



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-09-92-PT  
Date: 15 May 2012  
Original: English

**THE PRESIDENT OF THE TRIBUNAL**

**Before:** Judge Theodor Meron, President  
**Registrar:** Mr. John Hocking  
**Order of:** 15 May 2012

**PROSECUTOR**

v.

**RATKO MLADIĆ**

***PUBLIC***  
***WITH PUBLIC REDACTED ANNEX***

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**ORDER DENYING DEFENCE MOTION PURSUANT TO  
RULE 15(B) SEEKING DISQUALIFICATION OF PRESIDING  
JUDGE ALPHONS ORIE AND FOR A STAY OF  
PROCEEDINGS**

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**The Office of the Prosecutor**

Mr. Dermot Groome  
Mr. Peter McCloskey

**Counsel for Ratko Mladić**

Mr. Branko Lukić  
Mr. Miodrag Stojanović

**I, THEODOR MERON**, President 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 (“Tribunal”);

**BEING SEISED OF** the “Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orié and for a Stay of Proceedings”, filed with confidential annexes by Ratko Mladić (“Mladić”) on 11 May 2012 (“Motion”), which seeks, *inter alia*, the disqualification of Judge Alphons Orié pursuant to Rule 15(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), permission to exceed the applicable word limit for motions, and a stay of proceedings and adjournment of trial pending consideration of the Motion;<sup>1</sup>

**NOTING** that the trial in Mladić’s case is scheduled to commence with opening statements by the Office of the Prosecutor (“Prosecution”) on 16 May 2012;<sup>2</sup>

**NOTING** that I have received a “Report pursuant to Rule 15 (B)” from Judge Orié on 14 May 2012 (“Report”), annexed hereto, in which Judge Orié states that, in his view, the grounds advanced by Mladić for his disqualification are without merit;<sup>3</sup>

**CONSIDERING** that paragraph (C)7 of the Practice Direction on the Length of Briefs and Motions<sup>4</sup> provides that “[a] party must seek authorization in advance from the Chamber to exceed the word limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing”;

**NOTING** that Mladić filed the oversized Motion consisting of 13,260 words<sup>5</sup> simultaneously with his request for an extension rather than in advance of it, as required under the Practice Direction;

**CONSIDERING** that, although the Motion could be dismissed for failing to conform with the Practice Direction insofar as Mladić did not seek prior authorization, I find that it is in the interest of judicial economy to address the merits of the Motion in order to advance the proceedings in this case to the greatest extent possible;

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<sup>1</sup> Motion, paras 1-2, 6, 8, p. 41.

<sup>2</sup> Pre-Trial Conference, 24 April 2012, pp. 327-328. *See also* Decision on Two Defence Requests for Adjournment of the Start of Trial, 3 May 2012, paras 1-3. In light of the urgency of this matter, I consider that it is in the interest of justice to rule on the Motion without awaiting a response from the Prosecution. In so doing, I am satisfied that the Prosecution does not suffer any prejudice.

<sup>3</sup> *See* Report, paras 77-78.

<sup>4</sup> IT/184 Rev. 2, 16 September 2005 (“Practice Direction”).

<sup>5</sup> Motion, p. 41. *See also* Practice Direction, para. (C)5.

**RECALLING** that Article 21 of the Statute of the Tribunal guarantees the right to a fair trial and that the right to be tried before an independent and impartial tribunal is an integral component of this right;<sup>6</sup>

**RECALLING** that the Judges of the Tribunal enjoy a presumption of impartiality, that the party seeking to disqualify a Judge bears the burden of adducing sufficient evidence that the Judge is not impartial, and that there is a high threshold to rebut the presumption of impartiality;<sup>7</sup>

**RECALLING** that the Appeals Chamber of the Tribunal (“Appeals Chamber”) has previously held that this high threshold is required because “it is as much a threat to the interests of the impartial and fair administration of justice for judges to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias as is the real appearance of bias itself”;<sup>8</sup>

**RECALLING** that:

[a]lthough it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour[;]<sup>9</sup>

**RECALLING** that the Appeals Chamber has also previously held that:

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[;]<sup>10</sup>

**RECALLING** that a reasonable observer who is properly informed possesses “knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the

<sup>6</sup> *Prosecutor v. Anton Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”), para. 177. See also *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 (“*Galić* Appeal Judgement”), para. 37.

<sup>7</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Vojislav Šešelj’s Motion to Disqualify Judge Alphons Orié, 7 October 2010 (“*Šešelj* Decision”), para. 11; *Galić* Appeal Judgement, para. 41.

<sup>8</sup> *Šešelj* Decision, para. 11. See also *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 707.

<sup>9</sup> *Čelebići* Appeal Judgement, para. 707 (internal citation omitted).

<sup>10</sup> *Furundžija* Appeal Judgement, para. 189. See also *Galić* Appeal Judgement, para. 39.

background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold";<sup>11</sup>

**CONSIDERING** that Rule 15(B)(ii) of the Rules provides that, 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 for disqualification;

**CONSIDERING** that, after review of each of Mladić's arguments for Judge Orić's disqualification and Judge Orić's responses thereto, I am not satisfied that Mladić has demonstrated that a reasonable observer, properly informed, would reasonably apprehend bias, and I accordingly find Mladić's request for Judge Orić's disqualification to be unmeritorious;


**CONSIDERING** that, because Mladić has failed to substantiate his claims that Judge Orić should be disqualified, I do not find it necessary to appoint a panel of three Judges to consider the Motion pursuant to Rule 15(B)(ii) of the Rules;<sup>12</sup>

**HEREBY GRANT** the Motion in part, insofar as Mladić has requested leave to exceed the applicable word limit for the Motion; and

**DENY** the Motion in all other respects.

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

Done this 15th day of May 2012,  
At The Hague,  
The Netherlands.

  
Judge Theodor Meron  
President

[Seal of the Tribunal]

<sup>11</sup> *Furundžija* Appeal Judgement, para. 190. See also *Galić* Appeal Judgement, para. 40.

<sup>12</sup> See, e.g., *Šešelj* Decision, para. 28; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Motion for Disqualification, 12 January 2009, para. 15.

**PUBLIC REDACTED ANNEX**



United Nations  
Nations Unies



International  
Criminal Tribunal  
for the former  
Yugoslavia

Tribunal Pénal  
International pour  
l'ex-Yougoslavie

# INTERNAL MEMORANDUM - MEMORANDUM INTERIEUR

Date: 14 May 2012  
To: Theodor Meron, President  
A:  
From: Alphons Orie, Presiding Judge, Trial Chamber I  
De:  
Subject: Report pursuant to Rule 15 (B)

The *Mladić* Trial Chamber received the “Defence Motion Pursuant to Rule 15 (B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings”, filed on 11 May 2012 (“Motion”). The Motion sets out 17 grounds (“Grounds”) for my disqualification in my role as Presiding Judge in the *Mladić* case.

In this report, I will address the following issues:

- I General observations, including:
  - who is properly seised of the Motion and whether it was filed in a timely manner;
  - the representation of Trial Chamber activities as constituting my personal activities; and
  - adverse rulings by the Trial Chamber as a basis for disqualification.
- II A general overview of the applicable law, including international, regional and domestic jurisdictions.
- III The Grounds for my disqualification raised in the Motion. In relation to Grounds B and C, the law specifically applicable in relation to these grounds (and to a lesser extent also to Grounds D, E and F) is explored in more depth.
- IV Conclusion

## I. General observations

1. As a preliminary matter, I note that there exists some confusion as to who is properly seised of the Motion. The Motion states that the submission is “brought before the President of the Tribunal”.<sup>1</sup> However, it also states that “the Defence respectfully requests that the *Presiding Judge of Trial Chamber I* issue an order [...]”.<sup>2</sup> In the present circumstance, I consider that you, as President of the Tribunal, are seised of all the requests for relief, and that neither the Chamber nor I, as Presiding Judge of Trial Chamber I, are seised of any requests, including that of a stay of proceedings and adjournment of the trial.

2. With regard to the timing of the Motion, I note that the *Mladić* case was assigned to Trial Chamber I on 1 June 2011.<sup>3</sup> In the subsequent weeks, I carefully considered my position in relation to Rule 15 of the Tribunal’s Rules of Procedure and Evidence

<sup>1</sup> Motion, para. 1.

<sup>2</sup> Motion, Section V, Relief Requested. (Emphasis added).

