



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-03-67-R77.2-A

Date: 2 December 2009

Original: English

CHAMBER CONVENED BY ORDER OF THE PRESIDENT

Before: Judge Burton Hall, Presiding
Judge Howard Morrison
Judge Guy Delvoie

Registrar: Mr. John Hocking

Decision of: 2 December 2009

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON MOTION FOR DISQUALIFICATION OF
JUDGES FAUSTO POCAR AND THEODOR MERON
FROM THE APPEALS PROCEEDINGS**

Amicus Curiae Prosecutor

Mr. Bruce MacFarlane, QC

The Accused

Mr. Vojislav Šešelj

I. PROCEDURAL HISTORY

1. On 24 July 2009, Trial Chamber II 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”) convicted Šešelj of one count of contempt.¹ On 18 August 2009, Šešelj filed a notice of appeal against the Judgement.² On 27 August 2009, the President assigned a bench composed of Judges Mehmet Güney, Fausto Pocar, Andrésia Vaz, Theodor Meron and Christoph Flügge to consider the Appeal.³
2. On 10 September 2009, Šešelj filed a motion to disqualify Judges Fausto Pocar and Theodor Meron from considering the Appeal.⁴
3. Pursuant to Rule 15 of the Rules of Procedure and Evidence (“Rules”), the Presiding Judge of the Appeals Chamber, who is also the President of the Tribunal, conferred with Judges Pocar and Meron and, in his capacity as President, he appointed this Chamber to consider the merits of the Motion.⁵

II. APPLICABLE LAW

4. The Statute of the Tribunal sets a high eligibility standard for its Judges requiring them to be “persons of high moral character, impartiality and integrity”.⁶ One of the procedural safeguards of this standard is enshrined in Rule 15 of the Rules providing 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”.⁷
5. The Appeals Chamber has established the legal test of the concept of judicial “impartiality”, holding that
 - A. A Judge is not impartial if it is shown that actual bias exists.
 - B. There is an unacceptable appearance of bias if:

¹ Judgement on Allegations of Contempt, filed confidentially on 24 July 2009” (“Judgement”). Public version of the Judgement was filed the same day.

² Notice of Appeal Against the Judgement on Allegations of Contempt of 24 July 2009, filed confidentially on 18 August 2009 (“Appeal”). English version of the Appeal was filed on 25 October 2009.

³ Order Assigning Judges to a Case Before the Appeals Chamber, filed on 27 August 2009.

⁴ Motion by Professor Vojislav Šešelj for Disqualification of Judges Fausto Pocar and Theodor Meron from the Appeals Proceedings”, filed before the President of the Tribunal on 10 September 2009 (“Motion”).

⁵ Decision on Motion for Disqualification, 6 November 2009 (“President’s Disqualification Decision”), paras 5 and 17.

⁶ Article 13 of the Statute.

⁷ Rule 15(A) of the Rules.

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. 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.⁸

6. For the purpose of evaluating whether a judge has not been impartial under the Appeals Chamber's test, a "reasonable observer" is defined as "an informed person, with knowledge of all 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".⁹

7. An analysis of the Tribunal's jurisprudence shows that an inquiry into alleged judicial bias is conducted with a strong assumption of his/her impartiality.¹⁰ As a consequence, the moving party bears a burden to adduce sufficient evidence of a Judge's impartiality being required to "firmly" establish a reasonable apprehension of bias.¹¹

III. SUBMISSIONS

8. In the Motion, Šešelj seeks disqualification of Judges Pocar and Meron from considering the Appeal because allegedly each has a personal interest in the case and therefore cannot be seen as impartial.¹² He submits that Judges Pocar and Meron have contributed to an alleged seven-year violation of his rights and have shown "unrestrained personal hatred" of him.¹³

⁸ *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("Furundžija Appeals Judgement"), para. 189, subsequently quoted in President's Disqualification Decision, para. 2; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-PT, Decision on Motion to Disqualify Judge Picard and Report to the Vice-President Pursuant to Rule 15(B)(ii), 22 July 2009, ("Karadžić Decision"), para. 15; *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

⁹ *Furundžija Appeals Judgement*, para. 190. See also President's Disqualification Decision, para. 2; *Karadžić Decision*, para. 16; *Lukić Decision*, para. 2.

¹⁰ *Furundžija Appeals Judgement*, para. 197. See also President's Disqualification Decision, para. 3; *Karadžić Decision*, para. 17; *Lukić Decision*, para. 3. A high threshold for rebutting the presumption of impartiality of Judges is imposed. In the words of the Appeals Chamber "just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice it would be as much of a potential 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.", *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("Čelebići Appeals Judgement"), para. 707.

