

**UNITED  
NATIONS**



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-01-47-PT  
Date: 26 March 2002  
Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Wolfgang Schomburg, Presiding  
Judge Florence Mumba  
Judge Carmel Agius

**Registrar:** Mr. Hans Holthuis

**Decision of:** 26 March 2002

**PROSECUTOR**

v.

**ENVER HADŽIHASANOVIĆ  
MEHMED ALAGIĆ  
AMIR KUBURA**

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**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**

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**The Office of the Prosecutor:**

Ms. Jocelyne Bodson  
Mr. Ekkehard Withopf  
Ms. Cynthia Fairweather

**Counsel for the Accused:**

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović  
Ms. Vasvija Vidović and Mr. John Jones for Mehmed Alagić  
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

## I. INTRODUCTION

1. This Trial Chamber 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 ("International Tribunal"), is seized of the confidential "Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Kubura", filed by the Office of the Prosecutor (hereinafter "Prosecution") on 20 December 2001 ("Motion of 20 December 2001"), in which the Prosecution requests the Trial Chamber to review a decision rendered on 26 November 2001 by the Deputy Registrar of the International Tribunal assigning a co-counsel for the Accused Kubura. Before joining private legal practice, counsel in question was previously associated with the Prosecution as a legal advisor for the period of January 1996-January 2000.

2. The Lead Counsel for the Accused Kubura filed the confidential "Defence Response to Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Amir Kubura", on 18 January 2002 (hereinafter "Defence Response").

3. The confidential "Prosecution's Reply to the Defence's Response to Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-Counsel to the Accused Amir Kubura" was filed on 4 February 2002 (hereinafter "Prosecution Reply").

4. The Trial Chamber issued a confidential scheduling order on 31 January 2002, which invited the Registrar of the International Tribunal to file submissions on the issues raised by the Motion of 20 December 2001, the Defence Response, and the Prosecution Reply including, in particular, the following issues:

1) whether, in the light of the law and practice of the International Tribunal, a Chamber may review a decision of the Registrar of the International Tribunal assigning counsel to a concrete case;

2) whether, if the answer to question 1) were to be in the negative, there would be a genuine obstacle in terms of general principles of law for a Chamber to review such a decision in the interests of justice and integrity of the proceedings before the International Tribunal; and

3) whether, if the answer to question 2) were to be in the negative, this Chamber could also take into consideration a possible scenario in which more than one counsel with previous association with the International Tribunal appear in one and the same case.

5. On 8 February 2002, the Registrar of the International Tribunal filed the confidential "Registry Submission regarding the Assignment of Rodney Dixon as Co-Counsel to the Accused Kubura" (hereinafter "Registry Submission").

## II. ADMISSIBILITY

6. The first question before the Chamber is one on the admissibility of the Motion of 20 December 2001: can a Trial Chamber review the Registrar's decisions assigning counsel?

7. While conceding that there is no explicit provision in the Rules of Procedure and Evidence of the International Tribunal (hereinafter "Rules") or in the *Directive of Assignment of Defence Counsel*, as amended on 15 December 2000 (hereinafter "Directive"), the Motion of 20 December 2001 argues that an analogy should be drawn between this case and the one envisaged in Article 13 of the *Directive*.

8. The Defence Response submits that Article 11 of the *Directive* establishes the power of the Registrar to assign counsel, whereas Article 13(B) of the Directive is concerned with remedy accorded an accused before the International Tribunal in the cases in which his request for assigning a counsel is refused by the Registrar.<sup>1</sup> It draws a distinction between the matter of assignment of counsel and the conduct of counsel during trial. Only the conduct is governed by the Rules. It suggests that the Chamber decline jurisdiction over the Motion of 20 December 2001 but that it will have the power to deal with the conduct of the counsel in question during the trial. Subsidiarily, it argues that if the Prosecution was relying on Article 13 (B) of the *Directive*, the Motion of 20 December 2001 was filed out of time.<sup>2</sup>

9. The Prosecution Reply submits that the Motion of 20 December 2001 was filed pursuant to Rules 54 and 73 of the Rules as well as the inherent powers of the International Tribunal "to entertain motions relevant to the control of its proceedings". Were the Chamber not to accept the Motion of 20 December 2001 as based on the two rules, the Prosecution Reply would rely on the

