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: 13 December 2013

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IN TRIAL CHAMBER III

Before: **Judge Jean-Claude Antonetti, Presiding**
Judge Mandiaye Niang
Judge Flavia Lattanzi

Registrar: **Mr John Hocking**

Decision of: **13 December 2013**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

DECISION ON CONTINUATION OF PROCEEDINGS

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

I. INTRODUCTION

1. On 13 November 2013, Trial Chamber III 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 ("Chamber" and "Tribunal", respectively) invited Vojislav Šešelj and the Office of the Prosecutor ("Accused" and "Prosecution", respectively) to make submissions on the continuation of the proceedings following the disqualification of Judge Harhoff and his replacement by Judge Niang.[1] The Parties filed their submissions on 20 November 2013[2] and on 2 December 2013, respectively.[3]

2. Pursuant to Rule 54 of the Rules of Procedure and Evidence ("Rules"), in light of the Parties' submissions and the overall evidence in the case, the Chamber renders its decision on the continuation of the proceedings.

II. PROCEDURAL BACKGROUND

3. The trial against the Accused began on 7 November 2007[4] and ended on 20 March 2012 following the closing arguments of the Prosecution and the Accused.[5] On 12 April 2013, the Chamber issued an order setting the date for the delivery of the Judgement as 30 October 2013.[6]

4. On 1 July 2013, the Accused filed a motion for the disqualification of Judge Harhoff in the present case due to a "reasonable fear" of bias.[7] On 28 August 2013, a panel of three judges made up of Judge Moloto, Judge Liu and Judge Hall ("Panel") found, by majority, Judge Liu dissenting, that an appearance of unacceptable bias existed on the part of Judge Harhoff[8] and upheld the

1 "Decision Inviting the Parties to Make Submissions on Continuation of Proceedings", 13 November 2013 (public).
2 "Opinion Concerning the Decision of Trial Chamber III on Continuation of Proceedings", 20 November 2013 (public) ("Accused's Submission"). The official English translation was filed on 27 November 2013.
3 "Prosecution Submission on Continuation of Proceedings", 2 December 2013 (public) ("Prosecution's Submission").
4 *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Scheduling Order", 18 September 2007 (public).
5 Closing Arguments of the Accused, T(E), 20 March 2012, pp. 17553 and 17554 (public).
6 "Scheduling Order", 12 April 2013 (public).
7 "Professor Vojislav Šešelj's Motion for Disqualification of Judge Frederik Harhoff", 1 July 2013 (public). The official English translation was filed on 9 July 2013. *See* notably para. 3.
8 "Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President", 28 August 2013 (public) ("Decision of 28 August 2013"), para. 14.

application.[9] On 7 October 2013, the Panel denied by majority, Judge Liu dissenting, the Prosecution motion for reconsideration of the Decision of 28 August 2013.[10]

5. On 31 October 2013, the acting President of the Tribunal assigned, with immediate effect, Judge Niang to the Chamber seized of the present case as a substitute for Judge Harhoff.[11]

III. ARGUMENTS OF THE PARTIES

A. The Accused

6. Contending that the continuation of deliberations is liable to violate his fundamental rights, the Accused opposes the continuation of deliberations, seeks the immediate termination of proceedings and his immediate release. He also seeks financial compensation of 12 million euros.

7. Firstly, the Accused claims that the proceedings cannot continue due to the appearance of bias on the part of Judge Antonetti and Judge Lattanzi. According to the Accused, this bias comes from the support that Judge Antonetti and Judge Lattanzi showed for Judge Harhoff at the time of his disqualification.[12] The Accused also believes that Judge Harhoff, who was found to be biased by the Panel, necessarily influenced the presentation of evidence.[13] Moreover, the Accused argues that it is unthinkable that Judge Niang should take part in the drafting of the Judgement without being involved in the hearing of the testimony of all the witnesses.[14] According to the Accused, a judge must be in a position to ask questions of witnesses and to note their conduct during their testimony in order to be able to draw conclusions on their credibility.[15] The Accused also submits that Judge Niang will not be able to become familiar with the case in a year, especially since he has been assigned to the *The Prosecutor v. Vujadin Popović* Case.[16] Finally, the Accused criticises the

[9] Decision of 28 August 2013, para. 15.
[10] "Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Request for Clarification, and Motion on Behalf of Mićo Stanišić and Stojan Župljanin", 7 October 2013 (public), para. 21.
[11] "Order Assigning a Judge Pursuant to Rule 15", 31 October 2013 (public).
[12] Accused's Submission, paras 1, 4 and 5.
[13] Accused's Submission, para. 5.
[14] Accused's Submission, paras 6 and 9.
[15] Accused's Submission, paras 6 and 9.
[16] Accused's Submission, paras 6 and 7.

Chamber for not holding public hearings in order to collect the submissions of the Parties on the continuation of proceedings.[17]

8. Secondly, the Accused lists a number of violations of his fundamental rights that would affect the fairness of the trial. Firstly, the Accused believes that his detention is arbitrary to the extent that there has been no decision that has validated its legality.[18] Secondly, while invoking his right to represent himself, the Accused notes that the judges of the Tribunal imposed stand-by Counsel on him against his wishes and without valid reason.[19] Thirdly, the Accused notes that during the pre-trial stage, a significant number of documents and CD-ROMs were disclosed to him in a language he did not understand.[20] Moreover, the Accused emphasises that the Prosecution did not disclose to him all the evidence before the start of the trial, in particular the identity of protected witnesses, thus placing him in a position of inequality in relation to the Prosecution.[21] Fourthly, the Accused criticises the Chamber for having applied retroactively Rule 92 *ter* of the Rules, and for having admitted, pursuant to this Rule, written statements of Prosecution witnesses without allowing him to cross-examine these witnesses.[22] Fifthly, the Accused argues that there are no grounds to grant protective measures to more than half of the witnesses, many of whom had been subjected to interference and intimidation by the Prosecution.[23] Sixthly, invoking the silence of the Statute of the Tribunal on this subject, the Accused argues that there was no legal basis to find him guilty of contempt of the Tribunal on three occasions.[24] Seventhly, the Accused notes that the Indictment covers events that took place in Vojvodina when it is common knowledge that there was no armed conflict in this area in the period relevant to the Indictment.[25] He also observes that the period

[17] Accused's Submission, paras 4, 7 and 8.
[18] Accused's Submission, para. 10.
[19] Accused's Submission, par. 11
[20] Accused's Submission, paras 12 and 13.
[21] Accused's Submission, paras 12 and 13.
[22] Accused's Submission, para. 14.
[23] Accused's Submission, paras 15 and 16.
[24] Accused's Submission, paras 17 to 20. With respect to the first of these proceedings, the Accused adds that the book for whose publication he was charged contained public documents admitted into evidence and did not reveal the identity of any protected witness; that only 7 % of the book had been translated into English, which therefore did not allow the judges to grasp the entire content; that the Judgement and Judgement on Appeal each had a "secret" version, thus going against the principle of the public nature of judgements; that the sentence of 15 months in prison imposed on him exceeds the sentence usually imposed in cases of contempt of the Tribunal: para. 18. With respect to the second proceedings, the Accused maintains that the charges in the Indictment were not precise enough and that it was absurd to charge him with having put at risk his own witnesses: para. 19. As for the third proceedings, the Accused argues that this dealt with the same facts as in the two previous proceedings. The Accused adds that the proceedings were irregular because no witness was heard and his case manager was not allowed to be present during the hearings: para. 20.
[25] Accused's Submission, para. 22.

relevant to the Indictment is not sufficiently precise.[26] Lastly, the Accused contends that the overall length of the trial violates his right to be tried without undue delay.[27]

9. According to the Accused, all these violations have prejudiced him considerably. In view of the systematic violation of his fundamental rights and, more specifically, his right to be tried without undue delay, the Accused requests the termination of the proceedings and his immediate release.[28] The Accused moreover contends that the mere recognition that his rights were violated is insufficient compensation for the harm caused to him; consequently, he requests financial compensation of 12 million euros.[29]

B. The Prosecution

10. The Prosecution requests the continuation of deliberations as soon as Judge Niang certifies familiarity with the record of proceedings.

11. According to the Prosecution, this would be the only solution in accordance with the interests of justice and the victims.[30] In fact, according to the Prosecution, the continuation of deliberations based on the existing record of proceedings is a fair and expeditious way to proceed. On the one hand, the Prosecution notes that the Accused had the opportunity to challenge the evidence admitted into the record.[31] On the other, the Prosecution notes that the judges of the Tribunal have the possibility to examine written evidence and that they also have at their disposal audio and video recordings of hearings to assess the witnesses' demeanour at trial.[32]

12. The Prosecution submits that the continuation of the proceedings based on existing records accords with the prior practice of the Tribunal. In support of its arguments, the Prosecution raises in particular the replacement of Judge May by Judge Bonomy in *The Prosecutor v. Slobodan Milošević* Case, which occurred after the close of the Prosecution's case.[33] The Prosecution contends that the record with which Judge Niang needs to familiarise himself is considerably smaller than the record

[26] Accused's Submission, para. 22.
[27] Accused's Submission, paras 21 and 23.
[28] Accused's Submission, pp. 15 and 16.
[29] Accused's Submission, para. 24 and p. 16.
[30] Prosecution's Submission, paras 1 and 2.
[31] Prosecution's Submission, para. 3.
[32] Prosecution's Submission, para. 3.
[33] Prosecution's Submission, para. 4.

in *The Prosecutor v. Slobodan Milošević* Case.[34] In any case, the Prosecution submits that the decision to continue proceedings must be adopted before Judge Niang certifies familiarity; according to the Prosecution, speculation on Judge Niang's ability to make the necessary certification is premature and irrelevant at this juncture.[35]

13. The Prosecution further notes that several Chambers of the Tribunal have in the past already rejected various allegations of violations mentioned by the Accused in his submission.[36] With respect to the delay in the proceedings, the Prosecution notes that it was not ruled excessive in 2011 and that this still remains true today.[37] In any case, the Prosecution argues that any delay must be seen as being linked to the conduct of the Accused, in particular the number of frivolous motions, and that the sentences imposed for contempt of the Tribunal should also be taken into account.[38] The Prosecution adds that the length of other international cases of similar scope to that of the Accused has not been found to be excessive.[39]

14. Finally, with respect to the bias of Judge Antonetti and Judge Lattanzi alleged by the Accused, the Prosecution observes that the Tribunal is not seized of any formal application to this end.[40] It also recalls that the judges of the Tribunal enjoy a strong assumption of impartiality.[41] The Prosecution contends that Judge Antonetti and Judge Lattanzi would not be considered biased – or having the appearance of bias – simply because of the findings of an appearance of bias in respect of Judge Harhoff.[42]

15. Consequently, the Prosecution requests that the Chamber order the continuation of the proceedings; grant the Parties 14 days to file any appeal against this decision; restart deliberations – notwithstanding any appeals – as soon as Judge Niang informs the Chamber that he has familiarised himself with the record of the proceedings; and issue a final Judgement within a reasonable time.[43]

[34] Prosecution's Submission, para. 5.
[35] Prosecution's Submission, para. 6.
[36] Prosecution's Submission, para. 7.
[37] Prosecution's Submission, para. 8.
[38] Prosecution's Submission, para. 8.
[39] Prosecution's Submission, para. 8.
[40] Prosecution's Submission, para. 9.
[41] Prosecution's Submission, para. 9.
[42] Prosecution's Submission, para. 9.
[43] Prosecution's Submission, para. 10.

