

**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: 19 November 2010
Original: English

CHAMBER CONVENED BY ORDER OF THE PRESIDENT

Before: Judge Howard Morrison, Presiding
Judge Alphons Orié
Judge Guy Delvoie

Registrar: Mr. John Hocking

Date: 19 November 2010

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

CONFIDENTIAL

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

Amicus Curiae Prosecutor:
Mr Bruce MacFarlane

The Accused:
Mr Vojislav Šešelj

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I. BACKGROUND

1. On 26 January 2009, the Prosecution filed a confidential and *ex parte* motion pursuant to Rule 77 of the Rules of Procedure and Evidence of the Tribunal (“Rules”), alleging that Vojislav Šešelj (“Šešelj”) knowingly and wilfully interfered with the administration of justice by disclosing confidential information in three books he authored.¹ 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”) was ordered to consider the motion.² On 21 August 2009, Trial Chamber II denied the Prosecution’s Motion to initiate contempt proceedings against Šešelj.³ On appeal of this Decision, the Appeals Chamber determined that “no reasonable trier of fact could have concluded that insufficient grounds exist to prosecute Šešelj pursuant to Rule 77(D)”⁴ and ordered Trial Chamber II to issue an order in lieu of an indictment against Šešelj.⁵ Trial Chamber II initiated contempt proceedings against Šešelj on 3 February 2010 “for having disclosed information which may identify the 11 protected witnesses in violation of orders of a Chamber”⁶ and issued an order in lieu of an Indictment against Šešelj.⁷

2. On 13 April 2010, Šešelj filed a Motion seeking the disqualification of Judge O-Gon Kwon and Judge Kevin Parker under Rule 15 from ruling on the contempt proceedings against him.⁸ He requested the following: (i) that Judge Robinson, in his role as President of the Tribunal, issue a decision on the merits of his application to dismiss the judges; (ii) that President Robinson confer with Judges Kwon and Parker in advance of issuing his decision on their disqualification; (iii) that the President appoint a panel of three judges drawn from Chambers to consider his motion for disqualification; and (iv) that the President of the Tribunal assign another two judges in place of Judges Kwon and Parker to the Trial Chamber that will serve on the Bench of the second contempt proceeding.⁹

¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution’s Motion under Rule 77 Concerning Further Breaches of Protective Measures (confidential and *ex parte*), 26 January 2009.

² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Assigning Motion to a Trial Chamber (confidential and *ex parte*), 13 March 2009.

³ *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) (confidential and *ex parte*), 21 August 2009.

⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-A, Decision on the Prosecution’s Appeal against the Trial Chamber’s Decision of 21 August 2009 (confidential and *ex parte*), 17 December 2009 (“Appeal Decision”), para. 27.

⁵ Appeal Decision, para. 28.

⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Public Redacted Version of Second Decision on Prosecutions’ Motion Under Rule 77 Concerning Further Breaches of Protective Measures (Three Books) Issued on 3 February 2010, 4 February 2010 (“Decision of 3 February 2010”), para. 20.

⁷ *Ibid.*

⁸ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker (public and redacted), 29 April 2010 (“Šešelj’s Motion”).

⁹ *Ibid.*, para. 10.

3. On 6 May 2010, Judge Burton Hall sent a memorandum to the President. He noted that, under Rule 15(B), when a party applies to the Presiding Judge of a Chamber for the disqualification of a Judge in that Chamber, as Šešelj had, the Presiding Judge shall confer with the Judge in question and report to the President of the Tribunal. Since Judge Kwon was the Presiding Judge in the Šešelj proceeding, as well as one of the judges Šešelj was seeking to disqualify, he was not in a position to report to the President as required under Rule 15(B). Thus, Judge Hall referred the matter to the President himself.