¹¹ *Čelebići Appeals Judgement*, para. 707; *Furundžija Appeals Judgement*, para. 197. See also President's Disqualification Decision, para. 4; *Karadžić Decision*, para. 17; *Lukić Decision*, para. 3.

¹² Motion, p. 4.

¹³ Motion, pp 3-5.

A. Allegations against Judge Pocar

9. Šešelj argues that there is a strong impression of bias on the part of Judge Pocar. In support of his Motion, he submits that in his various capacities as President of the ICTY, President of the ICTY Bureau, Presiding Judge of the Appeals Chamber and member of the Appeals Chamber, Judge Pocar dismissed a large number of Šešelj's motions or appeals.¹⁴ Šešelj recalls that between 10 June 2003 and 9 April 2009, Judge Pocar took part in denying 33 of his motions and appeals while during the same period taking part in only two decisions labelled in the Motion as "positive for Professor Vojislav Šešelj".¹⁵

10. Šešelj devotes an extensive part of his Motion to express his disappointment in decisions of various organs of the Tribunal concerning the process of imposing counsel on him - culminating in his hunger strike from 10 November – 8 December 2006 - and in the way Judge Pocar, in his capacity as President of the Tribunal, acted in regard to Šešelj's hunger strike.¹⁶ In this respect, Šešelj argues that Judge Pocar's "scandalous statements" to the international media about Šešelj's hunger strike show Judge Pocar's "hatred, bias and especially vindictiveness", prejudices which even increased after Šešelj's book about Judge Pocar was published in 2009.¹⁷

B. Allegations against Judge Meron

11. Šešelj argues that there is a strong impression of bias on the part of Judge Meron. In support of his Motion, Šešelj submits that in Judge Meron's various capacities as President of the ICTY, President of the ICTY Bureau, Presiding Judge of the Appeals Chamber and member of the Appeals Chamber, during the period of 10 June 2003 – 9 April 2009, that he took part in issuing "16 decisions against Professor Vojislav Šešelj" and "merely one positive one".¹⁸ Moreover, Šešelj submits that in the period of February 2003 – November 2005, in his capacity as a President of the ICTY whose duty was to supervise the activities of the Registry, Judge Meron "allowed the Registry to brutally violate Professor Vojislav Šešelj's rights" by imposing "inhumane isolation" upon him.¹⁹ In this respect, Šešelj also recalls the instance when Judge Meron rejected Šešelj's complaint letter against the "incredible capriciousness shown by the Registrar of the International Tribunal".²⁰

¹⁴ Motion, pp 5-28, 30.

¹⁵ Motion, pp 30, 44.

¹⁶ See Motion, pp 10-23.

¹⁷ Motion, pp 29-30.

¹⁸ Motion, pp 31-32, 34-35, 39-44.

¹⁹ Motion pp 31-38, 42-43.

²⁰ Motion, pp 38-40.

12. Šešelj also argues that Judge Meron, as a former diplomatic representative of Israel, cannot consider Šešelj's Appeal without bias because of Šešelj's open political sympathy for the Palestinian cause.²¹ Moreover, Šešelj submits that Judge Meron's bias against him was deepened when Šešelj published a book about Judge Meron.²²

IV. DISCUSSION

13. The Chamber notes that Šešelj's allegations of bias on the part of Judges Pocar and Meron are mainly rooted in his disagreement with the various decisions issued in the course of the proceedings against him.²³ The Chamber is of the opinion that the fact that a judge decides against a

²¹ Motion, pp 40-41.

²² Motion, p. 42.

