

**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-T

Date: 14 January 2008

Original: English

THE PRESIDENT OF THE TRIBUNAL

Before: Judge Fausto Pocar, President

Registrar: Mr. Hans Holthuis

Order of: 14 January 2008

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**ORDER ON THE PROSECUTION MOTION FOR THE
DISQUALIFICATION OF JUDGE FREDERIK HARHOFF**

The Office of the Prosecutor:

Ms. Christine Dahl

The Accused:

Mr. Vojislav Šešelj

I, **FAUSTO POCAR**, 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”),

NOTING the oral application on 8 January 2008 by the Office of the Prosecutor (“Prosecution”) for the disqualification and withdrawal of Judge Frederik Harhoff (“Application”) pursuant to Rule 15(B)(i) of the Rules of Procedure and Evidence (“Rules”);¹

NOTING that pursuant to Rule 15(B) of the Rules the Application was referred to the Presiding Judge of the Trial Chamber, Judge Jean-Claude Antonetti, who, in accordance with Rule 15(B)(i) of the Rules, consulted with Judge Harhoff and, on 8 January 2008, submitted to me a report pursuant to that Rule;

NOTING that on 9 January 2008, I issued the “Order pursuant to Rule 15” appointing a panel of three Judges (“Panel”) to consider the merits of the Application;

NOTING the “Report to the President pursuant to Rule 15(B)(ii) concerning the Prosecution Application for the Disqualification and Withdrawal of Judge Frederik Harhoff” submitted to me by the Panel on 14 January 2008, a copy of which is annexed;

CONSIDERING that it is the report of the Panel that the Motion be refused;

In the foregoing circumstances, and having regard for the reasons set forth in the report of the Panel, pursuant to Rule 15 of the Rules, I hereby **REFUSE** the Application.

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

Done this fourteenth day of January 2008,
at The Hague, The Netherlands.



Judge Fausto Pocar

President

¹ T. 2238 (8 January 2008).

[Seal of the Tribunal]



ANNEX

**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-T

Date: 14 January 2008

Original: English

PANEL CONVENED BY ORDER OF THE PRESIDENT

Before: Judge O-Gon Kwon, Presiding
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 14 January 2008

PROSECUTOR
v.
VOJISLAV ŠEŠELJ

PUBLIC

**REPORT TO THE PRESIDENT PURSUANT TO RULE 15(B)(ii)
CONCERNING THE PROSECUTION APPLICATION FOR THE
DISQUALIFICATION AND WITHDRAWAL OF JUDGE FREDERIK
HARHOFF**

Office of the Prosecutor

Ms. Christine Dahl

The Accused

Mr. Vojislav Šešelj

I. Background

1. Pursuant to Rule 15(B)(ii), Judge Pocar appointed this panel (“Panel”) to report to him its decision on the merits of the Prosecution’s oral application of 8 January 2008 (“Application”) to disqualify and withdraw Judge Harhoff from sitting on the trial panel in *Prosecutor v. Šešelj* (“Šešelj”).¹
2. The Application is based on Judge Harhoff’s participation in a 1993 interview with Isak Gaši while performing pro bono work for a human rights organization, the Danish Helsinki Committee (“Helsinki Committee”).² The Helsinki Committee was gathering evidence to forward to the Commission of Experts established by the United Nations Security Council to analyze evidence of serious violations of international humanitarian law committed during the conflict in the former Yugoslavia.³ Judge Harhoff is listed as an interviewer on the Helsinki Committee report describing the Gaši interview (“Helsinki Report”), but he was present for only part of the interview and did not draft the report.⁴
3. Gaši is now a prospective prosecution witness in *Šešelj*.⁵ The Prosecution represents that his testimony will relate to events at Brčko and Bijeljina—sites that are removed from the indictment pursuant to the Trial Chamber’s decision applying Rule 73 *bis* of the Rules of Procedure and Evidence (“Rules”).⁶ The Trial Chamber’s Rule 73 *bis* decision orders the Prosecution not to present evidence “in respect of crimes allegedly committed in” Brčko and Bijeljina but permits “non-crime-base evidence in respect of” those sites.⁷ The Trial Chamber will, however, permit Gaši to offer testimony pertaining to a pattern of conduct (“pattern evidence”) relevant to proof of a joint criminal enterprise.⁸
4. The Prosecution argues that Judge Harhoff should be disqualified from sitting on the Šešelj trial panel, asserting:

¹ President’s Order, p. 3.

