

**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: 22 June 2010
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Patrick Robinson, President

Registrar: Mr. John Hocking

Decision: 22 June 2010

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON MOTION BY PROFESSOR VOJISLAV ŠEŠELJ
FOR THE DISQUALIFICATION OF JUDGES O-GON KWON
AND KEVIN PARKER**

Amicus Curiae Prosecutor:

Mr. Bruce McFarlane, Q.C.

Counsel for 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 (“International Tribunal”), acting pursuant to Rule 15 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), render the following decision with regard to the “Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker” filed on 13 April 2010 (“Motion”).¹

I. BACKGROUND

1. On 26 January 2009, the Prosecution filed confidentially and *ex parte*, a motion pursuant to Rule 77 of the Rules, wherein it submitted that Vojislav Šešelj (“Šešelj”) had knowingly violated orders of the Trial Chamber presiding over the Šešelj Case,² by disclosing confidential information in three books which he had allegedly authored.³ On 13 March 2009 I issued an order assigning Trial Chamber II to examine the Prosecution Motion.⁴

2. On 21 August 2009, Trial Chamber II issued a decision denying the Prosecution Motion.⁵ The Prosecution appealed the Decision of 21 August 2009, pursuant to Rule 77(J) of the Rules.⁶ In a decision issued on 17 December 2009, the Appeals Chamber granted the Prosecution Appeal, determining that sufficient grounds existed to prosecute Šešelj pursuant to Rule 77(D) of the Rules.⁷ The Appeals Chamber thereby ordered Trial Chamber II to issue an order in lieu of an indictment against Šešelj pursuant Rule 77(D)(ii) of the Rules.⁸ In a decision rendered on 3 February 2010, Trial Chamber II issued an order in lieu of an indictment pursuant to Rule 77 of the Rules, commencing contempt proceedings against Šešelj “for having disclosed information which may identify [...] 11 protected witnesses in violation of orders of a Chamber”.⁹

¹ On 27 April 2010, Trial Chamber II issued *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, “Order Regarding the Filing of a Motion” (“Order of 27 April 2010”). In the Order of 27 April 2010, at pp. 1-2, Trial Chamber II instructed the Registry, “to file the Motion both confidentially without redactions” and publicly with certain specified redactions. The confidential English version of the Motion was filed on 27 April 2010. The public redacted version of the English and BCS versions of the Motion were filed on 29 April 2010.

² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67.

³ *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.

⁴ *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.

⁵ *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”).

⁶ *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”).

⁷ *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”).

⁸ *Id.*, para. 28.

⁹ *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

3. In the Motion filed on 13 April 2010 Šešelj requests: (1) the disqualification of Judges Kwon and Parker, (2) that I appoint a panel of three Judges to consider the Motion pursuant to Rule 15(B)(ii) of the Rules, and (3) that I “assign another two Judges to the Trial Chamber that will sit in Case IT-03-67.R77.3”.¹⁰

4. On 6 May 2010 Judge Burton Hall issued a memorandum in which he noted that: (1) pursuant to Rule 15(B)(i), 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 International Tribunal, and (2) as the Motion in the instant case impugns Judge Kwon, the Presiding Judge in the matter, “the Presiding Judge is not in a position to report to the President pursuant to Rule 15(B)(i)”. Judge Hall, “as the one Judge on the Panel whose disqualification the Accused is not seeking”, referred the matter to me “for further proceedings pursuant to Rule 15”.

