



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: IT-04-74-AR73.1

Date: 24 November 2004

Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision of: 24 November 2004

PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

**DECISION ON APPEAL BY BRUNO STOJIĆ AGAINST TRIAL CHAMBER'S
DECISION ON REQUEST FOR APPOINTMENT OF COUNSEL**

Counsel for the Prosecutor

Mr. Kenneth Scott

Counsel for Jadranko Prlić

Mr. Ćamil Salahović
Mr. Želimir Par

Counsel for Bruno Stojić

Mr. Željko Olujić

Counsel for Berislav Pušić

Mr. Marinko Škobić

Counsel for Slobodan Praljak

Mr. Božidar Kovačić
Mrs. Nika Pinter

Counsel for Milivoj Petković

Ms. Vesna Alaburić

Counsel for Valentin Ćorić

Mr. Tomislav Jonjić

1. The Appeals Chamber is seised of the “Appeal Against Decision of the Trial Chamber dated July 30, 2004 Regarding the Motion to Appoint Željko Olujić Lead Counsel”¹ filed by the accused Bruno Stojić (“Appellant”).
2. The interlocutory appeal challenges the “Decision on Requests for Appointment of Counsel” rendered by Trial Chamber I on 30 July 2004 (“Impugned Decision”). The Trial Chamber had found that due to the fact that Mr. Željko Olujić² is the lead counsel appointed by the Appellant, and the assigned lead counsel for the accused Ivica Rajić in case number IT-95-12-PT, a “conflict of interest is very likely to arise and that such likelihood will very likely prevent Mr. Olujić from defending [the Appellant] in the best of his interests.”³ Consequently, the Trial Chamber barred Mr. Željko Olujić from representing the Appellant and invited the Appellant to appoint another lead counsel within a period of one month.
3. On 5 August 2004, the Appellant filed the Request for Certification.⁴ On 1 September 2004, the Trial Chamber granted the Appellant’s Request for Certification pursuant to Rule 73(B) of the Rules of Procedure and Evidence (“Rules”) and decided to stay the execution of the Impugned Decision until the Appeals Chamber has decided on the matter.⁵
4. The Appeal Brief was filed on 13 September 2004.⁶ The Prosecution responded on 22 September 2004.⁷ No reply was filed.

I. Background

5. The Appellant did not request the assignment of Mr. Olujić under the legal aid system of the International Tribunal. Mr. Olujić’s services are paid for by the Croatian Government.⁸ A power of attorney was filed on 6 April 2004, after the Registrar had determined that Mr. Olujić met the requirements provided for within the Rules. At the initial appearance on 6 April 2004, Judge Alphons Orié expressed concerns regarding the potential existence of conflict of interests on the

¹ “Appeal Brief.”

² “Mr. Olujić.”

³ Impugned Decision, para. 30.

⁴ *Prosecutor v. Jadranko Prlić et al*, Case No.: IT-04-74-PT, “Accused Bruno Stojić’s Request for Certification of the Right to Appeal in Order to Appeal Against the Decision of the Trial Chamber Dated 30, July 2004 Regarding the Motion to Appoint Željko Olujić Lead Counsel” (“Request for Certification”).

⁵ *Prosecutor v. Jadranko Prlić et al*, Case No.: IT-04-74-PT, “Certification for Appeal of Decision on Conflict of Interest Revoking Counsel of Accused Stojić” (“Certification”).

⁶ Pursuant to Rule 73(C) of the Rules, upon certification a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify. However, the Trial Chamber acknowledged in a communication dated 7 September 2004, that the Appellant only received a copy of the Certification on 6 September 2004. Electronic communication between Mr. Olujić and the Trial Chamber on 7 September 2004.

⁷ *Prosecutor v. Jadranko Prlić et al*, Case No.: IT-04-74-PT, “Prosecutor’s Response to the Appeal Against the Decision of the Trial Chamber dated July 30, 2004 Regarding the Motion to Appoint Željko Olujić Lead Counsel ” (“Prosecution’s Response”).

ground that Mr. Olujić was already representing another defendant, namely Ivica Rajić, before the Tribunal who is accused of charges arising from the same or partly similar facts as those charged against the Appellant.

