



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-08-91-A
Date: 3 December 2013
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THE PRESIDENT OF THE TRIBUNAL

Before: Judge Carmel Agius, Acting President

Registrar: Mr. John Hocking

Decision: 3 December 2013

PROSECUTOR

v.

**MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN**

PUBLIC

DECISION ON MOTION REQUESTING RECUSAL

The Office of the Prosecutor:

Ms. Helen Brady

Counsel for Mićo Stanišić

Mr. Slobodan Zečević
Mr. Stéphane Bourgon

Counsel for the Stojan Župljanin:

Mr. Dragan Krgović
Ms. Tatjana Čmerić

1. I, Carmel Agius, Acting President of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory in the former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal”, respectively), am seised of “Stojan [Ž]upljanin’s Motion Requesting Recusal of Judge Liu Daqun from Adjudication of Motion to Vacate Trial Judgement” (“Motion Requesting Recusal”), filed by Stojan Župljanin (“Župljanin”) on 21 October 2013.

I. BACKGROUND

2. On 27 March 2013, Trial Chamber II issued its judgement (“Judgement”) in the case of *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, in which it convicted Župljanin of one count of persecution as a crime against humanity; one count of extermination as a crime against humanity; one count of murder as a violation of the laws or customs of war; one count of torture as a violation of the laws or customs of war; and sentenced him to 22 years’ imprisonment. In the same Judgement, Mićo Stanišić (“Stanišić”) was convicted of one count of persecution as a crime against humanity, one count of murder as a violation of the laws or customs of war, one count of torture as a violation of the laws or customs of war, and was sentenced to 22 years’ imprisonment. All parties have appealed the Judgement.¹

3. On 8 April 2013, President Theodor Meron issued the “Order Assigning Judges to a Case Before the Appeals Chamber”, in which he ordered that the bench in the present case be composed of himself, myself, Judge Patrick Robinson, Judge Liu Daqun and Judge Arlette Ramaroson.

4. On 25 July 2013, in my capacity as Acting President, I appointed a panel of three judges in the case of *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T (“Panel” and “Šešelj case”, respectively) pursuant to Rule 15(B)(ii) of the Rules of Procedure and Evidence (“Rules”) to determine “Professor Vojislav Šešelj’s Motion for the Disqualification of Judge Frederik Harhoff” (“Šešelj Motion”).² The Panel was comprised of Judge Bakone Justice Moloto, Judge Liu Daqun and Judge Burton Hall.³ On 28 August 2013, the Panel issued its decision on the Šešelj Motion, in which it granted that motion (“Šešelj Decision”).⁴ On 7 October 2013, the Panel issued a further

¹ See Notice of Appeal on Behalf of Mićo Stanišić, 13 May 2013; Notice of Appeal on Behalf of Stojan [Ž]upljanin, 13 May 2013; Prosecution Notice of Appeal, 13 May 2013.

² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Pursuant to Rule 15, 25 July 2013. See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Professor Vojislav Šešelj’s Motion for the Disqualification of Judge Frederik Harhoff, 9 July 2013. The original BCS version of the motion was received on 1 July 2013.

³ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Pursuant to Rule 15, 25 July 2013.

⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013.

decision in which it found that the Prosecution had failed to demonstrate that reconsideration of the Šešelj Decision was justified.⁵

5. On 21 October 2013, Župljanin filed “Stojan [Ž]upljanin’s Motion to Vacate Trial Judgement” (“Motion to Vacate”) before the Appeals Chamber, as well as the Motion Requesting Recusal.