5. In an order dated 7 May 2010, Judge Kwon noted: (1) my absence from the International Tribunal during the relevant period, (2) that as Vice President of the International Tribunal he exercises, pursuant to Rule 21 of the Rules, the functions of the President in case of my absence or inability to act, and (3) that his status as one of the two impugned Judges in the Motion gave rise to a conflict of interest necessitating his withdrawal from considering the Motion in accordance with Rule 15(A) of the Rules.¹¹ Accordingly, in accordance with Rule 22(A) of the Rules, Judge Kwon assigned Judge Mehmet Güney, in lieu of himself, to consider the Motion.¹² On 28 May 2010 I issued an order reassigning myself to consider the Motion in place of Judge Güney.¹³

6. In a memorandum dated 8 June 2010, I invited comments from Judges Kwon and Parker on the matter (“Memorandum of 8 June 2010”). In response to the Memorandum of 8 June 2010, Judges Kwon and Parker provided comments in a memorandum dated 9 June 2010 (“Memorandum of 9 June 2010”).

II. APPLICABLE LAW

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

(“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.

¹⁰ Motion, para. 10.

¹¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Order Assigning Motion, 7 May 2010, p. 3.

¹² *Id.*

¹³ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Order Reassigning Motion, 28 May 2010, p. 3.

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.¹⁴

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."¹⁵

8. The Appeals Chamber has also emphasized that there is an assumption of impartiality that attaches to a Judge.¹⁶ 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 to rebut the presumption of impartiality.¹⁷ The party must demonstrate "a reasonable apprehension of bias by reason of prejudgement" which is "firmly established".¹⁸ 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."¹⁹

9. 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.

¹⁴ *Prosecutor v. Anton Furundžija*, Case No. IT-95-17/1-A, Judgement ("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.

¹⁵ *Lukić Decision*, para. 2; *Blagojević Decision*, para. 2; *Šešelj Decision*, para. 5; *Furundžija Appeal Judgement*, para. 190.

¹⁶ *Lukić Decision*, para. 3; *Blagojević Decision*, para. 3; *Šešelj Decision*, para. 5; *Furundžija Appeal Judgement*, para. 196.

¹⁷ *Lukić Decision*, para. 3; *Blagojević Decision*, para. 3; *Šešelj Decision*, para. 5; *Furundžija Appeal Judgement*, para. 197.

¹⁸ *Lukić Decision*, para. 3; *Blagojević Decision*, para. 3; *Furundžija Appeal Judgement*, para. 197; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("Čelebići Appeal Judgement"), para. 707.

¹⁹ *Lukić Decision*, para. 3; *Blagojević Decision*, para. 3; *Čelebići Appeal Judgement*, para. 707.

- (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.

III. SUBMISSIONS IN THE MOTION

A. Request to Exceed the Word Limit

10. In the Motion, Šešelj requests leave, pursuant to paragraph (C)(7) of the Practice Direction on the Length of Briefs and Motions, to exceed the prescribed word limit.²⁰ In so doing, Šešelj refers to the case of *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2 (“Prior Contempt Case”) in which he was charged for contempt of the International Tribunal pursuant to Rule 77 of the Rules.²¹ Šešelj submits, *inter alia*, that the Prior Contempt Case “is surrounded by exceptional circumstances” indicating the absence of impartiality on the part of Judges Kwon and Parker. He thereby argues that the “detailed argumentation” of these circumstances requires that the Motion exceed the set word limit.²²

B. Allegations against Judge Kwon and Judge Parker

11. Šešelj states that the very fact that Judges Kwon and Parker presided over his trial in the Prior Contempt Case, provides a sufficient basis for their disqualification from presiding over the trial in *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3 (“Current Contempt Case”).²³

12. Šešelj further submits that Judges Kwon and Parker acted unprofessionally and impartially by commencing with the Prior Contempt Case pursuant to Rule 77 of the Rules. He asserts that Rule 77 has no legal foundation under either the Statute of the International Tribunal (“Statute”) or international law. Šešelj argues that the decision to proceed with the Prior Contempt Case, despite the absence of jurisdiction to do so, demonstrates bias on the part of Judges Kwon and Parker.²⁴

²⁰ Motion, pp. 2-5. See the Practice Direction on the Length of Briefs and Motions, IT/184 Rev. 2, 16 September 2005 (“Practice Direction”).

²¹ Motion, pp. 2-5.

