ANNEX B
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International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

INTERNAL MEMORANDUM - MEMORANDUM INTERIEUR

Date: 17 January 2014

To: Theodor Meron, President
A:

From: Alphons Orie, Presiding Judge, Trial Chamber I
De:

Subject: Report pursuant to Rule 15 (B)

The *Mladić* Trial Chamber received the "Defence Motion to Exceed Word Count and Defence Motion Pursuant to Rule 15 (B) Seeking Disqualification of Judge Christoph Flügge" ("Flügge Motion") and "Defence Motion to Exceed Word Count and Defence Motion Pursuant to Rule 15 (B) Seeking Disqualification of Presiding Judge Alphons Orie" ("Motion"), both filed on 16 December 2013 ("Motions"). I have consulted Judge Flügge as prescribed by Rule 15 (B) (i). His report is attached as Annex A and I have nothing to add to his conclusions. I also attach as Annex B my report of 14 May 2012 to the President ("2012 Memorandum") which dealt with a previous disqualification request and which addresses many of the grounds raised in the Motion.

In this report, I will address the following issues:

I General observations, including:
- who is properly seised of the Motions and whether they were filed in a timely manner;
- the representation of Trial Chamber activities as constituting my personal activities; and
- adverse rulings by the Trial Chamber as a basis for disqualification.

II A general overview of the applicable law, including international, regional and domestic jurisdictions.

III The grounds for my disqualification raised in the Motion.

IV Conclusion

I. General observations

1. As a preliminary matter, I note that there exists some confusion as to who is properly seised of the Motions. The Motions state that the submissions are "brought before the President of the Tribunal".[1] However, the Motions also include the Judges of the Mladić case on their cover pages, stating that they are filed before "the Trial Chamber". Furthermore, the Flügge Motion states that "the Defence seeks the *Chamber*'s leave to exceed the word limit for this motion".[2] In addition, on 18 December 2013, the Prosecution sought an extension of time to respond to the Motions from the Mladić Chamber.

[1] Flügge Motion, para. 1; Motion, para. 1.
[2] Flügge Motion, para. 2 (Emphasis added).

2. I note that pursuant to Rule 15 (B) of the Rules both requests should have been filed before me *as Presiding Judge of Trial Chamber I*, despite the Defence's arguments to the contrary. However, as I would have reported to you in any event pursuant to the rule, I will set out my position below. Accordingly, in the present circumstances, I consider that all the requests for relief in the Motions, as well as the Prosecution's request for an extension of time to respond and the Defence's request for leave to reply, are before you, as President of the Tribunal.[3]

3. I further note that the Motion repeats a number of grounds already raised in the Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings, filed on 11 May 2012 ("2012 Disqualification Motion"). You denied the Defence motion on 15 May 2012. The Defence is not seeking a reconsideration of this decision. Nonetheless, I will address all grounds raised by the Defence.

4. With regard to the timing of the motions, I refer to the 2012 Memorandum, paragraphs 2 through 4. Further, with regard to adverse ruling by a Chamber as a basis for disqualification, I refer to paragraph 6 of the 2012 Memorandum.

5. I will address one general issue. The Motion alleges that various decisions, orders, and actions were taken by me personally. As the record demonstrates, they were taken by the Chamber as a whole. For written decisions, orders, and other filings, it is the Tribunal's practice that only the Presiding Judge signs on behalf of the Chamber. The decisions, orders, and filings are, however, deliberated and decided upon by the whole Chamber and this is reflected in the text of any such decisions and orders. This raises another, related matter. I note that all of the decisions referred to in the Motion were taken without dissenting or separate opinions appended thereto. In this respect, any bias attributed to me based solely on these decisions would be equally attributable to the other two judges of the bench. While the Motion purports to lay out grounds demonstrating my alleged personal bias, in fact the result is to challenge the partiality of the Chamber as a whole. It is important to note that the implication of a finding of personal bias based on these grounds would necessarily be applicable to all the Tribunal's Presiding Judges and their respective Chambers. I dealt with this already in the 2012 Memorandum at paragraphs 5 and 7.

6. The Defence's new submissions in this respect emphasize that the Defence refers to my role as Presiding Judge.[4] These further submissions do not lead me to depart from my views expressed above. The Defence seems to suggest that the Presiding Judge has certain additional powers in adjudicating the case before the Chamber. This is not the case.

II. Law

7. I have extensively set out the applicable law in the 2012 Memorandum, paragraphs 9-12. I recall and refer to it for the below analysis.

III. Grounds

[3] This is in line with your decision of 20 December 2013 granting the Prosecution's request for extension of time.
[4] Motion, para. 18.

Ground A

8. The Defence has pointed to what it considered "irregular procedures" during the initial appearance and the trial proceedings.

Initial Appearance

9. During the initial appearance on 3 June 2011, I asked the Accused whether he wanted to have the indictment read out in full.[5] Pursuant to Rule 62 (A) (ii), the Chamber "*shall* read or have the indictment read to the accused in a language the accused understands"[6] but it is accepted practice that this may not be necessary if the accused waives this right. The Accused responded that "I do not want to have a single letter or sentence of that indictment read out to me".[7] I proceeded to only read out a summary of the indictment instead, for the benefit of the Accused and the public.

10. The Defence appears to claim that when an accused waives his right to have the indictment read to him in full, the relevant Pre-Trial Chamber must abstain from reading the Indictment or even a summary of it.[8] The Defence challenges my references to situations where a summary of the Indictment was read despite a waiver. I accept that the Haradinaj and Karadžić situations may have been slightly different from the situation of the Accused. In the Defence's view, the initial appearance of Ante Gotovina can be distinguished from that of Ratko Mladić because the Gotovina indictment had been kept under seal for some years. In fact, the Gotovina Indictment was made public more than 21 months prior to his initial appearance.[9] Despite Mr Gotovina's waiver, the assigned Judge had the Indictment read out in full, as opposed to just reading a summary. Furthermore, I do not see a problem in referring to my own practice.

11. The right of an accused to have the Indictment read to him derives from the obligation of the court to read or have it read to him. To waive this right means nothing more than that the accused accepts that the court proceed without such reading. The Chamber acknowledged this waiver, which meant that the Indictment was not obligatorily to be read to the accused, and accommodated him in part by not reading the Indictment in full. That an accused can waive his right that the Indictment is read to him does not mean that he can dictate that the Indictment will not be read, neither in full nor in summary form. It was within the discretion of the Chamber to decide how to proceed with reading the Indictment and the Chamber had to consider in this context, apart from the interests of the Accused, the wider interests of justice.

12. The Defence further states that in none of the instances cited by me were the accused removed from the courtroom for requesting that their waiver be respected, suggesting that that was the situation with Mr Mladić. This is factually incorrect. Mr Mladić was not removed from the courtroom during the initial appearance, but during the further appearance, and not for "requesting that his waiver [to have the Indictment read

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[5] T. 11.
[6] Rule 62 (A) (ii) of the Rules (Emphasis added).
[7] T. 11.
[8] See Motion, para. 19.
[9] *Prosecutor v. Gotovina*, Case No. IT-01-45-I, Order Lifting the Seal on the Amended Indictment, Decision on Leave to Amend Indictment and on Confirmation of Amended Indictment and Order for Non-Disclosure, and Warrant of Arrest, 8 March 2004.

out] be respected" but for consistently interrupting the proceedings when I was in the process of entering pleas of "not guilty" on the Accused's behalf.

Courtroom removals

13. The Defence states that I have continued these irregular procedures by removing the Accused from the courtroom during the trial.[10] I refer to my above general considerations with regard to the fact that these were decisions by the Chamber as a whole. Furthermore, I note that Rule 80 of the Rules provides for the Chamber's authority to remove the Accused from the courtroom. The Defence has neither sought reconsideration nor certification to appeal any of these removal decisions, nor does it point to any improper application of the law. Under these circumstances, I am unable to see how this matter demonstrates bias on my part.

Communication with counsel

14. The Defence states that I have prevented communication between the Accused and counsel, including on one occasion when there was a technical problem with the Accused's B/C/S audio.[11] A review of the transcript pages cited by the Defence demonstrates that the Accused interrupted the proceedings after his counsel had stated that the technical problems had been resolved. As such, I consider the Defence submission not to be on point. I also note that the Chamber always paid proper attention that the Accused could follow the proceedings in B/C/S.[12]

15. The Defence further states that I demonstrated bias by allowing "testimony concerning privileged communications between the Accused and his counsel".[13] I note that there was a long procedural history in relation to the testimony of Prosecution witness Maria Karall. The Chamber granted a Prosecution motion to add this witness to the Prosecution's Rule 65 *ter* witness list, and prior to her testimony denied a Defence motion to not hear her testimony.[14] A subsequent certification request by the Defence was denied on the grounds that the Defence had not demonstrated that the requirements for certification had been met.[15] The Defence did not file a request for reconsideration. I consider it inappropriate for the Defence to raise the same matters which have been fully litigated, now as part of a disqualification motion. Nonetheless, as the submissions have been made, I will address them below.

16. The Defence states that the Chamber did not refute the submission that the Accused's utterances overheard by Maria Karall during a break constituted privileged communications.[16] While the Chamber at one point indicated that if the Accused audibly speaks to his counsel in court he waives his lawyer-client privilege,[17] it was made clear to the Accused from the very beginning of this case that if he wants to keep certain matters between himself and his counsel he should do his part by speaking at a lower volume.[18] In

[10] Motion, para. 24.
[11] Motion, paras 24-25.
[12] See e.g. T. 5698, 10013, 15251.
[13] Motion, para. 26.
[14] Decision on the Prosecution's Motion for Leave to Amend its Rule 65 *ter* Witness List, 22 August 2013; T. 16589-16590.
[15] Decision on Defence Request for Certification to Appeal Oral Decision of 12 September 2013, 21 October 2013.
[16] Motion, para. 30.
[17] T. 1481.
[18] T. 20.

any event, the Chamber was never asked to decide about the exact status of the Accused's utterances, whether he waived his privilege or whether the utterances never even entered the sphere of such privilege. Waiver does not have to refer to releasing existing privileged information but can also refer to a conscious choice to communicate in a setting which lacks the confidentiality the accused is entitled to. An accused can thus also waive his right to have a privileged conversation by, for example, speaking to his counsel in a public setting.

