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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991	Case No.: IT-03-67-PT Date: 16 February 2007 Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: **Judge Fausto Pocar, President**

Registrar: **Mr. Hans Holthuis**

Decision of: **16 February 2007**

THE PROSECUTOR

v

VOJISLAV ŠEŠELJ

DECISION ON MOTION FOR DISQUALIFICATION

Counsel for the Prosecutor:

Ms. Hildegard Uertz-Retzlaff
Mr. Ulrich Müssemeyer
Mr. Daniel Saxon

The Accused:

Mr. Vojislav Šešelj

1. On 17 November 2006, Vojislav Šešelj ("Šešelj") filed before the Presiding Judge of Trial Chamber One and myself, as President of the International Tribunal, a Motion requesting the disqualification of Judges Alphons Orie, Patrick Robinson and Frank Höpfel from the trial and appeal proceedings in the case against him.[1] This is not the first time that Šešelj has filed a motion seeking the disqualification of Judges assigned to the case against him. On 2 October 2006, he filed three similar motions before the Bureau of the International Tribunal requesting the disqualification of the Bench then assigned to his case comprised of Judge Patrick Robinson, Judge Alphons Orie and Judge Bakone Justice Moloto.[2] On 6 November 2006, the Bureau dismissed those three motions on the ground that the Bureau had no jurisdiction over the motions filed before it.[3] In that Decision, the Bureau explained to Šešelj the procedure to be followed under Rule 15 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), to have a motion for disqualification considered. In this Motion, Šešelj has attempted to follow that procedure.

2. Šešelj has filed his Motion before the Presiding Judge in the case against him, Judge Alphons Orie, pursuant to Rule 15(B)(i), which in relevant part provides that:

> 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 [...]. The Presiding Judge shall confer with the Judge in question and report to the President.

Šešelj has also filed his Motion before me and has requested that following my receipt of the report from Judge Orie, I take the step identified in subparagraph (ii) of Rule 15(B):

> 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.

However, as will be explained in the following, I have determined that it is not necessary in this instance to appoint a panel of three Judges from other Chambers to issue a decision on the merits of the Motion.

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[1] Motion to Disqualify Judges Alphonsus [*sic*] Orie, Patrick Robinson and Frank Höpfel From the Trial and Appeal Proceedings in the Case Against Vojislav Šešelj, 17 November 2006, translation received on 5 December 2006 ("Motion").

[2] Request for the ICTY Bureau to Disqualify and Withdraw Judge Alfons [*sic*] Orie from the Trial and Appeal in the Case Against Dr. Vojislav Šešelj, 2 October 2006; Request that the Bureau of the ICTY Disqualify and Withdraw Judge Patrick Robinson from the Trial and Appeals Proceedings in the Case Against Dr. Vojislav Šešelj, 2 October 2006; Application for the Bureau of the ICTY to Disqualify and Withdraw Judge Bakone Moloto from the Trial and Appeal Proceedings in the Case Against Dr. Vojislav Šešelj, 2 October 2006.

[3] Decision on Motions for Disqualification of Judge Patrick Robinson, Judge Alphons Orie and Judge Bakone Justice Moloto, 6 November 2006 ("Decision").

Rather, I am satisfied by the report provided to me by the Presiding Judge that there is no merit to Šešelj's Motion. I note at the outset that Judge Robinson, named in the Motion as one of the Judges Šešelj seeks to have disqualified, is no longer assigned to Šešelj's case but was replaced by an *ad litem* Judge on 27 November 2006, in order to permit the Tribunal to begin another trial.[4]

3. On 26 January, the Presiding Judge provided me with a report on the Motion for disqualification in accordance with Rule 15(B)(i). In that report, the Presiding Judge advised me that he did not consult with Judge Robinson due to his replacement and, as such, he considered the request with respect to Judge Robinson to be moot. I concur with that conclusion.

Applicable Law

4. Before considering the contents of the report of the Presiding Judge, it is worth recalling the provision of Rule 15, which identifies the basis for the disqualification of a Judge from proceedings against an accused. Rule 15(A) 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.