6. On 22 October 2013, Judge Meron issued an order in his capacity as Presiding Judge of the Appeals Chamber, in which he withdrew from considering the Motion to Vacate and the Motion Requesting Recusal on the basis that he considered that the subject matter of both motions gave rise to a conflict of interest.⁶ Accordingly, Judge Meron assigned both motions to me for appropriate action pursuant to Rule 15(A) of the Rules.⁷

7. On 25 October 2013, the Prosecution filed its response to both motions.⁸ Župljanin filed his reply on 28 October 2013.⁹ On 29 October 2013, Mićo Stanišić filed the “Consolidated Reply on Behalf of Mićo Stanišić to Prosecution Consolidated Response with Confidential Annexes A & B” (“Stanišić Reply”), in which he joined and supported Župljanin’s Motion Requesting Recusal.¹⁰

8. On 28 November 2013, in my capacity as Acting President further to the Order of 22 October 2013, I appointed Judge William Hussein Sekule to the bench of the Appeals Chamber to replace Judge Meron for the purposes of the Motion Requesting Recusal.¹¹

II. SUBMISSIONS

9. Župljanin requests Judge Liu Daqun to “recuse himself” from consideration of the Motion to Vacate on the grounds that “[t]he basis of bias raised in the [Šešelj Motion] is the same as raised in the [present case]”.¹² According to Župljanin, as a member of the Panel in the Šešelj case, Judge

⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin, 7 October 2013.

⁶ Order Assigning Motions to a Judge, 22 October 2013 (“Order of 22 October 2013”), p. 1.

⁷ *Ibid.*

⁸ Prosecution Consolidated Response to Stanišić’s Motions for Mistrial and Provisional Release, and Župljanin’s Motions to Vacate Trial Judgement, for Recusal of Judge Liu and Provisional Release, 25 October 2013 (“Prosecution Consolidated Response”).

⁹ Stojan Župljanin’s Reply to Prosecution’s Response to Motions to Vacate Trial Judgement, Provisional Release and for Recusal of Judge Liu Daqun, 28 October 2013 (“Župljanin Reply”).

¹⁰ Stanišić Reply, para. 31. I note that Stanišić mischaracterises the Motion Requesting Recusal as dealing with all adjudication “on the consequences of the Special Chamber’s final determination on the rebuttal of the presumption of impartiality afforded to Judge Harhoff”. In fact, the Motion Requesting Recusal is limited to the Motion to Vacate.

¹¹ Order Replacing Judge in Respect of a Motion Before the Appeals Chamber, 28 November 2013, (“Order of 28 November 2013”), p. 1.

¹² Motion, para. 1.

Liu adjudicated that matter, and expressed his views in a dissent, and is therefore not in a position to adjudicate the Motion to Vacate without being predisposed to a particular outcome.¹³

10. In response, the Prosecution submits that Župljanin has neither rebutted the strong assumption of Judge Liu's lack of bias, nor satisfied the relevant threshold for demonstrating the existence of a reasonable apprehension of bias.¹⁴ The Prosecution submits that "[n]umerous decisions have held that a judge should not be disqualified from hearing a case merely because he or she previously dealt with evidence related to the same facts in other cases".¹⁵

11. In reply, Župljanin submits that "the request for Judge Liu to recuse himself, or to be recused, is based on his previous judicial determination of essentially the same matter now pending before the Appeals Chamber".¹⁶ Župljanin submits that the authorities relied upon by the Prosecution support "the recusal of Judge Liu".¹⁷ Further, Župljanin relies on the "limited scope and substantial correlation of issues between the disqualification of Judge Harhoff in the *Šešelj* case, and the disqualification of Judge Harhoff requested in this case".¹⁸ Finally, Župljanin submits that Judge Liu is a "jurist of unquestioned integrity", but that "[a] reasonable apprehension of bias by prejudgment would arise in respect of any Judge in the circumstances".¹⁹

12. Stanišić submits that "Judge Liu should recuse himself from sitting and adjudicating on the consequences of decisions in relation to which he has already expressed his judicial views".²⁰ Stanišić argues that a "reasonable apprehension of prejudgement necessarily arises", despite emphasizing that "he is in no way questioning the professional integrity of Judge Liu".²¹

III. APPLICABLE LAW

13. Rule 15(A) of the Rules provides that:

A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

14. The Appeals Chamber has held that:

¹³ *Ibid.*

¹⁴ Prosecution Consolidated Response, para. 14.

¹⁵ Prosecution Consolidated Response, para. 15.

¹⁶ Župljanin Reply, para. 8.

¹⁷ Župljanin Reply, paras 9-11.