4. On 7 May 2010, Judge Kwon, serving as President in President Robinson's absence from the Tribunal and in his role as Vice-President of the Tribunal,¹⁰ assigned Judge Mehmet Güney to consider the Motion due to this conflict of interest.¹¹ On 28 May 2010, Judge Patrick Robinson reassigned himself to consider the motion for disqualification in place of Judge Mehmet Güney.¹²

5. On 22 June 2010, President Robinson issued his decision on the merits of Šešelj's application.¹³ The President found "no merit in the Motion".¹⁴ However, in light of Rule 15(B)(ii) and because Šešelj requested a panel to be constituted, the President appointed a panel of three Judges to consider the merits of the Motion.¹⁵ The Bench was originally composed of Judges Christoph Flügge, Howard Morrison, and Guy Delvoie. On 6 July 2010, under Rule 19 and in consideration of the trial management and case distribution needs of the Tribunal, Judge Christoph Flügge was replaced by Judge Alphons Orié.¹⁶ The composition of the Chamber remained the same after a request for disqualification¹⁷ of Judge Orié was denied by the President.¹⁸

II. SUBMISSIONS

A. Vojislav Šešelj's Motion

6. Šešelj contends in his Motion that because Judges Kwon and Parker were on the bench in the previous contempt case against him, they should be prohibited from ruling in a second contempt

¹⁰ Rule 21 of the Rules of Procedure states *inter alia* that the Vice-President "shall exercise the functions of the President in case of the latter's absence or inability to act".

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

¹² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Order Reassigning Motion, 28 May 2010, p.3.

¹³ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker ("President's Decision"), 22 June 2010.

¹⁴ President's Decision, para. 33.

¹⁵ *Ibid.*

¹⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Order Replacing Judge, 6 July 2010, p.2.

¹⁷ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Motion by Professor Vojislav Šešelj for the Disqualification of Judge Alphonsus Orié, 6 September 2010 (confidential).

¹⁸ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Vojislav Šešelj's Motion to Disqualify Judge Alphons Orié, 7 October 2010.

proceeding.¹⁹ In the first proceeding, Šešelj was convicted and sentenced to a single term of imprisonment of 15 months. He alleges that this sentence was disproportionate when one compares his sentence to similarly-situated Accused at the Tribunal.²⁰ He notes that the average sentence in contempt cases at the ICTY is around three and one-half months, whereas the judges issued a sentence almost five times higher in his case.²¹ Šešelj continues by arguing that by virtue of the books he has written specifically concerning Judges Kwon and Parker, it would be impossible for the judges to be impartial and neutral in any future proceedings against him. He suggests this animus and desire for revenge may explain why additional contempt proceedings were filed against him.²²

7. Šešelj continues in his lengthy submission by arguing that he has the right to freedom of expression under Article 10(1) of the European Convention on Human Rights, thereby entitling him to give his books uncomplimentary titles in response to the “inappropriate and unprecedented” sentence imposed upon him.²³

8. He then questions why the first contempt proceeding was not decided by Trial Chamber III, whose Judges were more familiar with the facts of the Šešelj case than Trial Chamber II.²⁴ According to Šešelj, assigning the case to Trial Chamber II appears to indicate bias by Judges Kwon and Parker. He next contends that the information in the book the subject of the previous contempt proceedings was not confidential, and ruling that it was indicates a lack of impartiality.²⁵

9. Šešelj further asserts that Judges Kwon and Parker are unable to serve impartially on the Bench in the current contempt proceeding because they failed to dismiss the previous contempt trial based upon the Tribunal’s lack of jurisdiction to prosecute individuals for contempt.²⁶ He also argues that the two judges did not model their work on the Statute of the International Criminal Court, which demonstrates their bias against him.²⁷

10. Šešelj also argues that Judges Kwon and Parker should be disqualified from ruling on his second contempt proceeding because they accepted the appointment of Mr. Bruce MacFarlane as an *Amicus* Prosecutor in the proceeding. He argues that this is relevant because Mr. MacFarlane does not speak Serbian, is not an expert on the former Yugoslavia, and is from a different legal

¹⁹ Šešelj Motion, pp.12-14.

