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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-05-88-PT

Date: 28 September 2005

Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Decision of: **28 September 2005**

PROSECUTOR

v.

Zdravko TOLIMIR
Radivoje MILETIĆ
Milan GVERO

CONFIDENTIAL
DECISION ON APPOINTMENT OF CO-COUNSEL FOR RADIVOJE MILETIĆ

The Office of the Prosecutor:

Mr Peter McCloskey

Counsel for the Accused:

Ms Natacha Fauveau-Ivanović for Radivoje Miletić
Mr Dragan Krgović for Milan Gvero

1. Background

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 ("Tribunal") is seized of an "Appeal of the Registry's Decision Regarding the Assignment of Co-counsel" filed on 2 June 2005 by Radivoje Miletić" ("Appeal").[1] By the contested decision, communicated to Radivoje Miletić ("Accused") in a letter of 27 May 2005 ("Decision"), the Registrar, acting by the Deputy Head of the Office for Legal Aid and Detention Matters (OLAD), refused the Accused's request for the assignment of Mr Nenad Petrušić as co-counsel for his trial. On 14 June 2005 the Defence submitted an "Addendum to the Appeal of 2 June 2005".[2] On 27 June 2005, at the request of the Trial Chamber, the Registrar filed a confidential[3] "Registry Submission Pursuant to Rule 33 of the Rules of Procedure and Evidence Regarding Radivoje Miletić's Motion for Review of the Registry Decision on the Assignment of Co-counsel" ("Registry Submission"). On 29 June 2005 the Prosecution filed under seal its "Response to the Trial Chamber's Request for Comments from the Prosecution on the Issue Raised in the Registrar's Decision of 27 June 2005 Regarding Assignment of Co-counsel for the Accused Radivoje Miletić" ("Prosecution Response"). On 30 June 2005 the Defence filed a partially confidential "Request for Leave to Reply and Reply to the Submission by the Registry Concerning the Assignment of Co-counsel" ("Reply").[4] The Trial Chamber grants leave to reply and takes note of the contents of this Reply.

2. On 8 April 2005 the Accused had informed the Registry that he wished to have Ms Natacha Fauveau-Ivanović assigned as his Defence Counsel. Ms Fauveau satisfied the criteria provided by the Rules of Procedure and Evidence ("Rules") and the Directive on Assignment of Defence Counsel ("Directive") and she was assigned as the Accused's Defence Counsel on 14 April 2005. The Accused had earlier sought to have Mr Nenad Petrušić assigned as his (Lead) Defence Counsel, but by letter of 4 April 2005 he was formally advised by the Registry that this was refused because Mr Petrušić did not meet the language qualification i.e., he was not proficient in one of the two working languages of the Tribunal.

3. On 20 April 2005, Ms Fauveau, having been duly assigned as (Lead) Defence Counsel for the Accused, requested the assignment of Mr Petrušić as co-counsel pursuant to Article 16(C) (ii) of

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1 « Appel contre la décision du greffe relative à la commission du co-conseil ».
2 « Addendum à l'appel du 2 juin 2005 ».
3 On 4 July 2005 the Registry filed a "Notice of Confidential Filing" in which it informed that its Submission was to be treated as confidential.

the Directive. The Directive had been adopted by the Registrar Pursuant to Rule 44(C) of the Rules and approved by the Permanent Judges of the Tribunal. This was refused by the Decision of the Registrar ("Decision"), acting by the Deputy Head of OLAD, and was communicated by the letter dated 27 May 2005. On 2 June 2005 the Motion for Review of the Registrar's Refusal was filed.

2. The Decision

4. In the Decision, after reciting briefly the history of discussions and requests between the Accused and OLAD concerning the representation of the Accused, it was said that the Registry

> "... is unable to grant your request for the assignment of Mr Petrušić as co-counsel. The Registry believes that Mr. Petrušić's representation of General Militić would conflict with his former representation of General Krstić and, as such, would be contrary to the interests of Justice"

5. In the two paragraphs of the letter that followed, the factual basis for the conclusion about a conflict of interest is detailed. This drew on the circumstances alleged in the indictment and findings made in the earlier trial of General Krstić and in other proceedings in this Tribunal in connection with the same events. The focus was on the relationship between the Main Staff of the VRS of which the Accused is alleged to have been the most senior Operations Officer holding the post of Chief of Operations and Training, and the Drina Corps which was directly subordinated to the Main Staff at the relevant time and of which General Krstić was the Commander. It is alleged by the prosecution *inter alia* that the Drina Corps and General Krstić implemented orders and directives of the Main Staff in pursuing, in particular, an alleged Joint Criminal Enterprise to force the Muslim population out of the Srebrenica and Zepa enclaves. It is the prosecution case that the Accused was also a participant in this Joint Criminal Enterprise.

