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:	7 October 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: **7 October 2013**

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON PROSECUTION MOTION FOR RECONSIDERATION OF DECISION ON DISQUALIFICATION, REQUESTS FOR CLARIFICATION, AND MOTION ON BEHALF OF STANIŠIĆ AND ŽUPLJANIN

Office of the Prosecutor
Mr. Matthias Marcussen

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Self-represented

I. PROCEDURAL HISTORY

1. On 28 August 2013, this Chamber ("Chamber") issued a decision ("Decision") in which the Majority, Judge Liu dissenting, upheld a motion by Vojislav Šešelj for the disqualification of Judge Frederik Harhoff from the proceedings in *Prosecutor v. Šešelj* ("*Šešelj* case") on the basis of a letter written by Judge Harhoff dated 6 June 2013 ("Letter").[1] On 3 September 2013, the Acting President of the Tribunal issued an order, *inter alia*, staying the assignment of another Judge to sit in place of Judge Harhoff, and requesting a report from the remaining Judges seised of the *Šešelj* case on whether to rehear or continue with the proceedings ("3 September Order").[2] On 3 September 2013, Judge Jean-Claude Antonetti and Judge Flavia Lattanzi filed a request for clarification of the Decision with the Chamber and the Acting President, and Judge Harhoff also filed a similar request with the Chamber (together "Requests for Clarification").[3] On the same date, the Prosecution filed a motion seeking reconsideration and the stay of the Decision before the Acting President ("Motion").[4] The Defence did not file a response.

2. On 4 September 2013, the Acting President issued an order partially staying the 3 September Order, except insofar as it stayed the appointment of another Judge to sit in place of Judge Harhoff.[5] On 4 September 2013, Judge Antonetti issued a decision lifting the confidentiality ("Decision on Confidentiality") of the report and the attached comments of Judge Harhoff (together "Report"), dated 8 July 2013, which Judge Antonetti had sent to the Acting President.[6]

3. On 6 September 2013, the Acting President issued an order reconvening the Chamber for the purposes of considering the Motion.[7] On 10 September 2013, the Acting President issued a response to the clarification request of Judges Antonetti and Lattanzi.[8] On 12 September 2013, Counsel filed a motion on behalf of Mićo Stanišić and Stojan Župljanin ("Stanišić and Župljanin

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1 Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013; Prosecution's Response to Motion for Disqualification of Judge Frederik Harhoff, 17 July 2013, Appendix B, Letter of Judge Harhoff, 6 June 2013.

2 Order Following Decision of the Panel to Disqualify Judge Frederik Harhoff, 3 September 2011.

3 Request for Urgent Clarification to the Panel and the Vice President, 3 September 2013; Request for Clarification of the Panel Decision of 28 August 2013, 3 September 2013.

4 Prosecution Motion for Reconsideration of Decision on Defence Motion for Disqualification Judge Frederik Harhoff, 3 September 2013.

5 Order Partially Staying Execution of "Order Following Decision of the Panel to Disqualify Judge Frederik Harhoff", 4 September 2013.

6 Décision Portant Levée de la Confidentialité du Rapport Du Président de La Chambre Addressé au Président du Tribunal ou du Judge Désigné par Lui en Cas Échéant Relatif á La Requete en Récusation du Juge Harhoff, 10 Septembre 2013.

7 Order on Prosecution Motion for Reconsideration and Request for Stay ("Order on Motion for Reconsideration"), 6 September 2013.

8 Response to Request for Urgent Clarification to the Panel, and the Vice President ("Response to Request for Clarification"), 10 September 2013.

Motion") seeking leave to make submissions on the Motion.[9] On 20 September 2013, the Prosecution responded to the Stanišić and Župljanin Motion.[10]

II. PRELIMINARY MATTERS

4. The Chamber will first consider whether Judges Antonetti, Lattanzi, and Harhoff, and Stanišić and Župljanin have standing in the present proceedings. The limitation on the power of reconsideration has been clearly established in the jurisprudence of the Tribunal which provides that as a general rule "a request for reconsideration of a decision in one case filed by an appellant who is not party to that case must fail for lack of standing to seek such reconsideration".[11]

5. The Chamber notes that Stanišić and Župljanin are not parties to the *Šešelj* case and do not provide cogent reasons as to why the Chamber should depart from the jurisprudence. Furthermore, the Chamber notes that Stanišić and Župljanin have another forum, namely the appeals process in their own case, in which they may raise their arguments. The Chamber thus finds that they lack standing to intercede in the present proceedings.

