



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-98-32/1-T  
Date: 12 January 2009  
Original: English

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**THE VICE-PRESIDENT OF THE INTERNATIONAL TRIBUNAL**

**Before: Judge O-Gon Kwon, Vice-President**

**Acting Registrar: Mr. John Hocking**

**Decision of: 12 January 2009**

**PROSECUTOR**

**v.**

**MILAN LUKIĆ  
SREDOJE LUKIĆ**

***PUBLIC***

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**DECISION ON MOTION FOR DISQUALIFICATION**

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**Office of the Prosecutor**

Mr. Dermot Groome

**Counsel for the Accused**

Mr. Jason Alarid and Mr. Dragan Ivetić for Mr. Milan Lukić  
Mr. Đuro Čepić and Mr. Jens Dieckmann for Mr. Sredoje Lukić

I, O-Gon Kwon, Vice-President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal"), acting pursuant to Rules 15 and 21 of the Rules of Procedure and Evidence ("Rules"), render the following decision in relation to "Milan Lukić's Application for Disqualification and Withdrawal of the Trial Chamber Based on Prosecution *Ex Parte* Applications Against the Accused, the Defence Team, and Defence Witnesses During Trial Creating a Risk of an Appearance of Prejudice" ("Motion"), filed before the Trial Chamber on 15 December 2008.

## I. BACKGROUND

1. In the Motion, Milan Lukić ("Lukić") requests the disqualification of the "President of the Chamber," Judge Patrick Robinson, as well as Judges Christine Van den Wyngaert and Pedro David (collectively, "Judges"), from the proceedings in the case against him.<sup>1</sup> On 17 December 2008, the Trial Chamber directed the Motion to the Presiding Judge of Trial Chamber III,<sup>2</sup> Judge Iain Bonomy ("Presiding Judge"), who conferred with the Judges in question and produced a report in relation to the Motion in accordance with Rule 15(B)(i) of the Rules,<sup>3</sup> which 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 upon the above grounds. The Presiding Judge shall confer with the Judge in question and report to the President.

The same day, the Presiding Judge issued a preliminary order directing Lukić to supplement the Motion with information to substantiate his claim and setting forth a schedule for the Prosecution's response to the Motion.<sup>4</sup> On 19 December 2008, Lukić submitted additional filings in support of the Motion in accordance with the Preliminary Order.<sup>5</sup> On 23 December 2008, the Prosecution filed a response,<sup>6</sup> and on 30 December 2008, Lukić requested leave to reply to the Response,<sup>7</sup> which

<sup>1</sup> Milan Lukić's Application for Disqualification and Withdrawal of the Trial Chamber Based on Prosecution *Ex Parte* Applications Against the Accused, the Defence Team, and Defence Witnesses During Trial Creating a Risk of an Appearance of Prejudice, 15 December 2008 ("Motion"), p. 11. *See also* Order Directing Motion to President of Trial Chamber III, 17 December 2008 ("Order of 17 December 2008"), p. 2.

<sup>2</sup> Order of 17 December 2008, p. 2. *See also* Report of the Presiding Judge of Trial Chamber III to Vice-President of Tribunal Pursuant to Rule 15(B)(i) in Re Milan Lukić Motion for Disqualification of Trial Chamber ("Report of the Presiding Judge"), para. 2.

<sup>3</sup> Report of the Presiding Judge, para. 4.

<sup>4</sup> Preliminary Order in Re Milan Lukić Motion for Disqualification of Trial Chamber, 17 December 2008 ("Preliminary Order"), para. 4.

<sup>5</sup> Milan Lukić's Supplement Pursuant to Preliminary Order in Re Milan Lukić Motion for Disqualification of Trial Chamber, 22 December 2008 ("Supplement to Motion").

