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: 4 September 2013

Original: ENGLISH
French

THE PRESIDENT OF THE CHAMBER

Before: **Judge Jean-Claude Antonetti, Presiding**

Registrar: **Mr John Hocking**

Decision of: **4 September 2013**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION TO UNSEAL THE REPORT OF THE PRESIDING JUDGE TO THE PRESIDENT OF THE TRIBUNAL OR ALTERNATIVELY THE JUDGE DESIGNATED BY HIM REGARDING THE MOTION FOR DISQUALIFICATION OF JUDGE HARHOFF

The Office of the Prosecutor
Mr. Serge Brammertz

The Accused
Mr. Vojislav Šešelj

PROCEDURAL BACKGROUND

On 1 July 2013, the Accused Vojislav Šešelj filed a motion for disqualification of Judge Harhoff. Following this motion, I wrote a confidential report pursuant to Rule 15 of the Rules and attached the written comments of the Judge in question to that report.

As the President of the Tribunal discharged himself of the consideration of the motion, the Vice-President, Judge Agius, was then designated. Judge Agius deemed it appropriate to seize a panel of judges composed of Judges Moloto, Hall and Liu, and it should be noted that Judges Moloto and Hall had sat on other cases with Judge Harhoff.

On 28 August 2013, the panel of Judges issued a decision granting, by majority, the motion of the Accused Vojislav Šešelj.

On 4 September 2013, Judges Antonetti and Lattanzi sent a joint decision to the panel and the Vice-President, drawing their attention to the fact that **neither** the report of the Presiding Judge **nor** the written comments of the Judge in question had been mentioned in the decision. On the same day, Judge Harhoff also sent a request that the panel of Judges consider my report and his comments. Moreover, the Prosecutor of the Tribunal, in the person of Mr. Serge Brammertz, also sent a motion for review of the decision.

REASONS FOR THE CONFIDENTIALITY OF THE REPORT

Although I am in favour of public proceedings, for various reasons that I will explain below I was forced not to file the report as a public document and I marked it as "**confidential**". However, I took care to add the following comment in a footnote: "**I reserve the option to make this report public if needed**".

On 8 July 2013, due to new circumstances, I announced that I could make this report public. These circumstances are set out below in the section entitled "Reasons for lifting the seal of confidentiality".

I deemed it fit to keep this report temporarily confidential because of the content of my report. The contentious email sent by **Judge Harhoff** to a circle of close friends was, as far as I am concerned, covered by the **secrecy of correspondence**, therefore I could only violate this secrecy in case of absolute necessity, which is the case now.

The second reason is that, according to **Judge Harhoff**, he did not send this email and, even today, he is not able to say **who** could have sent his personal thoughts to the Danish newspaper. In view of the publication of this email and the disastrous consequences that ensued during deliberations, i.e. an interruption of the course of justice, it will be necessary to institute contempt proceedings under Rule 77 of the Rules of Procedure and Evidence, and it was necessary to keep this part of the report under seal to preserve evidence.

It should not be ruled out that a destabilisation plot was hatched by a third party or an entity with substantial resources to achieve this aim. Only a thorough investigation can identify those who sent the personal thoughts of Judge Harhoff to the Danish newspaper and reveal the **real reasons** for sending them.

As I said in my report, I have also taken account of the fact that other Judges have made public statements on the jurisprudence of this Tribunal, but they have not been disqualified.

REASONS FOR LIFTING THE SEAL OF CONFIDENTIALITY

If we look at the decision of the panel, we can see that there is no reference to this report or to the comments of the Judge in question. It is true that after my report was sent to the Vice-President, he asked me if I stood by my position on confidentiality. I then replied in the affirmative. I believe that in the Vice-President's decision appointing the panel, he makes a reference to my report by saying, nevertheless, that like the Prosecution in its submission (about which I did not know at the time of writing my report), I was in favour of **denying the motion**.

Hypothetically, since in the decision on their appointment there was only a brief reference to my report which was stamped as "confidential", it is quite possible that the Judges of the panel left my report and the comments of the Judge out of their considerations and reasoning.

At this stage, this would be a logical explanation why this report and the comments of the Judge were not taken into consideration. Quite rightly, the Prosecution argued that not taking this report into consideration would be a mistake. Moreover, **Judge Harhoff** himself, who has the right to a "fair trial", must know that his arguments were taken into consideration by those who decided on his fate. The fact that the decision against him may have been taken because of this omission calls for **review** of the case, which is also the whole meaning of the Prosecution's motion.