²² *Id.*, pp. 3-4.

²³ *Id.*, p. 14.

²⁴ *Id.*, pp. 19-21.

13. Šešelj also submits that Judges Kwon and Parker based the findings made in the Trial Judgement in the Prior Contempt Case,²⁵ on the assertions of an *Amicus Curiae* Prosecutor who, *inter alia*: (1) was ignorant of the Serbian language, (2) had never read the book impugned in the Prior Contempt Case, and (3) asserted that “there was no need to translate a book of more than 1,195 pages of text”.²⁶ Šešelj argues that Judges Kwon and Parker issued the Trial Judgement in the Prior Contempt Case “based on this unprofessional conduct of the *Amicus*”, and that this demonstrates a lack of impartiality on the part of Judges Kwon and Parker.²⁷

14. Šešelj further submits that Judges Kwon and Parker applied a double-standard in their treatment of the Prior Contempt Case relative to other contempt cases at the International Tribunal over which both Judges presided.²⁸ Šešelj compares the Prior Contempt Case with: (1) the *Marijačić* Case over which Judge Kwon presided,²⁹ and (2) the *Tabaković* Case over which Judge Parker presided.³⁰

15. Šešelj submits that the evidence against the accused in the *Marijačić* Case was more substantial than the evidence against Šešelj in the Prior Contempt Case. Šešelj appears to argue that there was no evidence establishing that he violated the protective measures in question as to render him liable under Rule 77 of the Rules.³¹ Šešelj thus submits, *inter alia*, that there was no evidence that the impugned publication in the Prior Contempt Case had been widely read in the region of the former Yugoslavia given that it: (1) was “difficult to read”, (2) consisted of documents “that were mostly of no interest to the general public”, and (3) did not “discuss current events”.³² Šešelj further submits that:

It is generally known that there is a principle in criminal law which requires that a cause/effect relationship must exist between an action and its effect. The action taken must be the cause of the effect or the effect must be the result of the *actus reus* of a criminal act. In the Judgement in Case IT03-67-R77.2 [*sic*], the answer to these key questions is either lacking or avoided.³³

Šešelj also submits that there was no evidence establishing that the impugned publication in the Prior Contempt Case disclosed the name or protected status of the relevant witness.³⁴ He also

²⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Judgement on Allegations of Contempt, issued confidentially on 24 July 2009 (“Trial Judgement in the Prior Contempt Case”). The public version of the Trial Judgement in the Prior Contempt Case was issued on 24 July 2009.

²⁶ Motion, pp. 22-23.

²⁷ *Id.*, p. 24.

²⁸ *Id.*, pp. 24-41.

²⁹ *Id.*, pp. 24-39. Šešelj refers to the case of *Prosecutor v. Ivica Marijačić, Markica Rebić*, Case No. IT-95-14-R77.2 (“*Marijačić* Case”).

³⁰ Motion, pp. 39-41. Šešelj refers to the case of *Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1 (“*Tabaković* Case”).

³¹ Motion, pp. 24-26 and pp. 37-38.

³² *Id.*, pp. 24-26.

³³ *Id.*, p. 31.

³⁴ *Id.*, pp. 26-27.

submits that “none of the three protected witnesses mentioned [... in the Prior Contempt Case] suffered any harm after the publication of the book” impugned in that case.³⁵ Šešelj states that “not a single page (or the title) of the book [...] violates protective measures or Rule 77 of the ICTY Rules”.³⁶

16. Šešelj further asserts that Judge Kwon applied a double-standard in assessing the *mens rea* in the *Marijačić* Case as opposed to the Prior Contempt Case. He states that while there was ample evidence establishing *mens rea* in the *Marijačić* Case, there was no evidence of *mens rea* in the Prior Contempt Case.³⁷ Šešelj submits that in view of the foregoing, the Prior Contempt Case ought to have been dismissed, and that the failure of Judge Kwon to do so demonstrates bias on the part of Judge Kwon.³⁸