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<sup>1</sup> Paras. 4-5. Article 11, "Decision by the Registrar", provides that "(A) After examining the declaration of means laid down in Article 7 and relevant information obtained pursuant to Article 10, the Registrar shall determine how far the suspect or accused lacks means to remunerate counsel, and shall decide, providing reasons for his decision: (i) without prejudice to Article 18, to assign counsel and choose for this purpose a name from the list drawn up in accordance with Article 14; or, (ii) without prejudice to Article 18, that the suspect or accused disposes of means to partially remunerate counsel in which case the decision shall indicate which costs shall be borne by the Tribunal; or (iii) not to grant the request for assignment of counsel. (B) To ensure that the right to counsel is not affected while the Registrar examines the declaration of means laid down in Article 7 and the information obtained pursuant to Article 10 the Registrar may temporarily assign counsel to a suspect or an accused for a period not exceeding 120 days. (C) If a suspect or an accused, either (i) requests an assignment of counsel but does not comply with the requirements set out above within a reasonable time; or (ii) fails to obtain or to request assignment of counsel; or (iii) fails to elect in writing that he intends to conduct his own defence; the Registrar may nevertheless assign him counsel in the interests of justice in accordance with Rule 45 of the Rules and without prejudice to Article 18." Article 13, "Remedy against the Registrar's decision", provides in paragraph (B) that "the suspect whose request for assignment of counsel has been denied may, within two weeks of the date of notification to him, make a motion to the Chamber before which he is due to appear for immediate review of the Registrar's decision. The Chamber may (i) confirm the Registrar's decision; or (ii) rule that the suspect or accused has means to partially remunerate counsel, in which case it shall refer the matter again to the Registrar for determination of which parts shall be borne by the Tribunal; or (iii) rule that a counsel should be assigned."

inherent powers of the International Tribunal to justify the review by the Chamber of the Registrar's decision assigning counsel. Mindful of the division of powers between the Registry and the Chambers, the Prosecution Reply also suggests that for the reason that "a decision such as the assignment of counsel, while superficially appearing a purely administrative decision, may impact upon the course of justice before the Tribunal", the International Tribunal "must have the inherent and implied power to control the right of appearance before it even if it involves exercising a power tantamount to a 'review' of a Registry decision".

10. The Registry Submission argues that "in the absence of any express provision to the contrary, such as Article 13 of the Directive of the Assignment of Defence Counsel, Chambers do not possess a general power of review over Registry decisions". In the context of a concrete case, it suggests that "if during the course of proceedings, it becomes evident that a conflict of interest exists, and that this conflict would be likely to improperly prejudice the outcome of proceedings, then the Chamber may invite the Registrar to reconsider the assignment of Mr. Dixon in lights [*sic*] of its findings, or the material presented before the Chamber". While recognising that the Chamber has the inherent power to regulate the proceedings and the conduct of the parties, the Registry Submission argues that "this power should only be utilised in a manner that is consistent with and complementary to the powers of the Registrar", and that "an order to withdraw the assignment of counsel requested by an accused is contrary to an accused's right to free choice of counsel, which would not be an appropriate area for the Chamber to exercise its inherent powers".

11. The Chamber considers the issue to be of general importance. At the same time, the Chamber observes that the issue is not covered by provisions of the Rules and the Directive. The Chamber will therefore focus primarily on the submission that the jurisdiction of the Chamber in this matter is based on Rules 54 and 73 and the inherent powers of the International Tribunal.

12. The Chamber notes that the Registry Submission refers to Rule 33 (A) of the Rules which is explicit as to the authority of the President of the International Tribunal over the exercise of powers by the Registrar in the administration of the International Tribunal.<sup>3</sup> The Registry Submission thus argues that, as far as Chambers are concerned, there is no "general power of review over Registry decisions". The Chamber considers that Article 13 of the Directive amply demonstrated that the President and Chambers may intervene in certain decisions of the Registrar.

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<sup>2</sup> Article 13 (B) provides for a time-limit of two weeks following the notification of the refusal to assign counsel, for the accused to seek review of the refusal decision before the Chamber his case is pending.

<sup>3</sup> "...Under the authority of the President, the Registrar shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication".