<sup>3</sup> *Prosecutor v. Mladić*, Case No. IT-09-92-I, Order Assigning Judges to a Case before a Trial Chamber, 27 May 2011, p. 3.

("Rules") in order to determine whether I should recuse myself from the case. Having considered, in particular, my previous role as the Presiding Judge in the *Galić* and *Krajišnik* cases, I found no reason to recuse myself.

3. Many of the grounds put forth in the Motion relate to matters which the Defence has been aware of for quite some time, but which it is only now raising days before the start of trial. Rule 15 (B) of the Rules does not address when a party should bring a motion for disqualification in relation to when the party first became apprised of any of the alleged facts of partiality. Yet, this issue was briefly raised by Judge Liu in the context of a disqualification motion, in which he stated "[a]lthough neither the Statute nor the Rules provide any time-limits for the filing of motions during trial, both parties are certainly under a general obligation to act swiftly in order to ensure that the accused can be tried expeditiously".<sup>4</sup> Further, the principle of timeliness is reflected in the rules of procedure and evidence of both the International Criminal Court ("ICC") and the Extraordinary Chambers in the Court of Cambodia ("ECCC"), which mandate that a disqualification motion must be brought "as soon as" the party is aware of the grounds on which it is based.<sup>5</sup>

4. Several national jurisdictions also require "timely" motions for disqualification, including Canada,<sup>6</sup> Switzerland,<sup>7</sup> Germany,<sup>8</sup> and Austria.<sup>9</sup> Additionally, in the United States, this requirement is codified in federal statute<sup>10</sup> and has been developed through federal circuit court jurisprudence.<sup>11</sup> The timeliness requirement has been expressed as requiring that a motion for disqualification be brought "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim".<sup>12</sup> Further, it has been stated that "[t]he most egregious delay - the closest thing to *per se* untimeliness - occurs when a party already knows the facts purportedly showing an appearance of

<sup>4</sup> *Prosecutor v. Galić*, Case No. IT-98-29, Decision on the Defence Motion for Withdrawal of Judge Orić, 3 February 2003, para. 11.

<sup>5</sup> See Rule 34 (2) of the ICC Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000) (which provides that "a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based"; Internal Rule 34 (3) of the ECCC Internal Rules (Rev. 8) (3 August 2011) (providing that "[t]he application shall be filed as soon as the party becomes aware of the grounds in question"). See also *Co-Prosecutors v. Ieng Sary*, 002/19-09-2007/ECCC/TC, Decision on Ieng Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, para. 2.

<sup>6</sup> *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 (accepting that "in order to maintain the integrity of the court's authority such allegations must, as a general rule, be brought forward as soon as it is reasonably possible to do so").

<sup>7</sup> See Code de procédure pénale Suisse du 5 octobre 2007 (Code de procédure pénale, CPP), Art. 58, Récusation demandée par une partie (which provides that "[l]orsqu'une partie entend demander la récusation d'une personne qui exerce une fonction au sein d'une autorité pénale, **elle doit présenter sans délai à la direction de la procédure une demande en ce sens**, dès qu'elle a connaissance du motif de récusation) (Emphasis added).

<sup>8</sup> See German Procedural Code (Strafprozeßordnung – StPO), §25.

<sup>9</sup> See Austrian Procedural Code (Strafprozeßordnung 1975 – StPO), §73.

<sup>10</sup> U.S.C. § 144, "Bias or prejudice of judge". The Code provides, in relevant part, "[w]henever a party to any proceeding in a district court makes and files a **timely** and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party [...]" (Emphasis added).

<sup>11</sup> See, for example, *Polizzi v. United States*, 926 F.2d 1311, 1321 (2d Cir. 1991). In *Polizzi*, the Court noted that a timeliness requirement has been read into U.S.C. §455, notwithstanding that this section has no explicit requirement. *Ibid.* Section 455 of the Code, "Disqualification of justice, judge or magistrate", applies to "any justice, judge, or magistrate of the United States". See also *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991) (requiring "reasonable promptness after the ground for such a motion is ascertained"); *United States v. Stenzel*, 49 F.3d 658, 661 (10th Cir. 1995) (finding that "[b]ecause the defendant made no timely objection the recusal issue was not preserved for appeal").

<sup>12</sup> *Apple v. Jewish Hosp. and Medical Center*, 829 F.2d 326, 333 (2d Cir. 1987).

impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal”.<sup>13</sup>

5. I will make one more general observation. In the Motion, the Defence refers to various decisions, orders, and actions allegedly taken by me personally.<sup>14</sup> As the record demonstrates, they were in fact taken by the Chamber as a whole. With regard to written decisions, orders, and other filings, it is the Tribunal’s practice that only the Presiding Judge signs on behalf of the Chamber. Such decisions, orders, and filings are, however, deliberated and decided upon by the Chamber as a whole and this is reflected in the text of any such decisions and orders. With regard to oral decisions delivered at status conferences when the full Chamber was not present, these were all deliberated and adopted by the Chamber as a whole. I have repeatedly made this clear to the parties and the public at the outset of every status conference, in stating that:

I inform the parties that, although I am alone here, that any guidance or any decisions that will be announced have been deliberated and adopted by the Chamber as a whole.<sup>15</sup>

To the extent matters were raised by the parties during those status conferences that necessitated a decision, I regularly deferred such matters until after the Chamber had the possibility to deliberate and decide on them.<sup>16</sup>

6. In relation to this final observation, I also note that a number of the grounds put forward relate to my alleged bias based on the outcome of Chamber decisions. The question of whether adverse rulings can evidence judicial partiality has been considered by this Tribunal before. Under the previous regime set out in Rule 15 (B), the Bureau stated that while it “would not rule out entirely the possibility that decisions rendered by a Judge or Chamber by themselves could suffice to establish actual bias, it would be a truly extraordinary case in which they would.”<sup>17</sup> The requisite showing required by the moving party is that “the rulings are, or would reasonably be perceived as, attributable to a predisposition against the applicant, and not genuinely related to the application of law (on which there may be more than one possible interpretation) or to the assessment of the relevant facts.”<sup>18</sup> This high standard is in line with other international tribunals and national domestic courts.<sup>19</sup> The ECCC has indicated one rationale for this high standard in that when adverse rulings “are objected to by counsel, the appropriate remedy is appeal rather than disqualification, on the grounds that all judges would otherwise risk being subject to disqualification whenever they make adverse rulings against a party.”<sup>20</sup>

<sup>13</sup> *United States v. Vadner*, 160 F.3d 263, 264 (5th Cir. 1998).

<sup>14</sup> See, in particular, Grounds H, I, J, M, and N in the Motion.

<sup>15</sup> See T. 57, 75, 96-97, 126, 151, 185, 216.

<sup>16</sup> See, for example, T. 69, 82, 197, 218-219.

<sup>17</sup> *Prosecutor v. Blagojević*, Case No. IT-02-60, Decision on Blagojević’s Application Pursuant to Rule 15 (B), 19 March 2003 (“*Blagojević Decision*”), para. 14.

<sup>18</sup> *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44, Decision on Motion by Karemera for Disqualification of Judges [Bureau], 17 May 2004, para. 13; See also *Prosecutor v. Ntahobali*, Case No. ICTR-97-21, Decision on Motion for Disqualification of Judges, 7 March 2006, para. 12.

<sup>19</sup> See *Co-Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007/ECCC/TC, Decision on Application for Disqualification of Judge Silvia Cartwright, 9 March 2012 (“*Cartwright Decision*”) (stating that “not even adverse rulings by a Judge in relation to a party by themselves suggests actual bias or creates a basis on which, a reasonable observer, properly informed, could reasonably apprehend bias [...]”); *In re IBM Corp.*, 45 F.3d 641 (2nd Cir. 1995), citing to *Liteky v. United States*, 114 S.Ct. 127 (1994) (in which the US Supreme Court stated that “[j]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion” and “can only in the rarest circumstances evidence the degree of favoritism or antagonism required”).

<sup>20</sup> *Cartwright Decision*, para. 18.



7. This raises another, related matter. I note that all of the decisions referred to in the Motion were taken without dissenting or separate opinions appended thereto. In this respect, any bias attributed to me based solely on these decisions would be equally attributable to the other two judges of the bench. While the Motion purports to lay out grounds demonstrating my alleged personal bias, in fact the result is to challenge the partiality of the Chamber as a whole. It is important to note that the implication of a finding of personal bias based on these grounds would necessarily be applicable to all the Tribunal's Presiding Judges and their respective Chambers.

