

**UNITED
NATIONS**

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06 November 2009



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-R77.2-A
Date: 6 November 2009
Original: English

THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: **Judge Patrick Robinson, President**
Registrar: **Mr. John Hocking**
Decision of: **6 November 2009**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON MOTION FOR DISQUALIFICATION

Amicus Curiae Prosecutor:

Mr. Bruce MacFarlane, QC

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 (“Rules”), render the following decision in relation to the “Motion by Professor Vojislav Šešelj for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings” (“Motion”), filed before me on 10 September 2009.¹

I. BACKGROUND

1. On 24 July 2009, Trial Chamber II issued the confidential “Judgement on Allegations of Contempt” (“Judgement”), in which it convicted Vojislav Šešelj of one count of contempt and sentenced him to fifteen months of imprisonment.² On 18 August 2009, Mr. Šešelj filed a confidential notice of appeal against the Judgement (“Appeal”).³ On 27 August 2009, I issued the “Order Assigning Judges to a Case Before the Appeals Chamber”, in which I assigned a bench composed of Judges Mehmet Güney, Fausto Pocar, Andrésia Vaz, Theodor Meron, and Christoph Flügge to consider the Appeal. In his Motion, Mr. Šešelj requests the disqualification of Judges Fausto Pocar and Theodor Meron from the bench considering his Appeal.⁴

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 exists 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

¹ An English version of the Motion was filed on 2 October 2009.

² A public version of the Judgement was filed the same day.

³ Notice of Appeal Against the Judgement on Allegations of Contempt of 24 July 2009, 18 August 2009. An English version of the Appeal was filed on 25 October 2009.

⁴ Motion, pp. 4 and 45.

the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁵

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.”⁶

3. The Appeals Chamber has also emphasized that there is an assumption of impartiality that attaches to a Judge.⁷ 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.⁸ The party must demonstrate “a reasonable apprehension of bias by reason of pre-judgement” which is “firmly established.”⁹ 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.”¹⁰

4. 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 on 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 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.

⁵ *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. See also *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*, 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.

⁶ *Lukić Decision*, para. 2; *Blagojević Decision*, para. 2; *Šešelj Decision*, para. 5; *Furundžija Appeals Judgement*, para. 190.

⁷ *Lukić Decision*, para. 3; *Blagojević Decision*, para. 3; *Šešelj Decision*, para. 5; *Furundžija Appeals Judgement*, para. 196.

⁸ *Lukić Decision*, para. 3; *Blagojević Decision*, para. 3; *Šešelj Decision*, para. 5; *Furundžija Appeals Judgement*, para. 197.

⁹ *Lukić Decision*, para. 3; *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.

¹⁰ *Lukić Decision*, para. 3; *Blagojević Decision*, para. 3; *Čelebići Appeals Judgement*, para. 707.

III. DISCUSSION

A. Preliminary Issues

5. As a preliminary matter, I note that Mr. Šešelj has filed his Motion before me in my capacity as Presiding Judge of the Appeals Chamber, and as noted above, under Rule 15(B)(i) of the Rules, once 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. Given that I am both the Presiding Judge of the Appeals Chamber and the President, it is clear that the requirement that the Presiding Judge report to the President under Rule 15(B)(i) of the Rules is inapplicable under the circumstances. However, in accordance with this Rule, as Presiding Judge of the Appeals Chamber, I have conferred with both Judges Pocar and Meron, who informed me that in their view, there is no basis for their disqualification or withdrawal pursuant to Rule 15(A).

6. Additionally, I note that I recently withdrew from considering a motion filed by Mr. Šešelj for review of a decision of the Registrar on the basis that my prior involvement in the substantive case against Mr. Šešelj gave rise to a conflict pursuant to Rule 15(A).¹¹ However, I have reconsidered that withdrawal, and I am now of the view that the basis for my withdrawal in that previous matter was not well founded. Neither the request for review of the Registrar's decision, nor this request for the disqualification of two of the Judges appointed to consider the Appeal, concerns any question of guilt or innocence in relation to the substantive case against Mr. Šešelj. Therefore, I do not consider that I have had any association, which might affect my impartiality in determining this Motion.

