IT-03-67-T
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04 SEPTEMBER 2013

60988

NATIONS UNIES

Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991

Affaire n° : IT-03-67-T

Date: 4 septembre 2013

Original: FRANÇAIS

LE PRÉSIDENT DE LA CHAMBRE

Composée comme suit: **M. le Juge Jean-Claude Antonetti, Président**

Assistée de: **M. John Hocking, le Greffier**

Ordonnance rendue le: **4 septembre 2013**

LE PROCUREUR

c/

VOJISLAV ŠEŠELJ

DOCUMENT PUBLIC

ANNEXE COMPLÉMENTAIRE Á LA DÉCISION PORTANT LEVÉE DE LA CONFIDENTIALITÉ DU RAPPORT DU PRÉSIDENT DE LA CHAMBRE ADRESSÉ AU PRÉSIDENT DU TRIBUNAL OU DU JUGE DÉSIGNÉ PAR LUI LE CAS ÉCHÉANT RELATIF Á LA REQUÊTE EN RÉCUSATION DU JUGE HARHOFF

Le Bureau du Procureur
M. Serge Brammertz

L'Accusé
M. Vojislav Šešelj

En complément de ma décision enregistrée ce matin, il convient d'ajouter en annexe B les observations du Juge Harhoff mentionnées dans son mémo intérieur du 8 juillet 2013.

En conclusion, j'**ORDONNE** l'ajout en annexe B de ce document à la précédente décision de ce jour.

Fait en anglais et en français, la version en français faisant foi.

Jean-Claude Antonetti
Président

En date du quatre septembre 2013
La Haye (Pays-Bas)

[Sceau du Tribunal]

Annexe B

United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

INTERNAL MEMORANDUM - MEMORANDUM INTERIEUR

Date: 8th July 2013

Ref.: IT-03-67-T
PUBLIC

To:
A: Judge Jean-Claude Antonetti, Presiding Trial Judge

From:
De: Judge Frederik Harhoff

Subject:
Objet: Vojislav Šešelj's Motion for Recusal of Judge Harhoff

On 1st July 2013, Mr. Vojislav Šešelj ("the Accused") filed a motion, the English translation of which was provided only recently, for my recusal under Rule 15 of the Rules of Procedure and Evidence in the trial against him.

The Motion is based on the allegation that I am not and indeed have not been impartial because of the views expressed in a private e-mail of 6th June 2013, which I wrote in Danish and sent to personal friends in Denmark, and which was subsequently leaked to the press. In the e-mail, I raised concerns over the change in the Tribunal's judicial practice by the Appeals Chamber's acquittals in the cases against the Croatian generals *Gotovina & Markač* and the Serbian general *Momčilo Perišić* and also by the Trial Chamber's recent acquittal in the case against the Serbian general *Jovica Stanišić & Franko Simatović*. An unofficial translation of my e-mail was provided to the President and the Vice-President before Mr. Šešelj filed his Motion.

The hearings in the trial against Mr. Šešelj ended in March 2012 and the Trial Chamber is currently deliberating on the merits and drafting the judgement.

According to Rule 15 (A), a Judge may not sit on a trial in which he or she has a personal interest, or concerning which the Judge has or has had any association which might affect his or her impartiality. Rule 15 (B) further requires the Presiding Judge of the Chamber to confer with me before sending a report to the President of the Tribunal. The present Memorandum includes my observations to the Presiding Judge pursuant to Rule 15 (B) on the alleged bias or the possibly perceived bias by an informed observer in the public domain.

As far as I understand Mr. Šešelj's Motion, it concerns an alleged or perceived bias on my part, based on the assertion that I favour conviction of all persons, or at least all Serbs who have been indicted before the Tribunal, regardless of the evidence, thereby disregarding the presumption of innocence.

Mr. Šešelj further argues that my e-mail was "open" (paragraph 7 of the Motion) and intentionally published in the Danish newspaper "Berlingske". As an initial observation, this is incorrect. My e-mail was purely private and was never intended to become public. Someone leaked the e-mail to the Danish Newspaper "BT" (a tabloid paper in the Danish Berlingske media group) who chose to print it against my will.

The e-mail was a follow-up of my submission a few days earlier – also by e-mail to the *same* group of recipients – of two articles printed in The Economist and the New York Times on 1st and 2nd June 2013, respectively. Both articles were reprinted in the ICTY Media Report on 3rd June 2013. They raised questions about the rationale behind the Tribunal's acquittals in the three cases mentioned above and hinted at the possibility that the Tribunal might have been under influence by foreign States likely to be involved in conflicts in the future. This was the background for my second (leaked) e-mail in which I sought to convey my personal observations on the matters raised in the two articles. The second e-mail clearly refers to the first one with the two articles attached and I therefore submit, for the purposes of responding to the allegation raised in Mr. Šešelj's Motion, that my two e-mails must be seen together. Even if the second e-mail did not specifically identify the two articles, the informed observer would still be able to understand that concerns similar to those raised in the e-mail had already been expressed elsewhere.

1. The alleged bias

In my second e-mail, seeking to understand the rationale behind the two AC judgements, I tried to figure out just *who* might have an interest in seeking to adjust the Tribunal's jurisprudence on criminal responsibility for senior military leaders, assuming that such adjustment would most likely have been the result of some indication from sources outside the Tribunal.

My immediate answer to that question was that it could have been the military establishments in "dominating countries", such as the US or Israel (who are currently engaged in armed conflicts) who may have wished to ensure that International Criminal Law did *not* develop international criminal legal standards by which their generals could be convicted as members of a JCE or for aiding and abetting *unless* they had also actively contributed to the commission of crimes within the common purpose, or given "specific directions" as accomplices to the commission of crimes. I allowed for the possibility that our President had somehow accepted this inclination towards tightening the conditions for criminal legal responsibility for generals, but I added that we shall never know if such influence was ever attempted.