²³ In the Motion, Šešelj analyses the following decisions and orders issued or co-issued by Judge Pocar: Decision on Motion for Disqualification, 10 June 2003; Decision on the Interlocutory Appeal Concerning the Denial of a Request for a Visit to an Accused in the Detention Unit, 29 January 2004; Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004; Decision on Appeal Against the Decision of the Registry of 20 January 2006, 7 April 2006; Decision on Appeal Against Decisions of the Registry of 20 August 2004 and 30 January 2006, 11 April 2006; Decision on Appeal Against Decision Denying Permission for Legal Representatives to Visit the Detainee, 25 May 2006; Decision on Šešelj's Request that the ICTY President Order that Honourable Serbs in Detention and Those who Have Arranged a Plea Bargain with the Prosecution and Agreed to Give False Testimony Be Segregated in the Detention Unit and Prevented from Being Able to Contact Each Other, 15 June 2006; Decision on Motion For Reconsideration of the "Decision on The Interlocutory Appeal Concerning Jurisdiction" Dated 31 August 2004, 15 June 2006; Decision on Šešelj's Appeal Against the Registry Decision of 9 May 2006, 26 June 2006; Decision on Šešelj's Appeal Against Decision of the Registrar of 14 June 2006, 25 August 2006; Decision on Appeal Against the Decision of the Registry of 10 July 2006, 4 September 2006; Decision on Šešelj's Request that the ICTY President Order the Removal of all Obstacles that Restrict the Equality of all Radio and Television Stations to Broadcast Šešelj's Trial, 11 September 2006; Order Assigning Judges to a Case Before the Appeals Chamber, 11 September 2006; Decision on Extension of Word Limits, 27 September 2006; Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006; Decision on Motion to Quash the Practice Direction on the Length of Briefs and Motions, 6 November 2006; Decision on Motions for Disqualification of Judge Patrick Robinson, Judge Alphons Orié and Judge Bakone Justice Moloto, 6 November 2006; Decision on Appeal Against the Registrar's Decision to Assign David Hooper as Defence Counsel in the Proceedings Against Dr. Vojislav Šešelj, 10 November 2006; Decision on Motion for Dismissal Proceedings to be Issued by the Bureau Against Judge Patrick Robinson, Judge Alphons Orié and Judge Bakone Justice Moloto, 20 November 2006; Decision on Appeal Against the Registrar's Decision of 19 October 2006, 23 November 2006; Decision on Appeal Against the Registrar's Decision to Assign Standby Counsel, 9 January 2007; Decision on Motion for Disqualification, 16 February 2007; Decision on Appeal Against Registry Decision of 16 January 2007, 5 March 2007; Decision on Appeal Against Registry Decision of 19 December 2006, 12 March 2007; Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007; Decision on Appeal Against Decision of the Registrar of 24 January 2007, 20 April 2007; Decision on Appeals Against Decisions of the Registrar of 4 January 2007 and 9 February 2007, 25 April 2007; Decision on Appeal Against Registry Decision of 16 February 2007, 27 April 2007; Decision on Vojislav Šešelj's Appeal Against the Trial Chamber's Decision of 19 July 2007, 14 December 2007; Decision on Vojislav Šešelj's Appeal Against the Trial Chamber's Oral Decision of 7 November 2007, 24 January 2008; Decision on Appeal Against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008; Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008, 25 July 2008 (Confidential); Decision on the Registry Submission Pursuant to Rule 33(B) Following the President's Decision of 17 December 2008, 9 April 2009. Šešelj also analyses the following decisions issued or co-issued by Judge Meron: Decision on Motion for Disqualification, 10 June 2003; Decision on the Interlocutory Appeal Concerning the Denial of a Request for a Visit to an Accused in the Detention Unit, 29 January 2004; Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004; Decision on Validity of Appeal of Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 29 July 2004; Decision on Request to Exclude the Prosecutor of the International Tribunal - Carla Del Ponte, 2 December 2004; Decision on Motion to Change Seat of Tribunal, 3 May 2005; Decision on "Request of the Accused Asking President of the Tribunal Theodor Meron to Reverse the Decision of the Deputy Registrar Prohibiting Dr Vojislav Šešelj from Communicating with Anyone and Receiving Visits for at Least 60 Days", 21 September 2005; Decision on Motion

party at trial, even on numerous occasions, can not, as such, be taken as an indicia of possible bias on his/her part.

14. Similarly, the Chamber finds that decisions of the Registrar and Deputy Registrar mentioned in the Motion,²⁴ and the fact that they were issued under general supervision of Judge Meron exercised under Rule 19 of the Rules as the President of the Tribunal, cannot, as such, constitute evidence of bias on part of Judge Meron.

15. The Chamber does not find any merit in Šešelj's interpretation of the reasons for Judge Meron's alleged refusal of his complaint letter. The Chamber notes in this respect that establishing one or more instances of disagreement with a position presented by Šešelj by no means indicates the existence of bias against him.

16. The Chamber rejects Šešelj's allegation that the series of decisions issued by various organs of the Tribunal preceding the end of his self-imposed hunger strike, including those decisions in which Judges Pocar and Meron were involved in rendering, can be labelled as "attempted judicial murder" (sic). As such, this unfounded allegation does not support any allegation of bias against him.²⁵ Similarly, the Chamber does not accept as an example of bias Šešelj's speculative interpretation of the statements allegedly made by Judge Pocar to international media referring to Šešelj's hunger strike.