IV. DISCUSSION

16. The current situation is unprecedented in the history of the Tribunal. In its assessment of the decision to be taken, the Chamber will ensure that it maintains a proper balance between the fundamental rights of the Accused, on the one hand, and the interest of justice on the other, while noting that the two are not mutually exclusive.

17. The Accused requests a termination of the proceedings and compensation of 12 million euros due to a series of violations of his fundamental rights that affect the fairness of the trial. The Chamber will first examine (A) the violations that were allegedly committed before the disqualification of Judge Harhoff, and will then (B) assess the consequences of the disqualification and (C) the assignment of Judge Niang for the remainder of the proceedings. Lastly, the Chamber will (D) analyse the claims of the Accused that the Chamber was obliged to obtain the submissions of the Parties during a public hearing.

A. Allegations of Violations of the Fundamental Rights of the Accused prior to the Disqualification of Judge Harhoff

1. On the Allegations of the Arbitrary Nature and Lack of Legal Basis for the Detention and the Violation of the Right of the Accused to Be Tried without Undue Delay

18. The Chamber notes that it has ruled on several occasions on these matters.

19. In the Decision of 10 February 2010 the Chamber dismissed an oral request of the Accused for abuse of process,[44] in which he emphasised, *inter alia*, the excessive length of his detention and that he had waited for five years before his trial started.[45] The Chamber deems, in particular, that the right of the Accused to be tried without undue delay had not been violated in light of the complexity of the case, the number of witnesses heard, the exhibits tendered before the Chamber, the conduct of the Parties and the serious nature of the charges brought against the Accused.[46]

[44] "Decision on Oral Request of the Accused for Abuse of Process", 10 February 2010 (public) ("Decision of 10 February 2010 on Abuse of Process"), para. 32.
[45] Status Conference, T(E), 20 October 2009, pp. 14756 to 14762 (public session).
[46] Decision of 10 February 2010 on Abuse of Process, paras 28 to 32.

20. In its Decision of 29 September 2011,[47] the Chamber dismissed another motion of the Accused on the same matter,[48] recalling that in its Decision of 10 February 2010 on Abuse of Process it emphasised that international and European case-law clearly establishes that there is no predetermined time-limit beyond which a trial would be considered unfair due to undue delay.[49] The Chamber also pointed out that it had shown many times that it constantly ensured the respect of the rights of the defence, such as the one recognised under Article 21 (4) (c) of the Statute.[50] Moreover, the Chamber noted that the Accused had not requested either a certification to appeal the Decision of 10 February 2010 on Abuse of Process or its reconsideration by the Chamber. For this reason, while noting that the Accused did not exercise his right to challenge the Decision of 10 February 2010 on Abuse of Process, the Chamber decided in this respect to examine the arguments that only related to the period after 10 February 2010.[51] The Chamber noted that since 10 February 2010 there had not been any particular delays or suspensions of the trial, and observes that the Accused had not seized it of any request for provisional release pursuant to Rule 65 (B) of the Rules.[52] Consequently, the Chamber deemed that the Accused did not present any evidence that would lead to a finding that an abuse of process had occurred and, more specifically, that his detention was excessive in light of the procedural developments in the case that arose after 10 February 2010.

21. In its Decision of 21 March 2012, the Chamber denied a new submission of the Accused on this matter, deeming that the Accused had simply reiterated the arguments that were rejected by the Decision of 10 February 2010 and the Decision of 29 September 2011.[53] In its Decision, the Chamber noted that the Accused had not shown that his right to be tried within a reasonable time had

[47] "Decision on Motion by Accused to Discontinue Proceedings", 29 September 2011 (public) ("Decision of 29 September 2011"), paras 32 and 33.
[48] "Motion to Discontinue the Proceedings due to Flagrant Violation of the Right to a Trial Within a Reasonable Period in the Context of the Doctrine of Abuse of Process", 13 July 2011 (public). In this Motion, the Accused requested that the Chamber discontinue his trial on the grounds of the abuse of process doctrine, emphasising the serious violations of his rights. More specifically, he emphasised the excessive length of his detention without the Chamber reaching the Judgement stage or issuing a decision on the matter of the length constituted a violation of his right to be tried within a reasonable period (*ibid.*, paras 15, 16, 19, 20 and 73).
[49] Decision of 29 September 2011, para. 27.
[50] Decision of 29 September 2011, para. 27.
[51] Decision of 29 September 2011, para. 28.
[52] Decision of 29 September 2011, para. 13. Moreover, the Chamber noted that in his Motion the Accused limited himself to denouncing the length of his detention, comparing it to the trials of accused at various international and national courts, whose complexity was not comparable to this case, and by invoking the speed of international proceedings that were not of a criminal nature, and which were mainly conducted without the appearance of witnesses. Furthermore, the Chamber noted that there had been some trials, especially at the ICTR, that lasted much longer than this case and to which the Accused avoided referring (Decision of 29 September 2011, para. 30).

been violated, nor that the length of his preventive detention was excessive.[54] With respect to this, the Chamber also recalled that it was up to the Accused, should he so wish, to file a reasoned request for provisional release in line with Rule 65 (B) of the Rules.[55]

22. On 20 March 2012, the Accused seized the Chamber of an oral request for provisional release, arguing that there were no longer any reasons to keep him in detention since, according to him: (i) he did not represent a flight risk; (ii) he could not influence witnesses because the witnesses called by the Prosecution had already been examined; and (iii) there was no danger of him committing new crimes that could lead to an indictment before the Tribunal because "the state of war is no longer in effect in the Balkans".[56] On 23 March 2012, the Chamber rejected the request of the Accused emphasising that it was not persuaded that "he would appear in court for the rendering of the judgement or would otherwise return to the UN Detention Unit in The Hague […] upon expiry of the release period, and that, if released, he would not pose a danger to any victim, witness or other person".[57] Moreover, the Chamber noted that the Accused failed to indicate in his oral request the country to which he sought to be provisionally released and recalled that on 12 March 2012, it had ordered the Registry, *proprio motu*, to appoint a commission of three medical experts to provide a report on the compatibility of the Accused's detention at the Detention Unit with his health.[58] This commission of experts concluded that the medical care and facilities at the United Nations Detention Unit were adequate and therefore compatible with the health of the Accused.[59]

23. With respect to the period between 21 March 2012, the date of the last decision validating the length of the proceedings, and 28 August 2013, the date of the disqualification of Judge Harhoff, the Chamber deems that this is a reasonable period for deliberations, considering the complexity of the proceedings, especially the number of counts, the amount of evidence and the complexity of events and applicable law.

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[53] "Decision on Accused's Claim for Damages on Account of Alleged Violations of His Elementary Rights During Provisional Detention", 21 March 2012 (public) ("Decision of 21 March 2012"), para. 91.
[54] Decision of 21 March 2012, para. 92.
[55] Decision of 21 March 2012, para. 92.
[56] Closing Arguments, T(E), 20 March 2012, pp. 17550 to 17551 (public session).
[57] "Decision on the Accused Vojislav Šešelj's Request for Provisional Release", 23 March 2012 (public) ("Decision of 23 March 2012"), paras 15 and 18.
[58] Decision of 23 March 2012, paras 16 and 17.
[59] "Registrar's Submission of Expert Report", 21 May 2012 (public), public annex entitled "Report Pursuant to the 'Order Further to the "Order to Proceed with a New Medical Examination" of 12 March 2012" of 5 April 2012 by Trial Chamber III", 27 April 2012, p. 2.

24. Since the requests of the Accused on the alleged violation of his right to be tried without undue delay prior to the Decision of 21 March 2012 have already been ruled on, the questions relating to this alleged violation raised in the Accused's Submission are moot. Moreover, the Chamber finds that the time that elapsed between the Decision of 21 March 2012 and the Decision of 28 August 2013 is reasonable and did not lead to a violation of the above right.

2. On the Allegation of Imposing Stand-by Counsel against the Wishes of the Accused and the Violation of His Right to Represent Himself

25. The Chamber recalls its Decision of 21 March 2012 in which it found that the Accused could not claim that his right to self-representation was violated by the Tribunal.[60] The Chamber also recalls its finding that the Tribunal cannot be held responsible for the consequences of the Accused's choice to undertake a hunger strike when legitimate and established remedies were available to him.[61] Since the Accused's request with respect to the imposition of stand-by Counsel against his wishes has already been ruled on by the Chamber, the matter of this alleged violation raised in the Accused's Submission is moot.

3. On the Allegation of the Prosecution's Refusal to Disclose to the Accused Names of Protected Witnesses, Confidential Information, and Hard Copies of Documents in a Language He Understands

26. With respect to the allegation of the Prosecution's refusal to disclose to the Accused confidential portions of expert reports, the Chamber notes that the Accused does not provide any details allowing it to identify the nature and content of these documents. Moreover, the Chamber notes that the pre-trial Judge has already ruled on these requests of the Accused on comparable matters.[62]

[60] Decision of 21 March 2012, para. 18.
[61] Decision of 21 March 2012, para. 19.
[62] *See* for example *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on the Re-Examination of the Decision of Trial Chamber I of 2 October 2006 (Motion No. 286)", 14 June 2007 (public): the pre-trial Judge ordered the Prosecution to disclose to the Accused the Theunens Report in an unredacted version no later than 30 days before the definitive date of the commencement of the trial. *See* also *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Submission Number 240 regarding the Disclosure of Documents", 9 July 2007 (public): the pre-trial Judge partially granted the Accused's Submission and ordered the Prosecution to disclose, as soon as possible, in hard copy and in a language the Accused understands the expert reports of Dr Osman Kadić, Dr Zoran Stanković, Dr Davor Strinović, Colonel Ivan Grujić and Ewa Tabeau.

27. With respect to the names of protected witnesses, the Chamber notes that the Accused did not provide any details in support of his allegation. The Chamber further recalls that the pre-trial Judge, the current Chamber and the Appeals Chamber have already ruled on the matter of late disclosure to the Accused of the identity of some witnesses, which should occur no later than 30 days before their testimony.[63] Therefore, the Chamber concludes that the Accused has already exercised his right to a remedy in this respect.