8. Finally, I note that the Motion refers to my "personal staff" and "[Judge Orić's] staff".<sup>21</sup> Obviously I have no personal staff. The legal staff working on this case serves the Chamber as a whole.

## II. Law

9. 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.

10. Rule 15 (B) governs the procedure for determining disqualification:

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

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

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

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

11. According to the Tribunal's Appeals Chamber, there is a presumption of impartiality which attaches to a Judge.<sup>22</sup> As such, judges have a duty to sit in any case in which they are not obliged to recuse themselves.<sup>23</sup> There is a high threshold to rebut this presumption of impartiality: "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudice and this must be 'firmly established'".<sup>24</sup> Following the case law of the European Court of Human Rights

<sup>21</sup> See Motion, paras 11, 103.

<sup>22</sup> *Prosecutor v. Furundžija*, Appeals Chamber, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("Furundžija AJ"), para. 196. See e.g., *Prosecutor v. Kordić et al.*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998, p. 2.

<sup>23</sup> *Furundžija AJ*, para. 196. See *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgement on Recusal Application*, 1999 (7) BCLR 725 (CC), 3 June 1999, para. 48.

<sup>24</sup> *Furundžija AJ*, para. 197.

("ECtHR"), the Appeals Chamber found that "there is a general rule that a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias".<sup>25</sup> Questions of potential bias are to be considered in the context of this presumption of the judges' impartiality, reinforced by the oath judges make on taking up their duties.<sup>26</sup>

12. On this basis, the Appeals Chamber considered the following principles in applying the impartiality requirement: (1) a judge is not impartial if it is shown that actual bias exists. (2) There is an unacceptable appearance of bias if:

- (a) 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 which circumstances, a judge's disqualification from the case is automatic, or
- (b) the circumstances would lead a reasonable observer,<sup>27</sup> properly informed, to reasonably apprehend bias.<sup>28</sup>

### III. Grounds

#### Ground A

13. The Defence has pointed to what it considered "certain irregularities" in the manner in which I conducted the initial and further appearances. During the initial appearance on 3 June 2011, I asked the Accused whether he wanted to have the indictment read out in full.<sup>29</sup> Pursuant to Rule 62 (A) (ii), the Chamber "*shall* read or have the indictment read to the accused in a language the accused understands"<sup>30</sup> but it is accepted practice that this may not be necessary if the accused waives this right. Mr. Ratko Mladić ("Accused") responded that "I do not want to have a single letter or sentence of that indictment read out to me".<sup>31</sup> I proceeded to read out a summary of the indictment instead, for the benefit of the Accused and the public. This manner of proceeding, as well as the text of the summary itself, had been considered and agreed upon by the Chamber as a whole, who were present at the initial appearance.<sup>32</sup>

<sup>25</sup> *Furundžija* AJ, para. 189.

<sup>26</sup> *Furundžija* AJ, para. 197.

<sup>27</sup> *Furundžija* AJ, para. 190. A "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."

<sup>28</sup> *Furundžija* AJ, para. 189. With regard to the appearance of bias, the test is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgment) would be that the judge in question might not bring an impartial and unprejudiced mind to the issues arising in the case." *Prosecutor v. Delalić et al.*, Appeals Chamber, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 683. See also *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on Joint Motion to Disqualify, 3 May 2002, para. 26. To the requirement that such an apprehension of bias must be a reasonable one, see *Prosecutor v. Delalić et al.*, Appeals Chamber, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 697. For ICTR case law, see ICTR *Prosecutor v. Jean-Paul Akayesu*, Appeals Chamber, Case No. ICTR-96-4-A, Judgement 1 June 2001, para. 91; ICTR *Prosecutor v. Karemera, Rwamakuba, Ngirumpatse, Nzirorera*, The Bureau, Decision on Motion by Nzirorera for Disqualification of Trial Judges of 17 May 2004, paras 8-11.

<sup>29</sup> T. 11.

<sup>30</sup> Rule 62 (A) (ii) of the Tribunal's Rules of Procedure and Evidence. (Emphasis added).

<sup>31</sup> T. 11.

<sup>32</sup> See T. 1.

14. The statute of the Tribunal (“Statute”) and the Rules contain no provision establishing a right of an accused not to have read to him the charges against him. The Defence appears to claim that there is a “regular and accepted procedure at initial appearances”, followed in “all other cases”, that when an accused waives his right to have the indictment read to him, this waiver is accepted by the relevant Pre-Trial Chamber and, in such a situation, not even a summary of the indictment is read.<sup>33</sup> In this respect, the Defence points to the initial appearance of Goran Hadžić as example of this “regular and accepted procedure”. I have not made a review of all the initial appearances before the ICTY, but nevertheless doubt that what the Defence describes is a “regular and accepted” procedure and it is certainly not followed in all cases. In this respect, I draw your attention to the initial appearances of Ramush Haradinaj (at which the Judge read a summary, despite waiver), Ante Gotovina (at which the Judge read a summary and had the indictment read in full, despite waiver), and Radovan Karadžić (at which a summary was read, despite waiver).

15. At paragraph 26 of the Motion, the Defence alleges that the indictment was read during the Further Appearance of 4 July 2011. However, the indictment was not read on this occasion, nor was there a discussion as to whether it should or should not be read out. At the Further Appearance, before the Chamber as a whole and despite interruption, I merely read the charges against the Accused so that he could plead to them.<sup>34</sup>

16. At paragraph 30 of the Motion, the Defence refers to a moment when I allegedly misspoke and referred to the Accused as “Mr. Tadić”. I was unable to verify whether I misspoke exactly in the manner as claimed by the Defence. But even if I did, I would consider it a simple error which reveals nothing that could be reasonably perceived as an appearance of bias.

17. In sum, I consider that this Ground has certain factual inaccuracies. However, even if I accept the Defence representations as factually correct, I do not consider that the actions taken by the Chamber could reasonably be perceived as an appearance of bias on my part.

#### Grounds B-C

18. Under Ground B and C, the Defence has argued that I have a “personal interest in preserving the findings” of the judgements in the *Galić* case and *Krajišnik* case.<sup>35</sup> I will first set out the case law in this respect and then deal with the substance of the Defence’s argument.

##### *1. Case law (ICTY, ECtHR, and national case law)*

19. There are several ICTY and ICTR decisions which involve a judge sitting on two separate cases relating to the same or similar facts. In these cases, the accused argued the appearance of bias because the judges, by virtue of their sitting on a related case, had heard allegations against the accused, had heard evidence relevant to the accused’s case, or had already appraised the credibility of such evidence.

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<sup>33</sup> See Motion, paras 25, 27, 29.

<sup>34</sup> See T. 44-50.

<sup>35</sup> *Prosecutor v. Galić*, Case No. IT-98-29, Judgement and Opinion, 5 December 2003 (“*Galić* Judgement”); *Prosecutor v. Krajišnik*, Case No. IT-00-39, Judgement, 27 September 2006 (“*Krajišnik* Judgement”).

20. The ICTR Appeals Chamber in the *Nahimana* case found that the Judges of the Tribunal are sometimes involved in several trials which, by their very nature, cover issues that overlap. In the absence of evidence to the contrary, the Appeals Chamber assumed that by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case. It agreed with the ICTY Bureau in *Kordić and Čerkez* that “a Judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases”.<sup>36</sup>

21. In [ REDACTED ], the President denied the Accused’s motion to disqualify [ REDACTED ] from the appeal of the conviction because he had been Presiding Judge on two previous cases: [ REDACTED ]. The Accused claimed that [ REDACTED ] was the Prosecution’s key witness in the Accused’s case and [ REDACTED ] had already participated in deliberations over the witness’s credibility. Hence, the Accused claimed that the Judge’s positive assessment of [ REDACTED ] credibility over exactly the same facts on which he testified during the trial that gave rise to the Accused’s appeal provided sufficient appearance of bias for disqualification. However, the President held that “the presumption of a Judge’s impartiality when dealing with evidence from prior proceedings applies regardless of whether the Judge previously made positive or negative assessments of the credibility of that evidence” and so the fact that the Judge had “previously heard testimony from a witness regarding the same facts in dispute on appeal” and “made an assessment of the credibility of that testimony” is not itself a sufficient basis to require disqualification.<sup>37</sup>

22. Tribunal decisions regularly refer to the professional capacity of judges to put out of their mind evidence other than that presented in the trial before them in rendering a verdict. For example, in *Kupreškić et al.*, the Trial Chamber ruled that whatever evidence was adduced in *Furundžija* would not be regarded as evidence in *Kupreškić et al.*:

