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UNITED NATIONS

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

Case No.: IT-03-67-AR15bis

Date: 6 June 2014

Original: English

IN THE APPEALS CHAMBER

Before: **Judge William H. Sekule, Presiding**
Judge Christoph Flügge
Judge Arlette Ramaroson
Judge Khalida Rachid Khan
Judge Koffi Kumelio A. Afanđe

Registrar: **Mr. John Hocking**

Decision: **6 June 2014**

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON APPEAL AGAINST DECISION ON CONTINUATION OF PROCEEDINGS

The Office of the Prosecutor:

Mr. Mathias Marcussen

The Accused:

Mr. Vojislav Šešelj

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1. The Appeals Chamber 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 ("Appeals Chamber" and "Tribunal", respectively) is seised of the "Appeal of Professor Vojislav Šešelj Against the Decision of Trial Chamber III on Continuation of Proceedings Dated 13 December 2013", filed on 30 December 2013 ("Motion") by Vojislav Šešelj ("Šešelj"), in which he submits that the Trial Chamber erred in its "Decision on Continuation of Proceedings", filed on 13 December 2013 ("Impugned Decision").

I. BACKGROUND

2. The initial indictment in this case was confirmed on 14 February 2003.[1] On 24 February 2003, Šešelj voluntarily surrendered himself to the Tribunal.[2]

3. Šešelj is charged with persecution, deportation, and other inhumane acts as crimes against humanity, as well as with murder, torture, cruel treatment, wanton destruction of villages or devastation not justified by military necessity, destruction or wilful damage done to institutions dedicated to religion or education, and plunder of public or private property as violations of the laws or customs of war.[3]

4. The Prosecution commenced its case against Šešelj on 7 November 2007,[4] and closed its case in December 2010.[5] Šešelj did not present a defence case.[6] Over 175 trial days, the Trial Chamber received the evidence of 99 witnesses and admitted 1,399 exhibits into evidence.[7]

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[1] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-I, Confirmation of Indictment and Order for the Warrant for Arrest and Surrender, 14 February 2003, p. 2.

[2] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-I, *Ordonnance du Président Relative à l'Attribution d'une Affaire à une Chambre de Première Instance*, 25 February 2003, p. 2.

[3] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Third Amended Indictment, pp. 7, 10-11, 13-14. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision Regarding Third Amended Indictment, 9 January 2008 (English translation filed on 15 January 2008), p. 4; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Rule 98*bis* Decision, T. 4 May 2011 pp. 16832-16833. Unless otherwise indicated, all citations in the present Decision are to the English version of the relevant document or transcript page.

[4] *See* Impugned Decision, para. 3. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No.2) on Assignment of Counsel, 8 December 2006, para. 29 ("nullif[ying] the opening of the proceeding in this case and order[ing] that the trial restart [...] [when Šešelj] is fully able to participate in the proceedings as a self-represented accused").

[5] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Rule 98*bis* Decision, T. 4 May 2011 p. 16827. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T. 7 July 2010 pp. 16364-16365.

[6] *See, e.g., Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Scheduling Order (Final Briefs, Prosecution and Defence Closing Arguments), 31 October 2011 (English translation filed on 22 November 2011), p. 3.

[7] *See* Emails from Registry Court Officer to Appeals Chamber Associate Legal Officer, 11 April 2014, 15 April 2014 and 24 April 2014. Ten witnesses were called by the Trial Chamber, and the remaining witness testimony was adduced by the Prosecution. The Prosecution tendered 1,367 exhibits that were admitted into evidence, Šešelj adduced 6 exhibits, and there are 26 Chamber exhibits.

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5. The Trial Chamber heard closing arguments from 5 March through 20 March 2012.[8] On 12 April 2013, the Trial Chamber scheduled the pronouncement of its Judgement for 30 October 2013.[9]

6. On 30 May 2013, the Appeals Chamber rendered its third judgement concerning contempt proceedings against Šešelj. He has been convicted of three counts of contempt of the Tribunal, for which he has been sentenced to a total of four years and nine months' imprisonment.[10]

7. On 1 July 2013, Šešelj filed a motion for the disqualification of Judge Harhoff ("Disqualification Motion") based on an email written by Judge Harhoff on 6 June 2013, and published shortly afterwards.[11]

8. On 28 August 2013, the Chamber seised of the Disqualification Motion found, Judge Liu dissenting, that a reasonable observer properly informed would reasonably apprehend bias with respect to Judge Harhoff.[12]

9. On 3 September 2013, Judge Agius, in his capacity as Acting President, stayed the assignment of another Judge to replace Judge Harhoff, pending a report from the remaining Judges of the Trial Chamber concerning whether to rehear the case or continue the proceedings with a substitute Judge.[13] The following day, Judge Agius partially stayed the execution of this order pending resolution of a motion for reconsideration and a request for clarification, but confirmed the order staying the assignment of another Judge to sit in place of Judge Harhoff.[14]

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[8] *See, e.g., Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Closing Arguments, T. 5 March 2012 p. 17114, T. 6 March 2012 p. 17180, T. 7 March 2012 pp. 17269-17270, T. 14 March 2012 p. 17329, T. 15 March 2012 p. 17401, T. 20 March 2012 pp. 17466-17467, 17540.

[9] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Scheduling Order, 12 April 2013 (English translation filed on 15 April 2013), p. 1.

[10] *See In the Case of Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Judgement, 19 May 2010 (public redacted version), paras 5, 42 (affirming his sentence of 15 months' imprisonment); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3-A, Judgement, 28 November 2012, paras 8, 23-24, 34 (affirming his sentence of 18 months' imprisonment, and finding that this sentence was served after – and not concurrent with – his prior sentence of 15 months' imprisonment); *Contempt Proceedings Against Vojislav Šešelj*, Case No. IT-03-67-R77.4-A, Public Redacted Version of "Judgement" Issued on 30 May 2013, 30 May 2013, paras 21, 54 (affirming his sentence of two years' imprisonment).

[11] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Professor Vojislav Šešelj's Motion for Disqualification of Judge Frederik Harhoff, 1 July 2013 (English translation filed on 9 July 2013), paras 1, 3, 6, 9-10, 58. *See generally Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, *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*, 4 September 2013, Annex B (Internal Memorandum from Judge Harhoff to Judge Antonetti, 8 July 2013).

[12] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013, paras 14-15.

[13] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Following Decision of the Panel to Disqualify Judge Frederik Harhoff, 3 September 2013 ("Order of 3 September 2013"), p. 2.

[14] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Partially Staying Execution of "Order Following Decision of the Panel to Disqualify Judge Frederik Harhoff", 4 September 2013, p. 1. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order on Prosecution Motion for Reconsideration and Request for Stay, 6 September 2013, p. 2

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10. On 17 September 2013, Judge Antonetti, in his capacity as Presiding Judge of the Trial Chamber, rescinded the order scheduling the pronouncement of the Judgement.[15]

11. On 7 October 2013, the Chamber seised of the Disqualification Motion denied the requests for clarification and denied, Judge Liu dissenting, the motion for reconsideration.[16]

12. On 31 October 2013, Judge Agius assigned, pursuant to Rule 15(B)(ii) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), Judge Niang to the Bench seised of the *Šešelj* case.[17]

13. On 13 November 2013, the Trial Chamber invited Šešelj and the Prosecution to make submissions on the continuation of the proceedings.[18] Šešelj submitted that it would be unfair to continue the proceedings, and that the only adequate solution would be to suspend the proceedings and release him. He also sought financial compensation of 12 million euros.[19] The Prosecution submitted that the interests of justice require a determination on the merits of the case within a reasonable time, and that the trial should continue at the deliberation stage as soon as Judge Niang certifies his familiarity with the record. The Prosecution also requested that the Parties be granted 14 days to file any appeal from the Trial Chamber's order on the continuation of proceedings.[20]

14. On 13 December 2013, the Trial Chamber rendered the Impugned Decision,[21] ordering the continuation of proceedings from the close of hearings as soon as Judge Niang finishes familiarising himself with the record and informs the Trial Chamber.[22] The translations of the

(reconvening the Chamber seised of the Disqualification Motion for the purposes of considering the motion for reconsideration); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Response to Request for Urgent Clarification to the Panel and the Vice President, 10 September 2013 (responding to one of the requests for clarification).

[15] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order to Rescind Scheduling Order of 12 April 2013, 17 September 2013 (English translation filed on 20 September 2013), pp. 1-2.

[16] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin, 7 October 2013, para. 22 (denying as well a motion on behalf of Mićo Stanišić and Stojan Župljanin seeking leave to make submissions). Judge Moloto appended a separate opinion to this Decision.

[17] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Assigning a Judge Pursuant to Rule 15, 31 October 2013 ("Order of 31 October 2013"), p. 2.

[18] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision Inviting the Parties to Make Submissions on Continuation of Proceedings, 13 November 2013 (English translation filed on 18 November 2013) ("Decision of 13 November 2013"), p. 3. Judge Antonetti appended a concurring opinion to this Decision.

[19] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Opinion Concerning the Decision of Trial Chamber III on Continuation of Proceedings, 20 November 2013 (English translation filed on 27 November 2013) ("Šešelj Submission of 20 November 2013"), p. 16.

[20] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution Submission on Continuation of Proceedings, 29 November 2013 ("Prosecution Submission of 29 November 2013"), paras 1-2, 10.

[21] Impugned Decision (rendered in French on 13 December 2013, and filed in English and BCS on 23 December 2013). Judge Antonetti and Judge Niang each appended a separate opinion to this Decision.

[22] Impugned Decision, p. 22.

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Impugned Decision were filed on 23 December 2013, and Šešelj received the Impugned Decision on that day.[23]

15. On 30 December 2013, Šešelj filed the Motion.[24] The Prosecution responded on 20 January 2014,[25] to which Šešelj replied on 31 January 2014.[26] The case was assigned to the present Bench on 13 February 2014.[27]

II. PRELIMINARY MATTERS

16. As a threshold matter, the Appeals Chamber notes that the Trial Chamber was reconstituted following Judge Niang's appointment to the Bench pursuant to Rule 15(B)(ii) of the Rules, and not pursuant to Rule 15*bis* of the Rules.[28] The Appeals Chamber also observes that the Trial Chamber acted pursuant to Rule 54 of the Rules, instead of pursuant to Rule 15*bis* of the Rules, when it rendered the Impugned Decision.[29] In this regard, the remaining two Judges of the Trial Chamber have indicated their view that "all the questions tied to the disqualification are found solely" in Rule 15, rather than in Rule 15*bis*.[30]

17. Rule 15*bis* of the Rules provides, in part, that:

> (C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of all the accused, except as provided for in paragraphs (D) and (G).
>
> (D) If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised

[23] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, *Procès-Verbal*, dated 23 December 2013 (filed on 3 January 2014) ("*Procès-Verbal* of 23 December 2013") (indicating that Šešelj received the English and BCS translations of the Impugned Decision on 23 December 2013).
[24] Motion (received in BCS on 30 December 2013, and filed in English and BCS on 10 January 2014).
[25] Response to Appeal Against Decision on Continuation of the Proceedings, 20 January 2014 ("Response").
[26] Reply to Prosecution's Response to Appeal Against Decision on Continuation of the Proceedings, 31 January 2014 (filed in English on 6 February 2014) ("Reply").
[27] Order Assigning Judges to a Case Before the Appeals Chamber, 13 February 2014, p. 1. *See also* Order Assigning a Motion to a Judge, 13 January 2014, p. 1.
[28] Order of 31 October 2013, p. 2.
[29] Impugned Decision, para. 2 *and* p. 22. The Trial Chamber also acted pursuant to Rule 54 of the Rules when it invited submissions from the Parties. *See* Decision of 13 November 2013, p. 3.
[30] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Internal Memorandum from Judge Antonetti and Judge Lattanzi to Judge Agius, 3 September 2013 (filed publicly on 4 September 2013). *See also* Order of 3 September 2013, pp. 1-2.