17. Furthermore, if the Defence takes issue with the fact that a decision was rendered in court on the spot, it should have sought the appropriate relief before the Chamber. In any event, the authorities now cited by the Defence[19] all misunderstand the situation at issue. The issue is not whether lawyer-client conversations are privileged. The issue here is whether this privilege attaches to loud interventions of the Accused and the Chamber found that it did not.

18. The Defence goes on to state that the Accused's health condition requires him to speak loudly and affects his impulse control.[20] Over the course of the Prosecution's case, the Chamber observed on numerous occasions that the Accused is perfectly able to control the volume of his speech.

19. The Defence further alleges that the Prosecution "surreptitiously" sought to eavesdrop on the Accused's conversations with his counsel during court breaks and did not disclose its intended actions to the Defence. The Defence again misstates the facts. The Prosecution clearly announced its intended actions almost half a year before the incident involving Maria Karall. On 23 August 2012, the Prosecution stated:

> [Mr. GROOME]: Secondly, Mr. Mladic has also adopted a practice of shouting instructions and other information to his Defence team. We can all hear it and many members of the Prosecution team understand what is being said. Before the summer break, Mr. Mladic said something which was certainly not in his interests to say. I want to make it very clear to Mr. Mladic and the Mladic Defence that while communications between an accused and his counsel are privileged and sacrosanct, it is the Prosecution's position that if such communications are made public, because they are shouted across a courtroom, it is the Prosecution's position that this important privilege may be deemed to have been waved and the Prosecution may seek to use any inculpatory statements shouted in this manner.[21]

20. Furthermore, counsel and Accused are not forced to stay in the courtroom during court breaks – where other people are present – and cannot reasonably expect that conversations yelled across the courtroom are to be considered privileged. There is nothing surreptitious about the Prosecution's conduct in this regard.

21. The Defence then states that the decision to allow the testimony of Maria Karall violates the Accused's right to be free from discrimination, as it fails to take into account the medical condition of the Accused.[22] As stated above, all of this rests on the premise that privilege attaches and that the Accused's medical condition does not allow for him to speak softly. This has been addressed above.

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[19] Motion, para. 34.
[20] Motion, paras 57, 61.
[21] T. 1481.
[22] Motion, para. 56.

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

Grounds B and C

23. The Defence argues that an appearance of bias originates from my alleged attitude towards the Accused's health during the proceedings. Such attitude, according to the Defence, is proved by the Appeals Chamber's overturning of the Trial Chamber's denial of an adjustment in the trial sitting schedule due to health concerns of the Accused, and manifested in some positions that I have expressed on behalf of the Chamber.

24. As a general remark, I would like to point out that the Accused's health has been of primary concern to the Chamber throughout the proceedings. The Chamber has taken various steps in order to closely monitor the Accused's medical situation, including, *inter alia*, entrusting an independent expert with a medical examination of the Accused, setting up a system of periodic reports on the Accused's health by the Medical Staff of the United Nations Detention Unit ("UNDU"), and hearing the UNDU Medical Officer in court.[23] No decision has been taken by the Chamber without having acquired a comprehensive overview of the Accused's medical situation.

25. Regarding Ground B, the issue of the modification of the trial sitting schedule, I reiterate my position, as set out above, on the alleged appearance of bias based on unfavourable decisions. A reversal by the Appeals Chamber of a Trial Chamber decision cannot *per se* imply that the Trial Chamber was affected by bias or that a reasonable observer would apprehend bias, especially if the Appeals Chamber made no finding to such effect.

26. Regarding Ground C, I note that the Defence has referred to various circumstances and has mentioned some issues which have been addressed under Ground A. The Defence claims that during periods of ill health for the Accused, I interfered with his ability to participate in the proceedings by refusing to stay or delay proceedings, and by forcing the Accused to choose between attending the proceedings despite being ill or missing them.[24] However, this assertion finds no support in the record or reality. The Chamber's cautious approach of verifying claims of illness was influenced by a long history of claims about the Accused not feeling well which finally were found to be without medical substance.[25] At no time did the Chamber, let alone me, decide to continue the proceedings without having ascertained that the Accused was, from a medical point of view, capable of participating and that his absence was the result of his own will not to attend. On every occasion in which the Accused indicated that he was not feeling well, his blood pressure was measured by qualified personnel and the measurements were found to be within an acceptable range.[26] The Defence assertion is further undermined by the fact that on at least two occasions in which the Accused's health condition did not allow him to be present in court, the Chamber decided to adjourn or to sit only to deal with procedural

[23] A broad description of the steps taken by the Chamber in this regard is contained in Order for Medical Examination of the Accused Pursuant to Rule 74 *bis*, 15 November 2013, paras 1-2.
[24] Motion, para. 79.
[25] T. 1856:14-17; 5488:22-23.
[26] See Registrar's Submission of the Internal Memoranda, 15 March 2013 (Confidential), with Confidential Annex, referring to all the events cited at Footnote 82 of the Motion.

matters, provided that Counsel agreed with the Chamber's inclination to proceed in this manner.[27]

27. The Defence further claims that I interfered with the Accused's right to participate in the proceedings and possibly infringed upon international human rights standards on the protection of persons with disabilities, by directing him to communicate with counsel during proceedings mainly through the use of written notes.[28] Firstly, I would like to stress that this decision was taken as a result of the Accused's continuous interference with the testimonies of witnesses, after the Chamber received complaints on the Accused's behavior from five different witnesses.[29] Secondly, despite this direction, the Chamber has on many occasions allowed the Accused to briefly consult counsel during the proceedings, provided that the volume of such consultation was not audible to others in the courtroom.[30] Thirdly, I note that, except for some general observations, the issue of the Accused's alleged inability to write by hand has never been formally or informally raised before the Chamber. On the contrary, the Chamber, having seen the Accused on an almost daily basis for 1.5 years, observed that he is with high frequency and adequate speed engaged in writing and exchanging notes with his counsel.[31]

28. Finally, the Defence claims that I showed my bias when the Chamber did not object to the change in the trial schedule which provisionally set the proceedings for the first two weeks of December from the morning to the afternoon, despite being aware of the Accused's preference for attending court in the morning due to his health issues.[32] I recall that the Chamber decided to grant the Defence's request to schedule morning court sessions, although no medical reasons had been established, "to the extent the Registry [was] able to do so".[33] Unless external circumstances – such as e.g. the hearing of witnesses from other continents via video-link – made it impossible to act otherwise, proceedings almost always took place in the morning. After the sessions for December 2013 were provisionally set for the afternoons due to courtroom unavailability, as soon as the Chamber noticed that a courtroom in the morning would be available, the sessions were moved to the morning.[34] Even when provisionally scheduling sessions for the afternoon, there was a very high chance that the sessions would be moved back to the mornings. The way in which an appearance of bias ascribable to the Chamber, let alone to me, can be inferred from these episodes remains unclear to me.

Ground D

29. I do not see how my role as presiding judge in the *Stanišić and Simatović* case, in which the two accused therein were acquitted, in any way gives rise to actual bias or an unacceptable appearance of bias in my current role as presiding judge in the *Mladić* case. In particular, the Defence fails to establish how actual or apparent bias can be derived from the *Stanišić and Simatović* Trial Chamber's inability to conclude that Stanišić and/or Simatović directed and organized the formation of the Skorpions, and its finding that the Skorpions and Serbian Volunteer Guard at one point in time operated under the command

[27] This happened on 12 and 13 July 2012, T. 819-829, 823-824, 827-828 and on 8 and 9 April 2013, T. 9513-9514, 9541.
[28] Motion, para. 83.
[29] T. 3226-3227.
[30] See e.g. T. 11696-11697, 12099-12100, 13063, 15440, 16335, 17265, 18939, 19000, 19079.
[31] See also T. 20711.
[32] Motion, para. 85.
[33] Scheduling Order, 15 February 2012, para. 13.
[34] T. 19898.

of General Dragomir Milošević of the VRS. While Mladić's alleged position as commander of the VRS Main Staff would make him the ultimate superior of General Dragomir Milošević, I recall the standard laid down by the ECtHR in its *Poppe v. The Netherlands* Judgement. The applicant's fear of bias can only be objectively justified if the previous proceedings determined that the applicant's involvement "fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence".[35] With no such adjudication having been made by the *Stanišić and Simatović* Trial Chamber of Mladić's participation in crimes subject of the present case, any findings made in the former proceeding do not give rise to an unacceptable appearance of bias on my part.

30. Furthermore, the Defence does not explain why I would have a "strong personal interest" in maintaining consistency with the findings of the *Stanišić and Simatović* Trial Chamber. As a judge who undertook a solemn declaration to fulfil my duties "honourably, faithfully, impartially and conscientiously", I will not hesitate to support findings in contradiction with those found in previously rendered judgements by benches I had been a member of, should the evidence in the case at hand call for a different finding to be made.

31. Finally, the Defence makes an unclear submission regarding four adjudicated facts that the Appeals Chamber had identified as having been improperly reformulated by the *Mladić* Trial Chamber, coupled with what appears to be a clearly erroneous reference to my having been defence co-counsel in the *Stanišić and Simatović* case.[36] The Defence submits that these adjudicated facts "originated from other proceedings judicially noted in *Stanišić and Simatović*", without further explanation.[37] I therefore consider that no response is due in relation to paragraph 97 of the Motion, except insofar as Ground K is addressed, but I am willing to provide a response should the Defence clarify its submission.