13. The basis for presidential intervention in general lies in the provision of Rule 33 (A) of the Rules. In addition, Rule 44 on the Appointment, Qualifications and Duties of Counsel provides in the last sentence of paragraph (b) that “A suspect or accused may appeal a decision of the Registrar to the President.” This provision may be considered as *lex specialis* to the *lex generalis* of Rule 33 (A).

14. The basis for action by a Chamber rests with its power and duty to guarantee a fair trial and the proper administration of justice as set forth in the Statute of the International Tribunal. It is against this background that Rules 46 and 77, for example, have been included in the Rules. Rule 46 (A)(i) determines that a Chamber may refuse audience to counsel if the conduct of that counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings. Rule 46 (A)(ii) goes one step further by providing that the Chamber may even determine that counsel is no longer eligible to represent a suspect or accused. Rule 77 (I) allows a Chamber to take a similar decision in case a counsel is found guilty of contempt of the Tribunal. These Rules, which aim to exclude a counsel in general are, however, not exhaustive.

15. Another important provision in this respect is Rule 45, on “Assignment of Counsel”. Rule 45 (A) provides:

Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in the Directive set out by the Registrar and approved by the permanent Judges.

The procedure mentioned in the Rule is found in Article 11 of the *Directive*, “Decision of the Registrar”. This article provides the Registrar with the power either to assign counsel from the list of counsel he is empowered to maintain under Rule 45 (B) or to refuse to assign counsel. There is no question that the primary responsibility for assigning counsel rests with the Registrar. However, Rule 45 does not cover the circumstances in which a factor other than the means of the accused to pay his counsel has become an important issue in its correct implementation. Among the factors at issue in the present dispute is the potential for a conflict of interest or undue advantage to one of the parties. Since a factor relating to the disqualification of counsel in relation to a particular case can arise from the moment counsel is assigned, the Chamber considers that the question of both appointment and qualification of counsel may have a role to play in this context.

16. The appointment and qualification of counsel is regulated by Rule 44 of the Rules which reads, in part:

(A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. A counsel shall be considered qualified to represent a suspect or accused

if the counsel satisfies the Registrar that the counsel is admitted to the practice of law in a State, or is a University professor of law, and speaks one of the two working languages of the Tribunal.

...

(C) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment on the Assignment of Defence Counsel.

17. From the above it follows that once a Chamber is seized of a case, any measure or request that may impact on the conduct of the case is within its power of regulation and control, not as a replacement for the similar powers vested in the Presidency, but as an alternative path to fulfil the mandate of the International Tribunal. From the above, it also follows that if the Rules explicitly provide for the power of a Chamber to take such far-reaching steps as to exclude a counsel for all future cases from representing a suspect or accused, the Chamber certainly has the power to take less far-reaching steps aimed at ensuring a fair trial and the proper administration of justice in a concrete case pending before that Chamber. One such measure a Chamber is entitled to take is to determine that a counsel in such a particular case must be disqualified and barred from representing a suspect or accused, due to a conflict of interest resulting from a counsel having worked with the Office of the Prosecutor on a related case.

18. The Chamber wishes to stress here that the issue in such a particular case is not one of assignment of counsel to a suspect or accused in general. The issue here is rather one of qualification or disqualification as it relates to the question of whether, in relation to a concrete case at hand, counsel will be able to meet the qualifications required to guarantee a fair trial and the proper administration of justice. This must function in an equal way regardless of whether counsel is *appointed* pursuant to Rule 44 or *assigned* pursuant to Rule 45.

19. Rule 54, "General Rule", provides:

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

As is known, this rule has been applied widely in the judicial practice of the International Tribunal, including in matters as distinct as scheduling court sessions, indicating protective measures, subpoenaing witnesses or documents, and requesting medical reports on detainees. It is conceivable that an issue like the assignment or disqualification of counsel can be a matter falling within the scope of the rule because of its being part of the process of preparation or, later on, conduct of a trial. The issue of whether a person is suitable to act as counsel in a certain case is just one aspect of the fair trial obligation imposed on the Chamber. A competent and qualified counsel serves the

important purpose of assisting the International Tribunal in fulfilling its extraordinary international mandate. Whether the accused receives a fair trial whereby justice is both done and seen to be done, is a matter over which the Chamber has jurisdiction.

20. Rule 73, "Other Motions", provides, *inter alia*:

(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber.