The other reason that I can cite for justifying the lifting of the confidentiality seal stems from paragraph 6 on page 2 of my report, where I said that the judgment should be delivered on 30 October 2013, given that the Accused has been in provisional detention for over ten years and that this should be given **absolute priority** over any other considerations so as to avoid a major destabilisation of the functioning of the court.

The consequences of the decision of the panel are enormous and the Rules of Procedure and Evidence do not provide for a case where a motion for disqualification can be made during deliberations. This is all the more understandable because, since the deliberations are secret, there can be no communication with the outside world and therefore the risk of disqualification is almost nil.

The Rules of Procedure and Evidence provide that, should the opinion of the panel be in favour of disqualification, the President must appoint a Judge. However, it appears from the recent decision of the Vice-President that a "mixture" has been made of Rule 15 on **disqualification** and Rule 15 ***bis*** on the **absence of a Judge**. In my opinion, we cannot play around with the provisions of Rule 15 *bis* which concern an entirely different situation, in particular that relating to the consent of the accused; if necessary, it would be the work of the new Chamber with a new Judge to rule on such a motion, but this cannot be ordered by the President of the Tribunal.

Similarly, as we are in the final stages of proceedings, the question arises as to whether a restart of the trial would not cause **enormous prejudice** to the Accused Vojislav Šešelj? On the day that my report was written, he had been 3,787 days in provisional detention and, in case of retrial with a new composition of the Chamber, he would still remain in detention for several more years.

Admittedly, the Accused has the right to use all means to defend himself, but these means should not be allowed to turn against him. In this case, his motion is obviously counter-productive.

I attach my original report with the confidential classification removed.

CONCLUSION

Consequently, I **ORDER** that my report be unsealed.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this fourth day of September 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

Annex

United Nations
Nations Unies

International
Criminal Tribunal
for the former
Yugoslavia

Tribunal Pénal
International pour
l'ex-Yougoslavie

INTERNAL MEMORANDUM - MEMORANDUM INTERIEUR

Date: 8 July 2013 Ref.: **CONFIDENTIAL**

To: President Meron, or a Judge designated by him if appropriate
À:

Copy: Judge Harhoff
Copie: Judge Lattanzi

From: Judge Antonetti
De:

Subject: Motion for Disqualification of Judge **Frederik Harhoff** filed by the Accused Vojislav Šešelj/Report
Objet:

Pursuant to Rule 15 (B) (i) of the Rules of Procedure and Evidence, I hereby inform you of the situation following the motion for the disqualification of **Judge Frederik Harhoff** filed by the **Accused Vojislav Šešelj**.

Firstly, I am sending this report to you as a **confidential document** because I deem that it should not be disclosed publicly **without my approval**. Considering the **sensitivity** of the issue, this memo must remain **confidential.**[1]

In my capacity as Presiding Judge, I am sending you this report as I did for a previous motion for the disqualification of **Judge Harhoff**. I did the same in a previous case involving another Judge and to my great surprise, the President at the time was of the opinion that the report should have been sent to him by the Presiding Judge of Trial Chamber III. I have a completely different interpretation of Rule 15 of the Rules, all the more so because both the text and its underlying spirit favour having the Presiding Judge of the case in question seize the President of the Tribunal.

Any other solution would, in my eyes, mean diverting from procedure for obscure reasons. With the aim of making sure that you are fully informed, please find enclosed in the annex a report that I sent to the President at the time (Cf. Annex 1) and the decision that followed my report (Cf. Annex 2).

The Tribunal has been the focus of enough articles on the possible pressuring of Judges and there is no need to add more in relation to the present case.

In this respect, you were part of the Bureau, along with Judges Pocar, Robinson, Liu and Shahabuddeen, that ruled on 11 January 2005 on a motion from Vojislav Šešelj regarding the President of the Tribunal. In paragraph 5 of the decision, you stated: "As the language of Rule 15 clearly states, an application for disqualification is to be made to the Presiding Judge of the Chamber seized of a case (…)", which means, therefore, that the motion should be filed with the Presiding Judge seized of the case.

Pursuant to this same **Rule**, I met with the Judge who is the object of the motion for disqualification and I enclose herewith **his written submission**.

As far as I am concerned, I would like firstly to state that the correspondence sent by **Judge Harhoff** to a group of Danish friends is **covered by the secrecy of correspondence**, in accordance with international instruments (Article 17.1 of the International Covenant on Civil and Political Rights; Article 12 of the Universal Declaration of Human Rights).