17. Šešelj also argues that the 15 month sentence imposed in the Prior Contempt Case was unjust and disproportionate.³⁹ He submits that despite the fact that there was more substantial evidence against the accused in the *Marijačić* and *Tabaković* cases, and that the gravity of the offences committed by the accused in those cases exceeded the gravity of the offences with which he was charged in the Prior Contempt Case, Šešelj received a significantly more stringent sentence than the accused in those cases.⁴⁰ It is thereby submitted that relative to the *Marijačić* and *Tabaković* cases, Judges Kwon and Parker applied a double-standard in the sentencing of Šešelj in the Prior Contempt Case which demonstrates a lack of impartiality on the part of both Judges warranting their disqualification from the Current Contempt Case.⁴¹

18. Šešelj further states that following the delivery of the Trial Judgement in the Prior Contempt Case, he published two books which respectively criticised Judge Kwon and Judge Parker (“Two Books”). Šešelj argues that:

[...] it is clear to any unbiased and reasonable observer that the publication of [... these] books about Judges O-Gon Kwon and Kevin Parker under the previously mentioned (harsh) titles would certainly provoke in these judges even greater bias against (but also a wish for revenge against) and hatred of Professor Vojislav Šešelj.⁴²

³⁵ *Id.*, p. 38.

³⁶ *Id.*, p. 27.

³⁷ *Id.*, pp. 31-34.

³⁸ *Id.*, pp. 28, 34.

³⁹ *Id.*, pp. 24, 37-41.

⁴⁰ *Id.*, pp. 28, 34, 37-38 and 40-41.

⁴¹ *Id.*, pp. 38-39 and 41.

⁴² *Id.*, pp. 5-6.

Šešelj further submits that the publication of these books “in essence destroyed any possibility of O-Gon Kwon and Kevin Parker being impartial and neutral in the new Case IT-03-67-R77.3”.⁴³

19. Šešelj further submits that the publication of the Two Books “probably even contributed” to the opening of the Current Contempt Case.⁴⁴ He asserts that the Current Contempt Case “was opened only for the purpose of revenge by Judges O-Gon Kwon and Kevin Parker against a detainee”.⁴⁵ In support of this submission Šešelj states that: (1) the Prosecution Motion requesting the commencement of proceedings in the Current Contempt Case was filed “almost at the same time as the start of proceedings” in the Prior Contempt Case, and (2) the *Amicus Curiae* Prosecutor in the Prior Contempt Case and the Current Contempt Case “is the same person”.⁴⁶

20. Šešelj also challenges Trial Chamber II’s decision issuing the order in lieu of an indictment in the Prior Contempt Case.⁴⁷ It is submitted that Judge Parker “completely ignored” certain factual circumstances that should have resulted in the dismissal of the Prosecution’s Motion initiating the Prior Contempt Case.⁴⁸ Šešelj asserts that Judge Parker’s failure to consider these facts, and the Decision Issuing the Indictment in the Prior Contempt Case, indicate that “he cannot be considered an impartial and neutral judge” in the Current Contempt Case.⁴⁹

21. Šešelj further notes that the Prosecution Motion Initiating the Prior Contempt Case, was originally filed before Trial Chamber III prior to the assignment of the issue to Trial Chamber II. It is argued that as the Chamber presiding over the Šešelj Case, Trial Chamber III would have been better informed of the issues in the Šešelj Case, and therefore better suited to preside over the Prior Contempt Case. In particular, Šešelj submits that Judge Parker, as part of the Bench in Trial Chamber II, would have been less knowledgeable of the Šešelj Case than the Judges in Trial Chamber III. He thereby asserts that the transfer of the Prior Contempt Case to Trial Chamber II was “illogical” and thus indicative of bias on the part of Judge Parker.⁵⁰

22. Šešelj also submits that the existence of a confidential version and a public version of the Trial Judgement in the Prior Contempt Case indicates a desire on the parts of Judges Kwon and

⁴³ *Id.*, p. 6.