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himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.

18. Unlike Rule 15*bis*(D), Rules 15 and 54 of the Rules do not provide for an automatic right of appeal. As observed above, the Trial Chamber rendered the Impugned Decision pursuant to Rule 54 of the Rules. As a general matter, if any party wishes to challenge such a decision before the Appeals Chamber, it must receive certification to do so from the Trial Chamber, in accordance with Rule 73(B) of the Rules. In the present case, Šešelj did not seek certification to appeal the Impugned Decision.[31]

19. The Appeals Chamber notes that the Prosecution has not challenged the filing of the Motion before the Appeals Chamber.[32] To the contrary, the Prosecution had asked the Trial Chamber, prior to the rendering of the Impugned Decision, to "grant the Parties 14 days to file any appeal from [the Impugned Decision]".[33] Šešelj filed his appeal seven days after receiving the translations of the Impugned Decision.[34]

20. The Appeals Chamber notes the unprecedented nature of the current situation, as well as the fact that the Rules do not explicitly regulate whether proceedings may be continued with a substitute Judge following the disqualification of a Judge at a more advanced stage, namely the deliberations stage. The Appeals Chamber observes that the guarantees provided for in Rules 15*bis*(C) and 15*bis*(D) of the Rules have been consistently applied or referred to in the present situation.[35] The Appeals Chamber considers that these Rules are designed to ensure that an accused's right to a fair trial is sufficiently safeguarded, and that the fair trial guarantees provided for in these Rules apply *mutatis mutandis* to the present situation. Under Rule 15*bis*(D) of the Rules, when a decision is taken to continue the proceedings with a substitute Judge even though the

[31] The Appeals Chamber notes that Šešelj offers no compelling explanation of the basis for his motion before the Appeals Chamber. *See* Motion, para. 2 (making the undeveloped submission that "[t]he grounds for appeal derive from Article 25 of the ICTY Statute"). The Appeals Chamber recalls that Article 25 of the Statute "specifically guarantees the right of appeal to 'persons convicted by the Trial Chambers', in other words, *against their judgement and sentence*". *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 14 (emphasis added).

[32] *See, e.g.*, Response, para. 5 (stating that the Impugned Decision should "be upheld").

[33] Prosecution Submission of 29 November 2013, para. 10. The Appeals Chamber notes that the Impugned Decision did not address this request.

[34] *See supra*, paras 14-15.

[35] *See* Order of 3 September 2013, p. 2 (stating that "the interests of fairness and transparency" warrant the application of Rules 15*bis*(C) and 15*bis*(D) of the Rules *mutatis mutandis* to the present case); Order of 31 October 2013, p. 2 (same); Decision of 13 November 2013, p. 3 (providing Šešelj with an opportunity to withhold his consent to the continuation of proceedings); Impugned Decision, Separate Opinion of Judge Mandiaye Niang, paras 7-10, 12-14 (emphasizing that the two remaining Judges of the Trial Chamber were unanimous that the proceedings should be continued in the interests of justice); Impugned Decision, para. 51 *and* p. 22 (indicating that the newly appointed Judge must first become familiar with the proceedings and declare his familiarity with the record, before the proceedings continue); Motion, para. 5 (disputing the general applicability of Rule 15*bis* of the Rules, but in an appeal filed directly before the Appeals Chamber as would have been provided for in Rule 15*bis*(D) of the Rules); Response, paras 3, 11 (referring twice to the Impugned Decision as comporting with "the object and purpose of Rule 15*bis* of the Rules").

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accused has withheld his consent, such a decision "is subject to appeal directly to a full bench of the Appeals Chamber by either party".

21. Therefore, for the purposes of the admissibility of the Appeal, and in light of the spirit of these Rules, the Appeals Chamber considers that the same protection as that provided for by Rule 15*bis*(D) of the Rules should apply in the present case. The Appeals Chamber further observes that the interests of neither Šešelj nor the Prosecution are prejudiced by the adjudication of this Appeal.

22. In these particular circumstances, the Appeals Chamber holds that the Impugned Decision is subject to appeal directly to a full bench of the Appeals Chamber.

23. Rule 15*bis*(F) of the Rules provides that such an appeal "shall be filed within seven days of filing of the impugned decision", and Rule 126(B) of the Rules indicates that "time shall begin to run as from the date of the distribution of the document". As noted above,[36] the Impugned Decision was distributed to Šešelj on 23 December 2013, and he filed his appeal seven days later on 30 December 2013. The Appeals Chamber therefore considers that Šešelj submitted his appeal within the prescribed time limits, and dismisses as moot Šešelj's request for an extension of the deadline.[37] The Appeals Chamber accepts the Motion as being properly before it.

24. The Appeals Chamber also notes that Šešelj questions "whether Judge Niang can take any part in the issuing" of the Impugned Decision, referring to Rule 15*bis*(D) of the Rules.[38] The Appeals Chamber observes no impropriety in Judge Niang's participation in rendering the Impugned Decision after his appointment to the Bench by the Acting President under Rule 15 of the Rules.[39] The Appeals Chamber further observes that the two remaining Judges were unanimous in agreeing to continue the proceedings, and therefore considers that Šešelj has not demonstrated any prejudice with regard to Judge Niang's participation in rendering the Impugned Decision.

25. Having addressed these preliminary matters, the Appeals Chamber will now turn to a consideration of the merits.

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[36] *See supra*, paras 14-15, 19.
[37] *See* Motion, para. 3.
[38] Motion, para. 31.
[39] *See* Order of 31 October 2013, p. 2. *See also* Impugned Decision, Separate Opinion of Judge Mandiaye Niang, paras 2-15.

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III. SUBMISSIONS OF THE PARTIES

A. Šešelj

26. Šešelj asks that the Appeals Chamber vacate the Impugned Decision, and either stay the proceedings and release him or, alternatively, restart the trial with the newly assigned Judge.[40]

27. He submits that the Impugned Decision lacks a legal basis, as the Rules do not "envisage that proceedings can be continued after the disqualification of one of the judges of a Trial Chamber and the appointment of another during the trial stage"[41] unless a reserve judge has been present throughout trial[42] or unless the accused provides his consent, which has not been the case here.[43] Šešelj contends that comparisons with other cases are unhelpful, as proceedings have never before been continued with a substitute Judge after the disqualification of an original member of the Bench, nor has this ever taken place at such an advanced stage of the proceedings.[44]

28. Šešelj argues that permitting the trial to continue would be contrary to the principles relating to "immediacy",[45] the adversarial process with participation by the Judges,[46] "the establishment of the material facts",[47] and the requirement that witnesses be heard *viva voce* with few exceptions.[48] He further emphasizes that Judge Niang did not take part in the trial "for a single day", and that it would be unprecedented for a Judgement to be rendered by a Judge "who has never once entered the courtroom during the trial, who has never seen the accused, and who has not seen any of the witnesses, experts or prosecution attorneys".[49]

29. Šešelj also maintains that the proceedings have been marred by violations of his fair trial rights,[50] and that he should have been given the opportunity to discuss the continuation of proceedings with the Trial Chamber at a status conference.[51]

30. In addition, Šešelj submits that because Judge Harhoff participated in every decision of the Trial Chamber, "all proceedings during the course of the trial are therefore invalid" and "the

[40] Motion, para. 54. *See also* Motion, paras 4, 13, 24, 33, 51; Reply, para. 21.
[41] Motion, para. 4. *See also* Motion, paras 5, 7, 35, 42.
[42] Motion, para. 5.
[43] Motion, paras 42, 49, 51. *See also* Motion, para. 21.
[44] Motion, paras 16, 21-25, 32, 40, 49; Reply, para. 9.
[45] Motion, para. 8 (explaining that "[i]n other words, it is not possible for a judge who was not present during the presentation of evidence or the hearing of witnesses to subject that evidence or witness testimony to personal critical assessment"); Reply, paras 5, 7.
[46] Motion, para. 9. *See also* Motion, paras 33, 50; Reply, paras 7-8.
[47] Motion, para. 10 (elaborating that "[t]he principle of establishment of the material facts requires that the judge arrives at the facts freely and without being bound by rules on the presentation of evidence").
[48] Motion, paras 11-12, 15. *See also* Motion, paras 33, 46-47; Reply, para. 7.
[49] Motion, para. 12. *See also* Motion, paras 31-32, 35; Reply, paras 5, 7.
[50] Motion, paras 19, 36, 40-41, 49, 51. *See also* Motion, paras 27, 29; Reply, paras 3, 8, 12-13, 15-18.

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subsequent assignment of a substitute judge cannot revalidate the trial or remove the influence of [a biased] judge on the whole course of the trial".[52]

31. Finally, Šešelj claims that his right to a fair and expeditious trial has already been violated, and that it would be unjust for his detention to be prolonged indefinitely while Judge Niang familiarises himself with the record.[53] In this regard, Šešelj underscores that "Judge Niang cannot physically review the record in a period of six months or even a much longer period".[54]

B. Prosecution

32. The Prosecution responds that Šešelj has failed to demonstrate any error in the Impugned Decision and that his appeal should be dismissed.[55] In particular, the Prosecution submits that the Trial Chamber did not abuse its discretion in rendering the Impugned Decision,[56] and that "[j]ustice requires a judgement on the merits of this case in a fair and expeditious manner".[57]

33. The Prosecution maintains that the Trial Chamber acted appropriately in deciding to continue the proceedings in the most expeditious manner possible,[58] that prior cases demonstrate the possibility of doing so,[59] and that due consideration was given to Šešelj's fair trial rights and to the interests of justice.[60] The Prosecution disputes Šešelj's challenges to the conduct of the proceedings, and submits that Šešelj's rights have not been infringed by the length of his detention or trial.[61] As a result, the Prosecution submits that Šešelj has not shown that the Trial Chamber erred in exercising its discretion.[62]

IV. STANDARD OF REVIEW

34. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in relation to the management of the proceedings before them.[63] In order to successfully challenge a discretionary

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[51] Motion, para. 26. *See also* Motion, paras 23-24, 27-28, 38-39.
[52] Motion, para. 6. *See also* Motion, paras 5, 34; Reply, para. 10.
[53] Motion, paras 18-19, 35-37, 50, 52; Reply, paras 2, 4, 19. *See also* Motion, paras 20-21, 28, 30, 40, 53; Reply, paras 5, 8, 11, 13-16.
[54] Motion, para. 50. *See also* Motion, paras 19, 35; Reply, para. 7.
[55] Response, paras 1, 5, 42. In the alternative, the Prosecution submits that if a new trial is ordered, the case would have to be referred to the President to assign the new Judges. Response, paras 41-42.
[56] Response, paras 6-40.
[57] Response, para. 1.
[58] Response, paras 2-4, 6-9.
[59] Response, paras 3, 11, 13.
[60] Response, paras 3-4, 8-9. *See also* Response, paras 35-38.
[61] Response, paras 4, 8, 14-34.
[62] Response, paras 6-10, 42.
[63] *See, e.g.*, *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.3, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, 22 October 2013 (confidential) ("*Mladić* Decision of 22 October 2013"), para. 11; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgement, 4 December 2012 ("*Lukić and Lukić* Appeal Judgement"), para. 17.