This rule has wide applicability not only in the course of a trial but also in certain pre-trial matters including the indication of protective measures. Its scope of application is wide enough to cover the issue before the Chamber so far as that issue influences the procedure in a concrete case.

21. The Chamber considers that the issue of qualification, appointment and assignment of counsel, when raised as a matter of procedural fairness and proper administration of justice, is open to judicial scrutiny. The silence of the Rules and the Directive alone does not lead to a finding of a kind of *non liquet* in respect of the issue. Problems relating to the defence of an accused will affect the conduct of a case over which a Chamber has not only the power but also the duty to regulate in accordance with the statutory requirements for a fair and expeditious trial. Such requirements are part of the mandate of the International Tribunal to ensure that justice is seen to be done. These problems, therefore, are justiciable.

22. A subsidiary issue is whether the Motion of 20 December 2001 was filed out of time and whether by a late filing, the Prosecution has acquiesced in the Registrar's decision in question, which was rendered 26 November 2001. While time limits set out in the Rules must be complied with, the Chamber nevertheless considers that qualification, appointment and assignment of counsel continuously affects the concept of a fair trial so long as a counsel acts on behalf of a suspect or accused, and that there can be no time limits for challenges raised under Rules 54 and 73 in the course of the proceedings before the Chamber.

23. The Chamber therefore finds, that the concrete issue of qualification, appointment and assignment of counsel is properly within the jurisdiction of this Chamber where it can be shown that it affects, or is likely to affect, the right of the accused to a fair and expeditious trial or the integrity of the proceedings.

24. The Chamber, however, wishes to emphasise that although it considers that it is vested with the power to review a decision of this type in the interests of justice, it is not obliged to intervene in every complaint regarding the assignment of counsel. It recognises that the Registrar has the primary responsibility in this matter and that, if the Registrar was not properly informed of

necessary facts, he would be entitled to reconsider his previous decision on the basis of new information hitherto unavailable to him. In cases where within this limited scope, the Chamber reviews a final decision of the Registrar on an assignment of counsel because of an alleged disqualification of counsel in the case at hand, and then decides to correct that decision, it may order the Registrar to withdraw that assignment immediately. In the view of the Chamber, this is not a power to overrule the responsibilities of the Registrar, but rather a power which is complementary to that of the Registrar and aimed at ensuring the proper administration of justice, a power that falls clearly within the primary, if not exclusive, responsibility of the Chamber.

### III. MERITS

25. Now the Trial Chamber will turn to the question: does previous association create a conflict of interest or undue advantage with regard to the assignment in question?

#### A. Submissions of the Parties and the Registry

26. The Registry's Decision of 26 November 2001 which assigned Mr. Dixon as co-counsel for the Accused Kubura states that Article 21 of the Statute of the International Tribunal provides the accused with the right of free choice of counsel, that Mr. Dixon has provided the Registry with detailed information on his previous association with the Prosecution, but that the Prosecution has not supplied the Registry with specific information as to the level of involvement of Mr. Dixon which might lead to a conflict of interest. The decision also finds that Mr. Dixon has provided in writing his undertaking to abide by the confidentiality of any information obtained while working for the Prosecution and that the information available does not show a conflict of interest. As a result, the assignment was approved by the Registry.

27. The Motion of 20 December 2001 alleges that the assignment of Mr. Dixon as co-counsel will cause both a conflict of interest and an undue advantage due to his previous association with the Prosecution during which period he was involved in "relevant investigations and relevant prosecutions of the so-called 'flip-side' cases such as Blaskić, Kordić and Čerkez, and Čelebići". Supporting materials to that effect are attached.

28. The Defence Response argues that, notwithstanding the documents attached to the Motion of 20 December 2001, the Prosecution has failed to pinpoint the precise conflict of interest and that "the Prosecution must *at least be required to identify the confidential material, not in the public domain, or disclosed to the Defence in any event, which it alleges Mr. Dixon had access to while*



*with the OTP, that gives rise to a conflict of interests in the specific circumstances of the case against Mr. Kubura.”* This argument is made in reference to the fact that the Deputy Prosecutor stated to the Registrar in his letter of 1 November 2001 that “I cannot predict what potential conflicts may arise for him as the trial unfolds”. The Defence Response stresses that “most importantly, none of the documents show that Mr. Dixon was in any way involved *in investigation or preparing the case against Mr. Kubura*”.

