



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: 17 June 2004
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Bert Swart

Registrar: Mr. Hans Holthuis

Order of: 17 June 2004

PROSECUTOR
v.
ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ

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

The Office of the Prosecutor:

Ms. Ann Sutherland

Counsel for the Accused:

Mr. Jovan Simić, for Željko Mežakić
Ms. Sanja Turlakov, for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić, for Dušan Fuštar
Ms. Slobodanka Nedić, for Duško Knežević

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 (“the International Tribunal”),

BEING SEISED of a confidential “Prosecution’s Second Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić” filed on 24 February 2004 (“the Second Motion”), in which the Office of the Prosecution (“Prosecution”) requests the Trial Chamber to “act now” and resolve the conflict of interest regarding Defence counsel, Mr. Jovan Simić, currently assigned as lead counsel to represent the accused Željko Mejačić in the present case, and also counsel to the accused Dragoljub Prcać in the case *Prosecutor v. Kvočka et al.*, currently on appeal,¹ by requesting the Registrar to withdraw Mr. Simić’s assignment from one of the two cases,

NOTING the following submissions in the Second Motion:

- (i) in the present circumstances, the Prosecution has not been in a position to discuss with Mr. Prcać his willingness to participate in additional interviews with the Prosecution pursuant to Rule 63 (A) of the Rules, and testify voluntarily, without the presence of Mr. Simić unless, the Prosecution submits, the accused voluntarily and expressly agrees to proceed without counsel present,
- (ii) in response to the Prosecution’s application to amend its Rule 65ter witness and exhibit lists,² Mr. Simić has put on record his objection to Mr. Prcać appearing as a witness in the *Mejačić* case, which, the Prosecution submits, demonstrates that the matter is now ripe for determination as it is interfering with the orderly progression of the case, as Mr. Simić cannot give independent and objective advice to Mr. Prcać as to whether he should agree to testify and to participate in additional interviews with the Prosecution,
- (iii) Mr. Simić cannot at the same time objectively advise Mr. Mejačić about effectively challenging the parts of Mr. Prcać’s testimony without compromising his representation of Mr. Prcać,

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

² *Prosecutor v. Mejačić et al.*, Case No. IT-02-65-PT, “Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness and Exhibit Lists”, 18 February 2004.

- (iv) in the current circumstances, allowing Mr. Simić to continue to represent both accused Mejakić and Prcać would be detrimental to the right of both men to make informed decisions based solely on their own best interests,

NOTING the confidential “Defence Response to Prosecution Second Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić” filed on 5 March 2004, in which Mr. Simić submits that apart from seeking a different remedy - that Mr. Simić be removed from one of the two cases, as opposed to being removed from this specific case -, the Prosecution has failed to raise any new issue,

NOTING the “Decision on Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić” issued by this Trial Chamber on 18 September 2003 (“First Decision”), in which the Trial Chamber recognised that a conflict of interest would arise were Mr. Prcać to be called to testify in the *Mejakić* case; however, upheld the Registrar’s Decision of 30 July 2003 appointing Mr. Jovan Simić as lead counsel for the accused Mejakić, *inter alia* on the basis that lead counsel had followed the procedure laid out in Article 14 of the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal,³ the Trial Chamber considered that it was not appropriate at that stage for the Trial Chamber to make a determination since there was no certainty that Mr. Prcać would testify in the *Mejakić* case,

NOTING the Decision of the Trial Chamber granting the Prosecution’s request to have Mr. Prcać added to the Prosecution’s witness list in the *Mejakić* case⁴ which, however, denied a request to have the transcript of an interview of Mr. Prcać added to the exhibit list, on the basis that “there is no certainty that Mr. Prcać will testify in this case, so that the accused would have an opportunity to cross-examine him as to the content of his interview with the Prosecution”,⁵

CONSIDERING that the Second Motion is concerned (as was the first application) with the question of the existence of a potential conflict of interest arising from a decision of the Registrar to

³ IT/125/Rev. 1, 12 July 2002 (“Code of Conduct”). Article 14 (E) of the Code of Conduct provides: “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 necessary steps 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*” (emphasis added). *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, “Decision on Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić”, 18 September 2004.

⁴ *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, “Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness and Exhibit Lists”, 18 February 2004.