6. With respect to the Requests for Clarification, the Chamber considers that the same logic applies since the Judges are also not parties to the *Šešelj* case in accordance with the definition of parties as set out in Rule 2 of the Tribunal's Rules of Procedure and Evidence ("Rules"). The Chamber thus finds that Judges Antonetti, Lattanzi, and Harhoff also lack standing to seek clarification of the Decision. Notwithstanding this, to the extent that the submissions made by Judges Antonetti, Lattanzi, and Harhoff overlap with those contained in the Motion, the Chamber has addressed them in its reasoning below.

7. The Chamber further notes that, in addition to seeking reconsideration of the Decision, the Prosecution requests that the Decision be stayed pending the outcome of the Motion.[12] The Chamber observes that the Acting President has already ruled that the Decision be stayed insofar as it relates to the appointment of another judge to sit in place of Judge Harhoff at least until such time

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9 Joint Motion on behalf of Mićo Stanišić and Stojan Župljanin Seeking Leave to make Submissions on Reconsideration of the Chamber's Decision, 12 September 2013.

10 Prosecution Response to Joint Motion on Behalf of Mićo Stanišić and Stojan Župljanin Seeking Leave to Make Submissions on Reconsideration of the Chamber's Decision, 20 September 2013.

11 *Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41-AR73, Decision on Motion for Reconsideration, 4 October 2006, paras 14-15; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52, Decision on Appealant Jean-Bosco Baraygwiza's Motion for Clarification and Guidance following the Decision of the Appeals Chamber dated 16 June 2006 in *Prosecutor v. Karemera et al.* Case and Prosecutor's Motion to Object to the Late Filing of Jean Bosco Barayagwiza's Reply, 8 December 2006, para. 10.

12 Motion, paras 21-22.

as the Chamber has considered the Motion.[13] The Chamber therefore considers this aspect of the Motion to be moot.

III. SUBMISSIONS

8. The Prosecution seeks reconsideration of the Decision on the basis that the Chamber made a clear error of reasoning in three respects.[14] Firstly, the Prosecution contends that the Majority was in error because it failed to apply the correct standard for impartiality in the jurisprudence arising from Rule 15 of the Rules.[15] In particular, the Prosecution argues that the Majority "presumed partiality" rather than impartiality in that it incorrectly found that a reasonable person would apprehend bias on the part of Judge Harhoff based on the Letter.[16] The Prosecution contends that the failure to apply the presumption of impartiality is also evident from a comparison with other cases where an appearance of bias was found.[17] Secondly, the Prosecution argues that the Majority made a clear error of fact in concluding that Judge Harhoff's reference to a moral and professional dilemma was a reference to his difficulty in applying the current jurisprudence of the Tribunal.[18] Finally, the Prosecution contends that the Chamber erred in not taking the Report into account.[19]

IV. APPLICABLE LAW

9. A Chamber has an inherent discretionary power to reconsider its previous decisions.[20] In order to succeed in a request for reconsideration, an applicant must satisfy the relevant Chamber of "the existence of a clear error of reasoning in the [d]ecision, or of particular circumstances justifying its reconsideration in order to avoid injustice".[21] Such "particular circumstances" may include new facts or new arguments that have arisen since the issuance of the previous decision.[22] The applicant must demonstrate how these new facts or arguments justify reconsideration.[23]

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13 Order on Motion for Reconsideration, p. 2.
14 Motion, paras 1, 4.
15 *Ibid.*, paras 4, 8-9.
16 *Ibid.*, paras 4, 6-17.
17 *Ibid.*, paras 15-16.
18 *Ibid.*, paras 18-19.
19 *Ibid.*, para. 20.
20 *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 ("*Prlić* Decision"), para. 6.
21 *Prlić* Decision, para. 18; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2.
22 *Ibid.*
23 *Prlić* Decision, para. 18; *Prosecutor v. Hadžihasanović and Kubura,* Case No. IT-01-47-A, Decision on Appellant's Motion for Reconsideration and Extension of Time Limits, 30 January 2007, para. 9; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Prosecution Motion for Reconsideration of