²⁰ *Ibid.*, p.3.

²¹ *Ibid.*

²² Šešelj Motion, pp. 5-7.

²³ *Ibid.*, pp.8-9.

²⁴ *Ibid.*, pp.14-16.

²⁵ *Ibid.*, pp.18-19.

²⁶ *Ibid.*, pp.19-20.

²⁷ *Ibid.*, p.21.

environment and culture.²⁸ Additionally, Mr. MacFarlane had not read the entire book that was the subject of the contempt proceeding.²⁹ According to Šešelj, no impartial judge would unquestioningly have believed in the *Amicus*'s expertise.

11. Šešelj additionally asserts that Judges Parker and Kwon should be disqualified because they decided upon a higher sentence than the *Amicus* Prosecutor had suggested.³⁰ Also, he argues that his case was treated differently from other cases ruled upon by Judges Kwon and Parker, including *Prosecutor v. Marijačić and Rebić*.³¹ His primary concern relates to the punishment levied against the accused in *Marijačić and Rebić* in comparison to his first contempt conviction.³² He also submits that the delay in filing contempt charges against him (11 months) compared to *Marijačić and Rebić* (12 days) demonstrated the bias of Judge Kwon.³³ He then contends that the confidential information disclosed in the *Marijačić and Rebić* case posed a much more serious threat to the credibility of the Tribunal than his book.³⁴ Also, the accused in *Marijačić and Rebić* violated both a binding court order and Rule 77, while Šešelj submits he never violated any court order.³⁵ Additionally, the accused in the *Marijačić and Rebić* case clearly admitted disclosing confidential information, while Šešelj strongly disagrees that he ever disclosed confidential information.³⁶ In conclusion, if Judge Kwon had acted similarly in Šešelj's first contempt case, Šešelj contends he would have been acquitted.³⁷

12. Šešelj continues by claiming that he did not possess the requisite *mens rea* in the previous contempt case and Judges Kwon and Parker demonstrated their lack of impartiality by finding that he did, in fact, possess the *mens rea* required under Rule 77.³⁸

13. In relation to Judge Parker, Šešelj noted that his lack of partiality was clear if one reviewed his previous judgement in the *Prosecutor v. Zuhdija Tabaković* case.³⁹ Mr Tabaković received a three-month sentence, as compared to Šešelj's 15-month sentence.⁴⁰ Šešelj was also concerned that

²⁸ *Ibid.*, p.22.

²⁹ *Ibid.*, p.23.

³⁰ Šešelj Motion, p. 24.

³¹ *Prosecutor v. Iviča Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006.

³² *Ibid.*, pp. 24-29.

³³ *Ibid.*, p. 30, 33.

³⁴ *Ibid.*, p. 33.

³⁵ *Ibid.*, p. 35.

³⁶ *Ibid.*, pp. 36-37.

³⁷ *Ibid.*, p. 34.

³⁸ *Ibid.*, pp. 32-33.

³⁹ *Ibid.*, pp. 39-41.

⁴⁰ *Ibid.*, pp. 40-41.

the time elapsed before the “handing down of judgements” in the Tabaković case was much shorter than in the Šešelj case.⁴¹

14. Finally, Šešelj seeks the disqualification of Judges Parker and Kwon because, in his submission, they issued a confidential (as well as a public version) judgement in the previous contempt proceeding in part to conceal their biased decision-making.⁴² He contends that neither the Statute of the Tribunal, the Rules or various human rights instruments provide for confidential judgements.⁴³

B. Memorandum of 9 June 2010 from Judges Kwon and Parker

15. In response to a 8 June 2010 Memorandum from the President of the Tribunal inviting comments from Judges Kwon and Parker before issuing a decision on the merits regarding this matter, the Judges stated on 9 June 2010 that:

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 to us. We have neither seen nor read any such publications, and do not intend to do so.