<sup>6</sup> Prosecution Response to Milan Lukić's Application for Disqualification of the Trial Chamber, 23 December 2008 ("Response").

the Presiding Judge denied.<sup>8</sup> On 2 January 2009, given that the President of the International Tribunal is one of the Judges subject to the Motion, the Presiding Judge submitted his Report to me in my capacity as Vice President of the International Tribunal, in accordance with Rule 15(B)(iv) of the Rules, which provides that:

If the Judge in question is the President, the responsibility of the President in accordance with [Rule 15(B)] 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.<sup>9</sup>

## II. APPLICABLE LAW

2. 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.

The Appeals Chamber has held that “a Judge is not impartial if it is shown that actual bias exists.” An unacceptable appearance of bias if:

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

the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>10</sup>

With respect to the reasonable observer prong of this 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 judicial integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.”<sup>11</sup>

3. The Appeals Chamber has also emphasized that there is an assumption of impartiality that attaches to a Judge.<sup>12</sup> Accordingly, the party who seeks the disqualification of a Judge bears the burden of adducing sufficient evidence that the Judge is not impartial, and there is a high threshold

<sup>7</sup> Confidential Milan Lukić’s Request for Leave to Reply and Correlative Extension of Time, 30 December 2008.

<sup>8</sup> Report of the Presiding Judge, para. 8.

<sup>9</sup> See Report of the Presiding Judge, para. 12.

<sup>10</sup> *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008 (“*Blagojević Decision*”), para. 2. See also *Prosecutor v. Vojislav Šešelj*, Decision on Motion for Disqualification, 16 February 2007 (“*Šešelj Decision*”), para. 4; *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija Appeals Judgement*”), para. 189.

<sup>11</sup> *Blagojević Decision*, para. 2; *Šešelj Decision*, para. 5; *Furundžija Appeals Judgement*, para. 190.

<sup>12</sup> *Blagojević Decision*, para. 3; *Šešelj Decision*, para. 5; *Furundžija Appeals Judgement*, para. 196.

to rebut the presumption of impartiality.<sup>13</sup> The party must demonstrate “a reasonable apprehension of bias by reason of prejudgement” which is “firmly established.”<sup>14</sup> The Appeals Chamber has explained that this high threshold is required because “it is as much of a threat to the interests of the impartial and fair administration of justice for judges to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias as is the real appearance of bias itself.”<sup>15</sup>

### III. DISCUSSION

4. In the Motion, Lukić asserts that the disqualification of the Judges is warranted “due to secret *ex parte* criminal contempt proceedings conducted and completed by the Office of the Prosecutor and the Trial Chamber, creating conflicts and an appearance of prejudice to the right to fair and just proceedings.”<sup>16</sup> He also seeks disqualification of Judge Patrick Robinson on the separate basis of Judge Robinson’s recent election as President of the International Tribunal.<sup>17</sup> In its Response, the Prosecution requests that the Motion be denied on the basis that Lukić “has failed to adduce any evidence whatsoever of bias on the part of the Trial Chamber.”<sup>18</sup> The Prosecution contends that, to the contrary, all available evidence “clearly indicates that the Judges of the Trial Chamber are impartial.”<sup>19</sup>

#### A. Disqualification for Alleged Undue Exposure to Extra-Judicial, *Ex Parte* Allegations, Information and Influence<sup>20</sup>

5. Lukić asserts that the impartiality of the Judges has been compromised by numerous *ex parte* Prosecution submissions, including “inflammatory, extra-judicial information with a strong likelihood of creating prejudice or the appearance of prejudice,” related to allegations of contempt on the part of Lukić, his Defence team, and Defence witnesses.<sup>21</sup> In this regard, Lukić argues:

The OTP created an avenue for it to improperly influence and prejudice the Trial Chamber, against the Accused, almost through out [sic] the entire OTP presentation of its case, through its *ex parte*, Chamber-sanctioned investigation. The *ex parte*, extra-judicial information consisted in large part on [sic] untested and questionable sources, that included the Secret Police of a hostile foreign government, a prior OTP witness who failed to disclose the matters at the Tribunal during original testimony, and trusting the word of a convicted murderer who failed to confirm OTP theories

<sup>13</sup> Blagojević Decision, para. 3; Šešelj Decision, para. 5; Furundžija Appeals Judgement, para. 197.