The jurisprudence of the Tribunal with respect to the proper interpretation of this provision is well established. In interpreting the impartiality requirement, the Appeals Chamber has held that not only should a Judge be subjectively free from bias, but there should also "be nothing in the surrounding circumstances which objectively gives rise to the appearance of bias".[5] An appearance of bias is established if: "(i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or (ii) the circumstance would lead a reasonable observer, properly informed, to reasonably apprehend bias."[6]

5. With respect to the reasonable observer prong of the test, the Appeals Chamber has held that the "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

[4] Order Assigning an *Ad Litem* Judge to a Case Before a Trial Chamber, 27 November 2006.
[5] *Prosecutor v Furundžija*, Case No: IT-95-17/1-A, Judgement, 21 July 2000, para. 189.
[6] *Ibid.*

of the fact that impartiality is one of the duties that Judges swear to uphold."[7] When applying this test, Judges enjoy a presumption of impartiality. Thus in "the absence of evidence to the contrary, it must be assumed that the Judges of the International Tribunal can disabuse their minds of any irrelevant personal beliefs or predispositions."[8] The burden is upon the moving party to adduce sufficient evidence that a Judge was not impartial and there is a high threshold to rebut the presumption of impartiality.[9]

Motion for Disqualification

6. In support of his Motion for the disqualification of Judge Höpfel, Šešelj alleges that Judge Höpfel participated in a decision in his case to which he was not authorised to participate. He claims that Judge Höpfel was assigned to his case by an order issued by me on 31 October 2006, making that assignment effective from 1 November 2006. However, on 25 October 2006, in the Trial Chamber decision ordering the assignment of standby counsel and delaying the commencement of trial, Judge Höpfel is identified as a member of the Bench. Šešelj claims that it was not possible for Judge Höpfel to act as a member of the Bench prior to the issuing of my order of 31 October assigning him to Šešelj's trial.[10]

7. While I appreciate Šešelj's confusion with respect to this issue, the complaint is without merit. On 3 October 2006, I issued an order assigning Judge Höpfel to Trial Chamber I for the purposes of pre-trial work. I was able to do so by reference to Security Council resolution 1481 (2003), which permits *ad litem* Judges to work on any case pre-trial. To be assigned to the actual trial of an accused, however, a letter of appointment by the Secretary-General is required. Such a request was made by me to the Secretary-General and following the decision of the Secretary-General to make the appointment on 21 September 2006, another order was issued by me on 31 October 2006, assigning Judge Höpfel to the trial of Šešelj. The decision Judge Höpfel participated in on 25 October 2006 was a pre-trial decision, and he was properly assigned to Šešelj's case pre-trial by my order of 3 October 2006.

8. Šešelj's next allegation is that since 1 November 2006, Judge Höpfel has participated in rendering oral and written decisions and orders at the three status conferences by the Trial Chamber, which violated his rights. He claims that the fact that Judge Höpfel has never issued a separate or dissenting opinion establishes that Judge Höpfel "has fully adopted the style of work of the Trial

[7] *Ibid.*, para. 190 (internal citation omitted).
[8] *Ibid.*, para. 197(internal quotation marks omitted).
[9] *Ibid.*
[10] Motion, p. 14

Chamber and Judges Orie and Robinson, who are the most prominent protagonists of violating" his rights.[11]

9. The Presiding Judge advised that he did consult with Judge Höpfel on this allegation and that following that consultation he considered the allegation to be without merit. Likewise, I am not persuaded that Šešelj's complaint is capable of establishing bias or the appearance of bias on the part of Judge Höpfel. Šešelj has not adduced any evidence capable of establishing a personal interest on the part of Judge Höpfel in this case or any association that affects his impartiality. His claim is rather that he does not agree with the decisions issued by the Trial Chamber assigned to his case to which Judge Höpfel joined and such disagreement cannot rebut the presumption of impartiality of Judge Höpfel.

10. With respect to Šešelj's complaints of impartiality on the part of Judge Orie, the allegations are numerous. Judge Orie has considered each of the allegations made and reported to me that he does not consider that Šešelj has established either actual bias or the appearance of bias on his part. Having considered the allegations for myself, and as will be explained below, I cannot but only concur fully with Judge Orie. Šešelj has not adduced any evidence capable of establishing a personal interest on the part of Judge Orie in this case or any association that affects his impartiality. He has not adduced any evidence capable of establishing any bias or the appearance of bias on the part of Judge Orie and has failed to rebut the strong presumption of impartiality.