III. APPLICABLE LAW

16. Article 13 of the Statute of the Tribunal sets forth the general requirement for the qualifications of judges. It states that “the permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices”.⁴⁴ Before assuming duties as a judge at the Tribunal, each judge must take an oath, including *inter alia* making a solemn declaration to exercise their powers “honourably, faithfully, impartially and conscientiously”.⁴⁵

⁴¹ *Ibid.*, p. 41.

⁴² *Ibid.*, pp. 41-43.

⁴³ *Ibid.*, pp. 42-43.

⁴⁴ See Statute of the International Criminal Tribunal for the Former Yugoslavia established by Security Council Resolution 827, adopted by S/RES 827 (1993), as amended by S/RES 1166 (1998), S/RES 1329 (2000), S/RES 1411 (2002), S/RES 1431 (2002), S/RES 1481 (2003), S/RES 1597 (2005), S/RES 1660 (2006), S/RES 1837 (2008), S/RES 1877 (2009) (“ICTY Statute”), Article 13.

⁴⁵ Rules of Procedure and Evidence of the ICTY, IT/32/Rev.43, 10 December 2009, Rule 14.

17. Because of these pre-requisites to appointment, judges are presumed to be impartial. A high threshold exists to warrant the dismissal or recusal, of or by, a Judge for bias or partiality.⁴⁶ Disqualifying judges based upon unfounded allegations of bias is as much a threat to justice as a judge who is not impartial.⁴⁷ Permitting casual dismissal could encourage “judge-shopping”, where, if it were easily accomplished, the party seeking disqualification could seek to dismiss a judge in order to get another judge he or she believes would be more likely to rule in that party’s favour. Thus, it is for these reasons that the moving party must demonstrate that bias is “firmly established” in the evidence.⁴⁸

18. Rule 15(A) of the Rules states 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.

19. Rule 15(B) governs the general procedure that must be followed in alleging that a judge should be disqualified for a lack of impartiality. It states, in relevant part, 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.
- (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”.

20. Jurisprudence of the Tribunal has interpreted the impartiality requirement contained in the Statute and Rules to possess an objective and subjective component. In general, this means 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”.⁴⁹

21. Thus, the Appeals Chamber has previously held that:

⁴⁶ *Prosecutor v. Anton Furundžija*, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000 (“*Furundžija* Appeal Judgement”) para. 189.

⁴⁷ *Prosecutor v. Radoslav Brdanin*, IT-99-36-R77, Decision on Application for Disqualification, 11 June 2004, para. 8; also see *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Motion for Disqualification, 12 January 2009, para. 3.

⁴⁸ *Furundžija* Appeal Judgement, para. 197.

⁴⁹ *Furundžija* Appeal Judgement, para. 189; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006, para. 38.

1. A judge is not impartial if it is shown that actual bias exists.
 2. There is an unacceptable appearance of bias if:
 - A. 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
 - B. The circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁵⁰
22. A reasonable observer who is properly informed possesses "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".⁵¹

IV. DISCUSSION

23. Cardinal to any system of justice is the presumption that an accused is innocent until proven guilty. An addition to this immutable presumption is the need for an impartial and unbiased decision-maker. Rule 15 crystallises this right by permitting an accused to challenge a Judge's impartiality in a particular case, thereby ensuring that only unbiased, impartial judges decide an accused's guilt or innocence.

24. Šešelj alleges in this case that Judges Kwon and Parker lack the requisite impartiality to rule on Šešelj's second contempt proceeding. The Panel, therefore, needs to answer whether the arguments presented by Šešelj provide evidence of actual bias against him or, alternatively, whether a reasonable observer, properly informed of the circumstances of the case, would perceive bias by Judges Kwon and Parker against Šešelj.

