LECTURE ON CONFLICTS OF INTEREST

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Preface:

Summaries of all major ICTY and ICC decisions concerning conflicts of interest follow below. They are intended to supplement the lecture material provided. Registry decisions have generally been excluded, except where the Registry Decision in question was particularly clear concerning the standard it applied to determine whether counsel could be assigned. The cases have been briefed primarily to demonstrate the malleable and various standards employed at the ICTY and ICC. The reader would be well-advised to thoroughly read and analyze the cases themselves.

ICTY CASES

I. Conflicts arising because counsel may be called as a witness

***Prosecutor v. Blagoje Simić et al.*, IT-95-9-T, Decision on Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević, 25 March 1999**[1]

FACTS:

The OTP sought to resolve a conflict of an alleged conflict of interest regarding Mr. Borislav Pisarević, Defence Counsel for the Accused Zarić, prior to the commencement of the trial by determining whether Mr. Pisarević is likely to be called as a witness at trial.[2]

The OTP submitted that Mr. Pisarević had personal knowledge of certain facts to be addressed at the trial which made him a compellable witness, both for the Accused and the OTP, and interfered with his ability to act as Defence Counsel and to perform his duties with impartiality.[3]

Specifically, the OTP submitted that Mr. Pisarević allegedly concealed a prospective witness, Sulejman Tihić in his home on the night of the alleged Serb attack on Bosanski Šamac and that he spoke with two Accused, Zarić and Blagoje Simić, about whether Mr. Tihić should surrender to Serb authorities. Mr. Pisarević was also allegedly present when Mr. Tihić was allegedly arrested at gunpoint by the Accused Todorović. Further, in his capacity of President of the Party of Democratic Changes in Bosanski Šamac, the OTP alleged that Pisarević attended several meetings where political issues were discussed among ethnic groups, and witnesses would testify that he frequently took the side of the Serbs and that he had advance knowledge of the Serb attack on Bosanski Šamac.[4]

The OTP argued that if Mr. Pisarević were called as a witness during trial then a conflict of interest would arise under Article 16 of the 1997 ICTY Code of Professional Conduct for the Defence Counsel Appearing before the International Tribunal ("1997 ICTY Code of Conduct"), which states that "Counsel must not act as advocate in a trial in which the Counsel

[1] *Prosecutor v. Blagoje Simić et al.*, IT-95-9, Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević, 25 March 1999 ("Simić Decision"), *available at* http://www.icty.org/x/cases/simic/acdec/en/90325DS56369.htm.
[2] *Id*., para. 1.
[3] *Id*., para. 2.
[4] *Id*., para. 3.

is likely to be a necessary witness except where the testimony relates to an uncontested issue or where substantial hardship would be caused to the Client if that Counsel does not so act."[5]

The OTP submitted that in the alternative, the Trial Chamber should determine whether an informed waiver of the conflict by all the Accused would be sufficient to withstand scrutiny on appeal if thereafter, Zarić claimed that he had been denied a fair trial.[6]

ISSUE:

Whether a Counsel is precluded from representing an Accused due to a conflict of interest where he had personal knowledge of and was intimately involved in many of the events at issue in the trial.

DECISION:

The Trial Chamber held that in order for Mr. Pisarević to continue his representation of Zarić he must obtain, within 7 days of the decision, Zarić's full and informed written consent, and transmit it to the Trial Chamber.[7]

STANDARD:

The Trial Chamber held that a conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice.[8]

The Trial Chamber found the mechanisms in Article 9(5) of the 1997 ICTY Code of Conduct appropriate in dealing with conflicts of interest at this stage.[9]

RATIONALE:

Based on the OTP's assertion that Mr. Pisarević may have concealed a witness, the Trial Chamber found it conceivable that Mr. Pisarević could be called to testify by the OTP or by one of the Accused other than Zarić. The Trial Chamber saw a likelihood, especially from

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[5] *Id.*
[6] *Id.*, p. 3.
[7] *Id.*, p. 10.
[8] *Id.*, p. 6.
[9] *Id.*, p. 9; 1997 ICTY Code of Conduct, Art. 9(5):

> Where a conflict of interest does arise, Counsel must –
> (a) promptly and fully inform each potentially affected client of the nature and extent of the conflict; and
> (b) either:
> (i) take necessary steps to remove the conflict; or
> (ii) obtain the full and informed consent of all potentially affected clients to continue the representation, so long as Counsel is able to fulfil all other obligations under this code.

what Mr. Pisarević had described regarding his knowledge of relevant events, that he would be a necessary witness with respect to some events. On the basis of those submissions, the Trial Chamber found that there was a potential conflict of interest arising at the trial between Mr. Pisarević and his client.[10]

The Trial Chamber found that the consent of Mr. Pisarević's client was compatible with the continued discharge of Mr. Pisarević's other obligations under the 1997 ICTY Code of Conduct. In determining that Article 9(5)(b)(ii) of the 1997 ICTY Code of Conduct is appropriate, the Trial Chamber gave due weight to the right of the Accused to counsel of his choice. Mr. Pisarević was therefore required to obtain the full and informed consent of his client to continue the representation.[11]

[10] Simić Decision, p. 7-8.
[11] *Id.*, p. 9.

***Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Conflict of Interest of Attorney Miroslav Šeparović, 27 February 2007**[12]

FACTS:

The issue of an alleged conflict of interest stemming from Mr. Šeparović representing Markač as Lead Counsel was first raised by Gotovina in response to an OTP motion to join the indictments of *Prosecutor v. Gotovina* and *Prosecutor v. Čermak & Markač*. Gotovina submitted that Mr. Šeparović's representation of Markač created a conflict of interest because Mr. Šeparović, who was Minister of Justice of Croatia at the time of the alleged crimes, could provide exculpatory evidence that Gotovina had no authority to investigate or punish military subordinates for criminal acts.[13] In its decision on joinder, the Trial Chamber did not rule as to whether a conflict of interest existed, finding that if Mr. Šeparović could provide important testimony for Gotovina, he could equally be expected to provide relevant testimony in Markač's own case, even if the cases were not combined. "Therefore, while a conflict of interests on the part of Mr. Šeparović may arise if the assertions of the Gotovina Defence are true, this conflict would not be resolved if the Motion is denied."[14]

The Trial Chamber's decision was affirmed on Appeal, with the Appeals Chamber stating that it:

