



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-95-11-A

Date: 23 October 2007

Original: English

**THE VICE-PRESIDENT OF THE INTERNATIONAL TRIBUNAL**

**Before:** Judge Kevin Parker, Vice-President

**Registrar:** Mr. Hans Holthuis

**Order of:** 23 October 2007

**PROSECUTOR**

**v.**

**MILAN MARTIĆ**

**PUBLIC**

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**ORDER ON DEFENCE MOTION TO DISQUALIFY JUDGE  
WOLFGANG SCHOMBURG FROM SITTING ON APPEAL**

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**The Office of the Prosecutor:**

Ms. Michelle Jarvis

**Counsel for the Accused:**

Mr. Predrag Milovančević  
Mr. Nikola Perović

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”),

**NOTING** the “Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal”, filed by the Defence on 17 August 2007 (“Motion”);

**NOTING** that the President of the Tribunal, Judge Pocar, as the Presiding Judge of the Appeals Chamber, in accordance with Rule 15(B)(i) of the Rules of Procedure and Evidence (“Rules”) consulted with Judge Schomburg and on 20 September 2007 submitted to me a report pursuant to Rules 15 and 21 of the Rules;

**NOTING** that on 5 October 2007, I issued an Order pursuant to Rules 15 and 21 of the Rules, appointing a panel of three Judges (“Panel”) to consider the merits of the Motion;

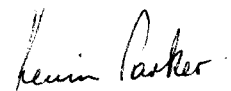
**NOTING** the “Report to the Vice-President pursuant to Rule 15(B)(ii) concerning Defence Motion to disqualify Judge Schomburg from sitting on Appeal” submitted to me by this Panel on 19 October 2007, a copy of which is annexed;

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

In the foregoing circumstances and having regard to the reasons set out in the report of the Panel, pursuant to Rules 15 and 21 of the Rules I hereby **REFUSE** the Motion.

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

Done this twenty-third day of October 2007,  
at The Hague, The Netherlands.



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Judge Kevin Parker

Vice-President

[Seal of the Tribunal]

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**ANNEX**



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-95-11-A

Date: 19 October 2007

Original: English

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**PANEL CONVENED BY ORDER OF THE VICE-PRESIDENT**

**Before:** Judge Patrick Robinson, Presiding  
Judge Carmel Agius  
Judge Iain Bonomy

**Registrar:** Mr. Hans Holthuis

**Decision of:** 19 October 2007

**PROSECUTOR**  
v.  
**MILAN MARTIĆ**

**PUBLIC**

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**REPORT TO THE VICE-PRESIDENT PURSUANT TO RULE 15(B)(ii)  
CONCERNING DEFENCE MOTION TO DISQUALIFY JUDGE  
SCHOMBURG FROM SITTING ON APPEAL**

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**Office of the Prosecutor**

Ms. Michelle Jarvis

**Counsel for the Accused**

Mr. Predrag Milovančević  
Mr. Nikola Perović

**THIS PANEL** 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”), having been appointed by Vice-President Parker pursuant to Rule 15(B)(ii) of the Rules of Procedure and Evidence (“Rules”) by order dated 5 October 2007 to render its decision on a motion to disqualify Judge Wolfgang Schomburg from sitting on appeal (“Vice-President’s Order”);<sup>1</sup>

**NOTING** the “Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal”, filed by the Defence on 17 August 2007 (“Motion”);

**NOTING** the “Prosecution Response to Motion to Disqualify Judge Wolfgang Schomburg”, filed on 27 August 2007 (“Response”), and the “Reply to Prosecution Response to Defence Motion to Disqualify Judge Wolfgang Schomburg from Sitting on Appeal”, filed on 3 September 2007 (“Reply”);

**NOTING** that the Motion was filed before the President of the Tribunal, Judge Fausto Pocar, as the Presiding Judge of the Appeals Chamber, and that the President consulted with Judge Schomburg in accordance with Rule 15(B)(i) and submitted a report to Vice-President Parker on 20 September 2007;<sup>2</sup>

**NOTING** that the Vice-President’s Order requires this Panel to “consider the merits of the Motion and report its decision on those merits to [the Vice-President] pursuant to Rule 15(B)(ii)”;<sup>3</sup>

**NOTING** that the Defence asserts that Judge Schomburg should be disqualified from sitting on the appeal and from his assignment as Pre-Appeal Judge in this case, arguing that

- a. Judge Schomburg’s German nationality gives rise to an appearance of bias as the Defence appeal involves many issues “directly connected with the German involvement and German policy towards Croatia during World War II and during the period relevant for the present case (1990-1995)”;<sup>4</sup>

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<sup>1</sup> Order Pursuant to Rule 15, 5 October 2007.

<sup>2</sup> Vice President’s Order, p. 1.

<sup>3</sup> *Ibid.*, p. 2.

<sup>4</sup> Motion, para. 13.

