



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

Case No. IT-02-65-AR73.1

Date: 6 October 2004

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Mehmet Güney, Presiding
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca**

Registrar:

Mr. Hans Holthuis

Decision of:

6 October 2004

PROSECUTOR

v.

**ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ**

**DECISION ON APPEAL BY THE PROSECUTION TO
RESOLVE CONFLICT OF INTEREST REGARDING
ATTORNEY JOVAN SIMIĆ**

The Office of the Prosecutor:

Mr. Norman Farrell
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Jovan Simić for Željko Mežaković
Mr. Branko Lukić for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić for Dušan Fuštar
Mrs. Slobodanka Nebić for Duško Knežević

A handwritten signature in black ink, appearing to be 'Gj'.

1. The Appeals Chamber is seized of an appeal by the Prosecution from a Decision of the *Mejakić* Trial Chamber,¹ by which it rejected a motion alleging a conflict of interest regarding Defence counsel, Mr. Jovan Simić. Mr. Simić is currently assigned as lead counsel to the accused Željko Mejakić in the case *Prosecutor v. Mejakić et al.* and to the accused Dragoljub Prcać in the case *Prosecutor v. Kvočka et al.*, currently pending appeal.²

Background

2. In a motion filed on 18 August 2003, the Prosecution raised before the Trial Chamber the issue of a conflict of interest regarding Mr. Simić, assigned both to the accused Mejakić, and to the accused Prcać in the case *Prosecutor v. Kvočka et al.* In a decision of 18 September 2003, the Trial Chamber upheld the Registrar's decision to appoint Mr. Simić as counsel for Mr. Mejakić ("First Decision").³ The Trial Chamber considered that a conflict of interest may arise since, if Mr. Prcać was called to testify in the *Mejakić et al.* case. In that case it would be difficult for Mr. Simić as counsel of both Mr. Prcać and Mr. Mejakić to reconcile his duty to protect the interests of each accused. However, the Trial Chamber found it not appropriate at that stage to make any determination, as there was no certainty that Mr. Prcać would testify in the *Mejakić et al.* case.

3. On 24 February 2004, the Prosecution filed a confidential "Second Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić". It requested the Trial Chamber to "act now" and to request the Registrar to withdraw Mr. Simić's assignment from one of the two cases. The Prosecution submitted that, due to the conflict of interest, it was unable to discuss with Mr. Prcać about his willingness to testify without the presence of Mr. Simić. In its Decision of 17 June 2004 ("Impugned Decision"), the Trial Chamber denied the Prosecution's second motion. The Trial Chamber considered that, although it had allowed the Prosecution to include Mr. Prcać in its witness list pursuant to Rule 65ter (E) (ii) of the Rules of Procedure and Evidence ("Rules"), it did not necessarily follow that Mr. Prcać would testify in the *Mejakić et al.* case. The Trial Chamber further pointed out that the Prosecution had no particular right to interview an accused in a specific case for the purpose of securing his testimony in another case and, therefore, the argument that the Prosecution was unable to discuss with Mr. Prcać without the presence of Mr. Simić was without merit.

¹ Decision on Prosecution's Second Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 17 June 2004.

² *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, "Judgement", 2 November 2001.

³ Decision on Prosecution motion to resolve conflict of interest regarding attorney Jovan Simić, 18 September 2003.

4. On 6 July 2004, the Trial Chamber granted the “Prosecution’s Request for Certification” pursuant to Rule 73(B) of the Rules.⁴ The Prosecution filed the “Prosecution’s Appeal Brief” before the Appeals Chamber on 13 July 2004 (“Appeal”), to which Mr. Simić responded confidentially, 14 days later, on 27 July 2004.⁵

5. The Prosecution’s Reply⁶ was filed confidentially on 3 August 2004, six days after the filing of Mr. Simić’s Response. The Prosecution requested leave of the Appeals Chamber to file this Reply and submitted that the time limit of Part III, paragraph 9 of the Practice Direction on procedure for the filing of written submissions in appeal proceedings before the International Tribunal⁷ (“Practice Direction”) did not apply to the present appeal, as it applied only to appeals requiring a grant of leave by the Appeals Chamber, not to appeals certified by the Trial Chamber.

6. The Practice Direction provides that responses to interlocutory appeals are due ten days after the filing of the appeal, and replies four days after the filing of the response.⁸ The Appeals Chamber recalls the recent decision of the ICTR Appeals Chamber issued in the case *Prosecutor v. Bizimungu et al.*:

The Appeals Chamber notes, however, that the Practice Direction does not specifically provide a deadline for responses to appeals that follow certification of the Trial Chamber, although the Appeals Chamber has recently suggested that the response time of ten days should also apply to appeals following certification. The Appeals Chamber affirms this interpretation of the Practice Direction.⁹

The decision makes clear that the Practice Direction does apply to certified appeals. The Appeals Chamber recognizes that this clarifying decision may not have come to the attention of the Parties. Considering, moreover, the minor nature of the delays, both Mr. Simić’s Response and the Prosecution’s Reply will be considered.