17. The Chamber also finds that Šešelj's allegations that Judges Pocar and Meron are biased against him by virtue of Šešelj writing derogatory books about them²⁶ are equally unsubstantiated and based on purely speculative grounds.²⁷

for Reconsideration of the "Decision on The Interlocutory Appeal Concerning Jurisdiction" Dated 31 August 2004, 15 June 2006; Decision on Extension of Word Limits, 27 September 2006; Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006; Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007; Decision on Vojislav Šešelj's Appeal Against the Trial Chamber's Decision of 19 July 2007, 14 December 2007; Decision on Vojislav Šešelj's Appeal Against the Trial Chamber's Oral Decision of 7 November 2007, 24 January 2008; Decision on Appeal Against the Trial Chamber's Oral Decision of 9 January 2008, 11 March 2008; Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008, 25 July 2008 (Confidential); Decision on the Registry Submission Pursuant to Rule 33(B) Following the President's Decision of 17 December 2008, 9 April 2009.

²⁴ Decision of Deputy Registrar, 11 December 2003; Decision of Registrar, 29 December 2003; Decision of Deputy Registrar, 8 January 2004; Decision of Deputy Registrar, 6 February 2004; Decision of Deputy Registrar, 16 February 2004; Decision of Deputy Registrar, 9 March 2004; Decision of Registrar, 8 April 2004; Decision of Deputy Registrar, 7 May 2004; Decision of Deputy Registrar, 9 June 2004; Decision of Deputy Registrar, 23 June 2005.

²⁵ See e.g. Motion, pp 5, 10-12.

²⁶ The books in question are: *Fausto Pocar, the Corrupt President of the Illegal Hague Tribunal*, Serbian Radical Party, Belgrade 2009; and *Theodor Meron, the Genocidal Israeli Diplomat*, Serbian Radical Party, Belgrade 2004, see Motion, pp 6-7.

²⁷ The Chamber notes that if a party's own criticisms of judges could warrant disqualification of judges, it would give parties the power to remove judges simply by making derogatory statements about them.

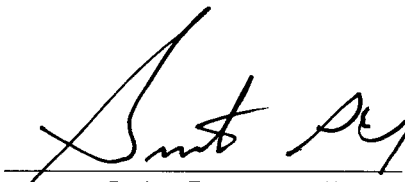
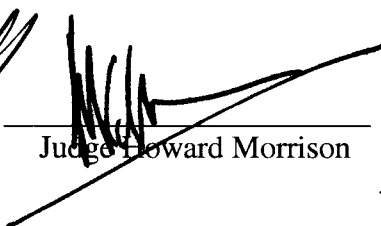
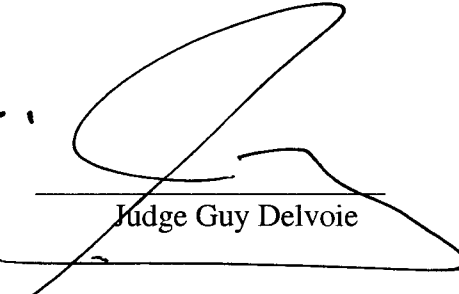
18. Finally, the Chamber rejects Šešelj's assertions accrediting certain political views to Judge Meron merely by virtue of the fact that Judge Meron in the past acted as an Israeli diplomat. Šešelj's claim that his publicly expressed sympathy towards Palestinians can reasonably be interpreted as impacting on Judge Meron's impartiality in deciding the Appeal is wholly unsubstantiated.

19. In the Chamber's opinion, Šešelj's arguments submitted in support of his allegations in the Motion are based on speculation and baseless inferences from the facts—all arguments unreservedly falling short of the test of circumstances leading a reasonable observer to reasonably apprehend bias. The Chamber therefore finds that the Motion not only lacks any merit but that the Motion is frivolous in nature and aimed at disturbing the fair and expeditious conduct of the trial.

V. REPORT ON THE MERITS OF THE MOTION

20. Pursuant to Rule 15 of the Rules, the Chamber finds that an informed person, with knowledge of all relevant circumstances, would not be led to reasonably apprehend any bias on part of Judges Pocar and Meron in deciding the merits of the Appeal. The Chamber finds that the evidence presented by Mr. Šešelj in his Motion falls short of rebutting the presumption of impartiality attached to the Judges of the Tribunal. For the foregoing reasons, the Motion is **DISMISSED**.

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

 <hr/> Judge Burton Hall Presiding	 <hr/> Judge Howard Morrison	 <hr/> Judge Guy Delvoie
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Dated this second day of December 2009

At The Hague

The Netherlands

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