

IT-08-91-A  
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International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of the  
Former Yugoslavia since 1991

Case No. IT-08-91-A  
Date: 24 February 2014  
Original: English

**BEFORE THE PANEL**

**Before:** Judge Christoph Flüge  
Judge Howard Morrison  
Judge Melville Baird

**Registrar:** Mr John Hocking

**Decision of:** 24 February 2014

**PROSECUTOR**

v.

**MIĆO STANIŠIĆ  
and  
STOJAN ŽUPLJANIN**

***PUBLIC***

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**DECISION ON MOTION REQUESTING RECUSAL OF JUDGE  
LIU FROM ADJUDICATION OF MOTION TO VACATE  
TRIAL JUDGEMENT**

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**Office of the Prosecutor**  
Ms Helen Brady

**Counsel for Mićo Stanišić**  
Mr Slobodan Zečević  
Mr Stéphane Bourgon

**Counsel for Stojan Župljanin**  
Mr Dragan Krgović  
Ms Tatjana Čmerić

## A. PROCEDURAL HISTORY

1. On 27 March 2013, the Trial Chamber in the *Stanišić and Župljanin* case issued a judgement sentencing Stojan Župljanin and Mićo Stanišić to 22 years imprisonment (“*Stanišić and Župljanin* Judgement”).<sup>1</sup>
2. On 28 August 2013, a chamber convened by order of the Acting President decided by majority, Judge Liu Daqun dissenting, to disqualify Judge Frederik Harhoff as a Judge in the *Prosecutor v. Šešelj* case.<sup>2</sup>
3. On 21 October 2013, the Župljanin Defence filed a motion requesting “recusal” of Judge Liu Daqun (“Judge Liu”) from adjudication of a motion filed by the same Defence team to vacate the *Stanišić and Župljanin* Judgement.<sup>3</sup>
4. The Prosecution filed a response addressing the Motion for Recusal on 25 October 2013.<sup>4</sup> On 28 October 2013, Župljanin Defence filed a reply.<sup>5</sup> On 29 October 2013, the Stanišić Defence also filed a reply to the Prosecution Response whereby it joined the Motion for Recusal.<sup>6</sup>
5. By decision of 3 December 2013, the Acting President denied the Motion for Recusal.<sup>7</sup> On 13 December 2013, the Župljanin Defence filed a request for appointment of a panel to adjudicate the Motion for Recusal, to which the Prosecution responded on 20 December 2013.<sup>8</sup> On 23 December 2013, the Stanišić Defence joined the Motion for Recusal, adopting the submissions by

<sup>1</sup> *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Judgement.

<sup>2</sup> *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, and Dissenting Opinion of Judge Liu, 28 August 2013 (“Decision on Harhoff Disqualification”).

<sup>3</sup> Stojan Župljanin’s Motion Requesting Recusal of Judge Liu Daqun from Adjudication of Motion to Vacate Trial Judgement, 21 October 2013 (“Motion for Recusal”); Stojan Župljanin’s Motion to Vacate Trial Judgement, 21 October 2013 (“Motion to Vacate the Trial Judgement”).

<sup>4</sup> 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 (“Prosecution Response”).

<sup>5</sup> 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”).

<sup>6</sup> Consolidated Reply on Behalf of Mićo Stanišić to Prosecution Consolidated Response with Confidential Annexes A & B, 29 October 2013, paras. 31-34.

<sup>7</sup> Decision on Motion Requesting Recusal, 3 December 2013 (“Decision on Motion for Recusal”), paras 23-24.

<sup>8</sup> Župljanin Defence Request for Appointment of a Panel To Adjudicate the Request for Disqualification of Judge Liu Daqun, 13 December 2013; Prosecution Response to Župljanin Request for Appointment of a Panel, 20 December 2013.

the Župljanin Defence.<sup>9</sup> The Stanišić and Župljanin Defence shall be collectively referred to as “the Defence”, hereinafter.