6. Upon review of the indictments brought against the Appellant and Mr. Ivica Rajić, the Registry concluded that a potential conflict of interests existed arising from the simultaneous legal representation of the Appellant and Mr. Ivica Rajić, and invited the Appellant to submit the matter to the Trial Chamber seized of the case.⁹ On 4 May 2004, the Appellant filed the “Request for the Assignment of Lead Counsel to the Accused Bruno Stojić;” it was pursuant to this motion that the Impugned Decision was rendered.

II. Submissions

Right of the accused to choose counsel of one’s own choosing

7. The Appellant submits that the Impugned Decision failed to take into consideration the guarantees provided for in Article 21 4(d) and (e) of the Statute of the International Tribunal (“Statute”).¹⁰ The Appellant does not agree with the proposition that the right to free legal assistance does not confer the right to choose one’s counsel, and submits that “no one, not even the ICTY Appeals Chamber has the authority to change the fundamental regulations of the Tribunal’s Statute in such a degree...”¹¹ In response, the Prosecution submits that the Appeals Chamber has rendered various decisions in cases before both Tribunals to the effect that the right to free legal assistance does not confer the right to choose one’s legal counsel, and that such conclusion “was reached through a textual and systematic interpretation of the Statute and the [Rules].”¹² The Prosecution further submits that in cases where counsel is not assigned by the Registry, the right of an accused to have counsel of his own choosing is not absolute since such right is limited by Rule 44 of the Rules and Article 20 of the Statute.¹³

Conflict of Interests

8. The Appellant submits that it is undisputed that there is no conflict of interests, and no likelihood that a conflict of interests will arise.¹⁴ He appears to suggest that Article 14 of the Code

⁸ Letter by the Chief of the Office of Legal Aid and Detention Matters dated 28 April 2004, referred to by the Impugned Decision as “Correspondence of the Registry.”

⁹ Letter by the Chief of the Office of Legal Aid and Detention Matters dated 28 April 2004. *See* Impugned Decision, footnote 6.

¹⁰ Appeal Brief, para. 10 at p. 1.

¹¹ *Ibid*, para. 11 at p. 1.

¹² Prosecution’s Response, para. 3.

¹³ *Ibid*, para. 4.

¹⁴ Appeal Brief, para. 13 at p. 2.

of Professional Conduct for Defence Counsel¹⁵ is too broad because “each counsel appearing before the Tribunal for the first time could be rejected, especially if one includes the omnipresent phrase that conflict of interests may reasonably be expected.”¹⁶ The Appellant stresses that it is in fact the Defence counsel “who is entirely familiar with all the possible conflicts of interests outside the ICTY.”¹⁷ The Prosecution submits that there is a dispute regarding the existence of a conflict of interests, and that the counsel’s duty to act in a situation where a conflict of interests arises is not exclusive of the Trial Chamber’s powers pursuant to Article 20 of the Statute.¹⁸

9. The Appellant asserts that the Trial Chamber’s “primary concern is not the rights of the accused, but the procedure itself.”¹⁹ The Prosecution responds that the integrity of the proceedings includes the proper representation of the accused.²⁰

10. The Impugned Decision points out that Mr Olujić had considered that the fact that Ivica Rajić was an army commander, as opposed to the Appellant who is accused as a civilian authority, excludes any risk of conflict of interests between the two accused, and states that Mr. Olujić had admitted that Mr. Ivica Rajić’s defence strategy was to blame higher-up authorities.²¹ The Appellant argues that such admission has been “interpreted or translated wrongly,” and adds that “Ivica Rajić would not shift guilt to his superiors.”²² In this respect, the Appeal Brief is not clear, since the Appellant submits that:

[t]he Defence has never said that the fact that one is accused as a civilian excludes collision of interests with one accused as a soldier. The defence said that the fact that an individual is accused only as civilian excludes the conflict with a soldier.²³

The Prosecution responds that the Appellant is charged, pursuant to Article 7(3) for (a) acts committed by Ivica Rajić, based upon his *de jure* and *de facto* authority over him, and (b) for crimes committed in Vareš and Stupni Do pursuant to Ivica Rajić’s orders.²⁴

11. While the Appellant concedes that both he and Ivica Rajić are “charged with crimes connected with the same events,”²⁵ he submits that “it is not true that [he] and Ivica Rajić are accused of the same criminal acts.”²⁶ The Prosecution submits that “all the crimes for which Ivica

¹⁵ Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, IT/125/Rev.1, July 2002.

