



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

Case No. IT-00-39-PT
Date: 22nd January
2003
Original: English

THE TRIAL CHAMBER

Before: Judge Liu Daqun, Presiding
Registrar: Mr. Hans Holthuis
Decision of: 22nd January 2003

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

**DECISION ON THE DEFENCE APPLICATION FOR
WITHDRAWAL OF A JUDGE FROM THE TRIAL**

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Deyan Ranko Braschich
Mr. Nikola Kostich

1. Introduction

1. Pursuant to Rule 15(B) of the Tribunal's Rules of Procedure and Evidence ("the Rules"), the accused *Momčilo Krajišnik* has applied to me as Presiding Judge of Trial Chamber I for the withdrawal of Judge Alphons Orié from the trial against him in this Chamber (the "Application").¹ The Accused asserts that Judge Orié, by virtue of his previous function as co-counsel for a person once convicted by this Tribunal, Mr. Dusko Tadić, who eventually will be called to testify as a witness for the Defence in the present case, has "an association which might affect his [...] impartiality" for which reason he may not sit on the Bench.²

2. Background

2. The case against *Momčilo Krajišnik* was assigned by the President of the Tribunal in November 2002 to Trial Chamber 1, composed of Judge Amin El Mahdi, Judge Alphons Orié and myself as Presiding Judge.³

3. Judge Orié was elected a Judge of the Tribunal by the United Nations General Assembly in March 2001, at which time he had served since 1997 as a Judge in the Supreme Court of The Netherlands. From 1995 to 1997, while being a partner in the Dutch law firm Wladimiroff & Spong, he acted as co-counsel for Duško Tadić in the trial before this Tribunal, but was granted leave to withdraw as co-counsel upon his appointment to the Dutch Supreme Court, prior to the Tribunal's rendering of its Judgement in Tadić.⁴ He is currently the Presiding Judge in Section B of Trial Chamber I.

3. The Submissions of the Parties

4. In his Application, the Accused reminds that Duško Tadić was represented at trial by Mr. Michael Wladimiroff as counsel and Mr. Alphons Orié, as co-counsel and confirms that Mr. Tadić will be called as a witness for the Defence, as will indeed a number of witnesses who also appeared in the case against Tadić. The Accused, furthermore, refers in his Application to the Prosecution's motion for the Chamber to take judicial notice of adjudicated facts, many of which are gathered,

¹ Application of 14 January 2003 to the Presiding Judge Pursuant to Rule 15(B) for the Withdrawal of a Judge.

² See *Prosecutor vs. Duško Tadić*, IT-94-1-T.

³ Ordonnance du Président relative à l'attribution d'une affaire à une Chambre de première instance.

⁴ See UNGA doc. A/55/773 of 9 February 2001, Curricula Vitae of Candidates Nominated by States Members of the United Nations, at page 58.

inter alia, from the Tadić-case and thus, in the view of the Accused, corroborating the assumption of a disqualifying association between Judge Orić and the facts and circumstances of the present case.

5. The Prosecutor responded that the Application fails to meet the threshold to rebut the presumption of the Judges' impartiality and quoted the Appeals Chamber's judgement of 21 July 2000 in *Furundžija* to demonstrate that this threshold is indeed high.⁵ In the Prosecutor's view, the Application does not provide any ascertainable facts which may raise doubts about Judge Orić's impartiality in the present case, for which reason the Application should be dismissed.

4. Analysis and Findings

6. The matter to be addressed in this instance is whether Judge Orić's earlier participation as co-counsel for the defence of an accused who now appears as a witness in another case before this Tribunal may constitute, in light of the language and the spirit of Rule 15(A) of the Rules, "*an association which might affect his impartiality*". The Application brought by the Accused is based on Rule 15(B) of the Rules, but any finding under this provision relies upon the grounds spelled out in Rule 15(A). I shall therefore begin my analysis within the realm of the latter.

7. The problem raised in the Application begs two questions, *viz.*: (1) Is there an association between Judge Orić and the present case? and, in the affirmative, (2) May this association affect Judge Orić's impartiality?

8. A few initial considerations should be given to the notion of "an association". It would be erroneous to assume from the outset that every possible association, however remote, between the Judge and the Accused or for that matter a witness or the facts relating to another case against a witness automatically qualifies as "an association" within the meaning of Rule 15. For there to exist a relevant association in terms of this Rule, in my view, the party challenging the Judge's impartiality must demonstrate that the Judge entertains a personal interest in or a particular concern for any of the Parties, the witnesses or the facts of the case. Such personal interest or particular concern is certainly different from any lawyer's professional interest in the subject-matter of the case.