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decision, a party must demonstrate that the trial chamber has committed a discernible error.[64] The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[65] The Appeals Chamber will also consider whether the trial chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[66]

V. DISCUSSION

A. Applicable Law

35. In this regard, the Appeals Chamber recalls that a decision to continue the proceedings with a substitute Judge is a discretionary decision to which the Appeals Chamber owes deference:

> The discretion of the Trial Chamber meant that the Trial Chamber had the right to establish the precise point within a margin of appreciation at which a continuation [of the proceedings] should be ordered. In that decision-making process, the Appeals Chamber can intervene only in limited circumstances, as, for example, where it is of the view that there was a failure to exercise the discretion, or that the Trial Chamber failed to take into account a material consideration or took into account an immaterial one and that the substance of its decision has in consequence been affected. It is not enough that the Appeals Chamber would have exercised the discretion differently. However, even if a trial court has not otherwise erred, the appellate "court must, if necessary, examine anew the relevant facts and circumstances to exercise a discretion by way of review if it thinks that the [Judges'] ruling may have resulted in injustice to the [appellant]".[67]

36. In reaching its decision, the Trial Chamber must determine whether, taking all the circumstances into account, the continuation of proceedings would serve the interests of justice.[68] The parties "bear no burden of proving that continuing or not continuing the proceedings would

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[64] *See, e.g.*, *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013 ("*Karadžić* Decision of 13 November 2013"), para. 29; *Mladić* Decision of 22 October 2013, para. 11; *Lukić and Lukić* Appeal Decision, para. 17.

[65] *See, e.g.*, *Karadžić* Decision of 13 November 2013, para. 29; *Mladić* Decision of 22 October 2013, para. 11; *Lukić and Lukić* Appeal Judgement, para. 17.

[66] *See, e.g.*, *Mladić* Decision of 22 October 2013, para. 11; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.10, Decision on Appeal from Decision on Duration of Defence Case, 29 January 2013, para. 7; *Lukić and Lukić* Appeal Judgement, para. 17.

[67] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A15*bis*, Decision in the Matter of Proceedings under Rule 15*bis*(D), 24 September 2003 ("*Nyiramasuhuko et al.* Decision of 24 September 2003"), para. 23. *See also The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR15*bis*.3, Decision on Appeals Pursuant to Rule 15*bis* (D), 20 April 2007 ("*Karemera et al.* Decision of 20 April 2007"), para. 19.

[68] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR15*bis*.2, Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 22 October 2004 ("*Karemera et al.* Reasons filed on 22 October 2004"), paras 52, 54. Judge Shahabuddeen and Judge Schomburg each provided a declaration in relation to this matter. *See Karemera et al.* Reasons filed on 22 October 2004, Declaration of Judge Shahabuddeen ("*Karemera et al.* Declaration of 22 October 2004"); *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR15*bis*.2, Declaration of Judge Schomburg in Relation to Reasons for Decision of Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, dated 23 October 2004 ("*Karemera et al.* Declaration dated 23 October 2004").

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better serve the interests of justice",[69] and accordingly taking into account whether a party has discharged this burden would be an immaterial consideration constituting an error.[70] Other errors previously identified by the Appeals Chamber include requiring the substitute Judge to evaluate whether the record itself – including the availability of video- or audio-recording – is compatible with the requirements of a fair trial.[71]

37. The Appeals Chamber further recalls that:

> There is a preference for live testimony to be heard by each and every judge. But that does not represent an unbending requirement. The Rules and the cases show that exceptions can be made. The exceptions may relate even to evidence involving an assessment of demeanour, various ways being available to assist a new judge to overcome any disadvantages.[72]

In light of the discretion inherent in a decision to continue proceedings with a substitute Judge, the Appeals Chamber has "not consider[ed] it useful to lay down a hard and fast relationship between the proportion of witnesses who have already testified and the exercise of the power to order a continuation of the trial with a substitute judge", as "[t]he stage reached in each case need not always be the same".[73]

B. Continuation of Proceedings

38. The Parties dispute the extent to which prior cases are applicable to the present situation. Šešelj remarks that proceedings have never before been continued with a substitute Judge during the stage when the Judges deliberate and render judgement.[74] The Prosecution states that continuing proceedings, from the point when a Judge stopped participating, is consistent with prior practice and with the object and purpose of Rule 15*bis* of the Rules.[75]

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[69] *Karemera et al.* Reasons filed on 22 October 2004, paras 52, 54.
[70] *Karemera et al.* Reasons filed on 22 October 2004, paras 52, 54.
[71] *Karemera et al.* Reasons filed on 22 October 2004, para. 58 ("[T]he remaining Judges erred in considering that the substitute Judge should evaluate the 'compatibility' of fair trial requirements with the fact that he or she is to acquaint himself or herself with the testimonies from the transcript and audio-recordings. This observation is incorrect because [...] the substitute Judge is to 'familiarise' himself or herself with 'the record' of the proceedings, whatever that record may contain. In any event, this is done *after* the [decision] to continue the trial with a substitute Judge. Therefore, any evaluation of the record by the substitute Judge could have no effect on the decision to continue the trial."). The Appeals Chamber observes that this standard is not clearly reflected in the *Nyiramasuhuko et al.* case, in which it was considered that "the adequacy of the record of proceedings is a matter for the substitute judge to pass on" and that if the substitute Judge does not feel adequately acquainted with the proceedings, then he or she "will not give the required certificate". *Nyiramasuhuko et al.* Decision of 24 September 2003, para. 33. Given that this issue is not material to the resolution of the present Motion, the Appeals Chamber will not address it further. *See also Karemera et al.* Reasons filed on 22 October 2004, paras 59, 61 (finding "the fact that the testimonies were given in a language not understood by the Bench" to be an immaterial consideration that should not have been taken into account).
[72] *Karemera et al.* Decision of 20 April 2007, para. 42; *Nyiramasuhuko et al.* Decision of 24 September 2003, para. 25.
[73] *Nyiramasuhuko et al.* Decision of 24 September 2003, para. 27.
[74] *See, e.g.*, Motion, paras 25, 49.
[75] Response, para. 11. *See also* Response, para. 3.

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39. The Appeals Chamber recalls that, despite the lack of an accused's consent, both ICTY and ICTR trial chambers in the *Nyiramasuhuko et al.*,[76] *Slobodan Milošević*,[77] *Krajišnik*,[78] and *Karemera et al.* cases[79] have, at different stages of the proceedings, rendered decisions continuing the proceedings with a substitute Judge pursuant to Rule 15*bis* of the Rules. The Appeals Chamber observes, however, that the current situation is unprecedented in that the Impugned Decision was rendered at a more advanced stage than that of the above-mentioned cases.

40. The Appeals Chamber recalls that Article 20(1) of the Statute of the Tribunal provides in part that trial chambers "shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the [Rules], with full respect for the rights of the accused". As noted above,[80] Rules 15*bis*(C) and 15*bis*(D) of the Rules are designed to ensure that an accused's right to a fair trial is sufficiently safeguarded. The Appeals Chamber observes that Rule 15*bis*(D) of the Rules requires a determination of whether, taking all the circumstances into account, the continuation of proceedings with a substitute Judge would serve the interests of justice.

41. The Appeals Chamber therefore considers that neither the Statute nor the Rules prevented the Trial Chamber from exercising its discretion to determine, within the circumstances of the particular case before it, whether it would serve the interests of justice to continue the proceedings with a substitute Judge. The Appeals Chamber will now examine whether the Trial Chamber committed a discernible error in exercising its discretion.

42. In the Impugned Decision, the Trial Chamber stated that it would "ensure that it maintains a proper balance between the fundamental rights of the Accused, on the one hand, and the interest of

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[76] *See Nyiramasuhuko et al.* Decision of 24 September 2003, paras 2 ("Twenty-three prosecution witnesses had already testified [...]."), 3-4, 37.

[77] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Pursuant to Rule 15 *bis* (D), 29 March 2004 ("*Slobodan Milošević* Order of 29 March 2004"), p. 2. *See Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Notification of the Completion of Prosecution Case and Motion for the Admission of Evidence in Written Form, 25 February 2004, p. 4 (confirming that the Prosecution case was closed). Šešelj states that Milošević "did not object" to the continuation of proceedings, and therefore their two cases are not comparable. Motion, para. 16. The Appeals Chamber considers it clear that Milošević, like Šešelj, did not provide consent for the proceedings to continue with a substitute Judge. *See Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 25 March 2004 pp. 32078-32079 (Slobodan Milošević twice stated that he did not wish to "declar[e] [his] views", which the President expressly understood "as amounting to refusal to consent"). *See also Slobodan Milošević* Order of 29 March 2004, p. 2 (noting "that the Accused did not consent"); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Amici Curiae Observations Pursuant to Rule 15*bis*(C) for Hearing on 25 March 2004, dated 21 March 2004, para. 5.

[78] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision Pursuant to Rule 15 *bis* (D), 16 December 2004, para. 14 (stating that "just over one-third of Prosecution witnesses have been heard") *and* p. 7; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, T. 15 December 2004 pp. 9493, 9539.

[79] *See Karemera et al.* Decision of 20 April 2007, paras 3, 46; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of the Proceedings, 6 March 2007 ("*Karemera et al.* Trial Decision of 6 March 2007"), paras 1, 68, 71 (referring to 13 Prosecution witnesses who testified for more than 100 trial days); *Karemera et al.* Reasons filed on 22 October 2004, paras 3-4, 57 ("It appears that thirteen witnesses testified in the case thus far [...]."), 68-69 (deciding, by Majority, that the appearance of bias extended to the two remaining Judges through their acquiescence in continuing the trial with the Judge who later withdrew). *See also Karemera et al.* Declaration of 23 October 2004; *Karemera et al.* Declaration of 22 October 2004.

