking Admission of Additional Evidence with Annex, 2 July 2013, paras 2, 9, p. 7.
[9] Motion on Behalf of Mićo Stanišić Seeking Leave to Amend Notice Appeal with Annexes A, B and C, 2 July 2013, paras 5, 30-35, 39.
[10] Appellant's Brief on Behalf of Mićo Stanišić, 19 August 2013; Stojan [Ž]upljanin's Appeal Brief, 19 August 2013 (confidential); Prosecution Appeal Brief, 19 August 2013. *See also* Stojan [Ž]upljanin's Appeal Brief, 23 August 2013 (public redacted).
[11] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013, para. 14.
[12] [Ž]upljanin's Second Request to Amend his Notice of Appeal and Supplement his Appeal Brief, 9 September 2013, paras 1-3, 7.
[13] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin, 7 October 2013, para. 21.
[14] Order Assigning Motions to a Judge, 22 October 2013, p. 1; Order Assigning a Motion to a Judge, 25 October 2013, p. 1.
[15] Order Replacing a Judge in Respect of Motions before the Appeals Chamber, 28 November 2013, p. 1; Order Replacing a Judge in Respect of a Motion before the Appeals Chamber, 28 November 2013, p. 1.
[16] Stojan [Ž]upljanin's Motion Requesting Recusal of Judge Liu Daqun from Adjudication of Motion to Vacate Trial Judgement, 21 October 2013.
[17] Decision on Motion Requesting Recusal, 3 December 2013.

request, joined by Stanišić, for the appointment of a Panel to adjudicate the request for disqualification of Judge Liu.[18] The appointed Panel[19] denied the request on 24 February 2014.[20]

II. SUBMISSIONS OF THE PARTIES

1. Motions

6. Župljanin requests the Appeals Chamber to vacate the Trial Judgement on the basis that the Trial Chamber was not a properly constituted trial chamber consisting of three impartial judges.[21] For the same reason, Stanišić requests the Appeals Chamber to declare a mistrial and to vacate "the entire trial process culminating in the Trial Judgement".[22] The Appeals Chamber understands Stanišić's motion to also encompass a request to vacate the Trial Judgement.[23] Stanišić further requests the Appeals Chamber to order the immediate cessation of proceedings.[24] The Applicants argue that a reasonable observer, properly informed, could reasonably apprehend bias in favour of conviction on the part of Judge Harhoff.[25] They contend that the finding of the Special Panel in the *Šešelj* Decisions, that the presumption of impartiality attaching to Judge Harhoff had been rebutted in the *Šešelj* case, is "equally" or "directly" applicable to their case.[26]

7. The Applicants submit that the finding in the *Šešelj* Decisions is not confined to a particular accused or set of circumstances.[27] They claim that the views expressed by Judge Harhoff in the Letter did not concern a particular case.[28] They argue that the bias demonstrated by Judge Harhoff in the Letter relates to the criminal liability of "military commanders", especially by way of "joint criminal enterprise", which is the specific category into which they both fall.[29] The Applicants contend that there is an evident risk that actual bias influenced the Trial Judgement and an unavoidable reasonable apprehension of bias.[30] They emphasise that Judge Harhoff expresses in the Letter a "deep professional and moral dilemma" in respect of the Tribunal's case law from autumn