Composed as it is of professional judges, the Trial Chamber is capable of disregarding any such evidence relating to Anto Furundžija offered in *Prosecutor v. Kupreškić et al.* (IT-95-16-T) when the members of this Trial Chamber sit in the case of *Prosecutor v. Furundžija*.<sup>38</sup>

23. The same judicial capability is referred to in the *Galić* case:

Judges’ training and professional experience engrain in them the capacity to put out of their mind evidence other than that presented at trial in rendering a verdict. Judges who serve as fact-finders may often be exposed to information about the cases before them either in the media or, in some instances, from connected prosecutions. The Bureau is not of the view that Judges should be disqualified simply because of such exposure. [...] The need to present a reasoned judgement explaining the basis of their findings means that

<sup>36</sup> *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Case No. ICTR-99-52-A, Judgement 27 November 2008 (“*Nahimana AJ*”), para. 78. The ICTY Bureau had found that two judges in the *Kordić and Čerkez* case, who at the time were hearing related witnesses and evidence in the *Blaškić* case, were not precluded from hearing the case against Kordić and Čerkez. See *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14-T, Decision of the Bureau of 5 May 1998; Case No. IT-95-14/2-PT, Decision on the Application of the Accused for Disqualification of Judges Jorda and Riad of 21 May 1998 (together: “*Kordić and Čerkez Decisions*”).

<sup>37</sup> [ REDACTED ].

<sup>38</sup> *Prosecutor v. Kupreškić*, IT-95-16-T, Order on Emergency Motion to Limit Prosecutor’s Inquiry Relating to Accused Anto Furundžija, 26 August 1998.

Judges at the Tribunal are forced to confine themselves to the evidence in the record in reaching their conclusions.<sup>39</sup>

24. In *Krajišnik*, the Presiding Judge considered that the reasonable observer would know that the Tribunal is established to hear a number of cases related to the same overall conflict, *i.e.* the violations of humanitarian law committed in the territory of the former Yugoslavia since 1991. The judges of the Tribunal will therefore be frequently faced with oral and material evidence relating to the same facts which, as highly qualified professional judges, will not affect their impartiality.<sup>40</sup>

25. In *Šešelj*, the Accused moved to disqualify the Presiding Judge based upon his prior participation in the *Babić* case, in which Šešelj was named as part of the JCE in the indictment. The President elected not to form a reporting panel on the grounds that he was not persuaded that the Presiding Judge's participation in other cases – which may have contained facts of relevance to the allegations against Šešelj in his own case – established actual or implied bias, holding that:

What Šešelj seems to completely underestimate is the integrity of the judicial office and the professionalism of judicial office holders. Judges are expected to be able to put out of their minds allegations in other cases which may have prejudicial effect to an accused before them and to adjudicate their case on the basis of the evidence before them only.<sup>41</sup>

26. There is also relevant case law of the European Court of Human Rights. Article 6 (1) of the European Convention of Human Rights (“Convention”) provides that in the determination of [...] any criminal charge against him, everyone is entitled to a fair and public hearing [...] by an independent and impartial tribunal established by law. Impartiality in this context means lack of prejudice or bias.<sup>42</sup>

27. The ECtHR has consistently held that impartiality under Article 6 (1) of the Convention must be determined first, according to a subjective test, that is on the basis of the personal conviction, interest or behaviour of a particular judge in a given case, and second on an objective test, that is by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.<sup>43</sup> Under the objective test:

[I]t must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks

<sup>39</sup> *Prosecutor v. Galić*, IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), 28 March 2003 (“*Galić Decision*”), para. 16.

<sup>40</sup> *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003 (“*Krajišnik Withdrawal Decision*”), paras 15, 17.

<sup>41</sup> *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, President, Decision on Motion for Disqualification, 16 February 2007, para. 25.

<sup>42</sup> *Law of the European Convention on Human Rights*, Harris, O'Boyle and Warbrick, 2nd Edition, Oxford University Press, 2009. See also ECtHR *Warsicka v. Poland*, Judgement of 16 April 2007, Application No. 2065/03, para. 35.

<sup>43</sup> See *inter alia* ECtHR *Indra v. Slovakia*, Judgement of 1 May 2005, Application No. 46845/99, para. 49; ECtHR *Warsicka v. Poland*, Judgement of 16 April 2007, Application No. 2065/03, para. 35; ECtHR *Poppe v. The Netherlands*, Judgement of 24 March 2009, Application No. 32271/04, para. 22; ECtHR, *Fatullayev v. Azerbaijan*, Judgement of 4 October 2010, Application No. 40984/07, para. 136.

impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be objectively justified.<sup>44</sup>

28. The ECtHR has dealt specifically with the issue of disqualification where a judge has sat on the separate cases of co-perpetrators. In *Poppe v. The Netherlands* (“*Poppe*”), the applicant had been charged in the Netherlands as co-actor in a group of eight persons with drug-related offences and participation in a criminal organisation.<sup>45</sup> He had subsequently been found guilty and sentenced to three years imprisonment. Poppe applied to the ECtHR, alleging a violation of Article 6 (1) of the Convention, as two judges in the court of first instance that had heard his case lacked the required impartiality as they had delivered judgements in cases concerning a number of Poppe’s co-accused prior to hearing his case and that these judgements had set out Poppe’s involvement in those criminal offences.<sup>46</sup>

29. The ECtHR considered generally that the work of criminal courts frequently involves judges presiding over various trials in which a number of co-accused are charged and that it would render the work of the criminal courts impossible, if by that fact alone, a judge’s impartiality could be called into question.<sup>47</sup> In *Poppe*, the ECtHR applied the objective test and held that:

[T]he mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not, in itself, sufficient to cast doubt on that judge's impartiality in a subsequent case. It is, however, a different matter if the earlier judgments contain findings that actually prejudge the question of the guilt of an accused in such subsequent proceedings.<sup>48</sup>

30. The Court further held that in determining the “question of the guilt” the Court has to take into account “whether the applicant’s involvement with [other co-perpetrators mentioned in the earlier judgements] fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence was [...] addressed, determined or assessed by the trial judges whose impartiality the applicant now wishes to challenge.”<sup>49</sup> The ECtHR therefore examined the judgements handed down by the national court in relation to Poppe’s co-accused, in order to determine whether these included any finding that in fact prejudged Poppe’s guilt. It found that in these judgements, the judges had not addressed the issue of whether the applicant’s involvement fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty beyond reasonable doubt.<sup>50</sup> The ECtHR therefore found that the applicant’s fear of bias on the part of the two judges was not objectively justified.<sup>51</sup>

<sup>44</sup> See *inter alia* ECtHR *Ferrantelli and Santangelo v. Italy*, Judgement of 7 August 1996, Application No. 19874/92, para. 58; ECtHR *Indra v. Slovakia*, Judgement of 1 May 2005, Application No. 46845/99, para. 49; ECtHR *Warsicka v. Poland*, Judgement of 16 April 2007, Application No. 2065/03, para. 37; ECtHR, *Fatullayev v. Azerbaijan*, Judgement of 4 October 2010, Application No. 40984/07, para. 136.

<sup>45</sup> ECtHR *Poppe v. The Netherlands*, Judgement of 24 March 2009, Application No. 32271/04 (“*Poppe* ECHR Judgement”), para. 7.

<sup>46</sup> *Poppe* ECHR Judgement, paras 3, 19.

<sup>47</sup> *Poppe* ECHR Judgement, para. 23

<sup>48</sup> *Poppe* ECHR Judgement, para. 26.