² T. 2233-2234, 2243-2244 (8 January 2008).

³ See Memorandum from Judge Frederick Harhoff to Judges Jean-Claude Antonetti and Flavia Lattanzi, Recusal from the *Šešelj* trial, 8 January 2008, para. 1 (“Memorandum from Judge Harhoff”) (describing the Danish Helsinki Committee’s evidence-gathering work); U.N. Security Council Resolution 780, U.N. Doc. S/RES/780 (1992), 6 October 1992, p. 2 (establishing Commission of Experts and stating its mandate).

⁴ T. 2244 (8 January 2008); Danish Helsinki Committee, First Report to the Commission of Experts, 25 May 1993, p. 2 (“First Danish Helsinki Committee Report to the Commission”).

⁵ T. 2233 (8 January 2008).

⁶ T. 2234-2235 (8 January 2008).

⁷ *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on the Application of Rule 73 *bis*, 8 November 2006, pp. 9-10 (“Rule 73 *bis* Decision”).

⁸ T. 2235, 2241 (8 January 2008). See also Rule 73 *bis* Decision, paras. 27-28 (permitting “non-crime base evidence that contributes to proving the charges beyond the limited scope of proving the occurrence of a crime or crimes within the geographically defined areas, even if it relates to a crime site for which no evidence relating to specific alleged crimes is to be presented”); T. 2255-2256 (9 January 2008) (reiterating that the Prosecution may permit evidence concerning Brčko and Bijeljina relating to joint criminal enterprise).

- a. Judge Harhoff would be “in the invidious position of having to judge the results of his own work” because there are inconsistencies between the Helsinki Report and Gaši’s anticipated testimony and Gaši has testified in the past that he does not “abide by” the Helsinki Report, the interpreter was “very poor”, and there are mistakes and omissions in the report;⁹
- b. the requirement that judges be independent of the Prosecution means that judges “cannot have played any role” in the investigation “leading up to the inception of criminal proceedings and their later trial” and Judge Harhoff’s work for the Helsinki Committee conflicts with this postulate;¹⁰ and
- c. there is further potential for appearance of bias in light of Šešelj’s objection to pattern evidence since Judge Harhoff would have a stake in excluding Gaši’s pattern evidence to avoid criticism of the Helsinki Report.¹¹

5. The Prosecution stipulates that there is no actual bias and argues instead that there is an appearance of bias.¹²

6. Šešelj opposes the Application and in court on 8 January 2008 argued that:

- a. as a non-governmental organization engaged in political work, the Helsinki Committee is not a judicial body nor does it investigate;¹³
- b. the Application is a delaying tactic by the Prosecution and he does not want his trial postponed;¹⁴ and
- c. Gaši’s testimony should be excluded as irrelevant because it pertains to events not charged in the latest Indictment.¹⁵

7. In accord with Rule 15(B)(i), the Presiding Judge of the Trial Chamber, Judge Antonetti, consulted with Judge Harhoff and submitted a report to President Pocar on 8 January 2008

⁹ T. 2234-2236 (8 January 2008); Prosecution’s Citations in Support of Motion under Rule 15, 9 January 2008, (“Prosecution Citations”), para. 3. *See also Prosecutor v. Milošević*, Case No. IT-02-54-T, T. 26448, 26452 (11 September 2003); *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, T. 523-524, 549 (5 February 2004).

¹⁰ T. 2236, 2249 (8 January 2008).

¹¹ T. 2248-2249 (8 January 2008).

¹² T. 2236 (8 January 2008).

¹³ T. 2239 (8 January 2008).

¹⁴ T. 2239 (8 January 2008).