6. On 7 February 2014, the Acting President of the Tribunal appointed a panel of three Judges to consider the merits of the Motion for Recusal (“Panel”).<sup>10</sup>

7. On 19 February 2014, the Defence submitted a motion requesting leave to file three supplemental authorities in support of the request for the Motion for Recusal.<sup>11</sup> In accordance with the Practice Direction on the procedure for filing written submissions during appeal proceedings, the Panel considers this filing as untimely and exercises its discretion to reject it.<sup>12</sup>

## **B. SUBMISSIONS OF THE PARTIES**

8. The Defence seeks the recusal of Judge Liu on the basis that he served on the bench of a special chamber which ruled on Judge Frederik Harhoff’s disqualification from the *Šešelj* case and dissented from the majority’s finding that Judge Harhoff demonstrated an appearance of bias in favour of conviction of the accused in that case.<sup>13</sup> As such, the Defence argues that Judge Liu is not in a position to adjudicate the matter of vacating the Trial Judgement in the *Stanišić and Župljanin* case “without being predisposed to a particular outcome, and without an unacceptable appearance of bias arising,” given that Judge Harhoff served on the bench of that Trial Chamber.<sup>14</sup> The Defence submits that the request for Judge Liu’s recusal is based on his previous judicial determination of essentially the same matter now pending before the Appeals Chamber, namely, whether Judge Harhoff is to be disqualified for bias because of the views expressed in his email of 6 June 2013.<sup>15</sup> The Defence asserts, further, that the “limited scope and substantial correlation of issues between the disqualification of Judge Harhoff in the *Šešelj* case, and the disqualification of Judge Harhoff

<sup>9</sup> 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, paras 14-15.

<sup>10</sup> Decision on Župljanin Defence Request for Appointment of a Panel to Adjudicate the Request for Disqualification of Judge Liu Daqun, 7 February 2014.

<sup>11</sup> Župljanin Submission of Supplemental Authorities in Support of his request for disqualification of Judge Liu Daqun, 19 February 2014. The Stanišić Defence joined this filing. *See* Stanišić Motion on behalf of Mićo Stanišić Joining Župljanin Submission of Supplemental Authorities in Support of his Request for Disqualification of Judge Liu Daqun, 21 February 2014.

<sup>12</sup> Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 4, 4 April 2012, paras 12-14, 20.

<sup>13</sup> *See* Decision on Harhoff Disqualification, Dissenting Opinion of Judge Liu; Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin, 7 October 2013, Dissenting Opinion of Judge Liu.

<sup>14</sup> Motion for Recusal, para. 1.

<sup>15</sup> Župljanin Reply, para. 8.

requested in this case,” gives rise to a reasonable apprehension that Judge Liu would be biased by way of prejudgement.<sup>16</sup>

9. The Prosecution argues that the Defence’s asserted grounds for Judge Liu’s recusal ignores the relevant case law: that a judge should not be disqualified from hearing a case merely because he or she previously dealt with evidence related to the same facts in other cases; and that the question is not whether the judge will decide an issue in the same way he or she decided it previously, but whether the judge will “bring an impartial and unprejudiced mind to the issues in the present case” as cited in the Tribunal’s jurisprudence.<sup>17</sup>

### **C. APPLICABLE LAW**

10. Articles 20(1) and 21(2) of the Statute of the Tribunal (“Statute”) enshrine the right of an accused to a fair trial. In this context, Article 13 of the Statute pronounces on the impartiality and integrity of Tribunal Judges.<sup>18</sup> Rule 15 of the Rules of Procedure and Evidence (“Rules”) provides, moreover, 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 may 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.
  - (iii) The decision of the panel of three Judges shall not be subject to interlocutory appeal.
  - (iv) If the Judge in question is the President, the responsibility of the President in accordance with this paragraph shall be assumed by the Vice-President or, if he or she is not able to act in the application, by the permanent Judge most senior in precedence who is able to act.

11. The Appeals Chamber has observed that there is a presumption of impartiality attached to a Judge, and that a high threshold has to be attained in order for that presumption to be rebutted.<sup>19</sup> Before a Judge can be disqualified, a reasonable apprehension of bias by reason of prejudgment

<sup>16</sup> Župljanin Reply, para. 12.

<sup>17</sup> Prosecution Response, paras 14-15.

<sup>18</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”), para. 177.

<sup>19</sup> *Furundžija* Appeal Judgement, paras 196-197.

must be “firmly established”.<sup>20</sup> This high threshold is required, according to the Appeals Chamber, because “just as any real appearance of bias of (*sic*) the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias.”<sup>21</sup>

12. The Appeals Chamber has held that a Judge is not impartial if it is shown that actual bias exists or, *inter alia*, there is an unacceptable appearance of bias if the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>22</sup> A “reasonable observer” must be “an informed person, with knowledge of all the relevant 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”.<sup>23</sup> In circumstances where a Judge’s involvement in earlier proceedings is relied upon as a ground to establish a reasonable apprehension of bias, the requisite test, as recognized by the Tribunal’s jurisprudence, is whether a reasonable observer, as defined above, would be of the view that the Judge in question “might not bring an impartial and unprejudiced mind to the issues”.<sup>24</sup> The test is not whether the Judge would merely decide the issues in the same way as they were decided in earlier proceedings.<sup>25</sup>

#### **D. DISCUSSION**

13. As a preliminary matter, the Panel agrees with the conclusion of the Acting President that the nature of the Defence request is for disqualification of Judge Liu, governed by Rule 15(B), and not recusal, governed by Rule 15(A) of the Rules.<sup>26</sup> The Panel will therefore discuss the merits of the Motion for Recusal pursuant to Rule 15(B) of the Rules.