6. General Krstić was convicted after trial, and remains so after appeal, of offences, which, in part, are the same as those with which the Accused is charged. He was represented at his trial by Mr Petrušić.

7. The decision continues:

> "...The nexus between the Main Staff and the Drina Corps and the positions held by General's Militić and Krstić during the relevant period demonstrate that there is a real possibility that your client's interests require him to take a position that would be adverse to the interests of General Krstić. If this were to happen, Mr Petrušić would be placed in a conflict of interest situation."

The decision continues a little later:

> "In this case, based on the facts outlined above, the Registry has assessed that the likelihood of a conflict of interest arising is reasonably high. "

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[4] « Demande d'autorisation de réponse et la réponse aux arguments du Greffe concernant la commission du co-conseil ».

8. The Decision then analyses the likely effects on the trial and on the Defence of the Accused should an actual conflict situation arise, notes that withdrawal of co-counsel would harm the Accused's Defence and disrupt the proceedings and may prejudice the administration of justice, and observes, from experience in other cases, that a withdrawal of co-counsel can create significant delays in proceedings. For these reasons, rather than an-assignment of Mr Petrušić as co-counsel being in the interests of justice, as required by the Rules and the Directive for the Registrar to exercise his discretion to allow the assignment of Mr Petrušić, it was the conclusion of the Registrar that an assignment of Mr Petrušić would be contrary to the interests of justice.

The Decision concludes that:

> "In light of above, the waiver by General Krstić on 9 February 2005 cannot have the effect of validating the assignment of Mr Petrušić."

3. Assignment of Counsel

9. By Article 21(4)(D) of the Statute of the Tribunal an Accused has the right to "Defend himself in person or through legal assistance of his own choosing". Necessarily, of course, the right of an Accused to choose his or her counsel is limited to counsel qualified to appear before the Tribunal. Rule 44 sets out the required qualifications. They are extensive and deal in particular with the legal qualification, good standing and professional conduct of the counsel. There is a specific requirement that counsel has written and oral proficiency in one of the two working languages of the Tribunal, although, it is also provided that where the Registrar deems it to be in the interests of justice to waive this requirement, he may do so. In such an exceptional case, however, by Rule 44(D) he may impose conditions *inter alia* respecting the costs of translation and interpretation, and requiring an undertaking from counsel not to seek any extension of time by virtue of his lack of proficiency in one of the working languages of the Tribunal.

10. The present is not such a case, however, as the Accused hasn't the means to remunerate counsel of his choice. Instead, he sought the assignment of a counsel by the Registrar pursuant to the legal aid scheme of the Tribunal. This is administered pursuant to Rule 45 and the Directive; see Rules 44(C) and 45(A). For this purpose the Registrar maintains a list of counsel, who possesses additional specific competence related to the jurisdiction of the Tribunal, have at least 7 years relevant experience, and have indicated their availability and willingness to be assigned to represent persons.

4. Legal basis for review

11. By Rule 44(B) an Accused may seek a review by the President of a Decision of the Registrar to refuse to admit counsel of an accused's choice who has been retained by the Accused, but who does not meet the language requirement. In the case of the assignment of counsel to an Accused under the legal aid scheme (Rule 45), however, there is no provision for such a review by the President.