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justice on the other, while noting that the two are not mutually exclusive".[81] The Trial Chamber further underscored "the *sui generis* nature of the present situation caused by the replacement of a Judge of the Chamber two months before the rendering of the Judgement", and concluded that this does not constitute an obstacle to the continuation of proceedings.[82]

43. In reaching this conclusion, the Trial Chamber relied on three considerations. First, it stated that the substitute Judge must familiarise himself with the record before starting deliberations.[83] Second, the Trial Chamber noted that video recordings will allow the substitute Judge to assess witnesses' courtroom conduct and to evaluate their credibility.[84] Third, the Trial Chamber observed that if the substitute Judge wishes to question the witnesses on any matter, they could be recalled for further evidence.[85] In view of these considerations, and making express reference to "the interest of justice, and especially of a fair trial", the Trial Chamber deemed it necessary to resume proceedings from the close of hearings.[86]

44. The Appeals Chamber sees no error in this regard. At the outset, the Appeals Chamber recalls that the need for a substitute Judge to certify his or her familiarity with the record is among the "safeguards ensur[ing] that fair trial rights are not compromised".[87] Moreover, the Appeals Chamber has previously confirmed that proceedings could continue even in the absence of video-recordings of previous testimony for the substitute Judge to review.[88] In the present case, the Trial Chamber appropriately took into account that video recordings exist, and that they will permit the substitute Judge to evaluate the credibility of witnesses. With regard to the possibility of recalling witnesses, this too has been previously treated by the Appeals Chamber as being a material consideration to be taken into account.[89]

45. Šešelj has not demonstrated that the Trial Chamber erred in relying on these considerations, or that it took into account immaterial considerations. His mere disagreement with the outcome of the Impugned Decision is insufficient to show an abuse of discretion by the Trial Chamber.

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[80] *See supra*, para. 20.
[81] Impugned Decision, para. 16.
[82] Impugned Decision, paras 55, 61.
[83] *See* Impugned Decision, para. 51.
[84] *See* Impugned Decision, para. 53.
[85] *See* Impugned Decision, para. 54.
[86] Impugned Decision, para. 61.
[87] *Karemera et al.* Decision of 20 April 2007, para. 43. *See also Nyiramasuhuko et al.* Decision of 24 September 2003, para. 33.
[88] *See Nyiramasuhuko et al.* Decision of 24 September 2003, paras 29-35, 37-38.
[89] *See Nyiramasuhuko et al.* Decision of 24 September 2003, paras 34-35, 37-38.

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C. Alleged Unfairness of the Trial

46. Šešelj also contends that the remaining Judges erred in concluding that the trial should be continued despite circumstances which rendered the trial unfair. In his view, the violations of his rights have been so significant that the trial cannot be saved.[90]

47. The Trial Chamber considered these issues in the Impugned Decision, concluded that many of these allegations were moot as they had already been ruled upon, and rejected Šešelj's arguments that the trial to date had been unfair.[91]

48. The Appeals Chamber considers that Šešelj merely repeats on appeal arguments which the Trial Chamber already addressed, and that he fails to demonstrate any error by the Trial Chamber.

D. Alleged Requirement of Oral Submissions

49. Šešelj avers that the Trial Chamber erred in refusing to "discuss" this matter with him "at a status conference".[92] The Appeals Chamber understands this submission to challenge the Trial Chamber's decision to invite the Parties to make written, as opposed to oral, submissions.[93]

50. The Trial Chamber considered that the decision on how to consult with the Parties was a matter for its determination, and it found that Šešelj had been regularly consulted through his written submissions, which the Trial Chamber had invited.[94]

51. The Appeals Chamber recalls that the parties to a case have a right to be heard before a decision is made which can affect their rights.[95] While the ICTY has exhibited a preference for seeking submissions orally when assessing whether to continue proceedings with a substitute Judge,[96] the ICTR has tended to receive such submissions in writing.[97] The Appeals Chamber considers that it was within the Trial Chamber's discretion to seek submissions from the Parties in written form.

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[90] *See, e.g.*, Motion, paras 29, 36, 41, 51.
[91] *See* Impugned Decision, paras 8-9, 17-47, 60.
[92] Motion, para. 26. *See also* Motion, paras 23-24, 27-28.
[93] *See* Decision of 13 November 2013, p. 3. *See also* Šešelj Submission of 20 November 2013, para. 4.
[94] *See* Impugned Decision, paras 1, 7, 17, 57-59.
[95] *See, e.g.*, *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-A15*bis*, Decision in the Matter of Proceedings under Rule 15*bis*(D), 21 June 2004, para. 9.
[96] *See Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, T. 15 December 2004 pp. 9491-9542; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, T. 25 March 2004 pp. 32071-32079; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, T. 1 October 2002 pp. 8927-8930; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, T. 21 January 1999 pp. 17543-17553 (closed session).
[97] *See, e.g.*, *Karemera et al.* Trial Decision of 6 March 2007, paras 3-5; *The Prosecutor v. Édouard Karemera et al.*, Case No. 98-44-T, Decision on Continuation of Trial, 16 July 2004, pp. 2-4 (recalling, in part, that the written submissions had followed the Appeals Chamber's decision directing the remaining Judges to permit the Parties to make

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E. Alleged Impact of Judge Harhoff's Role in the Trial

52. Šešelj submits that Judge Harhoff's participation "in the issuing of all decisions of the Trial Chamber" has rendered the trial proceedings invalid.[98]

53. In considering this matter, the Trial Chamber first noted that Šešelj did not particularize which decisions were allegedly influenced by Judge Harhoff. The Trial Chamber then concluded that "there is nothing to indicate at this stage" that Judge Harhoff's presence during the trial violated Šešelj's right to a fair trial.[99]

54. The Appeals Chamber recalls that the right to be tried before an independent and impartial tribunal is an integral component of the right to a fair trial enshrined in Article 21 of the Statute. This fundamental guarantee is also reflected in Article 13 of the Statute, and is further reinforced by Rule 15(A) of the Rules, which 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."[100]

55. The continuation of proceedings with a substitute Judge, after the disqualification of an original member of the Bench due to an appearance of bias, represents a novel issue before the Appeals Chamber.[101] While the *Karemera et al.* case shared similar features at one point in time, ultimately all three Judges on the Bench were replaced owing to concerns over an appearance of bias.[102] The subsequent determination in that case to disregard a number of decisions, and to rehear all of the evidence,[103] therefore offers little guidance where only one Judge has been disqualified.

56. The Appeals Chamber recalls that in the *Hartmann* contempt case, two members of the Specially Appointed Chamber were replaced at the pre-trial phase due to direction given by the

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any relevant submissions); *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. 98-42-T, Decision in the Matter of Proceedings under Rule 15*bis*(D), 15 July 2003, pp. 2-7.

[98] Motion, para. 6. *See also* Motion, paras 5, 34.

[99] Impugned Decision, para. 48. *See also* Impugned Decision, paras 7, 17.

[100] *See, e.g., Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Judgement, 23 January 2014 ("*Šainović et al.* Appeal Judgement"), para. 179; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement"), para. 39; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement"), para. 37.

[101] *See Karemera et al.* Decision of 20 April 2007, para. 3 (one Judge withdrew from the trial for health reasons); *Nyiramasuhuko et al.* Decision of 24 September 2003, para. 2 (one Judge's term of office expired during trial proceedings after he was not re-elected by the General Assembly). *See also Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, T. 10 December 2004 pp. 9480-9481 (one Judge withdrew from the case because his term of office was set to expire before the judgement was likely to be rendered); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Appointing a New Presiding Judge for Trial Chamber III, 26 February 2004, p. 2 (indicating that the Presiding Judge would resign for reasons related to his health). The Appeals Chamber observes that, in the *Krajišnik* and *Slobodan Milošević* cases, there was no appeal of the decision to continue proceedings with a substitute Judge.

[102] *See, e.g., Karemera et al.* Reasons filed on 22 October 2004, paras 2, 66-69.

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Bench to the *amicus curiae* during the investigative phase.[104] The newly composed Chamber considered that whether to nullify its previous decisions was a matter within its discretion.[105] With regard to decisions and orders relating to non-substantive matters, the Chamber found no prejudice to the accused's right to a fair trial.[106] As for the remaining substantive decisions, the Chamber fully reviewed them and expressly "adopted their reasoning and disposition".[107] Consequently, the Chamber found that it was not in the interests of justice to nullify these decisions and orders.[108] The Appeals Chamber observes similarities with the present case, where all prior decisions were made, in part, by Judges remaining on the Bench.

57. Turning first to the two remaining Judges in this case, the Appeals Chamber recalls that all Judges of the Tribunal enjoy a presumption of impartiality, and that a high threshold must be reached in order to rebut this presumption.[109] The Appeals Chamber does not consider the fact that the remaining Judges shared a Bench with Judge Harhoff is sufficient to overcome this presumption of impartiality, and nor does it suffice to demonstrate any potential impact on their views as expressed in prior decisions in these proceedings. Moreover, the Trial Chamber stated that proceedings would be resumed "from the close of hearings", thereby indicating that the remaining Judges will not rely on their prior deliberations with Judge Harhoff, but instead will restart their deliberations with the substitute Judge.[110] The Appeals Chamber considers this to be appropriate under the circumstances.

58. With regard to the substitute Judge, the Appeals Chamber considers it noteworthy that he has expressed that, in addition to his familiarisation with the evidence, he will also "study decisions, especially those relating to the admission or rejection of evidence" and "will keep as evidence only the exhibits that have been admitted in accordance with [his] understanding of the provisions of the Rules".[111] Furthermore, he "will state [his] position" on the decisions rendered by the previous

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[103] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-PT-Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004, paras 11-14, 21-23. Judge Short appended a dissenting opinion to this Decision, which was filed the following day.

[104] *See In the Case of Florence Hartmann*, Case No. IT-02-54-R77.5, Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer, 27 March 2009 (public redacted version), paras 52-53, 55. Judge Flügge appended a separate opinion concurring in the result, and Judge Bonomy appended a partially dissenting opinion to this Report. *See also In the Case of Florence Hartmann*, Case No. IT-02-54-R77.5, Order Replacing Judges in a Case Before a Specially Appointed Chamber, 2 April 2009, p. 2.

[105] *In the Case of Florence Hartmann*, Case No. IT-02-54-R77.5, Decision on Defence Motion Pertaining to the Nullification of Trial Chamber's Orders and Decisions, 19 May 2009 ("*Hartmann* Specially Appointed Chamber Decision of 19 May 2009"), para. 9.

[106] *Hartmann* Specially Appointed Chamber Decision of 19 May 2009, para. 10.

[107] *Hartmann* Specially Appointed Chamber Decision of 19 May 2009, para. 11.

[108] *See Hartmann* Specially Appointed Chamber Decision of 19 May 2009, paras 9-11.

[109] *See, e.g., Šainović et al.* Appeal Judgement, para. 181; *Martić* Appeal Judgement, para. 41; *Galić* Appeal Judgement, para. 41.

[110] Impugned Decision, para. 61. *See also* Impugned Decision, para. 51.

[111] Impugned Decision, Separate Opinion of Judge Mandiaye Niang, para. 17.

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Bench in this case, and "will acknowledge them as [his] only inasmuch as [he himself] would have ruled in the same way".[112]

59. Based on the foregoing, the Appeals Chamber finds that Šešelj's submissions have not demonstrated that the trial proceedings have been rendered invalid by Judge Harhoff's participation, and nor has Šešelj shown any such error in the Impugned Decision.