[18] Župljanin Defence Request for Appointment of a Panel to Adjudicate the Request for Disqualification of Judge Liu Daqun, 13 December 2013; Motion on Behalf of Mićo Stanišić joining Župljanin Defence Request for Appointment of a Panel to Adjudicate the Request for Disqualification of Judge Liu Daqun, 23 December 2013.
[19] *See* Decision on Župljanin Defence Request for Appointment of a Panel to Adjudicate the Request for Disqualification of Judge Liu Daqun, 7 February 2014, p. 3 (ordering a Bench composed of Judges Christoph Flügge, Howard Morrison and Melville Baird).
[20] Decision on Motion Requesting Recusal of Judge Liu from Adjudication of Motion to Vacate Trial Judgement, 24 February 2014, paras 16-17.
[21] Motion to Vacate, paras 2, 26.
[22] Motion for Mistrial, paras 1-3, p. 10.
[23] Motion for Mistrial, paras 3, 35, 37.
[24] Motion for Mistrial, paras 4, 19, 42, p. 10.
[25] Motion for Mistrial, paras 2, 6-19, 30, 34; Motion to Vacate, paras 1-2, 22, 26.
[26] Motion for Mistrial, paras 1-3, 8-15, 34; Motion to Vacate, paras 1, 10-17.
[27] Motion for Mistrial, paras 2, 9-11, 13; Motion to Vacate, para. 12.
[28] Motion for Mistrial, paras 11-12, 16; Motion to Vacate, paras 12-13.
[29] Motion for Mistrial, para. 14; Motion to Vacate, paras 13, 17, 20.
[30] Motion for Mistrial, paras 18, 29-30, 34; Motion to Vacate, paras 15, 17.

2012 and that he sent the Letter 71 days after he signed the Trial Judgement.[31] Stanišić adds that Judge Hall, who was the Presiding Judge in his trial, was a member of the Special Panel, which in his submission makes the finding in the *Šešelj* Decisions "directly relevant" to the present proceedings.[32]

8. The Applicants argue that as the Trial Chamber was not properly constituted by three impartial judges, the trial process has been vitiated, and the appropriate course of action is to vacate the Trial Judgement.[33] They add that the fact that two other members of the Trial Chamber arrived at the same conclusions as Judge Harhoff cannot legitimize the Trial Judgement since a properly constituted trial chamber must be composed of three independent and impartial judges and because the presence of a judge whose impartiality has been rebutted inevitably taints the entire trial process.[34] Stanišić contends that the appellate proceedings must be immediately discontinued in view of the seriousness of the breach of fair trial rights at issue and since, unlike in the *Šešelj* case, the Trial Judgement has already been rendered.[35] Župljanin argues that the only appropriate remedy in the circumstances is to vacate the Trial Judgement as soon as the matter can be practicably adjudicated, *i.e.* without waiting to adjudicate the matter as part of the overall appellate proceedings in the case, citing in support decisions of national courts.[36]

9. The Applicants further contend that the Tribunal must take into account the need to inspire confidence and legitimacy in the public and in its "particular constituency" in dealing with allegations of judicial bias, and in particular, the apprehension of bias arising from Judge Harhoff's Letter.[37]

2. Prosecution's Response

10. The Prosecution responds that both motions are procedurally flawed and should be denied.[38] It argues that the Tribunal's jurisprudence has established that the sole manner by which a party may challenge a trial judge's impartiality during the appellate phase of a case is through his or her notice of appeal, as the Applicants have already attempted to do, and that the matter will be adjudicated upon in the appeal judgement if these requests are granted.[39] The Prosecution contends

[31] Motion for Mistrial, paras 15-16; Motion to Vacate, paras 1, 20.
[32] Motion for Mistrial, paras 17-18.
[33] Motion for Mistrial, paras 3, 35-37; Motion to Vacate, paras 23-24.
[34] Motion for Mistrial, paras 38-41; Motion to Vacate, para. 24.
[35] Motion for Mistrial, paras 4, 19, 42. *See also ibid.*, paras 20-30.
[36] Motion to Vacate, paras 2, 16-19, 24-25, *citing Hoekstra v. HM Advocate* (No. 2), 2000 J.C. 391 ("*Hoekstra* case"), paras 18, 20, 22, 24; *Hathcock v. Navistar Intern. Transp. Corp.*, 53 F.3d 36 (4th Cir. 1995) ("*Hathcock* case"), pp 39, 41; *Caperton et al. v. Massey Coal Co. Inc. et al.*, 129 S. Ct. 2252 ("*Caperton et al.* case"), p. 2267.
[37] Motion for Mistrial, para. 32; Motion to Vacate, paras 21-22.
[38] Consolidated Response, paras 1, 11, 17.
[39] Consolidated Response, paras 1, 5.