12. As the jurisprudence of the Tribunal has recognised, however, it does not follow that the Registrar's decision to refuse a requested assignment of co-counsel is altogether final. In a number of decisions in this Tribunal it has been recognised that it is inherent in the judicial function of the Tribunal that a decision of the Registrar which affects, or is likely to affect, the right of an Accused to a fair and expeditious trial or the integrity of the proceedings, may be reviewed by the Trial Chamber before which the trial is to be held, or is being held.[5]

13. It has been made clear, that this jurisdiction is limited to cases which meet those jurisdictional conditions. Even then, it is not the role of the Trial Chamber to intervene in every complaint, recognising that the Registrar has primary responsibility in the matter of the assignment of counsel and co-counsel.[6] Indeed in the *Knezević* case, it was observed that a Chamber should only exercise its power relating to the assignment of counsel "in exceptional cases".[7]

14. In a case where a jurisdictional basis exists for a Trial Chamber to entertain a motion to review the refusal of the Registrar to assign a requested co-counsel, some guidance as to the approach to a review of the merits by the Trial Chamber and the standard to be applied in determining whether to interfere with a decision of the Registrar, may be found in the Appeals Chamber's decision in *Kvočka et al* where it was said

> "The administrative decision will be quashed if the Registrar has failed to comply with the legal requirements of the Directive. This issue may in the particular case involve a consideration of the proper interpretation of the Directive. The administrative decision will also be quashed if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision or if he has failed to take into account relevant material or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached (the "unreasonableness" test). These issues may in the particular case involved, at least in part, a consideration of the sufficiency of the material before the Registrar, but (in the absence of unreasonableness) there can be no interference with the

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5 *Prosecutor v Enver Hadžihasanović et al,* Case No.: IT-01-47-PT, Decision on Prosecution's Motion for Review of the Decision of the Registar to Assign Mr Rodney Dixon as Co-Counsel to the Accused Kubura, 26 March 2002, paras 23-24. Note also Article 13(B) of the Directive which appears, however, to be directed to the case of a refusal to assign any counsel.

6 *Ibid,* paras 23-24; *Prosecutor v Milan Martić,* Case No.: IT-95-11-PT, Decision on Appeal against Decision of Registry, 2 August 2002, p 6.

7 *Prosecutor* v *Duško Knežević,* Case No.: IT-95-4-PT and IT-95-8/1-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002, p 4.

> margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled." [8]

15. As the Chamber understands the submissions of the Accused their effect is that the decision of the Registrar should be quashed, and Mr Petrušić should be assigned as co-counsel by the Chamber, on two bases each of which is within the principles enunciated in the *Kvočka et al* decision. First, it is contented the Registrar's decision involves a rejection of the Accused's legal right to conduct his defence by counsel of his own choosing and, secondly, it is argued he reached wrong conclusions about the existence and significance of the conflict of interest identified by the Registrar and therefore failed properly to determine whether the interests of justice would be served by the assignment of Mr Petrušić.

16. The first of these contentions is based on a misconception of the legal position. As has been indicated, the Accused has not the financial means to retain his own counsel. The counsel he selected to conduct his defence from the list of qualified counsel who were prepared to act under the legal aid scheme at the Tribunal has been assigned to him. In this case, the Registrar, in the exercise of his discretionary power to assign counsel to the Accused under the legal aid scheme, not only took into account the Accused's expressed preference to be assigned Ms Fauveau as his (lead) defence counsel, but gave full effect to Accused's expressed preference and assigned Ms Fauveau. Strictly, the legal position with respect to the assignment of Ms Fauveau as (lead) defence counsel is that described in the *Šljivančanin* decision where it was said by the President of the Tribunal:

> "19. Mr Šljivančanin claims that the registrar's refusal to assign his preferred attorneys violates Mr Šljivančanin's right to counsel of his own choice, guaranteed by Article 21, para 4 of the Statute. The claim may be quickly rejected.
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> 20. This case concerns the assignment of counsel to be paid for by the Tribunal. Whatever may be the scope of the right to counsel of ones own choosing when a defendant hires his own counsel, the right to publicly paid counsel of ones own choice is limited. The ICTR Appeals Chamber and several ICTY Trial Chambers have repeatedly held that, while the Registrar should normally take a defendant's preferences into account, a defendant must accept any duly qualified counsel appointed from the list maintained by the Registrar. I fully concur in that view."[9]

17. Thus, while it is not a matter of legal right, well founded notions of fairness are reflected in the view expressed in the *Šljivančanin* decision, and in the earlier Trial Chamber decision. In *Martić* it is suggested that the Registrar in the exercise of his discretionary power to assign counsel

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[8] *Prosecutor v Miroslav Kvočka et al,* Case No.: IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Lefal Aid from Zoran Žigić, 7 February 2003, para 13.