11. Šešelj bases his claim of lack of impartiality on the part of Judge Orie by reference to decisions issued by the Trial Chamber to which he does not agree.[12] He gives the following examples of decisions that he claims evidence partiality on the part of Judge Orie: the Decision on Filing of Motions of 19 June 2006 in which he claims that Judge Orie suspended the application of the Practice Direction on the Length of Briefs and Motions only with respect to him; the Decision on Form of Disclosure of 4 July 2006, which he says imposed upon him disclosure in electronic form and in a foreign language thereby violating his right to be informed in Serbian as his mother tongue and his right to be informed in hard-copy format; and the Decision on Assignment of Counsel, which ordered his participation in his trial through assigned counsel. Šešelj notes that this last decision was overturned by the Appeals Chamber on 20 October 2006 and claims that "this fact, in itself, illustrates best that Judge Orie has a propensity to trample on the human rights of the accused".[13]

12. While I appreciate that none of the decisions identified by Šešelj are decisions that he agrees to, I am not able to find that they are such as to establish any actual bias or the appearance of bias on the part

[11] *Ibid.*, p. 14.
[12] *Ibid.*, p. 3.

of Judge Orie. Each of the decisions are the type of decisions that Trial Chambers are entitled to take, and commonly do take, in the exercise of their discretion for purposes of ensuring the orderly conduct of an accused's trial. The decisions are not taken against the interests of the accused, but in the interests of the accused's right to an expeditious and well-managed trial. Accordingly, Šešelj's allegations to the contrary are without merit. Finally, with respect to the Trial Chamber's decision assigning counsel, which was overturned by the Appeals Chamber, that overturning was based on procedural grounds only and, as such, the original decision is not one which can be said to establish the type of allegation made by Šešelj. Again, I am confident that the Trial Chamber's decision to assign counsel to Šešelj was motivated by a desire to ensure the integrity of the trial process and protect his rights in that process, it was not a decision taken to deliberately derogate from Šešelj's rights as he here claims.

13. Šešelj next complains that the Trial Chamber, under the presidency of Judge Orie, granted the Dutch attorney Mr. van der Spoel the status of standby counsel to him and permitted van der Spoel to file an interlocutory appeal on his behalf against the Decision on Assignment of Counsel. Šešelj claims that this was done in spite of the fact that Judge Orie knew that Šešelj never had any contact with him and refused to recognise him as his counsel. Šešelj alleges that, while permitting van der Spoel to file an appeal, Judge Orie refused to grant him leave to do so on his own behalf.[14]

14. While I also disagree with the decision granting the Dutch attorney Mr. van der Spoel the status of standby counsel to Šešelj given the strong and lasting opposition manifested by the latter towards the former, I have no doubt and believe that no reasonable observer could have reasonable doubt that this decision formed part of the more general decision to ensure the integrity of the trial and protection of Šešelj's right to a proper defence. As to the decision of permitting the standby counsel to file an interlocutory appeal on behalf of Šešelj, it was clearly taken in the interest of protecting Šešelj's right to appeal. None of the two above mentioned decisions therefore shows evidence of bias or special interest on the part of Judge Orie establishing the possibility of actual bias or the appearance of bias.

15. Šešelj also alleges that the Trial Chamber decision to impose standby counsel following the Appeals Chamber decision overturning the Decision on Assignment of Counsel is further evidence of Judge Orie's bias against him.[15]

16. In his report, Judge Orie notes that standby counsel was deemed necessary almost from the beginning of Šešelj's case, and that the imposition of standby counsel was a return to the position that existed prior to the imposition of assigned counsel, which was overturned on appeal. I agree with Judge

[13] *Ibid.*, p. 3.
[14] *Ibid.*, p. 4.

Orie that the action of the Trial Chamber in returning to the status quo following the Appeals Chamber decision does not establish actual bias or the appearance of bias on the part of Judge Orie as the Presiding Judge of the Trial Chamber. It merely shows a desire on the part of the Trial Chamber to ensure the orderly conduct of the trial in light of the history of the proceedings by which it had been deemed necessary to provide Šešelj with the assistance of counsel.

17. Šešelj next provides a narrative of events that occurred in various status conferences that he claims is evidence of Judge Orie's bias against him. At the status conference of 1 November 2006, he claims that he asked to be removed because he could not bear to be in the courtroom due to Judge Orie's disregard of human rights. At the status conference of 8 November, he claims that Judge Orie rendered nine oral decisions each denying the "elementary conditions for the preparation of defence" and during the closed part of the status conference, Judge Orie issued a warning to him about an event from 2005 and threatened to deprive him of his right to self-representation. Šešelj argues that the warning which the Appeals Chamber decision of 20 October 2006 said must be given to him prior to any imposition of assigned counsel related to future events and not events alleged to have occurred in 2005.[16]

18. In the report provided, Judge Orie explains that while Šešelj did ask to be removed from the courtroom at the status conference of 1 November 2006, it was because he did not wish to be in the same courtroom as standby counsel. Judge Orie also states that the warning made at the status conference of 8 November was made in response to the refusal of Šešelj during that status conference to accept a finding of the Trial Chamber in its Decision on Assignment of Counsel in relation to a violation by him in 2005 of protective measures for a witness. With respect to the decisions complained of, they were all decisions made towards the expeditious and orderly conduct of the trial.