that the Applicants offer no cogent reasons to depart from the normal appellate process in order to dispose of this matter.[40] It adds that since the Applicants have already initiated this appellate process, they cannot now "opt out" of it.[41] The Prosecution argues that the Applicants cite no jurisprudence in support of the "extraordinary and unprecedented remedies" they request, and that the Appeals Chamber has recognised that the appellate process sufficiently guarantees the right to a fair trial and in accordance with the norms of due process.[42]

11. The Prosecution submits that the *Šešelj* Decisions do not amount to grounds to circumvent the normal appellate procedure in this case.[43] It points out that when the Applicants tried to intervene in the *Šešelj* case, the Special Panel rejected their request, holding that the appropriate place for them to raise their arguments concerning Judge Harhoff's impartiality was "*the appeals process* in their own case".[44] It also argues that the Applicants fail to explain why the *Šešelj* Reconsideration Decision that they seek to rely on as support for their requests to amend their Notices of Appeal would justify circumventing this same appellate procedure.[45] The Prosecution submits that the *Šešelj* Reconsideration Decision is not directly or equally applicable to this case, and that the Special Panel's determinations were limited to the *Šešelj* case only.[46] It argues that the Special Panel discussed the issue of Judge Harhoff's bias within the context of the charges against Vojislav Šešelj and emphasises that factual findings from one case do not bind a finder of fact in a subsequent case at the Tribunal.[47] Accordingly, it contends that the Appeals Chamber must make its own determination on whether Judge Harhoff was biased in this case.[48]

12. The Prosecution adds that Stanišić's proposed remedy – declaration of mistrial – is simply not available at this stage of the case, with appellate proceedings well underway, and can only be requested during the trial itself.[49]

13. The Prosecution submits that the arguments challenging Judge Harhoff's impartiality are not properly before the Appeals Chamber and consequently does not respond to them.[50] It states that it will respond to these arguments only if and when the Appeals Chamber grants the Applicants' requested amendments to their Notices of Appeal and orders supplemental briefing.[51]

---

[40] Consolidated Response, para. 1.
[41] Consolidated Response, para. 6.
[42] Consolidated Response, para. 6.
[43] Consolidated Response, paras 1, 7.
[44] Consolidated Response, para. 7, *citing Šešelj* Reconsideration Decision, para. 5 (emphasis in Consolidated Response).
[45] Consolidated Response, para. 8.
[46] Consolidated Response, para. 9.
[47] Consolidated Response, para. 9.
[48] Consolidated Response, para. 9.
[49] Consolidated Response, para. 10.
[50] Consolidated Response, para. 2.
[51] Consolidated Response, para. 2.

The Prosecution urges a speedy resolution of the motions that relate to the question of Judge Harhoff's impartiality.[52]

3. Replies

14. The Applicants reply that the Appeals Chamber has the authority under Rule 54, together with Rule 107 of the Rules, to issue interlocutory decisions, including on the discontinuation of proceedings, because of a violation of an accused's rights.[53] Stanišić submits that the Rules or relevant jurisprudence do not preclude interlocutory adjudication of his request for the immediate cessation of proceedings.[54] He also contends that a motion for mistrial is admissible during appellate proceedings under Rules 73 and 107 of the Rules.[55] Župljanin argues that the Appeals Chamber has in the past issued an order for the termination of proceedings and release of an accused after interlocutory review of a denial of an accused's rights, and submits that it may do so in appellate proceedings as well.[56]