> considers that under Article 26 of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, this conflict of interests to Šeparović is a basis for requesting withdrawal as Counsel for Markač given that 'Counsel shall not act as an advocate in a proceeding in which counsel is expected to be a necessary witness except where (i) the testimony relates to an uncontested issue; (ii) the testimony relates to the nature and value of legal services rendered in the case; or (iii) substantial hardship would be caused to the client if that counsel does not so act.' Šeparović is not expected to testify as to an uncontested issue or with regard to his legal services. Thus, unless Šeparović can demonstrate that his withdrawal would cause a substantial hardship to Markač, the Appeals Chamber expects that he will withdraw, whether representing Markač in a joint trial with Gotovina or in a separate trial only with Čermak, in compliance with his ethical and professional obligations.[15]

[12] *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Conflict of Interest of Attorney Miroslav Šeparović ("Šeparović TC Decision"), 27 February 2007, *available at* http://www.icty.org/x/cases/gotovina/tdec/en/070918a.pdf.

[13] *Prosecutor v. Gotovina, Prosecutor v. Čermak & Markač*, IT-03-73-PT, IT-01-45-PT, Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006, para. 65.

[14] *Id*., paras. 65-66.

[15] *Prosecutor v. Gotovina, Prosecutor v. Čermak & Markač*, IT-03-73-AR73.1, IT-03-73-AR73.2, IT-01-45-AR73.1, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006, paras. 33-34 (quote para. 34).

Markač requested clarification from the Appeals Chamber, asserting that Mr. Šeparović was not a necessary witness in the joint case and withdrawal would pose substantial hardship to him, and requesting clarification as to whether to bring the matter before the Trial or Appeals Chamber. The Appeals Chamber clarified that it had not made a finding as to actual conflict of interest and "decisions on matters relating to the calling of witnesses and assignment of counsel at trial fall squarely within the discretion of the Trial Chamber…."[16]

In bringing the matter before the Trial Chamber, Mr. Šeparović again asserted that he was not a necessary witness because other potential witnesses could testify in his stead. He also claimed that he did not have any conversations regarding Operation Storm with President Tudjman or the Accused in the case. Therefore, if he were to be called as a witness, it would fall under Article 26 of the 2006 ICTY Code of Conduct's[17] exceptions that allow Counsel to be called as a witness, without having to withdraw.[18] Mr. Šeparović also argued that to remove him as Lead Counsel for Markač would cause hardship to Markač.[19]

The Disciplinary Counsel of the Association of Defence Counsel Practising before the ICTY ("ADC") issued an advisory opinion identifying potential and foreseeable conflicts of interest due to Mr. Šeparović's representation of Markač.[20]

The OTP asserted that it was necessary for the Trial Chamber to act swiftly to maintain the integrity of proceedings and avoid a conflict of interest.[21]

ISSUE:

Whether a lawyer can act as Lead Counsel for an Accused, in a case in which the lawyer is alleged to have had a personal interest and was likely to be called as a witness.

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[16] *Prosecutor v. Gotovina, Prosecutor v. Čermak & Markač*, IT-03-73-AR73.1, IT-03-73-AR73.2, IT-01-45-AR73.1, Decision on Appellant Mladen Markač's Motion for Clarification, 12 January 2007.

[17] ICTY Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 Rev. 2, 29 June 2006 ("2006 ICTY Code of Conduct").

[18] *Id.* Article 26 states:

> Counsel shall not act as an advocate in a proceeding in which counsel is likely to be a necessary witness except where:
> (i) the testimony relates to an uncontested issue;
> (ii) the testimony relates to the nature and value of legal services rendered in the case; or
> (iii) substantial hardship would be caused to the client if that counsel does not so act.

[19] Šeparović TC Decision, p. 7.

[20] *Id.*, p. 2-3.

[21] *Id.*, p. 3.

DECISION:

The Trial Chamber found that there was a conflict of interest because:

1. Mr. Šeparović had personal interest in the case which would disqualify him as Counsel under Article 14 (D)(iv)(2); and

2. Because of his personal knowledge, Mr. Šeparović is likely to be called as witness.[22]

The Trial Chamber warned Mr. Šeparović that he had jeopardized his client's interests by not withdrawing earlier in the proceedings and had failed to meet the standard of professional ethics required in the performance of his duties before the Tribunal.[23]

STANDARD:

The standards used in this case were:

Article 14(D) (iv)(2) of the 2006 ICTY Code of Conduct, which states:[24]

> Counsel or his firm shall not represent a client with respect to a matter if: … Counsel's professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected by: … Counsel's own financial, business, property or personal interests.

And, Article 26 of the 2006 ICTY Code of Conduct, which states:[25]

> Counsel shall not act as an advocate in a proceeding in which counsel is likely to be a necessary witness except where:
> (i) the testimony relates to an uncontested issue;
> (ii) the testimony relates to the nature and value of legal services rendered in the case; or
> (iii) substantial hardship would be caused to the client if that counsel does not so act.

RATIONALE:

The Trial Chamber considered Article 14(D)(iv)(2) of the 2006 ICTY Code of Conduct and stated that it could not accept Mr. Šeparović's judgment as Lead Counsel, because his judgment was likely to be affected by personal interest, given that Mr. Šeparović had been Minister of Justice at the time.[26]

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[22] *Id.*, p. 10.
[23] *Id.*
[24] *Id.*, p. 5-7.
[25] *Id.*
[26] *Id.*, p. 5.

The Trial Chamber considered that Mr. Šeparović could, as Minister for Justice, have been responsible for military courts and that he "has the potential of exculpating the Ministry of Defence and in turn, [this could] be relevant evidence for the determination of criminal responsibility of Markač."[27]

The Trial Chamber found that Mr. Šeparović's witness statements would likely be contested because his testimony as to the military justice system allegedly being under the control of the Ministry of Justice is a matter of fact to be determined at trial.[28]

The Trial Chamber considered Mr. Šeparović's claim that since the trial date was so close, his withdrawal would influence the equality of arms and that if new Lead Counsel were to be introduced at this point, he or she would not have time to properly prepare, thus causing hardship to Markač.[29] The Trial Chamber, due to the circumstances of Mr. Šeparović's own personal interest in the case, found "that the harm caused to the Accused Mladen Markač and to the integrity of proceedings … would clearly and demonstrably outweigh any hardship suffered by Markač as a result of Mr. Šeparović's withdrawal as Counsel."[30]

[27] *Id.*
[28] *Id.*, p. 4.
[29] *Id.*, p. 7.
[30] *Id.*, p. 7-8.

