

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-R77.3
Date: 7 October 2010
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Patrick Robinson, President

Registrar: Mr. John Hocking, Registrar

Decision: 7 October 2010

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON VOJISLAV ŠEŠELJ'S MOTION TO
DISQUALIFY JUDGE ALPHONS ORIE**

Amicus Curiae Prosecutor
Mr. Bruce McFarlane

The Accused
Mr. Vojislav Šešelj

I, **Patrick Robinson**, 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 (“Tribunal”), am seised of a “Motion by Professor Vojislav Šešelj for the Disqualification of Judge Alphonsus Orié”, filed confidentially on 6 September 2010 (“Motion”).

A. Background

1. On 26 January 2009, the Prosecution filed confidentially and *ex parte* a motion pursuant to Rule 77 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), wherein it submitted that Vojislav Šešelj (“Accused”) had knowingly violated orders of the Trial Chamber presiding over the Šešelj case¹ by disclosing confidential information in three books that the Accused had allegedly authored.² On 13 March 2009, I issued an order assigning Trial Chamber II to examine the Prosecution Motion.³

2. On 21 August 2009, Trial Chamber II issued a decision denying the Prosecution Motion.⁴ The Prosecution appealed the Decision of 21 August 2009, pursuant to Rule 77(J) of the Rules.⁵ In a decision issued on 17 December 2009, the Appeals Chamber granted the Prosecution Appeal, determining that sufficient grounds existed to prosecute the Accused pursuant to Rule 77(D) of the Rules.⁶ The Appeals Chamber therefore ordered Trial Chamber II to issue an order in lieu of an indictment against the Accused pursuant to Rule 77(D)(ii) of the Rules.⁷ In a decision rendered on 3 February 2010, Trial Chamber II issued an order in lieu of an indictment, thus commencing contempt proceedings against the Accused “for having disclosed information which may identify ... 11 protected witnesses in violation of orders of a Chamber”.⁸

3. On 27 April 2010, the Accused requested (a) the disqualification of Judge O-Gon Kwon and Judge Kevin Parker from the above-captioned proceedings, (b) that I appoint a panel of three

¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67.

² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution’s Motion under Rule 77 Concerning Further Breaches of Protective Measures, filed confidentially and *ex parte* on 26 January 2009 (“Prosecution Motion”), paras 1–2.

³ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Assigning Motions to a Trial Chamber, issued confidentially and *ex parte* on 13 March 2009.

⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution’s Motion Under Rule 77 Concerning Further Breaches of Protective Measures (Three Books), issued confidentially and *ex parte* on 21 August 2009 (“Decision of 21 August 2009”).

⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution’s Notice of Appeal, filed confidentially and *ex parte* on 7 September 2009 (“Prosecution Appeal”).

⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Decision on the Prosecution’s Appeal against the Trial Chamber’s Decision of 21 August 2009, issued confidentially and *ex parte* on 17 December 2009, para. 27 (“Appeal Decision”).

⁷ Appeal Decision, para. 28.

⁸ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Second Decision on Prosecution’s Motion Under Rule 77 Concerning Further Breaches of Protective Measures (Three Books), issued confidentially on 3 February 2010 (“Decision of 3 February 2010”), para. 20(a). The public redacted version of the Decision of 3 February 2010 was issued on 4 February 2010.

Judges to consider his motion, and (c) that I assign two other Judges to the Trial Chamber that will sit in Case No. IT-03-67-R77.3 (“First Motion”).⁹

4. On 6 May 2010, Judge Burton Hall issued a memorandum in which he noted that, pursuant to Rule 15(B)(i) of the Rules, where a party applies to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber, the Presiding Judge shall confer with the Judge in question and report to the President of the Tribunal. He also stated that the Presiding Judge of Trial Chamber was not in a position to report to the President pursuant to Rule 15(B)(i) of the Rules. Therefore, Judge Hall, as the one Judge on the panel whose disqualification was not sought, referred the matter to the President for further proceedings pursuant to Rule 15 of the Rules.

5. On 7 May 2010, Judge Kwon, in his capacity as Acting President during my temporary absence from the Tribunal, issued an order in which he considered that his status as one of the two Judges impugned in the First Motion gave rise to a conflict of interest necessitating his withdrawal from considering the First Motion in accordance with Rule 15(A) of the Rules. Accordingly, in accordance with Rule 22(A) of the Rules, Judge Kwon assigned Judge Mehmet Güney, in lieu of himself, to consider the First Motion.¹⁰ On 28 May 2010, I issued an order reassigning myself to consider the First Motion in place of Judge Güney.¹¹

6. In a memorandum dated 8 June 2010, I invited comments from Judges Kwon and Parker on the matter. In response, Judges Kwon and Parker provided comments in a memorandum dated 9 June 2010.