15. The Applicants further reply that they are not precluded from seeking immediate relief by having sought leave to address a ground of appeal on the same underlying issue.[57] Župljanin adds that merely because such issues can be addressed in the context of an appeal judgement does not mean that it is impermissible for interlocutory disposition.[58] He contends that there is no incompatibility between the appellate process and the ability to bring a motion for provisional relief, and if appropriate, summary determination.[59]

16. The Applicants submit that an interlocutory decision in the circumstances is not only permissible, but appropriate.[60] Stanišić argues that since the issuance of the *Šešelj* Reconsideration Decision, the appellate process is no longer appropriate in this case since there is no valid trial judgement upon which to base an appellate process.[61] He posits that appellate proceedings on the matter would perpetuate the fair trial violation and negatively impact upon the integrity of the Tribunal's proceedings.[62] Župljanin similarly claims that he is suffering ongoing and immediate prejudice that should be addressed as soon as possible.[63] Stanišić further argues that when the

[52] Consolidated Response, para. 16.
[53] Stanišić Reply, paras 14, 17, 23-24; Župljanin Reply, para. 2.
[54] Stanišić Reply, paras 4, 22.
[55] Stanišić Reply, para. 21 and fn. 30.
[56] Župljanin Reply, para. 2, citing *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 ("*Barayagwiza* Decision"), para. 113.
[57] Župljanin Reply, para. 6; Stanišić Reply, paras 4, 12, 22.
[58] Župljanin Reply, para. 3.
[59] Župljanin Reply, para. 6.
[60] Župljanin Reply, para. 5; Stanišić Reply, paras 14-17.
[61] Stanišić Reply, paras 14-16.
[62] Stanišić Reply, para. 15.
[63] Župljanin Reply, para. 6.

reason for vitiating the entire trial proceedings only comes to light after their cessation, there must be an immediate interlocutory remedy available to remedy the breach of rights.[64] Župljanin adds that a summary procedure is appropriate and judicially efficient.[65]

17. In addition, Stanišić replies that the Prosecution wilfully misconstrues the Motion for Mistrial.[66] He states that the *Šešelj* Decisions are a "final determination" and a "general finding" on Judge Harhoff's bias, that the finding is equally applicable to his case, and that the Motion for Mistrial does not concern the merits of that decision.[67] He contends that the "core issue" is what consequences flow from the Special Panel's finding of an unacceptable appearance of bias in favour of convicting on the part of Judge Harhoff.[68] Stanišić argues that the Motion for Mistrial concerns the "irreparable violation" of his right to a fair trial as a result of having been tried by a judge who unacceptably appears to be predisposed to convicting accused persons.[69]

18. The Applicants submit that the Prosecution's decision to "waive" its right to respond to submissions in the Motions should not be permitted to interfere with the Appeals Chamber's resolution of the Motions.[70]

III. APPLICABLE LAW

19. Under Article 25 of the Statute, a person convicted by a Trial Chamber may allege an error of law invalidating the decision. A convicted person on appeal who alleges that their right to a fair trial has been infringed due to a violation of the right to be tried by an independent and impartial tribunal alleges an error of law invalidating the trial judgement.

20. Neither the Statute nor the Rules explicitly regulate motions for a declaration of mistrial or to vacate a trial judgement. Pursuant to Rules 54 and 107 of the Rules, the Appeals Chamber may issue such orders as may be necessary for the conduct of proceedings.[71]

IV. DISCUSSION

21. The Appeals Chamber recalls the well-established practice at the Tribunal to deal with allegations of partiality of trial judges in the course of the normal appellate process, *i.e.* in the

[64] Stanišić Reply, para. 17.
[65] Župljanin Reply, para. 5.
[66] Stanišić Reply, paras 1, 11.
[67] Stanišić Reply, paras 2, 8, 20. *See also* Stanišić Reply, para. 9.
[68] Stanišić Reply, para. 3.
[69] Stanišić Reply, para. 10.
[70] Župljanin Reply, para. 7; Stanišić Reply, para. 18.
[71] Rule 107 of the Rules provides that the rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

appeal judgements.[72] The Appeals Chamber further recalls that the right to be tried before an independent and impartial tribunal is an integral component of the right to a fair trial, as guaranteed in Article 21 of the Statute.[73] The appellate process at the Tribunal adequately safeguards this fundamental fair trial right of convicted persons.[74]