¹⁶ Appeal Brief, para. 13 at p. 2.

¹⁷ Appeal Brief, para. 13 at p. 3.

¹⁸ Prosecution’s Response paras 6 and 7.

¹⁹ Appeal Brief, para. 14 at p. 3.

²⁰ Prosecution’s Response, para. 9.

²¹ Impugned Decision, para. 20.

²² Appeal Brief, para. 20 at p. 5.

²³ *Ibid*, para. 29 (b) at p. 7.

²⁴ Prosecution’s Response, paras 16 and 17.

²⁵ Appeal Brief, para. 24.

²⁶ Appeal Brief, para. 29 at p. 7.

Rajić has been charged in the amended indictment can also be found...in the indictment against [the Appellant].²⁷

12. The Appellant argues that there can be no conflict of interests if either he or Mr. Ivica Rajić decided to plead guilty.²⁸ The Prosecution responds that it fails to understand such reasoning, and submits that a guilty plea of either of the accused is to the disadvantage of the other.²⁹

13. The Impugned Decision noted that in Mr. Olujić's view, the fact that the instant case and Mr. Ivica Rajić's case are presided over by Judge Liu Daqun, makes the conflict of interests "practically impossible" to arise "because the defence is controlled in both cases."³⁰ With respect to this argument, the Appeal Brief is seemingly contradictory and unclear. The Appellant first asserts that:

The fact that the same judge presides over both cases, so he can naturally detect and prevent every conflict of interests that may arise, should be emphasized.³¹

In subsequent paragraphs the Appeal Brief reads as follows:

The [Impugned Decision] states incorrectly that the Defence emphasized the importance of the fact that the same judge presides over both cases...³²

The [Impugned Decision] claims, without any basis that the Defence objects to the presence of the same judge...³³

14. According to Mr. Olujić, the Defence counsel's role is to advise his clients on how to minimize all potential conflicts, and coordinate the two defenses in order to make the punishment less severe; therefore he does not deem as problematic a situation where one client may take a position which is contrary to the other client's interests.³⁴ Regarding the role of Mr. Olujić, the Appeal Brief states that: "the fact that Mr. Olujić talked about the possibility of his prevention of minimizing conflict of interest was always conditional, [*i.e.*] potential."³⁵ The Appellant adds that: "...even if it happened...that conflict of interests will be cancelled with the existence of a common counsel, and not with imposing different counsels to the two accused..."³⁶ The Prosecution responds that it is not counsel's role to "instruct, filter, modify or interpret" the evidence pertaining to the case of one of his clients, in order to avoid damaging the case of another client.³⁷

²⁷ Prosecution's Response, para. 19.

²⁸ Appeal Brief, para. 24.

²⁹ Prosecution's Response, para. 20.

³⁰ Impugned Decision, para. 22.

³¹ Appeal Brief, para. 22 at p. 5.

³² *Ibid.*, para. 29 (c) at p. 8.

³³ *Ibid.*

³⁴ Impugned Decision, para. 25.

³⁵ Appeal Brief, para. 29 (e) at p. 9.

³⁶ Appeal Brief, para. 29 (e) at p. 9.

³⁷ Prosecution's Response, para. 10.

Privileged Position of the Prosecutor

15. The Appellant argues that the Defence is at a disadvantage compared with to the Prosecution since the same person is acting as a Prosecutor in both the present case and the case against Ivica Rajić.³⁸ He further submits that:

...the Prosecution prevents work on two procedures, which are prosecuted by the same Prosecutor! So superior in many other ways, the Prosecution wants to ensure another exclusive right, and that is to communicate with both the accused.³⁹

16. The Prosecution responds that this argument is incorrect because it ignores the nature of the Prosecution's duty which is to represent the international community, asserts that there is no conflict in having the same person acting as a Prosecutor in two related cases, and submits that it is part of the Defence's strategy to blame the Prosecution.⁴⁰

17. In response to the Appellant's allegation that the Prosecution wants to deprive him of a proper defence (because it finds him to be "politically more important")⁴¹ the Prosecution responds that it is confident that the Appellant "can be provided an effective defence by counsel who is free from conflicts of interests."⁴²