¹⁸ Župljanin Reply, para. 12.

¹⁹ Župljanin Reply, para. 13.

²⁰ Stanišić Reply, para. 34.

²¹ Stanišić Reply, para. 32.

A. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.²²

15. The Appeals Chamber has held that the reasonable observer "must be an informed person, with knowledge of all the relevant circumstances, including traditions of judicial integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold".²³

16. Furthermore, Rule 15(B) of the Rules provides that:

(i) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question and report to the President.

(ii) Following the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers to report to him its decision on the merits of the application. If the decision is to uphold the application, the President shall assign another Judge to sit in the place of the Judge in question.

(iii) The decision of the panel of three Judges shall not be subject to interlocutory appeal.

(iv) If the Judge in question is the President, the responsibility of the President in accordance with this paragraph shall be assumed by the Vice-President or, if he or she is not able to act in the application, by the permanent Judge most senior in precedence who is able to act.

17. A high threshold must be met to rebut the presumption of impartiality that attaches to Judges.²⁴ Any party seeking the disqualification of a Judge bears the burden of adducing sufficient evidence to firmly establish "a reasonable apprehension of bias by reason of prejudgement".²⁵ The Tribunal has recognised that, in circumstances where a Judge's involvement in earlier proceedings is relied upon as a ground to establish a reasonable apprehension of bias, the requisite test is whether a "hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement)" would be of the view that the Judge in question

²² *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("Furundžija Appeal Judgement"), para. 189; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4-A, Decision on Vojislav Šešelj's Motion to Disqualify Judges Arlette Ramarosan, Mehmet Güney and Andréia Vaz, 10 January 2013 ("Šešelj 2013 Decision"), para. 10.

²³ *Furundžija Appeal Judgement*, para. 190. See also *Šešelj 2013 Decision*, para. 10.

²⁴ *Furundžija Appeal Judgement*, para. 197; *Šešelj 2013 Decision*, para. 11.

²⁵ *Furundžija Appeal Judgement*, para. 197; *Šešelj 2013 Decision*, para. 11. See also *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("Galić Appeal Judgement"), para. 44.

“might not bring an impartial and unprejudiced mind to the issues”.²⁶ The test is *not* whether the Judge would merely decide issues in the same way as they were decided in the earlier proceedings.²⁷

IV. DISCUSSION

18. As a preliminary matter, I note that the Rules establish distinct processes for recusal, on the one hand, and disqualification and withdrawal, on the other. Pursuant to Rule 15(A), recusal is the process by which a Judge voluntarily withdraws in circumstances in which that Judge considers a personal interest or association may affect his or her impartiality.²⁸ Conversely, Rule 15(B)(i) establishes the procedure for parties seeking to apply “for the disqualification and withdrawal of a Judge” on the basis of a personal interest or association affecting the Judge’s impartiality. While Župljanin has not referred to either provision, it is apparent from the nature of Župljanin’s submissions that he is in fact seeking the disqualification of Judge Liu under Rule 15(B)(i).²⁹ I note that the Prosecution has responded to the Motion Requesting Recusal as though it were an application for disqualification under Rule 15(B)(i).³⁰ Accordingly, and in the interests of judicial economy, I will consider the Motion Requesting Recusal on the assumption that it is brought pursuant to Rule 15(B)(i), regardless of the confusion in terminology.

19. A request for disqualification or withdrawal ultimately requires a determination to be made by the President.³¹ According to the Order of 22 October 2013, Judge Meron referred the Motion Requesting Recusal, which Stanišić has now joined, to me “for appropriate action”.³² Since Judge Meron is the President of the Tribunal and has withdrawn from considering the Motion Requesting Recusal, I understand that “appropriate action” necessitates my assignment as Acting President with respect to the Motion Requesting Recusal.³³

20. I recall that the procedure under Rule 15(B)(i) requires a party seeking the disqualification and withdrawal of a Judge from a Chamber to apply to the Presiding Judge of the Chamber concerned. As Judge Meron is presiding generally in this case, the Motion Requesting Recusal therefore ought to have been filed before him in his capacity as Presiding Judge of the Appeals Chamber. I note, however, that Župljanin has filed the Motion Requesting Recusal before the

²⁶ *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 19.