Arguments as Grounds for Disqualification

1. Disqualification Based on Grounds of Appeal Presented in the First Contempt Proceeding

25. Judges Kwon and Parker (together with Judge Iain Bonomy) convicted Šešelj in his first contempt proceeding and sentenced him to a single term of imprisonment of 15 months. In his Motion, Šešelj contends that, due to the previous judgement, Judges Kwon and Parker are either

⁵⁰ *Furundžija* Appeal Judgement, para 189; also see *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32-11-T, Decision on Motion for Disqualification, 12 January 2009, para. 2.

⁵¹ President's Decision, para. 7; also see *Furundžija* Appeal Judgement, para. 190.

actually biased against him or a reasonable observer would apprehend bias. Therefore, he argues that they lack the requisite impartiality.

26. Arguments in this Motion that are substantively similar to arguments presented as appeal grounds in his previous contempt appeal include that: (i) Šešelj's sentence for contempt was disproportionate to his conduct, as well as higher than that suggested by the *Amicus* Prosecutor, thus exhibiting a clear double-standard by Judges Kwon and Parker in relation to other similarly situated individuals who have been convicted of contempt at the ICTY;⁵² (ii) the Judges lack impartiality to rule on the current case because they refused to dismiss the first contempt proceeding for lack of jurisdiction, as the Tribunal lacks jurisdiction to prosecute individuals for contempt;⁵³ (iii) the bias of Judges Kwon and Parker was evident in that they failed to model their previous Judgement on the Statute of the International Criminal Court;⁵⁴ (iv) the information in the book the subject of the previous contempt proceeding was not confidential, and therefore because Šešelj did not violate protective measures, Judges Kwon and Parker lack impartiality in convicting him;⁵⁵ (v) Šešelj lacked the *mens rea* in the previous contempt case and Judges Kwon and Parker demonstrated their lack of impartiality by finding that he did, in fact, possess the requisite *mens rea* under Rule 77;⁵⁶ and (vi) Judges Kwon and Parker issued a confidential Judgement in the previous contempt proceeding against Šešelj in part to conceal their biased decision-making.⁵⁷

27. On appeal, the Appeals Chamber considered and ultimately dismissed these arguments, upholding the conviction under Rule 77(A)(ii), as well as the accompanying sentence.⁵⁸ Even though Šešelj now finesses his argument to assert that they demonstrate Judge Kwon and Judge Parker's lack of impartiality, there is no need to reconsider these arguments, as they are substantively similar to the arguments that were ultimately rejected by the Appeals Chamber.

28. In any event, Šešelj offers no adequate explanation as to how these alleged errors during the contempt trial amount to judicial bias on the part of Judges Kwon and Parker. Instead, he appears to argue that, due to the decision-making of Judges Kwon and Parker, bias or the appearance of bias on the face of those decisions is evident. Simply stating that a judge is biased because she or he ruled in a particular way is an insufficient basis for disqualification. As stated in the *Brđanin* case:

⁵² Šešelj Motion, p. 3; *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 ("Notice of Appeal" and "Appeal Brief"), paras 7 and 16; Appeal Judgement, paras 33-41.

⁵³ Šešelj Motion, pp. 19-20; Notice of Appeal, para. 2; Appeal Brief, para. 11; Appeal Judgement, paras 15-17.

⁵⁴ Šešelj Motion, p. 21; Notice of Appeal, para. 2; Appeal Brief, para. 11; Appeal Judgement, paras 15-17.

⁵⁵ Šešelj Motion, pp. 18-19, 24-28; Notice of Appeal, para. 3; Appeal Judgement, paras 18-20.

⁵⁶ Šešelj Motion, pp. 32-33; Notice of Appeal, para. 5; Appeal Brief, para. 14; Appeal Judgement, paras 24-26.

“There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way”.⁵⁹

29. Šešelj must show that, beyond the Judges’ alleged errant decision-making in the previous contempt proceeding, they harbour a predisposition against him that would establish actual bias or lead a reasonable observer to apprehend bias. Šešelj has failed to demonstrate such a predisposition, and his argument is dismissed.