<sup>14</sup> Blagojević Decision, para. 3; Furundžija Appeals Judgement, para. 197; Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgement, 20 February 2001 (“Čelebići Appeals Judgement”), para. 707.

<sup>15</sup> Blagojević Decision, para. 3; Čelebići Appeals Judgement, para. 707.

<sup>16</sup> Motion, pp. 2 and 11.

<sup>17</sup> Motion, p. 11.

<sup>18</sup> Response, para. 25.

<sup>19</sup> Ibid.

<sup>20</sup> See Motion, p. 11.

<sup>21</sup> Motion, paras 10-25 and 27-28. See also Supplement to Motion.

against the Defence, including failing to identify a Defence team member in a photo array line up.<sup>22</sup>

Lukić contends that as a result of these submissions, during the presentation of the Prosecution's case, the Defence was "under 'a cloud of suspicion'"<sup>23</sup> "all Court rulings can carry an appearance of bias and predetermination,"<sup>24</sup> and "the stigma of this ongoing investigation has [...] impacted the credibility of the entire Defence presentation [...]"<sup>25</sup> Lukić asserts that the parties or Trial Chamber could have avoided the appearance of bias "by appointing an *amicus* prosecutor and/or a pro tem judge/Trial Chamber to handle the matter."<sup>26</sup> Lukić also submits that the Prosecution demonstrated its determination to prejudice the Trial Chamber when it filed a record of United Nations Detention Unit Rule 64 proceedings as annexes to a response after the Presiding Judge had already recused himself from determining the matter.<sup>27</sup> Lukić further argues that:

In the present matter, the Trial Chamber sat in secret, as an investigating grand jury against one party to the proceedings, supervising and monitoring the OTP through *ex parte* channels. In the instant matter, as the presence of the Presiding Judge and the entire Trial Chamber may have been influenced by the repeated, strong allegations dealt with in the continued *ex parte* filings of the OTP against the Defence, therefore, recusal is warranted in this case. At the very least the dual role played by overseeing the present proceedings while also hearing *ex parte* proceedings at least creates an appearance of bias that should be avoided and that threatens the integrity of the proceedings, when it is incumbent upon any fact-finding Judge to maintain the role as [sic] blind justice.<sup>28</sup>

6. In response, the Prosecution argues that contrary to Lukić's allegations, the Trial Chamber demonstrated impartiality in relation to the Prosecution's allegations of contempt.<sup>29</sup> The Prosecution cites two Trial Chamber decisions in support of its submission, including the "Decision on Prosecution Report"<sup>30</sup> and a "Clarification" decision.<sup>31</sup> With regard to the Decision on Prosecution Report, the Prosecution notes the Trial Chamber's findings that:

(i) [...] the information and evidence submitted by the Prosecution related to the Accused Milan Lukić and Defence Witnesses MLD 2 and MLD 10 was "largely unsubstantiated, relying heavily ... on hearsay reports of alleged meetings" and

(ii) [...] "the Prosecutor's continued and expanded investigation has failed to produce any material in support of the allegations with respect to the two other identified suspects [members of the

<sup>22</sup> Motion, para. 27.

<sup>23</sup> Motion, para. 29.

<sup>24</sup> Motion, para. 30.

<sup>25</sup> Motion, para. 31.

<sup>26</sup> Motion, para. 36.

<sup>27</sup> *Ibid.*

<sup>28</sup> Motion, para. 37.

<sup>29</sup> Response, para. 11.

<sup>30</sup> Response, para. 13 (citing Decision on Prosecution Report Pursuant to Order to Investigate Potential Contempt of the Tribunal, as Amended, Decision on Motion for Leave to Amend Prosecution's List of Witnesses, and Decision on Third Prosecution Urgent Motion in Connection with Contempt Proceedings, 6 October 2008 ("Decision on Prosecution Report")).