29. The Registry Submission outlines the procedure for the assignment of counsel by the Registry. First, the parties are to be consulted as to whether there may be a potential conflict of interest before the assignment is approved. Second, where a party alleges a conflict of interest, the Registry will verify, on the basis of the materials presented by the party, “whether the alleged conflict would be likely to prejudice the outcome of the proceedings, or result in an improper advantage or disadvantage for one of the parties”. Further, the materials will be reviewed to see whether the alleged conflict could result in a potential disadvantage to the accused. In respect of the case of Mr. Dixon, the Registry Submission considers that any undue advantage his assignment might generate would be balanced by the fact that the cases in which he previously worked “have been exhaustively litigated at first instance, and are in advanced appellate stage”. The existence of a particular ‘prosecutorial strategy’ could therefore be deduced by any person who followed the public hearings and filings of these trials.” Despite the supporting documents annexed to the Motion of 20 December 2001, the Registry Submission states that “there was insufficient evidence” to conclude that the assignment “would be likely to prejudice the outcome of the trial improperly, cause an unfair advantage to the defence, or result in a material disadvantage to the Office of the Prosecutor”. The Registry is prepared, however, to re-consider its decision of 26 November 2001 should there be new material pointing to a conflict of interest unknown to the Registry at the time of the decision.

## **B. Discussion**

30. The ultimate concern of the Chamber is to ensure the integrity of the proceedings – that justice is to be done and seen to be done – and to ensure the right of the accused to a fair and expeditious trial. Subsumed under that general principle are two questions this Chamber must resolve: 1) is there a conflict of interest that affects, or is likely to affect, the integrity of the proceedings before the Chamber and 2) is there an undue advantage arising from the assignment which undermines the integrity of proceedings before the Chamber? In order to answer these questions, the Chamber will examine the law of the Tribunal as well as national practice where the law of the Tribunal is silent.

31. The Chamber will first consider the relevant provisions, if any, of the basic law and regulations of the Tribunal.

32. Article 21 (4) of the Statute provides, *inter alia*, that:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

...;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

....

This provision forms the basis for Rule 45 and Article 11 of the Directive of the Assignment of Defence Counsel, as already referred to and commented upon above.

33. However, the Rules and the Directive do not touch upon the specific question of a possible conflict of interest in the case a defence counsel has previously worked with the Office of the Prosecutor.

34. The same applies to the *Prosecutor's Regulation No.2 (1999): Standards of Professional Conduct for Prosecution Counsel*. The Chamber notes in this context also that this Regulation does not contain any prohibition of prosecution staff members from becoming defence counsel.

35. Article 9 of the *Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal (IT/125)* ("Code of Conduct") refers to the issue of conflict of interest. The relevant parts of the article provide:

(1) Counsel owes a duty of loyalty to his or her Client. Counsel must at all times act in the best interests of the Client and must put those interests before their own interests or those of any other person.

(2) In the course of representing a Client, Counsel must exercise all care to ensure that no conflict of interest arises.

(3) Without limiting the generality of sub-articles (1) and (2), Counsel must not represent a Client with respect to a matter if:

(a) such representation will be or is likely to be adversely affected by representation of another Client;

(b) representation of another Client will be or is likely to be adversely affected by such representation;

(c) the Counsel's professional judgement on behalf of the Client will be, or may reasonably be expected to be, adversely affected by:

(i) the Counsel's responsibilities to, or interests in, a third party;

....

This *Code of Conduct* was drafted in June 1997 on the basis of a survey of Bar codes of seven countries: Australia, Belgium, Bosnia and Herzegovina, England, France, Netherlands, Spain, and the United States; an International Charter of Defence Rights by the *Union Internationale des Avocats*, and the *Code of Conduct for Lawyers in the European Community*.<sup>4</sup> Here again, however, the Chamber observes that the *Code of Conduct* says nothing about a conflict of interest which may arise from the previous association of a defence counsel with the Prosecution.

36. The Chamber must therefore conclude that there is no relevant provision in the basic law and regulations of the Tribunal dealing with the dispute before it.

37. There are also no rules, norms or guidelines available that may apply correspondingly. For example, norms relating to the disqualification of judges can hardly serve as a useful tool here as such rules are designed to ensure the impartiality of the judges whereas in the present case, rules relating to defence counsel are aimed at protecting primarily the rights of the party needing representation.