2. Disqualification due to Books Written by Šešelj about Judges Kwon and Parker

30. Šešelj contends that “the zealotry of Judges O-Gon Kwon and Kevin Parker is particularly noticeable following the publication of the books about them”.⁶⁰ He continues by noting that “[i]t is clear that Judges O-Gon Kwon and Kevin Parker have a personal interest in [...] [the case at hand] following the publication of the books”. As a consequence, Šešelj argues that the Judges must be disqualified for lacking impartiality. He concludes this argument by suggesting that the books he wrote, and the concomitant prejudice of Judges Kwon and Parker against Šešelj thereafter, may explain the initiation of the second contempt proceeding against him.⁶¹

31. Judges Kwon and Parker addressed their knowledge of these publications in the Memorandum sent to President Robinson on 9 June 2010. In it they stated that “[w]e notice that Šešelj also refers to publications which, he says, refers to us. We have neither seen nor read any such publications, and do not intend to do so”.⁶² Beyond this assertion by Judges Kwon and Parker, Šešelj fails to provide any tangible examples of bias or a reasonable apprehension of bias against him by Judges Kwon and Parker by virtue of these publications. Šešelj presumes that the two judges

⁵⁷ Šešelj Motion, pp. 41-43; Notice of Appeal, para. 9; Appeal Brief, para. 18; Appeal Judgement, paras 30-32.

⁵⁸ See *In the Case Against Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Appeal Judgement, 19 May 2010.

⁵⁹ *Prosecutor v. Radoslav Brdanin and Talić*, IT-99-36/1-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 18 (other citations omitted); also see *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Decision on Motion for Disqualification of Judges, Bureau, 25 April 2006, para. 12, which stated that the purpose of reviewing judicial decisions for evidence of bias is “not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias [...] what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law (on which there may be more than one possible interpretation) or to the assessment of the relevant facts”.

⁶⁰ Šešelj Motion, p.10.

⁶¹ *Ibid.*, pp. 5-6.

⁶² See *supra*, para. 15 for the entire communication by Judges Kwon and Parker in this memorandum.

must have antipathy for him due to publication of these books; however, he fails to show the Tribunal, through the words or actions of the judges, that this is in fact the case.

32. Regarding Šešelj's speculation that the second contempt proceedings were probably initiated as a result of the publication of these books, it is important to note that the second contempt proceedings against Šešelj were only initiated by Trial Chamber II in response to an order from the Appeals Chamber.⁶³ Šešelj's conjecture that Judges Kwon and Parker were probably responsible for initiating the second contempt proceedings in response to their bias against Šešelj, consequently, has no merit.

33. Finally, it must be noted that if it were possible that a party could engineer the dismissal or recusal of a Judge simply by writing defamatory or uncomplimentary material about him or her in order to claim the existence of bias or the appearance of bias, then the functioning of a court or tribunal would be negated by the simple mechanism of writing such material in respect of the entire bench. Such a consequence would defeat the wider interest of justice. Thus, this argument has no merit.

3. Disqualification Based upon Šešelj's Diminished Freedom of Expression

34. Šešelj next argues that his freedom of expression had been impinged upon by the institution of criminal proceedings in response to, in Šešelj's opinion, the publication of his books.⁶⁴ He argues *inter alia* that the ICTY is not able to "prevent the personal war by [Judges] O-Gon Kwon and Kevin Parker over the publication of books about them"⁶⁵ and, thus, "there can be no question of impartiality or of a neutral trial"⁶⁶ in this second contempt proceeding.

35. When invoking his right to freedom of expression, Šešelj apparently ignores that this right is not absolute and that the exercise of the freedom of expression carries with it duties and responsibilities necessary to protect other legitimate interests, and may be subject to penalties as prescribed by law. The protection of witnesses ordered by a judicial organ is among those interests. Šešelj's failure to address the limits of the exercise of freedom of expression causes the Chamber to not further elaborate on this aspect and leave it to this general observation. The Chamber is not called to decide on the substance of the exercise of the freedom of expression by Šešelj, but only to decide whether the exercise of the judicial functions by Judges Kwon and Parker, in relation to charges of contempt, demonstrate partiality, bias, or an appearance of bias.