<sup>49</sup> *Poppe* ECHR Judgement, para. 28.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

31. In the *Miminoshvili v. Russia* case, the ECtHR confirmed the standard it had set in *Poppe*.<sup>52</sup> The Court found that the previous judgement did not contain findings that actually prejudged the question of the applicant's guilt in subsequent proceedings and concluded that there had been no violation of Article 6 (1) of the Convention.<sup>53</sup> In reaching its conclusion, the Court also considered that a professional judge is *a priori* better prepared to disengage him - or herself from their experience in previous proceedings (compared to a lay judge or juror), which supported their ability to examine the case without bias.<sup>54</sup>

32. With regard to national case law, it is interesting to consider the example of Germany. German courts regularly fail to find a judge biased due to their having previously sat on a criminal or civil case that involved the same facts as the case in question.<sup>55</sup> These courts also do not find the judge biased in proceedings that charge a perpetrator with the same offence for which the judge had convicted the co-perpetrators in an earlier trial.<sup>56</sup> In this regard, one portion of one of these decisions is worth highlighting: the judges had already sat on cases that dealt with the other participants in the same corruption case. Even though the judges made reference to acts of the applicants in the judgements of the other participants, this was not found to warrant disqualification of the judges from hearing the case against the applicants themselves. The court found that the judges were not bound to their description of the acts of the applicants as set out in the judgements against the other participants, as hearing new evidence in the proceedings against the applicants may well have convinced them to establish different facts.<sup>57</sup> The ECtHR, in *Schwarzenberger v. Germany*, reviewed a case in which two judges had previously convicted the applicant's accomplice for the same offence with which the applicant was charged.<sup>58</sup> The Court found that the judges had undertaken a fresh consideration of the applicant's case and determined that there was no violation of Article 6 (1) of the Convention.<sup>59</sup>

## 2. The Application of Case law to Grounds B and C

33. The *Krajišnik* and *Galić* judgements contain several references to the Accused, many of which simply review evidence related to him. According to Appeals Chamber's

<sup>52</sup> ECtHR *Miminoshvili v. Russia*, Judgement of 28 June 2011, Application No. 20197/03 ("*Miminoshvili* ECHR Judgement"), paras 116, 118.

<sup>53</sup> *Miminoshvili* ECHR Judgement, paras 118-119.

<sup>54</sup> *Miminoshvili* ECHR Judgement, para. 120.

<sup>55</sup> BGHSt (German Supreme Court on Criminal Cases), BGHSt 21, p. 334, 341; *Goltdammer's Archiv für Strafrecht* ("GA") 1978, p. 243; *Monatsschrift für deutsches Recht* ("MDR") 1972, p. 387; OLG (Higher Regional Court) Düsseldorf, *Neue Juristische Wochenschrift* ("NJW") 1982, p. 2832; GA 1993, p. 461.

<sup>56</sup> BGH MDR 1974, p. 367; *Neue Zeitschrift für Strafrecht* ("NSTZ") 1986, p. 206; BGHSt, *Strafverteidiger* ("StV") 1987, p. 1; BGHSt, NJW 1996, p. 1355, 1357; BGHSt NJW 1997, p. 3034, 3036; *Neue Zeitschrift für Strafrecht Rechtsprechungsreport* ("NSTZ-RR") 2001, p. 129.

<sup>57</sup> NJW BGH 1997, p. 3034, 3036. The German original reads: "Auch die Schilderung des Tatgeschehens einschließlich der Handlung der erst später ihrerseits angeklagten Tatbeteiligten in den früheren Urteilen der abgelehnten Richter führt hier nicht zu einem anderen Beurteilungsergebnis. Es lag vielmehr in der Natur der Sache, daß die Tatschilderung an dieser Stelle bereits die dann noch nicht angeklagten Beteiligten einschließen mußte. Daraus folgt nicht, daß die Richter, die an diesen früheren Urteilen beteiligt waren, sich endgültig auf diese Schilderung festgelegt hatten. Die Einlassung der späteren Angeklagten oder die neue Beweisaufnahme konnten sie durchaus dazu bewegen, die Feststellungen in anderer Sache anders zu treffen; tatsächlich wurden die Angeklagten Z. und W. - entgegen der Verurteilungsprognose im Eröffnungsbeschluß - teilweise freigesprochen".

<sup>58</sup> ECtHR *Schwarzenberger v. Germany*, Judgement of 10 August 2006, Application no. 75737/01 ("*Schwarzenberger* ECHR Judgement"), paras 6-8, 12, 41.

<sup>59</sup> *Schwarzenberger* ECHR Judgement, paras 42-46.

case law as reviewed above, there is an unacceptable appearance of bias where the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>60</sup> However, the Appeals Chamber has clearly set out that a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, merely because he is exposed to evidence relating to these events in both cases.<sup>61</sup> Instead, by virtue of their training and experience, judges can be assumed to rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case.<sup>62</sup> According to a decision by the ICTY President, the presumption of impartiality applies regardless of whether a judge previously made positive or negative assessments of the credibility of that evidence.<sup>63</sup> Consequently, the hearing, reviewing, and weighing of evidence in *Krajišnik* and *Galić* related to events relevant in the *Mladić* case should in and of itself not give rise to an unacceptable appearance of bias. The *Galić* case does not present further issues of possible appearance of bias.

34. The *Krajišnik* Trial Chamber further concluded that as of 12 May 1992, the Accused was a member of the Pale-based leadership component of a JCE to ethnically recompose the territories under the control of the Bosnian-Serb leadership by expelling Bosnian Muslims and Bosnian Croats, including through the commission of crimes against humanity.<sup>64</sup> The JCE further included other members of the JCE charged in the *Mladić* case.<sup>65</sup> The Chamber also found that the bombardment of Sarajevo was “massive and indiscriminate” and that “the Bosnian-Serb leadership, in a meeting with the Accused, did not oppose the Accused’s decision to attack Sarajevo with artillery”.<sup>66</sup> The Chamber noted the bombardment of Sarajevo as a “case in point” of the Bosnian-Serb leadership accepting and encouraging killings in connection with attacks as part of the JCE.<sup>67</sup>

35. The specific circumstances of the Tribunal argue in favor of a high standard for what constitutes “findings which actually prejudge the question of the guilt of an accused”. National legal systems involve a wide variety of cases and a large number of judges to sit on them. By contrast, the Tribunal was set up to deal with cases arising from a specific series of events and has a limited number of judges. Too low a standard in this respect might result in an unworkable situation for the Tribunal, particularly in this late stage of its lifespan with many judges having sat on related cases. A high standard would also be in line with the Tribunal’s case law emphasis on judges’ professional capacity, as reviewed above.

36. The *Krajišnik* Trial Chamber found that after the Accused’s decision to attack Sarajevo with artillery, Sarajevo was attacked in a massive and indiscriminate manner. However, this finding was reached in the context of whether murder became part of JCE and is not a finding on whether the artillery attack constituted an unlawful attack on civilians or civilian objects as a crime under the Statute. Further, technically, the finding does not address whether the Accused himself decided to or intended to attack Sarajevo indiscriminately (only that the attack, which followed his decision, was indiscriminate).

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<sup>60</sup> See *Furundžija* AJ, para. 189, reviewed above.

<sup>61</sup> See *Nahimana*, AJ, para. 78, reviewed above.

<sup>62</sup> *Ibid.*

<sup>63</sup> See *Popović* Decision, reviewed above.

<sup>64</sup> *Krajišnik* Judgement, paras 1087-1090.

<sup>65</sup> *Krajišnik* Judgement, para. 1087.

<sup>66</sup> *Krajišnik* Judgement, para. 1108. See also para. 1121.

<sup>67</sup> *Krajišnik* Judgement, para. 1108.



37. In light of the *Poppe* Judgement, I consider that the *Krajišnik* findings do not determine whether Mladić's conduct fulfilled all the relevant criteria of a crime under the Statute, or whether Mladić was guilty beyond reasonable doubt for any such crime. Having reviewed the *Krajišnik* findings, I conclude that they do not prejudge the question of Mladić's guilt.

38. With regard to paragraphs 38 and 46 of the Motion, I understand the ground raised to be an alleged conflict of interest due to my participation in the adjudication of facts in the *Galić* and *Krajišnik* cases, which were then judicially noticed in the *Mladić* case by this Chamber. First, I note that no disqualification request was made by the Defence when responding to the Prosecution's Motion.<sup>68</sup> Second, the Defence has not requested reconsideration of the Chamber's decision on this basis, nor is it defined as an issue it wishes to raise on appeal in the Defence request for certification to appeal.<sup>69</sup> Further, I am not aware of any Rule or case law that would have required my recusal on this basis. I also consider that the generally applicable holding as to the professional capacity of judges to put out of their mind evidence other than that presented in the trial before them, applies to this ground.