¹⁵ T. 2239-2242, 2249-2250 (8 January 2008).

recommending denial of the Application.¹⁶ Judge Harhoff indicated that the circumstances identified in the Application do not impugn his ability to act impartially, and Judge Antonetti concurred.¹⁷ Judge Antonetti reasoned that

- a. proceedings of a political nature are distinct from proceedings of a judicial nature and Judge Harhoff's prior work for the Helsinki Committee was part of a political process even if the work contributed to the creation of the Tribunal and was at the origin of the prosecutions;¹⁸ and
- b. the Prosecution has failed to show how meeting a witness years ago constitutes a case of possible bias or would present the appearance of bias to a reasonable and fully informed observer.¹⁹

II. The Standard for Disqualification of Judges

8. Rule 15(B)(i) permits parties to apply for disqualification on the grounds listed in Rule 15(A). Rule 15(A) provides in pertinent part 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.”

9. The Appeals Chamber has explained that Rule 15(A) should be interpreted in light of the general rule that a judge “should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.”²⁰ There is no issue of actual bias in this case.²¹ Rather, the Application alleges an appearance of bias.²² There is an unacceptable appearance of bias if:

- i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. [. . .] or

¹⁶ See Order Pursuant to Rule 15, 9 January 2008, p. 3 (“President’s Order”) (summarizing procedural history); Memorandum from Judge Jean-Claude Antonetti to Judge Fausto Pocar, *Récusation du Juge Harhoff*, 8 January 2008, p.1 (“Memorandum, *Récusation du Juge Harhoff*”) (stating Judge Antonetti’s recommendation and rationale).

¹⁷ President’s Order, p. 3.

¹⁸ Memorandum, *Récusation du Juge Harhoff*, p.1.

¹⁹ *Ibid.* Judge Antonetti also noted Judge Harhoff’s solemn declaration to exercise his functions faithfully and impartially and included a memorandum from Judge Harhoff explaining his role in the interview with Gaši. *Ibid.*; Memorandum from Judge Harhoff, p. 1.

²⁰ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, paras. 189, 191 (“*Furundžija* Appeal Judgement”). See also *Prosecutor v. Blagojević, Obrenović, Jokić and Nikolić*, Case No. IT-02-60, Decision on Blagojević’s Application Pursuant to Rule 15(B), para. 10 (reasoning that Rule 15 has been interpreted broadly as coterminous with the requirement of impartiality in the Statute) (“*Blagojević* Bureau Decision”).

²¹ T. 2236 (8 January 2008).

²² T. 2236 (8 January 2008).

ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.²³

10. The reasonable observer standard is based on “an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background” and who is “apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.”²⁴

11. The Appeals Chamber has emphasized the well-settled presumption that Judges of the International Tribunal are presumed to be impartial.²⁵ A party challenging the presumption of impartiality must meet a “high threshold” by “firmly establish[ing]” a reasonable apprehension of bias.²⁶ The high threshold is necessary because, as the Appeals Chamber has explained, “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.”²⁷

III. Analysis

12. The question presented is whether Judge Harhoff’s participation more than a decade ago in part of an interview with Gaši for a human rights organization engaged in fact-gathering meets the high threshold for firmly establishing an unacceptable appearance of bias.

13. The Application is couched in both the rights of an accused—though Šešelj opposes the Application—and what is styled as the Prosecution’s right to a fair trial before an independent and impartial tribunal.²⁸

14. Article 21(2) of the Statute guarantees an accused “a fair and public hearing,” and the Appeals Chamber has recognized that “the fundamental human right to be tried before an independent and impartial tribunal” is “an integral component” of the fair trial guarantee.²⁹ Article 13(1) of the Statute states the qualifications of judges and requires that judges “be persons of high moral character, impartiality and integrity”.

²³ *Furundžija* Appeal Judgement, para. 189.

²⁴ *Ibid.*, para. 190 (quoting *R.D.S. v. The Queen* (1997) Can. Sup. Ct., delivered 27 September 1997).

²⁵ *E.g., Prosecutor v. Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, para. 41 (*Galić* Appeal Judgement”); *Furundžija* Appeal Judgement paras. 196-97.

²⁶ *Furundžija* Appeal Judgement, para. 197.

²⁷ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005, para. 19.

²⁸ T. 2236, 2243 (8 January 2008); Prosecution Citations, paras 6-8.

²⁹ *Blagojević* Bureau Decision, para. 6 (quoting *Furundžija* Appeal Judgement, para. 177 & n.239).