⁴⁴ *Id.*

⁴⁵ *Id.*, p. 7.

⁴⁶ *Id.*, p. 13.

⁴⁷ *Id.*, pp. 16-19. See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Decision on Allegations of Contempt, issued confidentially on 21 January 2009 (“Decision Issuing the Order in Lieu of an Indictment in the Prior Contempt Case”). The public version of the Decision Issuing the Indictment in the Prior Contempt Case was issued on 21 January 2009.

⁴⁸ Motion, pp. 16-18. See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Prosecution’s Motion under Rule 77 Concerning the Breach of Protective Measures, filed confidentially and *ex parte* on 10 October 2008 (“Prosecution Motion Initiating the Prior Contempt Case”).

⁴⁹ Motion, p. 19.

⁵⁰ *Id.*, pp. 15-16.

Parker to conceal crucial facts from the public.⁵¹ It is argued that “[n]either the Statute nor the ICTY Rules provide for the existence of two versions of a judgement”.⁵²

IV. MEMORANDUM OF 9 JUNE 2010

23. In the Memorandum of 9 June 2010, Judges Kwon and Parker jointly stated as follows:

We have not considered it necessary or appropriate that we should withdraw from hearing the present Contempt allegation against Šešelj. We have no personal interest in the case, nor any association which might affect our impartiality.

It is the case that we were members of a Chamber which convicted Šešelj of a Contempt, but this concerned entirely separate and unrelated events and has no relevance to Šešelj’s guilt or innocence of the present allegation. Hence it does not affect our impartiality in the present case and it does not appear to us that an impartial and informed observer would consider that it might do so.

We notice that Šešelj also refers to publications which, he says, refers [*sic*] to us. We have neither seen nor read any such publications, and do not intend to do so.

V. DISCUSSION

A. Request to Exceed Word Limit

24. Paragraph (C)(5) of the Practice Direction provides that the length of motions filed before a Chamber, other than those filed with regard to appeals from judgement, interlocutory appeals and Rule 115 motions, shall not exceed 3,000 words. The Practice Direction further provides at paragraph (C)(7) that “[a] party must seek authorization in advance from the Chamber to exceed the word limit [...] and must provide an explanation of the exceptional circumstances that necessitate the oversized filing”.

25. Although these provisions specifically refer to motions filed before a Chamber, I consider them equally applicable to motions filed before the President. Thus, at 16,146 words, Šešelj’s Motion exceeds the prescribed word limit of 3,000 words. Furthermore, Šešelj has failed to: (1) seek advance authorization for his over-sized Motion, and (2) sufficiently demonstrate a necessity for 16,146 words to address the issues raised therein. However, I consider that it is in the interest of an expedient disposal of the Motion to consider it validly filed.

⁵¹ *Id.*, pp. 42-43.

⁵² *Id.*, p. 42.

B. Request for Disqualification

26. I note firstly, that in his Motion, Šešelj repeats in substance a number of issues that were raised in his Appeal Against the Trial Judgement in the Prior Contempt Case,⁵³ and addressed in the Appeal Judgement in the Prior Contempt Case.⁵⁴ These issues include: (1) the assertion that the International Tribunal lacks the jurisdiction to pursue contempt proceedings pursuant to Rule 77 of the Rules,⁵⁵ (2) the contention that the Trial Chamber erroneously based the Trial Judgement in the Prior Contempt Case on only a partial translation of the book impugned in that case,⁵⁶ (3) challenges to the sentence imposed in the Trial Judgement in the Prior Contempt Case,⁵⁷ (4) submissions contesting the legality of the existence of a confidential version and a public version of the Trial Judgement in the Prior Contempt Case,⁵⁸ (5) the assertion that there was no evidence establishing *mens rea* in the Prior Contempt Case,⁵⁹ and (6) the contention there was no evidence that Šešelj had violated the relevant protective measures in the Prior Contempt Case.⁶⁰ The Appeals Chamber considered each of these arguments and found them to be without merit. Accordingly, these issues will not be revisited in the instant decision.