7. On 22 June 2010, I appointed a panel of three Judges to decide the First Motion, namely Judge Christoph Flügge, Judge Howard Morrison, and Judge Guy Delvoie.¹² On 6 July 2010, I assigned Judge Alphons Orié to the three-Judge panel, in the place of Judge Flügge.¹³

8. In the instant Motion, the Accused requests, pursuant to Rule 15 of the Rules, that I disqualify Judge Alphons Orié from the three-Judge panel that is assigned to decide the Accused’s First Motion.

⁹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, confidential Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 27 April 2010.

¹⁰ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Order Assigning Motion, 7 May 2010, p. 3.

¹¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Order Reassigning Motion, 28 May 2010, p. 3.

¹² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, 22 June 2010.

¹³ *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Order Replacing Judge, 6 July 2010.

9. On 20 September 2010, the *Amicus Curiae* Prosecutor (“*Amicus* Prosecutor”) responded that the Motion is without merit, an abuse of process, and ought to be dismissed *in limine*, *i.e.*, without appointing a three-Judge panel.¹⁴

B. Applicable law

10. 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. A Judge is not impartial if it is shown that actual bias exists.

B. There is an unacceptable appearance of bias if:

i) a Judge is a party to the case, or has 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 circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹⁵

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.”¹⁶

11. The Appeals Chamber has also emphasised that there is a presumption of impartiality that attaches to a Judge.¹⁷ 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

¹⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, confidential Prosecutor’s Response to the Motion for the Disqualification of Judge Alphons Orié, 20 September 2010, para. 1 (“Response”).

¹⁵ *Prosecutor v. Anton Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”), para. 189; *see also* *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Motion for Disqualification, 12 January 2009 (“*Lukić* Decision”), para. 2; *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008 (“*Blagojević* Decision”), para. 2; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 16 February 2007 (“*Šešelj* Decision”), para. 4.

¹⁶ *Lukić* Decision, para. 2; *Blagojević* Decision, para. 2; *Šešelj* Decision, para. 5; *Furundžija* Appeal Judgement, para. 190.

¹⁷ *Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Šešelj* Decision, para. 5; *Furundžija* Appeal Judgement, para. 196.

to rebut the presumption of impartiality.¹⁸ The party must demonstrate “a reasonable apprehension of bias by reason of prejudgement” that is “firmly established”.¹⁹ The Appeals Chamber has explained that this high threshold is required because “it is as much 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.”²⁰

12. Furthermore, Rule 15(B) of the Rules provides that:

- (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.

C. Discussion

1. Procedure under Rule 15

13. The Accused, having moved for the disqualification of two of the Judges sitting on his contempt trial (“First Motion”), has now also moved for the disqualification of one of the three Judges assigned to the panel to decide his First Motion.

14. The *Amicus* Prosecutor observes that Rule 15(B)(i) of the Rules deals with the disqualification of a Judge from “a trial or appeal” and that the Rules are silent in relation to a motion aimed at disqualifying a Judge from a three-Judge panel assigned to decide a disqualification motion.²¹ The *Amicus* Prosecutor nevertheless takes the position that the procedure to be followed for the Motion should mirror that for the disqualification of a Judge from a trial or

¹⁸ *Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Šešelj* Decision, para. 5; *Furundžija* Appeal Judgement, para. 197.

¹⁹ *Furundžija* Appeal Judgement, para. 197; see also *Lukić* Decision, para. 3; *Blagojević* Decision, para. 3; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići* Appeal Judgement”), para. 707.

²⁰ *Čelebići* Appeal Judgement, para. 707; see also *Lukić* Decision, para. 3; *Blagojević* Decision, para. 3.

²¹ Response, para. 7.

appeal.²² Under the present circumstances, the *Amicus* Prosecutor suggests that the President direct the Motion to the Presiding Judge of the three-Judge panel assigned to decide the First Motion.²³

15. Because the Motion is aimed at the composition of the three-Judge panel composed for the purpose of deciding a disqualification motion, rather than at the composition of a bench of a trial or appeal, I am in agreement with the *Amicus* Prosecutor that the present circumstances are not expressly encompassed within Rule 15 of the Rules. However, I am of the view that it is in the interests of justice and judicial economy to apply the provisions of Rule 15 of the Rules to the present situation. In this regard, I note that the *Amicus* Prosecutor does not resist the Motion on the basis of any procedural irregularities, but rather opposes the Motion on its merits.²⁴

16. The procedure to be followed in the present case would be for the Presiding Judge of Trial Chamber II, Judge Parker, to consult Judge Orié and then report to me, pursuant to Rule 15(B)(i) of the Rules; however, Judge Parker is one of the Judges challenged in the First Motion. Moreover, the Presiding Judge of Trial Chamber III is Judge Kwon, who is also a Judge challenged in the First Motion. Finally, the Presiding Judge of Trial Chamber I, Judge Orié, is the subject of the Motion itself. Therefore, in the present circumstances, I myself have consulted Judge Orié regarding the Motion, in order to ascertain his views in relation to whether he has any actual or apparent conflict of interest in serving upon the three-Judge panel to decide the First Motion.

