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**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-02-65-PT
Date: 18 September 2003
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Order of: 18 September 2003

PROSECUTOR

v.

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

**DECISION ON PROSECUTION MOTION TO RESOLVE
CONFLICT OF INTEREST REGARDING ATTORNEY JOVAN
SIMIĆ**

The Office of the Prosecutor:

Ms. Joanna Korner
Ms. Sureta Chana

Counsel for the Accused:

Mr. Jovan Simić, for Željko Mejačić

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”),

BEING SEISED of a “Prosecutor’s Motion for the Trial Chamber to Take an Informed Waivers on the Record of Any Conflict-of-Interest” filed on 18 August 2003 (“Motion”), in which the Office of the Prosecution (“Prosecution”) raises the issue of a conflict of interest regarding defence counsel Jovan Simić, assigned both to the accused Željko Meakić in this case (“the Accused”), and to the accused Dragoljub Prcać in the case *Prosecutor v. Kvočka et al.*, currently on appeal,¹

NOTING the following Prosecution submissions in the Motion:

- (i) that although the Registry Decision appointing Mr. Simić as counsel for the accused Meakić takes account of the statements filed by both Mr. Meakić and Mr. Prcać indicating that they have been fully informed of the existence and extent of any potential conflict of interest,² both Accused, and Mr. Meakić in particular, should be advised by independent counsel of the consequences of Mr Simić’s dual representation (“first submission”);
- (ii) that in the course of interviews conducted by the Prosecution of Mr. Prcać, and in the presence of Mr. Simić, Mr. Prcać made a number of statements which the Prosecution regards as evidence that the Accused Meakić was in a position of authority at the Omarska camp; Mr. Simić, the Prosecution submits, will thus be precluded from adopting the defence theory that Mr. Meakić was not in effective command and control of the Omarska camp, and that someone else or indeed Mr. Prcać was (“second submission”);
- (iii) Mr. Prcać’s knowledge of the structure of authority in the camp makes him a compellable witness for the Prosecution, the Trial Chamber or the other co-accused, in which case, the Prosecution submits, prejudice must be presumed since Mr. Simić would have to advise the witness on any rights he may or may not have to testify, and

¹ *Prosecutor v Kvoča et al.*, Judgement, Case No. IT-98-30/1-T, 2 Nov. 2001.

² Registrar Decision, Case No. IT-02-65-PT, 30 July 2003.

may be called to cross-examine his own client thereby creating a dilemma for him as to whose interests to protect (“third submission”);

NOTING the “Defence Response to Prosecution Motion for the Trial Chamber to Take Informed Waivers on the Record of Any Conflict-of-Interests” (“the Defence Response”) filed by assigned counsel, Mr. Jovan Simić (“Defence”), on 1 September 2003, in which Mr. Simić submits, *inter alia*, as follows:

- (i) that in light of the potential conflict of interest, he took the necessary steps, including initiating discussions with representatives of the Prosecution and informing the Office of Legal Aid and Detention Matters of the same, also submitting statements by the accused Meakić and Prcać both consenting to being represented by him, and stating that, in their view, no conflict exists;
- (ii) as evidenced by the statement of Mr. Meakić, the Accused does not intend to dispute the fact that he was superior to Mr. Prcać at the Omarska camp, nor does he deny the facts arising from the interviews of Mr. Prcać by the Prosecution;
- (iii) as to the possibility that Mr. Prcać might be called to testify in the *Meakić* case, Mr. Simić submits that such a scenario is based on the assumption that Mr. Prcać will be willing to testify which, the Defence submits, is highly unlikely considering that Mr. Prcać did not testify in his own case; that, in any event, Mr. Prcać may be requested to state whether he intends to do so;

CONSIDERING that the Registrar has the primary responsibility in the determination of matters relating to the assignment of counsel under the legal aid system of the Tribunal, in accordance with the relevant provisions of the Rules of Procedure and Evidence (“Rules”);³ that, however, the Trial Chamber has a statutory obligation to ensure a fair and expeditious conduct of the proceedings with full respect for the rights of the accused,

NOTING that in matters involving the professional conduct of defence counsel, Rule 44 (C) of the Rules provides that, in the performance of their duties, counsel are *inter alia* subject to

³ See, in particular, Rules 44 and 45 of the Rules.

the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal (“Code of Conduct”),⁴

NOTING that Article 14 of the Code of Conduct (“Conflict of Interest”) 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:
 - (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.

NOTING that Mr. Simić, acknowledging a potential conflict of interest, followed the procedure laid out under the above provision, in that he has obtained, in writing, the consent of Mr. Meakić and Mr. Prcać to represent both of them,

NOTING that Mr. Meakić and Mr. Prcać have each filed a “Statement” in which both Accused consent to be represented by Mr. Simić “under the full awareness of (their) legal,

⁴ As Amended on 12 July 2002, IT/125/Rev. 1

material and moral responsibility”,⁵ also stating that they see no conflict of interest; and the Registrar has concluded that both accused have been fully informed of the existence and extent of any potential conflicts of interest;

CONSIDERING that, in the Chamber’s view, there is no need for both Accused to be advised by independent counsel of the consequences of Mr. Simić representing both of them (first submission),

CONSIDERING that, in his statement, Mr. Meakić does not deny that he was in a position of authority at the Omarska camp, also acknowledging that Mr. Prcać spent some time at the Omarska camp under his command; that the Defence reiterates this position in its Response and, therefore, in the Trial Chamber’s view, there is no basis for the second submission as to conflict of interest, that is, in relation to the question of effective command and control of the Omarska camp,

CONSIDERING that a conflict of interest would arise in relation to the third submission since, were Mr. Prcać to be called to testify in the Meakić case, it would be difficult for Mr. Simić, as counsel of both Accused, to reconcile his duty to protect the best interests of each Accused; indeed, he would have to cross-examine Mr. Prcać,

CONSIDERING however that it is not appropriate at this stage for the Trial Chamber to make a determination as to whether the consent of the Accused would irreversibly prejudice the administration of justice,⁶ since there is no certainty that Mr. Prcać will testify in the Meakić case,

CONSIDERING therefore, that the Trial Chamber is not satisfied that the assignment of Mr. Simić as defence counsel to Mr. Meakić would lead to prejudice of the kind described above,

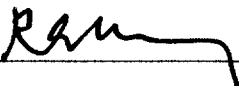
PURSUANT to Rule 54 of the Rules,

⁵ See Attachments to Registrar’s Decision of 7 July 2003 assigning Mr. Jovan Simić as counsel for the Accused on a temporary basis for the purpose of representing him during the initial appearance on 7 July 2003.

⁶ Rule 14 (E)(ii)(2) of the Code of Conduct.

HEREBY UPHOLDS the Registrar's Decision of 30 July 2003 appointing Mr. Jovan Simić as counsel for the Accused Željko Mejačić.

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



Richard May
Presiding

Dated this eighteenth day of September 2003
At The Hague,
The Netherlands

[Seal of the Tribunal]