27. I now turn to Šešelj's submission that his publication of the Two Books: (1) provides a sufficient basis for the disqualification of Judges Kwon and Parker from the Current Contempt Case, and (2) "probably even contributed" to the opening of the Current Contempt Case, "for the purpose of revenge by Judges O-Gon Kwon and Kevin Parker against a detainee".⁶¹ At this juncture I reiterate that a party seeking the disqualification of a Judge bears the burden of adducing sufficient evidence that the Judge in question lacks impartiality, and that in doing so, the party must demonstrate that there is "a reasonable apprehension of bias by reason of prejudgement" which is "firmly established". In the present instance, Šešelj has failed to adduce any evidence of conduct on

⁵³ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Notice of Appeal and Appellant's Brief Against the Judgment on Allegations of Contempt Pursuant to the Decision on Prosecution's Motion for Order Striking Appellant's Notice of Appeal and Appeal Brief and Closing the Case Issued by the Appeals Chamber on 16 December 2009, 18 January 2010 ("Appeal Against the Trial Judgement in the Prior Contempt Case"). The BCS version of the Appeal Against the Trial Judgement in the Prior Contempt Case was filed on 12 January 2010.

⁵⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Judgement, issued confidentially on 19 May 2010 ("Appeal Judgement in the Prior Contempt Case"). The public redacted version of the Appeal Judgement in the Prior Contempt Case was issued on 19 May 2010.

⁵⁵ Motion, pp. 19-21. See Appeal Against the Trial Judgement in the Prior Contempt Case, paras 2, 11; Appeal Judgement in the Prior Contempt Case, paras 15-17.

⁵⁶ Motion, pp. 22-24. See Appeal Against the Trial Judgement in the Prior Contempt Case, paras 4, 13; Appeal Judgement in the Prior Contempt Case, paras 21-23.

⁵⁷ Motion, pp. 24, 28, 37-41. See Appeal Against the Trial Judgement in the Prior Contempt Case, paras 7, 16; Appeal Judgement in the Prior Contempt Case, paras 33-41.

⁵⁸ Motion, pp. 42-43. See Appeal Against the Trial Judgement in the Prior Contempt Case, paras 9, 18; Appeal Judgement in the Prior Contempt Case, paras 27-29.

⁵⁹ Motion, pp. 31-34. See Appeal Against the Trial Judgement in the Prior Contempt Case, paras 5, 14; Appeal Judgement in the Prior Contempt Case, paras 24-26.

⁶⁰ Motion, pp. 24-28. See Appeal Against the Trial Judgement in the Prior Contempt Case, paras 3, 12; Appeal Judgement in the Prior Contempt Case, paras 18-20.

⁶¹ Motion, pp. 5-7.

the part of Judges Kwon and Parker indicating a lack of impartiality on the part of either Judge stemming from the publication of the Two Books, and that the Current Contempt Case was initiated as a result. Instead, Šešelj merely speculates regarding the attitude of both Judges to the publication of the Two Books. As I noted on a prior occasion, “[s]uch speculation does not constitute evidence of bias”.⁶² Moreover, I note the statement by Judges Kwon and Parker to the effect that “neither [has] seen nor read any such publications”, and that they “do not intend to do so”.⁶³