22. The Motions request the Appeals Chamber to adjudicate the allegation of Judge Harhoff's partiality in an interlocutory decision rather than in the appeal judgement. The Appeals Chamber will first consider whether it has the authority to consider an allegation of judicial bias in an interlocutory decision at this stage in the appeal proceedings of this case. Should it find itself vested with such authority, the Appeals Chamber will secondly assess whether it has been shown that issuing an interlocutory decision on the matter is necessary. Third, the Appeals Chamber will consider whether there exists any justification to exercise its inherent power to stay or terminate proceedings in this case.

23. First, as to the Appeals Chamber's authority, the Applicants contend that the Appeals Chamber is authorised or at least not precluded by the Rules to issue an interlocutory decision that would terminate proceedings because of a violation of an accused's rights. They rely on Rule 54, which, in conjunction with Rule 107 of the Rules, permits the Appeals Chamber to issue orders as necessary for the conduct of proceedings.[75] The Appeals Chamber notes that the application of Rule 54 is discretionary and dependent upon the necessity of the relevant order for the conduct of the

[72] *See Prosecutor v. Milan Martić,* Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement"), paras 30, 39-46; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008, paras 43, 77-107; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement"), paras 27-45; *Prosecutor v. Zejnil Delalić et al.,* Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Delalić et al.* Appeal Judgement"), paras 651-709; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement"), paras 164-215. *See also Ildephonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Judgement, 8 May 2012, paras 12-21; *Tharcisse Renzaho v. The Prosecutor*, Case No. ICTR-97-31-A, Judgement, 1 April 2011, paras 13-50; *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, paras 371-379; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.* Appeal Judgement"), paras 18, 47-90; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, paras 12-58; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, paras 43-46; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement"), paras 36-125; *The Prosecutor v. Jean-Paul Akayesu*, Judgment, 1 June 2001, paras 85, 194-207.

[73] *Martić* Appeal Judgement, para. 39; *Galić* Appeal Judgement, para. 37; *Furundžija* Appeal Judgement, para. 177. *See also Nahimana et al.* Appeal Judgement, para. 47; *Rutaganda* Appeal Judgement, para. 39; *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001, para. 51.

[74] *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on Sredoje Lukić's Motion Seeking Reconsideration of the Appeal Judgement and on the Application for Leave to Submit an *Amicus Curiae* Brief, 30 August 2013, p. 3; *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 9.

[75] *See*, *e.g.*, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.1, Stay of "Decision on Defence Motion of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005", 16 December 2005.

proceedings.[76] The Appeals Chamber therefore finds that it has the authority to consider an allegation of judicial bias in an interlocutory decision at this stage in the appeal proceedings under this rule.

24. The Appeals Chamber will now consider whether the Applicants have demonstrated that an interlocutory decision on this matter is necessary for the conduct of proceedings.

25. The Appeals Chamber is not persuaded that the findings made by the Special Panel in the *Šešelj* Decisions regarding Judge Harhoff's partiality constitute extraordinary circumstances that require an interlocutory decision on the matter. The basis of the Applicants' argument is that the *Šešelj* Decisions are "directly" or "equally" applicable to the present case. As a rule, the factual findings or decisions in particular cases are not binding on other cases at the Tribunal.[77] The *Šešelj* Decisions are therefore not binding on the Appeals Chamber. The Special Panel, in finding that the Applicants had no standing in those proceedings, itself recognised that the *Šešelj* Decisions are only applicable to and binding on the *Šešelj* case. It specifically noted that the Applicants "have another forum, namely the appeals process in their own case, in which they may raise their arguments".[78] Stanišić has failed to establish the relevance, in the present circumstances, of the fact that Judge Hall, the Presiding Judge in this case at trial, was part of the Special Panel. Further, there has been no "general finding" or "final determination" on Judge Harhoff's alleged partiality with regard to the present case. Since Judge Harhoff's alleged partiality in this case has not been determined, there is no basis for the claim of "ongoing prejudice" during the appeal proceedings.