10. In previous decisions, it has been held that the "principle of finality dictates that the power to reconsider previous decisions should be exercised sparingly" and that therefore a party must meet a high threshold in order to succeed in its motion for reconsideration.[24]

11. The Chamber further refers to the provisions of Rule 15 of the Rules and related jurisprudence as set out in the Decision.[25]

V. DISCUSSION

12. The Chamber emphasises that Rule 15(B)(ii) of the Rules is clear in its enunciation of the role of a panel that is appointed to decide on the merits of an application for disqualification. It is not the role of the panel to conduct a trial or a disciplinary procedure. The panel considers the conduct of the judge in question to determine whether it meets the standard set out in Rule 15(A) of the Rules and the related jurisprudence, and then reports its decision to the President.

A. Application of the impartiality standard

13. In the Decision, the Majority concluded that a reasonable person, properly informed, would reasonably apprehend bias on the part of Judge Harhoff in favour of conviction.[26] In arriving at this conclusion, the Majority did not, as contended by the Prosecution, presume partiality on the part of Judge Harhoff. Rather, it applied the presumption of impartiality and concluded that the contents of the Letter were both reliable and sufficient to rebut that presumption. Moreover, contrary to the Prosecution's submission that the Majority relied on excerpts of the Letter in isolation,[27] the Majority made it clear that it considered the Letter in its entirety in reaching its conclusion.[28] As regards the Prosecution's argument that the Majority did not attribute the "reasonable person" with knowledge of all relevant circumstances,[29] the Majority, Judge Liu dissenting, considers that it did take into account all such circumstances and emphasised that the reasonable observer, *properly*

Majority Decision Denying Admission of Document Rule 65*ter* Number 03003 or in the Alternative Certification of the Majority Decision with Partly Dissenting Opinion of Judge Delvoie, 27 February 2012 ("*Haradinaj* Decision"), para. 11.

24 *Haradinaj* Decision, para. 12, *referring to Prosecutor v. Semanza,* Case No. ICTR-97-20-T, Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses, 9 May 2002, para. 8; *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E)", 15 June 2004, para. 7; *In re Deogratias Sebureze and Maximilien Turbinabo*, Case Nos MICT-13-40-R90 and MICT-41-R90, Decision on ICTR Prosecutor's Motion for Reconsideration of 20 March 2013 Decision, 17 July 2013, para. 13.

25 Decision, paras 4-7.

26 Decision, para. 13.

27 Motion, paras 8, 11.

28 Decision, para. 13.

29 Motion, para. 11.

informed, would reasonably apprehend bias.[30] In the Majority's view, it is axiomatic that being properly informed would include having knowledge of the role of Judges, including the oath taken to exercise their powers impartially and conscientiously.

14. The Prosecution further submits that the Majority erred in not taking account of Judge Harhoff's previous adjudications at the Tribunal. The Chamber recalls that the jurisprudence of the Tribunal sets out that simply alleging bias against a Judge because he or she ruled in a certain way is insufficient for disqualification.[31] In the Decision, the Majority stated that it did not "consider the Defence's submissions regarding Judge Harhoff's previous adjudications at the Tribunal to be relevant".[32] Thus, the Majority rejected the Defence's suggestion that voting in favour of conviction in a particular case or cases would be relevant to or probative of the issue of bias. This must also logically apply to situations where a Judge has voted in favour of acquittal.

15. The Prosecution further contends that the Majority incorrectly applied the presumption of impartiality by concluding that Judge Harhoff's reference to "military commanders" showed a propensity to convict the Accused.[33] The Majority, Judge Liu dissenting, finds that the Prosecution has not demonstrated a clear error of reasoning in the finding that an appearance of bias existed on the part of Judge Harhoff as a result of his reference in the Letter to a set practice of convicting military commanders, or in the related consideration that the Accused is charged with, *inter alia*, directing paramilitary forces.[34] Nor, has the Prosecution shown any particular circumstances justifying reconsideration in order to avoid an injustice.

16. The Prosecution also submits that the other cases in which Judges have been disqualified are clearly distinguishable from the present case in that Judge Harhoff "simply disagreed with developments in the jurisprudence".[35] In the Decision the Chamber indicated that it did consider the conduct of Judge Harhoff to be different from situations of other Judges' pronouncements regarding the jurisprudence of the Tribunal.[36] The Majority considered that Judge Harhoff's reference to a set practice of convicting accused was such that a reasonable, informed observer would conclude that

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30 Decision, para. 13.