I did not suggest, of course, that the normal *mens rea* and *actus reus* requirements should still not be proven beyond a reasonable doubt, as usual; it goes without saying that no one can be convicted of a crime unless the evidence convincingly supports a finding of guilt. I just did not highlight this because that was not the point. The fact that I did not specifically say so, however, does certainly not imply that I have abandoned the requirement of evidence and any allegation about an inclination on my part towards convicting persons without sufficient evidentiary support is simply unfounded. My concern was my failure to understand the AC's acquittals.

I find, and I expressed this indirectly in the e-mail, that the conditions for criminal legal responsibility for top military commanders should remain the way they stood *before* Gotovina. However, this is not to say that generals must be punished without regard to the evidence which must always and *also* be established. It was the addition of *further* requirements for showing intent and action that I did not understand, and I believe this is clear from the context.

The e-mail did not distinguish between the facts in the three judgements and was not very clear on the distinction between JCE, aiding & abetting and command responsibility *because it was not written as a legal intervention*. It just suggested that the Tribunal's change of practice might now make it very difficult to convict the superior military commanders and that this departure from the Tribunal's practice may not only make it almost impossible to convict generals in the future, but also that it might have been prompted by external influence on the Tribunal or its President.

My e-mail does not mention Mr. Šešelj at all or contain any reference to the trial against him. The point made in the e-mail about criminal responsibility only relates to "senior military officers", which does not apply to the Accused because he is not a senior military officer. I have not expressed any prejudice in my e-mail against Serbs or Muslims or Croats, or indeed against generals as such, and I do not hold any such prejudice. Indeed, the two AC judgements in which I fail to understand the premises of the AC, concern both Croats and Serbs. I did refer to – as an example only – "ethnic cleansing of non-Serbs as part of the common purpose" of the JCE as alleged in many of the indictments, but that does certainly not imply that I hold that JCE-expulsion of other ethnicities was only a matter for the Serbs; the Tribunal's jurisprudence clearly shows otherwise. Finally, I do not have or have ever had any personal interest whatsoever in the trial against the Accused and I have not had any association with him or anyone else that might affect my impartiality in the case. I therefore do not believe that my e-mail contains any element that might cast doubts about my impartiality in this trial.

2. The perceived bias

The question is then to ascertain if an "informed observer" could possibly arrive at another conclusion upon reading my e-mail.

The essential point made in my e-mail – that military establishments in States currently engaged in armed conflict might have exerted influence on the Tribunal's President in order to bring about a change of the Tribunal's practice regarding the conditions for criminal legal responsibility of superior military leaders – is hardly a point that could lead an informed observer to conclude that I hold any bias against the Accused or against Serbs as such.

After referring to the two articles and announcing to offer some *personal observations* to the contents thereof, the e-mail gave a very brief resumé of the Tribunal's judicial practice up until 2012 in respect of the modes of liability under Article 7.1., including the JCE, and 7.3. for *superior military commanders*. It went on to explain that the AC judgement in Gotovina had now *changed* this practice and that its judgement in Perišić had introduced a new requirement of knowledge and intent for conviction of supreme military commanders as accomplices ("specific direction", which I did not mention directly), and that the Trial Chamber's judgement in Stanišić & Simatović seemed to follow track.

I noted, as already mentioned above, that this change of practice would henceforth probably make it very difficult to convict any of the superior military commanders because the new requirements introduced by the change of practice would be very difficult to prove, (such as, for example, the "specific direction" by the accomplice).

I also made the remark that I had always found that it was just to convict the superior commanders for crimes committed with their knowledge within the framework of a joint criminal enterprise but again, this is clearly not to say that I have abandoned all the normal requirements for *mens rea* and *actus reus* and evidentiary proof. The point was, and this is clear from the context, that the new practice would require more than just the degree of intent associated with knowledge, *i.e.* that the supreme commanders could only be convicted in the future if *a stronger degree of intent* could be proven at trial. This may not be an accurate depiction of the impact of the change of the Tribunal's practice, but that is beyond the point. The essential aspect in relation to the Motion is that this does not in any way suggest a belief or indeed a desire on my part to have generals convicted irrespectively of the evidence against them. To express a preference for preserving the law as it stood before the change does not, of course, imply a total abdication from all the normal *mens rea* and *actus reus* requirements.

I added a little further on that I had always rendered my judgements in confidence that the superior commanders would come to realize at some point that the common plan to forcibly evict "others" from "own areas" contradicts a fundamental order in life, a commanding sense of right and wrong – not least in a World where internationalization and globalization would seem to discard any notion of a natural right to live in particular areas together with like-minded people only, without the presence of others. However, this is a moral and a political statement, not a legal position; it merely states that the business of ethnically cleansing certain areas by way of mass atrocities and horror runs against some higher moral order of life and I do not think that any observer would disagree with this or indeed understand it any differently. It has nothing to do with the issue of whether Serbs (or Muslims or Croats, for that matter) or generals as such must be convicted for crimes committed within a JCE independently of the evidence.

My interpretation of what prompted the AC's (and the Trial Chamber's) judgements in these cases may be right or wrong or just inaccurate, but again, that is not relevant to the determination of any perceived bias on my part. The issue raised in the e-mail was that I would find myself in a serious moral and legal dilemma if I were to discover that our Tribunal had somehow submitted to pressure or influence from military stakeholders outside the Tribunal. I do not believe that an informed observer could have missed that.