Delay

18. The Appellant points out that Mr. Olujić has been working on his case for 6 months, and after describing the work done by his counsel he states that "a new counsel would cancel all that work and delay the procedure."⁴³ In response the Prosecution submits that much more serious lengthy delays at future critical stages of the case might occur if this issue is not resolved now.⁴⁴

III. Discussion

19. Pursuant to Article 21(4) (b) and (d) of the Statute the accused is entitled to legal assistance of his own choosing. However this guarantee is not without limits. Previous decisions issued by the Appeals Chamber have established that the right to publicly paid counsel of one's own choice is limited.⁴⁵ In principle the choice of any accused regarding his Defence counsel in proceedings

³⁸ Appeal Brief, para. 29 (c) at p. 8.

³⁹ *Ibid.*

⁴⁰ Prosecution's Response, paras 22, 23.

⁴¹ Appeal Brief, para. 30 at p. 9.

⁴² Prosecution's Response, para. 24.

⁴³ Appeal Brief, para. 14 at p. 4.

⁴⁴ Prosecution's Response, para. 14.

⁴⁵ *Prosecutor v. Jean Kambanda*, Case No.: ICTR-97-23-A, Appeals Chamber Judgement, 19 October 2000, para. 33; *Prosecutor v. Jean Paul Akayesu*, Case No.: ICTR-96-4-A, Appeals Chamber Judgement, 1 June 2001, paras 61, 62; *Prosecutor v. Vidoje Blagojević et al*, Case No.: IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, para. 22; *Prosecutor v. Željko Mejakić*

before the International Tribunals should be respected unless there are sufficient grounds to override the accused's preference in the interests of justice. When the fairness of the trial which is one of the fundamental rights of the accused also provided for in Article 21 of the Statute, is at stake (as it is suggested to be the case here) the accused's choice might be overridden regardless of whether the case is concerned with the appointment of counsel paid by the accused. As rightly stated in the Impugned Decision, one of the limits to the accused's choice is the existence of a conflict of interests affecting his counsel.⁴⁶

20. The Appeals Chamber rejects the reasoning that "[because] the interests of the accused are not defined by the Prosecution or the Trial Chamber, but by the accused themselves,"⁴⁷ the Trial Chamber erred in making a finding as to whether a conflict of interests was likely to arise.

21. The Appeals Chamber recalls that the issue of qualification, appointment and assignment of counsel, is open to judicial scrutiny.⁴⁸ The issue being raised bears on the substantive nature of the representation by Mr. Olujić and the proper fulfilment of the obligations which derive from the legal representation of the Appellant.⁴⁹ Problems relating to the Appellant's defence would affect the conduct of the case which the Trial Chamber has the duty to regulate in accordance with the requirements set forth in Article 20 of the Statute.⁵⁰ In sum, a conflict of interests between Mr. Ivica Rajić and the Appellant would affect the fairness of the proceedings. This concerns, first, the responsibility of the Trial Chamber to ensure that the trial is fair, and secondly, the right of the Appellant and of Ivica Rajić to a fair trial.⁵¹

22. A conflict of interests between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice.⁵² Article 14 of the Code of Conduct⁵³ which concerns the existence of a conflict of interests, provides that a counsel may not represent a

et al., Case No.: IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004, para. 8.

⁴⁶ Impugned Decision, para. 13; see *Prosecutor v. Željko Mejačić et al.*, Case No.: IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004, para. 8.

⁴⁷ Appeal Brief, para. 29(e) at p 9.

⁴⁸ *Prosecutor v. Enver Hadžihasanović et al.*, Case No.: IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002, para. 21.

⁴⁹ See *Prosecutor v. Vidoje Blagojević et al.*, Case No.: IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević's Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 27.

⁵⁰ *Prosecutor v. Enver Hadžihasanović et al.*, Case No.: IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002, para. 21.

⁵¹ See *Prosecutor v. Blagoje Simić et al.*, Case No.: IT-95-9-PT, Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević, 25 March 1999, p. 6.