28. With respect to the allegation of refusal to disclose to the Accused hard-copy documents in a language that he understands, the Chamber recalls its Decision of 21 March 2012, in which it found, based on arguments similar to those presented in the Accused's Submission, that it was not in a position to conclude that any rights of the Accused had been violated.[64] The Chamber in fact recalled, one the on hand, that on 8 December 2006 the Registrar granted the requests of the Accused regarding the disclosure in hard copy in the Serbian language of all the documents originating from the Prosecution,[65] and on the other, that the Accused received translations into Bosnian/Croatian/Serbian of all documents admitted to the record in a systematic and timely fashion.[66]

29. Since the requests of the Accused in respect of the Prosecution's refusal to disclose to him the names of protected witnesses, confidential information, documents in hard copy and in a

[63] *See* for example *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Adopting Protective Measures", 30 August 2007 (confidential) ("Decision of 30 August 2007"); *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Prosecution Motion for Reconsideration of the Decision on Protective Measures of 30 August 2007", 16 October 2007 (confidential) ("Decision of 16 October 2007"); Oral Decision on the Application for Reconsideration of the Decision on the Reconsideration by the Prosecution of the Decision relating to the Adoption of Protective Measures of 30 August 2007, T(E), 7 November 2007, pp. 1784 to 1786 (public) ("Oral Decision of 7 November 2007"); "Decision on Vojislav Šešelj's Motion for Reconsideration of the Decision of 30 August 2007 on Adopting Protective Measures", 11 January 2008 (public) ("Decision of 11 January 2008"): the Chamber upheld the Decision of 30 August 2007 and the Decision of 16 October 2007. *See* also *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.6, "Decision on Vojislav Šešelj's Appeal against the Trial Chamber's Oral Decision of 7 November 2007 ", 24 January 2008 (public): the Appeals Chamber denied the appeal of the Accused against the Oral decision of 7 November 2007 on the grounds that the Accused did not show that the Trial Chamber committed a clear error in the exercise of its discretionary power when it authorised the late disclosure of the identity of a limited number of witnesses to the Accused 30 days before their own testimony. The Appeals Chamber also deemed that the right of the Accused to prepare his defence was not harmed by this late disclosure.

[64] Decision of 21 March 2012, para. 29.

[65] "Decision", 8 December 2006 (confidential) in confidential annex VI to "Registry Submission Regarding Questions Raised in the Chamber's Scheduling Order of 1 December 2006", 15 December 2006 (public with confidential and *ex parte* annexes).

[66] Decision of 21 March 2012, para. 29.

language that he understands has already been ruled on, the matter of this alleged violation, raised in the Accused's Submission, is moot.

4. On the Allegations with Respect to Rule 92 *ter* of the Rules

30. The Chamber recalls that the statements of 13 witnesses were admitted pursuant to Rule 92 *ter* of the Rules and that all the witnesses in question were called to testify before the Chamber to confirm their statements.[67] The Accused indicated in his final brief that this provision "violates not only the principle of evidentiary procedure but also represents a type of abuse that limits and denies the right of defence, bringing in question the fair and just trial".[68]

31. The Accused refused to cross-examine these witnesses on principle.[69] In any case, the Accused confirmed that, even if he had taken advantage of his right to cross-examine these witnesses within the time-limit under Rule 92 *ter* of the Rules, he would never have been able to verify all the assertions in these statements.[70] Moreover, the Accused had already indicated that this Rule was added to the Rules after his surrender to the Tribunal and should therefore not apply to his trial in line with Rule 6 (D) of the Rules which does not allow retroactive application of rules.[71]

32. The Chamber deems that the arguments of the Accused are lacking in merit. Firstly, the Chamber recalls that Rule 92 *ter* of the Rules allows the admission of written statements or transcripts of evidence given in other proceedings before the Tribunal, on condition that the persons making the statements or transcripts are available to testify in order to attest in court to the accuracy of their statement or transcript and to be cross-examined.[72] This procedure is applied, under the

[67] Witness VS-021; Witness VS-1000; Witness VS-1087; Witness VS-1105; Witness Fadil Kopić; Witness Ibrahim Kujan; Witness VS-1052; Witness Dragutin Berghofer; Witness Miodrag/Milorad Vojnović; Witness Jelena Radošević; Witness Julka Maretić; Witness VS-1134; Witness Vesna Bosanac.
[68] Final Brief of the Accused, pp. 11, 12, 318 and 319.
[69] Final Brief of the Accused, p. 11. *See* also, for example, Questions on the Procedure, T(F), 5 March 2008, p. 4561; Witness VS-1000, T(E), 11 December 2008, p. 12985 (private session); Witness VS-1134, T(E), 15 October 2008, p. 10793; Witness VS-1105, T(E), 16 July 2008, pp. 9513 and 9514; "Redacted Version of the 'Decision on the Prosecution's Consolidated Motion pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quarter* of the Rules of Procedure and Evidence' Filed Confidentially on 7 January 2008", 21 February 2008 (public) ("Decision of 21 February 2008"), paras 19 to 21 referring to "Professor Vojislav Šešelj's Motion for the Trial Chamber to Dismiss All Prosecution Motions for the Application of Rule 92 *bis*, 92 *ter* and 92 *quater* Because It Would Constitute Retroactive Application in His Case", 5 December 2007 (public).
[70] Final Brief of the Accused, p. 12.
[71] Final Brief of the Accused, p. 12.
[72] Rule 92 *ter* (A) of the Rules; *see* also *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Order Setting Out the Guidelines for the Presentation of Evidence and the Conduct of the Parties During the Trial", public, 15 November 2007 (public), annex to the Order, para. 29. The Chamber recalls that, in general terms, when a Party calls a witness to testify

supervision of the Chamber, in order to ensure efficiency and clarity, and to avoid unnecessary repetition and presentation of information that is not relevant.[73]

33. Furthermore, the Appeals Chamber deemed that "[w]here a witness is present before the Court and orally attests to the accuracy of the statement, the evidence entered into the record cannot be considered to be exclusively written […]. The testimony of the witness constitutes a mixture of oral and written evidence."[74] The Appeals Chamber also noted that "the appearance of the witness in court to orally attest to the accuracy of the tendered statement is an important safeguard in itself because the witness is certifying the accuracy of the statement before the court and is available to answer questions from the bench".[75]

34. Moreover, the Rules explicitly offer the Accused the right to cross-examine witnesses who testify under Rule 92 *ter* of the Rules. In this case, having refused to exercise this right,[76] the Accused cannot pretend that he was not able to verify the claims in the statements of the witnesses in question.

35. Finally, the Chamber has already specified that, unless it has been proved that the rights of the Accused are prejudiced, Rules 92 *ter* of the Rules may be applied retroactively.[77] The Chamber found that the Accused had not suffered any prejudice following the adoption of these Rules because, on the one hand, he was informed more than a year earlier of the possibility that the Prosecution could use these procedures and, on the other hand, he had the same rights and could have sought the application of Rules 92 *ter* of the Rules during the presentation of the defence evidence.[78] In his Final Brief, the Accused merely reiterated the arguments that were rejected by the Chamber in its Decision of 21 February 2008, without showing that the reasoning of this Decision was erroneous.

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under Rule 92 *ter* of the Rules, it reads at the hearing a summary of the statement which has no probative value. It may then proceed to a brief examination-in-chief in order to clarify or bring to light particular elements of the testimony.

[73] *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, "Order on the Procedure for the Conduct of Trial", 8 October 2009 (public), Annex, para. L.

[74] *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.4, "Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Witness Statements", 30 September 2003 (public) ("Decision *S. Milošević* of 30 September 2003"), para. 16.

[75] Decision *S. Milošević* of 30 September 2003, para. 19.

[76] The Chamber drew the attention of the Accused to the fact that if he deprived himself of the possibility of cross-examination, there could be some elements in favour of his defence that he could not present, and that this was his choice but that it could be a risk for him (*see* Questions on Procedure, T(E), 5 March 2008, p. 4562).

36. Since the Accused's requests with respect to the application of Rule 92 *ter* of the Rules have already been ruled on, this matter to which the Accused's Submission relates is moot.

5. On the Allegation of Erroneously Granting Protective Measures to More than Half of the Witnesses, Victims of Interference by Members of the Prosecution

37. With respect to allegations of having erroneously granted protective measures, the Chamber recalls that the Accused filed several motions for review of decisions on the adoption of protective measures, or to rescind protective measures,[79] and that the Chamber has already ruled on these motions.[80] Since the Accused's motions on the granting of protective measures to witnesses have already been ruled on, this matter to which the Accused's Submission relates is moot.

38. With respect to allegations that members of the Prosecution interfered with witnesses, the Chamber recalls, on the one hand, its Decision of 10 February 2010 in which it noted that this allegation, similar to the one made in the Accused's Submission, has already been raised in motions of the Accused on which the Chamber has already ruled.[81] On the other hand, the Chamber recalls that on 29 June 2010 it ordered the Registry to assign an *amicus curiae* to investigate allegations of intimidation and pressure on witnesses by some investigators for the Prosecution submitted by the

[77] Decision of 21 February 2008, paras 33 and 34, referring to Rule 6 (D) of the Rules.
[78] Decision of 21 February 2008, paras 35 to 37.
[79] *See* for example *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Professor Vojislav Šešelj's Motion for Review of the Decision of 30 August 2007 on Adopting Protective Measures", 9 November 2007 (confidential) ("Motion of 9 November 2007"): in it, the Accused sought a review of the Decision of 30 August 2007. The Accused thus requested, with the exception of protective measures needed for victims of sexual crimes, that the protective measures ordered be rescinded since they did not apply, were erroneous and violated his right to a fair trial (Motion of 9 November 2007, paras 7, 8 and 10). *See* also "Motion of Professor Vojislav Šešelj for Trial Chamber III to Order that All Protective Measures Granted to the Prosecution Witnesses Who Are Not Victims be Rescinded, to Dispense with Closed Sessions and to Order that Witnesses who Continue to Enjoy Protective Measures May No Longer Testify in Closed Session", 19 May 2008 ("Motion of 19 May 2008"): the Accused requested especially that the Chamber order the rescinding of all protective measures granted to Prosecution witnesses who were not victims (Motion of 19 May 2008, pp. 7 and 8).
[80] *See*, for example, Decision of 11 January 2008 and "Decision on the Accused's Motion to Rescind Protective Measures (Submission 389)", 23 June 2008 (public).
[81] Decision of 10 February 2010 on Abuse of Process, para. 25. *See The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Order regarding Mr Šešelj's Motion for Contempt Proceedings", 11 June 2007 (public); *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on the Accused's Motion for Review of the Order of 15 May 2007", 13 August 2007 (public); "Decision on Motions by the Prosecution and the Accused to Instigate Contempt Proceedings against Ms Dahl (from the Office of the Prosecutor) and Mr Vučić (Associate of the Accused)", 10 June 2008 (confidential); "Decision on the Accused's Submissions 382 and 386 to Instigate Contempt Proceedings against Paolo Pastore-Stocchi", 18 November 2008 (confidential).

Accused.[82] On 28 October 2011, the Chamber filed a public redacted version of the report by the *amicus curiae* and ordered the Parties to file their submissions.[83] In this report, the *amicus curiae* concluded that there were no grounds to instigate contempt proceedings against some investigators of the Prosecution.[84] In its Decision of 22 December 2011, the Chamber decided, by a majority, Judge Lattanzi partially dissenting, not to disclose the *inter partes* version of the *amicus curiae* report, rejected the Accused's motion to instigate contempt proceedings against some investigators of the Prosecution and rejected the Prosecution's motion to admit to the record the public version of this report.[85] On 25 January 2012, the Chamber denied the request for certification to appeal the Decision of 22 December 2011 filed by the Prosecution.[86] Since the Accused's requests with respect to the alleged interference with witnesses by members of the Prosecution have already been ruled on, the matter of these alleged violations, raised in the Accused's Submission, are moot.