[9] *Prosecutor v Vesselin Šljivančanin,* Case No.: IT-95-13/1-PT, Decision on Assignment of Defence Counsel, 20 August 2003, paras 19-20 (footnotes omitted).

should respect the choice of an accused unless there are well-founded reasons not to assign the chosen counsel.[10]

18. It is to be noted that this concern for fairness appears to be in general keeping with the approach of the European Court of Human Rights, in respect of Article 6(3)(c) of the European Convention of Human Rights, as expressed in *Croissant v Germany,* where it was said

> "It is true that Article 6(3)(c) entitles 'everyone charged with a criminal offence' to be defended by counsel of his own choosing. Nevertheless, and not withstanding the importance of a relationship of confidence between the lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the Accused be defended by counsel appointed by them. When appointing defence counsel the National Courts must certainly have regard to the defendant's wishes; indeed, German Law contemplates such course. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice".[11]

19. It is to be emphasised, however, that the issue in this case concerns the assignment of co-counsel, not the (lead), defence counsel. Under the terms of Article 16 of the Directive, it is the lead counsel, rather than the Accused, who seeks the assignment of a co-counsel. There is a different emphasis in the case of the appointment of co-counsel. The primary focus is on the needs of the Accused's lead counsel for suitable assistance by counsel chosen by the lead counsel, rather than on the preferences of the Accused. Indeed, it has been held by the Appeals Chamber in *Blagojević* that lead counsel may seek the appointment of a nominated co-counsel without the Accused's agreement to the choice of co-counsel. It was said by the Appeals Chamber:

> "As already stated, the appointment of co-counsel is a decision to be made by Counsel pursuant to Article 16 of the Directive. In this respect, provided the Registrar is satisfied that the nominated person meets the requirements of Article 14 of the Directive, the propriety of Counsel seeking the appointment of a particular person does not turn upon the awareness of an Accused of the likelihood of such an appointment or upon the agreement of an Accused to that appointment."

20. It was further said

> "Further, while the selection of Co-counsel is a matter which falls to lead Counsel under Article 16 of the Directive, the selection of lead Counsel is a matter which falls to the Registrar under Article 14 of the Directive. The Registrar may take into account an Accused's preferences, as he did in the appointment of lead counsel in this case, but it is within the Registrar's discretion to override that preference if he considers that it is in the interests of justice to do so." [12]

21. The apparent effect of these decisions is that the assignment of co-counsel is not a matter involving the legal right of the Accused to be represented by counsel of his own choosing.

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[10] *Prosecutor v Milan Martić,* Case No.: IT-95-11-PT, Decision on Appeal against Decision of Registry, 2 August 2002, pp 5-6.

[11] *Croissant v Germany,* EUR.CT.H.R. Judgement, 25 September 1992, Series A No. 237-B, para 29.

[12] *Prosecutor v Vidoje 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, paras 21and 22. This decision was made before the July 2004 amendments to Rules 44 and 45 but those amendments do not appear to affect these observations of the Appeals Chamber.

Nevertheless, as they also indicate, considerations of fairness emphasise the desirability of the Registrar also taking into account any preference expressed by the Accused, as to the co-counsel to be assigned. In a case such as the present in which in fact the lead counsel and the Accused each favour the assignment of Mr Petrušić, the Registrar would normally be expected to take into account the Accused's preference and would no doubt give effect to it unless, in the view of the Registrar, there was good reason for not doing so. This statement of the position is subject, however, to a further material consideration in a case in which, as in this case, the preferred co-counsel is not qualified to act as counsel before the Tribunal.

5. Language qualification

22. In the present case the assignment of co-counsel requested by Ms Fauveau is also most materially affected by the language qualification requirement of Rule 44(B) which is incorporated into the legal aid scheme by Rule 45(B). This is also reflected in the Directive. It is open to the Registrar under Rule 44(B) to admit a counsel who does not speak either of the two working languages of the Tribunal, but who speaks the native language of the Accused, but the Registrar may only do so at the request of the Accused *and* where the interests of justice so *demand.* Necessarily, the interests of justice must be viewed in light of the particular case.