***Prosecutor v. Gotovina et al.*, IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest and Finding of Misconduct, 4 May 2007[31]**

FACTS:

See above summary.[32]

ISSUES:

Whether the Trial Chamber erred in:

1. finding Counsel to be a necessary witness;
2. finding that Counsel had a person interest in the case;
3. failing to find that Counsel's withdrawal would cause the Accused substantial hardship;
4. failing to find that a client's consent could resolve any conflict of interest; and,
5. failing to weigh the overall interests of justice and the Accused's right to a fair trial.[33]

DECISION:

The Appeals Chamber found that the Trial Chamber did not err and dismissed the Appeal.

STANDARD:

The standard used by the Appeals Chamber to determine whether there was a conflict of interested created by Mr. Šeparović's continued representation of Markač was:

Article 14(A) of the 2006 ICTY Code of Conduct, which states:[34]

> Counsel owes a duty of loyalty to a client. Counsel also has a duty to the Tribunal to act with independence in the interests of justice and shall put those interests before his own interests or those of any other person, organization or State.

and Article 26 of the 2006 ICTY Code of Conduct, which states:[35]

> Counsel shall not act as an advocate in a proceeding in which counsel is likely to be a necessary witness except where:

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[31] *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest and Finding of Misconduct, 4 May 2007 ("Šeparović AC Decision"), *available at* http://www.icty.org/x/cases/gotovina/acdec/en/070504.pdf.
[32] The Markač Defence also appealed against a separate decision by the Trial Chamber finding that Mr. Šeparović had engaged in misconduct. This decision was not summarized herein as it is not directly relevant.
[33] Šeparović AC Decision, para. 13.
[34] *Id.*, para. 23.
[35] *Id.*, para. 18.

(i) the testimony relates to an uncontested issue;
(ii) the testimony relates to the nature and value of legal services rendered in the case; or
(iii) substantial hardship would be caused to the client if that counsel does not so act.

RATIONALE:

The Appeals Chamber found that the Trial Chamber did not err in concluding that it reasonably foresaw the likelihood that Mr. Šeparović would be called as a witness given his former position as the Minister for Justice. It found that Article 26 of the 2006 ICTY Code of Conduct only envisages that "Counsel shall not act as an advocate in proceedings in which Counsel is *likely* to be called as a witness."[36] The Appeals Chamber noted that although the OTP had not stated it wished to call Mr. Šeparović as a witness, Gotovina had not ruled it out and the Trial Chamber had not ruled out calling Mr. Šeparović as a witness.[37]In addition, the Appeals Chamber found that should Mr. Šeparović be called to testify, the Trial Chamber is not precluded from using Mr. Šeparović's evidence in support of or against Čermak or Markač.[38]

The Appeals Chamber agreed with the Trial Chamber that Mr. Šeparović's denial that the Ministry of Justice was responsible for the Military Courts, thereby eliminating a defence strategy that would have been open to Markač, may be considered a significant indication of a conflict of interest. Therefore, the Appeals Chamber concluded that Mr. Šeparović failed to demonstrate that the Trial Chamber committed a discernable error.[39]

The Appeals Chamber found that the harm caused to Markač and the integrity of proceedings if Mr. Šeparović were to continue as his Counsel would clearly outweigh the hardship suffered by Markač as a result of Mr. Šeparović's withdrawal. Furthermore, it found that Co-Counsel would likely be able to continue to represent Markač, reducing the potential hardship caused to him.[40]

The Appeals Chamber found that even though Mr. Šeparović's withdrawal would cause a delay in the proceedings, the hardship caused to Markač would be all the greater at a later stage of proceedings, should this issue not be solved at the present stage.[41]

[36] *Id.* (emphasis in original).
[37] *Id*.
[38] *Id*., para. 19.
[39] *Id*., para. 24.
[40] *Id.*, para. 28.
[41] *Id*., para. 29.

The Appeals Chamber agreed with the Trial Chamber that consent given by a potentially affected client to remove a conflict of interest with Counsel is not conclusive of there being no conflict of interest.[42]

The Appeals Chamber had already found that Mr. Šeparović's further representation of Markač is likely to cause prejudice to the administration of justice.[43] Gotovina had not waived his right to call Mr. Šeparović as a witness and had clearly indicated that there was, in his view, a conflict of interest.[44] The Appeals Chamber found that Markač's consent to Mr. Šeparović continuing to represent him is not enough to remove this conflict of interest.[45]

The Appeals Chamber found that the choice of the Accused with regards to his Defence Counsel should be respected, unless there are sufficient reasons to override that choice.[46] In this case, the Appeals Chamber found that Mr. Šeparović had a personal interest on account of his previous position as Minister of Justice. It further found that his personal knowledge of the crimes alleged against the three Accused meant Mr. Šeparović would be likely to be called as a necessary witness for one of the Accused.[47]

[42] *Id.*, para. 32.
[43] *Id*., para. 29.
[44] *Id*., para. 33.
[45] *Id.*, para. 37.
[46] *Id.*
[47] *Id*., para. 38.

II. Conflicts arising because counsel was a former member of the Prosecution

***Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, 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, 26 March 2002**[48]

FACTS:

Mr. Rodney Dixon worked for the OTP as a Legal Advisor between January 1996 and January 2000.

On 26 November 2001, the Deputy Registrar assigned Mr. Dixon as Co-Counsel for the Accused Kubura.[49]

The OTP filed a motion alleging that the assignment of Mr. Dixon as co-counsel would cause both a conflict of interest and an undue advantage due to his prior association with the OTP.[50]

The Trial Chamber considered the following facts:

- 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 related 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 & 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.[51]

[48] *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, 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, 26 March 2002.
[49] *Id*., para. 1.
[50] *Id*., para. 27.
[51] *Id*., para. 49.

ISSUE:

1. Whether the Trial Chamber had jurisdiction to review Registry decisions on assignment of counsel; and

2. Whether a former OTP Legal Advisor would be precluded due to a conflict of interest from representing an Accused where the former OTP Legal Advisor had worked on cases related to the Accused's case.