- b. Judge Schomburg's past position as Undersecretary of State at the Senate Justice Department in Berlin from 1989 to 1991 means that he "was a member of the German state machinery" during "the period of crucial German support to Croatia";<sup>5</sup> and
- c. Statements of Judge Schomburg quoted in an 18 November 2005 *Deutsche Welle* article demonstrate a "prejudicial position relating to the facts that have to be elaborated by the Appeals Chamber";<sup>6</sup>

**NOTING** that the Prosecution asserts the Motion should be dismissed, arguing that

- a. The Defence cannot rebut the presumption that Judge Schomburg is impartial by reference to his German nationality and past position because "a Judge's nationality or origin is irrelevant to the determination of bias";<sup>7</sup>
- b. Judge Schomburg's comments, as reported in *Deutsche Welle*, actually confirm that his German nationality has not been a factor influencing his work at the Tribunal;<sup>8</sup> and
- c. The Defence claim is inappropriately based on material which is not part of the evidentiary record in this case;<sup>9</sup>

**CONSIDERING** that 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";

**CONSIDERING** that the Appeals Chamber has observed with respect to this Rule that

- A. A Judge is not impartial if it is shown that actual bias exists.
- B. 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
  - (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>10</sup>

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<sup>5</sup> *Ibid.*, para. 28.

<sup>6</sup> *Ibid.*, para. 35.

<sup>7</sup> Response, para. 2.

<sup>8</sup> *Ibid.*, para. 7.

<sup>9</sup> *Ibid.*, para. 9.

<sup>10</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (*Furundžija* Appeal Judgement), para. 189.

**CONSIDERING** that the Appeals Chamber further explained that the “reasonable observer” contemplated in this Rule must be considered “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 apprised also of the fact that impartiality is one of the duties that Judges swear to uphold”;<sup>11</sup>

**CONSIDERING** that it is well-settled that there exists a presumption of impartiality in relation to the functioning of any Judge of the Tribunal,<sup>12</sup> and a party challenging this presumption must meet a high threshold by “firmly establish[ing]” a reasonable apprehension of bias;<sup>13</sup>

**CONSIDERING** that—as the Appeals Chamber has noted—this high burden on the moving party is necessary 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 is the real appearance of bias itself”;<sup>14</sup>

**CONSIDERING** that the Appeals Chamber has held

[t]he nationalities [...] of Judges of this Tribunal are, and must be, irrelevant to their ability to hear the cases before them impartially. The Statute of the Tribunal requires Judges to be ‘persons of high moral character, impartiality and integrity.’ Before taking up their duties, each Judge must make a solemn declaration committing himself or herself to performing those duties ‘honourably, faithfully, impartially and conscientiously.’ [The domestic Judges’] ability to [...] consider nothing but the evidence presented to them in deciding on an individual’s guilt, constitute[s] a touchstone of their role as judges. So it is at this International Tribunal.<sup>15</sup>

**CONSIDERING** further that the Appeals Chamber has stated that “the policies of the governments of the countries from which Judges of this International Tribunal come are, and must be, irrelevant to the carrying out of their judicial responsibilities”;<sup>16</sup>

**CONSIDERING** that the implication of the Defence’s argument that a judge cannot be considered impartial where he or she might be called upon to consider acts of the government of the state of which he or she is a national is flatly contradicted by the established jurisprudence of the Tribunal and patently insufficient to rebut the presumption of impartiality;

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<sup>11</sup> *Ibid.*, para. 190.

<sup>12</sup> *Ibid.*, para. 196.

<sup>13</sup> *Ibid.*, para. 197.

<sup>14</sup> *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 (citing *Prosecutor v. Delalić et al*, Case No. IT-96-21-A, Judgement, 21 February 2001 [Čelebići Appeal Judgement], para. 707).

<sup>15</sup> *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Motion for Disqualification, 10 June 2003, para. 3.

<sup>16</sup> *Ibid.*, para. 4.

**CONSIDERING** that the Defence does not attempt to demonstrate that in his past position with the Senate Justice Department in Berlin Judge Schomburg was directly or indirectly involved with any aspect of German governmental policy even remotely related to the issues in this case, and that this claim is likewise devoid of merit and patently insufficient to rebut the presumption of impartiality;

**CONSIDERING** that the actual statements attributed to Judge Schomburg in the *Deutsche Welle* article at issue<sup>17</sup> fail to demonstrate any “prejudicial position relating to the facts that have to be elaborated by the Appeals Chamber”<sup>18</sup>, and, thus, belie the Defence claim that Judge Schomburg does not bring an impartial mind to the proceedings at hand;

**CONSIDERING**, therefore, that the Defence arguments fall far short of establishing that any reasonable observer, with sufficient knowledge of all the relevant circumstances, would reasonably apprehend bias on the part of Judge Schomburg in relation to issues arising in this case;

**CONSIDERING** the foregoing, and that it is not necessary to consider the Prosecution’s argument that the Motion is based on material which is not part of the evidentiary record in this case;

**CONSIDERING**, therefore, that the Motion is patently unmeritorious;

**PURSUANT TO** Rule 15(B)(ii) of the Rules, **HEREBY REPORTS** to Vice-President Parker its decision that the Motion be **REFUSED**.

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



Patrick Robinson  
Presiding

Dated this nineteenth day of October 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

<sup>17</sup> These statements were reported in an article entitled “Nuremberg’s Legacy Lives on in Struggle for International Justice”, as follows:

Though Judge Schomburg sees himself as an international judge, he is aware that his German nationality has presented him with a unique opportunity to show the world that Germany has returned to normality. “I’m celebrating the fact that I have concluded my first four years of tenure at the tribunal without one single staff member ever questioning how I, as a German, can act in this tribunal,” Schomburg said. “On the other hand, I am personally very often moved when I quote from judgments made at Nuremberg, to see how we are always being confronted with the past and the lessons learned by German society.” Motion, para. 33.

<sup>18</sup> Motion, para. 35.