26. The Appeals Chamber is similarly not convinced by the submission that an interlocutory decision is appropriate or necessary because appellate proceedings would undermine the public's confidence in, and the integrity of, the Tribunal. As noted above, there is an established avenue at the Tribunal to deal with allegations of bias of trial judges – the normal appellate process.

27. The national decisions cited by the Applicants do not support the argument that interlocutory adjudication on allegations of bias of a trial judge is necessary outside of the normal appellate proceedings. The *Hoekstra* case concerned a motion before the Scottish High Court of Justiciary to disqualify a judge sitting on an appeal case.[79] The circumstances of the *Hoekstra* case required an interlocutory decision by an appeal court to ensure that the ongoing appellate

[76] *Delalić et al.* Appeal Judgement, para. 558; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Décision sur la Requête de Ferdinand Nahimana aux fins de Communication d'Éléments de Preuve Disculpatoires et d'Investigations sur l'Origine et le Contenu de la Pièce à Conviction P 105, 12 September 2006, para. 13.
[77] *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Motion to Intervene and Statement of Interest by the Republic of Croatia, 8 February 2012, para. 12; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 114.
[78] *Šešelj* Reconsideration Decision, para. 5.
[79] *Hoekstra* case, para. 2.

proceedings would be determined by an impartial tribunal. No such justification exists in the present case.

28. In the *Hathcock* case, the United States Court of Appeals, Fourth Circuit, disqualified a judge, set aside his earlier order, and remanded the case to be heard by a different judge.[80] The Court of Appeals' intervention was to prevent a judge who appeared to have a "predisposition" against the defendant from continuing to hear the case.[81] In the present case the Trial Judgement has been issued and the allegation that a trial judge was biased may be dealt with in the normal appellate process.

29. In the *Caperton et al.* case, the Supreme Court of the United States reversed a judgement of a lower court on the basis that one of the judges on that bench should have recused himself.[82] The case was remanded for further proceedings.[83] The Appeals Chamber notes that the Supreme Court heard this case pursuant to the regular appellate process in the United States of America.[84] The decision does not therefore support the argument that an appeal court must issue an interlocutory decision outside of the normal appellate process on an allegation of judicial bias in a lower court.

30. The Appeals Chamber further notes that none of the national cases cited by the Applicants support the "extraordinary remedy" requested in the Motions – the immediate cessation of proceedings on the ground that the entire trial proceedings have been vitiated.[85] The decisions either referred or remanded the cases to a different judge or re-constituted bench.[86]

31. The judgements of the European Court of Human Rights ("European Court") cited by Stanišić also do not support this remedy.[87] In the case against Cyprus, the European Court found a violation of the right to be tried by an impartial tribunal since the Supreme Court of Cyprus had failed to remedy the violation of the right to a fair trial by the trial court.[88] In the present proceedings, the Appeals Chamber has not determined whether the allegation of partiality of a trial judge is founded, therefore a claim cannot be made that it has failed to remedy a violation of fair trial rights. In the United Kingdom cases referred to by Stanišić, the European Court found that since the defects leading to partiality were organisational in the courts-martial system, the subsequent review procedure could not correct the problems. Neither was remand considered an

[80] *Hathcock* case, p. 42.
[81] *Hathcock* case, p. 41.
[82] *Caperton et al.* case, pp 2265-2267.
[83] *Ibid.*, p. 2267.
[84] *Ibid.*, p. 2259. The Supreme Court granted a *writ of certiorari*, *i.e.* heard the case pursuant to the regular appellate process in the United States.
[85] Motion for Mistrial, para. 42, p. 10. *See also* Župljanin Reply, para. 2.
[86] *See supra*, paras 27-29.
[87] *See* Motion for Mistrial, paras 32-33.