DECISION:

The Trial Chamber found that it had jurisdiction to review the decision, but because of a lack of concrete indicators of a real possibility of conflict of interest, it was not satisfied that Mr. Dixon should be disqualified as Co-Counsel.[52] The Trial Chamber dismissed the Motion.

STANDARD:

The Chamber considered whether there was a real possibility of a conflict of interest due to the former and present assignment of counsel.[53]

RATIONALE:

The Trial Chamber first considered whether it had jurisdiction to review Registry Decisions on assignment of counsel and determined that it did, because "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." It held that 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."[54]

The Trial Chamber held that "[t]he 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." The Trial Chamber then defined two questions it had to resolve: "(1) is there a conflict of interest that affects, or is likely to affect the integrity

[52] *Id*., paras. 30, 56.
[53] *Id*., para. 56; *See also* para. 46.
[54] *Id*., para. 17.

of the proceedings before the Chamber and (2) is there and undue advantage arising from the assignment which undermines the integrity of proceedings before the Chamber?"[55]

In order to answer these questions, the Trial Chamber examined the applicable law before the ICTY. Finding the applicable law to be silent,[56] the Trial Chamber examined national practice.[57] The Trial Chamber concluded 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."[58]

The Trial Chamber found no guidance in the applicable law or in national practice. It therefore developed a test to applied.[59]

The Trial Chamber stated 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.[60]

The Trial Chamber found that "[i]t is undoubtedly the case that the prior association with the Prosecution has provided Mr. Dixon with certain advantages"[61] but "[c]onsidering, however, the nature and extent of the prior association of Mr. Dixon, the Chamber is not convinced that the advantage was such it would amount to *undue* advantages that might have an impact on the fairness of the trial."[62]

The Trial Chamber added: "[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."[63]

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[55] *Id*., para. 30.
[56] *Id*., paras. 31-36.
[57] *Id*., para. 38.
[58] *Id*., para. 42.
[59] *Id*., para. 44.
[60] *Id*., para. 46.
[61] *Id*., para. 50.
[62] *Id*., para. 51 (emphasis in original).
[63] *Id*., para. 53.

The Trial Chamber took into consideration the fact that Mr. Dixon provided a written undertaking not to violate the confidentiality of any information he had access to while working for the OTP, and the fact that he consulted with his Bar authorities before accepting the defence of the Accused Kubura.[64]

[64] *Id.*, para. 52.

***Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Motion for Clarification, Reconsideration or Certification to Appeal, 18 September 2007**[65]

FACTS:

The Accused Čermak and Markač filed a joint motion to resolve an alleged conflict of interest regarding Attorney Gregory Kehoe, in which Čermak and Markač requested that the Trial Chamber:

1. Order the OTP to inform it of Gregory Kehoe's involvement in the investigation of Operation Storm by providing all relevant information on the conflict of interest to the Trial Chamber (first request), and

2. To decide whether Mr. Kehoe had a conflict of interest in representing Gotovina as Co-Counsel, considering Mr. Kehoe's prior involvement in the case as a member of the OTP (second request).[66]

Čermak and Markač alleged that between 1995-1999/2000, while Mr. Kehoe was working for the OTP, he was involved in the investigation of crimes allegedly committed during and after Operation Storm, and investigations into Gotovina and related matters.[67] They further alleged that Mr. Kehoe must have been involved in formulating investigation and prosecutorial strategies in this case; for example, they alleged that Mr. Kehoe supervised legal and investigative staff, attended meetings, interviewed witnesses and analyzed witness interviews. Gotovina, whom Mr. Kehoe later represented as Co-Counsel, was allegedly one of the suspects then being investigated by Mr. Kehoe in his former role with the OTP.[68]

On 25 July 2007, the Trial Chamber issued an Order, (in response to Čermak and Markać's joint motion to resolve the alleged conflict of interest regarding Mr. Kehoe ((first request)), for the OTP to provide the Trial Chamber with all *material* in relation to Mr. Kehoe's participation in the OTP investigation of the individuals in the *Gotovina* case.[69]

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[65] *Prosecutor v. Gotovina et al*., IT-06-90-PT, Decision on Motion for Clarification, Reconsideration or Certification to Appeal, 18 September 2007 ("Decision on Motion for Clarification, Reconsideration or Certification to Appeal"), *available at* http://www.icty.org/x/cases/gotovina/tdec/en/070918a.pdf
[66] *Id*., para. 1.
[67] *See Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Ivan Čermak and Mladen Markač's Joint Motion to Resolve Conflict of Interest Regarding Attorney Gregory Kehoe, 29 November 2007 ("Kehoe Decision"), p. 2.
[68] *Id.*
[69] Decision on Motion for Clarification, Reconsideration or Certification to Appeal, para. 2.

The OTP sought clarification as to what was meant by "materials" in this context. If the Order required the OTP to provide "the actual underlying material," from the inquiry into Mr. Kehoe's involvement in the OTP investigation into the *Gotovina* case, then the OTP sought reconsideration of the Order. If the Trial Chamber denied reconsideration, the OTP stated that it sought certification to appeal the Order.[70]

The OTP submitted that material reviewed by the OTP, in order to determine Mr. Kehoe's involvement in the *Gotovina* case investigations, was part of its internal work product. The OTP submitted that to disclose internal work product could compromise the independence of the OTP and jeopardize the fairness of the trial.

The OTP argued that providing summaries of documents used to assess whether there was a conflict of interest created by Mr. Kehoe's former position in the OTP would be enough for the Trial Chamber to assess the likelihood of a conflict of interest.

ISSUE:

Whether the Trial Chamber can access the internal work product of the OTP to determine whether a conflict of interests exists between Counsel's former position with the OTP and current position as Defence Co-Counsel.

DECISION:

The Trial Chamber denied the OTP's request for clarification, reconsideration, or certification to appeal, having found that a. there was no need for it to clarify its Order, b. there was no merit in the OTP's submissions requesting reconsideration, and c. the issue was not one which significantly affects the fair an expeditious conduct of the proceedings, so the requirement for certification had not been met.[71]

RATIONALE:

The Trial Chamber stated that it did not intend to interfere or limit the OTP's ability to perform its functions and the exercise of OTP discretion. It also stated that there was nothing in the ICTY Statute or ICTY Rules of Procedure and Evidence that would prevent the Trial Chamber from receiving materials in order to be able to carry out its duties under the statute to ensure the fairness and integrity of proceedings.[72]

[70] *Id.*, para. 4.
[71] *Id.*, para. 16.
[72] *Id.*, para. 11.

