



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-02-60-R
Date: 2 July 2008
Original: English

THE VICE-PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: Judge Kevin Parker, Vice-President
Registrar: Mr. Hans Holthuis
Decision: 2 July 2008

PROSECUTOR

v.

VIDOJE BLAGOJEVIĆ

PUBLIC

DECISION ON MOTION FOR DISQUALIFICATION

The Office of the Prosecutor:

Mr Peter Kremer

Counsel for the Accused:

Mr Vladimir Domazet

I, Kevin Parker, Vice-President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal"), acting pursuant to Rules 15 and 21 of the Rules of Procedure and Evidence ("Rule"), make the following

DECISION

1. On 9 June 2008 Counsel for Vidoje Blagojević applied by a Motion to the President of the Tribunal, Judge Fausto Pocar, as the Presiding Judge of the Appeals Chamber, seeking the disqualification and withdrawal of Judges Pocar, Mohamed Shahabuddeen, Mehmet Güney, Andréia Vaz, and Theodor Meron from sitting to hear and determine Mr Blagojević's Request for a Review of the Appeals Judgement in his case.¹ On 16 June 2008 the President submitted a report referring the matter to me pursuant to Rule 15(B)(iv) and Rule 21 of the Rules, because, as one of the Judges whose disqualification is sought, and as the Presiding Judge of the Appeals Chamber, he is unable to act on the Motion. In his report it is indicated, pursuant to Rule 15(B)(i), that no member of the Chamber intends to withdraw.

2. Pursuant to Rule 15(A) a Judge may not sit in any case in which he or she "has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality." The Appeals Chamber has observed in respect of this Rule that:

(i) A Judge is not impartial if it is shown that actual bias exists.

(ii) There is an unacceptable appearance of bias if:

a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or

the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.²

It has been noted with respect to the reasonable observer prong of this test that this must be an informed person, with knowledge of all the relevant circumstances, including the traditions of

¹ *Prosecutor v Blagojević*, Case No: IT-02-60-R, "Mr Vidoje Blagović Request for Disqualification of the President and Judges of the Appeals Chamber pursuant to Rule 15 of the Rules of Procedure and Evidence," 9 June 2008 ("Motion") and *Prosecutor v Blagojević*, Case No: IT-02-60-R, "Mr Vidoje Blagojević Request for Review of Judgement from 9 May 2007", 6 May 2008 ("Request for Review"), respectively.

² *Prosecutor v. Furundžija*, Case No: IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeals Judgement"), para 189. See also *Prosecutor v. Brđanin*, Case No: IT-99-36-R77, "Decision on Application for Disqualification", 11 June 2004 ("*Brđanin* Decision"), para 6.

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.³

3. There is a presumption of impartiality which attaches to a Judge.⁴ It is for a party who seeks the disqualification of a Judge to adduce sufficient evidence that the Judge is not impartial. A high threshold is required to rebut the presumption of impartiality.⁵ The existence of a reasonable apprehension of bias must be “firmly established.”⁶ As has been observed in the jurisprudence, a high threshold is required as 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 the real appearance of bias itself.⁷

4. By the Motion it is contended that the Judges whose disqualification is sought have demonstrated partiality in the course of the case of Vidoje Blagojević, that they have violated his basic rights to a fair trial and that they have made decisions and passed judgements in his case always to his detriment. These same contentions were made by Mr Blagojević in a letter to the President of the Tribunal, dated 20 May 2008, to which the Motion refers.

5. The contentions are not further particularized or developed, nor are they supported by additional factual material. No particular act or conduct or circumstance, whether of any or all of the five Judges, is advanced in support of the contention that partiality has been demonstrated in the course of the case of Mr Blagojević, or in respect of the contention that his basic right to a fair trial has been violated. The third contention is that the decisions and judgements of the five Judges in his case have been to his detriment.

6. There has only been one trial on indictment of Mr Blagojević before this Tribunal. The five Judges heard and determined the appeal which Mr Blagojević brought against his conviction in this trial and the sentence imposed. Various two or three of the five Judges had earlier heard and determined interlocutory appeals relating to this trial, which essentially concerned issues of discovery, legal representation and provisional release. Judges Andréia Vaz and Theodor Meron have only sat on the appeal against conviction and sentence. The references in the Motion to “the case” and “his case” are clearly referring to these appeals in this one trial.

³ *Furundžija* Appeals Judgement, para 190. See also *Prosecutor v Šešelj*, Case No: IT-03-67-PT, “Decision on Motion for Disqualification”, 16 February 2007 (“*Šešelj* Decision”), para 5.

⁴ *Furundžija* Appeals Judgement, para 196. See also *Šešelj* Decision, para 5.

⁵ *Furundžija* Appeals Judgement, para 197; *Šešelj* Decision, para 5.

⁶ *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; *Brdanin* Decision, para 8; *Šešelj*, Decision, para 5.

⁷ *Čelebići* Appeals Judgement, para 707; *Brdanin* Decision, para 8.

7. Given the nature and terms of the three contentions which are the sole basis for the Motion, and in the absence of any more particular ground, it is apparent that the concern giving rise to the Motion is that Mr Blagojević's appeals have not been successful. He contends, in effect, that, because the decisions were adverse, the five Judges have demonstrated partiality, have violated his right to a fair trial, and have made decisions and passed judgements to his detriment.

8. The mere fact of the dismissal of an appeal on its merits by an Appeals Chamber of this Tribunal cannot, by itself, provide a basis for any reasonable apprehension of bias by the Judges deciding the appeal. An appeal which lacks the necessary merit must be dismissed. Judges acting with complete impartiality and integrity may properly conclude that an appeal has not the necessary merit. These are matters which a reasonable observer, who was properly informed in the sense discussed earlier, would appreciate. They would necessarily preclude such an observer from apprehending bias simply because an appeal was dismissed.

9. On this understanding, what is contended by the Motion does not advance any matter on which it could be open properly to conclude that the five Judges, or any of them, lacked the necessary impartiality to do justice in respect of the Request for Review made by Mr Blagojević, or that a reasonable observer, properly informed could so apprehend.

10. In the particular circumstances of this case there is a further consideration. The Motion concerns a Request for Review of a decision of the Appeals Chamber. Relevantly, Rule 119(A) provides for a request for review to be heard by the Appeals Chamber which gave the decision to be reviewed. The Rule expressly provides that if any Judge who constituted the original Chamber is no longer a Judge of the Tribunal, another Judge shall be appointed in place of that Judge. The five Judges who are the subject of the Motion constituted the Appeals Chamber which gave the decision to be reviewed.

11. Relevantly, a request for review occurs only where a new fact has been discovered since the hearing of the Appeal. The essential issue is the effect of this new fact on the case. An object of Rule 119 is that the Judges who are familiar with the case should consider the effect of this newly discovered fact on the case. Necessarily, as the fact is new, this issue is one which has not been considered or decided by the Judges who made the decision to be reviewed. Rule 119 is, therefore, directed to furthering the interests of justice in the particular case.

12. As has been indicated, this is not a case in which it is raised that any of the five Judges has a personal interest or association affecting their impartiality. In this situation there is no reason why Rule 119 should not be given effect.

13. Rule 15(B)(ii) 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 the application. In the present Motion, for the reasons indicated, no matter is raised which is capable of justifying the granting of the Motion. No matter is raised which presents an issue requiring a decision on its merits. It is not necessary, therefore, to appoint a panel of three Judges pursuant to Rule 15(B)(ii.)

For the foregoing reasons the Motion is **DISMISSED**.

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



Judge Parker
Vice-President

Dated this second day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]