39. In relation to paragraph 39, I will here also address Ground K, found at paragraphs 88-93. In paragraphs 39 and 89-92 of the Motion, the discussions, in court and at the 26 March 2012 Rule 65 *ter* meeting, are misrepresented. First, as will be clear by reviewing the entirety of the transcripts at issue, or any transcript from the pre-trial stage of the *Mladić* case, discussions on potential agreement on facts and that of proposed expert reports are always distinct and the relevant topic is clearly announced before any discussion. In this situation, the cited transcript pages all occurred during a discussion on agreed facts. The same proposed expert report was discussed separately in the context of Rule 94 *bis* during the discussion on the general topic of expert reports.<sup>70</sup>

40. Despite the dispute in relation to the qualifications of the proposed Prosecution expert Richard Philipps, I did not exclude the possibility that the parties could agree on matters of fact contained in charts attached to the expert report and had invited them to explore this option. If the content of the charts produced by the expert would accurately reflect what both parties thought to be true, it would become irrelevant in relation to those facts, and those facts only, that the Defence challenged the qualifications of the expert. It appeared at the status conference of 29 March 2012 that the parties had not entered into negotiations on the matter. After again having explained to Mr. Lukic what my intentions were, he agreed that Mr. Petrušić and Mr. McCloskey would sit together and see what could be achieved. The discussion ended as follows:<sup>71</sup>

JUDGE ORIE: Then I suggest that Mr. Petrusic and Mr. McCloskey sit together, look at the chart, forget about who produced them, and see whether it accurately reflects what it says it reflects.

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<sup>68</sup> See Defence Response to "Prosecution Motion for Judicial Notice of Adjudicated Facts" filed 9 December 2012, 1 February 2012.

<sup>69</sup> See Defence Motion for Certification to Appeal the First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 March 2012; See also Defence Request to File Reply in Support of Defence Motion for Certification to Appeal the First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 April 2012. The request for leave to reply included the reply as Annex A; See Defence Motion for Certification to Appeal the Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 20 April 2012.

<sup>70</sup> Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 340; T. 276.

<sup>71</sup> T. 274-275.

MR. LUKIC: Thank you, Your Honour.

JUDGE ORIE: And then to see to what extent you could agree. Perhaps you agree on 90 per cent but not on the last 5 per cent or not at all. I'm not suggesting anything. But that is specifically what I asked you to do in your conversations with the Prosecution. And I understand that on from the middle of next week you'll give it a try to do that.

MR. LUKIC: Thank you, Your Honour.

41. Encouraging the parties to explore whether they can narrow the matters in dispute, and enable them to focus on those, falls within the scope of the duties of the Pre-Trial Judge, acting under the authority and the supervision of the Trial Chamber, as provided for in Rule 65 ter (B) and (H). I fail to see how this creates an appearance of bias.

42. For paragraphs 40 and 41 of the Motion, I quote the relevant portions of the transcript:<sup>72</sup>

MR. LUKIĆ: [...] the Defence will object any written statement tendered under the Rule 92 bis if it goes to prove that the acts and conduct of the accused as charged in the indictment because it is directly against the rule, and this also goes to the acts and conduct of subordinates of the accused.

[...]

JUDGE ORIE: Yes. What I was -- you were talking about the subordinates [...] Do you have case law to say that whatever is done by subordinates is excluded and is included in acts and conduct as charged against the accused?

MR. LUKIĆ: I don't know it by heart. We addressed it before. But I can tell you that according to the indictment, every single military person, police officer, and even local Serbs according to the indictment are subordinate to my client.

JUDGE ORIE: Yes. But are there other cases where whatever someone who was subordinated was -- or under the -- whether that was all excluded. We'll have a look at it but that is, of course, one of the issues we'll have to specifically research in order to follow your rather general rejection of almost of the 92 bis material.

43. This exchange occurred in the context of the Defence responding, without limitation, to a submission made by the Prosecution on the tendering and presentation of evidence, rather than in relation to any specific Rule 92 bis motion. The Defence refers, in paragraph 40, to the case law of the Tribunal where the proximity of subordinates to the accused is relevant in order to determine whether their acts and conduct in itself form an obstacle to the admission of their statements under Rule 92 bis. That element of proximity was missing in the very broad claim counsel made in court, i.e. that all acts and conduct of the subordinates would be treated as if it were acts and conduct of the accused under Rule 92 bis. That triggered my question to clarify the legal authority to support the broad claim so that the Chamber could seriously consider the merits of it, in addition to written filings made on this same matter. I do not see how this exchange can reasonably be perceived as an appearance of bias.

#### Grounds D-F

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<sup>72</sup> T. 387-388.

44. Under Grounds D, E, and F, the Defence has raised that I have a “personal interest in preserving the findings” of the sentencing judgements in the *Češić*, *Babić*, and *Mrđa* cases.<sup>73</sup>

45. I reiterate my position, as set out above in relation to Grounds B and C, relating to the Tribunal’s case law as to the potential disqualification of a judge due to previous participation in a trial arising out of the same, or similar, series of events. In addition, I note that in accepting a guilty plea, the Trial Chamber, pursuant to Rule 62 *bis* (iv), must be satisfied that “there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case”.<sup>74</sup> As noted by the Appeals Chamber, a common procedure is that the parties enter negotiations and agree on the facts underlying the charges to which the accused will plead.<sup>75</sup> This is not the same as a Trial Chamber adjudicating facts for which the Prosecution must have met its burden of persuasion as to their accuracy.

46. In relation to paragraph 57 of the Motion, the Defence links sentencing considerations in the *Babić* case to a denial by the Chamber of a Defence request to strike parts of the Prosecutions Pre-Trial Brief or, in the alternative, to postpone the start of the trial. The Defence found elements in the Prosecutions Pre-Trial Brief which it claimed amounted to new charges. Reference was made to events that occurred outside the temporal and geographical scope of the Indictment. The Chamber rejected the claim that the Prosecution, by these references, could have expanded the scope of its case and therefore denied the Defence requests. In so doing, the Chamber underlined the role of the Indictment, but attempted to avoid any misunderstanding that facts outside the temporal and geographic scope of the Indictment would necessarily be without any relevance. It is common practice in the Tribunal that the parties seek to pay attention to the history and the context of the conflict in the former Yugoslavia and are allowed, within limits, to do so. The text of the transcript speaks for itself:<sup>76</sup>

Mr. Lukic, the indictment is the primary accusatory instrument, and any other accusatory instrument cannot add charges or material facts amounting to charges. The Prosecution’s pre-trial brief particularises the alleged case against an accused and can assist the Defence in its preparations. Criminal liability is measured by considering whether evidence has been [*sic*] proven the allegations contained in the indictment, not in the pre-trial brief. The requests are therefore denied. In addition, references to matters that are outside the temporal, geographic, and/or subject-matter scope of the indictment are not *per se* irrelevant to the indictment. For example, background information may be important to understand or to contextualise later events.

47. I am unable to understand how the *Babić* sentencing judgement, issued by the Trial Chamber without any dissenting or concurring opinions attached thereto, could be linked to this decision of the present Chamber.<sup>77</sup> I also note that the Defence did not seek certification to appeal or reconsideration of the Chamber’s decision denying its requests, as provided for in the Rules.

<sup>73</sup> *Prosecutor v. Češić*, Case No. IT-95-10/1-S, Sentencing Judgement, 11 March 2004; *Prosecutor v. Babić*, Case No. IT-03-72-S, Sentencing Judgement, 29 June 2004; *Prosecutor v. Mrđa*, Case No. IT-02-59-S, 31 March 2004.

<sup>74</sup> *Prosecutor v. Milan Babić*, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 (“*Babić* Sentencing Appeal”), para. 18.

<sup>75</sup> *Ibid.*

<sup>76</sup> T. 326-327.

<sup>77</sup> Motion, para. 57. The Defence states cautiously that “[...] one cannot exclude” that the *Babić* proceedings influenced the Chamber’s decision.

48. In sum, the sentencing judgements in the *Češić*, *Babić*, and *Mrđa* cases contain no references to the Accused, do not make any findings in relation to Accused's alleged role in a JCE, and do not contain any findings which could be said to "actually prejudice the question of the guilt" of the Accused. Further, I fail to see how my role as Presiding Judge of any of these sentencing judgements could create an appearance of bias in the present case.

#### Ground G

49. In Ground G, the Defence deals with my previous role as a member of the Defence team of Duško Tadić. Indeed, I was a member of this Defence team. The submissions in paragraphs 65-68 are, however, not entirely clear to me.

50. The Chamber has taken judicial notice of facts adjudicated in the *Tadić* case. The evidence presented in that case apparently convinced the judges of that Trial Chamber, beyond a reasonable doubt, of the truth of those facts. It is unclear to me how the decision of this Chamber on adjudicated facts, including from the *Tadić* case, in combination with my role as co-counsel to Mr. Tadić, reveals anything that can reasonably be understood as an appearance of bias. Further, my position as former Defence counsel in the *Tadić* case was not raised in response to the Prosecution's Motion seeking the Prijedor facts to be judicially noticed, nor was the matter defined as an issue the Defence wishes to raise in its motion seeking certification to appeal the "First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts".