⁶³ Appeal Decision, paras 27-28.

⁶⁴ Šešelj Motion, p.8.

⁶⁵ *Ibid.*, p.10.

⁶⁶ *Ibid.*

36. Proceedings were instituted against Šešelj for violating the protective measures ordered by the Chamber hearing the Šešelj case in respect of three witnesses. There were no actions mentioned by Šešelj by Judges Kwon and Parker, outside of the administration of their general judicial duties, to indicate that they lack impartiality in relation to Šešelj or in any way have unlawfully restricted his freedom of expression. Alleging, without more, that there is a “personal war” being waged against Šešelj by the two judges, in part by the institution of criminal proceedings against him (even though Judges Kwon and Parker originally dismissed the Prosecution’s Motion to institute the second contempt proceedings)⁶⁷ fails to satisfy the required threshold.

4. Disqualification due to Unequal Treatment of Šešelj when Compared to Others

37. As stated above, Šešelj contends that a lack of impartiality of Judges Kwon and Parker is evident by reviewing the sentence of Šešelj in the first contempt case and comparing it to other contempt proceedings that the two judges have served. In particular, Šešelj focused on Judge Kwon’s involvement in the *Marijačić and Rebić* judgement⁶⁸ and Judge Parker’s involvement on the *Zuhdija Tabaković* case.⁶⁹

38. The exercise of a Trial Chamber’s discretion in assessing culpability and, if necessary, sentencing does not, in and of itself, show bias or the appearance of bias. The argument that bias, or an appearance of it, is demonstrated by pointing at differences in sentencing when comparing a previous judgement against Šešelj with judgements rendered by the same judges in contempt cases against other accused is without merit. It ignores that in sentencing judges consider all relevant aspects of a case. Divergences in those aspects may result in diverging sentences and provide in themselves no basis for bias or appearance of bias. Šešelj fails to substantiate how the differences in the sentences, beyond the normal divergence as explained above, would be indicative of bias. His claim in this respect is denied.

5. Disqualification Because Trial Chamber III, not II, should have Decided the Case

39. Šešelj next argues that Judges Kwon and Parker should be dismissed because Trial Chamber III, the Chamber seised of the *Prosecutor v. Vojislav Šešelj* case, should have heard the first contempt proceeding, and, since a new Chamber was constituted, Judges Kwon and Parker acted partially.⁷⁰

⁶⁷ *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) (confidential and *ex parte*), 21 August 2009.

⁶⁸ *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Trial Judgement, 10 March 2006.

⁶⁹ *Prosecutor v. Zuhdija Tabaković*, Case No. IT-98-32/1-R77.1, Sentencing Judgement, 18 March 2010.

⁷⁰ Šešelj Motion, pp.14-16.

40. Šešelj has failed to show actual bias or that a reasonable observer would apprehend bias under these circumstances. In any event, Trial Chamber III did not hear the case because they requested withdrawal from ruling on the matter on the grounds that their determination may give rise to an appearance of a lack of impartiality.⁷¹ It was only as a result of their withdrawal that Trial Chamber II (and, consequently, Judges Kwon and Parker) was ordered to consider the Motion.⁷²

6. Disqualification Based Upon Other Miscellaneous Grounds

41. Šešelj also challenges the Judges' acceptance of the appointment of Mr. Bruce MacFarlane as an *Amicus* Prosecutor. No impartial judge, according to Šešelj, would have unquestioningly believed in the *Amicus*'s expertise.⁷³