⁵² *Ibid.*

⁵³ Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 Rev. 1, as amended on 12 July 2002 ("Code of Conduct").

client when this representation affects or can affect the representation of another client. The relevant provisions read as follows:

- D. Counsel or his firm shall not represent a client with respect to a matter if:
- i. such representation will be, or may reasonably be expected to be, adversely affected by representation of another client;
 - ii. representation of another client will be, or may reasonably be expected to be, adversely affected by such representation;
 - iii. the matter is the same or substantially related to another matter in which counsel or his firm had formerly represented another client ("former client"), and the interests of the client are materially adverse to the interests of the former client; or
 - iv. counsel's professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected by:
 1. counsel's responsibilities to, or interests in, a third party; [...]
- E. Where a conflict of interest does arise, counsel shall:
- i. promptly and fully inform each potentially affected present and former client of the nature and extent of the conflict; and
 - ii. either:
 1. take all steps necessary to remove the conflict; or
 2. obtain the full and informed consent of all potentially affected present and former clients to continue the representation unless such consent is likely to irreversibly prejudice the administration of justice.

23. Ivica Rajić is charged, under Articles 7(1) and 7(3) of the Statute, with acts committed in Vareš and Stupni Do between October 1993 and December 1993, on the basis of his *de jure* and *de facto* control of various Croatian Defence Council units in his area of responsibility (which included Kiseljak, Kakanj and Vareš municipalities), including the Ban Jelčić Brigade, the Bobovac Brigade and units known as the "Maturice" and "Apostoli."⁵⁴ The Appellant is charged as a participant in a joint criminal enterprise under Article 7(1) of the Statute and as a superior under Article 7(3) of the Statute for criminal acts committed in his capacity as the head of the Ministry of Defence of the HVO from 3 July 1992 until November 1993, on the basis of his *de jure* and *de facto* power over the Herceg-Bosna / HVO armed forces. The indictment brought against the Appellant covers criminal acts committed in Vareš and Stupni Do between October 1993 and December 1993. Ivica Rajić, the "Maturice" and "Apostoli" units, are mentioned among those who took part in those acts.⁵⁵

⁵⁴ See Impugned Decision, para. 18; Amended indictment against Ivica Rajić, Case No.: IT-95-12-PT, 14 January 2004, para. 2.

⁵⁵ See Impugned Decision, para. 19; Indictment against the Appellant, Case No.: IT-04-74-PT, 4 March 2004, paras 4, 5, 18, 207-216.

24. In light of the above, the Appeals Chamber considers that there were sufficient elements before the Trial Chamber for it to reasonably conclude that both accused are charged with the same criminal acts, and were allegedly linked by a relatively close superior-subordinate relationship at the relevant time. Therefore, the Appeals Chamber is not satisfied that the Appellant has established that the Trial Chamber erred in finding that “a conflict of interest is very likely to arise, and that such likelihood will very likely prevent Mr. Olujić from defending the Appellant in the best of his interests.”⁵⁶ The Appeals Chamber is convinced that there is a substantial conflict of interests, as a Defence Counsel can never work serving best the interests of both the Appellant and Ivica Rajić. The aforementioned scenario would allow Defence Counsel to shift the responsibility - if any – for the alleged crimes from one accused to the other. The argument in relation to the Office of the Prosecutor is invalid, the Prosecutor represents the interests of the international community. She is not counsel for an accused. Thus, she cannot be affected by any clash of interests between one accused and another,

25. The Appeals Chamber rejects the assertion that, because Ivica Rajić is charged as a military authority, as opposed to the Appellant who is accused “only” as a civilian authority, any risk of conflict of interests between the two accused is excluded. With respect to the Appellant’s argument that the same judge presides over both cases and can therefore detect and prevent every conflict of interests that may arise, the Appeals Chamber considers that, in a case of this kind, safeguarding the interests of justice requires not only the existence of a mechanism for removing conflicts of interests after they have arisen but also the prevention of such conflicts before they arise. The Appeals Chamber holds that it is precisely the purpose of the Impugned Decision to prevent any such conflict from arising.⁵⁷

26. Pursuant to Article 14(E) of the Code of Conduct Mr. Ivica Rajić submitted a written statement in which he gave his consent to Mr. Olujić to take charge of the defence of the Appellant, and stated that there was no conflict of interests between Mr. Ivica Rajić’s defence and the defence of the Appellant.⁵⁸

27. The Appeals Chamber recalls that consent provided by a potentially affected client or former client to remove a conflict of interests upon consultation with the counsel should generally be regarded as fully informed in the absence of an indication to the contrary.⁵⁹ However, such consent is not conclusive of there being no conflict of interests. Thus, there is no need to discuss

⁵⁶ Impugned Decision, para. 30.