⁵ *Ibid.*

appoint Mr. Simić, already assigned lead counsel to the accused Prcać, as lead counsel for the accused Mejakić, thereby extending Mr. Simić's assignment to more than one accused at a time,

NOTING the Directive on Assignment of Defence Counsel⁶ which provides that, in principle, no counsel shall be assigned to more than one accused at a time, unless an assignment to more than one accused "would neither cause prejudice to the defence of either accused, nor a potential conflict of interest",⁷

NOTING that the Code of Conduct provides that, where a conflict of interest does arise, counsel is required either to take the necessary steps to remove the conflict, or obtain the full and informed consent of all potentially affected clients in order to continue the representation "unless such consent is likely to irreversibly prejudice the administration of justice",⁸

CONSIDERING that the latter procedure was followed by Mr. Simić and sanctioned in the Decision of the Registrar dated 30 July 2003, which stated that "the Registry has ascertained that both accused have been fully informed of the existence and extent of any potential conflicts of interest and pursuant to Article 14 (E)(ii)(2), have both signed informed waivers";⁹ therefore, in the circumstances of this case, the decision of the Registrar to assign Mr. Simić as counsel to the accused Mejakić cannot be said to have failed to comply with the requirements of the Directive,

CONSIDERING that the Trial Chamber must determine whether the consent given by both accused to be represented by Mr. Simić is likely to "irreversibly prejudice the administration of justice", a determination which, in the view of the Trial Chamber, is closely related to the integrity of the proceedings and the fairness of the trial,¹⁰

CONSIDERING that the Trial Chamber recognised in its First Decision that a conflict of interest would arise were Mr. Prcać to be called to testify in the *Mejakić* case; that following the Trial Chamber's decision to allow the Prosecution to amend its witness list to include Mr. Prcać, the Prosecution has in fact so amended its witness list; however, it does not necessarily follow that Mr.

⁶ IT/73/Rev 9, 12 July 2002. ("Directive").

⁷ Article 16 (E) of the Directive.

⁸ Article 14 (E) (ii) of the Code of Conduct.

⁹ Decision of the Registrar, Case No. IT-02-65-PT, 30 July 2003.

¹⁰ *Prosecutor v. Blagojević*, Case No. IT-02-60-AR73.4, "Ex Parte and Confidential Decision on Appeal by Vidoje Blagojević to Replace his Defence Team", 7 November 2003; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR 73.2, "Decision on Interlocutory Appeal on Motion for Additional Funds", 13 November 2003, para. 19.

Prcać will testify in this case;¹¹ indeed, the request to have the transcript of an interview of Mr. Prcać added to the exhibit list was denied on the ground that there was no certainty that Mr. Prcać would testify in this case,


CONSIDERING that the Trial Chamber is mindful of its duty to provide every reasonable and practicable facility to each party to facilitate access to evidence that may be relevant to his case; however, in the view of the Trial Chamber, there is nothing in the Statute and the Rules of the Tribunal to suggest that the Prosecution has a right to interview an accused in a particular case for the purpose of securing his testimony in another case; the argument that the Prosecution is unable to discuss with Mr. Prcać his willingness to participate in additional interviews with the Prosecution or testify voluntarily, without the presence of Mr. Simić, pursuant to Rule 63 (A) of the Rules, is thus without merit,

CONSIDERING that the Trial Chamber is not satisfied that, in the present circumstances, representation of the two accused by Mr. Simić is likely to affect the integrity of the proceedings or otherwise irreversibly prejudice the administration of justice,

PURSUANT TO Rule 73 of the Rules of Procedure and Evidence of the International Tribunal,

HEREBY DENIES the Second Motion.

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


Patrick Robinson
Presiding

Dated this seventeenth day of June 2004
At The Hague
The Netherlands

[Seal of the Tribunal]

¹¹ As noted in the decision, the only effect of the amendment was to put the defence teams on notice that that particular witness may be called to testify in these proceedings, without prejudice of the obligation on the party wishing to call the witness to take the necessary measures to secure his testimony. *See Prosecutor v Mejakic et al.*, Case No. IT-02-65-PT, "Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness and Exhibit Lists", 18 February 2004, p. 2.