Discussion

7. The Registrar has the primary responsibility of determining matters relating to the assignment of counsel under the legal aid system. The Trial Chamber, however, considered that it had a statutory obligation to ensure a fair and expeditious conduct of the proceedings, and that from this obligation it derived the power to decide on the Prosecution’s motion alleging a conflict of

⁴ Decision on Prosecution’s Request for Certification of the Trial Chamber’s Decision on Second Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 July 2004.

⁵ Defence Response: Prosecution’s Appeal brief, confidential, 27 July 2004 (“Response”).

⁶ Prosecution’s Reply to “Defence Response : Prosecution’s Appeal brief”, confidential, 3 August 2004 (“Reply”).

⁷ Practice Direction on procedure for the filing of written submissions in appeal proceedings before the International Tribunal, IT/155/Rev. 1, 7 March 2002.

⁸ Practice Direction, Part II paras. 2 and 3, Part III paras. 8 and 9.

interest.¹⁰ The approach of the Trial Chamber is consistent with the Appeals Chamber's decision in the case *Prosecutor v. Blagojević* of 7 November 2003.¹¹ In that decision, the Appeals Chamber confirmed that the Trial Chamber has an inherent power to ensure that the trial of an accused is fair. However, the Appeals Chamber warned that in exercising this power the Trial Chamber cannot appropriate for itself a power that is conferred elsewhere.¹² The Directive on Assignment of Defence Counsel¹³ does not provide any specific procedure for the removal of Defence Counsel in the case of a conflict of interest at the request of the Prosecution, and as such, the Trial Chamber could rely on its inherent power to review the assignment of Mr. Simić.

8. The right to choose counsel is a fundamental right of the accused and is recognized by Article 21(4) (b) and (d) of the Statute of the International Tribunal ("Statute"). However, this right is not without limits. The Appeals Chamber has on several occasions stated that "the right to free legal assistance by counsel does not confer the right to counsel of one's own choosing."¹⁴ One of the limits to the accused's choice is a conflict of interest affecting his counsel. Under Article 14 of the Code of Conduct,¹⁵ a counsel may not represent a client when this representation affects or can affect the representation of another client. Article 14 of the Code of Conduct provides, in relevant parts, as follows:

C. Counsel shall not represent a client in connection with a matter in which counsel participated personally and substantially as an official or staff member of the Tribunal or in any other capacity, unless the Registrar determines, after consultation with the parties and taking account the views of the Chamber, that there is no real possibility shown that a conflict between the former and present assignment exists.

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:

⁹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's interlocutory appeal against Trial Chamber II Decision of 6 October 2003 denying leave to file Amended Indictment, 12 February 2004, para. 9. (footnote omitted)

¹⁰ First Decision, p. 2.

¹¹ *Prosecutor v. Blagojević*, 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.

¹² *Idem*, para. 7.

¹³ Directive on Assignment of Defence Counsel, IT/73, Rev 9, as amended on 12 July 2002.

¹⁴ *Prosecutor v. Akayesu*, Case No. ICTR-96-4A, Appeals Chamber Judgement, 1 June 2001, para. 61.

¹⁵ Code of professional conduct for counsel appearing before the International Tribunal, IT/125 rev. 1, as amended on 12 July 2002 ("Code of Conduct").

1. counsel's responsibilities to, or interests in, a third party; or

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.

This requirement is reflected by Article 16 (E) of the Directive on Assignment of Defence Counsel:

- E. No counsel shall be assigned to more than one suspect or accused at a time, unless an assignment to more than one suspect or accused would neither cause prejudice to the defence of either accused, nor a potential conflict of interest.

Mr. Simić had acknowledged a potential conflict of interest and, following the procedure laid out under Article 14 of the Code of Conduct, obtained the written consent of both Mr. Mejakić and Mr. Prcać to represent each of them.

9. The Trial Chamber found in the First Decision as well as in the Impugned Decision that a conflict of interest would arise were Mr. Prcać called to testify in the *Mejakić et al.* case. It considered, however, that, at the present stage of the proceedings, it was not certain that Mr. Prcać would testify in the *Mejakić et al.* case. The Trial Chamber was not satisfied that, in the present circumstances, the representation of Mr. Prcać and Mr. Mejakić was likely to affect the integrity of the proceedings or otherwise irreversibly prejudice the administration of justice.