39. The Accused further alleges that he proved that at least 55 Prosecution witnesses were false witnesses.[87] The Chamber notes that the Accused's Submission does not provide any detailed information allowing it to identify these witnesses. Consequently, the Chamber is not in a position to verify either the truthfulness of this allegation or whether this concerns the same persons who were the subject of the Decision of 22 December 2011 on Vojislav Šešelj's motion to instigate criminal proceedings against certain Prosecution witnesses.[88]

[82] "Redacted Version of the 'Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj's Motion for Contempt against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon'", 29 June 2010 (public), pp. 8 and 9.
[83] "Decision on New Filing of Public Redacted Version of the *Amicus Curiae* Report", 28 October 2011 (public) ("Decision of 28 October 2011"), p. 2.
[84] Annex to the Decision of 28 October 2011, p. 240.
[85] "Decision on Vojislav Šešelj's Motion for Contempt against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon and on the Subsequent Requests of the Prosecution", 22 December 2011 (public with a separate opinion of Presiding Judge Jean-Claude Antonetti and a partially dissenting opinion of Judge Flavia Lattanzi in a public annex, and a separate opinion of Presiding Judge Jean-Claude Antonetti in an annex, confidential and *ex parte* for the two Parties), p. 9.
[86] "Decision on Prosecution Request for Certification to Appeal Decision of 22 December 2011", 25 January 2012 (public).
[87] Accused's Submission, para. 15.
[88] "Decision on Vojislav Šešelj's Motion to Instigate Criminal Proceedings against Certain Prosecution Witnesses for Giving False Testimony", 22 December 2011 (confidential) ("Decision of 22 December 2011").

6. On the Accused's Arguments regarding Proceedings for Contempt of the Tribunal

40. The Chamber notes that it has already had to rule on the matter in question in its Decision of 21 March 2012.[89]

41. With respect to the first proceedings for contempt mentioned by the Accused, in its Judgement of 24 July 2009 Trial Chamber II found the Accused guilty of contempt of the Tribunal and sentenced him to 15 months in prison for having intentionally and knowingly obstructed the course of justice by revealing, in violation of the protective measures ordered by the Chamber, confidential information about three witnesses and by publishing extracts from one of the witnesses' confidential written statements in a book he authored.[90] In the Judgement on Appeal of 19 May 2010, the Appeals Chamber dismissed the appeal filed by the Accused and affirmed the sentence against him.[91]

42. With respect to the second contempt proceedings, the Chamber notes that in the Judgement of 31 October 2011, Trial Chamber II found the Accused guilty of contempt of the Tribunal and sentenced him to 18 months in prison for having intentionally and knowingly obstructed the course of justice by revealing, in violation of the protective measures ordered by the Chamber, confidential information about 10 protected witnesses in a book he authored.[92] In the Judgement on Appeal of 28 November 2012, the Appeals Chamber affirmed the sentence of 18 months' imprisonment pronounced against the Accused.[93]

43. With respect to the third contempt proceedings, the Accused was charged with having intentionally and knowingly obstructed the course of justice, by ignoring the Chamber's orders and decisions to withdraw from his website documents that revealed confidential information about a

[89] Decision of 21 March 2012, paras 93 to 97.
[90] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, "Judgement on Allegations of Contempt", 24 July 2009 (confidential, public redacted version filed on the same date) ("Judgement of 24 July 2009").
[91] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, "Judgement" on Appeal, 19 May 2010 (public redacted version) ("Judgement on Appeal of 19 May 2010").
[92] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, "Judgement", 31 October 2011 (confidential) ("Judgement of 31 October 2011").
[93] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3-A, "Judgement" on Appeal, 28 November 2012 (public) ("Judgement on Appeal of 28 November 2012"). The Appeals Chamber moreover noted that the Accused had been detained for a period exceeding the overall length of the sentence of 15 months imposed for the first contempt case no. IT-03-67-R77.2 and the sentence of 18 months in that particular case, and that the sentence had thus been served.

number of protected witnesses.[94] The Chamber observes that in the Judgement of 28 June 2012 the Accused was found guilty of contempt of the Tribunal by Trial Chamber II and sentenced, by a majority, Judge Trechsel dissenting, to a single term of imprisonment of two years.[95] In the Judgement on Appeal of 30 May 2013, the Appeals Chamber dismissed the appeal filed by the Accused in its entirety and affirmed the sentence.[96]

44. The Chamber finds that - with respect to the legal basis and the content of the decisions taken in the three contempt proceedings, and as it has already indicated in its Decision of 21 March 2012 - it does not have jurisdiction to reconsider the decisions and the judgements rendered by other Trial Chambers.

7. On the Allegation of the Political Nature of the Indictment against the Accused

45. The Chamber notes that this question has already been raised in several requests of the Accused, which were rejected by the Chamber.[97] Having already ruled on the motion of the Accused concerning the political nature of the Indictment, this matter, raised in the Accused's Submission, is moot.

8. On the Allegation of Imprecise Charges against the Accused

46. The Chamber notes that the Appeals Chamber has already found, in its Decision of 15 June 2006, that

> "[M]r Šešelj's allegations regarding the Appeals Chamber's statement that 'there can be situations where an armed conflict is ongoing in one state and ethnic civilians of one of the warring sides, resident in another state, become victims of a widespread or systematic attack in response to that armed conflict' and regarding the fact that paragraphs 12, 31 and 33 of the Indictment do not make specific reference to the existence of a systematic or widespread attack on civilians are frivolous. In particular, the Indictment against Mr Šešelj for crimes against humanity makes it sufficiently clear

[94] *The Prosecutor v.. Vojislav Šešelj*, Case No. IT-03-67-R77.4, "Third Decision on Failure to Remove Confidential Information from Public Website and Amended order in Lieu of Indictment", 29 March 2012 (confidential).
[95] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4, "Public Redacted Version of Judgement Issued on 28 June 2012", 28 June 2012 (public).
[96] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4-A, "Public Redacted Version of 'Judgement' Issued on 30 May 2013", 30 May 2013 (public).
[97] *See* "Decision on Motion by the Accused to Dismiss All Charges against Him (Submission 387) and Its Addendum (Submission 391)", 18 September 2008 (public) ("Decision of 18 September 2008") and Decision of 10 February 2010 on Abuse of Process, para. 24.

> that the Prosecution alleges that a widespread or systematic attack against the civilian population took place on the territory of Vojvodina at the time relevant to the Indictment.[98]

47. Moreover, in the Decision pursuant to Rule 98 *bis* of the Rules, the Chamber deems that "there is sufficient evidence at this stage to meet the requirements of Rule 98 *bis* of the Rules […] allow[ing] any reasonable trier of fact to conclude beyond any reasonable doubt that the crimes alleged under count 1, relating to persecution as a crime against humanity and under counts 10 and 11 relating to deportation and forcible transfer as crimes against humanity were part of a generalised attack against non-Serb civilian population with the goal of expelling them […] from some parts of Vojvodina in Serbia".[99] Since this request has already been ruled on, this matter, raised in the Accused's Submission, is moot.

B. The Consequences of the Disqualification of Judge Harhoff from the Remainder of Proceedings

1. The Consequences of the Findings of the Panel with respect to the Appearance of Bias of Judge Harhoff on the Evidence in the Record

48. The Chamber notes that the Accused did not provide any more detailed information allowing the Chamber to identify which of its decisions regarding the evidence have been influenced in any way by Judge Harhoff. In any case, with respect to the entire record, the Chamber deems that there is nothing to indicate at this stage that Judge Harhoff sitting in Chamber during the presentation of evidence could have led to a violation of the right of the Accused to a fair trial.

2. The Alleged Bias of Judge Antonetti and Judge Lattanzi

49. *In limine*, the Chamber notes that the Accused did not file any formal submission to disqualify Judge Antonetti and Judge Lattanzi and presents this allegation solely in the context of the decision on the continuation of proceedings.

50. The Chamber observes that in support of his claim, the Accused raises only the existence of a reasonable doubt of the bias of Judge Antonetti and Judge Lattanzi, which is not a criterion used to

[98] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR72.1, "Decision on the Motion for Reconsideration of the 'Decision on the Interlocutory Appeal concerning Jurisdiction' Date of 31 August 2004", 15 June 2006 (public) ("Decision of 15 June 2006 »), para. 22.
[99] Oral Decision pursuant to Rule 98 *bis* of the Rules, T(E), 4 May 2011, public, pp. 16840 to 16842.

assess the existence of bias. The Chamber recalls that the Judges enjoy an assumption of impartiality that cannot be rebutted easily.[100] Therefore, according to the Chamber, there is no obstacle to the continuation of proceedings from this point of view.

C. The Consequences of the Assignment of Judge Niang for the Continuation of the Proceedings

1. The Consequences of Assigning Judge Niang at the Deliberation Stage

51. It must be made clear that the new judge will not begin deliberations with his colleagues immediately. He must first become familiar with the proceedings and declare his familiarity before starting deliberations.

52. In the procedural context specific to the present case, the Appeals Chamber created principles aimed at guaranteeing the fairness of proceedings should a judge be replaced during a trial. The Appeals Chamber emphasised that there was a preference, in principle, for three judges to be present at the testimony of witnesses in court.[101] However, the Appeals Chamber specified that this was a general principle and not absolute, and that exceptions can be made. [102] In this regard, the Appeals Chamber emphasised that there are ways that allow a new judge to evaluate the testimony heard in his absence and, in particular, the conduct of witnesses in court.[103] Among other ways, the Appeals Chamber identified video recordings of witness testimony.[104] Lastly, the Appeals Chamber did not deem it necessary to establish a hard and fast relationship between the proportion of witnesses who have already testified and the exercise of the power to order a continuation of trial.[105]

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[100] *See*, for example, *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-A, Judgement on Appeal, 1 April 2011 (public), para. 21.
[101] *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-A15*bis*, "Decision in the Matter of Proceedings under Rule 15 *bis* (D)", 24 September 2003 (public), para. 25; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Judgement on Appeal, 27 November 2007 (public), para. 103.
[102] *The Prosecutor v. Pauline Nyiramasuhuko*, Case No, ICTR-98-42-A15*bis*, "Decision in the Matter of Proceedings under Rule 15*bis* (D)", 24 September 2003 (public), para. 25; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Judgement on Appeal, 27 November 2007 (public), para. 103.
[103] *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-A15*bis*, "Decision in the Matter of Proceedings under Rule 15 *bis* (D)", 24 September 2003 (public), para. 25.
[104] *The Prosecutor v. Édouard Karemera*, Case No. ICTR-98-44-AR15*bis*.3, "Decision on Appeals Pursuant to Rule 15bis (D)", 20 April 2007 (public), paras 43 and 45.
[105] *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-A15*bis*, "Decision in the Matter of Proceedings under Rule 15 *bis* (D)", 24 September 2003 (public), para. 27.

53. The Chamber notes that in the present case, video recordings will allow Judge Niang to study the conduct of witnesses in court and to evaluate their credibility. Consequently, Judge Niang must determine whether, in view of these recordings, he is able to familiarise himself with the record in a satisfactory manner.