B. Request to Exceed Word Limit

7. Mr. Šešelj requests authorization to exceed the page limit of the Motion, arguing that "exceptional circumstances, such as the importance of ensuring the independence and impartiality of the Judges, affect the legal conduct of proceedings with due respect for the right of the Accused to a fair and just trial, and require that reasons be elaborated on a greater number of pages."¹² I observe that pursuant to the Practice Direction on the Length of Briefs and Motions, motions filed before a Chamber other than appeals from judgement, interlocutory appeals, and Rule 115 motions must not exceed 3000 words.¹³ Furthermore, "[a] party must seek authorization in advance from

¹¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Assigning Vojislav Šešelj's Request for Review of Registrar's Decision of 10 September 2009, 7 October 2009, p. 2.

¹² Motion, p. 2.

¹³ IT/184/Rev.2, 16 September 2005, para. (C)(5).

the Chamber to exceed the word limits and must provide an explanation of the exceptional circumstances that necessitate the oversized filing".¹⁴ Although these provisions specifically refer to motions filed before a Chamber, I consider that they are equally applicable to motions filed before the President. Thus, in accordance with these provisions, Mr. Šešelj's Motion, which contained 16,128 words, should not have exceeded 3,000 words. Furthermore, I note that Mr. Šešelj has not sought advance authorization for his over-sized Motion nor sufficiently demonstrated that he needs 16,128 words to address the issues raised therein. Nevertheless, I consider that it is in the interest of an expedient disposal of the Motion to consider it validly filed.

C. Request for Disqualification

8. In the Motion, Mr. Šešelj argues that Judges Pocar and Meron should be disqualified from considering his Appeal on the ground that they have a personal interest in his case and therefore cannot be impartial in relation to it. In this regard, he alleges that Judges Pocar and Meron have contributed to the systematic violation of his rights during his past seven years of detention. He also notes that he has written books about both of these Judges and that the Judges' full names are indicated on the covers of the books.¹⁵

1. Allegations Regarding Judge Pocar

9. With regard to Judge Pocar, Mr. Šešelj argues specifically that in his capacity as President of the International Tribunal, President of the Bureau of the International Tribunal ("Bureau"), Presiding Judge of the Appeals Chamber, and Judge of the Appeals Chamber, Judge Pocar rendered or took part in as many as 33 decisions denying Mr. Šešelj's motions.¹⁶ Mr. Šešelj contends that by contrast, Judge Pocar only issued one decision and one order in his favour, and that these were issued only "after heavy pressure from the world public and the Russian Ministry of Foreign Affairs and after (and during) the hunger strike that went on for a full 28 days".¹⁷ Mr. Šešelj asserts that the decisions in which Judge Pocar denied his motions "demonstrate to any reasonable and impartial observer that there is a very strong bias in Judge Fausto Pocar which often transforms itself into unrestrained personal hatred of Professor Vojislav Šešelj".¹⁸ Mr. Šešelj also contends that Judge Pocar issued "scandalous statements" to the international media in relation to Mr. Šešelj's hunger

¹⁴ *Id.*, para. (C)(7).

¹⁵ Motion, pp. 3-4.

¹⁶ Motion, pp. 5-28 and 30.

¹⁷ Motion, p. 30.

¹⁸ Motion, p. 5.

strike that demonstrate Judge Pocar's hatred, bias and vindictiveness toward Mr. Šešelj, which increased after Mr. Šešelj published his book about Judge Pocar in 2009.¹⁹

D. Allegations Regarding Judge Meron

10. Mr. Šešelj similarly asserts that Judge Meron demonstrated bias against him when, in his capacity as President of the International Tribunal, Presiding Judge of the Appeals Chamber, Judge of the Appeals Chamber, and President of the Bureau, he issued or took part in 16 decisions dismissing Mr. Šešelj's requests, while only granting one request.²⁰ He also argues that "a reasonable and well-informed observer" could conclude that Judge Meron is biased given certain political views held by Mr. Seselj which Mr. Šešelj argues are incompatible with the alleged views of Judge Meron.²¹ Mr. Šešelj further contends that although the President is obliged to supervise the activities of the Registry pursuant to Rule 19 of the Rules, during his Presidency, Judge Meron "allowed the Registry to brutally violate" his rights by subjecting him to complete isolation through ten decisions rendered between 11 December 2003 and 9 June 2004.²² In addition, Mr. Šešelj submits that Judge Meron demonstrated bias against him when he rejected a letter from Mr. Šešelj complaining about the actions of the Registrar and Deputy Registrar and advised Mr. Šešelj that such submissions must be filed before the Registry of the International Tribunal and that if Mr. Šešelj disputed the work of the Registrar and his Deputy, Mr. Šešelj should appeal to them.²³