⁵⁷ Impugned Decision, para. 29.

⁵⁸ Statement dated 7 April 2004.

⁵⁹ *Prosecutor v. Milan Martić*, Case No.: IT-95-11-PT, 2 August 2002, Decision on Appeal Against Decision of Registry, p. 7.

whether the consent was in fact voluntary. The Appeals Chamber notes that shortly after the submission of the written consent by Mr. Ivica Rajić, the Registry expressly stated that it was not convinced that Mr. Ivica Rajić was conscious of all possible implications, and possible limitations that Mr. Olujić's simultaneous representation of the Appellant could impose upon Mr. Ivica Rajić's defence strategy.⁶⁰ The Appeals Chamber agrees with the Registry.

28. Article 16 (E) of the Directive on Assignment of Defence Counsel does not bar the assignment of the same counsel to more than one suspect or accused at a time, provided that such assignment would cause neither prejudice to the defence of either accused, nor a *potential* conflict of interests.⁶¹

29. In this respect, the Appeals Chamber is not satisfied that the Appellant has established that the Trial Chamber erred in finding that:

[t]he "unconditional" consent expressed by Mr. Stojić at his initial appearance and the Written Consent submitted by Ivica Rajić cannot have the effect of validating the appointment if the Trial Chamber is convinced that the interests of justice dictates otherwise.⁶²

30. In light of the submissions made by the Appellant before the Trial and Appeals Chambers, the Appeals Chamber considers that it was correct for the Trial Chamber to conclude that:

Mr. Olujić implicitly admits [...] that he may not be able to diligently and promptly protect his clients' best interests as expected and required of counsel: to suggest compromise rather than to pursue, without any restriction, the interests of his clients, is in contradiction with the counsel's professional obligations.⁶³

31. The Appeals Chamber is not persuaded by the Appellant's allegation that the Prosecution wants to deprive him of a proper defence, and rejects the Appellants' argument that the Defence is at a disadvantage compared with the Prosecution since the same person is acting as a Prosecutor in both, the present case and the case against Mr. Ivica Rajić.

32. The Appeals Chamber further finds that, even though the replacement of counsel will inevitably cause a delay in the proceedings, if the conflict of interests regarding the representation of the Appellant and Mr. Ivica Rajić is not resolved at the present stage of the proceedings, the administration of justice may be seriously prejudiced.

⁶⁰ Letter by the Chief of the Office of Legal Aid and Detention Matters dated 28 April 2004, referred to by the Impugned Decision as "Correspondence of the Registry."

⁶¹ Directive on Assignment of Defence Counsel, IT/73, Rev 10, 28 July 2004. In some countries counsel are precluded from representing more than one accused in the same case. The German Code of Criminal Procedure, for example, provides in section 146: Defence Counsel may not appear simultaneously for more than one person accused of the same offence. Neither may he, in a single proceeding, appear simultaneously for more than one person accused of different offences. (Unofficial translation).

⁶² Impugned Decision, para. 32.

⁶³ *Ibid.*, para. 29.

33. For the foregoing reasons, the Appeals Chamber hereby

DISMISSES the appeal, and

AFFIRMS the Impugned Decision.

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



Judge Fausto Pocar
Presiding

Judge Florence Ndepele Mwachande Mumba appends a Separate Opinion to the present decision and Judges Mohamed Shahabuddeen, Wolfgang Schomburg and Inés Mónica Weinberg de Roca append a joint Declaration.

Dated this twenty fourth day of November 2004
At The Hague,
The Netherlands.

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE MUMBA

1. I support the decision to dismiss this interlocutory appeal. My reasons for dismissing the appeal, however, are that counsel may be overburdened and may not have sufficient time to get instructions from each client and adequately prepare for trial as the trial progresses.

2. In trials before this Tribunal, concurrent briefs for one Defence counsel should not be granted in my view, as charges are likely to result in complex proceedings requiring timely decisions with full instructions, for counsel to deal with exigencies and to avoid delays. Indeed, over the years this has been observed in this Tribunal such that it has become a notorious fact, the Appeals Chamber can take notice without submissions from the parties. The administration of justice has to be safeguarded by Judges through the inherent power to control proceedings to ensure a fair and expeditious trial. "Interests of justice" do include justice to the Prosecution as well, who, by timing their witnesses according to the procedural rules, are entitled to expect the Defence to be ready for cross examination or, indeed, to take any other course of action that may be necessary, in a timely manner.