With regards the issue of clarification, the Trial Chamber found that it is not correct that the ability of the OTP to prepare fully and properly for litigation is seriously impaired if such internal work products are subjected to scrutiny by a Chamber in fulfillment of its duties under the Statute and the Rules.[73] The Chamber found that this is particularly true in matters concerning Article 20(1) of the ICTY Statute.

The OTP argued that it would not be appropriate for the Trial Chamber to review its internal work product on an *ex parte* basis because the application was for the benefit of the Defence.[74] However, the Trial Chamber relied on Rule 66(C) of the Rules of Procedure and Evidence by analogy, to find that if the Trial Chamber can receive documents from the OTP *in camera* regarding issues of public interest or security interests, then by analogy, it should able to receive confidential material for the purposes of assessing whether the alleged conflict of interests does exist.[75]

The Trial Chamber noted Judges are presumed to be impartial and therefore, "even if information bearing upon the substance of the case [were] included in the materials provided to the Trial Chamber, the Trial Chamber and its subsequent treatment of matter to be determined at trial [would] not be prejudiced."[76]

The Trial Chamber considered that summaries prepared by the OTP would be inadequate and would require the Trial Chamber to depend on the OTP.[77]

[73] *Id.*, para. 10.
[74] *Id.*, para 12.
[75] *Id.*
[76] *Id.*, para. 13.
[77] *Id.*, para. 14.

***Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Ivan Čermak's and Mladen Markač's Joint Motion to Resolve Conflict of Interest Regarding Attorney Gregory Kehoe, 29 November 2007[78]**

FACTS:

See above summary.

The OTP submitted the material requested by the Trial Chamber on a confidential and *ex parte* basis.[79] The OTP did not challenge the assignment of Mr. Kehoe.

The Trial Chamber ordered the Registrar to disclose the reasoning behind the appointment of Mr. Kehoe and all supporting documents, including correspondence with the OTP, it used to reach its decision.[80] The Deputy Registrar responded that he was aware Mr. Kehoe had worked for the OTP and requested the OTP to provide any information that might render Mr. Kehoe unsuitable to act as Counsel before the Tribunal.[81]

The Deputy Registrar also noted that he had assigned Mr. Kehoe as Defence Co-Counsel before receiving the result of the OTP's internal review of Mr. Kehoe's role within the OTP and his participation in the investigation related to Operation Storm.[82]

ISSUE:

Whether a former OTP Lawyer, who allegedly participated in investigations concerning material facts in a multiple Accused case, can act as Defence Counsel for one of the Accused.

DECISION:

The Trial Chamber concluded that there was no conflict of interest between Mr. Kehoe's former OTP position and his assignment as Co-Counsel for Gotovina.[83]

The Trial Chamber found that Mr. Kehoe did not personally or substantially participate in the present case while working for the OTP.[84]

[78] Kehoe Decision, *available at* http://www.icty.org/x/cases/gotovina/tdec/en/071129.pdf.
[79] *Id.*, p. 6.
[80] *Id.*, p. 3.
[81] *Id.*, p. 4.
[82] *Id.*
[83] *Id.*, p. 10.
[84] *Id.*

STANDARD:

Article 14(C) of the 2006 ICTY Code of Conduct was the basis on which the decision was assessed.[85]

The Trial Chamber assessed whether Mr. Gregory Kehoe "obtained any *undue advantage* relative to any other party to the proceedings which might impact the fairness of the proceeding,"[86] by using Article 14(C) of the 2006 ICTY Code of Conduct.

RATIONALE:

The Trial Chamber assessed the extent to which Mr. Kehoe was involved, as a Prosecutor, with the investigation concerning the Accused in this case.

The Trial Chamber carried out a thorough review of the substance of the Prosecution materials and concluded that:

- Mr. Kehoe worked as Senior Prosecutor for the OTP;
- Mr. Kehoe was not involved in formulating prosecutorial and investigative strategies in this case;
- Mr. Kehoe did not supervise the investigation into Operation Storm;
- Mr. Kehoe did not supervise staff investigating Operation Storm;
- Mr. Kehoe was copied on documents concerning investigations into crimes in the Republic of Croatia between 1991-1995, but this information concerned many investigations and not just Operation Storm;
- Mr. Kehoe did not attend any meetings or interview witnesses concerning the Operation Storm Investigation, Gotovina or related matters.[87]

[85] 2006 ICTY Code of Conduct, Art. 14(C) states: "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."
[86] Kehoe Decision, p. 10.
[87] *Id.*, p. 9.

The Trial Chamber found no evidence that Mr. Kehoe provided any legal advice concerning the Accused in this case.[88] The Trial Chamber also noted that the OTP did not claim and had never claimed that a conflict of interest existed.[89]

The Trial Chamber held that involvement of Counsel "with one of the other parties *in the same case* is incompatible with the representing the opposite party, but that working in part on the same factual basis alone does not create a conflict of interest."[90]

The Trial Chamber found that Mr. Kehoe did not personally and substantially participate in the investigation of Operation Storm, therefore, Mr. Kehoe's prior association with the OTP may have afforded him insight into the functioning of the OTP but Mr. Kehoe had not obtained any *undue advantage* relative to any other party to the proceedings.[91]

The Trial Chamber found that it need not consider whether there was a real possibility of a conflict between Mr. Kehoe's former OTP role and his appointment as Defence Counsel for Gotovina[92] because it found that Mr. Kehoe did not participate personally and substantially.[93]

[88] *Id.*
[89] *Id.*, note 37.
[90] *Id.*, p. 10.
[91] *Id.*
[92] *Id.*
[93] *Id.*

***Prosecutor v. Čermak*, IT-06-90-PT, Registry Decision, 13 November 2007**[94]

FACTS:

On the 6 September 2007, the Accused Čermak executed a power of attorney authorizing Mr. Steven Kay (Lead Counsel) and Mr. Andrew Cayley (Co-Counsel)[95] as his new lawyers to represent him before the ICTY, after his previous lawyers were removed due to a conflict of interest.