Ground E

32. The Defence argues that I have a "personal interest in preserving the findings" of the judgement in the *Galić* case.[38] The Defence raised this argument already in the 2012 Disqualification Motion and I have addressed this argument in the 2012 Memorandum.[39] I refer to that.

33. In relation to the additional submissions presented by the Defence in paragraphs 102-107 of the Motion, I would like to clarify the context of my references to material from the *Galić* case, which the Defence indicated as allegedly supporting an appearance of bias. I quote the following, relevant portions of the transcript of the cross-examination of Prosecution witness Hamill:[40]

> "Q. [MR. IVETIC]: [...] is it possible to determine how far a shot has travelled in relation to how far -- how deep it has impacted on a hard surface, that is to say the funnel -- the fuse tunnel or furrow of the crater?

[35] *Poppe* ECHR Judgement, para. 28.
[36] Motion, para. 97.
[37] Motion, para. 97.
[38] Motion, paras 99-108.
[39] 2012 Memorandum, paras 33-43.
[40] T. 5484-5487, 5502-5503.

A. [WITNESS HAMILL]: I am not aware of any publication which would give that type of information. Particularly as when the round impacts on the ground, the surface can be of various different types. [...]

JUDGE ORIE: Mr. Ivetic, you earlier had problems with expert matters. It is my recollection reading some of the judgement of this Tribunal that the matters you are addressing at this moment were dealt with by experts extremely specialised in this area, including the issues as you just mentioned them. Therefore, I'm wondering whether or not the basis of the knowledge of this witness on these matters should be tested before we ask questions around these matters, apart from whether this is expert evidence or not. I am perhaps a bit little less concerned by it in the formal sense than you are. The same may be true for my colleagues. But is there anyway, for example, to ask the witness whether he's aware of studies of the composition of the ground in relation to the penetration of the sound by projectiles, whether he has any knowledge of that Mr. Hamill, perhaps -- I think you heard the question. Are you aware of any studies of impact -- of projectiles on the various types of soil, concrete? Are you familiar with that?

THE WITNESS: I have not seen such literature, Mr. President. [...]

JUDGE ORIE: Mr. Ivetic, if you would read the proceedings, for example, in the Galic case, you'd find out that - and, of course, I'm referring to that case only - that experts of the Prosecution, expert of the Defence, both trained in the same field - I think even one being the professor of the other - agreed on important matters which required a thorough knowledge of exactly the kind of things Mr. Hamill has just told us he doesn't know about. So therefore, I wonder what is the use of asking these questions which require not only a bit of expertise but the highest possible expertise, which was, as I understand, only developed in the cases before this Tribunal, and then to ask the witness questions in the area where he has clearly shown to have no knowledge, let alone expert knowledge. [...]

MR. IVETIC: I will be happy to ask him as to his experiences of doing crater analyses and the education and training he has had in that regard if that will assists in terms of his knowledge base for the answers to the questions he provided to the Prosecution and to the Defence. [...]

JUDGE ORIE: Before we move on, could I ask the witness one or two questions. Mr. Hamill, have you read any of the reports which were later produced before this Tribunal by experts Vilicic and Zecevic.

THE WITNESS: No, sir, I have not.

JUDGE ORIE: Have you in any other way familiarised yourselves with what in addition to the technical possibilities you had at the time were available to experts that later studied and examined the matter?

THE WITNESS: No, sir. When we concluded our report on the 15th of February, that was the end of it, as far as we were concerned."

34. The aforementioned portion of the transcript indicates clearly that my intention when referring to expert reports used in the *Galić* case, was confined to assessing witness Hamill's extent of knowledge on the matter of fuse tunnel crater analysis and conclusions on the distance travelled by the shell. I inquired into relevant publications, including on the composition of surfaces, only after the witness himself had mentioned his lack of knowledge of publications and referred to the composition of surfaces as a relevant matter. The critical examination of a witness of fact presented by the Prosecution in relation to a matter, which may require a high level of expertise, shows, if anything, that I do not harbour any preconceptions against the Accused. Therefore, I do not find there is ground, based on which a well-informed and reasonable observer could come to the conclusion that I have a personal interest in preserving the findings of the *Galić* Trial Judgement.

35. With respect to the Defence's submission regarding the Appeals Chamber decision on the reformulation of Adjudicated Facts from the *Galić* Judgement and its impact on my role in the present trial, I refer to Ground K below.[41]

Ground F

36. I refer to the 2012 Memorandum about the allegations that I would have a strong personal interest in maintaining consistency with the findings made in the *Krajišnik* Trial Judgement.[42] The Defence further argues that the recent Appeals Chamber decision on adjudicated facts which overturned parts of the Trial Chamber's decision shows a bias on my part. This aspect is dealt with below in Ground K.

Ground G

37. I refer to the 2012 Memorandum about the allegations that I would have a strong personal interest in maintaining consistency with the findings made in the *Babić* Sentencing Judgement.[43]

38. In addition, I emphasize that there is nothing wrong with a Chamber admitting evidence on matters outside the temporal, geographical, and/or subject-matter scope of the indictment. Rule 92 *bis* (A)(i)(b) even explicitly provides for such a possibility.

39. Finally, I note that the Chamber has not yet decided on the Rule 92 *quater* motion to admit the evidence of Milan Babić, which adds to my confusion on how any appearance of bias could be established on this point.

Ground H

40. I note at the outset that this ground is a mere repetition of the Defence's submission in the 2012 Disqualification Motion.[44] [REDACTED][45] The President's prior denial of the Defence's original disqualification motion therefore remains valid in this regard. At any rate, I recall and refer to the 2012 Memorandum in this respect.[46]

Ground I

41. The Defence states that my previous role as a member of the Defence team of Duško Tadić raises a conflict of interest in my person and, therefore, represents a sufficient cause for my disqualification as Judge in the *Mladić* case in order to avoid the appearance of bias.[47] This argument was already addressed in the 2012 Memorandum and I refer to that.[48]

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[41] Motion, para. 101.
[42] 2012 Memorandum, paras 18-43.
[43] 2012 Memorandum, paras 44-48.
[44] 2012 Disqualification Motion, paras 59-63.
[45] [REDACTED]
[46] 2012 Memorandum, paras 44-48.
[47] Motion, para. 131.
[48] 2012 Memorandum, paras 49-54.

42. The Defence further specifies that the extensive period of my commitment as Mr. Tadić's co-counsel indicates that I must have obtained confidential information from Mr. Tadić relevant to the Accused's alleged involvement in the crimes committed by Duško Tadić in Prijedor municipality.[49] I reiterate that my former client never provided information to me related to his activities in Prijedor municipality that are at the basis of his conviction, as suggested by the Defence, or any other information that has a bearing on the determinations the Chamber will have to make in relation to the criminal responsibility of the accused for the crimes he is charged with. Even if I had received certain information in that capacity any appearance of bias would be wholly speculative and would not rebut the presumption of my impartiality.

43. With respect to the Defence's submission regarding the Appeals Chamber decision on the reformulation of Adjudicated Facts from the *Tadić* proceedings and its impact on my role in the present trial, I refer to Ground K below.[50]

Ground J

44. The Defence states that two sketches I drew during the testimony of Witness Smith raise the appearance of bias on my part.[51] The Defence suggests that these sketches and my questioning of the witness demonstrate that I have been influenced by knowledge obtained outside of the case.

45. I drew the sketches as a result of unclear terminology used during the testimony of Witness Smith. Unlike the Defence suggestion to the contrary, the questions were aimed at clarifying the witness's testimony and the sketches were aimed at better illustrating the different terminology used. As the sketches were shown to the witness, the Chamber determined that they should be made part of the evidentiary record and admitted them into evidence.[52] My questions were not triggered by any knowledge obtained from other cases but by common sense and listening to the witness's testimony.

46. The Defence further states that in admitting the sketches into evidence, I exceeded the limits of Rule 98 of the Rules. I do not understand Rule 98 of the Rules to require a Judge to instruct a party to sketch an illustration so that a witness's testimony can be better understood. Drawing a sketch is nothing else than a visual way of putting one's understanding of the testimony to a witness. In addition, neither party objected to the admission of the sketches at the time. The Defence also did not seek reconsideration or certification to appeal this decision.

Ground K

47. In Ground K, the Defence deals with the partially quashed decision by the Trial Chamber on reformulating adjudicated facts.[53]

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[49] Motion, paras 134-137.
[50] Motion, para. 138.
[51] Motion, paras 140-142.
[52] See Exhibits C2 and C3; see also T. 7576.
[53] Motion, paras 151-153.

48. The fact that the Appeals Chamber partially quashed the decision of the Trial Chamber on adjudicated facts is insufficient to conclude bias against the Accused. If this was the case, every quashed decision would open up a claim based upon bias of the trial judges. I also refer to my general observations on decisions unfavourable to a party.

49. Concerning the dissenting opinion of Judge Robinson, in which he questions the constitutionality of Rule 94(B) of the Rules, the Defence seems to suggest that the Chamber should disregard rules adopted by the plenary. I fail to see how the application of Rule 94(B) gives rise to an appearance of bias.