54. With respect to the questions that the new judge was not able to ask the witnesses who already testified, the Chamber notes that the Appeals Chamber raised the possibility of a newly-constituted Trial Chamber being able to recall witnesses in order to enable the new judge to evaluate certain matters concerning the credibility of these witnesses.[106]

55. In view of the aforementioned, the Chamber finds that the assignment of Judge Niang at the deliberations stage does not represent an obstacle to the continuation of proceedings.

2. The Consequence of the Time Needed for Judge Niang to Become Familiar with the Record

56. The Chamber deems that it is premature at this stage to wonder about the consequences of the time needed for Judge Niang to become familiar with the record. It therefore concludes that at this moment, the time needed for Judge Niang to become familiar with the record does not constitute an obstacle to the continuation of proceedings. As the guarantor of the rights of the Accused, the Chamber will ensure that he be tried without undue delay. It will continuously evaluate the guaranteed rights of the Accused to be tried without undue delay and, should the need arise, it will take the measures necessary to correct this.

D. The Alleged Obligation to Obtain the Submissions of the Parties during a Public Hearing

57. Firstly, the Chamber recalls that Rule 65 *bis* (A) of the Rules entitled "Status Conferences" only applies to the pre-trial stage[107] and that there is no document that obliges the Chamber to convene a public hearing periodically at the deliberations stage.

58. Secondly, having read the orders rendered by the Acting President, the Chamber notes on the matter of consulting the Accused, the Acting President only requested that the Juges of the Chamber who remained seized of the case consult "with the Accused on the question of whether to rehear the

[106] *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-A15*bis*, "Decision in the Matter of Proceedings under Rule 15 *bis* (D)", 24 September 2003 (public), paras 34 and 35.
[107] Administrative Hearing, T(E), 7 February 2012, p. 17065.

case or continue the proceedings", thus allowing the two remaining Judges to decide on how to consult with the Accused.[108]

59. Consequently, the Chamber finds that the Accused has been regularly consulted. The Chamber will ensure to convene an administrative hearing when circumstances related to the guarantee of the rights of the Accused so require.

E. CONCLUSION

60. To the extent that at this stage the Chamber does not deem that any of the Accused's fundamental rights have been violated, it considers the motion to suspend proceedings to be without merit and, consequently, that the related motion for compensation and for release is moot.

61. With respect to the foregoing, the Chamber finds that in this case there is no obstacle to the continuation of proceedings. Considering the *sui generis* nature of the present situation caused by the replacement of a Judge of the Chamber two months before the rendering of the Judgement, the Chamber deems that in the interest of justice, and especially of a fair trial, it necessary to resume proceedings from the close of the hearings.

[108] Order of the Acting President of 3 September 2013, p. 2.

V. DISPOSITION

FOR THE FOREGOING REASONS and pursuant to Rule 54 of the Rules,

THE CHAMBER unanimously

ORDERS the continuation of proceedings from the close of the hearings, as soon as Judge Niang has finished familiarising himself with the record and has informed the Chamber, which will render a decision to that effect,

DENIES all the requests of the Accused that oppose or are related to this matter.

Judge Antonetti and Judge Niang have each attached a separate opinion.

/signed/

Jean-Claude Antonetti

Presiding Judge

Done this thirteenth day of December 2013

The Hague (Netherlands)

[Seal of the Tribunal]

CONCURRING OPINION OF JUDGE ANTONETTI ON DECISION ON CONTINUATION OF PROCEEDINGS

The length of the Accused **Vojislav Šešelj**'s provisional detention today exceeds **ten years**. In spite of all the Judges' efforts, we find ourselves in a situation where the Judgement will be delivered, at best, in several months and, at worst, in several years, which will only extend the provisional detention of the Accused.

Aware of the **imperative** imposed upon me by my **oath**, I am bound to labour to find the best solution that would guarantee simultaneously the **speed of the trial** and **the rights of the Accused**.

Indisputably, the only realistic solution is the one taken by the Chamber today which was to order the continuation of deliberations. Any other solution would have had significant consequences on the situation of the Accused, who has been waiting for his Judgement since **24 February 2003.**

In accordance with the decision of the Chamber,[109] the parties filed their submissions on the key issue of the **continuation of the proceedings.**[110]

1. Procedural Background

Subsequent to **the close of the hearings** on **20 March 2012, during deliberations** in its former composition, the Chamber assessed it as useful to issue a scheduling order to the effect that the Judgement would be delivered at **0900 hours on 30 October 2013.**[111]

On 6 June 2013, several weeks prior to the close of the proceedings, which started on **24 February 2003,** the day of **Vojislav Šešelj**'s initial appearance, one of the Chamber's Judges addressed an

[109] "Decision Inviting the Parties to Make Submissions on Continuation of Proceedings", public, 13 November 2013.
[110] "Opinion Concerning the Decision of Trial Chamber III on Continuation of Proceedings", public, 20 November 2013 **[Accused's Submission]**; "Prosecution Submission on Continuation of Proceedings", public, 29 November 2013 **[Prosecution Submission]**.

email to a group of persons known to him that was later published against his will in a Danish newspaper in violation of the secrecy of private correspondence.

Following this publication, the Accused **Vojislav Šešelj**, knowing that the Judgement would be delivered in several weeks, considered it necessary, within the context of a **fair trial**, to submit a motion for the disqualification of this Judge, who was taking part in the deliberations.[112]

Since the decision of the Panel of Judges has the **authority** of "**a thing finally adjudicated**",[113] I will abstain from commenting on it, noting only the consequences of the decision, namely the replacement of **Judge Harhoff** by **Judge Niang.**

The two decisions that the Panel rendered by majority (with one Judge dissenting) had a reasoned basis and clearly indicated that the **appearance of bias** was the ground for disqualification.

2. Submissions by the Parties

Vojislav Šešelj argued for **termination of the proceedings**, **his immediate release** and **12 million euros** to be awarded as reparations for the prejudice he suffered.

Regarding the determination of the point from which to continue the proceedings, it seems that, in his opinion, the applicable provisions are those of Rule 15 *bis* of the Rules of Procedure and Evidence and that this Chamber must submit a **report** to **Judge Agius**, **the Vice-President**, who alone has jurisdiction concerning what is to come.

On 29 November 2013, the **Prosecution** unequivocally argued in favour of a continuation of the ongoing deliberations once **Judge Niang** familiarised himself with the case, along the lines of what was done in previous cases (***Milošević*** and ***Krajišnik*** Cases).

[111] "Scheduling Order", public, 12 April 2013.
[112] "Professor Vojislav Šešelj's Motion for Disqualification of Judge Harhoff", public, 1 July 2013.
[113] "Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President", public, 28 August 2013 **[Panel's First Decision]**; "Decision on Prosecution Motion for Reconsideration of Decision on

Given the importance of this issue, I felt it necessary to share my point of view in **this concurring opinion** since the stakes linked to the continuation of the proceedings are high.

3. Contamination

In his submission[114] the Accused **Vojislav Šešelj** expresses **reasonable doubt** as to the risk of contamination by **Judge Harhoff** of the two other Judges of the Chamber, as well as of the Judge newly appointed by the Vice-President.[115]

Without formalising this point of view, it should be noted that the Accused has not submitted a request for the disqualification of the entire Chamber. I could end my comments at this point but, since **judicial contamination** is an important matter, I am nevertheless bound to make the following observations:

In this matter, I must once more point out to the Accused that I am entirely independent, without bias toward him, as I confirmed previously.[116]

To approach the **contamination theory** solely on the basis of an **appearance of bias** would be equivalent to overturning the presumption of impartiality of **every** Judge of this Tribunal solely on the basis of subjective elements linked to **appearance**, which could not be possible given the

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Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin", public, 7 October 2013 **[Panel's Second Decision]**.

[114] "Opinion Concerning the Decision of Trial Chamber III on Continuation of Proceedings", public, 20 November 2013, p. 4, para. 5.

[115] "Opinion concerning the Decision of Trial Chamber III on Continuation of Proceedings", public, 20 November 2013, p. 5, para. 7.

[116] **"[Y]ou were involved in a number of demands for dismissal of Judges. I counted 12 and two Presidents of the Tribunal were also concerned, and I said, well, it's very curious that I'm not one of the Judges who's been – who was singled out by you. As far as this is concerned, Mr. Šešelj, I'll be very clear. Naturally, you have the right for a Judge to be dismissed; that's a possibility. But the Rules state that one dismisses a Judge because he may be suspected of being partial or being biased, and I'd like to state solidly that in this case I am in no way partial. As I have been examining the evidence, I noticed what was included in the case file. I took account of the fact it's included in the case file, and I will be listening to what you have to say in the course of your cross-examinations and the presentation of your case. And it's only at that stage that I will make a decision, like my colleagues who will be members of the Chamber."** See, T(F), 13 March 2007, p. 933.

rigorous criteria imposed by the Appeals Chamber in its many decisions regarding disqualification.[117]

Likewise, to believe that a judge can be influenced by another judge would be tantamount to claiming that an international judge, depending on the personalities of his other colleagues, could take a position on the basis of an opinion voiced by another judge and not on the basis of the record.

Furthermore, if we embark upon this train of thought, it would be tantamount to saying that, in the International Tribunal, there is a **judicial virus** going around **infecting all** the Judges and that, from the very beginning, there was no **vaccine** to immunise the Judges against infection. However, such a vaccine does exist and it is the **oath** of **impartiality** taken by every Judge.

Consequently, the Accused's argument set forth in paragraph 5 of his submission cannot be taken into consideration.[118]

4. Determination of the Point of Continuation of Proceedings

The new situation resulting from the disqualification has no precedent in the history of international justice since an international judge has never been disqualified and *a fortiori* **during deliberations**.

[117] ECHR, *Piersack v. Belgium*, Application No. 8692/79, 1 October 1982. According to these Judges, "[w]hilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect".
[118] Under Rule 5 (A) of the Rules of Procedure and Evidence: **"Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party."**

National examples that could be useful in this matter cannot serve as precedents, either, except for some isolated cases in common law jurisprudence where jurors (and not the judges) have been disqualified from trials which continued with the remaining jurors.[119]

In numerous trials before the ICTY, many Judges have been replaced during proceedings but **never** in the **deliberations** stage. All of these replacements were followed not by retrials but by a **continuation** of proceedings.

Moreover, the duty **to continue** is set forth clearly in Rule 15 *bis* (D) of the Rules.[120]

A particularly telling example is the one in the ***Slobodan Milošević* Case** where proceedings continued after the Chamber's Presiding Judge, **Judge May**, resigned.

Slobodan Milošević's trial began on **12 February 2002**. The Chamber was composed of Presiding Judge **Richard May** and Judges **Patrick Robinson** and **O-Gon Kwon**.

Presiding Judge May stopped sitting at the end of **January 2004**. On 10 February 2004, it was decided to continue the proceedings in keeping with Rule 15 *bis* of the Rules of Procedure and Evidence of the Tribunal.

On 12 February 2004, Judges **Patrick Robinson** and **O-Gon Kwon alone** heard the last two witnesses (out of the 297 identified by the Prosecutor): General Morillon and Witness B-235.