Given that the Registrar was aware of Mr. Cayley's previous employment at the OTP,[96] in deciding whether to assign Mr. Cayley, the Registrar considered his obligations under Article 14(C) of the 2006 ICTY Code of Conduct. These obligations had been set out by the Trial Chamber in its "Order to the Prosecution Concerning the Alleged Conflict of Interest of Attorney Gregory Kehoe," in which the Trial Chamber stated that it is the Registrar's duty, when aware of the proposed Counsel's previous participation in a specific matter as a staff member of the tribunal, to make a determination pursuant to Article 14(C) of the Code and to follow the procedure therein.[97]

The Registrar sought to confirm that Mr. Cayley did not participate personally and substantially in this case.[98] The Registrar requested that Mr. Cayley and the OTP comment on Mr. Cayley's prior participation in the case against Mr. Čermak or his Co-Accused, and if Mr. Cayley had participated, whether there was a real possibility of a conflict of interest.[99] The Registrar received submissions from Mr. Steven Kay (Lead Counsel) about Mr. Cayley's OTP participation in the case. The Registrar also received submissions from Mr. Cayley's wife, who was employed and continued to be employed by the OTP.

[94] *Prosecutor v. Čermak*, IT-06-90-PT, Registry Decision, 13 November 2007 ("Cayley Registry Decision"), *available at* http://icr.icty.org/frmResultSet.aspx?e=yxcf1t45lnvq5w55mqmr0o55&StartPage=1&EndPage=10.
[95] It is not stated explicitly in this decision whether Mr. Cayley was Co-Counsel or Lead Counsel. However, Mr. Cayley's biography indicates that he was Co-Counsel for Ivan Čermak. *See* UK MINISTRY OF DEFENCE, SERVICE PROSECUTING AUTHORITY, Biography: Mr. Andrew Cayley, (last visited 26 February 2014), http://spa.independent.gov.uk/test/director/dsp_biography.htm.
[96] Cayley Registry Decision, p. 3.
[97] *Id.*
[98] *Id.*
[99] *Id.*, p. 4.

ISSUE:

Whether a former OTP Senior Trial Attorney would be precluded from representing an Accused as Defence Counsel, given the material he could have been privy to as former OTP Senior Trial Attorney.

DECISION:

The Registrar concluded that Mr. Cayley met the qualification requirement set out in Rule 44 of the Rules of Procedure and Evidence, and was not convinced that Mr. Cayley had engaged in conduct prohibited by Rule 44(A)(vi).[100]

Pursuant to Rule 44(A) of the Rules, Mr. Cayley was admitted to represent the Accused before the ICTY.

STANDARD:

The Registrar used the standard that a former member of the OTP cannot act as Defence Counsel if:

1. He or she "*personally* participated"[101] in a case as a former OTP member of staff,[102] in which he or she is appointed as Defence Counsel;

2. He or she "*substantially* participated"[103] in a case as a former OTP member of staff, in which he or she is appointed as Defence Counsel; and

3. There is a "real possibility that a conflict between the former and present assignment exists."[104]

[100] *Id.*, p. 5.
[101] *Id.*, p. 3-5.
[102] This standard is taken from Article 14(C) of the 2006 ICTY Code of Conduct: "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" (emphasis added).
[103] Cayley Registry Decision, p. 3-5. *See also* 2006 ICTY Code of Conduct Art. 14(C) (emphasis added).
[104] Cayley Registry Decision, p. 3-5. *See also* 2006 ICTY Code of Conduct Art. 14(C) (emphasis added).

RATONALE:

The Registrar first established that Article 14(C) of the 2006 ICTY Code of Conduct was to be applied to determine whether Mr. Cayley could be assigned, due to his prior employment with the OTP.[105]

The Registrar accepted that there was a potential for a conflict to arise based on Mr. Cayley's former position with the OTP, if Mr. Cayley had worked on the matter with the OTP.[106]

The Registrar analyzed the facts in relation to Article 14(C) of the 2006 ICTY Code of Conduct to determine whether:

1. Mr. Cayley had personal involvement the case against Mr. Čermak or his Co-Accused;
2. Mr. Cayley had substantial involvement the case against Mr. Čermak or his Co-Accused; and
3. there is a real possibility of a conflict of interests arising.[107]

Based on submissions received by the OTP concerning Mr. Cayley's involvement in the case against Čermak or his Co-Accused, the Registrar concluded that Mr. Cayley did not "personally participate" in the OTP's case against Čermak.

To be thorough, the Registrar then assessed whether Mr. Cayley "substantially participated" in the OTP case against Mr. Čermak and concluded "that attending staff meetings did not amount to substantial participation the OTP case under Article 14 (C)."[108] Even if it could result in a conflict, the Registrar found that any ensuing conflict would most likely be able to be waived by the client.[109]

After reviewing the submissions received from the OTP and Mr. Cayley, the Registrar stated he was satisfied that Mr. Cayley did not participate personally and substantially in the case against Mr. Čermak or his Co-Accused. Therefore, he stated that he was satisfied that there was no conflict of interest.[110]

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[105] Cayley Registry Decision, p. 3.
[106] *Id.*
[107] *Id.*, p. 3-5.
[108] *Id.*, p. 4.
[109] *Id.*
[110] *Id.*, p. 6.

The Registrar also considered the Accused's right to defend himself through legal assistance of his own choosing as enshrined on Article 21(4)(d) of the ICTY Statute.

The Registrar found that Cayley had no personal or substantial involvement.[111]

[111] *Id.*, p. 4-5.

III. Conflicts arising because of counsel's concurrent representation of two clients

***Prosecutor v. Knežević*, IT-95-4-PT / IT-95-8/1-PT, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002**[112]

FACTS:

The Registry rejected Accused Knežević's request to assign Mr. Miodrag Deretić as his counsel on the basis that Mr. Deretić was assigned as Co-Counsel to the Accused Zoran Žigić, who was formerly charged in the same indictment as Knežević with crimes in the same location.

The Registry then rejected a request to assign Mr. Draško Zeć and instead assigned Mr. Moran, on the basis that Mr. Zeć and Mr. Deretić shared the same law office and the professional relationship between them was not sufficiently clear to ensure that a potential conflict of interest would not also affect Mr. Zeć. Knežević challenged the Registry's assignment of Mr. Moran and instead requested Mr. Zeć to be assigned.

According to the Registry, Mr. Zeć suggested in a number of unprivileged phone calls to Knežević that he should request his appointment as Counsel and stated that this would enable Mr. Deretić to act alongside him.