15. The panel considers that a person may not be a judge in a case when he is *actually biased*, for example when the person has a financial interest in the case.³⁰ In the event of actual bias, a judge is categorically disqualified from the case in question. Similarly, when someone is an actual party in a case—including when he is an accused, the accused’s lawyer, an intervener, or *amicus curiae*—he is automatically disqualified pursuant to the principle of *nemo debet esse iudex in propria causa* (no one should be a judge in one’s own cause).³¹ Finally, a judge is disqualified if there is a *reasonable apprehension of bias*—if a reasonable and fairly-informed observer would conclude that a judge might not remain impartial and unprejudiced.³² Ascertaining whether a reasonable apprehension of bias exists requires a court to consider the full panoply of circumstances in a given case.³³

16. The Prosecution, as noted above, has readily conceded that the present case does not involve any actual bias by Judge Harhoff.³⁴

17. The panel next considers whether the principle of *nemo debet esse iudex in propria causa* is applicable. The Application attempts to make much of the possibility that there will be inconsistencies between the Helsinki Report and Gaši’s testimony, claiming that if Gaši attributes errors to the report, then Judge Harhoff will have to judge his own work in assessing credibility and have a stake in ruling against the Prosecution on pattern evidence to eliminate Gaši as a witness and avoid criticism. The Prosecution claims that Judge Harhoff would therefore be a judge in his own cause.

18. The argument founders on a basic point: Neither Judge Harhoff nor the Helsinki Committee is a party to the present case, in contrast to the *Pinochet* case in which a judge was closely associated with an organization that was an intervener.³⁵ Consequently, the Prosecution has not demonstrated how Judge Harhoff’s participation would violate the principle of *nemo debet esse iudex in propria causa*.

19. The Panel finally considers whether the circumstances, taken as a whole, create a reasonable apprehension of bias.

³⁰ See *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 8 (“*Talić Decision*”).

³¹ *Talić Decision*, n.25. Cf. *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119, 132-133 H.L. (E.) (“*Pinochet*”) (noting that if “a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party,” then the case “is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial”).

³² *Talić Decision*, paras 8, 10, 15.

³³ See *ibid.*, para. 16.

20. The Prosecution invokes jurisprudence ruling that persons associated with a case as a prosecutor or police officer may not serve as a judge in the same case.³⁶ The situation here, however, is materially distinct from cases involving circumstances such as the former head of a public prosecutor's department responsible for prosecuting the accused sitting as judge in the case,³⁷ or judges who previously found that there was a "a very high degree of clarity" concerning guilt presiding over the accused's trial and appeal.³⁸

21. Judge Harhoff's volunteer work for the Helsinki Committee was not aimed at establishing or assessing the criminal responsibility of Šešelj. The Helsinki Committee helped in amassing data for the Commission of Experts, which played an important role in the establishment of this Tribunal³⁹—activity more properly characterized as political because it influenced political action rather than in the nature of police or prosecutorial investigation directed at a particular individual.

22. The fact that Judge Harhoff was involved in interviewing an individual who will now be a witness at trial is not by itself sufficient to objectively warrant apprehension of bias. Instructive in this regard is the judgement of the European Court of Human Rights in *Bulut v. Austria*, which held that fear of compromised impartiality is not objectively justified where a member of a trial court questioned two witnesses during the preliminary investigation.⁴⁰ Moreover, judges of this Tribunal may question witnesses in criminal proceedings and, as noted above, exposure to evidence while presiding in another criminal trial is not a ground for disqualification.

23. The Prosecution's argument that Judge Harhoff might have to judge his own work if the Helsinki Report is used to impeach Gaši is mistaken in its premise. Judge Harhoff did not write the Helsinki Report.⁴¹ His involvement in the genesis of the Helsinki Report was limited—he did not sign it and he was not even present for the entire interview.⁴² Nor was Judge Harhoff the translator at the interview—his recollection was that the translator was not a "sworn interpreter" and was,

³⁴ T. 2236 (8 January 2008).

³⁵ *Pinochet*, at 126.

³⁶ T. 2236-2237 (8 January 2008); Prosecution Citations, paras. 11-13.

³⁷ *Piersack v. Belgium*, European Court of Human Rights, No. 8692/79, Judgment, 1 October 1982, paras. 31-32.