Ground L

50. The Defence states that the Chamber failed to issue orders on disclosure violations and grant relief for late disclosures. I am again of the view that this is not the proper forum for these issues. The Defence should have sought relief from the Chamber in relation to these litigated issues. However, as this is part of the Motion, I feel compelled to address the issue. I also add that this aspect was addressed before in the 2012 Memorandum.[54]

51. I do not recall that the Defence has ever requested the Chamber to explicitly establish that there was a disclosure violation. In most cases, there was an initial dispute between the parties whether material was disclosed which was then resolved between the parties. In other instances, the Prosecution conceded disclosure shortcomings. In relation to Rule 65 *ter* additions to the Prosecution's exhibit list, the Defence has consistently stated that good cause is a *conditio sine qua non*. The Chamber has consistently held that good cause is only one factor in determining whether adding documents to the Prosecution's Rule 65 *ter* exhibit list is consistent with the interests of justice.

52. The Defence also challenges the Chamber's practice of issuing oral decisions.[55] I am unclear how oral decisions by the Chamber – which are always accompanied or followed by full reasons – deprive the Defence of the opportunity to effectively challenge those decisions. I also note that the Defence's allegation in footnote 175 of the Motion about reasons of a decision which "to date have not been provided" is factually incorrect. The reasons were given on 27 November 2013, at transcript pages 20040-20043. In addition, I note that the Rules explicitly provide for the possibility of issuing oral decisions, e.g. Rules 15 *bis* (F), 54 *bis* (C) (ii), 65 (D), 72 (C), 73 (C), 77 (J), 91 (I), and 98 *bis*.

53. In relation to non-granted adjournments, I note that the Defence was granted a number of adjournments during the Prosecution's case.[56] In addition, the Appeals Chamber recently confirmed a Trial Chamber decision which denied an adjournment based on alleged disclosure violations.[57]

Ground M

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[54] 2012 Memorandum, paras 65-69.
[55] Motion, para. 168.
[56] See e.g. Decision on Urgent Defence Motion of 14 May 2012 and Reasons for Decision on Two Defence Requests for Adjournment of the Start of Trial of 3 May 2012, 24 May 2012; T. 1245-1246; T. 6156.
[57] *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.2, Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods, 28 November 2013.

54. The Defence states that my Dutch nationality presents a conflict of interest and personal bias against the Defence as it relates to the Srebrenica charges. I refer to paragraph 60 of the 2012 Memorandum. In addition, I emphasize that the ruling of the Civil Chamber of the Supreme Court of the Netherlands (regarding the accountability of the Netherlands for the death of three Muslim men) is foreign to individual criminal responsibility, whether in general or in relation to the Accused.

55. The transcript pages referred to in paragraph 182 of the Motion as an example of me interrupting witnesses when they were talking about the Netherlands in relation to Srebrenica, clearly show that where I interrupted the witnesses it was only to have the witnesses listen to the question asked and give a focused answer. The questions were also not about the role of the Netherlands. It is the Chamber's responsibility under Rule 90 (F) to exercise control over the presentation of evidence so as to avoid needless consumption of time. As it is clear from the record, I intervene on a regular basis during the testimonies of witnesses, irrespective of the witnesses' nationalities, allegiances, or the subject-matter of their testimony.[58]

Ground N

56. The Defence points at the Chamber's practice of communicating minor procedural decisions via e-mail.[59] This ground was already addressed in the 2012 Memorandum and I refer to it.[60]

57. The Defence refers to two additional instances that were not mentioned in the 2012 Disqualification Motion, where the Chamber communicated decisions in an informal manner.[61] These two decisions have both been put on the record by the Chamber.[62] As such, these informal communications do not deny the Defence the possibility of locating and formulating a record of such decisions.

Ground O

58. The Defence states that I have placed the Defence at a disadvantage in relation to unequal allocation of time for the examination of witnesses. It points in particular to the cross-examination of Witness Bowen which was cut short.

59. The Defence's premise is incorrect. It assumes that it is entitled to a certain amount of time to cross-examine witnesses. This is not the case. The Chamber gave general guidance on the time it would expect for cross-examination for different types of witnesses.[63] It often stated that this general framework would need to be adapted to specific situations, for example to the way in which examinations are conducted. The Chamber at various occasions expressed concern about the lack of relevance in the questions posed in cross-examinations. However, in most cases, the Chamber allowed the

[58] See e.g. T. 15648:22-15649:8, 16683:12-16685:18, 19754:12-19755:4.
[59] Motion, paras 188-190.
[60] 2012 Memorandum, paras 62-64.
[61] Motion, para. 188.
[62] T. 1283-1284; Decision on the Defence Motions for Certification to Appeal the Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 June 2012, para. 3.
[63] T. 222.

Defence to use the time it had requested to use. There were also various instances where the Chamber allowed the Defence more time than estimated. I note that for Witness Bowen there was no request for reconsideration, certification to appeal, or recall. In deciding to end cross-examination, the Chamber stated:

> JUDGE ORIE: Mr. Ivetic, the Chamber is not assisted at this moment by hearing answers to those questions, unless in one question you can make it perfectly clear what the relevance is. Apparently you are challenging the opinion expressed by the witness when he is reporting on matters, which is not the same as giving testimony on matters. So therefore, will you please keep this in mind for the remaining three minutes you have.
>
> [...]
>
> JUDGE ORIE: Mr. Ivetic. Mr. Ivetic, there is one sentence, perhaps I spoke too quickly, which is missing from the transcript. I think that is that the Chamber was not assisted by hearing the answer to the question unless in the next question you could immediately establish the relevance. You failed to do so. Apart from that, I didn't interrupt you, the ten minutes are over. So this concludes your cross-examination.
>
> MR. IVETIC: Can I play the videotape that the --
>
> JUDGE ORIE: No --
>
> MR. IVETIC: -- court technical services did not permit me to play earlier, Your Honour?
>
> JUDGE ORIE: No, Mr. Ivetic. I told you that you had ten minutes left and I interrupted you halfway, where I said we were not assisted by what you elicited from this witness. You nevertheless continued. Therefore, my question now to you, Mr. Jeremy, is whether you have any further questions.
>
> MR. JEREMY: No further questions, Your Honours.
>
> MR. IVETIC: I want it stated on the record that the Defence was not permitted to play a videotape that it had tried to present earlier which the court services would not have audio for it.
>
> JUDGE ORIE: It is already on the record, Mr. Ivetic.
>
> MR. IVETIC: Thank you, Your Honour.
>
> JUDGE ORIE: Of course, you asked whether you could do it, and I said no, you can't because you have spent your last ten minutes in a different way. *And the ten minutes were based upon the Chamber's observation on how you conducted your cross-examination.*[64]

IV. Conclusion

60. Based on my understanding of the Motion, it does not appear that the Defence argues any actual bias on my part. As the Defence is not explicit, and the language used is sometimes ambiguous on this point, I first want to state that I reject any allegation of actual bias. Further, I was unable to identify any argument or evidence which would support a conclusion of bias.

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[64] T. 18157-18160 (Emphasis added).

61. Above, I dealt in detail with the factual and legal arguments raised. I conclude that none of these grounds, neither separately nor cumulatively, justify a finding that the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias on my part.

62. I bring to your attention that some matters in this report are confidential and should thus not be made public. I am willing to inform you of any redactions necessary in case you want to have a public redacted version available.

ANNEX A

United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

CONFIDENTIAL
INTERNAL MEMORANDUM - MEMORANDUM INTERIEUR

Date: 17 January 2014

To: Alphons Orie, Presiding Judge, Trial Chamber I
A:

From: Judge Christoph Flügge
De:

Subject: Conferring on Disqualification Motion Pursuant to Rule 15(B)

1. The Defence in the *The Prosecutor v. Ratko Mladić,* Case No. IT-09-92-T, has filed before the President of the Tribunal and the *Mladić* Trial Chamber a motion for my disqualification as a judge in the *Mladić* trial. Pursuant to Rule 15(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), I hereby submit this report to you in your role as the Presiding Judge of Trial Chamber I.

2. In this report, I will address the following:

I. Submissions of the Defence
II. Applicable Law on Disqualification
A. The Rule
B. Jurisprudence on Timeliness of Disqualification Motions
C. Jurisprudence on Grounds for Disqualification
III. Discussion of the Defence Grounds for Disqualification
A. Preliminary Matters
B. Timeliness of the Motion
C. Defence Grounds for Disqualification
1. Alleged Personal Nature of and Interest in Findings
2. Factual Overlap and Perceived Inability to Separate Findings from Other Cases
IV. Conclusion

I. Submissions of the Defence

3. On 16 December 2013, the Defence in the case of *The Prosecutor v. Ratko Mladić,* filed the "Defence Motion to Exceed Word Count and Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Judge Christoph Flügge" ("Motion"), in which the Defence requests that I be disqualified from the *Mladić* case pursuant to Rule 15(A).[1]

4. In support of its request for my disqualification, the Defence argues that I have a strong personal interest in "preserving" the findings from the *Tolimir* Trial Judgement[2] which overlap significantly with the Prosecution's case against Mr Mladić.[3] The Defence

[1] Motion, p. 11.
[2] *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Judgement, 12 December 2012 ("*Tolimir* Trial Judgement").
[3] Motion, paras 25-27.

argues that it would be reasonable to perceive that I am therefore unable to separate these findings from those to be made in the *Mladić* case and because of the significant overlap between the two cases, it would be similarly reasonable to perceive that I have consequently prejudged aspects of the *Mladić* case and am therefore biased against Mr Mladić.[4]

5. The Defence makes references to findings in the *Tolimir* Trial Judgement as my findings alone, as well as references to the fact that I signed and "presided over" the *Tolimir* Trial Judgement, as bases for my alleged personal interest in these findings remaining "intact".[5] The Defence also argues that it is reasonable to believe that I have a strong personal interest in "preserving the findings" of the *Tolimir* Trial Judgement particularly in light of Judge Prisca Nyambe's dissent from portions of that judgment.[6]

6. The Defence submits that the findings from the *Tolimir* Trial Judgement have common characteristics with the evidence and allegations in the *Mladić* trial particularly as they relate to the relationship between Mr Tolimir and Mr Mladić, and findings related to the Scorpions Unit.[7] The Defence argues that because of my personal interest and this significant overlap, I will be "hard-pressed" to abandon my understandings and findings from the *Tolimir* Trial Judgement and have therefore "pre-adjudicated" findings related to Mr Mladić.[8] The Defence lists several examples from the *Tolimir* Trial Judgement of what it characterizes as findings relating to Mr Mladić that I have "pre-adjudicated".[9]

II. Applicable Law

A. The Rule

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

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

8. Rule 15(B) of the Rules governs the procedure for determining disqualification:

> (i) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the judge in question and report to the President.
>
> (ii) Following the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers to report to him its decision on the merits of the application. If the decision is to uphold the application, the President shall assign another Judge to sit in the place of the Judge in question.
>
> (iii) The decision of the panel of three Judges shall not be subject to interlocutory appeal.
>
> (iv) If the Judge in question is the President, the responsibility of the President in accordance with this paragraph shall be assumed by the Vice-President or, if he or she is not able to act in the application, by the permanent Judge most senior in precedence who is able to act.