F. Alleged Undue Delay

60. Finally, Šešelj submits that his trial has already been unduly delayed, and that it cannot be prolonged further while the substitute Judge familiarises himself with the record. This process will be indefinite, in Šešelj's view, as it would be physically impossible for the substitute Judge to review the record in close to six months.[113]

61. The substitute Judge observed that it would be "difficult to give an *a priori* estimate of the time" needed to familiarise himself with the record. He gave himself "an initial period of six months after the resumption of activity in January 2014", and noted that the "time required will be reviewed according to the requirements of the task".[114]

62. Taking this into account, the Trial Chamber stated that:

> [I]t is premature at this stage to wonder about the consequences of the time needed for [the substitute Judge] to become familiar with the record. It therefore concludes that at this moment, the time needed for [the substitute Judge] to become familiar with the record does not constitute an obstacle to the continuation of proceedings. As the guarantor of the rights of the Accused, the Chamber will ensure that he be tried without undue delay. It will continuously evaluate the guaranteed rights of the Accused to be tried without undue delay and, should the need arise, it will take the measures necessary to correct this.[115]

63. The Appeals Chamber recalls that the right to be tried without undue delay is enshrined in Article 21(4)(c) of the Statute and protects an accused against *undue* delay, which is determined on a case-by-case basis. A number of factors are relevant to this assessment, including: the length of the delay; the complexity of the proceedings; the conduct of the parties; the conduct of the relevant authorities; and the prejudice to the accused, if any.[116] In this regard, the Appeals Chamber has

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[112] Impugned Decision, Separate Opinion of Judge Mandiaye Niang, para. 20.
[113] *See, e.g.*, Motion, paras 18-19, 35-36, 50, 52.
[114] Impugned Decision, Separate Opinion of Judge Niang, para. 22.
[115] Impugned Decision, para. 56. *See also* Impugned Decision, paras 8, 17-24.
[116] *See, e.g., Augustin Ndindiliyimana et al. v. The Prosecutor*, Case No. ICTR-00-56-A, Judgement, 11 February 2014 (public redacted version), para. 43 (making this statement concerning Article 20(4)(c) of the Statute of the ICTR, which is a mirror provision of Article 21(4)(c) of the Statute of the ICTY); *Justin Mugenzi and Prosper Mugiraneza*, Case No. ICTR-99-50-A, Judgement, 4 February 2013 ("*Mugenzi and Mugiraneza* Appeal Judgement"), para. 30 (same). *See also Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006, para. 17.

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considered that a 12-year incarceration prior to the issuance of the trial judgement does not amount to prejudice *per se*.[117]

64. The Appeals Chamber observes that Šešelj has been in custody since February 2003, or a period of approximately 11 years and four months. Owing to his contempt of the Tribunal, he has been sentenced to serve a total of four years and nine months' imprisonment. His trial commenced approximately six-and-a-half years ago in November 2007, and his judgement was initially expected to be rendered in October 2013, approximately six weeks before the Impugned Decision.[118]

65. The delivery of judgement has been delayed on account of the decision disqualifying Judge Harhoff from participating in this case.[119] To the extent that Šešelj argues that he cannot be blamed for this delay solely on account of exercising his right to seek this disqualification,[120] the Appeals Chamber agrees.

66. The issue before the Appeals Chamber, however, is not whether the disqualification of Judge Harhoff has delayed the proceedings, but instead whether Šešelj has shown that the continuation of proceedings with a substitute Judge, as decided by the Trial Chamber in the Impugned Decision, has resulted in an undue delay.

67. Šešelj is of the view that the substitute Judge will need significantly longer than six months to familiarise himself with the record in this case. The Appeals Chamber considers this to be speculative and insufficient to demonstrate, at present, that the Impugned Decision will unduly delay the proceedings. The Appeals Chamber also observes that the replacement of a Judge is expressly provided for in Rule 15*bis* of the Rules, which further takes note of the need for the substitute Judge to become familiar with the record of the proceedings. The time required for a Judge to familiarise himself or herself with the record, therefore, is not necessarily indicative of undue delay.

G. Conclusion

68. Šešelj has not demonstrated that the Trial Chamber, in exercising its discretion, committed a discernible error in rendering the Impugned Decision. Accordingly, the Appeals Chamber, Judge Afande dissenting, denies the Motion.

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[117] *See Mugenzi and Mugiraneza* Appeal Judgement, paras 28, 37, 64, 144 (dismissing Prosper Mugiraneza's submission to this effect in the context of allegations of undue delay).
[118] *See supra*, paras 2, 4-6, 10.
[119] *See supra*, paras 8, 10, 14.
[120] *See* Motion, para. 30.

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VI. DISPOSITION

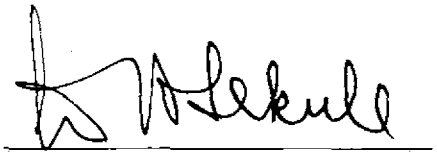
69. For the foregoing reasons, the Appeals Chamber:

ACCEPTS the Motion as being properly before it;

DISMISSES Šešelj's request for an extension of the filing deadline as moot; and

DENIES the Motion, Judge Afanđe dissenting.

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



Judge William H. Sekule
Presiding

Dated this sixth day of June 2014,
At The Hague,
The Netherlands.

Judge Koffi Kumelio A. Afanđe appends a dissenting opinion.

[Seal of the Tribunal]

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DISSENTING OPINION OF JUDGE KOFFI KUMELIO A. AFANDE

1. I respectfully disagree with the Majority's decision to continue proceedings that were already at deliberations stage, at which point Judge Frederick Harhoff (Judge Harhoff) was disqualified, by the majority of a Bench of this Tribunal, on the basis of an apprehension of bias on his part.[1]

2. The decision to disqualify Judge Harhoff says nothing on the consequences of the disqualification. However, I am of the view that Rule 15 of the Rules of Procedure and Evidence (Rule 15) is the only applicable law in the circumstances. I do not agree that any other provisions such as Rule 15*bis* or Rule 54 are applicable.[2] A strict application of Rule 15 could result in dismissing not only the trial proceedings conducted, but also nullifying the subsequent decision to continue proceedings.[3] In my opinion, the Majority's decision upholding the continuation of the proceedings is based on a *de lege lata* analysis of the impugned decision. The Majority's reasoning appears to have been restricted to the law that was misleadingly applied in the context of the case, combining the wording and the spirit of Rules 15, 15*bis* and 54 of the Rules, without taking into account whether these provisions are compatible or not. Whereas a *de lege ferenda* analysis which is required reveals as explored in this opinion, that not only are some of those provisions not compatible, but also that Rule 15 which is the provision that should apply is only partially, but not fully applied. Given the unavailability of on-point legal precedent directly applicable to this specific scenario, my reasoning is somewhat based on what I thought was a common sense assessment of the situation, supported by the prevailing international and national jurisprudence in relation to similar matters.

A. Factual Elements

3. Judge Harhoff has been disqualified for an apprehension of bias from the *Šešelj* Trial Bench during the deliberations stage, after all the evidence has been completely heard. Šešelj has been in custody since February 2003 upon his voluntary surrender, which approximates to a total period of eleven years and four months as of the date of this decision. His trial commenced in November 2007, and his judgement delivery was initially scheduled for October 2013, after almost six years of trial proceedings. Šešelj was consulted as to whether he consents to the continuation of his proceedings with the two remaining judges, completed with a newly appointed third judge. He

[1] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013 and Dissenting Opinion of Judge Liu.
[2] Koffi Kumelio A. Afande, Continuing or Recommencing Proceedings before the ICTR in the Absence of a Judge, in Protecting Humanity, Essays in International Law and Policy in Honour of Navanethem Pillay, Martinus Nijhoff Publishers, Leiden.Boston, 2010, pp. 285-286.

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declined to consent on the grounds that the entire proceedings were tainted by the bias of the disqualified judge. The Remaining Judges opposed by a memorandum,[4] the proposal of the Vice-President of the Tribunal to consider applying *mutatis mutandis* Rule 15*bis*, which provides for safeguards in situations of the "absence of a judge" resulting in the said judge being unavailable to continue sitting in a case.[5] Invoking the interests of justice, the reconstituted Bench of the three judges, composed of the remaining judges and the newly appointed judge (who has not declared his familiarisation with the case) has decided to continue the proceedings from the deliberations stage where it was. The Bench of the three judges affirms in its decision to have applied Rule 54 , which is a general provision used for the issuance of orders necessary for the purpose of the conduct of the trial, amongst other things. However, the reasoning in the said decision is rather akin to the provisions of Rule 15*bis*. Šešelj appealed the decision of the Trial Chamber. Šešelj requests for the case to be re-started or for the Appeals Chamber to dismiss it and order his immediate release. He also requested for compensation as reparation for the prejudice he would have suffered as a result.

B. The Casuistic of the Applicable Law and Jurisprudence

4. As to the law, three different provisions seem to have been combined or at least invoked in the present case:

- Rule 15(B)(ii) of the Rules

  "If the decision is to uphold the application [for disqualification], the President shall assign another Judge to sit in the place of the Judge in question".

- Rule 15*bis*(C) of the Rules

  "If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point ..."

- Rule 54 of the Rules

  "At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

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[3] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Continuation of Proceedings (rendered in French on 13 December 2013, and filed in English and BCS on 23 December 2013).
[4] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Internal Memorandum from Judge Antonetti and Judge Lattanzi to Judge Agius, 3 September 2013 (filed publicly on 4 September 2013).
[5] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Following Decision of the Panel to Disqualify Judge Frederik Harhoff, 3 September 2013.

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5. With regards to the jurisprudence, it is my view that except the *Karemera et al. case* 2004, all other cases referred to in the Majority decision as examples of applicable law[6] are irrelevant in the present specific circumstances. They are a standard applied rather in cases of absence in proceedings that are not at all suspected of bias, pursuant to Rule 15*bis*, which is completely different from the situation of the disqualification of a judge on the grounds of bias, being the very specific scenario of the case presently before the Appeals Chamber.

6. The Majority decision may be correct when it notes that the current case is of " ... unprecedented nature ...". I do agree that it is indeed unprecedented with regards to the late stage of the case at which the apprehension of bias was discovered and the subsequent disqualification of Judge Harhoff occurred. However, I do believe that it is not unprecedented in terms of the legal consequences of that disqualification, because even if the basic Rules do not regulate it, solutions are provided for by general principles of law and an overwhelming case law, both international and national.