appropriate remedy as an accused faced with a serious criminal charge is entitled to a first instance tribunal which can guarantee a fair trial.[89] The reasoning of the judgements is limited to the courts-martial system of the United Kingdom and is distinct from the alleged defect in the Trial Judgement in the present case, which concerns the alleged partiality of one trial judge, not an organisational defect within the Tribunal.

32. Neither do the decisions of the African Commission on Human and Peoples' Rights ("African Commission") cited by Stanišić substantiate the requested remedy.[90] In the communication regarding Egypt, the African Commission requested the release of the victims not merely because the Supreme State Security Emergency Court that heard their case was not independent and impartial,[91] but also because the decisions of the court are not subject to appeal.[92] Similarly, in the communications regarding Nigeria, the African Commission recommended that the complainants be released from custody after determining that the composition of the tribunals that tried them created the appearance, if not actual presence, of partiality *and* there was no avenue of appeal.[93] In the present proceedings, by contrast, the allegation of bias on the part of Judge Harhoff may be dealt with by an established appellate process. Requests by the Applicants to amend their respective Notices of Appeal to introduce a ground of appeal relating to the alleged bias of Judge Harhoff, as well as a request to introduce the Letter into the record, have been filed and will be decided by the Appeals Chamber.

33. Stanišić additionally relies on Rules 73 and 107 of the Rules to argue that a motion for mistrial may be made at the appellate stage of proceedings.[94] This is a novel issue on appeal. The Appeals Chamber recalls that Rule 107 of the Rules does not entail that all Rules applicable at the trial stage automatically apply at the appellate stage.[95] A mistrial is a trial that has been terminated

[88] *Kyprianou v. Cyprus*, App. No. 73797/01, Judgment, 15 December 2005, paras 134-135. *See also ibid.*, para. 36.
[89] *Wilkinson and Allen v. The U.K.*, App. Nos 31145/96 and 35580/97, Judgment, 6 February 2001, para. 24; *Moore and Gordon v. The U.K.*, App. Nos. 36529/97 and 37393/97, Judgment, 29 December 1999, para. 22.
[90] *See* Motion for Mistrial, para. 33 & fn. 37.
[91] *Egyptian Initiative for Personal Rights and Interights v. Egypt*, Comm. No. 334/06 (2011), paras 200-201, 207, 233.
[92] *Ibid.*, paras 205, 223-224, 233. The African Commission also found a number of other violations of the African Charter on Human and Peoples' Rights, including a violation of Articles 5 and 7 since the convictions were based partly on evidence obtained through torture. *Ibid.*, paras 219, 233.
[93] *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria*, Comm. No. 87/93, (1995), paras 11, 13-14, Holding; *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others) v. Nigeria*, Comm. No. 60/91, (1995), p. 2.
[94] Stanišić Reply, fn. 30. Rule 73, in conjunction with Rule 107 of the Rules, provides that a party may at any time move before the Appeals Chamber by way of motion for the appropriate ruling or relief.
[95] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 56; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 32 (Rule 107 enables "the Appeals Chamber to import rules for trial proceedings to fill a lacuna in appellate proceedings, subject to appropriate modifications").

prior to its conclusion.[96] A motion to declare a mistrial must thus be filed during the trial. This type of motion is not available or necessary in the appeal phase of a case. Whereas at the trial phase, bringing such a motion may be "indispensable to the grant of fair and appropriate relief,"[97] in appeal proceedings an allegation of a violation to the right to a fair trial will be considered in the appeal judgement.[98]

34. In light of the above, the Appeals Chamber considers that the Applicants have failed to show the necessity of an interlocutory order and therefore declines to exercise its discretion under Rules 54 and 107 of the Rules.