51. I do not recall receiving from Mr. Tadić information of the type or kind alluded to by the Defence. The suggestion that such information would possibly influence me during deliberations is therefore based on an erroneous assumption. I further do not share the Defence's logic as to the assumption it relies upon.

52. The apparent and actual conflict of interest arising from my role in the *Tadić* Defence has not been further explained. Would the fact that Mr. Tadić was convicted, despite a Defence team which argued that he should be acquitted, be in any way prejudicial to the Accused in the present case? Without further explanation, I have difficulties in comprehending the alleged conflict of interest, the potential prejudice to the Accused, or how it would affect my impartiality. If the conflict of interest rests on the same assumption as I dealt with in the previous paragraph, the same conclusion applies.

53. If my response shows a lack of understanding as to the argument raised specifically in relation to my role in the defence of Mr. Tadić, I am willing to reconsider my response once the matter is clarified. From my present understanding of Ground G, I do not see how the matters raised can be reasonably perceived as an appearance of bias.

54. Finally, I draw attention to the fact that, in the *Krajišnik* case, my disqualification was sought also in relation to my role as co-counsel on the *Tadić* Defence team. Although not exactly on the same grounds, the motion for disqualification was nevertheless denied.<sup>78</sup>

#### Grounds H-J and M

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<sup>78</sup> See *Krajišnik* Withdrawal Decision.

55. Grounds H, I, J, and M relate to decisions taken by the Chamber. In this respect, I refer to my general observations on the distinction between an action attributable to me, personally, and those of the Chamber as a whole. Further, these Grounds allege an appearance of bias based on the adverse nature of these decisions as perceived by the Defence.

56. The Chamber is currently seised of requests for certification to appeal in relation to several of the mentioned decisions and I do not therefore consider it appropriate to address any portion of the Motion that refers to either a ground for certification to appeal or an issue it would wish to raise on appeal. I also note, however, that in relation to several of the decisions, no requests for certification to appeal or requests for reconsideration have been filed.

57. For the aforementioned reason, I limit myself to stating that I do not find that any of the decisions, individually or if considered as a whole, meet the standard articulated in *Karamera*, *Blagojević*, and *Ntahobali* for a finding of bias based on the outcome of a Chamber decision. I emphasize that this in no way is an indication of the Chamber's final determination on any pending requests for certification or pending decisions. I make this statement solely in relation to the standard articulated for bias, not in relation to the relative merits of any of the Defence submissions in relation to these decisions. Further, in relation to the standard for a finding of bias or the appearance of bias, in my view, the Defence, as the moving party, has not demonstrated, as required under the Tribunal's case law, that any of these decisions genuinely could be perceived as not relating to the application of law or the assessment of relevant facts, or that they evidence any predisposition against the Accused.

58. Specifically in Relation to Ground H, I first note that paragraphs 71-74 of the Motion refer repeatedly to the Chamber's decisions as my own. In this respect, I refer to my general observations in paragraphs 5 and 6 on this aspect of the Motion. In relation to paragraph 72, I simply draw your attention to the fact that this issue was specifically addressed with the Defence for the express purpose of alleviating any misunderstanding on its part as to how the Chamber staff works on pending issues.<sup>79</sup> It is unfortunate that the Defence, in its Motion, failed to include the full record on this matter, including its oral response at the time, "thank you for your clarification, your Honour",<sup>80</sup> and instead chose to utilize a selected portion of the record, out of context, in relation to its allegation that this could constitute a "reasonable perception" of bias on my behalf.

59. In relation to paragraph 73 of the Motion, I note that Rule 94 of the Rules specifically permits a Trial Chamber to take judicial notice of adjudicated facts *proprio motu*, after hearing from the parties. Given that the Chamber has not at this time taken judicial notice, *proprio motu*, of any adjudicated facts and merely requested to hear from the parties, I fail to see how an action taken in accordance with and pursuant to the Rules could give rise to an appearance of bias, either as to myself, or to the Chamber.

#### Ground L

60. I am a national of the Netherlands. I was elected as a judge of this Tribunal by the General Assembly of the United Nations. I am remunerated for my work for this Tribunal by the United Nations. In no way do I feel or consider that I have any identification or

<sup>79</sup> Transcript of 20 February 2012 Rule 65 *ter* meeting, T. 253-255.

<sup>80</sup> Transcript of 20 February 2012 Rule 65 *ter* meeting, T. 255.

partiality with the Netherlands, its Government, any of its officials, or any individual of Dutch nationality in the performance of my duties. What binds me is the solemn declaration that I made when I undertook to fulfil my duties “honourably, faithfully, impartially and conscientiously”.

61. In view of the above, and in line with the position the Bureau has expressed on nationality as a ground for disqualification,<sup>81</sup> it is not my intention to comment on the assessments and claims the Defence makes in paragraphs 94-96 of the Motion. Although I did analyse these submissions, relying on the press-clipping that the Defence attached in Annex G, I will only provide my comments to you, and am ready to do so, if you consider them relevant in addition to what I stated in the previous paragraph.

#### Ground N

62. The system for communicating with the parties in this case includes sending certain communications via e-mail. The Defence correctly points out that certain decisions have been communicated in this way, in particular minor procedural decisions in between status conferences (for example, decisions on requests for exceeding word limits and decisions on requests for leave to reply). All decisions communicated in this way have been put on the record, either orally in court or in a written decision. The court record is therefore complete and accurate. Moreover, the parties have always had the possibility of requesting certification to appeal or reconsideration of the Chamber’s decisions, within the deadlines as stipulated by the Rules.

63. The system for communicating with the parties was set out by the Chamber at the 6 October 2011 status conference,<sup>82</sup> and the parties were given the opportunity to respond. I emphasize that this system was adopted by the Chamber as a whole. The Defence did not at the time, nor has it to date, raised the concerns expressed in the Motion with the Chamber.

64. I fail to see how the system for communicating with the parties, as adopted by the Chamber, could give rise to an appearance of bias, either as to myself, or to the Chamber.

#### Ground O

65. I reiterate that, as set out in my general observations, Ground O refers to deadlines set by the Chamber that the Defence has attributed to me personally. However, I note that the Defence never raised the issue of not having received translations at the time when deadlines were announced, and further that the deadlines were set in relation to the filing of the proposed expert reports, which the Prosecution in this case has stated were previously disclosed to the Defence. I draw your attention to this aspect because Rule 94 *bis* (B) of the Rules requires the Defence to file its Notice within 30 days of *disclosure* of the expert report or statement. In setting the deadline to the date of filing, rather than to the date of disclosure, the Chamber in fact provided the Defence with additional time. Further, the Defence never submitted that translations of reports were not disclosed. Additionally, the Defence has not mentioned this particular allegation in any of its Notices of Objection. Finally, I note that Rule 94 *bis* does not require the formal filing of any proposed expert report, and not all reports or statements are in fact tendered at trial. In this

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<sup>81</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003, paras 3-4.

<sup>82</sup> T. 75, 84-85.

regard, the Chamber would not normally be aware of the specifics of disclosure to the Defence, for example whether a translation was also disclosed. It is therefore incumbent upon the Defence to raise any disclosure related issue with the Chamber. Absent the Defence identifying such problems to it, the Chamber's lack of knowledge in relation to such issues cannot be seen as constituting an appearance of bias.

66. In relation to paragraph 109, the Motion purports to evidence my "minimizing" the issue of the lack of disclosure of B/C/S material. However, the entirety of the proffered transcript relates, not to disclosure, but to a discussion regarding a request for access to confidential materials from completed cases.<sup>83</sup> In this respect, and as has been noted above, the Motion, rather than providing a complete record of the exchange which took place, contains out of context and selective portions of the record. The Motion cites to transcript pages 336 to 337. I reproduce here the relevant context, beginning at transcript page 335 and continuing until the first line of the portion cited in the Motion:<sup>84</sup>

JUDGE ORIE: Okay. Then the next one, access motion. Motion seeking access to confidential materials in 32 closed cases. One of the items you are seeking is all audio recordings of all closed and private sessions. The Registry has raised, informally, with the Chamber, but I hereby put it on the record, practical concerns with – in relation to the time and the resources needed to provide this audio material as requested, and therefore I would like to invite you to clarify a few matters, Mr. Lukić. First, are you seeking B/C/S audio or also the audio of translations, English, French?

MR. LUKIĆ: Not French, definitely. Whatever we have in writing in English we don't need audio.