3. In as much as it is the duty of Judges to conduct proceedings with integrity, it is of the utmost importance, in my view, that caution should be exercised in the intervention as to choice of counsel for accused persons. An accused person's right to choose counsel is inherent in the right to a fair trial, albeit not absolute. In a number of cases in this Tribunal charges overlap, but that does not give the Prosecution any right to decide the strategy of the Defence case. The discussion of the possible scenarios for conflict of interest in the impugned decision hinge, in my view, on mere speculation. No iota of evidence was adduced to allow for the level of interference in the strategy of the Defence case as was pleaded by the Prosecution. Similarly, it is for the accused, and not the Chamber, to strategise the Defence case. Accepting that every trial bears a potential for conflict of

interest, a Chamber's intervention should be based on more than mere speculation in this important aspect of the rights of accused persons to a fair trial. The accused persons concerned gave informed consent in my view. That having been done, the Trial Chamber's obligation is to keep the lines of adversary clear during the trial. In addition, the analysis by the Trial Chamber, of the possible defences available to the accused persons, presents a misunderstanding of the duties of Defence counsel as the Prosecution's perception of a conflict of interest is based on the allegations contained in an indictment that has yet to be proved, and to accept that line of reasoning is, in my view, a misdirection.

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

Done this twenty fourth day November 2004,
At The Hague,
The Netherlands



Judge Florence Ndepele Mwachande Mumba

(Seal of the Tribunal)

**DECLARATION OF JUDGE SHAHABUDEEN, JUDGE SCHOMBURG AND JUDGE
WEINBERG DE ROCA**

1. Today's decision is unanimous. We however make this declaration to clarify one point. We fully agree that the Appeals Chamber should not decide against representation by counsel on the basis of mere speculation that there is a conflict of interests. Consequently, we would not give our support to the decision if it were based on mere speculation; but it is not.


2. In a case of this kind, it appears that a distinction may be usefully drawn between reasonable foresight and mere speculation, and that reasonable foresight is a sufficient basis of decision. The facts indicate that, at his trial, the appellant-accused could be taking a position which will be at variance with that of another accused who is also being represented by the same counsel. If the appellant-accused does so, there will be a conflict of interests on the part of counsel. Paragraphs 10, 14, 23, 24 and 27 of the decision of the Appeals Chamber are pertinent.

3. The fact that the appellant-accused, for any reason deemed sufficient to him, nevertheless agreed to common representation does not relieve the Appeals Chamber of its responsibility to ensure that, in the interests of justice, his case can be put forward, as from its very commencement, without any kind of inhibition resulting from retaining the same counsel.

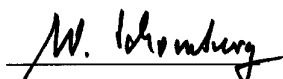
4. Conflict of interests rules vary in national jurisdictions. In the German system (as explained in the text set out in footnote 61 of the decision of the Appeals Chamber), with a view to avoiding any conflict of interests, counsel is strictly forbidden to represent more than one accused on the same charge. Other systems allow such representation subject to there being no conflict of interests or reasonable risk of it. Under rule 7 of the Dutch Code of Conduct of Advocates 1992 (*Gedrageregels 1992*) "Advocates may not look after the interests of two or more parties if their interests conflict, or if developments are likely to bring them into conflict." The principle of this provision looks like a reasonable basis for determining what is required by the interests of justice; it admits reasonable foresight.

5. We are hesitant to support the view that counsel may be overburdened and that he may not have sufficient time to get instructions from each client and to prepare adequately for trial as the trial progresses. These are important considerations, but we do not believe that the Appeals Chamber has had the benefit of argument on them.

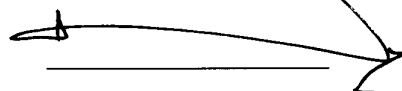
Done in English and French, the English text being authoritative.



Mohamed Shahabuddeen



Wolfgang Schomburg



Judge Weinberg de Roca

Dated 24 November 2004
At The Hague
The Netherlands

[Seal of the Tribunal]