38. Failing relevant rules within the legal framework of the Tribunal, the Chamber will have to consider whether national practices provide any guidance. The American Bar Association's *Model Rules of Professional Conduct* (2001 edition), Rule 1.11 (a), for example, provides:

Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency *consents* after consultation... (emphasis added)

These *Model Rules* are followed in two-thirds of the jurisdictions in the United States. The Rules therefore seek guidance from the parties involved and, in particular, require the *consent* of the government in order to have a lawyer with a possible conflict of interest represent a client<sup>5</sup>.

39. Opposed to this prerequisite of consent, the Chamber observes that, under some national practices, the approach has been taken that *for a certain period of time* former prosecutors or judges may not, in principle, become defence lawyers in the same district or court.

40. For example, Article 36 of the Chinese *Law on the Profession of Lawyer* forbids a former prosecutor or judge from serving as defence counsel within two years of his/her resignation from

<sup>4</sup> The list of sources is attached to the *Code*.

<sup>5</sup> Preface of the *Model Rules*.

the post of prosecutor or judge.<sup>6</sup> Section 20 (1), No.1 of the German *Federal Law on Lawyers*<sup>7</sup> has, in general, a time-limit of five years for admission to the roll if the applicant has worked as a judge or as a permanent civil servant, *inter alia* as Prosecutor, in the same district of the court where he applies for admission.<sup>8</sup> There seems to be a presumption of conflict of interests in these instances and the protection of the integrity of the judiciary is regarded as crucial.

41. Yet another approach can be found in the *Code of Conduct for the Bar of England and Wales* where there is no restriction on the possibility that a lawyer can work as a prosecuting or defence counsel, and where the practice is well known that a counsel may serve in these two functions in different cases.

42. On the basis of this survey, the Chamber can already come to no other conclusion than that national practices differ so much from each other on even the principal issues behind the question with which the Chamber is confronted, that it can derive no guidance from national practices, in the absence of applicable provisions in the *Rules*, the *Directive*, and the *Code of Conduct* of the International Tribunal itself.

43. Notwithstanding the conclusion that the Chamber receives very limited guidance from its own laws and national practices, it is still confronted with the question and obliged to answer whether, in the case at hand, the assignment of co-counsel to the accused is consonant with the interests of justice. In the matter before it, the Chamber also recalls that the interests of justice must be considered as well from the point of view of the Prosecution.

44. Before being able to answer this question, it needs to be determined which test should be applied here. In the absence of clear guidance, the Chamber must respect its obligation under the Statute and the Rules to ensure the integrity of the proceedings as the guiding principle. This obligation means also that the Chamber must ensure that justice is done and seen to be done and includes ensuring the accused' right to a fair and expeditious trial. This implies that the Chamber is careful to make sure that the proceedings are not halted by foreseeable and, thereby, avoidable risks.

45. The Chamber first observes that the Registry Submission notes the lack of proof to justify a finding that Mr. Dixon's prior association with the Prosecution "would be likely to prejudice the outcome of the trial improperly". This submission is given in terms of potential prejudice, but it

<sup>6</sup> This article was adopted in May 1996 by the People's Congress and amended in December 2001.

<sup>7</sup> Bundesrechtsanwaltsordnung of 1 August 1959.

<sup>8</sup> In Germany, in addition, Section 356 of the General Part of the German Penal Code (*Strafgesetzbuch*) on "Betrayal of a Party", in a legal system where the Prosecutor is not considered a party to the proceedings, even provides that the rendering of legal assistance in the same legal matter to both parties is a punishable offence. The underlying principle

also states that the available evidence has not indicated the existence of such potential prejudice. The Chamber takes cognisance of the criterion used in the Registry Submission for establishing the existence of a conflict of interest. The filing states in conclusion that:

In the event that the Prosecutor obtains previously unavailable material that would demonstrate the probability of a serious conflict, then the Registry would be prepared to reconsider its decision.