JUDGE ORIE: What you have in writing in what language?

MR. LUKIĆ: In English.

JUDGE ORIE: So –

MR. LUKIĆ: Probably we have – we'll be able to get transcripts in English.

JUDGE ORIE: Yes. I take it that you'll get transcripts in English.

67. In light of the full context of the record, it is apparent that this discussion does not relate at all to disclosure, nor does it relate to Rule 66 (A) (ii) of the Rules, as alleged in the Motion. Further, the access request at issue has not yet been decided upon. Finally, I note that, contrary to the Motion's allegation of 'minimizing' the Defence request, the Chamber was in fact seeking clarification on the Defence request. The Defence had requested access to audio without any further specification. In view of the Registry concerns, it was only reasonable to verify whether the Defence would need all audio, or whether providing the B/C/S audio would satisfy the request. It therefore becomes obvious to me that this part of Ground O cannot be considered to constitute any reasonable basis for an appearance of bias.

68. Similarly, in relation to the Motion's citation to an exchange from the 19 April 2012 Rule 65 *ter* meeting, this portion of the cited transcript is out of context and misleading as to my intentions and the purpose of the quoted text. As above, I set out the transcript immediately preceding that quoted in the Motion.<sup>85</sup>

<sup>83</sup> See Mladić Motion for Access to Completed Cases, 1 March 2012.

<sup>84</sup> Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 335-336.

<sup>85</sup> Transcript of 19 April 2012 Rule 65 *ter* meeting, T. 385.

JUDGE ORIE: [...] Now, the Chamber understands that any disclosure – I should say, perhaps, any additional disclosure – that means disclosure still remaining after all the batches of disclosure – that any disclosure, whether we are talking about 66 (A) or 68 or whatever, which is related to these witnesses will be completed by the 27th of April. And if there are any problems in this regard, the Chamber would like to know that immediately, without delay. And if it is already – if already any disclosure item is identified which is problematic, I do understand that it's – some BCS translation are, that's the 48 documents – do you think – the dead-line more or less was 27th of April – that this will be resolved in the next nine days, eight days? Eight days.

MR. GROOME: Your Honour, can I suggest that – we have prioritized it with CLSS, but it would be – prior to the Pre-Trial Conference we will actually speak to them. They now have it, they've had – they'll have an opportunity to look at it. And we'll provide the information that they'll provide us about when they'll do it.

JUDGE ORIE: Ok.

MR. GROOME: And, again, within that we will prioritize it so that it's prioritized in the order of the witnesses we will call.

69. In light of the full record, it is apparent that the context of this discussion has been misconstrued in the Motion. Contrary to showing a desire to “minimize” the Defence concerns, I engaged the Prosecution to ensure that it would fulfil its obligations by the deadline and keep the Chamber informed should any problems arise. Therefore, I believe it is clear that there cannot be any appearance of bias, nor do I find that this exchange evidences in any way that I am a threat to the integrity of the proceedings, as alleged in the Motion.

#### Ground P

70. Under Ground P, the Defence addresses a request by the Chamber to the Prosecution (communicated to the parties by e-mail) to make submissions on why a number of witnesses were presented as Rule 92 *ter* witnesses, as opposed to Rule 92 *bis* witnesses. The Defence argues that this “could be reasonably perceived as the Chamber, without having heard any submission or evidence, suggesting that certain witnesses be presented without the ability of the Defence to cross-examine the same, and that the Chamber was only interested in the position of the Prosecution”.<sup>86</sup> The Defence here correctly acknowledges that the request was made by the Chamber, and not by me as a single Judge. This, in itself, makes it difficult for me to understand how it can demonstrate bias or impropriety on my part.

71. The request by the Chamber read:

Many of the following witnesses' testimony concerns “crime-base” evidence. The Chamber requests that the Prosecution make submissions on the reasons why the following are proposed as Rule 92 *ter* witnesses as opposed to Rule 92 *bis* witnesses: RM507, RM506, RM053, RM051, RM070, RM063, RM013, RM050, RM048, RM032, RM018, RM056, RM045, RM037, RM079, RM069, RM169, RM162, RM151, RM144, RM129, RM167, RM215, RM249, RM313, and RM253.

72. The request was one of three specific requests and they were all made pursuant to Rule 73 *bis* (C) which states that “the Trial Chamber, *after having heard the Prosecutor*, shall determine (i) the number of witnesses the Prosecutor may call; and (ii) the time

<sup>86</sup> Motion, para. 112.



available to the Prosecutor for presenting evidence.” Even though the Rule does not require it, the Defence was heard on this matter.<sup>87</sup> Further, during the Rule 65 *ter* meeting of 26 March 2012, I emphasized that no decision had been taken by the Chamber as to whether specific witnesses would be accepted as Rule 92 *bis* or *ter* witnesses.<sup>88</sup>

73. At the 29 March 2012 status conference, I stated:<sup>89</sup>

Perhaps I should add one word. To the extent you have – you may have understood the questions by the Chamber, Mr. Groome, as questions steering matters in a way, that’s not what the Chamber tried to do [...] The Chamber, of course, is not telling any of the parties how it should present its case, although, of course, it is still supervising the presentation of evidence in a general sense under the Rules.

74. In addition, the final decision by the Chamber pursuant to Rule 73 *bis* (C) did not include any instruction to the Prosecution to change the mode of testimony for any witnesses from Rule 92 *ter* to Rule 92 *bis* or any reduction of the time requested by the Prosecution for its presentation of evidence.<sup>90</sup>

75. Based on the above considerations, it is not clear to me how the above would indicate any bias on my part, nor is it clear to me how any appearance of impropriety could attach to a request for submissions mandated by the Rules.

#### Ground Q

76. Under this Ground, the Defence argues that the Prosecution’s expression of preference, on two occasions, “for the manner of judicial management and ruling” by me in another case “can be reasonably perceived as the appearance of bias”. First, it is not clear to me how the Prosecution’s preference for a certain judicial management style that a Chamber, presided over by me, adopted in another case creates an appearance of bias on my part. Nor do I believe that the exchanges referred to in the Motion evidences any such appearance of bias. In particular, I draw your attention to the fact that I addressed this matter with the Prosecution as soon as it arose at the 3 May 2012 Pre-Trial Conference. In sum, I believe that my statement in court speaks for itself.<sup>91</sup>

JUDGE ORIE: Mr. Groome, I’m going to interrupt you here, the Guidelines, the Guidance, comes from the Chamber and what happened in another case was decided by that Chamber. Therefore, I think that – but let me consider that further with my colleagues in a second – I think it’s inappropriate to address individual judges on this kind of matters. But before I take this position as a firm position of this Chamber, I would have to consult with my colleagues. It underlines how much I am aware that I’m functioning in a collegial system.

[Pre-trial Chamber confers]

<sup>87</sup> Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 277; T. 241.

<sup>88</sup> Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 276-278.

<sup>89</sup> T. 242.

<sup>90</sup> T. 313-315.

<sup>91</sup> T. 384-385. After conferring with my colleagues, I ended by stating, “Mr. Groome, the Chamber has no problem whatsoever if you refer to practices which were – which you have seen in other cases, but that should be irrespective of whether judges in those cases are sitting in this case or not, let alone that you personally address Judges for that purpose”. T. 385.

#### **IV. Conclusion**

77. Based on my understanding of paragraphs 20 and 23 of the Motion, and the Defence's underlining of certain text therein, it does not appear that the Defence argues any actual bias on my part. As the Defence is not explicit, and the language used is sometimes ambiguous on this point, I first want to state that I reject any allegation of actual bias. Further, I was unable to identify any argument or evidence which would support such a conclusion. To the extent the Defence argues that my involvement in the decisions the Chamber will make would lead to the promotion of a cause in which I am involved, whether or not together with one of the parties,<sup>92</sup> I similarly conclude that such a ground for my disqualification is without merit.

78. In my report on the various grounds for disqualification, I dealt in detail with the factual and legal arguments raised. I conclude that none of these grounds justify a finding that the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias on my part. The same reasons which led me to this conclusion, as set out in this report, and to the extent relevant in this context, also support my position in respect of any allegation of actual bias or the promotion of a cause in which I would be involved.

79. I leave it in your hands whether or not to make this report public. The Motion was publicly filed. I have no objection to this report being made public as well.

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<sup>92</sup> The underlining under Rule 15 B (i) in the text of paragraph 22 is ambiguous and may raise questions about the interpretation of the decisions that the Defence quotes.