7. On a completely separate note, even though not raised by the parties, I am of the view that the unprecedented nature and the threshold of sensitivity, the interests of justice, the right of the accused to a fair trial, the interest and quest of victims for prompt justice, and the expectations of the International Community to fight against impunity, would have required a plenary meeting of all judges to make such an important decision, if such mechanism was provided for in the Rules or Statute. Firstly, indeed, the case before the Appeals Chamber raises a sensitive question of principle which would have necessitated a referral to the "Assemblée plénière" of the Cour de cassation in the French legal system.[7] Secondly, before the European Court of Human Rights, a complex case like this which raises a serious question likely to have an impact on the consistency and the extension of the jurisprudence or a case that has a huge repercussion, would have required a referral to the Grand Chamber.[8] The complexity of the case before the Appeals Chamber and the resulting inconsistency in the application of Rules 15, 15*bis* and 54 combined with the lack of specific jurisprudence on the matter, may well have required a full plenary of judges to reflect on the issue to ensure consistency and extension of the jurisprudence. However, neither Rule 24 of the Rules of Procedure and Evidence (Rule 24), nor any other provision in the Statute or the Rules, provide for any such judicial functions of the Plenary Meetings of the Tribunal. Even combining Rules 24 to 26, it appears that the Plenary Meetings are tasked with mainly non judicial functions. Therefore, Rule 24(vi) can obviously not be interpreted to encompass these functions, even when it reads that

[6] *See* Majority's Decision, paras 35-37 on "Applicable Law". See also paras 38-45 on "Continuation of Proceedings".
[7] Articles L431-5 et L431-6 du Code de l'Organisation Judiciaire.
[8] Article 43 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

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the Plenary Meetings "exercise any other functions provided for in the Statute or in the Rules". If, at this very late stage of the life of the Tribunal, it may be debatable to amend the provisions and include such possibility, two difficulties may arise with regards to the Residual Mechanism. Firstly, (theoretical reason), Rule 26 of the Rules of Procedure and Evidence of the Mechanism draws from the wording of Rule 24 of the Rules of the Tribunal and does not afford judicial functions to the Plenary. Secondly, (practical reason), it may be somewhat cumbersome and difficult to ensure the availability of most judges to attend a plenary session, since they are located at various parts of the world and not necessarily based at the seat of the Residual Mechanism. However, it may be considered acceptable if the judges proceed by way of written memoranda.

C. The Discussion of the Facts and the Law

8. The issue is whether the impossibility for Judge Harhoff to continue sitting in the *Šešelj* case due to his disqualification for reasons of apprehension of bias on his part pursuant to Rule 15 can equate to a situation of the absence of judge from a case for other reasons, pursuant to Rule 15*bis* or an incident requiring an order under Rule 54.

9. The Majority decision seems to have partially addressed that issue. Whilst it dealt with the issue of the impossibility of the judge to continue sitting in the case, the decision seems to have disregarded the reason for that impossibility, which is the disqualification, being different from a situation of "absence" of a judge as per Rule 15*bis*, but also the decision seems to imply that such impossibility is a simple and straightforward incident that falls within the scope of Rule 54 and that both provisions offers the solution that would be in the interests of justice.

10. In my humble opinion, Rule 15 is the only applicable law in the circumstances of this case in line with the interests of justice combining all necessary elements namely, the rights of the accused to a fair trial, the right and quest of victims to a prompt justice and the expectations of the International Community in the fight against impunity. Only that provision offers (a) the appropriate standard of safeguard of the interests of justice and (b) the reasonable remedies in the matter before the Appeals Chamber.

1. The standard of safeguard of the rights of the accused to a fair trial, in balance with the "interests of justice"

11. If there seems to be an apparent competition between Rule 15 and Rule 15*bis* to safeguarding the rights of the accused to a fair trial in balance with the "interests of justice", it is rather clear that Rule 54 strikingly falls out of the scope of the guarantees of such rights and interests.

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(a) Under Rule 15 and Rule 15*bis* of the Rules

12. Both the provisions of Rules 15 and 15*bis* set safeguards against unfairness in situations in which a judge cannot continue sitting in a case. But the legal regimes of both safeguards are substantially different with regards to the reasons why a judge can no longer continue to sit in the proceedings.

13. It is my view, as explained below that the Majority decision is questionable in finding that the guarantees provided for in Rule 15*bis* are sufficient[9] to safeguard or compensate the safeguard offered by Rule 15. The safeguard in Rule 15 is retroactive, whereas the safeguard in regard to Rule 15*bis* is prospective. The former aims at curing *post facto* proceedings already held but the fairness of which is supposed to have been affected, whereas the latter is meant to take stock of a partly heard case which is fair so far and prevent the remaining part of the proceedings to be held in the future from becoming unfair due to the absence of a judge. In that regard, both guarantees are not the same, because "a judge is disqualified" cannot equate to "a judge is absent".

14. The reason for Rule 15 is when a judge is disqualified for "apprehension of bias" or "actual bias" with the assumption that the fairness of the proceedings already held so far may have already been affected. The last sentence of Rule 15 indicates that a new judge shall be assigned, but does not say how to proceed further. In my view, the disqualification of a judge based on bias should have consequences and the proceedings should not just be allowed to continue, as if nothing serious happened. A judge who sat on the case has been disqualified from the Bench because of an apprehension of bias and this is relevant to the entire period of the proceedings. In my opinion, it certainly contaminates all rulings made during the trial. And the obvious difficulty or impossibility to respond with certainty to the question whether the proceedings up till that point are safe, casts a persisting doubt on the fairness of the said proceedings. My understanding of the whole theory of doubt in law is that it is meant to prevent error. Obviously, the safeguards in Rule 15 aim at protecting the accused from a situation of the apprehended bias of a judge, on the assumption that the proceedings so far are vitiated and cannot be remedied without error by the mere replacement of the disqualified judge. Hence, in a case of disqualification pursuant to Rule 15, the general and established principle is that the proceedings conducted up till that point are suspected of bias and shall be nullified, to preserve the fairness of the proceedings, as well as the accused's, victims' and public's confidence in the process. Already, in the *Karemera et al.* case, the Appeals Chamber quashed the decision of the remaining judges to continue the proceedings after an apprehension of

[9] *See* Majority Decision, para. 40.

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bias finding was made against one of the trial judges.[10] Similarly, various appellate courts in national jurisdictions, both in criminal and civil cases, have quashed convictions or alternatively ordered re-trials where there has been an apprehension of bias of a judge, magistrate or jury member.[11] I have not been able to identify any analogous case where the proceedings were continued as if nothing happened, after such a serious and significant event as a Rule 15 disqualification occurred and more importantly, certainly not at the very advanced stage of these proceedings where Judge Harhoff's apprehension of bias came to light. The fact that the charges in the cases dealt with by these national jurisdictions do not reach the threshold of the seriousness of those in the present case before the Appeals Chamber does not undermine the relevance of the case law they built. Indeed, they draw their relevance from the *Karemera et al.* jurisprudence of the ICTR, which they concur with and which dealt with a case of serious threshold. Furthermore, and contrary to the Majority decision,[12] it would not have been required to examine the impact of the apprehension of bias on the previous proceedings. In my view, since a Bench of the Tribunal found an apprehension of bias against Judge Harhoff and he is disqualified in the *Šešelj* case on that basis, it is already implied that all the proceedings in which Judge Harhoff participated in could have been unsafe. Indeed, in the case of *Indra v. Slovakia*, after having found that there had been a violation of Article 6.1 of the Convention on the ground of the lack of an impartial tribunal, the European Court of Human Rights held that it is not necessary to examine separately the complaint under Article 6.1 of the Convention concerning the alleged procedural unfairness.[13] Hence, the reasoning in the Majority decision is questionable as it implies that Šešelj should have particularised which decisions were allegedly influenced by the disqualified Judge Harhoff.[14] Requesting Šešelj to provide additional demonstration in that regard, not only reverses the burden of the proof, but gives the wrong impression that the Appeals Chamber is not drawing the right consequences from the finding made by the independent disqualification Bench. Moreover, the issue is not really whether Judge Harhoff influenced the other judges, decisions or rulings, but rather his presence throughout the trial. And the European Court of Human Rights rules as follows in the *Öcalan v. Turkey* case, in

[10] *Edouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR15*bis*.2, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 28 September 2004, para. 8 ("*Karemera et al.* Case 2004").
[11] *See, e.g.*, **SOUTH AFRICA**: *Rex v Katzeff* 1944 CPD 483; *R v Gubudela and Others* 1959 (4) SA 93 (E). **FRANCE**: Etiènne Daures, Recusation, *in Encyclopedie Dalloz*, septembre 1999, mise à jour en juin 2011, para. 44, Cassation criminelle, 16 mai 2000, n° 99-85.444, bulletin criminel n° 191; Cassation criminelle, 5 janvier 2005, n° 04-86.947, bulletin criminel n° 10; Cassation criminelle, 21 août 1990 n° 90-84.352; Cassation criminelle, 4 mars 1998 n° 97-86.544. **UNITED KINGDOM**: *R v Pouladian-Kari* (2012-2013) [2013 EWCA Crim 158]; *R v Malcolm* (2011) EWCA Crim 2069; *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 2) [1999] 1 WLR 272; *R v Liverpool City Justices, ex parte Topping* [1983] 1 All ER 490; *R v Bingham Justices, ex parte Jowitt*, The Times, 3 July 1974; *Dimes v Grand Junction Canal* (1852) 3 HLC 759. **CANADA**: *R. v. Colley* (1991) NSCA CanLII 2534.
[12] *See* Majority Decision, paras 46-59.
[13] ECHR Case, *Indra v. Slovakia, Application no. 46845/99*, Judgment, Strasbourg, 1 February 2005, p. 7, paras 2, 3.
[14] *See* Majority Decision, para. 53.

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which a military judge has been replaced because his presence among the members of the court was regarded to have affected the impartiality of the court:

> In short, most of the trial had already taken place before the [...] judge ceased to be a member of the court. The Court need not speculate on the question whether the [replaced] judge had actually influenced the other judges in the court during the course of the trial since, ... , it was his very presence prior to replacement which was the source of the problem.[15]

15. On the contrary, Rule 15*bis* sets a safeguard for when a judge is absent for "illness" or "any reason", with the risk that the remaining portion of the proceedings to be held may not guarantee the fairness in the absence of the judge. In my view, the phrase "any reason" in Rule 15*bis* cannot be interpreted to include "disqualification" in Rule 15.[16] It is true and obvious that each of both provisions is a *lex specialis* and stand alone provision in its own field. In my opinion, it is clear that the purpose of Rule 15*bis* does not involve an apprehension of bias on the part of any judge, and a safeguard is provided so that the unavailability of the judge does not negatively impact on the accused's right to a fair trial during the remaining part of the proceedings. I am of the view that no solution should be looked for in this clear-cut Rule 15 case, (which is a *lex specialis* on disqualification), in another *lex specialis*, here Rule 15*bis* for situations in which a judge is absent in proceedings that are impartial and in compliance to the fairness principle.

16. In addition to the foregoing, it is obvious that where impartiality of the tribunal is put into question and where this forms the background to the disqualification of a judge, this sets the situation apart from other situations where a judge is absent from a case with no question over impartiality.

17. Both rules provide for a safeguard which are exclusive and incompatible. In my view, they cannot be combined as done in the Majority decision,[17] for none of them was designed to safeguard the other one. Firstly, because applying Rule 15*bis* as safeguard to Rule 15, is like looking for a safeguard to a safeguard through another safeguard. This approach may be questionable; especially because each of both safeguards is a stand alone safeguard. Secondly, the standard of the safeguard of Rule 15 in the context of disqualification of a judge is higher than that of the safeguard provided for by Rule 15*bis* in the absence of a judge, which is lesser. The threshold of the guarantee through Rule 15 is so high that it is binding upon the accused, who cannot in principle waive that right. Therefore, I am of the opinion that it was not necessary to consult the accused as to whether he consents that the proceedings continue. Indeed, whereas the accused can relinquish the safeguard of Rule 15*bis*, the reason why he is consulted as to whether he consents or not to the continuation with

[15] ECHR, First Section, Case of *Öcalan v. Turkey* (Application no. 46221/99 – 12 March 2003), Judgment, Strasbourg, 5 May 2005, paras 117 -118.
[16] Koffi Kumelio A. Afande, *supra*, footnote 2.