Following the resignation of **Judge May**, which took effect on 1 June 2004, **Judge Bonomy** was appointed as replacement on **10 June 2004**[121] and Judge **Patrick Robinson** was appointed Presiding Judge of the Chamber as of that date.[122]

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[119] In Canada, in the murder trial of Pierre-Olivier Laliberté in April 2013, Juror No. 7 was disqualified by Judge Richard Grenier. In the same line, in Guy Turcotte's trial, Juror No. 5 was disqualified for partiality in May 2011.

[120] Under this Rule: **"If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party."**

[121] *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, "Order Replacing a Judge in a Case before a Trial Chamber", public, 10 June 2004.

[122] *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, "Order Appointing a New Presiding Judge for Trial Chamber III", public, 26 February 2004.

On 25 March 2004, the President of the Tribunal, **Judge Theodor Meron**, consulted **Slobodan Milošević** as to whether he had any objections regarding the continuation of the proceedings.[123] In the interests of justice and with no response given by the Accused, the continuation of the proceedings with a new Judge was ordered pursuant to Rule 15 *bis* (D) of the Rules.[124]

On **10 June 2004 w**hen the new Judge certified his familiarity with the case,[125] the proceedings continued with the issuance on 16 June 2004 of the decision on the motion for acquittal under Rule 98 *bis* of the Rules of Procedure and Evidence.[126]

One ought to note that **Judge Bonomy** took over his position on **1 June 2004** and that on **16 June 2004,** that is **15 days** later, with his colleagues, **Judges Robinson** and **O-Gon Kwon**, they rendered a decision that was of capital importance for the proceedings as it had to do with the 98 *bis* procedure. The decision, rendered **two weeks** after the arrival of the new Judge, had 142 pages and 330 paragraphs as well as 809 footnotes.

Similarly, the new Judge was able to give his opinion on several partial acquittals for reasons of lack of evidence (*cf*. table on pages 112 to 131) as well as on facts contained in paragraphs (E) and (F) (*cf*. pages 131 and 132).

It is therefore not impossible for an international judge to examine rapidly, in less than 15 days, the evidence submitted to him and *a fortiori* to continue proceedings if the international judge has several months to become acquainted with the proceedings.

As can be seen in this case, there has been a clear willingness to avoid wasting time and, moreover, not all the witnesses were re-examined nor were admitted exhibits reopened after the new Judge, taking over from the former Judge, took the necessary time to become acquainted with the case.

In the case of the ***Milošević*** **Case**, **Judge Bonomy** familiarised himself with **32,079** pages of transcript and **6,150** admitted exhibits.

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[123] Rule 15 *bis* (C) hearing held on 25 March 2004.
[124] *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, "Order Pursuant to Rule 15 *bis* (D)", public, 29 March 2004.
[125] *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, "Certification by Judge Bonomy of His Familiarity with the Record of the Proceedings", public, 10 June 2004.
[126] *The Prosecutor v. Slobodan Milošević*, IT-02-54-T, "Decision on Motion for Judgement of Acquittal", public, 16 June 2004.

With respect to this, it is appropriate to note that in the ***Šešelj*** Case we have **17,539** pages of transcript, **513** submissions by **Vojislav Šešelj** followed by relevant decisions and **1,399** admitted exhibits.

The new Judge is required to take a **reasonable amount of time** to familiarise himself with the proceedings.

In this context, the Trial Chamber could continue with deliberations once the new Judge has certified that he is sufficiently informed regarding the proceedings.[127]

5. Abuse of Process

The doctrine of the **abuse of process** is invoked in the Accused's Submission 513. This doctrine is widely recognised in international law.[128]

In his submission, the Accused again argues, in paragraphs 10 to 24, that the Chamber should rule in favour of the abuse of process.[129]

On this matter, the former Chamber previously issued its ruling, based on the same arguments.[130] If so required, what **new element** would support a finding that there was an abuse of process?

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[127] Rule 5 *bis* (D) of the Rules provides that: **"If no appeal is taken from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made."**

[128] "Opinion Concerning the Decision of Trial Chamber III on Continuation of Proceedings", public, 20 November 2013, pp. 6-15, paras 10-24. In this respect, Article 9§1 of the International Covenant on Civil and Political Rights stipulates that **"[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".** Also, Article 6§1 of the European Convention on Human Rights provides that "**[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"**. On this matter, the legal basis of the right to reparations is enshrined in international human rights instruments. Among these international instruments there are the Universal Declaration of Human Rights (Art. 8) and the International Covenant on Civil and Political Rights (Art. 2). On the level of international criminal tribunals, only the Rome Statute of the International Criminal Court confirms the right to reparations to victims in cases tried before the Court (Art. 75) and establishes a trust fund for the benefit of victims (Art. 79).

Incontestably, given the Order of 12 April 2013,[131] the Judgement was to have been delivered at 0900 hours on 30 October. In temporal terms, an eventual abuse of process would come after 30 October. Nevertheless, we find ourselves in a situation where the judgement has not been delivered because of the request for disqualification filed by the Accused. It is the Accused who, with his request, suspended the delivery of the Judgement which was supposed to have taken place independently of the transmission of **Judge Harhoff**'s email that triggered the proceedings.

Could one then argue that there might be a link between the e-mail and the fact that the Judgement has not been delivered as of yet? I consider that, in respect of the conditions required for there to be an abuse of process, an **element of intent** attributable to an actor must be present, and that, in this case, such an element of intent is missing, because **Judge Harhoff** never intended to prolong the proceedings.

6. Release

In my opinion, the request for release, as raised in the Accused's submissions, covers two aspects:

- **The first relates to the abuse of process;**

- **The second aspect relates to a classic application for release.**

It is upon this second aspect that I will focus here, as a classic application for release must be accompanied by guarantees we do not have in this instance.

In his submission the Accused requested **to be released immediately in the context of an abuse of process**. It must be noted that since his arrival in **The Hague on 23 February 2003**, compared to

[129] "Opinion Concerning the Decision of Trial Chamber III on Continuation of Proceedings", public, 20 November 2013, p. 15, para. 24.
[130] "Decision on Accused's Claim for Damages on Account of Alleged Violations of His Elementary Rights During Provisional Detention", public, 21 March 2012.
[131] "Scheduling Order ", public, 12 April 2013.

other accused, the Accused has never filed a request for release based on good and reasonable cause accompanied by guarantees from his or other States. Rule 65 of the Rules, which is the applicable Rule here, is quite stringent, and does not allow for release unless certain, clearly defined, criteria are met.[132]

On this matter, the case-law of the ICTY regarding the assessment of the criteria for release[133] is consistent, including the assessment of requests in the light of an accused's specific situation,[134] and that the criteria for the assessment of requests for provisional release filed at an advanced stage of the proceedings, in particular after the presentation of the Prosecution's evidence,[135] after the presentation of exculpatory material,[136] after deliberations, and/or while waiting for the judgement to be read out.[137]

In the present case, what is important is that the Accused does not take flight and that he appears at the hearing for the reading of his Judgement.

The guarantees the **Government of Serbia** could offer would be to have the Accused under 24-hour surveillance 7 days a week during his release, thereby eliminating this concern.

The other important element is the necessity that neither the Accused nor his associates interfere, in any manner whatsoever, with the witnesses and victims in this case, notably with protected witnesses

[132] According to Rule 65 (B) of the Rules: **"Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release."**

[133] *See* notably *The Prosecutor v. Mićo Stanisić*, Case No. IT-04-79-AR65.1, "Decision on Prosecution's Interlocutory Appeal of Mićo Stanisić's Provisional Release", public, 17 October 2005, para. 8; *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, "Decision on 'Prosecution's Appeal from *Décision relative à la demande de mise en liberté provisoire de l'Accusé Petković* dated 31 March 2008'", public, 21 April 2008, para. 8; *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.8, "Decision on 'Prosecution's Appeal from *Décision relative à la demande de mise en liberté provisoire de l'Accusé Prlić* dated 7 April 2008'", public, 25 April 2008, para. 10.

[134] *The Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.1, "Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release", public, 4 October 2005, para. 7; *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.14, "Decision on Jadranko Prlić's Appeal Against the '*Décision relative à la demande de mise en liberté provisoire de l'Accusé Prlić*', 9 April 2009", public, 5 June 2009, para. 13.

[135] *The Prosecutor v. Prlić et al.,* Case No. IT-04-74-AR65.5, "Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić", public, 11 March 2008, paras 20-21.

[136] *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, "Decision on Gvero's Motion for Provisional Release", redacted public version, 15 June 2009, paras 12, 15 and 16.

[137] *The Prosecutor v. Prlić et al.,* Case No. IT-04-74-T, "Redacted and Public Version of Order on Jadranko Prlić's Motion to Extend His Provisional Release", public, 1 March 2012, p. 4.

whose names and places of residence are known to the Accused. This is a very important issue which merits full consideration because it is not a theoretical question, as we have witnessed in the ***Jean-Pierre Bemba*** Case at the ICC, where five indictments were issued against several persons, including this Accused's own attorney.[138]

The present case becomes complicated due to the fact that, on several occasions, the Accused was the subject of contempt of court proceedings for having disclosed the names of protected witnesses, proceedings in which he was sentenced on three occasions.[139]

Consequently, there is an undeniable risk but I consider that, at this stage, the surveillance to be provided by law enforcement could resolve this issue.

The most delicate point regarding this potential release, in my opinion, has to do with the **exercise of his civil and political rights** that he enjoys under international treaties.[140]

The Accused **Vojislav Šešelj** is currently the president of a legitimate political party and he has not ceased his political activity since his detention.

Given that he has been able to act politically while in detention, can one seriously believe that, once released, there would be any kind of ban against him? This seems impossible to me, especially since the Accused **Vojislav Šešelj** is still **presumed innocent**.

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[138] *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidčle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13-l-US-Exp., "Decision Setting the Date for the First Appearance of Jean-Pierre Bamba Gombo, Aimé Kibolo Musamba and Fidèle Babala, and on Issues Relating to the Publicity of the Proceedings", public, 25 November 2013.

[139] In the contempt proceeding **IT-03-67-R77.2**, the Accused Vojislav Šešelj was sentenced on appeal on 19 May 2010 to 15 years of imprisonment. This sentence ran concurrently with the sentence of 18 months of imprisonment delivered by the Appeals Chamber on 28 November 2012 (**Case No. IT-03-67-R77.3**). In Case No. **IT-03-67-R77.4**, on 30 May 2013, the Appeals Chamber upheld the decision of the Trial Chamber by sentencing him to 2 years imprisonment.

[140] *See* notably Article 25 of the International Covenant on Civil and Political Rights which stipulates that: "**[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.**" On this point, Article 14§2 of the said Covenant adds: **"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."**

In order to overcome the difficulties noted above, release in a **country other than** the Republic of Serbia would help resolve the issue on the protection of witnesses as well as of the Accused's political activity and, therefore, in my opinion, would be a better guarantee against the risk of flight.