23. In this case, while Mr. Petrušić is not proficient in either of the working languages of the Tribunal, he is proficient in the Accused's native language, as also is the assigned lead counsel, Ms Fauveau. Thus, this is not a case in which, as has at times been the case, the assignment of a co-counsel who speaks the native language of the Accused has the desirable advantage of facilitating adequate communication between the Accused and lead counsel. The Chamber notes that Mr Petrušić has been placed on the list of counsel maintained by the Registrar pursuant to Article 14(C) of the Directive. This is possible because Mr Petrušić speaks "a language spoken in the territory over which the Tribunal has jurisdiction". However, in order for counsel on that list to be assigned as co-counsel in a particular case, the counsel must speak the "native language" of the Accused as required by Article 16(C) (ii) of the Directive and Rule 44(B), however, under each of those provisions of the Rules and the Directive, this can only occur where the Registrar is persuaded that it is in the interests of justice to do so. Unless the Registrar is so persuaded and excercises his discretion to waive the language qualification in this case, Mr Petrušić is not qualified to appear before the Tribunal.

6. Discussion of merits

24. In the present case the factors principally relied in the appellant's submissions as justifying the conclusion that the assignment of Mr Petrušić is in the interests of justice are first, the "Counsel

of Choice" contention which, as discussed earlier, is founded on a mistaken appreciation of the legal position as developed in the decisions of this Tribunal. Even so, it remains of relevance as indicated by the decisions, although, as discussed later, in this case that relevance is only potential because of the language qualification issue. Secondly, it is submitted that because Mr Petrušić has had the experience of representing General Krstić on the trial of charges some of which were the same or similar to those facing the Accused, he has a familiarity with the geographic region and many of the relevant facts and background circumstances. While this second submission is factually correct, it does not appear to the Chamber to be of significant weight, as these are matters with which experienced counsel will readily cope during routine preparation of a case. It has not been shown that there will be any significant ongoing advantage for the conduct of the trial, or that there would be any significant saving of time by the defence team, by virtue of Mr Petrušić's earlier representation of General Krstić.

25. It is also submitted that Mr Petrušić's ability to speak the native language of the Accused would facilitate communication with the defence team. In this regard it is also submitted that this is a relevant consideration that was not specifically mentioned in the Registrar's decision. While it may be of some convenience for a co-counsel to be able to speak the Accused's language, it is not apparent that this is a consideration of significant force, given that the lead counsel Ms Fauveau also speaks the native language of the Accused. Clearly this would be of much greater significance if lead counsel did not speak the Accused's language. In the Chamber's view, however, the Registrar appears to have been in error in one respect, which in itself satisfies the jurisdictional requirement identified earlier, in his consideration of the relevance of this issue to the exercise of the discretion to waive the language qualification. Given the legislative history of Rules 44 and 45, and of the Directive, especially the significant changes in July 2004, it appears correct to say, as the Registrar noted, that a significant reason for the continued presence of the exception is to enable the Registrar to assign a co-counsel who speaks the language of an Accused in a case where the lead counsel does not. However, the Chamber does not consider that there is justification to be found in the Rules or the Directive, or their history, for the further view that this is *the only circumstance* in which the discretion to waive the language qualification is justified. That appears to be the view taken by the Registrar. This appears to be too narrow an understanding of the discretion. The submissions of counsel for the Accused in this respect are well founded. It does not necessarily follow, of course, that there are circumstances in the present case which satisfy the interests of justice exception so as to enable the Registrar to waive the language qualification to allow the assignment of Mr Petrušić. That is the issue the Chamber will focus on as it considers the other issues relevant to this review of the Registrar's decision.

26. The significant countervailing consideration to Mr Petrušić's ability to speak the Accused's language remains that Mr Petrušić is not proficient in either of the working languages of the Tribunal. Hence, while he may speak to the Accused, and while he may be able to follow aspects of the proceedings by virtue of the interpretation into the language of the Accused, Mr Petrušić is unable to follow other significant aspects of the proceedings e.g., live transcripts in court, pleadings, motions, written submissions etc., and will be dependent on lead counsel in these respects. Indeed, where a co-counsel is not able to perform the full range of the functions of counsel because of lack of proficiency in one of the working languages of the Tribunal, it is rather inevitable that there may be unnecessary disruption or delay to the trial in the event that lead counsel is not able to continue (whether permanently or temporarily). The Chamber is not persuaded that the interests of justice, in so far as the language proficiency of Mr. Petrušić is concerned, tell positively in favour of the assignment of Mr Petrušić.