9. This is the test to be made in respect of the first question. *If* such association is shown, it then remains to be established whether it affects or might affect the Judge's impartiality in the individual case. That is the purpose of the second question.

⁵ See Prosecutor's Response of 20th January 2003 to the Defence Application for Withdrawal of a Judge.

10. Rule 15 on Disqualification reads,:

“(A). 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.

(B). 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 if necessary the Bureau shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.” (Italics added)

11. In my view, an association is likely to affect the impartiality of a Judge if the association involves the Judge’s personal interest in the outcome of the case. If that were the case, the Judge in question would certainly host an *actual bias* and thus be disqualified from the Bench.

12. There is, however, nothing in this case to suggest that Judge Orić is biased by personal interest in the outcome of the present case or that he otherwise may not bring an impartial and unprejudiced mind to the issues arising in this trial. The Accused, on the other hand, does not assert that Judge Orić is directly biased in this sense; in fact, the Accused’s submission is rather vague on this point as there is no clear indication of just *how* Judge Orić’s impartiality in the present case is supposed to be affected by his previous participation as co-counsel for one witness and his affinity with the merits of the old case against that witness. For the sake of the argument, thus, I will interpret the Application to imply that there is a risk that Judge Orić *might indeed be seen to be biased* for the reasons advanced by the Accused.

13. This understanding of Rule 15(A) is fully consistent with the Tribunal’s practice and the practice in national jurisdictions as well as in the European Court of Human Rights. In several cases,⁶ the Appeals Chamber of this Tribunal has established that a Judge should not only be free from bias, but also that there should be nothing in the surrounding circumstances which objectively give rise to an appearance of bias. The same is true for the position on Judges’ impartiality in Common Law as well as in Civil Law.⁷ According to the European Court of Human Rights, disqualification is required where there is either a lack of *subjective* impartiality (the existence of actual bias) or lack of *objective* impartiality (the existence of fear of bias); even where there is no suggestion of actual bias, in other words, the mere doubt about the Judge’s impartiality may amount to an inadmissible jeopardy of the confidence which the Court must inspire in a democratic society.

⁶ See the Appeals Chamber’s Judgement of 21 July 2000 in *the Prosecutor vs. Anto Furundžija*, IT-95-17/1-A, at paras. 189-91; and the Appeals Chamber’s Judgement of 20 February 2001 in *The Prosecutor vs. Delalić a.o.* (“the Čelibići Case”), IT-96-21-A, at par. 706. See also Judge Hunt’s pre-trial Decision of 18 May 2000 on Application by Momir Talić for the Disqualification and Withdrawal of A Judge, *Prosecutor vs. Brđanin and Talić*, IT-99-36-PT, at paras. 8 and 14.

⁷ See, e.g., for Common Law the House of Lords in the United Kingdom, *Ex Parte Pinochet Ugarte*, (no.2) 1999/2 WLR 272; and for Civil Law Article 668-69 of the French *Code de Procédure Pénal*; Section 60-61 of the Danish Code of Judicial Procedure (“*Retsplejeloven*”).

The decisive element in such cases, thus, is whether there is a legitimate and objectively justified reason to fear that a particular Judge lacks impartiality.⁸

14. To maintain that the Judge must not only be impartial, but also be seen to be impartial, however, is of only little use short of any indication of how or by whom the Judge's impartiality is hence to be ascertained. In the Tribunal's practice,⁹ the commonly applied model for this test is the perception of a "hypothetical fair-minded observer with sufficient knowledge of the actual circumstances to make a reasonable judgement". The "hypothetical fair-minded observer", by implication, is someone from outside who, as an *observer* (and not a party) recognizes and understands the circumstances well enough to tell whether or not the public sense of Justice would be challenged by the presence of a particular Judge on the Bench in the case at hand.

15. For the purpose of the present case, such an observer would know that a defence counsel's actual performance during a case is determined by the overall strategy adopted in agreement with the client, but that the defence counsel is certainly not committed to uphold these views as his or her personal opinion. The observer would also 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, and that the Judges of the Tribunal will therefore be faced frequently with oral and material evidence relating to the same facts which, as highly qualified professional Judges, will not affect their impartiality.