<sup>31</sup> Response, para. 13 (citing Clarification, 9 October 2008 ("Clarification Decision")).

Defence team] nor has it uncovered any further information as to the identity of the unidentified suspects.”<sup>32</sup>

The Prosecution further notes the Trial Chamber’s conclusion, as a result of these findings, that it was “not satisfied that there are sufficient grounds to proceed against any of the suspects currently being investigated by the Prosecutor[.]”<sup>33</sup> With respect to the Clarification Decision, the Prosecution notes the Trial Chamber’s finding that “no evidence was presented to it warranting the conclusion that the integrity of the Defence of Milan Lukić is in question.”<sup>34</sup> The Prosecution submits that the Clarification Decision demonstrates that the Judges have “disabuse[d] their minds’ of irrelevant considerations following their review of the evidence related to possible contempt.”<sup>35</sup>

7. The Prosecution also argues that in the Motion, the Defence made reckless and baseless allegations of Prosecution misconduct and requests the Presiding Judge to instruct the Defence to refrain from doing so.<sup>36</sup> In the Report of the Presiding Judge, the Presiding Judge found that this matter was “beyond the scope of my mandate or otherwise best left to the Trial Chamber trying the case or to the Vice-President, should he deem it appropriate.”<sup>37</sup> Likewise, I will not address this request, as the Trial Chamber is the appropriate venue before which to raise the matter.

8. In the Report of the Presiding Judge, the Presiding Judge notes that during conferences held with the Judges pursuant to Rule 15(B)(i) of the Rules:

[...] each of them stated unhesitatingly to me that he or she did not consider that anything that had occurred since the trial began had affected, or would affect, their ability to adjudicate the case impartially. None could think of any display of bias by any Judge during the trial, nor of any event or circumstance that would lead a properly informed observer to consider that there was a risk of judicial bias.<sup>38</sup>

The Presiding Judge further notes that upon review of the material submitted by Lukić in support of the Motion, including almost 400 pages of transcripts and filings, he found “no basis upon which it could possibly be argued that the Judges have displayed bias or that an informed observer would perceive a risk of bias.”<sup>39</sup>

9. Likewise, upon consideration of the Report of the Presiding Judge and the submissions of the parties, I am not satisfied that Lukić has established bias or the appearance of bias on the part of

<sup>32</sup> Response, para. 13 (citing Decision on Prosecution Report, p. 3) (footnotes omitted).

<sup>33</sup> Response, para. 14 (citing Decision on Prosecution’s Report, p. 3).

<sup>34</sup> Response, para. 15 (citing Clarification Decision, p. 3).

<sup>35</sup> Response, para. 15.

<sup>36</sup> Response, paras 22-24.

<sup>37</sup> Report of the Presiding Judge, para. 7.

<sup>38</sup> Report of the Presiding Judge, para. 15.

<sup>39</sup> Report of the Presiding Judge, paras 13 and 17.

the Judges. Lukić has not adduced any evidence capable of establishing a personal interest on the part of the Judges in this case or any association that affects their impartiality. Neither has Lukić provided evidence that the Judges violated any Rule or the relevant Practice Direction.<sup>40</sup> In light of the foregoing, Lukić has failed to rebut the strong presumption of impartiality on the part of the Judges.

10. Not only has Lukić failed to meet his burden of adducing sufficient evidence that the Judges are not impartial, but to the contrary, as noted by the Presiding Judge in his Report, evidence in the record demonstrates the impartiality of the Judges.<sup>41</sup> The Trial Chamber demonstrated such impartiality when, on 6 October 2008, it found that there were not sufficient grounds to proceed against any suspects being investigated by the Prosecution and accordingly declined to direct the Prosecution to prosecute the allegations of contempt.<sup>42</sup> The Trial Chamber again demonstrated its impartiality when it subsequently clarified that the Prosecution had failed to present evidence to substantiate its claim that the integrity of the Defence was in question.<sup>43</sup>