27. Rather than seeing advantage to the interests of justice in the earlier representation of General Krstić, the Registrar, in the Decision, was persuaded that it presented a risk that was reasonably high of a conflict of interest. This led the Registrar to the conclusion that the assignment of Mr. Petrušić would in fact be contrary to those interests.

28. Guidance is provided to counsel concerning conflicts of interest in the Code of Professional Conduct for Counsel Appearing before the International Tribunal ("Code of Conduct"). Among other cases of such conflict, the Code deals with a situation where "the matter is the same or substantially related to another matter in which counsel had formerly represented another client ("former client"), and the interests of the client are materially adverse to the interests of the former client" (Article 14(D)(iii)). Pursuant to that provision, the counsel concerned shall not represent the client with respect to the matter.

29. The Registrar's concern arose in particular because of the similarity of the charges against the Accused and General Krstić and because they relate to the same events. Further, the Accused is alleged to have participated in the same joint criminal enterprise. It was found in the *Krstić* case that there was co-operation between the Main Staff, in which the Accused held a senior position,[13] and the Drina Corps, commanded by General Krstić.[14] The identity of much of the factual basis to which the Indictment against the Accused refers, and the facts underlying the conviction of General Krstić, are factors which, in the view of the Chamber, do clearly give rise to a potential conflict of interest.

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[13] Indictment, para 6.

[14] *See Prosecutor v Radislav Krstić*, Case No.: IT-98-33: Trial Judgement, 2 August 2001, paras 266, 328-331, and Appeals Judgement, 19 April 2004, paras 47 and 54.

30. Contrary to submissions to this Chamber, the Registrar's decision appears to set out in reasonable detail the factual basis which persuaded the Registrar of a clear potential for a conflict of interest in this case. It is true, as the defence submits that Operation Krivaja 95 referred to by the Registrar is not expressly referred to in the present indictment. Given the nature of the prosecution case, however, it is not apparent that the Registrar's reliance *inter alia* on this has led the Registrar to have regard to an irrelevant consideration. As it was said in the Decision, the Registrar was persuaded that the nexus between the Main Staff and the Drina Corps and by the positions held by the present Accused and General Krstić at the time relevant to the indictment, give rise to a "real possibility" of a conflict of interest. In the circumstances, and having a regard also to matters discussed later in this decision, the Chamber is not persuaded that the Registrar, in reaching this conclusion, took into account irrelevant material, or that the conclusion he reached was one which no sensible person who had properly applied his mind to the circumstances could have reached. Hence, the Chamber is not persuaded that in this respect the Registrar fell into a factual error.

31. There are matters, however, which have not been expressly referred to in the Decision of the Registrar, which appear to the Chamber to be relevant to the question of the degree of risk of a conflict arising. First, the case against General Krstić in this Tribunal has been concluded. It may not be tried again in respect of those same offences. This, of course, in some respects lessens the prospect of the interests of General Krstić being now adversely affected by the present proceedings, especially as there is little practical prospect of any further indictment against General Krstić being dealt with by this Tribunal. However, given the nature of the factual basis of the charges for which General Krstić was tried, it cannot be said that the indictment against General Krstić has by any means exhausted charges that might be brought against him in respect of this episode. It must be borne in mind that there are other national jurisdictions, in which prosecutions are being pursued for war crimes and crimes against humanity arising from this tragic period of history in the Balkans. It cannot be said, therefore, that General Krstić can no longer be at risk of prosecution.

32. There is also a consent by General Krstić to Mr. Petrusić acting for the Accused. The Registrar did consider this, but was persuaded that if a conflict of interest did arise, the potential effect on the Accused's defence, and the proceedings and the administration of justice, was such that the consent should not prevail.[15] It is noted that it was held in the *Prlić* Appeals Decision that consent of a former client to his counsel for representation of an Accused is not conclusive of there being no conflict of interest. [16]

[15] Article 14(E) (ii) (2) of the ICTY Code of Conduct.

[16] *Prosecutor v. Jadranko Prlić et al.*, Case No.: IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić against Trial Chambers's Decision on Request for Appointment of Counsel, 24 November 2004, para 27, *Prosecutor v. Milan Martić,* Case no. IT-95-11-PT, Decision on Appeal against Decision of Registry, 2 August 2002, p 7.