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4 Motion, paras 25-27, 31.
5 Motion, p. 6 (subheading A); paras 5, 22, 25, 35-36.
6 Motion, paras 5, 22-25.
7 Motion, paras 17-22, 29-36.
8 Motion, paras 26, 35.
9 Motion, paras 25-28, 30-34.

B. Jurisprudence on Timeliness of Disqualification Motions

9. Rule 15(B) of the Rules does not address when a party should bring a motion for disqualification in relation to the time when that party first became aware of any of the alleged grounds of partiality. The principle of timeliness is however reflected in the rules of procedure and evidence of both the International Criminal Court ("ICC") and the Extraordinary Chambers in the Court of Cambodia ("ECCC"), which mandate that a disqualification motion must be brought as soon as the party is aware of the grounds on which it is based.[10]

10. Several national jurisdictions also require "timely" motions for disqualification, including Canada,[11] Switzerland,[12] Germany,[13] and Austria.[14] Additionally, in the United States, this requirement is codified in federal statute[15] and has been developed through federal circuit-court jurisprudence.[16] The timeliness requirement has been expressed as requiring that a motion for disqualification be brought "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim".[17] Further, it has been stated that "[t]he most egregious delay - the closest thing to *per se* untimeliness - occurs when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal".[18]

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

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

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

[13] *See* German Criminal Procedural Code (Strafprozeßordnung – StPO), §25.

[14] *See* Austrian Criminal Procedural Code (Strafprozeßordnung 1975 – StPO), §73.

[15] 28 U.S.C § 144, "Bias or prejudice of judge". The Code provides, in relevant part, "[w]henever a party to any proceeding in a district court makes and files a *timely* and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party". (emphasis added).

[16] *See, e.g., Polizzi v. United States*, 926 F.2d 1311, 1321 (2d Cir. 1991). In *Polizzi*, the Court noted that a timeliness requirement has been read into U.S.C. §455, notwithstanding that this section has no explicit requirement. Ibid. 28 U.S.C. § 455 of the Code, "Disqualification of justice, judge or magistrate", applies to "any justice, judge, or magistrate of the United States". *See also Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991) (requiring "reasonable promptness after the ground for such a motion is ascertained"); *United States v. Stenzel*, 49 F.3d 658, 661 (10th Cir. 1995) (finding that "[be]cause the defendant made no timely objection the recusal issue was not preserved for appeal").

[17] *Apple v. Jewish Hosp. and Medical Center*, 829 F.2d 326, 333 (2d Cir.1987).

[18] *United States v. Vadner*, 160 F.3d 263, 264 (5th Cir. 1998).

C. Jurisprudence on Grounds for Disqualification

11. According to the Tribunal's Appeals Chamber, there is a presumption of impartiality which attaches to a Judge.[19] As such, judges have a duty to sit in any case in which they are not obliged to recuse themselves.[20] There is a high threshold to rebut this presumption of impartiality: "disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established'".[21] Following the case law of the European Court of Human Rights ("ECtHR"), the Appeals Chamber found that "there is a general rule that a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias".[22] Questions of potential bias are to be considered in the context of this presumption of the judges' impartiality, reinforced by the oath judges make on taking up their duties.[23]

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

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

(b) the circumstances would lead a reasonable observer,[24] properly informed, to reasonably apprehend bias.[25]

13. In the *Renzaho* case, the ICTR Appeals Chamber reiterated its finding from the *Nahimana* case that the Judges of the Tribunal are "sometimes involved in trials which, by their very nature, cover overlapping issues".[26] In the absence of evidence to the

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

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

[21] *Furundžija* AJ, para. 197.

[22] *Furundžija* AJ, para. 189.

[23] *Furundžija* AJ, para. 197.

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

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

[26] *Prosecutor v. Tharcisse Renzaho*, Appeals Chamber, Case No. ICTR-97-31-A, Judgement, 1 April 2011, para. 22; The Presiding Judge in *Krajišnik* considered that the reasonable observer would know that the Tribunal is established to hear a number of cases related to the same overall conflict, *i.e.* the

contrary, the Appeals Chamber assumed that by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case. It therefore agreed with the holding of the ICTY Bureau in *Kordić and Čerkez* that "a Judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases".[27]

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

> Judges' training and professional experience engrain in them the capacity to put out of their mind evidence other than that presented at trial in rendering a verdict. Judges who serve as fact-finders may often be exposed to information about the cases before them either in the media or, in some instances, from connected prosecutions. The Bureau is not of the view that Judges should be disqualified simply because of such exposure. [...] The need to present a reasoned judgement explaining the basis of their findings means that Judges at the Tribunal are forced to confine themselves to the evidence in the record in reaching their conclusions.[28]

15. Likewise, in response to the accused's disqualification motion in *Šešelj*, the President placed special emphasis on the integrity of the judicial office and the professionalism of judicial office holders, stating the following:

> Judges are expected to be able to put out of their minds allegations in other cases which may have prejudicial effect to an accused before them and to adjudicate their case on the basis of the evidence before them only.[29]

16. Similarly, in his decision on a motion for disqualification in *Popović et al.*, the President held that "the presumption of a Judge's impartiality when dealing with evidence from prior proceedings applies regardless of whether the Judge previously made positive or negative assessments of the credibility of that evidence". The fact that the Judge had "previously heard testimony from a witness regarding the same facts in dispute on appeal" and "made an assessment of the credibility of that testimony" is not itself a sufficient basis to justify disqualification.[30]

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violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The judges of the Tribunal will therefore be frequently faced with oral and material evidence relating to the same facts which, as highly qualified professional judges, will not affect their impartiality. *See Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003 ("*Krajišnik* Withdrawal Decision"), paras 15, 17.

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

[28] *Prosecutor v. Galić*, IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), 28 March 2003 ("*Galić* Decision"), para. 16.

[29] *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, President, Decision on Motion for Disqualification, 16 February 2007, para. 25.

[30] *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, President, Decision on Drago Nikolić Motion to Disqualify Judge Liu Daqun, 20 January 2011 ("*Popović* Decision"), paras 3, 7-8, 10, 12; Tribunal decisions regularly refer to the professional capacity of judges to put out of their mind evidence other than that presented in the trial before them in rendering a verdict. For example, in *Kupreškić et al.*, the Trial Chamber ruled that whatever evidence was adduced in *Furundžija* would not be regarded as

17. Article 6(1) of the European Convention of Human Rights ("Convention") also provides for a fair and public hearing by an independent and impartial tribunal, impartiality thereby referring to a lack of prejudice or bias.[31] The ECtHR has consistently held that impartiality under Article 6(1) of the Convention must be determined first, according to a subjective test, that is on the basis of the personal conviction, interest or behaviour of a particular judge in a given case, and second on an objective test, that is by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.[32] Under the objective test:

> [...] it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be objectively justified.[33]

18. In *Poppe v. The Netherlands* ("*Poppe*"), the ECtHR considered that the work of criminal courts frequently involves judges presiding over various trials in which a number of co-accused are charged. Subsequently, it would render the work of the criminal courts impossible, if by that fact alone, a judge's impartiality could be called into question.[34] The ECtHR applied the objective test and held that:

> The mere fact that a judge has already ruled on similar but unrelated criminal charges or that he or she has already tried a co-accused in separate criminal proceedings is not, in itself, sufficient to cast doubt on that judge's impartiality in a subsequent case. It is, however, a different matter if the earlier judgments contain findings that actually prejudge the question of the guilt of an accused in such subsequent proceedings.[35]

19. The Court further held that in determining the "question of the guilt" the Court has to take into account:

> Whether the applicant's involvement with [other co-perpetrators mentioned in the earlier judgements] fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty, beyond reasonable doubt, of having committed such an offence was [...] addressed, determined or assessed by the trial judges whose impartiality the applicant now wishes to challenge.[36]

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evidence in *Kupreškić et al.*, see *Prosecutor v. Kupreškić*, IT-95-16-T, Order on Emergency Motion to Limit Prosecutor's Inquiry Relating to Accused Anto Furundžija, 26 August 1998.

[31] *See, inter alia,* ECtHR *Warsicka v. Poland*, Judgement of 16 April 2007, Application No. 2065/03, para. 35.

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

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

[34] *Poppe* ECHR Judgement, para. 23

[35] *Poppe* ECHR Judgement, para. 26.

[36] *Poppe* ECHR Judgement, para. 28. The ECtHR therefore examined the judgements handed down by the national court in relation to Poppe's co-accused, in order to determine whether these included any finding that in fact prejudged Poppe's guilt. It found that in these judgements, the judges had not

III. Discussion of the Defence Grounds for Disqualification

A. Preliminary Matters

20. As a preliminary matter, I note that in support of its arguments for disqualification, the Defence refers to paragraph 1170 of the *Tolimir* Trial Judgement as an instance in which I have allegedly prejudged findings related to Mr Mladić.[37] However, paragraph 1170, rather than being a finding of any kind, is instead a summary of arguments from the Prosecution's final trial brief in that case.