35. Third, the Appeals Chamber turns to the argument that it may order the termination of proceedings and release of an accused after interlocutory review of a denial of an accused's rights, including during appellate proceedings. The doctrine of "abuse of process" allows a court to decline to exercise jurisdiction either because it will be impossible to give the accused a fair trial or because it offends the court's sense of justice and propriety to try the accused in the circumstances of a particular case.[99] The question in cases of abuse of process is not whether it is "necessary" for a court to issue an interlocutory decision terminating proceedings (as for Rule 54 of the Rules examined above), but whether a court *should* continue to exercise jurisdiction over a case in light of serious and egregious violations of the accused's rights that would prove detrimental to the court's integrity.[100] The discretionary power of a court to stay or terminate proceedings by reason of abuse of process applies during the trial phase of a case, and is mostly concerned with prosecutorial misconduct, since its main purposes are to *prevent* wrongful convictions and preserve the integrity of the judicial system.[101] An allegation of partiality of a trial judge is a ground to appeal a conviction on the basis that it is unsafe.[102] As noted above, both Applicants have filed motions to amend their respective Notices of Appeal to include the issue of Judge Harhoff's alleged partiality

---

[96] Bryan Garner (ed.), *Black's Law Dictionary* (St. Paul, Minn.: West, 2009, 9th ed.), p. 1093 ("mistrial […] 1. A trial that the judge brings to an end, *without a determination on the merits*, because of a procedural error or serious misconduct occurring during the proceedings.") (emphasis added).
[97] *Delalić et al.* Appeal Judgement, paras 643-645.
[98] *See supra*, fn. 72. *See also Delalić et al.* Appeal Judgement, paras 643-645.
[99] *R. v. Horseferry Road Magistrates' Court, Ex p. Bennett (No.1)* [1994] 1 A.C. 42, H.L.(E.), 74G; *Barayagwiza* Decision, paras 74-75.
[100] *Barayagwiza* Decision, para. 74.
[101] *See*, *e.g.*, *Barayagwiza* Decision, para. 112; *Prosecutor v. Radoslav Brđanin & Momir Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Brđanin to Dismiss the Indictment, 16 May 2001, para. 5 ("[If a] Trial Chamber is satisfied that the absence of such resources will result in a miscarriage of justice, it has the inherent power and the obligation to stay the proceedings until the necessary resources are provided, in order to prevent the abuse of process involved in such a trial").
[102] *See R. v. A.* (No. 2) [2002] 1 A.C. 45; [2001] UKHL 25, in which Lord Steyn observed that it was well-established that the right to a fair trial was absolute in the sense that a conviction obtained in breach of it cannot stand (at p. 65, para. 38). *See also R. v. Forbes* [2001] 1 A.C. 473, 487; [2000] UKHL 66, para. 24; *R. v. Togher & Ors* [2001] 3 All E.R. 463; [2000] EWCA Crim 111, para. 33 ("if a defendant has been denied a fair trial it will almost be inevitable that the conviction will be regarded as unsafe").

and its impact on the Trial Judgement.[103] Stanišić has also requested to have the Letter introduced as additional evidence on appeal pursuant to Rule 115 of the Rules.[104] These three motions will be decided by the Appeals Chamber, and if granted, the Applicants and the Prosecution will have a full opportunity to litigate this issue.[105] The Appeals Chamber therefore finds no justification to stay or terminate appellate proceedings in the present case.

V. DISPOSITION

36. In view of the foregoing, the Appeals Chamber **DISMISSES** the Motions.

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

Done this 2nd day of April 2014,
At The Hague,
The Netherlands.

Judge Carmel Agius
Presiding Judge

[Seal of the Tribunal]

[103] *See supra*, para. 3.
[104] *See supra*, para. 3.
[105] The Appeals Chamber reserves its decision on the three motions which are still under consideration.