31 *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4-A, Decision on Vojislav Šešelj's Motion to Disqualify Judges Arlette Ramaroson, Mehmet Gűney, and Andrésia Vaz, 10 January 2013, para. 20; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 19 November 2010, para. 28. *See also Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 18.

32 Decision, para. 9.

33 Motion, para. 13.

34 Decision, paras 12-13.

35 Motion, para. 15.

36 Decision, para. 12.

he was not merely disagreeing with the jurisprudence of the Tribunal, but rather, that there was an appearance of bias on his part. The Majority, Judge Liu dissenting, finds that the Prosecution has neither demonstrated a clear error of reasoning in this respect, nor particular circumstances justifying reconsideration in order to avoid an injustice.

B. Interpretation of "deep professional and moral dilemma"

17. The Prosecution suggests that the Majority's conclusion that Judge Harhoff's reference to a "deep professional and moral dilemma" relates to a difficulty in applying the Tribunal's jurisprudence represents a "patently incorrect conclusion(s) of fact" and thus, a clear error of reasoning.[37] The Prosecution argues that Judge Harhoff's "professional and moral dilemma" relates rather to his subsequent reference in the Letter that some of his "colleagues have been behind a short-sighted political pressure".[38] The Majority, Judge Liu dissenting, considers that the Prosecution's view in this respect is, at best, a possible interpretation of the phrase "deep professional and moral dilemma" in the Letter. However, it does not consequently follow that the Majority's interpretation demonstrates any clear error of reasoning, particularly in light of Judge Harhoff's preceding criticism of the Tribunal's jurisprudence throughout the Letter, which the Majority took into account in interpreting this phrase.

C. Consideration of the Report

18. The Prosecution finally argues that the Majority "abused its discretion by not addressing the contrary report of the Presiding Judge [...] who found that the contents of the letter did not cast doubt on Judge Harhoff's impartiality."[39] The Chamber observes, as acknowledged by the Prosecution, that Rule 15 of the Rules only provides that the President, or in this instance the Acting President, receive and consider a report prepared by a Presiding Judge of a Chamber prior to deciding whether or not to appoint a panel to consider the merits of a motion for disqualification. This is supported by the jurisprudence of the Tribunal, which shows that the President both evaluates and specifically refers to such a report when deciding whether or not to convene a panel to determine the merits of a motion for disqualification.[40]

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37 Motion, paras 18-19.
38 *Ibid.*, para. 18.
39 *Ibid.*, para. 20.
40 See for example, *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings, 15 May 1992; *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision of the President on Jadranko Prlić's Motion to Disqualify Judge Árpad Prandler, 4 October 2010; *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Vojislav Šešelj's Motion to Disqualify Judge Orie, 7 October 2010.

19. Thus, the procedure under Rule 15 does not require the Chamber convened pursuant to Rule 15(B)(ii) to consider and address the Report in its decision. Furthermore, beyond the plain language of Rule 15, a review of the previous decisions by specially convened Chambers at the Tribunal does not reveal any established practice of taking into consideration the report of a Presiding Judge, or the comments of the Judge who is the subject of a motion for disqualification, in the substantive discussion on the merits of a motion for disqualification.[41] In light of the Rules and the Tribunal's jurisprudence on this issue, the Chamber considers that it was not bound to consider the Report.

20. In addition, in the circumstances of the present case, consideration of the Report is not probative of whether or not an appearance of bias exists. Moreover, the Report was issued over two months after the Letter became public. The Report is immaterial to the issue of whether a reasonable, informed observer would apprehend bias on the part of Judge Harhoff when the Letter became publicly available in June 2013.

D. Conclusion

21. For the reasons set out above, the Majority, Judge Liu dissenting, finds that the Prosecution has failed to demonstrate a clear error of reasoning in the Decision, or any particular circumstances which justify reconsideration of the Decision in order to avoid an injustice.

VI. DISPOSITION

22. For the foregoing reasons, the Chamber

(1) DENIES the Requests for Clarification, and the Stanišić and Župljanin Motion;

(2) DECLARES the Prosecution's request to stay the Decision moot;

(3) By Majority, Judge Liu dissenting, DENIES the Motion in all other respects; and

(4) ORDERS the Registry to submit a copy of this decision to Counsel acting on behalf of Stanišić and Župljanin.