Regarding his political function, the **only restriction** that should be imposed on him is that **he must not mention at any time whatsoever the facts with which he has been charged and the contents of the proceedings**. I recall an ongoing case before the ICC concerning the President of Kenya, **Mr Uhuru Kenyatta** and his Vice-President, **Mr William Ruto**, who, in spite of being elected and exercising their political functions, have appeared. The first decision of the Chamber of 18 June 2013[141] contains no limitations to the exercise of their civil and political rights. It is to be noted that on 25 October 2013,[142] the Appeals Chamber overturned the decision and reduced **President Kenyatta's** opportunity to be absent from the hearings to a bare minimum.[143] Furthermore, after the terrorist attack on 21 September 2013, the trial was suspended to allow **Mr William Ruto** to return to deal with the consequences of this act. We have here a temporary and exceptional example which shows that, even during a trial, **political and functional activity continues**. In our case, we are no longer in trial but in the **stage of deliberations** which should be an even more permissive factor.

It is for this reason that, all things considered, at least for the time being, I would prefer to wait for **an application for release** by the Accused, accompanied by guarantees from the Republic of Serbia or any other State, in order to make a definitive ruling, or if need be, ask my colleagues to act *proprio motu* for serious medical reasons that might be brought to the attention of the Judges.

7. Remedy for Prejudice to the Accused

In his submission, the Accused **Vojislav Šešelj** is requesting that the sum of **12 million euros** be awarded as remedy for the **prejudice** he suffered, as he did in a previous request. At this stage, it is appropriate to note that he did not strictly define the prejudice suffered by using exact criteria for

[141] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-977, "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", Public, 18 June 2013.
[142] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-977, "Judgment on the Appeal of the Prosecutor against the Decision of Trail Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'", public, 25 October 2013.

damage to his psyche, his person, his estate and otherwise. He sets an overall amount that is construed as the aggregate of all damages.

Rule 5 (C) of the Rules of Procedure and Evidence does allow him to request remedial action: **"[t]he relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with the fundamental principles of fairness"**. The issue which then arises is whether this prejudice can be tied to any potential **malfunction** in the proceedings. The issue of **excessive delays** has been the subject of several decisions by international courts, particularly with regard to the **length of detention on remand of** an accused and of his trial. The ICTR Appeals Chamber had the opportunity to rule on these subjects in the cases of ***Gatete*** and ***Mugenzi and Muginareza***.

The appeal judgement rendered by the ICTR Appeals Chamber in the ***Gatete*** **Case**[144] is significant in respect of this issue. In the said appeal judgement, the ICTR Appeals Chamber found a violation of the right of **Jean-Baptiste Gatete** to be tried without undue delay.[145] Essentially, the Appeals Chamber found a pre-trial phase lasting **seven years** to be **inordinate** when the case was not particularly complex, judging this extended time period and the prolonged phase of provisional detention that resulted from it to constitute prejudice *per se.*

The ICTR Appeals Chamber also recalled the **absolute necessity** of advancing diligently in a trial, particularly during deliberations. Although the Appeals Chamber did uphold the Trial Chamber's judgement convicting **Gatete** for genocide and extermination as crimes against humanity,[146] by contrast, it took into consideration both the severity of the crimes for which the conviction of **Jean-Baptiste Gatete** was upheld and the violation of his right to be adjudicated without inordinate

[143] *The Prosecutor v. Uhuru Muigai Kenyatta*, "Decision on the Prosecution's Motion for Reconsideration of the Decision Excusing Mr Kenyatta from Continuous Presence at Trial", Public, 26 November 2013.
[144] *Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, "Appeal Judgement", public, 9 October 2012.
[145] *Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, "Appeal Judgement", public, 9 October 2012, para. 288.
[146] *Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, "Appeal Judgement", public, 9 October 2012, para. 284.

delay and overturned the conviction for a life sentence delivered by the Trial Chamber, finding that this sentence needed to be reduced to a term of forty years in prison.[147]

In connection with the Appeal Judgement of 4 February 2013, in the ***Justin Mugenzi and Prosper Muginareza*** Case, the ICTR Appeals Chamber had to respond to the arguments brought by the Accused concerning the violation of their right to a **fair trial** on ground that the **length of deliberations** was inordinate. In that case, based on these arguments, the Appeals Chamber noted, in its decision of 4 February 2013[148] that the length of the trial was warranted by the **complexity of the case** and that length had to be understood from an overall perspective.[149]

In the ***Mugenzi and Muginareza*** **Case**, **Judge Short** took the opportunity to say in his dissenting opinion of 23 June 2010 that, from his point of view, there had been a violation of the rights of the Accused due to inordinate delays.[150]

In this regard, he reasoned that the appointment of his colleagues in a number of other cases had had such extensive consequences that one could say there had been a direct impact.[151]

In connection with the judgement rendered on 30 June 2011, he adopted a partially dissenting opinion, recalling afresh his opinion of 23 June 2010 and the consequences of appointing judges to other cases.[152]

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[147] *Jean-Baptiste Gatete v. The Prosecutor*, Case No. ICTR-00-61-A, "Appeal Judgement", public, 9 October 2012, para. 287.
[148] *The Prosecutor v. Justin Mugenzi and Prosper Mugiraneza*, Case No. ICTR-99-50-A, "Appeal Judgement" public, 4 February 2013.
[149] *The Prosecutor v. Justin Mugenzi and Prosper Mugiraneza*, Case No. ICTR-99-50-A, "Appeal Judgement", public, 4 February 2013, para. 37.
[150] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-T, "Decision on Propers Muginareza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay", public, 23 June 2010, p. 7, § 3.
[151] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-T, "Decision on Propers Muginareza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay", public, 23 June 2010, p. 7, § 4; p. 8, § 5.
[152] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-T, "Judgement and Sentence", public, 30 September 2011, pp. 548-549.

On the issue of **abuse of process**, his opinion appears of particular interest because it states that, in instances where the rights of the Accused are violated, dismissal of the Indictment is not the appropriate remedy. He considers that there ought to be only a reduction in the sentence.[153]

The Appeals Chamber, in its Judgement of 4 February 2013, addressed this issue in depth, in paragraphs 18 *et seq*..[154] It found that the Trial Chamber did not commit an error with regard to this issue by rejecting the arguments of the Accused; it should be noted that Judge Robinson dissented therefrom. It is pertinent, I find, for us to mention Judge Robinson's position concerning this issue, which is set forth on pages 56 to 60 of the Appeal Judgement. He recalls that the Accused Muginareza raised the issue of the delays between submissions and the Judgement, and that Judge Short was in agreement with the position of the said Accused.[155] In support of his argument, Judge Robinson recalls in paragraph 4 that there had been more complex cases for which the judgement phase was much shorter, citing among others the *Bagosora et al.* Case. He points out that, in that case, the judgement drafting phase took one year and eight months.[156] He further cites the example of the *Popović* Case before the ICTY – a more complex case for which the judgement was drafted in nine months.[157]

Judge Robinson considers that taking two years and 10 months to draft is an inordinately long time period and that, in his opinion, a period of one year is already substantial.[158]

He speaks out in favour of awarding each of the appellants 5,000 dollars for moral damages.[159]

[153] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-T, "Judgement and Sentence", public, 30 September 2011, p. 549, §7.
[154] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-A, "Judgement", public, 2 February 2013, pp. 6-13, §§18-37.
[155] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-A, "Judgement", public, 2 February 2013, pp. 56-57, §3.
[156] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-A, "Judgement", public, 2 February 2013, p. 57, §4.
[157] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-A, "Judgement", public, 2 February 2013, p. 57, §4.
[158] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-A, "Judgement", public, 2 February 2013, p. 58, §8.
[159] *The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jerôme-Clément Bicamumpaka and Prosper Muginareza,* ITCR-99-50-A, "Judgement", public, 2 February 2013, p. 60, §12.

Applying those standards in combination with the *Mugenzi and Muginareza* and *Gatete* Appeal Judgements, together with the opinions by Judges Short and Robinson, one could permissibly say that the length of the current deliberations could possibly be characterised as inordinate, because the close of the hearings was on 12 March 2012 and we now find ourselves at the end of 2013 without any judgement rendered.

Applying this jurisprudence in its entirety, it would be appropriate to either reduce the sentence in the event of conviction, or to award a sum of money.

Under the circumstances, a ruling on this seems premature to me, as, on the one hand, we have not received the submission of the Registry concerning this, or the entire submission by the Prosecution and, moreover, the Chamber adjudicating this case has not yet deliberated the charges.

Regardless, in order to assess this prejudice, we must first establish the **temporal scope** and also determine the actors that have caused the judgement to be delayed.

I will refrain from entering more deeply into this subject, but in the current phase, I wish to suggest **two parameters** likely to characterise the facts that have led to delays and likely to culminate in compensation:

The **first parameter** is to be found in the **imposition of stand by counsel against his will,** which obviously caused us to lose time working on the main case, because had this right been acknowledged from the outset, it is almost certain that the trial would have started promptly.[160]

The **second parameter** is connected to an internal factor pertaining to **how the Chamber functions**. The Judges of the Trial Chamber render a decision or a judgement following a very complex process they do not control, because they receive legal support from a legal team – they depend utterly upon them to produce points for reflection, summaries, or analyses enabling the Judges to deliberate. With regard to the time involved in preparing these items, which are instantiated in drafts, the Judges have

[160] The Trial Chamber was composed of Judges **Orie, Moloto and Robinson**. *See* "Order Reassigning a Case to a Trial Chamber", public, 3 May 2006.

no **means to act** because the members of the legal team do not fall under their **supervisory authority**, as they are neither recruited, nor evaluated, nor let go by the Judges. In some sense, the Judges have assistance that comes from an entity ("the Registry") over which they have **no control or authority whatsoever**. This situation has been aggravated since the close of the hearings by the departures in turn of **three legal officers of the Chamber**, particularly the last one, who did not inform the Chamber at the time of her entry into service about a recruitment process underway at another international institution. These departures led to delays because the schedules disclosed to the International Community by the President of the Tribunal were revamped multiple times, as from **March 2013**, the provisional date for reading out the Judgement, we ended up with **30 October 2013**; it being noted that the close of the hearings was on 12 March 2012.

From my perspective, there was **without any question** a delay related to **faulty administrative operations**. I found it necessary, in the context of a previous opinion, to raise this issue, hoping that in the future we would have **stability** at the level of the legal officer of the Chamber and the assistants, such that we could render the Judgement promptly once **Judge Niang** informed us of his readiness to deliberate.

Moreover, **Vojislav Šešelj** mentions the suspension or cancellation of proceedings – without the rest of us being entirely certain of the point of his request as his submissions are not at all clear in this respect in light of the English terms used in the official translation: "halt" and "suspension".

When viewed from a legal perspective, does the Trial Chamber possess the power to void an Indictment *proprio motu*? The Rules of Procedure and Evidence make no provision for such a possibility. By contrast, the Rules do mention **the withdrawal** of an Indictment in Rule 51. The Prosecutor may withdraw an Indictment after the case has been assigned to a Chamber only if that Chamber grants leave for this purpose (*cf.* Rule 51 (A) (iii)). For this reason, I consider that an Accused enjoys not the option to seize the Chamber with a motion to dismiss, but to ask the Prosecution (if it shares the point of view of the Accused) to bring a motion seeking to withdraw its Indictment, which would end the proceedings.

This certainly explains why the jurisprudence of the Appeals Chamber has never gone down the path of dismissing the Indictment.

This is particularly understandable when the response of the international community results from an Indictment that must be confirmed by a judge. It seems to me that once the charges have been confirmed there is no longer any possibility of going back, save for amendments to the Indictment following an order by the Chamber in connection with preliminary motions under Rule 72 of the Rules of Procedure and Evidence.