11. With regard to Lukić's argument that in order to avoid the appearance of impropriety, the Trial Chamber could have appointed an *amicus* prosecutor and/or pro tem Judge or Trial Chamber to adjudicate the matter, I concur with the conclusion of the Presiding Judge in his Report that "simply because a different course could have been taken other than the one the Chamber chose could not lead to the conclusion that dealing with the matter itself demonstrates bias or gives rise to an appearance thereof."<sup>44</sup> Furthermore, the procedure followed was well within the ambit of the Practice Direction on Contempt Procedure.<sup>45</sup>

## **B. Disqualification Due to Election as President of the International Tribunal**

12. Lukić also asserts that Judge Robinson should be disqualified on the ground that he was recently elected President of the International Tribunal.<sup>46</sup> Lukić specifically requests:

Recusal of the President of the Chamber, and as having been during these proceedings, elected President of the Tribunal, and due to the combined aforementioned reasons, also noting that all normal appeals of the process and all relief from issues involving the Registry normally pass through the President and would force the Vice-President placed in the conflict of ruling on the

<sup>40</sup> See Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal, IT/227, 6 May 2004 ("Practice Direction on Contempt Procedure").

<sup>41</sup> Report of the Presiding Judge, para. 17.

<sup>42</sup> Decision on Prosecution Report, pp. 3-4.

<sup>43</sup> Clarification Decision, p. 3.

<sup>44</sup> Report of the Presiding Judge, para. 18.

<sup>45</sup> Practice Direction on Contempt Procedure, para 5 (stating "[t]he request for an investigation shall be made *ex parte* and confidentially before the Chamber in which the contempt allegedly occurred.").

<sup>46</sup> Motion, p. 11.

sitting Tribunal President, as continuing issues that exemplify the inter relationship between the UNDU, the Registry, and the Trial Chamber arise;<sup>47</sup>

I observe that Lukić appears to be arguing that because many Registry decisions are subject to review by the President of the International Tribunal, and Judge Robinson has referred such matters to the Vice-President in this case, the Vice-President may be put in the position of deciding a matter involving a decision taken by the President, creating a conflict of interest. Lukić also appears to be suggesting that a conflict of interest will arise due to Judge Robinson's position as Presiding Judge of the Appeals Chamber, given that decisions certified for interlocutory appeal by the Trial Chamber are decided by the Appeals Chamber.

13. In this regard, I note that Rule 21 of the Rules takes the above situations into account, providing that "the Vice-President shall exercise the functions of the President in case of the latter's absence or inability to act." Furthermore, pursuant to Rule 15(B)(iv) of the Rules, if the President is subject to a motion for disqualification, the Vice-President must assume responsibility for it. Additionally, in the event that a Judge of the Appeals Chamber has a conflict of interest in a particular case, that Judge will not be appointed to sit on a bench in that case for the purpose of determining an interlocutory appeal.

14. Accordingly, Lukić has failed to substantiate his contention that Judge Robinson should be disqualified due to his recent election as President of the International Tribunal. Lukić has failed to adduce any evidence that Judge Robinson's election as President has affected or will affect his impartiality. As such, he has accordingly failed to rebut the strong presumption of impartiality.

#### IV. DISPOSITION

15. Rule 15(B)(ii) of the Rules provides that following the report of the Presiding Judge, if necessary, a panel of three Judges shall be appointed to report on the merits of an application for disqualification. In the present Motion, for the reasons indicated, I find that Lukić has failed to tender any evidence capable of warranting the appointment of a panel to consider the Motion. Lukić has not established any actual bias or the appearance of bias on the part of the Judges. Accordingly, it is not necessary to appoint a panel of three Judges.

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<sup>47</sup> *Ibid.*



16. On the basis of the foregoing, the Motion is **DISMISSED**.

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

Done this 12th day of January 2009,  
At The Hague,  
The Netherlands.

A handwritten signature in black ink, consisting of a stylized 'O' followed by a checkmark-like flourish, positioned above a horizontal line.

Judge O-Gon Kwon  
Vice-President