[41] See *Prosecutor v. Radovan 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; *In the Case against Florence Hartmann*, Case No. IT-02-54-R77.5, Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, 27 March 2009; *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), 28 March 2003.

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

Judge Bakone Justice Moloto
Presiding

Judge Liu Daqun

Judge Burton Hall

Dated this seventh day of October 2013.
At The Hague
The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE MOLOTO

1. While I agree entirely with the reasoning and outcome of the above decision, and notwithstanding my view that it is unnecessary to consider the Report, I wish to place on the record an important point concerning the procedure to be adopted in an application for disqualification pursuant to Rule 15.

2. In the Report, Judge Antonetti contends that Rule 15 provides that an application for disqualification is made to the Presiding Judge "seized of a case" and that accordingly, as Presiding Judge of Trial Chamber III, he met with Judge Harhoff and reported to the President.[1]

3. However, Rule 15(B)(i) states that "any party may apply to the Presiding Judge of *a Chamber* for the disqualification of a Judge of that Chamber [...]" (emphasis added) and it is the Presiding Judge of the Chamber who "shall confer with the Judge in question and report to the President". This is in clear contrast to the language in Rule 15(C) which refers to "The Judge of a *Trial Chamber* [....]" (emphasis added). While I note that the term 'Chamber' is often used in a generic sense in other provisions of the Rules,[2] in my view the distinction drawn between 'Chamber' and 'Trial Chamber' *within* the text of Rule 15 clearly signifies that these two terms have distinct connotations for the purposes of this particular rule. Accordingly, Rule 15 provides that it is the Presiding Judge of the overall Chamber, and not the Trial Chamber who confers with the Judge in question and then reports to the President.

4. In light of the above distinction within Rule 15, I disagree with Judge Antonetti's contention in the Report that a party seeking disqualification of a judge should apply to the presiding judge "seized of a case". Consequently, in my view it was not he, in his capacity as Presiding Judge of Trial Chamber III, who should have conferred with Judge Harhoff or forwarded the report to the President, but rather the Presiding Judge of the overall Chamber.

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1 Report, p.1.
2 See for example Rule 15 *bis*.

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

Judge Bakone Justice Moloto

Dated this seventh day of October 2013.
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE LIU

1. I respectfully disagree with the Majority's decision to deny the Prosecution's motion for reconsideration[1] of the Majority's decision of 28 August 2013 ("Impugned Decision"),[2] to which I appended a dissenting opinion.[3] In the Impugned Decision, the Majority upheld Vojislav Šešelj's motion for the disqualification of Judge Frederik Harhoff from the *Šešelj* case, finding that an appearance of bias exists on the part of Judge Harhoff on the basis of a letter he sent, dated 6 June 2013 ("Letter").[4] In my view, the Prosecution has demonstrated a "clear error of reasoning" in the Impugned Decision meriting reconsideration.

2. Rule 15(B)(iii) of the Tribunal's Rules of Procedure and Evidence ("Rules") stipulates that "[t]he decision of the panel of three Judges (on the merits of the application to disqualify a judge) shall not be subject to interlocutory appeal." Therefore, the only avenue available for a party who seeks to challenge such a decision is by means of a motion for reconsideration. The jurisprudence of the Tribunal provides that in order to succeed in a request for reconsideration, an applicant must satisfy that in the chamber's decision exists "a clear error of reasoning" or that reconsideration is justified "in order to avoid injustice".[5]

3. In the instant case, the Prosecution presents three errors of reasoning which it argues warrant reconsideration of the Impugned Decision.[6] In my view, two of these errors of reasoning warrant reconsideration and my discussion is therefore limited to them. Firstly, the Prosecution submits that the Majority failed to apply the presumption of impartiality and to correctly apply the reasonable person test in accordance with Rule 15 of the Rules and the jurisprudence of the Tribunal.[7] In this respect, the Prosecution contends that the Majority did not account for all the circumstances pertaining to Judge Harhoff and the Letter that a reasonable, informed observer would have taken into account. Secondly, the Prosecution argues that the Majority made a patently