In conclusion, the submissions of the parties (Accused and Prosecution) have shed considerable light on several important issues.

My objective since being sworn in to this case has not changed: to render judgement as early as possible, taking into consideration the digressions that occurred previously (the imposition of stand by counsel on the Accused against his will, replacements of initially appointed Judges of the Chamber).

In connection with this objective, I have categorically recused myself from all proceedings for contempt of Court brought against Vojislav Šešelj in order to remain, on the one hand, completely independent with respect to the possible guilt of the Accused under the Indictment, so that I would not be "tainted" by other subsequent considerations, and on the other hand, out of concern over wasting time. This objective has not changed.

This objective is one I continue to bear in mind. The objective could be achieved within a few months, if there is no new interference of any kind.

In the unlikely event of new interferences, they will not be the result of anything I have done because, without taking sides in any way whatsoever with respect to the Accused, my sole task is to assess the 1,399 evidentiary exhibits adduced by the Prosecution and the 17,539 pages of transcript in order to determine my position at the appropriate time on the counts in the Indictment.

The Judgement could therefore be rendered in just a few months, which would naturally entail an additional consequence for the Accused Vojislav Šešelj. These ought to be seen in the light of the implementation of his request for proceedings under Rule 65 of the Rules of Procedure and Evidence.

In the unfortunate instance this is not achieved, I would bear no responsibility in the matter, because I have done everything that I could to ensure that this Judgement would be delivered promptly, overcoming a variety of obstacles.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this thirteenth of December 2013

At The Hague
The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE MANDIAYE NIANG

1. While the deliberations in this case were under way, one of the three Judges of the Chamber was disqualified, following a motion for his disqualification filed by the Accused.[161]

2. Pursuant to Rule 15 (B)(ii) of the Rules of Procedure and Evidence ("Rules"), I was assigned to sit in the place of the disqualified Judge.[162]

3. The architecture of Rule 15 of the Rules, especially its first paragraph, is, I believe, based on the assumption that disqualification has to occur *in limine litis*. In addition, this rule says nothing about the procedure to be implemented to allow the Judge replacing his disqualified colleague to familiarise himself with the case. This omission seems logical, because if the assignment of a new Judge follows a disqualification that occurred *in limine litis*, then this assignment is made before the trial has commenced. In that case, the new Judge will start the trial with his two colleagues.

4. Nevertheless, experience shows that disqualification, or replacement of a Judge for other reasons, does not always occur before the commencement of the trial. In many cases before the ICTs, Judges were replaced when trials were already at an advanced stage.[163] In truth, a party seeks the disqualification of a Judge when it has been informed of an essential flaw that is likely to have an effect on that Judge; this information can appear at any time.

5. In this case, the hearing had already been closed when the disqualification took place.

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[161] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Panel of three Judges appointed by the Acting President of the Tribunal, "Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President", 28 August 2013 (public); *see* also *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Panel of three Judges appointed by the Acting President of the Tribunal, "Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin", 7 October 2013 (public).

[162] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Acting President of the Tribunal, "Order Assigning a Judge Pursuant to Rule 15", 31 October 2013 (public).

[163] *See*, for example, *The Prosecutor v. S. Milošević*, Case No. IT-02-54, in which Judge Bonomy was appointed to replace Judge May on 12 April 2004, although the Prosecution had closed its case on 25 February 2004. *See* also *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-T, in which Judge Solomy B. Bossa was appointed to replace Judge Maqutu on 20 October 2003, although 23 Prosecution witnesses had already appeared in court and another sixty or so Prosecution witnesses were still to testify before the start of the Defence case.

6. So, I was assigned to adjudicate a case after the presentation of evidence and after the close of the hearing. This already delicate situation is compounded by the silence of Rule 15 of the Rules pursuant to which I have been assigned.

7. In the light of this legal vacuum, the Vice-President of the Tribunal, in his capacity as Acting President, recommended to the two remaining Judges to apply Rule 15 *bis mutatis mutandis*.[164] This provision provides for the possibility to continue the proceedings with a new Judge, under certain conditions, when a Judge, for any reason whatsoever, is unable to continue sitting in an ongoing case.

8. The reluctance of the two remaining Judges to apply Rule 15 *bis* in a situation which, in their opinion, is governed by a specific provision,[165] led the Vice-President to adopt a pragmatic approach which consisted of exhausting the provisions of Rule 15 with my assignment, while referring the unresolved question of the continuation of the proceedings to the newly established Chamber.[166]

9. However, this approach of the Vice-President, which helped to avoid an initial impasse, has not resolved everything, especially not that which concerns me. Paradoxically, it has put me in a more ambiguous situation. Having been assigned, I immediately have to take part in decisions of the Chamber, even though Rule 15 *bis*, by which the Vice-President was guided, would not put me in such a situation before I have familiarised myself with the case.

10. However, this incongruity can be reconciled as I have done with respect to the two decisions in which I was called to take part, before I familiarised myself with the record.

11. The first decision invited the parties to make submissions on the continuation of proceedings. I took part in it only because it is an administrative act, an act that does not affect the substance of the case, an act that does not foreshadow the content of the decision that will follow and, therefore, it could not have any prejudicial effect. I am also of the opinion that the Vice-President could have

[164] *The Prosecutor v. Vojislav Šešelj*, Case. No. IT-03-67, Acting President of the Tribunal, "Order Following Decision of the Panel to Disqualify Judge Frederik Harhoff", 3 September 2013 (public).
[165] Internal Memorandum, 3 September 2013, filed as a public document on 4 September 2013.
[166] *The Prosecutor v. Vojislav Šešelj*, Case. No. IT-03-67, Acting President of the Tribunal, "Order Assigning a Judge Pursuant to Rule 15", 31 October 2013 (public), pp. 1 and 2.

conducted the consultation himself. I believe that a careful reading of Rule 15 *bis* (C) of the Rules opens up this possibility.[167] Nevertheless, it is important that the consultation has been completed.

12. The second decision is more compromising because it decides on the continuation of the proceedings in the name of the interests of justice. Rule 15 *bis* of the Rules, even though it does not apply formally, covers under its protective mantle any procedure to replace a Judge during a trial. This is the only provision that indicates the way forward. This Rule provides that the onus is on the *two remaining Judges* to determine *unanimously* on the continuation of the proceedings.

13. If abstention had been an option, it would have allowed me to reconcile the requirements of Rule 15 *bis* of the Rules with my previous assignment under Rule 15 of the Rules. I believe that the two remaining Judges are in this case much more equipped to decide what the interests of justice dictate.

14. In addition, I note with satisfaction that the two remaining Judges share the view that the proceedings should be continued in the interests of justice. Consequently, the requirement of Rule 15 *bis* is satisfied. I would not have accepted a situation in which my vote would have been necessary to tip the balance in favour of the continuation of the proceedings against the view of one of the two remaining Judges.

15. Having joined the two remaining Judges in, virtually, the same conditions as those for a Judge assigned pursuant to Rule 15 of the Rules, I now have to set my course with regard to the continuation of the proceedings.

16. I am fully aware of the difficulty of taking part in the deliberations without any familiarity with the case. This position is delicate, but it is not unprecedented nor does it present insurmountable challenges. Moreover, Rule 15 *bis* exists to deal with this kind of situation. The new Judge, it says, should familiarise himself with the record and certify this familiarity before joining his colleagues. The practice of the two ICTs shows precedents in which the proceedings were almost as

[167] *See*, for example, *The Prosecutor v. S. Milošević* Case, in which the President of the Tribunal himself consulted with the Accused in accordance with Rule 15 *bis* (D) of the Rules. *The Prosecutor v. S. Milošević*, Case No. IT-02-54, T(E), 25 March 2004, pp. 32071 to 32079 (open session).

advanced,[168] the size of the record to be studied was much larger[169] and the assessment of evidence was much more complex.[170]

17. However, my task will not be easy. To familiarise myself with this case, I will endeavour to examine all the evidence carefully, I will study all documentary evidence and all transcripts of testimonies, I will supplement that by watching videos of these testimonies, I will study decisions, especially those relating to the admission or rejection of evidence. I will keep as evidence only the exhibits that have been admitted in accordance with my understanding of the provisions of the Rules. In the event that it is necessary for me to clarify an important aspect of the case because it seems incomplete or ambiguous, I will invite my colleagues to reopen the proceedings, including additional hearings of witnesses in the most appropriate way.

18. Once I have satisfied all these requirements, I will report to the two remaining Judges on my familiarity with the record.

19. Another issue that has caught my attention is the possible contamination of the record by the disqualified Judge. The decision disqualifying him obviously refers to the extent of his "appearance of bias". If he was found to be in favour of conviction,[171] one has to wonder what the extent of this tendency was? Does it affect the previous adjudications of the Judge in question? The Judges of the disqualification panel seem to attach the importance of their decision only to future developments. Previous adjudications of the Judge in question do not seem to be tarnished by any suspicion. In any case, that seems to be the scope of paragraph 14 of the "Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin". [172]

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[168] *See*, for example, *The Prosecutor v. S. Milošević*, Case No. IT-02-54, in which Judge Bonomy was appointed to replace Judge May on 12 April 2004, although the Prosecution had closed its case on 25 February 2004.
[169] *See*, for example, *The Prosecutor v. S. Milošević*, Case No. IT-02-54, in which Judge Bonomy had to familiarise himself with a body of evidence much larger than in this case (358 witnesses, 6,150 exhibits, 32,079 pages of transcript, 293 hearing days).
[170] *See*, for example, *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-T, in which video recordings of many protected witnesses were not available, which limited the possibility for the new Judge to assess the conduct of these witnesses in court.
[171] *The Prosecutor v. Vojislav Šešelj*, Case. No. IT-03-67, Panel of three Judges appointed by the Acting President of the Tribunal, "Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President", 28 August 2013 (public), para. 13.
[172] *The Prosecutor v. Vojislav Šešelj*, Case. No. IT-03-67, Panel of three Judges appointed by the Acting President of the Tribunal, "Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for

20. I therefore conclude that the problem of contamination does not arise in respect of the decisions taken by the previous bench in this case. However, as I said above, I will state my position on these decisions. I will acknowledge them as mine only inasmuch as I myself would have ruled in the same way.

21. This case has already suffered many delays. I will embark on the task with due diligence. But I am also aware that in addition to my duties in other cases, I have to study 17,539 pages of transcripts regarding 97 testimonies, watch hundreds of hours of video, examine nearly 1,400 exhibits introduced during 175 trial days, and I will also read the decisions on motions, bearing in mind that the Accused has filed 513 motions to date.

22. Consequently, it is difficult to give an *a priori* estimate of the time that I will need to familiarise myself with the record. In addition, without prejudice to the content of the decision that may be rendered in this case on appeal, I give myself an initial period of six months after the resumption of activity in January 2014. The time required will be reviewed according to the requirements of the task.

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

/signed/

Mandiaye Niang
Judge

Done this thirteenth day of December 2013
At The Hague
The Netherlands

Clarification, and Motion on Behalf of Stanišić and Župljanin", 7 October 2013 (public), para. 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. 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'. 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." (footnotes omitted)