21. I also note that some matters in this report are potentially confidential and should therefore not be made public. I will be happy to inform you of any redactions necessary in case you want to have a public redacted version available.

22. I also note as a preliminary matter that as a professional judge of the Tribunal, I have carefully considered on two occasions my role as the Presiding Judge in the *Tolimir* case and any potential conflict it might cause with the *Mladić* case: first, at the commencement of the *Mladić* trial; and second, after the delivery of the *Tolimir* Trial Judgement. In neither instance did I find reason to recuse myself.

B. Timeliness of the Motion

23. I note with concern that the Motion, which advances arguments for my disqualification based solely on the content of the *Tolimir* Trial Judgement, was filed over a year after the issuance of that judgement on 12 December 2012. Furthermore, I am concerned about the appropriateness of the Defence waiting until the end of the Prosecution's case to file the Motion. Moreover, I note that the Defence does not address the timing of the Motion or offer any justification for having filed the Motion at such a late stage of the proceedings and with such a significant delay between the filing of the *Tolimir* Trial Judgement and its request for my disqualification on that basis.

24. As discussed above, although the timeliness of disqualification motions is not addressed in Rule 15(B) of the Rules, it is an established principle in international and domestic jurisprudence that such disqualification motions must be brought as soon as the moving party is aware of the grounds upon which the motion is based. In this regard, it must be noted that Mr Mladić is represented by counsel who work in the official languages of the Tribunal and who were in a position to fully understand the English original of the *Tolimir* Trial Judgement from the day it was filed. Therefore, because the Defence would have been aware of the grounds upon which the Motion is based upon receipt of the judgement, it was under an obligation to file without delay any disqualification motion based on that judgment. While there is no prescribed time limit in either the international or domestic jurisprudence for such motions, a delay of one year cannot be considered as a reasonable amount of time for the Defence to have read and understood the *Tolimir* Trial Judgment so as to become aware of the alleged grounds for disqualification.

25. Moreover, even if one disregards the fact that the Defence works in English – including the fact that the Motion was submitted in English with references to the English

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addressed the issue of whether the applicant's involvement fulfilled all the relevant criteria necessary to constitute a criminal offence and, if so, whether the applicant was guilty beyond reasonable doubt.[36] The ECtHR therefore found that the applicant's fear of bias on the part of the two judges was not objectively justified.

[37] Motion, para. 28, n. 37.

original of the judgement – and one assumes that the Defence needed to wait until the filing of the B/C/S translation of the judgement before it could become aware of the alleged grounds for disqualification, it must be noted that the B/C/S translation was filed on 6 June 2013, i.e. over six months before the Motion. Therefore, even if the Defence could justify the necessity of receiving the B/C/S translation, the significant amount of time that has elapsed would nonetheless constitute an unjustifiable delay in filing the Motion.

26. I also note with concern that the Defence waited to file the Motion until the end of the Prosecution's case in the *Mladić* trial, despite the fact that the alleged grounds for disqualification are wholly unrelated to events in these proceedings. In addition to the timeliness obligation discussed above in relation to the *Tolimir* Trial Judgement, the Defence was also obliged to file any disqualification motion as soon as possible in relation to the *Mladić* trial. The timeliness of the motion could have been considered differently if the Defence had, for example, relied on my individual conduct during the Prosecution's case in the *Mladić* trial as a factual basis for an assertion of bias, but the Defence presents no such argument. Therefore, absent any justification for the lateness of the Motion or a showing of a nexus between the alleged grounds of disqualification and events that took place during the Prosecution's case in the *Mladić* trial, the timing of the Motion should be considered to be highly inappropriate because of the potential impact on the expeditiousness of that trial.

27. Because the Defence was under an obligation to file the Motion promptly, but instead filed the Motion a year after becoming aware of the alleged grounds for disqualification and, inexplicably, only at the end of the Prosecution's case in the *Mladić* trial, the Motion should be denied as having not been filed in a timely manner. Alternatively, if it is found that the Defence could not understand the alleged grounds for disqualification until receipt of the B/C/S translation of the judgement, the time elapsed is nonetheless unreasonable and the timing remains inappropriate, and the Motion should, therefore, still be denied for reasons of untimeliness.

C. Defence Grounds for Disqualification

28. I do not understand the Motion to allege a lack of subjective impartiality, nor is any support given for such an argument. Instead, the Defence appears to limit its grounds for my disqualification to what it claims is an objectively reasonable perception of bias on my part against Mr Mladić. The Defence argues that this objectively reasonable appearance of bias exists as a result of my connection with the findings in the *Tolimir* Trial Judgment, as well as the factual overlap between the *Tolimir* and *Mladić* cases and my perceived inability to separate the findings in each case.

1. Alleged Personal Nature of and Interest in Findings

29. The Defence makes repeated references to the findings in the *Tolimir* Trial Judgment as being mine alone on the basis that I was the Presiding Judge in that case and signed the judgement. However, while the role of Presiding Judge of a particular chamber or case is clear, it is not entirely apparent to me what the Defence means by reference to my having "presided over the Trial Judgment" itself.[38] Nevertheless, neither my role as Presiding Judge of the *Tolimir* case, nor the fact that I signed the judgement, make the judgement's findings solely mine. Rather, in contrast to the Defence's characterizations, the findings in the *Tolimir* Trial Judgement are those of the *Tolimir* Chamber as a whole

[38] *See* Motion, p. 6 (subheading A); paras. 5, 22.

or, in instances where Judge Nyambe dissented, they represent the findings of the majority. Moreover, it should be noted that the entire *Tolimir* Chamber signed the Judgment.

30. Similarly, it is not clear to me how, nor does the Motion elaborate as to why, a dissenting opinion of a fellow judge would lead one to reasonably perceive that a judge of the majority would have a strong personal interest in ensuring that the majority's findings "remain intact". Moreover, I can only assume in this context that such references to "preserving" findings are meant to allege that findings from one case would somehow be transferred to another case.

31. As discussed in more detail below, the Defence's presupposition that findings might be transplanted from case to case shows a lack of understanding or appreciation for the integrity and professionalism of the Tribunal's judges, which the reasonably informed person would be expected to have. Moreover, the Defence does not provide any factual basis to support its allegation that I have a personal interest in preserving the findings of the *Tolimir* Trial Judgement, such as showing that I have a proprietary or financial interest, or that I share a common cause with one of the parties. It is also important to note that the propositions put forth by the Defence with regard to the personal nature of, and interests in, such findings would appear to apply to all Presiding Judges of the Tribunal, as well as every judge who signs a judgement or happens to share a bench with a dissenting colleague. For these reasons, I believe that the Motion has failed to show either that the findings in the *Tolimir* Trial Judgement are mine alone, or that I have any kind of personal interest in them being preserved or somehow transferred to another case.

2. Factual Overlap and Perceived Inability to Separate Findings from Other Cases

32. With regard to the Defence argument that there is impermissible overlap between the *Tolimir* and *Mladić* cases, it must first be noted that there is indeed a significant factual overlap between the findings in the *Tolimir* Trial Judgement and the evidence and allegations in the *Mladić* case to date, in particular as they concern the alleged events surrounding the fall of Srebrenica and the alleged subordinate/superior relationship between Messrs. Tolimir and Mladić. In this respect, the Defence correctly submits that the findings in the *Tolimir* Trial Judgement concerning the Scorpions Unit share common characteristics with the related allegations in the *Mladić* trial. Similarly, the Defence correctly submits that Mr Mladic is mentioned frequently in the *Tolimir* Trial Judgement, including in the factual and legal findings presented therein. However, the jurisprudence concerning the propriety of judges sitting in related trials is well established and does not support the proposition put forth by the Defence.

33. In accordance with the principles set forth by the Bureau in the *Kordić and Čerkez* case, I cannot be disqualified simply because I have heard evidence which overlaps significantly due to allegations in the *Tolimir* and *Mladić* cases arising from the same series of events. Similarly, as discussed in the *Poppe* case, the mere fact that I was a member of a chamber that tried Mr. Tolimir in separate criminal proceedings is not, by itself, sufficient to cast doubt on my impartiality in the *Mladić* case. The Defence has failed to argue any specific circumstances such as the ones referenced in the *Poppe* case that could justify deviating from this principle.

34. Moreover, as discussed in the analogous *Renzaho* case, my fellow Tribunal judges and I are commonly involved in trials that cover overlapping issues by their very nature. This principle of permissible overlap is especially significant at the Tribunal considering

its limited geographic and temporal jurisdiction and the relatively small pool of judges from which it draws. It is important to note that in this respect the proposition put forth by the Defence with regard to disallowing such overlap would have the effect of disqualifying many Tribunal judges who have heard evidence in closely-related cases and who have done so with increasing frequency as the Tribunal nears the completion of its mandate.

35. With regard to the Defence argument that it would be reasonable for one to perceive some difficulty on my part in disregarding findings from the *Tolimir* Trial Judgement when considering the allegations and evidence in the *Mladić* case, the jurisprudence is similarly well established and does not support this conclusion. As discussed in the *Renzaho* and *Nahimana* cases, in the absence of evidence to the contrary, it is understood that by virtue of my training and experience, I will rule fairly and rely exclusively on the evidence adduced in the case before me. Similarly, as stated in the *Galić* case, the requirement that my findings be based on reasoned judgement necessarily compels me to limit my considerations to the evidence on record before me. Moreover, as discussed in the *Šešelj* case, as a professional judge I am expected to disregard allegations from other cases which could have a prejudicial effect on the accused before me. For these reasons, it would not be reasonable for one to objectively perceive difficulty on my part in disregarding findings from the *Tolimir* case when considering a different yet related case such as the *Mladić* case.