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the replacement judge, it is not possible for the accused to waive his right and the attached safeguard in the context of Rule 15, unless it is permissible by the law and done in a non-equivocal way. So the European Court of Human Rights, in the *Pfeifer and Plankl v. Austria* case, when it ruled that as a right guaranteed by the Convention, the right to an impartial tribunal under Article 6.1, can only be waived, in so far as such a waiver is permissible, and must be established in an unequivocal manner.[18] Contrary to Rule 15*bis*, Rule 15 does not provide for such a waiver and the procedure by which it can be unequivocally established. Moreover, the fact that Šešelj withheld his consent unequivocally shows that he is not waiving that right. Because both rules provide for safeguards of different thresholds the one in Rule 15 being higher than that the one in Rule 15*bis*, the lesser cannot guarantee the higher, according to the principle "who can do less, cannot do more, but only who can do more, can do less". Hence, using the provision of Rule 15*bis* to safeguard the other safeguard of Rule 15 is akin to using the lesser safeguard to secure the higher. I am of the view that the guarantees in Rule 15*bis* are strikingly insufficient and cannot be regarded as offering the high threshold commensurate to the obvious importance of the safeguard in Rule 15. It is my belief that this approach undermines the standard of the safeguard provided for in Rule 15 which the drafters of the Rules of Procedure and Evidence and the International Community, (but also all general principles of law) concur to set as a high standard safeguard against unfairness.

(b) Under Rule 54 of the Rules

18. At the outset, it imports to state that Rule 54 is not a safeguard for the rights of the accused to a fair trial, but rather a provision to ensure that the mechanics of the proceedings continue smoothly without disruption. In my view, Rule 54 puts more emphasis on the continuation of the proceedings as a matter of proper administration of justice, and so cannot be seen as genuinely balancing that element with the rights to fairness as enshrined in Article 14 of the International Covenant on Civil and Political Rights (ICCPR). It is worth insisting on the wording of Rule 54 for a better understanding of the reasoning. Rule 54 expressly provides for "orders necessary for the continuation of the proceedings".[19] It is blatantly obvious that the criterion of "interests of justice" applied by the Trial Chamber is not in the wording of Rule 54 which the Trial Chamber affirms to have applied. It is rather the wording and the spirit of Rule 15*bis*, unless of course it is assumed that the "interests of justice" is one of the elements that shall be taken into account whilst assessing the "necessity for continuing the proceedings". Nevertheless, I am of the opinion that it cannot be in the

[17] *See* Majority Decision, para. 20.
[18] ECHR, Case *Pfeifer and Plankl v Austria*, (Application no. 10802/84), Judgement, Strasbourg, 25 February 1998, para. 37. *See also* ECHR, First Section, Case of *Öcalan v. Turkey* (Application no. 46221/99 – 12 March 2003), Judgement, Strasbourg, 5 May 2005, para. 116.
[19] *See also The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A15*bis*, Decision in the Matter of Proceedings under Rule 15bis(D), 24 September 2003, Dissenting Opinion of Judge David Hunt, para. 15.

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interests of justice to continue with proceedings which have been contaminated by an apprehension of bias. Whatever the case may be, Rule 54 can only apply when it is established that the proceedings are safe but there is a necessity to prevent a hitch likely to hamper their continuation, whereas in the current case, the continuation of the proceedings is exactly the decision to be made. In my view, once the fairness of proceedings is called into question as it is in the current case, Rule 54 cannot and should not be contemplated. It simply is not applicable in such serious circumstances and was not intended to be used for that purpose.

19. I also consider that the issue of whether Šešelj needed certification to appeal the Trial Chamber's decision on continuation of proceedings, as examined in the Majority decision,[20] is not convincing. In my opinion, the appeal lies as of right in the context of Rule 15 since the decision touches upon the fundamental right of the accused for defence. Therefore, it would be an additional jeopardy to hold the misleading application of Rule 54 by the Trial Chamber, against Šešelj to undermine and infringe his fundamental rights. It is obvious that the situation in regard to the correct legal provision is such that not only *Šešelj*, and the Prosecution (the parties) have been misled or confused, but also the Registry, who assigned the number "AR 15*bis*" to the case.

20. My humble opinion is that the Trial Chamber did err in law by resorting to Rule 54, which does not provide for any consultation with the accused regarding his consent, and by deciding to continue the proceedings with the replacement judge, without first ascertaining whether the proceedings up till that point were safe and in conformity with the standards of a fair trial.

2. The scope of the appearance of bias with regards to the decision to continue the proceedings

21. In my view, a decision to continue the proceedings presupposes that the procedure held up till this point is safe. As a matter of principle in the present circumstances, once the apprehension of bias is found by the relevant Bench, it is assumed that it cannot be proceeded as if it has not affected the proceedings held till that point in the case with the participation of the disqualified judge.

22. My own approach would have been to assume that the fairness of the said proceedings may have been tainted by the apprehension of bias of the disqualified judge and to first look into that. As a result, in these specific circumstances, I cannot join the Majority in upholding a decision to continue proceedings, when the fairness of proceedings held is in question and there has been no genuine assessment, investigation, evidence or determination to support the contrary that the proceedings were fair and safe.

[20] *See* Majority Decision, paras 18-23.

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23. In my opinion, only a fairness assessment can help ascertain whether the proceedings held and rulings in which Judge Harhoff took part in, have been contaminated and if so, whether they are irremediably contaminated. In the alternative, whether any negative impact arising from the bias can be cured. But it appears that it is difficult to check the safeness and fairness of the proceedings so far. The assessment ought to run from the very beginning of the proceedings, since nothing in the records shows the exact time when the apprehension of bias may have emerged in order for the assessment exercise to be limited to that period. The findings made by the remaining judges that the proceedings so far are safe[21] cannot supersede such an assessment that should have been ideally conducted by a Bench, not involving the remaining judges. In my opinion, the decision of a reconstituted Bench in the *Hartmann* contempt case, referred to in the Majority decision[22] is debatable, when it ruled that it had the discretion to make such a finding on the fairness of the previous decisions. The remaining judges in the *Šešelj* case do not also have that discretion, especially when they already decided to continue the proceedings, notwithstanding the disqualification of their third colleague on the grounds of apprehension of bias. Hence as far as the contrary is not established, the doubt of the fairness of the proceedings resulting from the apprehension of bias on the part of Judge Harhoff persists, in spite of the decision of the three judges that the trial was fair. That doubt must benefit the accused according to the principle of "*in dubio pro reo*". The proceedings should be declared void and dismissed in their entirety.

24. It appears that the newly assigned judge, whom I agree with on this point, is conscious of this risk of unfairness of the proceedings involving Judge Harhoff and intends to make such an assessment, when he declares in his separate opinion that with regards to decisions previously rendered in the case "je ne les ferai miennes que dans la mesure où j'aurais moi-même statué dans le même sens."[23] This means: "I will acknowledge them as mine only inasmuch as I myself would have ruled in the same way".[24] But, it may not be safe to entrust to the single and newly assigned judge that challenging fairness conformity assessment of proceedings which lasted for at least six years in the present case. My view is that the newly assigned judge is simply not equipped to deal with this onerous task single-handedly.

25. Moreover, the requirement for the newly assigned judge to participate in any decision in this case is that he familiarises himself with the case. Therefore, in my view his involvement in the process of the decision to continue the proceedings was too early, especially that proceedings are

[21] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Continuation of Proceedings, 13 December 2013.
[22] *See* Majority Decision, para. 56.
[23] *Le Procureur c/ Vojislav Šešelj*, Case No. IT-03-67-T, Original en français de l'Opinion Individuelle du Juge Mandiaye Niang à la Décision relative à la Continuation de la Procédure, 13 Décembre 2013, para. 20.
[24] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, English Translation of the Separate Opinion of Judge Mandiaye Niang to the Decision on Continuation of Proceedings, 13 December 2013, para. 20.

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under suspicion of bias, and he has not familiarised himself with the case and made the determination whether he agrees with the conduct of the trial and the rulings made before he joined the Bench. I am of the opinion that, as a matter of principle, the basis for the decision to continue the proceedings is incorrect in law, regardless of whether or not the apprehension of bias can be extended to the remaining judges. Consequently, it is irrelevant to make a finding on which judges should have made that decision or precisely as to whether it was right or lawful to have allowed the newly assigned judge to participate in the process for the decision to continue. Also, it is not necessary to make a finding on the issues, as to whether the apprehension of bias extends to the remaining judges and the newly appointed judge or whether the newly assigned judge was right to have taken part in the decision for continuation. Safe to state, in analogy to the Appeals Chamber's finding in the *Karemera et al.* case 2004,[25] that the circumstances of the remaining judges deciding to continue the proceedings though they are aware of the disqualification of a judge who sat with them during the trial, could well lead a reasonable, informed observer to objectively apprehend bias. I need to emphasize that this is not a finding of actual bias on the part of the remaining judges and the newly assigned judge to replace the disqualified judge, but it is rather a finding, made in the interests of justice, that the circumstances of the case give rise to an apprehension of bias.

26. I am of the opinion that the Majority decision upholding the Trial Chamber's decision to continue the proceedings is not borne out by the legal provisions on this issue. Firstly, the decision seems to consider that Rule 15 and Rule 15*bis* are compatible, whereas I am of the opinion that both provisions rather exclude one another. Secondly, the decision seems to imply that Rule 54 of the Rules (Rule 54) applies in this case, whereas the disqualification issue which touches upon the rights of the accused to a fair trial goes beyond the scope of a measure issue of the mechanics of the case. It is my view that it cannot be in the interests of justice, balanced with the rights of the accused to a fair trial to continue proceedings which are not safe.

3. The remedies in the interests of justice in balance with Šešelj's right to a fair trial and the quest of victims for justice as well as the integrity of the Tribunal and the International Community

27. Contrary to the Majority's view, I am of the humble opinion that a strict application of Rule 15 to the consequences of the disqualification of Judge Harhoff from the *Šešelj* case and subsequent Decision to continue proceedings warrants dismissing the proceedings held up till the point of the finding of disqualification of Judge Harhoff. In this regard, I wish to present clearly the other options that I would have duly considered before concluding, the one that ensures that justice

[25] *The Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR15bis.2, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, 28 September 2004, para. 67.

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is meted out effectively in the context of this case. Hence three alternatives exist that can be envisioned, which are either remanding the case before the same Trial Chamber, retrying Šešelj or the Tribunal setting aside its jurisdiction.