28. Furthermore, the sequence of events culminating in the issuance of the order in lieu of an indictment in the Current Contempt Case, amply demonstrates the insubstantial nature of Šešelj’s assertion that the publication of the Two Books “probably even contributed” to the opening of the Current Contempt Case by Judges Kwon and Parker. In this regard, I note that Trial Chamber II originally dismissed the Prosecution Motion Initiating the Current Contempt Case, in the Decision of 21 August 2009. Trial Chamber II determined, *inter alia*, that the Prosecution failed to provide a sufficient basis for issuing an order in lieu of an indictment against Šešelj pursuant to Rule 77(D) of the Rules.⁶⁴ However, following the Prosecution Appeal of the Decision of 21 August 2009, the Appeals Chamber concluded upon an independent review, that the Trial Chamber erred in its determination. The Appeals Chamber found that:

with respect to the 11 witnesses, the evidence before the Trial Chamber gave rise to a *prima facie* case that Šešelj knowingly disclosed their identifying information in violation of the Šešelj Trial Chamber’s orders. Therefore, no reasonable trier of fact could have concluded that insufficient grounds exist to prosecute Šešelj pursuant to Rule 77(D) of the Rules for having disclosed the said information.⁶⁵

The Appeals Chamber thus granted the Prosecution Appeal and ordered:

[...] the Trial Chamber to proceed against Šešelj for contempt pursuant to Rule 77(D)(ii) of the Rules by issuing an order in lieu of indictment to prosecute him for having disclosed information which may identify the 11 protected witnesses in violation of the Šešelj Trial Chamber’s orders.⁶⁶

Accordingly, in the Decision of 3 February 2010, Trial Chamber II issued the order in lieu of an indictment in the Current Contempt Case.⁶⁷ In so doing, the Trial Chamber specifically noted that:

By paragraph 28 of the Appeal Decision, the Chamber is ordered to issue an order in lieu of indictment in respect of 11 protected witnesses. There is therefore no reason for the Chamber to consider, or further consider, whether there are sufficient grounds to proceed for contempt and whether to exercise its discretion under Rule 77(D).⁶⁸

⁶² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Decision on Motion for Disqualification, 6 November 2009, para. 12.

⁶³ Memorandum of 9 June 2010.

⁶⁴ Decision of 21 August 2009, paras 15, 22, 28, 30-36.

⁶⁵ Appeal Decision, para. 27.

⁶⁶ *Id.*, para. 28.

⁶⁷ Decision of 3 February 2010, para. 20 and pp. 9-10.

⁶⁸ *Id.*, para. 18.

Thus, Šešelj's assertion that Judges Kwon and Parker proceeded with the Current Contempt Case in "revenge" for the publication of the Two Books, is entirely without foundation.

29. I now turn to Šešelj's submission that the transfer of the Prosecution Motion Initiating the Prior Contempt Case from Trial Chamber III before which it was originally filed, to Trial Chamber II, was "illogical" and indicative of bias on the part of Judge Parker.⁶⁹ I note firstly, the order issued confidentially and *ex parte* on 29 October 2008 by Judge Fausto Pocar, in his former capacity as President of the International Tribunal ("Former President"), whereby he assigned the Prosecution Motion Initiating the Prior Contempt Case, to Trial Chamber II.⁷⁰ The 29 October 2008 Order specifically stated that "the Judges sitting in *Prosecutor v. Vojislav Šešelj*, Case No, IT-03-67-T, Judges Jean-Claude Antonetti, Frederik Harhoff and Flavia Lattanzi" ("Three Judges") requested: (1) their withdrawal from considering the Prosecution Motion Initiating the Prior Contempt Case, and (2) that the Former President "assign other Judges to examine" the matter.⁷¹ The Three Judges submitted their request pursuant to Rule 15(A) of the Rules, "on the ground that their determination may give rise to an appearance that their impartiality to decide the merits of this case is impugned".⁷² Thus, noting "the trial management and case distribution needs of the International Tribunal" the Former President assigned the matter to Trial Chamber II.⁷³

30. Secondly, in my capacity as the current President of the International Tribunal, I subsequently issued the public redacted version of the 29 October 2008 Order.⁷⁴ In so doing I noted, *inter alia*, that: (1) "the accused has a right to know why another Chamber ruled on the Motion and not the Chamber seized of his trial", and (2) having sought the views of Judge Pocar and the Three Judges, "none of them [... were] opposed to the issuance of a public, redacted version of the Order".⁷⁵ Thus, in view of the foregoing, Šešelj's submission that the assignment of the Prior Contempt Case to Trial Chamber II was "illogical" and indicative of bias on the part of Judge Parker, is without merit.