ISSUE:

Whether Counsel sharing the same law office with a Counsel who has been found to have a conflict of interest with the Accused would be precluded from representing that Accused.

STANDARD:

The Trial Chamber applied no standard for assessing conflicts of interest, since it found that Counsel's improper conduct is a ground to prevent the Counsel from representing the Accused.[113]

DECISION:

The Trial Chamber denied the Application to review the Registry's decision.[114]

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[112] *Prosecutor v. Knežević*, Decision on Accused's Request for Review of Registrar's Decision as to Assignment of Counsel, 6 September 2002.
[113] *Id*., p. 4.
[114] *Id*.

RATIONALE:

The Trial Chamber considered that the right of an indigent accused to counsel of his own choosing is not without limits. It then considered that the Registry has the primary responsibility in the determination of matters relating to qualification, appointment or assignment of counsel.[115]

The Trial Chamber considered that "matters relating to the assignment of counsel for an accused affect the conduct of a trial; [and] that the Chamber has a statutory obligation to ensure the fair and expeditious conduct of the proceedings, with full respect for the right of the accused."[116]

The Trial Chamber recognized that the Registry "has responsibility for the assignment of Counsel," and the Trial Chamber's power to review a decision of the Registry should be used in exceptional cases.[117]

The Trial Chamber finally considered that:

> the proposal by Mr. Zeć (overheard in a non-privileged telephone conversation) that the Accused should appoint him as counsel, and that that would enable Mr. Deretić to act alongside him constitutes improper conduct, since it would, in effect, nullify the Registrar's decision not to appoint Mr. Deretić; and that, therefore, the Registrar was justified in his decision not to appoint Mr. Zeć as counsel to the Accused.[118]

[115] *Id*., p. 2-3.
[116] *Id*., p. 3.
[117] *Id*.
[118] *Id*., p. 4.

***Prosecutor v. Mejakić et al.*, IT-02-65-PT, Decision on Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 18 September 2003[119]**

FACTS:

Mr. Jovan Simić was assigned by the Registrar to be Lead Counsel for the Accused Mejakić. He was already acting as Lead Counsel for the Accused Prcać, whose case was on appeal. Mejakić and Prcać were both charged with crimes committed at Omarska camp. The OTP filed requests to resolve Mr. Simić's conflict of interest, alleging that:

1. Mejakić and Prcać should be advised by independent counsel of the consequences of Mr. Simić's dual representation;

2. Prcać made a number of statements concerning Mejakić's authority at the Omarska camp, so Mr. Simić will be unable to adopt a defence theory that Mejakić was not in effective command and control of the camp, or that someone else, such as Prcać, was in charge; and

3. Prcać is a compellable witness for the OTP, and this will cause a conflict because Mr. Simić will need to advise Prcać of his rights concerning testifying and may also have to cross-examine Prcać.

ISSUE:

Whether Counsel for an Accused would be precluded from representing him due to his concurrent representation of another Accused at the ICTY who was the direct subordinate of the first Accused and was charged with similar crimes.

DECISION:

The Trial Chamber upheld the Registrar's decision appointing Mr. Simić as Counsel for Mejakić.

STANDARD:

The Trial Chamber did not expressly state which standard it applied. However the Trial Chamber took into consideration the stage of the proceedings, and whether the concurrent representation "would irreversibly prejudice the administration of justice." According to the

[119]*Prosecutor v. Mejakić*, IT-02-65-PT, Decision on Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 18 September 2003 ("Mejakić First TC Decision").

Trial Chamber, this prejudice will arise when there is a "certainty" that one of the counsel's clients will testify in the other client's case.[120]

RATIONALE:

The Trial Chamber noted that Mr. Simić "acknowledg[ed] a potential conflict of interest" and followed the procedure laid out under Article 14 of the 2002 ICTY Code of Conduct[121] to obtain the consent of Mejakić and Prcać to represent both of them.[122]

The Trial Chamber then considered "that a conflict of interest would arise … were Mr. Prcać to be called to testify in the [Mejakić] case."[123]

However, the Trial Chamber found that it would not be appropriate at this stage to make a determination as to whether the consent of the Accused would irreversibly prejudice the administration of justice, since there was no certainty that Mr. Prcać would testify in the Mejakić case.[124]

[120] *Id.*, p. 4.
[121] ICTY Code of Professional Conduct for Counsel Appearing before the International Tribunal ("2002 ICTY Code of Conduct"), IT/125 Rev.1, 12 July 2002.
[122] Mejakić First TC Decision, p. 3.
[123] *Id.*, p. 4.
[124] *Id.*

***Prosecutor v. Mejakić et al.*, IT-02-65-PT, Decision on Prosecution's Second Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 17 June 2004[125]**

FACTS:

See above summary.

The OTP alleged that the matter was now ripe for determination, as, *inter alia*, a. it was unable to discuss Prcać's willingness to participate in interviews without the presence of Mr. Simić, b. it had put Prcać on its witness list and Mr. Simić had recorded an objection, and c. Mr. Simić would be unable to advise Mejakić about challenging parts of Prcać's testimony.

ISSUE:

Whether the consent given by both accused to be represented by Counsel is likely to irreversibly prejudice the administration of justice.[126]

DECISION:

The Trial Chamber was not satisfied that representation of the two Accused by Mr. Simić would be likely to affect the integrity of the proceedings or otherwise irreversibly prejudice the administration of justice and denied the Motion.[127]

STANDARD:

The Trial Chamber did not expressly state which standard it applied, though it considered that a conflict of interest would arise where there is a "certainty" that Mr. Prcać would testify in this case.[128]

RATIONALE:

The Trial Chamber, as in its previous decision, found:

> 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. Prcać will testify in this case; indeed, the request to have the transcript of an interview of Mr. Prcać added to

[125] *Prosecutor v. Mejakić*, IT-02-65-PT, Decision on Prosecution's Second Motion to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 17 June 2004, *available at* http://www.icty.org/x/cases/mejakic/tdec/en/040617.htm.
[126] *Id*., p. 3.
[127] *Id*.
[128] *Id*., p. 2.

> the exhibit list was denied on the ground that there was no certainty that Mr. Prcać would testify in this case.[129]

The Trial Chamber held that "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 … is thus without merit."[130]

[129] *Id*., p. 3.
[130] *Id*.