14. The Panel recalls that the majority of the special chamber, in its decision to disqualify Judge Harhoff as a trial Judge in the *Šešelj* case, found that there existed an unacceptable appearance of bias in that case, namely, a bias held by Judge Harhoff in favour of a conviction of the accused in that case.<sup>27</sup> Judge Liu, in his dissent, disagreed with the reasoning of the Majority in that, *inter alia*, it failed to properly apply the “reasonable observer” test and did not sufficiently consider

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 707.

<sup>22</sup> *Furundžija* Appeal Judgement, paras 189-190.

<sup>23</sup> *Furundžija* Appeal Judgement, para. 190.

<sup>24</sup> *Prosecutor v. Brđanin and 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. 19.

<sup>25</sup> *Ibid.*

<sup>26</sup> Decision on Motion for Recusal, para. 18.

<sup>27</sup> Decision on Harhoff Disqualification, para. 14.

circumstances such as the high eligibility standard for Judges as embodied in Article 13 of the Statute such that the strong presumption of impartiality was rebutted.<sup>28</sup>

15. The Panel considers as insubstantial the argument of the Defence that Judge Liu, having disagreed with the majority in the decision to disqualify Judge Harhoff as a Judge in the *Šešelj* case, is not in a position to adjudicate the Motion to vacate the Trial Judgement without an unacceptable appearance of bias. The Panel, in this context, considers that Judge Liu's position on the bench of a special chamber deciding on the matter of Judge Harhoff's disqualification in the *Šešelj* case at trial level must be distinguished from his adjudication of the Motion to Vacate the Trial Judgement in the *Stanišić and Župljanin* case as a member of the Appeals Chamber. In this latter capacity Judge Liu is not, as the Defence argues, dealing with the issue of disqualification of Judge Harhoff as such.<sup>29</sup> Notwithstanding the fact that the basis for the disqualification of Judge Harhoff may be a relevant factor when considering the Motion to Vacate the Trial Judgement, the Panel finds that consideration of this factor does not of itself constitute a circumstance which would lead a reasonable and informed observer to be of the view that Judge Liu might not bring an impartial and unprejudiced mind to the issues to be adjudicated in that motion.

16. The Panel concludes that the Defence has not demonstrated, as required, a reasonable apprehension of bias on the part of Judge Liu from the standpoint of a reasonable observer. It is not convinced by the submissions of the Defence that Judge Liu, having previously dissented on the issue of disqualification of Judge Harhoff, would be unable to impartially decide on the Motion to Vacate the Trial Judgement. In this respect, the Panel concurs with the reasoning set out by the Acting President in his Decision on Motion for Recusal in that a motion to vacate a trial judgement involves issues that need not be addressed in the context of a motion to disqualify a Judge.<sup>30</sup>

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<sup>28</sup> Decision on Harhoff Disqualification, Dissenting Opinion of Judge Liu, para. 8.

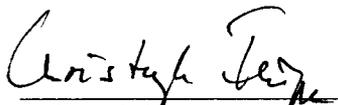
<sup>29</sup> Župljanin Reply, para. 12.

<sup>30</sup> Decision on Motion for Recusal, para. 23 and fn. 37.

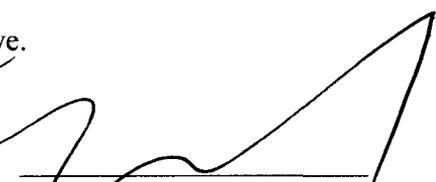
**E. DISPOSITION**

17. For the foregoing reasons, pursuant to Rule 15(B) of the Rules, the Panel hereby **DENIES** the Motion for Recusal.

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

  
\_\_\_\_\_  
Judge Christoph Flüge

  
\_\_\_\_\_  
Judge Howard Morrison

  
\_\_\_\_\_  
Judge Melville Baird

Dated this twenty-fourth day of February 2014  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**