³⁸ *Hauschildt v. Denmark*, European Court of Human Rights, No. 10486/83, Judgment, 24 May 1989, paras. 52-53.

³⁹ See M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 Crim. L. Forum 279, 280-83 (1994) (detailing history).

⁴⁰ *Bulut v. Austria*, European Court of Human Rights, No. 59/1994/506/588, Judgment, 22 February 1996, paras. 9, 33-34.

⁴¹ T. 2244 (8 January 2008).

⁴² T. 2244 (8 January 2008). The report was transmitted and signed by Erik Siesby, who is listed before Frederick Harhoff as an interviewer. First Danish Helsinki Committee Report to the Commission, pp.1-2.

rather, a Danish-Bosnian secretary.⁴³ Even if Gaši attributes inconsistencies to poor interpretation or mistakes in the report, those are not the work of Judge Harhoff.

24. The fact that Judge Harhoff has previously heard some of Gaši's evidence is not a basis for disqualification. Several previous cases are instructive in this regard. The Bureau in *Prosecutor v. Kordić and Čerkez* held that judges are not disqualified from hearing two or more criminal trials involving the same events even though the judges are exposed to the same evidence—and even if the accused in the later case was previously named as a co-accused in the earlier indictment.⁴⁴ The Appeals Chamber has held that serving as a confirming judge on an indictment in a case with evidence that overlaps with the evidence in the case against an accused is not a ground for disqualification.⁴⁵ In *Prosecutor v. Krajišnik*, a disqualification application was denied concerning a judge who was a former co-counsel for Dusko Tadić—though Tadić was expected to be a defence witness in *Krajišnik* along with several other witnesses who appeared in Tadić's case.⁴⁶ These authorities favour the conclusion that exposure to some of the evidence that will be adduced in another context is not a basis for disqualification.

25. It warrants noting that Judge Harhoff's memorandum indicates that he recollects the identity of the translator and that Gaši did not mention Šešelj "at any point" during the 1993 interview.⁴⁷ These recollections lend some credence to the Prosecution argument that Judge Harhoff's prior participation in the interview may colour his assessment of Gaši's testimony if discrepancies with the Helsinki Report are used to impugn Gaši. These recollections of an interview conducted more than a decade ago, however, are not necessarily material to the assessment of Gaši's evidence. As someone in need of an interpreter, Judge Harhoff would not be in a position to assess whether the interpretation was good or poor during the interview, even if he recollects the general background of the interpreter. And even if, to Judge Harhoff's recollection, Gaši did not mention Šešelj during the interview—though Gaši's testimony is now anticipated to "link some of the perpetrators" to Šešelj⁴⁸—the lack of prior mention does not necessarily bear on credibility because the prior interview concerned direct perpetrators and was not conducted in connection with the case against Šešelj. To the extent that Judge Harhoff has particular knowledge about the interview resulting in the Helsinki Report, "a fair-minded observer would know that Judges' training and professional experience engrain in them the capacity to put out of their mind evidence other than that presented

⁴³ Memorandum from Judge Harhoff, para. 3

⁴⁴ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2, Bureau Decision on Participation of Trial Chamber I Judges in the Case of the Prosecutor v. Blaskić, 4 May 1998, p. 2.

⁴⁵ *Galić Appeal Judgement*, paras. 35, 42-44.

⁴⁶ *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Decision on the Defence Application for Withdrawal of a Judge from the Trial, 22 January 2003, paras. 4, 15-16.

⁴⁷ *Ibid.* at paras. 3-4.

⁴⁸ T. 2235 (8 January 2008).

at trial”.⁴⁹ As the Appeals Chamber has observed, “Judges who serve as fact-finders are often exposed to information about cases before them either through the media or from connected prosecutions.”⁵⁰

26. Judge Harhoff was a relatively peripheral participant in an issue tangential to this case, the generation of the Helsinki Report. The circumstances do not meet the high threshold for firmly establishing a reasonable apprehension of bias.

27. For the foregoing reasons, the Panel **HEREBY REPORTS** to President Pocar pursuant to Rule 15(B)(ii) its decision that the Application be **REFUSED**.

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



O-Gon Kwon
Presiding

Dated this fourteenth day of January 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴⁹ *Galić* Appeal Judgement, para. 44.

⁵⁰ *Ibid.*