31. I also note Šešelj's submission that Judge Parker: (1) "completely ignored" certain factual circumstances in arriving at the Decision Issuing the Order in Lieu of an Indictment in the Prior Contempt Case, and (2) consequently, "cannot be considered an impartial and neutral judge" in the

⁶⁹ Motion, pp. 15-16.

⁷⁰ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Assigning Motions to a Trial Chamber, issued confidentially and *ex parte* on 29 October 2009 ("29 October 2008 Order"). The public redacted version of the 29 October 2008 Order was issued on 29 January 2009.

⁷¹ *Id.*, p. 2.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Issuing a Public Redacted Version of 29 October 2008 Order Assigning Motions to a Trial Chamber, 29 January 2009, p. 2.

⁷⁵ *Id.*

Current Contempt Case.⁷⁶ The Decision Issuing the Order in Lieu of an Indictment in the Prior Contempt Case was rendered pursuant to Rule 77 of the Rules.⁷⁷ Rule 77(J) of the Rules provides that:

Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless

- (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
- (ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Thus, the opportunity was available to Šešelj during the Prior Contempt Case, to appeal, pursuant to Rule 77(J) of the Rules, the decision issuing the order in lieu of an indictment in that case. The Current Contempt Case, which is a separate and distinct set of proceedings, is therefore an inappropriate forum for raising such objections. Accordingly, this issue will not be further addressed in the present decision.

32. I also note Šešelj's submission that the participation of Judges Kwon and Parker in the Prior Contempt Case, provides a sufficient basis in and of itself, to disqualify both from presiding over the Current Contempt Case.⁷⁸ As previously noted, the Current Contempt Case constitutes a separate and distinct set of proceedings, involving issues particular to the Current Contempt Case. Thus, the mere fact that Judges Kwon and Parker presided over the Prior Contempt Case is insufficient to rebut the presumption of impartiality attaching to both Judges for the purposes of the Current Contempt Case. I am therefore in agreement with the statement by Judges Kwon and Parker that their participation in the Prior Contempt Case does not affect their impartiality in the Current Contempt Case, and that no impartial and informed observer would consider that their aforementioned participation might do so, given that the Prior Contempt Case "concerned entirely separate and unrelated events and has no relevance to Šešelj's guilt or innocence of the present allegation".⁷⁹

33. I am therefore of the view that there is no merit in the Motion. However, I note the finding of the Appeals Chamber that:

⁷⁶ Motion, pp. 16-19.

⁷⁷ Decision Issuing the Order in Lieu of an Indictment in the Prior Contempt Case, para. 14 and pp. 8-9.

⁷⁸ *Id.*, p. 14.

⁷⁹ Memorandum of 9 June 2010.

[...] under the current Rule 15(B) of the Rules, where the President [...] has determined that it is not necessary to refer the matter to a panel of judges and decided the matter himself, and that decision is challenged, it becomes “necessary” to refer the matter to a panel of three judges.⁸⁰

Thus, in light of the foregoing, and in the interests of the expedient determination of this Motion, I consider it necessary to appoint a panel of three Judges to consider the merits of the Motion and **HEREBY ORDER** that the Bench to consider the Motion shall be composed as follows:

Judge Christoph Flügge

Judge Howard Morrison

Judge Guy Delvoie

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



Judge Patrick Robinson
President

Dated this 22nd day of June 2010,
At The Hague,
The Netherlands

[Seal of the Tribunal]

⁸⁰ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-AR15.1, Decision on Appeal from Decision on Motion to Disqualify Judge Picard, 26 June 2009, para. 8.