In an earlier passage, the Registry Submission distinguishes probability from possibility in relation to the point that different results arise from using the two criteria to determine whether a person like Mr. Dixon had access to confidential information during his prior association with the Prosecution. Stated otherwise, the Registrar argues that the possibility that a person had access to such information is not accepted as a criterion for disqualifying him as a counsel whereas the probability of such access is. However, in the view of the Chamber, in judicial proceedings a misstep in procedure with “possibly” adverse consequences will affect the integrity of the proceedings just as one will with “probably” adverse consequences.<sup>9</sup> The Chamber also considers that the probability test would be too high a standard as the harm from an erroneous assignment may be too great to redress for the integrity and expediency of the proceedings and the interests of witnesses and victims. This is even more the case in light of the very complex and often considerable time-consuming trials this Tribunal normally faces. The Chamber cannot wait until foreseeable harm is done to the proceedings. It is for the Chamber to prevent such foreseeable harm.

46. The Chamber is of the opinion that the appearance of a just procedure is as important as a just result for a fair trial. This is not to say that any challenge to the integrity of the proceedings, however artificial or theoretical, should form the basis of a reaction from the Chamber. Only when that challenge is real, some reaction is required. It thus follows that the Chamber will always guard the integrity of the proceedings before it, and any real possibility that the integrity of the proceedings before it may be affected adversely will lead the Chamber to remedy the cause of that real possibility. In other words, the Chamber will apply as a test for determining the question

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there is that a lawyer is disqualified from representing more than one party in one and the same case, i.e. on the same factual basis in an adversarial procedure.

<sup>9</sup> In this respect, reference can be made to two examples from national practices. First, Section 602 of the Code of Conduct for the Bar of England and Wales (7<sup>th</sup> edn., July 2000), requires a lawyer not to accept a brief or case “(d) if the matter is one in which he has reason to believe that he is likely to be a witness or in which whether by reason of any connection with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced; (e) if there is or appears to be a conflict or *risk* of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients (unless all relevant persons consent to the barrister accepting the instructions).” (*italics added*) Second, Rule 86 of the New South Wales (Australia) Barristers’ Rules of 17 April 1994 requires that a barrister is to refuse a brief or to appear before a court if he has information confidential to “any other party in the case other than” his client and the information may, “as a real possibility”, be helpful to his client’s case and that party has not consented to his using the information in the case.

before it whether there was a real possibility of a conflict of interest in relation to Mr. Dixon who first worked with the Office of the Prosecutor and is now assigned as co-counsel to the Accused Kubura. Should such a conflict of interest exist, the Chamber would have to conclude that Mr. Dixon should be disqualified from representing the accused in this case and would have to order the Registrar to withdraw Mr. Dixon's assignment.

47. Involvement of counsel with one of the parties *in the same case* is incompatible with representing the opposite party. Were this not so, the very essence of professional independence and integrity would be shattered and the duty of confidentiality towards the party he first represented irremediably compromised.

48. On the other hand, working in part on the same factual basis alone does not create a conflict of interests. The interest of the Prosecution is to guide the proceedings as close as possible to truth and justice. The knowledge of all available facts is also in the legally protected interests of the accused. See in this respect Rule 68 which is based on the fundamental principle of the right to be informed and heard.

49. What is the evidence presented by the parties in the present case, and does this evidence lead the Chamber to the conclusion that there is a real possibility of a conflict of interest which should lead to the disqualification of Mr. Dixon to represent the Accused Kubura? On the basis of the submissions of the parties, the following facts should be considered the core elements in determining the outcome of the application of the "real possibility test":

- During his time with the Prosecution, Mr. Dixon worked on a number of cases pending before the International Tribunal; at least some of these cases related to the Lašva Valley area;
- The case of the Accused Kubura also relates to the Lašva Valley area;
- The Lašva Valley cases Mr. Dixon worked on relate to armed conflicts between the government forces of Bosnia and Herzegovina and the Bosnian Croat forces in 1993-1994;
- The case of the Accused Kubura and of the two other co-accused in the present case relate to Bosniak military leaders;
- As conceded by Mr. Dixon, he had access to witness statements and affidavits in *Prosecutor v. Kordić and Čerkez*; in addition, he provided legal advice on potential legal defences and substantive issues, including that of command responsibility;

- In several documents attached to the Motion of 20 December 2001, the names of the co-accused Hadžihasanović and Alagić were mentioned and evidence relating to their actions was given. The same documents do not contain any reference to Mr. Kubura himself;
- Mr Dixon never worked in the case of the Accused Kubura in any capacity.