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[1] Decision on Reconsideration, para. 21.
[2] Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013 ("Impugned Decision").
[3] Impugned Decision, Dissenting Opinion of Judge Liu.
[4] Impugned Decision, para. 14.
[5] *Prosecutor* v. *Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlic's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, para. 18; *Prosecutor v. Hadžihasanović and Kubura,* Case No. IT-01-47-A, Decision on Appellant's Motion for Reconsideration and Extension of Time Limits, 30 January 2007, para. 9; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84bis-T, Decision on Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document Rule 65*ter* Number 03003 or in the Alternative Certification of the Majority Decision with Partly Dissenting Opinion of Judge Delvoie, 27 February 2012, paras 11-12.
[6] Prosecution Motion for Reconsideration, para. 4.
[7] Prosecution Motion for Reconsideration, paras 4, 6-17.

incorrect conclusion of fact in relation to its interpretation of Judge Harhoff's reference to a "deep professional and moral dilemma".[8]

4. With respect to the Prosecution's first submission regarding the presumption of impartiality and the reasonable person test, I recall that the test for the disqualification of judges pursuant to Rule 15 of the Rules requires that a reasonable observer, informed of *all* the circumstances pertaining to the events, would apprehend bias on the part of the judge.[9] In the Majority's view, it "did consider all such circumstances" pertaining to Judge Harhoff and the Letter.[10] However, as I outlined in my original dissenting opinion,[11] in the Impugned Decision, the Majority only addressed and evaluated three isolated sentences from the Letter.[12] In this regard, it is evident from the Majority's analysis in the Impugned Decision that it did not take into account other circumstances relevant to the assessment of whether the Letter would lead a reasonable, informed observer to apprehend bias, including for example the context in which these three identified statements were made in the Letter as well as the judicial function and presumed impartiality of judges. The Majority's incomplete analysis in this respect demonstrates a clear error of reasoning in the Impugned Decision.

5. With respect to the Prosecution's submission regarding the misinterpretation of the phrase "deep professional and moral dilemma", the Majority responds that although a different interpretation of the phrase is possible, in the present case its interpretation does not demonstrate any clear error of reasoning, "particularly in light of Judge Harhoff's preceding criticism of the Tribunal's jurisprudence throughout the Letter, which the Majority took into account in interpreting this phrase."[13] While the Majority now offers this clarification of its reasoning, in my view, there is nothing in the Impugned Decision that indicates that the Majority did in fact take into account any preceding criticism of the Tribunal's jurisprudence by Judge Harhoff in interpreting the phrase at issue. This is evidenced by the Majority's discussion in the Impugned Decision, where it referred only to three sentences in the Letter.[14] In these circumstances, I find unconvincing the Majority's rejection of the Prosecution's argument in this regard and further consider that the Prosecution correctly submits that the Majority erred in the conclusion it drew from Judge Harhoff's reference to a "deep professional and moral dilemma".

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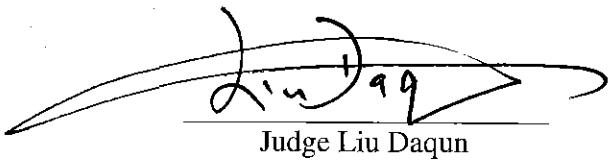
[8] Prosecution Motion for Reconsideration, paras 4, 18-19.
[9] *Prosecutor v. Furundžija,* Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 190; *Prosecutor v. Delalić et al.,* Case No. IT-96-21-A, Judgement, 20 February 2001, para. 697; *Prosecutor v. Radovan Karadžić,* Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), 22 July 2009, para. 16.
[10] Decision on Reconsideration, para. 12.
[11] Impugned Decision, Dissenting Opinion of Judge Liu, para. 5.
[12] Impugned Decision, paras 10-13.
[13] Decision on Reconsideration, para. 16.
[14] *Infra,* para. 4.

6. In addition to these errors, I consider that reconsideration of the Impugned Decision is also warranted "in order to avoid injustice". In my view, as expressed in my dissenting opinion, Judge Harhoff's conduct was "improper in various respects for a judge in his position".[15] I likewise found the Letter and its contents to be "unbefitting of a Judge".[16] Nevertheless, I find that the cursory approach undertaken by the Majority in its analysis and discussion of the Letter warrant reconsideration of the Impugned Decision in order to avoid injustice.

4. For the foregoing reasons, I would support reconsideration of the Impugned Decision.

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



Judge Liu Daqun

Dated this seventh day of October 2013,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

[15] Impugned Decision, Dissenting Opinion of Judge Liu, para. 2.
[16] *Ibid.*