²⁷ *Ibid.*

²⁸ See Rule 15(A) of the Rules.

²⁹ See Motion Requesting Recusal, para. 1; Župljanin Reply, paras 9-11.

³⁰ See Prosecution Consolidated Response, para. 15.

³¹ See Rule 15(B)(ii) of the Rules.

³² Order of 22 October 2013, p. 1; *supra* para. 5.

³³ See Rule 21 of the Rules.

Appeals Chamber. Following Judge Meron’s withdrawal and in accordance with Rule 22(B) of the Rules, I was elected Presiding Judge of the Appeals Chamber seised of this case in respect to the Motion Requesting Recusal.³⁴ In the interests of expediency and following informal consultations with the other Judges of the Appeals Chamber seised of this case, the Motion Requesting Recusal will be considered as validly filed before the Presiding Judge who, for all intents and purposes, is replacing the President in this matter.

21. I have conferred with Judge Liu, who has informed me that, in his view, there is no basis for his disqualification or withdrawal. Given that I am both the Presiding Judge and the Acting President, the requirement that the Presiding Judge report to the President becomes inapplicable in the present circumstances.³⁵

22. In accordance with Rule 15(B) of the Rules, the President has the authority to decide the matter or to appoint a panel of three Judges drawn from other Chambers to determine the merits of the application. I have decided to address the merits of the Motion Requesting Recusal myself.

23. In requesting disqualification and withdrawal, it is incumbent upon Župljanin and Stanišić to rebut the strong presumption of impartiality attached to Judge Liu. In the absence of evidence to the contrary, it is to be assumed that Judge Liu will consider the issues before him solely and exclusively on the basis of the submissions by the parties and evidence presented.³⁶ Župljanin and Stanišić merely rely on the similarity of the matters adjudicated by Judge Liu in the *Šešelj* case and those raised in the Motion to Vacate. While there may be overlap between the bases of bias relied upon, I consider a motion to disqualify a Judge in one case to be a substantially different question for determination than a motion to vacate a trial judgement filed before the Appeals Chamber in another.³⁷ Moreover, on numerous occasions, the Tribunal has observed that a reasonable apprehension of bias of a Judge in a case will not arise merely because he or she previously dealt with evidence related to the same facts in other cases.³⁸ Župljanin and Stanišić have failed to adduce

³⁴ See Order of 28 November 2013, p. 1.

³⁵ See *Prosecutor v. Vojislav Šešelj*, IT-03-67-R77.2-A, Decision on Motion for Disqualification, 6 November 2009, para. 5; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Decision on Motion for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings, 2 December 2009, para. 3.

³⁶ Cf. *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (“*Nahimana et al. Appeal Judgement*”), para. 84.

³⁷ I note, for example, that the Motion to Vacate involves various procedural issues that need not be addressed in the context of a motion to disqualify a Judge.

³⁸ *Galić Appeal Judgment*, para. 44. See also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President pursuant to Rule 15(B)(ii), 22 July 2009, para. 24; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff, 14 January 2008, paras 22, 24-25; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 16 February 2007, para. 25; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-R77, Decision on Application for Disqualification, 11 June 2004, para. 13; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003, para. 19. See *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para. 378; *Nahimana et*

sufficient evidence to demonstrate that a reasonable observer, properly informed, would be of the view that Judge Liu would not bring an impartial and unprejudiced mind to the issues of fact and law raised in determining the matter at hand. Therefore, Župljanin and Stanišić have failed to rebut the strong presumption of impartiality attached to Judge Liu.

V. DISPOSITION

24. For the above reasons, and pursuant to Rules 15 and 21 of the Rules, I hereby **DENY** the Motion Requesting Recusal.

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

Done this third day of December 2013,
At The Hague,
The Netherlands.



Judge Carmel Agius
Acting President

[Seal of the Tribunal]

al. Appeal Judgement, paras 78-79, 84-85; *Georges Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 42; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 269.