33. In further support of this Motion for the Review of the Registrar's decision, the Accused provided to this Chamber a consent of the present Accused to Mr Petrušić being assigned. This consent was given in the knowledge that Mr Petrušić acted for General Krstić. Also provided was a declaration of Mr Petrušić to the effect that there is no information he had from General Krstić which "did not come to light" in the Krstić trial. These declarations were not provided to the Registrar so they did not form part of the material considered in his decision. Even so, consent of the present Accused is of no relevance to the present issue as the point of concern is whether, by participating in the defence of the Accused, Mr Petrušić will be led into conflict with his professional responsibilities to his former client General Krstić. With regard to the declaration of Mr Petrušić we would assume that he would not be agreeable to being assigned as co-counsel if he was aware of a conflict because of confidential information he had from General Krstić that could be relevant to the defence of the Accused. Such confidential information is not, however, the only basis on which a conflict of interest can be reasonably anticipated in the present circumstances, even if it were fair and reasonable to expect that Mr Petrušić would be in a position to anticipate reliably all that might arise in the pending trial and the possible relevance to it of confidential information he gathered from any source of defending General Krstić.

34. The submissions of the Parties have sought to anticipate some situations that might give rise to actual conflict of interest in the pending trial. It is apparent from these that there is a prospect that General Krstić himself may be called as a Prosecution witness, at least if there is a joinder of two other accused with General Miletić as is to be sought by the prosecution. There is also a prospect that Mr Petrušić may be called as a witness to establish the provenance of certain documents he tendered in the trial of General Krstić and which are considered relevant to the Prosecution case against General Miletić. There are a number of uncertainties affecting each of these prospects but, had they been known to the Registrar, they would each properly have counted as demonstrating the potential for a conflict of interest and is increasing the prospect of a conflict arising. There was also much advanced by way of submission about the possibility of an agreement with Prosecution leading to a plea of guilty by General Miletić. The Prosecution observed that normally, in such a case, a condition required in such an agreement is cooperation with the Prosecution including, where appropriate, giving evidence in other cases. What General Miletić might be able to say with respect to General Krstić is, of course, presently unknown to Mr Petrušić. The Chamber would also observe that a submission was advanced in relation to these possible scenarios that Mr Petrušić, if assigned as co-counsel, need not be involved in the cross-examination of General Krstić or in any plea agreement negotiations. This submission appears to the Chamber to involve too limited an understanding of the obligations of counsel to an accused whom he or she

represents or has represented, whether as co-counsel or counsel. The conduct of the defence cannot be compartmentalised, as is suggested, to get around a conflict situation.

35. In the Chamber's view the most that can be said, as a consequence of a consideration of the matters that were before the Registrar but not expressly considered in the Decision, and also, the matters that have since been placed before this Trial Chamber, is that while there remains a clear potential for a conflict of interest should Mr Petrušić be assigned as co-counsel, the assessment by the Registrar that the likelihood of such a conflict arising is reasonably high would appear to overvalue that likelihood. The potential consequences nevertheless remain significant, should conflict actually arise.

36. It is important to recall that it is only if the Registrar is satisfied that it is in the interests of justice to waive the language requirement that it is possible, pursuant to the Rules and the Directive, for the Registrar to assign Mr Petrušić as co-counsel. In this case, even if the potential for a conflict of interest to arise was over-valued in the assessment of the Registrar, it appears to the Chamber that nothing considered in the Registrar's decision, or that was placed before the Registrar, or that is now submitted to this Chamber, demonstrates any factor or combination of factors of persuasive force for concluding that the assignment of Mr Petrušić as co-counsel would further the interests of justice in this particular case. Unless the Registrar, or this Chamber on review, is persuaded that it is in the interest of justice to waive the language requirement, Mr Petrušić is not qualified to be assigned as co-counsel.

37. This Chamber is not persuaded by anything that was before the Registrar, or by the additional matters that have been raised before it, that the interests of justice would be served by waiving the normal language qualification in this case.

7. Disposition

38. For these reasons the Trial Chamber dismisses the Motion for Review of the Registrar's Decision.

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

Dated this twenty-eighth day of September 2005,

At The Hague

The Netherlands

Judge Kevin Parker

Presiding Judge

[Seal of the Tribunal]