16. Based on these premises and having given full weight to the Application, I have not been satisfied that the hypothetical fair-minded observer with sufficient knowledge of the circumstances could or indeed would sustain any reasonable apprehension of bias or prejudice on the part of Judge Orić based on his association to a previous case in which he acted as co-counsel for a person who is now to be called as a witness in the present case.

17. Judge Orić was appointed a member of this Tribunal on the basis of his outstanding background which included, as can be retrieved from his public CV, his former role as co-counsel for Mr. Tadić. Had this fact been perceived as something which in any way would or indeed could affect his impartiality, he would certainly not have been elected as a Judge and there is therefore a presumption that his familiarity with the procedures of this Tribunal was seen as a merit rather than a reason for his disqualification. In my capacity as Presiding Judge of the Trial Chamber, I would

⁸ See *Piersac vs. Belgium*, Judgement of 1 October 1982, ECHR Series A No. 53, at para. 30; *Hauschildt vs. Denmark*, Judgement of 24 May 1989, ECHR Series A/154, paras. 46-48; *Thorgeir Thorgeirson vs. Iceland*, 14 ECHR Reports 1992; *Bulut vs. Austria*, Judgement of 22 February 1996, ECHR Reports 1996, at page 356, paras 31-33; *Feranteli & Santangelo vs. Italy*, 23 ECHR Reports 1997.

⁹ See Judge Hunt's pre-trial Decision of 18 May 2000 on the Application by Momir Talić for the Disqualification and Withdrawal of A Judge, *Prosecutor vs. Brđanin and Talić*, IT-99-36-PT, at para. 15.

add (but this is something that the fair-minded observer would not know) that many of the facts adjudicated in the Tadić Judgement and now identified for judicial notice in the present case are of a purely descriptive nature without any bearing on or implication of the guilt of the Accused, such as the geographical location of camps or the physical destruction of a number of buildings dedicated to religious purposes (mosques). As argued above in the name of the fair-minded observer, the Judges are frequently, and increasingly so as the trials devolve, faced with parts of the ever growing body of adjudicated facts before this Tribunal; this is exactly the background for the provision in Rule 94(B) and there is no ground for turning this development into an argument for disqualification of Judges. Judge Orić's former position on various factual issues relating to the Tadić case and notably the weight he appended to certain facts at that time depended exclusively on the defence strategy developed for that particular case. This question, however, is premature since the Trial Chamber has not yet taken any position on judicial notice of adjudicated facts in the present case.

18. After having thoroughly reviewed the Application, I am convinced that there is no ground for challenging the fact that Judge Orić is fully capable of applying his mind to the merits of this case in a completely unprejudiced and impartial manner.

19. From a general point of view, I feel impelled to remind that the question of withdrawal of Judges on alleged disqualification by virtue of their earlier participation in other cases from which witnesses or evidence will be brought to the case at hand is a matter of importance to all Chambers. For that same reason, the Tribunal has already at several occasions had the opportunity to establish that its Judges are not disqualified from hearing a case by the mere fact that they have dealt with witnesses or evidence related to the same facts in other cases.¹⁰ I therefore urge the Parties to apply their right to file motions to the Chamber with restraint and caution so as to avoid unnecessary delays in the proceedings.

20. I have, as I am required to do under Rule 15, discussed the Application with Judge Orić but have not found it necessary to refer the matter to the Bureau.

21. Having carefully considered the submissions of both Parties in the instant case, finally, I do not find sufficient grounds for calling for a hearing on this matter.

¹⁰ See, e.g., Decision of 21 May 1998 by Trial Chamber I in *The Prosecutor vs. Kordić & Čerkez*, IT-95-14/2-PT, at page 4.

5. Disposition

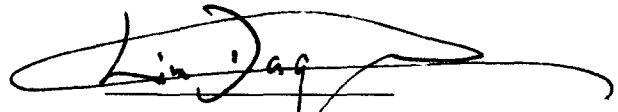
FOR THESE REASONS,

22. The Application is denied.

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

Dated this twenty second day of January 2003,

At The Hague,
The Netherlands

A handwritten signature in black ink, appearing to read 'Liu Daqun', written over a horizontal line. The signature is stylized and cursive.

Judge Liu Daqun

Presiding Judge

(Seal of the Tribunal)