19. Having considered the allegations and the response of the Presiding Judge, I am more than satisfied that there is absolutely no evidence of actual bias, nor the appearance of bias on the part of Judge Orie. What we have here is clearly a situation where an accused refuses to conform to judicial control of his proceedings because things are not handled in the way he would like. The fact that an accused does not like the way a Trial Chamber controls the conduct of his proceedings cannot establish bias on the part of that Chamber or any of its members. All it establishes is evidence of disagreement between an accused and a Judge.

20. Šešelj next provides an abridged version of Judge Orie's previous career as a partner in a Dutch law firm; his role as a defence counsel before this Tribunal, which Šešelj claims is evidence of Judge

[15] *Ibid.*
[16] *Ibid.*

Orie's bias against Serbs; his election as Judge of the Supreme Court of The Netherlands; and his holding of numerous offices today, which he claims are inconsistent with his position as a Judge of this Tribunal.[17]

21. In his report, Judge Orie acknowledges his earlier role as defence counsel before this Tribunal and states that in accordance with this ethical duty to do so, he acted at all time in the best interests of his client. With respect to his election as Judge of the Supreme Court of The Netherlands and holding of numerous other offices, he explains that while Šešelj presents them as if he is still active in them, most of them were one-off or short-term activities. Currently, he has special unpaid leave as a Judge of the Supreme Court and other positions are not active.

22. Again, I find no evidence of bias or special interest on the part of Judge Orie establishing actual bias or the appearance of bias. There is nothing inconsistent in Judge Orie's past activities as an advocate, Judge, or other office holder, with his current role as a Judge of this Tribunal. Nor is there any activity identified which could even remotely establish that Judge Orie does not bring an impartial mind to proceedings at this Tribunal.

23. Šešelj next claims that Judge Orie's participation in the *Babić* case shows that he cannot be impartial in relation to his case. He argues that in paragraph 7 of the Indictment against Milan Babić, he is named as a participant in a joint criminal enterprise. Šešelj claims that this "creates an unacceptable impression of bias because such circumstances give reason to every reasonable observer, properly informed, to apprehend bias on the part of Judge Orie on the grounds that the familiar details from this case prejudice" him.[18]

24. In his report, Judge Orie points out that it is common place at this Tribunal for there to be a degree of overlap between cases. However, it is also well established that each case will be decided on the basis of the evidence heard by the Chamber in relation to that particular case, apart from the taking of judicial notice under Rule 94 of the Rules. Furthermore, as Babić pleaded guilty, the present case law of this Tribunal prevents the taking of judicial notice of facts agreed between the parties for a guilty plea. In this respect, the case of *Babić* will have no influence on Judge Orie's adjudication of facts in the case against Šešelj.

25. Having considered the argument of Šešelj, I am not persuaded that the fact of Judge Orie's participation in other cases, which may have contained allegations against Šešelj, can establish actual

[17] *Ibid.*, p. 5.
[18] *Ibid.*, p. 6.

bias or the appearance of bias on the part of Judge Orie. 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. There is no indication that Judge Orie is unable to act in a way that is consistent with this expectation.

26. The final allegations made by Šešelj center on decisions taken by the Trial Chamber towards the proper management of the case against him[19] and, as already stated above, I am confident that these allegations only evidence frustration on the part of Šešelj with judicial control being exercised over his case. As previously stated, the fact that an accused does not like or agree with the decisions taken by a Trial Chamber aimed towards the orderly management of his case to ensure a fair and expeditious trial is not a fact that can establish bias, or the appearance of bias on the part of a Judge.

Disposition

27. In light of the foregoing, I am not persuaded that it is necessary for me to appoint a panel of three Judges pursuant to Rule 15(B)(ii) of the Rules. Šešelj has not established any actual bias or the appearance of bias on the part of Judge Höpfel or the Presiding Judge, Judge Orie. Rather, he has made numerous unfounded allegations, which are actually based upon his dislike with the way the Trial Chamber has been managing his trial in order to ensure that it is conducted expeditiously and fairly, and that his rights to a fair trial are fully protected.

28. Upon this basis, Šešelj's Motion and the request therein that I appoint a panel of three Judges pursuant to Rule 15(B)(ii) is **DENIED.**

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

Done this 16th day of February 2007,
At The Hague,
The Netherlands.

Judge Fausto Pocar
President

[Seal of the International Tribunal]

[19] *Ibid.*, p. 8.