42. On 4 February 2010, the Trial Chamber directed the Registrar of the Tribunal to appoint an *Amicus* Prosecutor to prosecute the charge set out in the order in lieu of an indictment.⁷⁴ Neither Rules 74,⁷⁵ 77(C), and 77(D), nor the Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal ("Practice Direction")⁷⁶ stipulate the qualifications that an *Amicus* Prosecutor should possess. However, the Registrar considered that it was nonetheless in the interests of justice to ensure the appointment of a qualified professional, familiar with the legal and procedural requirements of prosecuting such a case before the Tribunal, who also possessed relevant investigative or prosecutorial experience.⁷⁷

43. Mr. MacFarlane is a qualified senior attorney, appointed Queen's Counsel by the Government of Canada, and possesses extensive experience in criminal law and procedure, including investigative and prosecutorial experience in contempt proceedings before the Tribunal.⁷⁸ Mr. MacFarlane was therefore proposed as a suitable *Amicus* Prosecutor by the Registrar of the Tribunal, and the Trial Chamber approved this proposal in accordance with paragraph 9 of the

⁷¹ See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Annex I to Order Issuing a Public Redacted Version of 29 October 2008 Order Assigning Motions to a Trial Chamber, 29 January 2009.

⁷² *Ibid.*

⁷³ Šešelj Motion, pp.22-23.

⁷⁴ Decision of 3 February 2010, para. 20(c).

⁷⁵ Rule 74 provides in relevant part that "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a [...] person to appear before it and make submissions on any issue specified by the Chamber."

⁷⁶ IT/227, 6 May 2004.

⁷⁷ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision, 2 March 2010, p. 1 ("Registrar's Decision").

⁷⁸ Mr MacFarlane is acting as *Amicus* Prosecutor in contempt proceedings *In the Case Against Florence Hartmann* Case No. IT-02-54-R77.5, and previously acted as an *Amicus* Investigator in *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-Misc.2, to investigate whether there were sufficient grounds to instigate contempt proceedings against Ms. Hartmann. He also acted as *Amicus* Prosecutor in the previous contempt proceedings against Šešelj, *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A.

Practice Direction.⁷⁹ The Registrar subsequently appointed Mr. MacFarlane as *Amicus* Prosecutor on 2 March 2010.⁸⁰

44. Šešelj has objected to Mr. MacFarlane's appointment on the basis that he "does not know a single word of the Serbian language."⁸¹ Article 33 of the Statute of the Tribunal provides that its working languages shall be English and French. Serbian is not an official working language of the Tribunal. All filings, including documents tendered as evidence at trial, as well as motions and other records of the Tribunal are translated into one or both official languages as appropriate (in addition to the language of the accused when the language used was French or English). As such, it is immaterial to his appointment as *Amicus* Prosecutor that Mr. MacFarlane, as many of the counsel for the Prosecution and the Defence in this Tribunal, does not understand Serbian. It is equally immaterial whether Mr. MacFarlane has or has not read the entire book that formed the subject of the contempt proceedings.

45. Šešelj has failed to demonstrate any reason why the Judges should have questioned Mr. MacFarlane's expertise, or his appointment by the Registrar as *Amicus* Prosecutor. His claim that the Judges' acceptance of Mr. MacFarlane's appointment is indicative of their partiality has no merit and is, accordingly, dismissed.

⁷⁹ Registrar's Decision, p.2.

⁸⁰ *Ibid.*

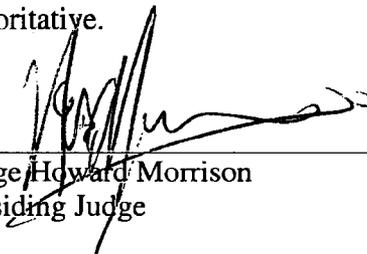
⁸¹ Šešelj Motion, p.22.

V. REPORT TO THE PRESIDENT⁸²

46. The Chamber, convened pursuant to Rule 15(B), finds that Šešelj's Motion is without merit.

47. For these reasons, the Motion is DISMISSED.

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



Judge Howard Morrison
Presiding Judge

Dated this 19th day of November 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

⁸² Rule 15(B)(ii) of the Rules states that "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" (emphasis added).