(a) The imperative to correct the error of law in dealing with Judge Harhoff's disqualification

28. I believe that one option could be to remand the case before the Trial Chamber with the replacement judge. Whilst doing so, it would require clearly ordering the Trial Chamber to apply the correct law and standard, which should certainly exclude Rule 15*bis* and Rule 54. As explained above, Rule 15*bis* provides for situations of "absence of a judge" in the fair proceedings, and not for "disqualification of a judge" which is governed by Rule 15. Indeed, a judge is absent can not equate to a judge is disqualified. Also, the issues which are at stake in situations of "disqualification of a judge" such as the rights of Šešelj to a fair trial, the right and quest of justice of victims, cannot be underplayed to the level of simple mechanic incident of proceedings under Rule 54.

(b) The retrial or the necessity for a verdict in the interests of Šešelj and the victims

29. I think that one other solution could be to order the retrial of the case by a completely new Bench of three judges, either of the Tribunal or of the Residual Mechanism, whichever serves a proper administration of justice and also the interests of justice best. It should be borne in mind that justice delayed is justice denied and this must apply not only to Šešelj, but also to the victims. Hence the rights to a fair trial of Šešelj, shall be balanced with the rights and quest of victims for prompt justice. In that regard, a retrial can be organised in a time-effective way. Nothing and no ruling from the previous proceedings should be used in the context of a trial *de novo*. Hence, to begin, the retrial could be based on the same indictment and the same pleas. A retrial may accommodate the possibility of provisional release, when appropriate, taking into account not solely the already six year duration of the previous proceedings, but rather the more than eleven years that Šešelj already spent in detention.

30. Ideally, all the witnesses should be called again depending on their availability, given the passage of time. They ought to be heard afresh by the new Bench. However, some difficulties which may arise with regards to the availability or appearance of the witnesses can perhaps be overcome with the use of Rule 92*bis*, allowing the certification of statements of witnesses to be admitted in trial, when the requirements are met. This would enable to not call all witnesses, bearing in mind that there is a preference for live testimony to be heard by each and every judge. However, I am aware that these can present other problems, such the inability of Šešelj to test the witnesses' evidence by way of cross-examination which could infringe his fundamental rights to a fair trial. Here, it is worth noting that the jurisprudence of Rule 15*bis* according to which the

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necessity of each and every judge to hearing live testimony is not an unbending requirement, [26] shall not apply here. I am of the view that exception to that principle applies only when the proceedings so far have been safe and would remain fair in spite of such exception, but not when the proceedings are assumed to be tainted as happens in the present case before the Appeals Chamber. Also the possibility of testimony by video-link can be resorted to as a solution to those difficulties that may arise from requiring the physical appearance of witnesses. Furthermore, judicial notices would enable the new Bench not to rule on all issues on which such notices have already been taken by the Chambers of the Tribunal.

31. The gravity of the charges against Šešelj is such that it shall not be undermined, with regards to taking into proper account the victims' interests. However, and in spite of all procedural guarantees and safeguards which could be implemented in order to have a re-trial, a trial *de novo* may inevitably pose various challenges, and could bear the risks which may ultimately justify that the Tribunal sets aside its jurisdiction.

(c) The possibility of setting aside the Tribunal's jurisdiction

32. This possibility which may lead to the release of Šešelj could be contemplated taking into account the risks of abuse of process and egregious violations of Šešelj's rights, but also some concerns of witnesses' protection.

33. The Appeals Chamber in various cases admits that "the doctrine of abuse of process may be relied on by a court, as a matter of discretion, in two distinct situations: (i) where a fair trial for the accused is impossible, usually for reasons of delay; and (ii) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct".[27] In the present case of Šešelj, because Judge Harhoff was involved since the pre-trial stage,[28] it is not only the impropriety of the trial that lasted six years but of both, the pre-trial and the trial proceedings for a total of eleven years approximately, that render them void to the extent that restarting another trial afresh will generate undue delay. Even, the use of available mechanisms to speed up the new trial, including the preparatory phase occasioned by the invalidation of the contaminated previous proceedings, may egregiously infringe Šešelj's rights to a fair trial. In this regards it is worth recalling that "the

[26] *Karemera et al.* Decision of 20 April 2007, para. 42; *Nyiramasuhuko et al.* Decision of 24 September 2003, para. 25.
[27] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 2009 ("*Karadžić* Decision of 12 October 2009"), para. 45; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999 ("*Barayagwiza* Decision of 3 November 1999"), para. 77.
[28] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Order Assigning Ad Litem Judges to a Case Before a Trial Chamber, 23 October 2007 and Order Assigning Judges to a Case Before a Trial Chamber, 26 October 2007 respectively.

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fundamental objective of the Tribunal, enshrined in Article 20(1) of the Statute [, is] to ensure that trials are fair, expeditious, and conducted with due regard for the protection of victims and witnesses".[29] The threshold of that "due regard for protection of victims and witnesses" may not be met by "obliging" some witnesses to appear again in order to testify in the new trial with the risk for their protection, letting alone that some of the said witnesses were themselves victims and would be reminded yet again of the gruesome ordeal that they went through. Hence, it is plausible in my view for the Tribunal to decline to exercise its jurisdiction in cases "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity".[30] Indeed, the integrity of the Tribunal would be seriously affected in starting a pre-trial and trial *de novo*, which may last for a long period of time in addition to the eleven years and four months custody of Šešelj. In my view, once a Bench of the Tribunal found the apprehension of bias on the part of Judge Harhoff and he was disqualified from the case, the Tribunal's integrity becomes at stake. I do completely concur with the Appeals Chamber that the remedy of setting aside jurisdiction will usually be disproportionate, as the correct balance must be maintained between the fundamental rights of the accused and the essential interests of the International Community in the prosecution of persons charged with serious violations of international humanitarian law.[31] And Šešelj is charged with persecution, deportation, and other inhumane acts as crimes against humanity, as well as with murder, torture, cruel treatment, wanton destruction of villages or devastation not justified by military necessity, destruction or wilful damage done to institutions dedicated to religion or education, and plunder of public or private property as violations of the laws or customs of war.[32] However, it is because the International Community is committed to the fundamental rights to a fair trial for the accused that it has created the Tribunals to uphold that principle that it enshrined not only in article 21.4(c) of its Statute, but also in article 14 of the International Covenant on Civil and Political Rights (ICCPR). If the Tribunal proceeds otherwise, it would undermine that principle which is one of the essential interests for which the very International Community has created the international criminal jurisdictions. This case is the very one in which the Tribunal could have met the expectation of the International Community in balancing the rights to a fair trial of the accused with the victims' quest of justice.

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[29] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Judgement, 19 July 2010, para. 35.
[30] *Karadžić* Decision of 12 October 2009, para. 45; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 ("*Dragan Nikolić* Decision of 5 June 2003"), para. 29; *Barayagwiza* Decision of 3 November 1999, para. 74.
[31] *Karadžić* Decision of 12 October 2009, para. 46; *Dragan Nikolić* Decision of 5 June 2003, para. 30.
[32] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Third Amended Indictment, pp. 7, 10-11, 13-14. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision Regarding Third Amended Indictment, 9 January 2008, pp. 2, 4; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Rule 98*bis* Decision, T. 4 May 2011 pp. 16832-16833, 16855.

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34. It is noteworthy that in a very recent, national United Kingdom case of *R v Pouladian-Kari*, after the Court of Appeal quashed the conviction as a result of the risk of unconscious bias on the part of a juror who had asked the Judge for guidance as to whether he should remain on the jury and the Judge did not discharge the jury, the Lord Chief Justice refused the Prosecution's application for a re-trial and upheld the Court of Appeal's decision to quash the conviction in its entirety, on the basis that it was not in the public interest for the Appellant to stand trial again.[33]

35. Based on my reasoning above, the Appeals Chamber should have granted the Defence Motion in part, quashed the impugned decision, dismissed the Indictment against Šešelj, ordered the immediate release of Šešelj and directed the Registrar to make the necessary arrangements.

(d) The principle of integral compensation or reparation of prejudice

36. This principle requires that all material and immaterial prejudice that may have resulted from this to Šešelj be identified, assessed and remedied. The first prejudice is that Šešelj has suffered proceedings in which Judge Harhoff took part. The ultimate remedy to that prejudice is the proposed nullification of the proceedings in which the judge took part. The question is now whether Šešelj has suffered any other prejudice that justifies any further compensation beyond the invalidation of the proceedings. Firstly, in regard to Šešelj's claim that his detention so far amounts to undue delay, it should be recalled that there is no clear-cut definition of "undue delay" in international law and the assessment shall be done on a case by case basis. I am of the view that the 11 years and four months that Šešelj has spent in custody awaiting trial cannot be regarded as undue delay, taking into account the objective complexity and the history of the case. Secondly, in my opinion, the four years and nine months' imprisonment that Šešelj was sentenced to as a result of his conviction for contempt,[34] cannot be seen as having caused him any prejudice, since the conviction would have been vacated together with the all previous rulings, and also that, in any event, he would have remained in detention awaiting trial and delivery of judgement.

37. In my view, the invalidation of the proceedings conducted up till the finding of apprehension of bias on the part of Judge Harhoff sufficiently compensates the prejudice, and there is no other prejudice left that could justify any other form of compensation, be it pecuniary. It is true that the decision to continue the proceedings, not only maintains, but prorogues that prejudice.

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[33] *R v Pouladian-Kari* (2012-2013) 2013 EWCA Crim 158.

[34] *See In the Case of Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Judgement, 19 May 2010 (public redacted version), paras 5, 42 (affirming his sentence of 15 months' imprisonment); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3-A, Judgement, 28 November 2012, paras 8, 23-24, 34 (affirming his sentence of 18 months' imprisonment, and finding that this sentence was served after – and not concurrent with – his prior sentence of 15 months' imprisonment); *Contempt Proceedings Against Vojislav Šešelj*, Case No. IT-03-67-R77.4-A, Public Redacted Version of "Judgement" Issued on 30 May 2013, 30 May 2013, paras 21, 54 (affirming his sentence of two years' imprisonment).

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D. Conclusion

38. Based on my full reasoning, careful consideration of all the options available detailed herein, and taking into account the delicate balance between all elements, namely the interests of justice, the rights of the accused, the rights and quest of victims for justice, the expectations of the International Community and the integrity of the Tribunal, I disagree with the Majority's decision to uphold the Trial Chamber's Decision to continue the proceedings. I am of the view that the current state of international and national case law required the Appeals Chamber to:

- Find that the Trial Chamber erred in law in deciding to continue the proceedings pursuant to Rule 54;
- Correct the error of law by granting Šešelj's appeal in part, vacate the decision of the Trial Bench to continue proceedings in such circumstances and reinstate the force of the safeguard in Rule 15 as the sole guarantee to be applied in this case;
- Make a decision as to whether the case shall be tried *de novo* or rather be dismissed, the arguments in support of the latter overweighing to a slight extent those for the former; and
- Deny the financial compensation as requested on the basis that the above will be commensurate to the prejudice he has suffered as a result of the unfairness of the proceedings ensuing from Judge Harhoff's participation and the subsequent finding of an apprehension of bias on his part.

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

Judge Koffi Kumelio A. Afanđe

Dated this sixth day of June 2014,
At The Hague,
The Netherlands.

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