[1] I reserve the option to make this report public **if needed.**

Since the contents of correspondence are supposed to remain **secret**, I shall refrain from discussing it in detail. Moreover, as this correspondence has been quoted in the submission by the Accused Vojislav Šešelj, referring to the said submission will provide a more complete overview.

It appears that the Danish newspaper obtained this correspondence **illegally** and published it **without the Judge's consent**. Consequently, it was never **Judge Harhoff's** intention to publicise his personal thoughts regarding the recently-issued decisions.

There is no need for me to opine on these personal thoughts as they fall within **his sphere of privacy** and are, in any case, nothing more than avenues of reflection**.**

The only issue I have is to know whether at any point during the **ongoing deliberations**, **Judge Harhoff** showed that he was **biased**. I can state regarding this issue, without violating the secrecy of deliberations, that **Judge Harhoff has always demonstrated the utmost professionalism and I never observed in him any bias for or against the accused since the proceedings commenced.**

As you know, the Judgement is scheduled to be delivered on **30 October 2013** although the Accused has been in provisional detention for over **ten years**. It is my opinion that under such circumstances, **achieving this legitimate goal should be given absolute priority over any other consideration with respect to our Institution as well as the Accused and the victims**. Any deviation from what has been envisaged and officially announced at the **Security Council** would, in my opinion, constitute a **major destabilisation** of our legal function.

Certainly, the Accused has his rights such as the possibility of challenging a Judge within the limits of the rules, which is what he has done. Nevertheless, his arguments do not seem at all convincing to me because, in accordance with the well-established case-law, he has not presented proof that would make a reasonable and duly informed observer legitimately concerned about a bias.

I wish to recall in this respect that **Judge Harhoff swore an oath** and, therefore, he should be **presumed unbiased**. The concern expressed by the **Accused Vojislav Šešelj** has not been formally established, and the high standard of proof required has not been met by the reasoning in his written submission. Moreover, as recalled in the proceedings for the disqualification of **Judge Orie**, the requesting party must act promptly because the court has the duty to ensure that the Accused be tried promptly; in the present case, there are only a few weeks left before the Judgement.

Consequently, I am in favour of denying the motion and I would like to add that Judge Frederik Harhoff has served as a judge with our institution for years and that he enjoys the complete trust of the authorities of this Tribunal, who have entrusted him on several occasions with the mission of "spreading the good word" outside with his speeches for the benefit of national courts. He has not been the only one to "spread the good word", as evidenced by the report *Legacy of the ICTY in the Former Yugoslavia*. In studying this report, I note that an Appeals Chamber Judge publicly raised the legal question of genocide: "The qualification that has been given by the ICTY as genocide in the Krstić case comes from an authoritative body. The ICJ could have gone for another qualification but they decided to make the same qualification". Likewise, in the presence of the Vice-President of the Tribunal, a Judge from the Court of Bosnia and Herzegovina raised the same legal issues as Judge Harhoff (Cf. p. 23 of the report). In comparing these statements to those made by Judge Harhoff in his private correspondence, I wonder where the line should be drawn. The best answer would be to prevent Judges from making any public comments outside the Tribunal.

Judge **Frederik Harhoff** was the **victim** of the publication of correspondence illegally obtained by a Danish newspaper. To this day, **no one** knows **who** disclosed this document. The possible hypotheses are that it was either one of the recipients of the correspondence, or another person or entity who may have penetrated Judge Harhoff's computer or communications network and sent the said document to this newspaper. The result was clear: there was an obvious wish, first and foremost, to destabilise our Tribunal and damage the reputation of Judge Meron and, secondly, to damage Judge Harhoff's honour in terms of being unbiased, and additionally to cause damage, if possible, to **Vojislav Šešelj** should the Judge *in fine* be replaced (although in this case he might have filed the motion for another purpose).

I have endeavoured to be as **thorough** as possible, while at the same time being constrained by the secrecy of the ongoing deliberations. My report, which has been sent pursuant to the Rules to the relevant Judge(s), should enable the latter, or the other Judges, to come to an independent and unbiased **decision**. I am confident in the functioning of our institution and I hope that our colleague will not be victimised for a second time; I note, furthermore, that to this day, the applicant has already served **3,787 days in provisional detention** and that the Judgement is scheduled for delivery on **30 October 2013 at 0900 hours.**