36. In following the principles discussed in the *Poppe* case, an objective, reasonable perception of bias might, however, be possible if the *Tolimir* Trial Judgment contained findings related to Mr Mladić that actually prejudged the question of his guilt. However, in contrast to the Defence submissions, this is not the case. Although Mr Mladić is referred to numerous times in the factual and legal findings found in the *Tolimir* Trial Judgement, in no instance is Mr Mladić's involvement with Mr Tolimir or others discussed or presented so as to fulfil all the relevant criteria necessary to constitute a criminal offence for which he might be liable. Moreover, the *Tolimir* Trial Judgement does not contain any determination or assessment of any criminal liability on the part of Mr Mladić beyond a reasonable doubt.

37. By way of example, the following are a few of the excerpts from the *Tolimir* Trial Judgement cited by the Defence as instances in which I have allegedly "pre-adjudicated" findings related to Mr Mladić:

> Moreover, shortly before his address to the crowd, Mladić was recorded in an intercepted conversation as having stated that all of the Bosnian Muslim population would be transported from Potocari, whether they wanted to or not.[39]
>
> The Chamber has found that Mladić, as well as security, and intelligence officers Radoslav Janković, Popović, Momir Nikolić and various corps and brigade officers were present at the UN compound in Potocari on the days of the forcible transfer on 12 and 13 July, and that they were directly involved on the ground and controlled the process.[40]
>
> The gesture Mladić made in Konjević-Polje in response to Momir Nikolić's inquiry about the fate of the prisoners, which Nikolić understood to mean they would be killed, as well as Mladić's order to Malinić to halt the registration of the prisoners in the Nova Kasaba Football Field constitute further evidence that the prisoners were destined to be killed.[41]

[39] *See* Motion, para. 28, n. 37; *Tolimir* Trial Judgement, para. 276.
[40] *See* Motion, para. 27, n. 36; *Tolimir* Trial Judgement, para. 1039.
[41] *See* Motion, para. 28, n. 37; *Tolimir* Trial Judgement, para. 1053.

38. Although these findings, as well as others cited by the Defence, discuss the acts of Mr Mladić based on evidence presented in the *Tolimir* trial, an example of something that remains conspicuously absent from such findings is any discussion of Mr Mladić's *mens rea* – a necessary element of any relevant criminal offence for which he could be liable. Additionally, as these examples illustrate, the findings cited by the Defence do not discuss any assessments of guilt on the part of Mr Mladić. Therefore, in accordance with the criteria set out in the *Poppe* case, the passages cited by the Defence do not contain findings that actually prejudge the question of guilt and, for this reason, the Defence has not shown that it would be objectively reasonable for one to perceive bias on my part against Mr Mladić.

IV. Conclusion

39. The Defence has failed to show that the findings from the *Tolimir* Trial Judgement amount to circumstances which would objectively give rise to an appearance of bias. As discussed above, a judge cannot be disqualified simply because he or she sits on two cases arising from the same events and hears evidence relating to those events in both cases – circumstances which are commonplace at the Tribunal. Furthermore, professional judges are expected to rely exclusively on the evidence adduced in the case before them regardless of any assessments of evidence in previous proceedings, and in this respect are understood to possess the integrity and impartiality necessary to separate findings from case to case, in particular when such cases contain significant factual overlap. Any properly informed and reasonable observer would be aware of these characteristics of professional judges and would, therefore, not reasonably apprehend bias on my part in the current circumstances.

40. For the reasons discussed above, I am convinced that the Defence has failed to show either actual bias or an unacceptable appearance of bias on my part and, in the event that the Motion is not denied for reasons of untimeliness, it should be denied for failing to show any grounds justifying my disqualification.

ANNEX B

United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

INTERNAL MEMORANDUM - MEMORANDUM INTERIEUR

Date: 14 May 2012

To: Theodor Meron, President
A:

From: Alphons Orie, Presiding Judge, Trial Chamber I
De:

Subject: Report pursuant to Rule 15 (B)

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

In this report, I will address the following issues:

I General observations, including:
- who is properly seised of the Motion and whether it was filed in a timely manner;
- the representation of Trial Chamber activities as constituting my personal activities; and
- adverse rulings by the Trial Chamber as a basis for disqualification.

II A general overview of the applicable law, including international, regional and domestic jurisdictions.

III The Grounds for my disqualification raised in the Motion: In relation to Grounds B and C, the law specifically applicable in relation to these grounds (and to a lesser extent also to Grounds D, E and F) is explored in more depth.

IV Conclusion

I. General observations

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

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

[1] Motion, para. 1.
[2] Motion, Section V, Relief Requested. (Emphasis added).
[3] *Prosecutor v. Mladić*, Case No. IT-09-92-I, Order Assigning Judges to a Case before a Trial Chamber, 27 May 2011, p. 3.

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

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

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

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[4] *Prosecutor v. Galić*, Case No. IT-98-29, Decision on the Defence Motion for Withdrawal of Judge Orie, 3 February 2003, para. 11.

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

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

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

[8] See German Procedural Code (Strafprozeßordnung – StPO), §25.

[9] See Austrian Procedural Code (Strafprozeßordnung 1975 – StPO), §73.

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

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

[12] *Apple v. Jewish Hosp. and Medical Center*, 829 F.2d 326, 333 (2d Cir.1987).

impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal".[13]

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

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

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

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

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[13] *United States v. Vadner*, 160 F.3d 263, 264 (5th Cir. 1998).
[14] See, in particular, Grounds H, I, J, M, and N in the Motion.
[15] See T. 57, 75, 96-97, 126, 151, 185, 216.
[16] See, for example, T. 69, 82, 197, 218-219.
[17] *Prosecutor v. Blagojević*, Case No. IT-02-60, Decision on Blagojević's Application Pursuant to Rule 15 (B), 19 March 2003 ("*Blagojević* Decision"), para. 14.
[18] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44, Decision on Motion by Karamera for Disqualification of Judges [Bureau], 17 May 2004, para. 13; See also *Prosecutor v. Ntahobali*, Case No. ICTR-97-21, Decision on Motion for Disqualification of Judges, 7 March 2006, para. 12.
[19] See *Co-Prosecutor v. Nuon Chea et al*, Case No. 002/19-09-2007/ECCC/TC, Decision on Application for Disqualification of Judge Silvia Cartwright, 9 March 2012 ("Cartwright Decision") (stating that "not even adverse rulings by a Judge in relation to a party by themselves suggests actual bias or creates a basis on which, a reasonable observer, properly informed, could reasonably apprehend bias [...]"); In *re* IBM Corp., 45 F.3d 641 (2nd Cir. 1995), citing to *Liteky v. United States*, 114 S.Ct. 127 (1994) (in which the US Supreme Court stated that "[j]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion" and "can only in the rarest circumstances evidence the degree of favoritism or antagonism required".)
[20] Cartwright Decision, para. 18.

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

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

II. Law

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

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

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

> (i) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the judge in question and report to the President.
>
> (ii) Following the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers to report to him its decision on the merits of the application. If the decision is to uphold the application, the President shall assign another Judge to sit in the place of the Judge in question.
>
> (iii) The decision of the panel of three Judges shall not be subject to interlocutory appeal.
>
> (iv) If the Judge in question is the President, the responsibility of the President in accordance with this paragraph shall be assumed by the Vice-President or, if he or she is not able to act in the application, by the permanent Judge most senior in precedence who is able to act.

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

[21] See Motion, paras 11, 103.

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

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

[24] *Furundžija* AJ, para. 197.

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

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

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

(b) the circumstances would lead a reasonable observer,[27] properly informed, to reasonably apprehend bias.[28]

III. Grounds

Ground A

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

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[25] *Furundžija* AJ, para. 189.
[26] *Furundžija* AJ, para. 197.
[27] *Furundžija* AJ, para. 190. A "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."
[28] *Furundžija* AJ, para. 189. With regard to the appearance of bias, the test is "whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgment) would be that the judge in question might not bring an impartial and unprejudiced mind to the issues arising in the case." *Prosecutor v. Delalić et al.*, Appeals Chamber, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 683. See also *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Decision on Joint Motion to Disqualify, 3 May 2002, para. 26. To the requirement that such an apprehension of bias must be a reasonable one, see *Prosecutor v. Delalić et al.*, Appeals Chamber, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 697. For ICTR case law, see ICTR *Prosecutor v. Jean-Paul Akayesu*, Appeals Chamber, Case No. ICTR-96-4-A, Judgement 1 June 2001, para. 91; ICTR *Prosecutor v. Karemera, Rwamakuba, Ngirumpatse, Nzirorera*, The Bureau, Decision on Motion by Nzirorera for Disqualification of Trial Judges of 17 May 2004, paras 8-11.
[29] T. 11.
[30] Rule 62 (A) (ii) of the Tribunal's Rules of Procedure and Evidence. (Emphasis added).
[31] T. 11.
[32] See T. 1.

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

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

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

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

Grounds B-C

18. Under Ground B and C, the Defence has argued that I have a "personal interest in preserving the findings" of the judgements in the *Galić* case and *Krajišnik* case.[35] I will first set out the case law in this respect and then deal with the substance of the Defence's argument.

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

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

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[33] See Motion, paras 25, 27, 29.
[34] See T. 44-50.
[35] *Prosecutor v. Galić*, Case No. IT-98-29, Judgement and Opinion, 5 December 2003 ("*Galić* Judgement"); *Prosecutor v. Krajišnik*, Case No. IT-00-39, Judgement, 27 September 2006 ("*Krajišnik* Judgement").