E. Discussion

11. Mr. Šešelj bases his claim that Judges Pocar and Meron are biased against him, in large part, on the fact that in their capacities as President of the International Tribunal, Presiding Judge of the Appeals Chamber, President of the Bureau, and Judge of the Appeals Chamber, they rendered or participated in many decisions dismissing his motions. While I appreciate that Mr. Šešelj does not agree with the outcome of the decisions he identifies, Mr. Šešelj has presented no evidence of bias or special interest on the part of Judges Pocar or Meron in rendering these decisions. Neither have I found, upon review of these decisions, any evidence establishing the possibility of actual bias or the appearance of bias. Disagreement with a decision issued by a Judge, without more, is not enough to rebut the presumption of impartiality that attaches to Judges of the International Tribunal.

¹⁹ Motion, pp. 28-30.

²⁰ Motion, pp. 8-9, 11-16, 18-21, 23-24, 26-28, 31-35, 39, 41-42, and 44-45.

²¹ Motion, pp. 30-31 and 40-41.

²² Motion, pp. 31-38 and 44-45.

²³ Motion, p. 38.

12. I further find that Mr. Šešelj has failed to substantiate his contention that Judges Pocar and Meron cannot be impartial in relation to his case given that Mr. Šešelj has written books about them. Mr. Šešelj simply speculates the reactions of Judges Pocar and Meron in relation to the publication of these books without providing any evidence whatsoever of actions on their part that demonstrate bias or the appearance of bias. Such speculation does not constitute evidence of bias.

13. Turning to Mr. Šešelj's allegation that Judge Pocar demonstrated bias against him when he issued certain statements to the international media in relation to Mr. Šešelj's hunger strike, I do not consider that unsubstantiated statements allegedly made by Judge Pocar in the media constitute a basis for questioning his impartiality. In any case, I do not find that the content of these alleged statements as represented by Mr. Šešelj in his Motion can reasonably be interpreted as establishing any bias or appearance of bias on the part of Judge Pocar.

14. As for Mr. Šešelj's complaint that Judge Meron cannot be impartial in relation to his case given certain political views held by Mr. Šešelj, which he argues are incompatible with Judge Meron's alleged political views, I note that Mr. Šešelj's allegations in this regard are purely speculative and lack any evidentiary basis.

15. Mr. Šešelj has similarly failed to provide any evidence that Judge Meron's supervision of the Registry's activities in relation to his case, or that his rejection of a letter from Mr. Šešelj complaining about the actions of the Registrar and Deputy Registrar, demonstrate bias or the appearance of bias on the part of Judge Meron. Rather, I am confident that these allegations only demonstrate that the Registry and Judge Meron issued decisions with which Mr. Šešelj does not agree. I reiterate that disagreement with a decision issued by a Judge, without more, is not enough to rebut the presumption of impartiality that attaches to Judges of the International Tribunal.

16. Accordingly, I am not persuaded that there is any merit in the Motion. However, I note the recent finding of the Appeals Chamber that:

[...] 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.²⁴

17. In light of the foregoing, in the interests of the expedient determination of this Motion, I nevertheless consider it necessary to appoint a panel of three Judges to consider the merits of the

²⁴ *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.

Motion and **HEREBY ORDER** that the Bench to consider the Motion shall be composed as follows:

Judge Burton Hall

Judge Howard Morrison

Judge Guy Delvoie

18. I also warn Mr. Šešelj that he should refrain from making disparaging remarks in any future motions filed before the International Tribunal. Such remarks are inappropriate and irrelevant to the merits of his requests.

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

Done this 6th day of November 2009,

At The Hague,

The Netherlands.



Judge Patrick Robinson

President