17. On 6 October 2010, Judge Orié informed me that he has no personal interest in the case and no association that might affect his impartiality in serving upon the three-Judge panel assigned to decide the First Motion. Moreover, Judge Orié informs me that it does not appear to him that a reasonable observer, properly informed, would reasonably apprehend bias or an appearance of bias on his part.

2. Request for extension of word limitation

18. The Accused requests an extension of the word limitation for the Motion.²⁵ Paragraph (C)7 of the Practice Direction on the Length of Briefs and Motions (IT/184/Rev. 2), dated 16 September 2005 (“Practice Direction”), provides as follows: “A party must seek authorization in advance from the Chamber to exceed the word limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing.” I note that the Accused filed the oversized Motion simultaneous with his request for an extension, not in advance of it, as required under the Practice Direction. The Motion is therefore not compliant with the Practice Direction.

²² Response, para. 8.

²³ Response, para. 9.

19. The Accused makes several arguments for his requested extension of the word limitation.

20. First, the Accused compares the present case to several prior contempt cases before the Tribunal, including a comparison between the sentences received in those cases with those of his own contempt conviction in another case.²⁶ I do not consider that such a comparison constitutes an explanation for exceptional circumstances that would warrant an extension of the word limitation.

21. Second, the Accused argues that the recent Judgement of the Appeals Chamber in the case of *Prosecutor v. Haradinaj et al.* leads to a conflict of interest in respect of Judge Orić sitting on the three-Judge panel to decide the First Motion.²⁷ It is submitted that the fact that the Appeals Chamber quashed some of the acquittals in the *Haradinaj et al.* trial and ordered a partial re-trial “completely degrades Judge Orić as a professional and a lawyer”.²⁸ The Accused argues that this situation is an exceptional one and that he therefore needs an extension of the word limitation to deal with it in his Motion. Although it is indeed the case that the Appeals Chamber ordering a re-trial is not common, I do not consider that the Accused has demonstrated the reason why he cannot deal with this circumstance within the word limitation set by the Practice Direction.

22. Third, the Accused explains that an order of the President of the Tribunal was served upon him in an untimely manner.²⁹ I do not consider that this circumstance is immediately relevant to the Accused’s request for an extension of the word limitation.

23. Fourth, the Accused argues that Judge Orić should be disqualified because he “participated in [his] attempted judicial murder”.³⁰ It is not immediately apparent how such a circumstance is relevant to the request for an extension of the word limitation.

24. I therefore find that the Motion could be dismissed on the basis that it is not in conformity with the Practice Direction. However, in the interests of judicial economy, I will also deal with the merits of the Motion below, in order to advance the proceedings in this case to the greatest extent possible.

3. Judge Orić’s alleged bias

25. The Accused argues that Judge Orić is biased against him because he (the Accused) has published a book about him with a “harsh title”. The Accused also reiterates that Judge Orić

²⁴ Response, para. 9.

²⁵ Motion, p. 2.

²⁶ Motion, pp. 2–5.

²⁷ Motion, pp. 5–6.

²⁸ Motion, pp. 6–7. The Accused also points out that Judge Orić sat on the bench of related contempt matters.

²⁹ Motion, p. 7.

“participated in [his] dark and brutal attempted judicial murder”, bears personal hatred towards him, and seeks to exact revenge.³¹

26. The *Amicus* Prosecutor responds that the Motion “is replete with speculation, hyperbole and innuendo and lacks evidence capable of establishing bias or the appearance of bias.” It is also argued that “the Accused simply recycles arguments advanced in previous motions which have been considered by the Chamber, but consistently rejected.”³²

27. I have considered the Accused’s allegations against Judge Orić and am of the view that the Accused has failed to put forth credible information to substantiate his claim that Judge Orić has either a personal interest in the First Motion or any association that affects his impartiality. The Accused has also not submitted information demonstrating actual bias or the appearance of bias on the part of Judge Orić. The strong presumption of impartiality has therefore not been rebutted.³³

28. 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. I find that the Accused has failed to substantiate any of his claims and therefore that it is not warranted to appoint a panel to consider the Motion. The Accused has not established any actual bias or the appearance of bias on the part of Judge Orić and has not rebutted the strong presumption of his impartiality. The Motion is patently unmeritorious, and there is no need to appoint a panel of three Judges.

³⁰ Motion, pp. 7–8.

³¹ Motion, pp. 9–13, 24–26.

³² Response, paras 15, 17–22.

³³ The Accused’s further submissions (Motion, pp. 16–24) are also either unsubstantiated or otherwise have been rejected in other decisions upon disqualification motions lodged by the Accused. *See, e.g., Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 16 February 2007, paras 10–19.

D. Disposition

29. For the foregoing reasons and pursuant to Rule 15 of the Rules and paragraph (C)7 of the Practice Direction, I hereby DISMISS the Motion.

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



Judge Patrick Robinson
President

Dated this seventh day of October 2010
At The Hague
The Netherlands

[Seal of the Tribunal]