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

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

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

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

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

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

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

[37] [REDACTED].

[38] *Prosecutor v. Kupreškić*, IT-95-16-T, Order on Emergency Motion to Limit Prosecutor's Inquiry Relating to Accused Anto Furundžija, 26 August 1998.

> Judges at the Tribunal are forced to confine themselves to the evidence in the record in reaching their conclusions.[39]

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

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

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

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

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

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

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[39] *Prosecutor v. Galić*, IT-98-29-T, Decision on Galić's Application Pursuant to Rule 15(B), 28 March 2003 ("*Galić* Decision"), para. 16.

[40] *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003 ("*Krajišnik* Withdrawal Decision"), paras 15, 17.

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

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

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

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

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

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

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

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

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[44] See *inter alia* ECtHR *Ferrantelli and Santangelo v. Italy*, Judgement of 7 August 1996, Application No. 19874/92, para. 58; ECtHR *Indra v. Slovakia*, Judgement of 1 May 2005, Application No. 46845/99, para. 49; ECtHR *Warsicka v. Poland*, Judgement of 16 April 2007, Application No. 2065/03, para. 37; ECtHr, *Fatullayev v. Azerbaijan*, Judgement of 4 October 2010, Application No. 40984/07, para. 136.
[45] ECtHR *Poppe v. The Netherlands*, Judgement of 24 March 2009, Application No. 32271/04 ("*Poppe* ECHR Judgement"), para. 7.
[46] *Poppe* ECHR Judgement, paras 3, 19.
[47] *Poppe* ECHR Judgement, para. 23
[48] *Poppe* ECHR Judgement, para. 26.
[49] *Poppe* ECHR Judgement, para. 28.
[50] Ibid.
[51] Ibid.

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

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

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

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

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[52] ECtHR *Miminoshvili v. Russia*, Judgement of 28 June 2011, Application No. 20197/03 ("*Miminoshvili* ECHR Judgement"), paras 116, 118.
[53] *Miminoshvili* ECHR Judgement, paras 118-119.
[54] *Miminoshvili* ECHR Judgement, para. 120.
[55] BGHSt (German Supreme Court on Criminal Cases), BGHSt 21, p. 334, 341; *Goltdammer's Archiv für Strafrecht* ("GA") 1978, p. 243; *Monatsschrift für deutsches Recht* ("MDR") 1972, p. 387; OLG (Higher Regional Court) Düsseldorf, *Neue Juristische Wochenschrift* ("NJW") 1982, p. 2832; GA 1993, p. 461.
[56] BGH MDR 1974, p. 367; *Neue Zeitschrift für Strafrecht* ("NStZ") 1986, p. 206; BGHSt, *Strafverteidiger* ("StV") 1987, p. 1; BGHSt, NJW 1996, p. 1355, 1357; BGHSt NJW 1997, p. 3034, 3036; *Neue Zeitschrift für Strafrecht Rechtsprechungsreport* ("NStZ-RR") 2001, p. 129.
[57] NJW BGH 1997, p. 3034, 3036. The German original reads: "Auch die Schilderung des Tatgeschehens einschließlich der Handlung der erst später ihrerseits angeklagten Tatbeteiligten in den früheren Urteilen der abgelehnten Richter führt hier nicht zu einem anderen Beurteilungsergebnis. Es lag vielmehr in der Natur der Sache, daß die Tatschilderung an dieser Stelle bereits die dann noch nicht angeklagten Beteiligten einschließen mußte. Daraus folgt nicht, daß die Richter, die an diesen früheren Urteilen beteiligt waren, sich endgültig auf diese Schilderung festgelegt hatten. Die Einlassung der späteren Angeklagten oder die neue Beweisaufnahme konnten sie durchaus dazu bewegen, die Feststellungen in anderer Sache anders zu treffen; tatsächlich wurden die Angeklagten Z. und W. - entgegen der Verurteilungsprognose im Eröffnungsbeschluß - teilweise freigesprochen".
[58] ECtHR *Schwarzenberger v. Germany,* Judgement of 10 August 2006, Application no. 75737/01 ("*Schwarzenberger* ECHR Judgement"), paras 6-8, 12, 41.
[59] *Schwarzenberger* ECHR Judgement, paras 42-46.

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

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

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

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

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[60] See *Furundžija* AJ, para. 189, reviewed above.
[61] See *Nahimana* AJ, para. 78, reviewed above.
[62] Ibid.
[63] See *Popović* Decision, reviewed above.
[64] *Krajišnik* Judgement, paras 1087-1090.
[65] *Krajišnik* Judgement, para. 1087.
[66] *Krajišnik* Judgement, para. 1108. See also para. 1121.
[67] *Krajišnik* Judgement, para. 1108.

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

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

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

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

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

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[68] See Defence Response to "Prosecution Motion for Judicial Notice of Adjudicated Facts" filed 9 December 2012, 1 February 2012.

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

[70] Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 340; T. 276.

[71] T. 274-275.

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

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

42. For paragraphs 40 and 41 of the Motion, I quote the relevant portions of the transcript:[72]

> MR. LUKIĆ: [...] the Defence will object any written statement tendered under the Rule 92 bis if it goes to prove that the acts and conduct of the accused as charged in the indictment because it is directly against the rule, and this also goes to the acts and conduct of subordinates of the accused.
>
> [...]
>
> JUDGE ORIE: Yes. What I was -- you were talking about the subordinates [...] Do you have case law to say that whatever is done by subordinates is excluded and is included in acts and conduct as charged against the accused?
>
> MR. LUKIĆ: I don't know it by heart. We addressed it before. But I can tell you that according to the indictment, every single military person, police officer, and even local Serbs according to the indictment are subordinate to my client.
>
> JUDGE ORIE: Yes. But are there other cases where whatever someone who was subordinated was -- or under the -- whether that was all excluded. We'll have a look at it but that is, of course, one of the issues we'll have to specifically research in order to follow your rather general rejection of almost of the 92 bis material.

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

Grounds D-F

[72] T. 387-388.

44. Under Grounds D, E, and F, the Defence has raised that I have a "personal interest in preserving the findings" of the sentencing judgements in the *Češić*, *Babić*, and *Mrđa* cases.[73]

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

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

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

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

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

[74] *Prosecutor v. Milan Babić*, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Sentencing Appeal"), para. 18.

[75] Ibid.

[76] T. 326-327.

[77] Motion, para. 57. The Defence states cautiously that "[...] one cannot exclude" that the *Babić* proceedings influenced the Chamber's decision.

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

Ground G

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

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

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

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

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

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

Grounds H-J and M

[78] See *Krajišnik* Withdrawal Decision.

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

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

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

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

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

Ground L

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

[79] Transcript of 20 February 2012 Rule 65 *ter* meeting, T. 253-255.
[80] Transcript of 20 February 2012 Rule 65 *ter* meeting, T. 255.

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

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

Ground N

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

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

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

Ground O

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

[81] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003, paras 3-4.
[82] T. 75, 84-85.

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

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

> JUDGE ORIE: Okay. Then the next one, access motion. Motion seeking access to confidential materials in 32 closed cases. One of the items you are seeking is all audio recordings of all closed and private sessions. The Registry has raised, informally, with the Chamber, but I hereby put it on the record, practical concerns with – in relation to the time and the resources needed to provide this audio material as requested, and therefore I would like to invite you to clarify a few matters, Mr. Lukić. First, are you seeking B/C/S audio or also the audio of translations, English, French?
>
> MR. LUKIĆ: Not French, definitely. Whatever we have in writing in English we don't need audio.
>
> JUDGE ORIE: What you have in writing in what language?
>
> MR. LUKIĆ: In English.
>
> JUDGE ORIE: So –
>
> MR. LUKIĆ: Probably we have – we'll be able to get transcripts in English.
>
> JUDGE ORIE: Yes. I take it that you'll get transcripts in English.

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

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

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[83] See Mladić Motion for Access to Completed Cases, 1 March 2012.
[84] Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 335-336.
[85] Transcript of 19 April 2012 Rule 65 *ter* meeting, T. 385.

> JUDGE ORIE: [...] Now, the Chamber understands that any disclosure – I should say, perhaps, any additional disclosure – that means disclosure still remaining after all the batches of disclosure – that any disclosure, whether we are talking about 66 (A) or 68 or whatever, which is related to these witnesses will be completed by the 27th of April. And if there are any problems in this regard, the Chamber would like to know that immediately, without delay. And if it is already – if already any disclosure item is identified which is problematic, I do understand that it's – some BCS translation are, that's the 48 documents – do you think – the dead-line more or less was 27th of April – that this will be resolved in the next nine days, eight days? Eight days.
>
> MR. GROOME: Your Honour, can I suggest that – we have prioritized it with CLSS, but it would be – prior to the Pre-Trial Conference we will actually speak to them. They now have it, they've had – they'll have an opportunity to look at it. And we'll provide the information that they'll provide us about when they'll do it.
>
> JUDGE ORIE: Ok.
>
> MR. GROOME: And, again, within that we will prioritize it so that it's prioritized in the order of the witnesses we will call.

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

Ground P

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

71. The request by the Chamber read:

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

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

[86] Motion, para. 112.

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

73. At the 29 March 2012 status conference, I stated:[89]

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

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

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

Ground Q

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

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

[87] Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 277; T. 241.
[88] Transcript of 26 March 2012 Rule 65 *ter* meeting, T. 276-278.
[89] T. 242.
[90] T. 313-315.
[91] T. 384-385. After conferring with my colleagues, I ended by stating, "Mr. Groome, the Chamber has no problem whatsoever if you refer to practices which were – which you have seen in other cases, but that should be irrespective of whether judges in those cases are sitting in this case or not, let alone that you personally address Judges for that purpose". T. 385.

IV. Conclusion

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

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

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

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