50. It is undoubtedly the case that the prior association with the Prosecution has provided Mr. Dixon with certain advantages. He knows how the Office of the Prosecutor functions, he became familiar with the Prosecution strategies at that time and, in general, acquired knowledge about the cases of the Bosnian Croats, the so-called “flip side”-cases.

51. Considering , however, the nature and extent of the prior association of Mr. Dixon, the Chamber is not convinced that the advantage was such that it would amount to *undue* advantages that might have an impact on the fairness of this trial.

52. Further, Mr. Dixon has not only undertaken in writing not to violate the confidentiality of any information he had access to while working for the Prosecution, but also consulted with his Bar authorities before accepting the defence of the Accused Kubura. The Chamber observes in this context, that it might have been useful if certain general guidelines or rules had been established in the past that would have provided guidance as to how to avoid having former Prosecution office employees resign and start working as a defence counsel before this Tribunal. This guidance would have avoided, or at least controlled, the issue of advantage or undue advantage. However, as discussed at length above, no such norms have been established and, so far as the Chamber is aware, no steps have ever been taken by the Office of the Prosecutor to put such norms in place. Failing such norms, it is not for the Chamber itself to “legislate” and develop them.

53. In both the Registry’s decision of 26 November 2001 and the Registry Submission, doubt is expressed as to whether, on the basis of the submissions by the Prosecution, Mr. Dixon’s previous association with those other cases may affect, actually or potentially, the proper conduct of the present case. As observed, Mr. Dixon’s knowledge of the cases of the Bosnian Croat accused might have provided some advantage in relation to the defence of his present client. The Chamber, however, wishes to stress that, in its view, prior association alone does not justify disqualification of a former employee of the Prosecution from becoming a defence counsel. A party seeking disqualification of counsel under the pretext of fair trial interests always bears the burden of persuading and convincing a Chamber that such prior association is such that it would amount to a real possibility of a conflict of interests.

54. Taking into account all the submissions of the parties and the Registrar, the Chamber concludes that the Prosecution has not been able to demonstrate that the prior association of Mr. Dixon with the Prosecution and the work he was required to do at that time provide a sufficient basis to conclude that a real possibility of a conflict of interest exists. Mr. Dixon was involved in cases factually related to the one in which he now is assigned as co-counsel but has not been working on the case against the accused he now represents.



#### IV. CONCLUSION

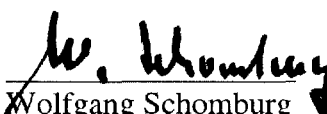
55. The Registrar of the International Tribunal has the primary responsibility in determining which counsel it may appoint or assign, in accordance with the *Rules*, the *Directive*, and the *Code of Conduct*. The Chamber, however, is authorised to review such a decision by the Registrar because of its power and duty to ensure the integrity of the proceedings. This includes the obligation for the Chamber to ensure that justice is done and seen to be done and to ensure that the accused will have a fair and expeditious trial not interrupted or halted by a foreseeable risk that a counsel has to be dismissed.

56. On the specific question of how to assess possible conflicts of interest between former employees of the Prosecution now assigned to defend an accused before the Tribunal, the Chamber had to conclude that both the law of this Tribunal and national practice provide very little guidance. Although such guidance would certainly have made the task of deciding this case much easier, it is not the task of the Chamber to elaborate such general norms and apply them to the question before it. The Chamber could therefore only address this question by remaining as close as possible to the general, but fundamental, duty to ensure the integrity of the proceedings. The Chamber has developed the test that a real possibility must be proved that there is a conflict of interest between the former and present assignment of counsel. The most obvious example of such a conflict would be if the counsel, now representing the accused, had worked for the Prosecution on the very same case against this very accused. That has not been established. In all other possible cases, the Chamber must be careful in drawing conclusions too readily. The Prosecution has established only that, while working for the Prosecution, Mr. Dixon worked on a number of cases to a certain extent factually related to the case in which his client is now involved. Because of a lack of more concrete indicators of a real possible conflict of interests, the Chamber is not satisfied that Mr. Dixon should have been disqualified as counsel in this particular case.

## V. DISPOSITION

57. The Chamber hereby dismisses the Motion of 20 December 2001.

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

  
Wolfgang Schomburg  
Presiding Judge

26  
Done this day of March 2002  
At The Hague,  
The Netherlands

[Seal of the Tribunal]