10. The Prosecution submits that the Trial Chamber erred in law in concluding that the representation of Mr. Mejakić and Mr. Prcać by the same Defence Counsel was not likely to affect the integrity of the proceedings or otherwise irreversibly prejudice the administration of justice. The Prosecution further submits that the Trial Chamber's reasoning, that the conflict will not cause the requisite degree of prejudice as it was not certain that Mr. Prcać would testify as a witness, is erroneous. In the view of the Prosecution, the conflict of interest exists now, not sometime in the future. The Prosecution points out that it could subpoena Mr. Prcać, so that he could be brought before the Trial Chamber also without his consent. Moreover, the Prosecution argues that it has the right to subpoena a prospective witness for an interview (not testimony) if that person is likely to give material evidence. The Prosecution therefore concludes that Mr. Prcać, prior to deciding whether to cooperate with the Prosecution, clearly requires advice and consultation with an

independent lawyer presently.

11. The Appeals Chamber understands that Mr. Simić submits in his Response that a conflict of interest does not exist. He argues that the Prosecution may not include Mr. Prcać in its witness list, as Mr. Prcać did not consent to give evidence for the Prosecution. Mr. Simić further submits that the fact that Mr. Prcać was convicted in the *Kvočka et al.* case “absolutely excludes any possibility” for him to ever appear as a witness in the *Mejakić et al.* trial. The Prosecution replies that Mr. Prcać’s right to silence, which would include his right not to answer questions which incriminate himself, is different from the right not to be compelled as a witness. The Prosecution further notes that a number of accused have testified in other cases both before and after conviction.

12. The Appeals Chamber finds that a conflict of interests does exist at the present stage of the proceedings. It is not contested that Mr. Mejakić was the direct superior of Mr. Prcać in the Omarska camp. Mr. Mejakić is charged with crimes committed in the Omarska camp under Article 7 (1) of the Statute for participating in a joint criminal enterprise. In addition, he is charged under Article 7 (3) of the Statute, on the basis that he was the commander of the camp and had effective control over the guard shift commanders, camp guards, and other persons working within or visiting the Omarska camp. Further, the Prosecution claims that Mr. Prcać has given evidence incriminating Mr. Mejakić in an interview with the Prosecution in the *Kvočka et al.* case. It was for this reason that the Trial Chamber considered Mr. Prcać’s evidence significant and allowed the Prosecution to include Mr. Prcać in its witness list.¹⁶

13. It is not necessary to determine if the Prosecution has the right to apply for a subpoena for an interview with Mr. Prcać in the present case. Even if Mr. Simić’s view, that Mr. Prcać may only testify voluntarily, was accepted, the conflict of interest would still exist. Mr. Simić acknowledges that, regardless of an *obligation* to testify, Mr. Prcać may be included in the Prosecution’s witness list and testify *if he consents*. As counsel for Mr. Prcać, Mr. Simić is under an obligation to consider what benefits Mr. Prcać might derive from cooperation with the Prosecution by voluntarily giving evidence against Mr. Mejakić. On the other hand, as counsel for the accused Mejakić, Mr. Simić is under an obligation to ensure that Mr. Mejakić’s best interests are protected. This may include taking every legal step possible to ensure that either Mr. Prcać’s evidence is not heard or that it does not implicate Mr. Mejakić.

14. The Appeals Chamber further finds that, if the conflict of interest regarding the representation of Mr. Prcać and Mr. Mejakić is not resolved at the present stage of proceedings, the administration of justice may be irreversibly prejudiced. The Appeals Chamber considers that the

conflict of interest is an important one. The Trial Chamber noted in its First Decision that Mr. Mejakić did not deny that he was in a position of authority at the Omarska camp, and that he acknowledged that Mr. Prcać spent some time there under his command.¹⁷ Mr. Mejakić is charged with command responsibility under Article 7(3) of the Statute. Mr. Prcać may give evidence on the command structure of the Omarska camp as well as on the particular offences committed in this camp. The evidence given by Mr. Prcać may therefore have a significant impact on the trial of Mr. Mejakić.

15. The decision by Mr. Prcać whether to cooperate with the Prosecution has to be taken presently, and it may impact on the potential benefits for Mr. Prcać and on the conduct of the *Mejakić* trial. Moreover, the conflict of interest may influence the Defence strategy of Mr. Mejakić, for example, by preventing his counsel from calling certain witnesses in order not to prejudice the interests of Mr. Prcać. There is finally the risk that Mr. Simić might withdraw in the course of the trial because of the conflict of interest, thus delaying the proceedings. For these reasons also the Appeals Chamber finds that the representation of both Mr. Mejakić and Mr. Prcać by Mr. Simić is likely to irreversibly prejudice the administration of justice.

Disposition

For the foregoing reasons, the Appeals Chamber hereby

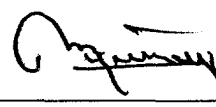
GRANTS the Appeal;

REVERSES the Impugned Decision; and

ORDERS the Registrar to withdraw Mr. Simić's assignment to one of the two cases.

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

Done this 6th day of October 2004,
At The Hague,
The Netherlands.



Judge Mehmet Güney
Presiding Judge

¹⁶ Decision on Prosecution motion for leave to amend its Rule 65*ter* witness and exhibit lists, 18 February 2004.

¹⁷ First Decision, p. 3.