***Prosecutor v. Mejakić et al.*, IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest regarding Attorney Jovan Simić, 6 October 2004[131]**

FACTS:

See above summaries.

ISSUE:

Whether Counsel would be precluded from representing an Accused due to his concurrent representation of another Accused at the ICTY who was alleged to have been a subordinate of the first Accused and who had previously given evidence incriminating that Accused.

DECISION:

The Appeals Chamber found that Mr. Simić's representation of both Mejakić and Prcać is likely to irreversibly prejudice the administration of justice,[132] and therefore granted the appeal and reversed the Impugned Decision.[133]

STANDARD:

The Appeals Chamber did not expressly state which standard it applied, though it held that Counsel cannot represent two clients where their concurrent representation "is likely to irreversibly prejudice the administration of justice."[134]

RATIONALE:

The Appeals Chamber held that the "right to choose counsel is a fundamental right … [h]owever, this right is not without limits…. One of the limits to the accused's choice is a conflict of interest affecting his counsel.[135]

The Appeals Chamber relied on several factors, such as:

- the fact that one client was the "direct superior" of the other;[136]

[131] *Prosecutor v. Mejakić*, IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004 ("Mejakić AC Decision"), *available at* http://www.icty.org/x/cases/mejakic/acdec/en/041006.htm.
[132] *Id.*, para. 15.
[133] *Id.*, p. 6.
[134] *Id.*, para. 15.
[135] *Id.*, para. 8.
[136] *Id.*, para. 12.

- the factual nexus between the alleged crimes;[137]
- the fact that the OTP claimed that Prcać had given evidence incriminating Mejakić;[138]
- the protection of the best interest of the two clients is opposite;[139]
- "the decision whether to cooperate with the Prosecution has to be taken presently;"[140]
- the evidence given by Prcać may have a significant impact on the trial of Mejakić.[141]

The Appeals Chamber found that:

- "a conflict of interest does exist at the present stage of the proceedings;"[142]
- "the conflict of interest is an important one;"[143]
- "the conflict of interest may influence the Defence strategy;"[144]
- "if the conflict of interest … is not resolved at the present stage of the proceedings, the administration of justice may be irreversibly prejudiced;"[145]
- "[t]here is finally the risk that Mr. Simić might withdraw in the course of the trial because of the conflict of interest, thus delaying the proceedings."[146]

[137] *Id*., paras. 12, 14.
[138] *Id*., para. 12.
[139] *Id*., para. 13.
[140] *Id*., para 15.
[141] *Id*., para. 14.
[142] *Id*., para. 12.
[143] *Id*., para. 14.
[144] *Id*., para. 15.
[145] *Id*., para. 14.
[146] *Id*., para. 15.

***Prosecutor v. Prlić et al.*, IT-04-74-PT, Decision on Request for Appointment of Counsel, 30 July 2004[147]**

FACTS:

Mr. Željko Olujić was assigned as Lead Counsel to the Accused Rajić in a different case and was chosen by the Accused Stojić as his Lead Counsel in the present case. Mr. Želimir Par was the assigned Lead Counsel of the Accused Martinović in a different case and was chosen by the Accused Prlić as his Co-Counsel in the present case. Mr. Tomislav Jonjić was the Lead Counsel of the Accused Ljubičić in a different case and was chosen as Lead Counsel by the Accused Čorić in the present case.

At the initial appearance, Judge Orie expressed concerns as to a potential conflict of interest of each of these Defence counsels,[148] because the Counsels were already representing others before the ICTY who were accused or convicted in the first instance of charges arising from the same or partly similar factual situations as those charged against the Accused in the *Prlić* case.[149]

The Registrar invited these Counsel to submit the matter to the Trial Chamber. Mr. Par and Mr. Olujić submitted requests for assignment before the Trial Chamber.[150] They each filed declarations, which denied the existence of any conflict of interest. In addition, the Accused in other cases who would be affected by the alleged conflicts of interest (Rajić, Ljubičić, and Martinović), submitted written statements. In these statements they asserted that they had been informed of the existence of potential conflict of interest and agreed to their counsels' representation of Accused in the *Prlić* case.[151] The OTP filed a general submission expressing concerns about actual and potential conflicts of interest with respect to each counsel.

<u>Relationship between Stojić and Rajić</u>

> "Bruno Stojić is presented in the Indictment as the head of the HVO department (later Ministry) of Defence from 3 July 1992 until November 1993, and, in this capacity, that body's top political and management official, in charge of the Herceg-Bosna/HVO

[147] *Prosecutor v. Prlić et al.*, IT-04-74-PT, Decision on Requests for Appointment of Counsel, 30 July 2004 ("Prlić TC Decision"), *available at* http://www.icty.org/x/cases/prlic/tdec/en/040730.htm.
[148] Judge Orie also expressed concern as to Praljak's Counsel; however this will not be addressed herein as Praljak then declined to be represented by that Counsel and selected a new Defence team.
[149] Prlić TC Decision, para. 3.
[150] *Id*.
[151] *Id*.

armed forces, who exercised *de jure* and *de facto* power, effective control and substantial influence over all parts and branches of such forces' operations."[152]

"Ivica Rajić is charged with these acts on the basis of his de jure and de facto command and control of various Croatian Defence Council units in his area of responsibility (including Kiseljak, Kakanj and Vares municipalities), including the Ban Jelacic Brigade, the Bobovac Brigade and units known as the 'Maturice' and 'Apostoli.'"[153]

Relationship between Prlić and Martinović

Prlić was alleged to have "acted as the Prime Minister of Herceg-Bosna/HVO government."[154]

Martinović was alleged to have been "a relatively low-level commander within the HVO," and "his unit was allegedly under the HVO Main Staff chain of command or placed under the command of the area commander when sent to the front lines."[155]

Relationship between Čorić and Ljubičić

Ljubičić "was allegedly commander of the 4th military police battalion from January 1993 until 1 July 1993, then assistant chief of the military police administration for the Central Bosnia Operational Zone until November 1993."[156]

Čorić was allegedly "Deputy for Security and commander of the HVO police administration from April 1992 until November 1993 and minister of interior in the Croatian Republic of Herceg-Bosna from about 20 November 1993 onwards." He allegedly had "*de jure* and/or *de facto* command and control of the HVO Military Police and to have exercised effective control and substantial influence over the HVO Military Police, including the authority and responsibility to command and discipline members of the HVO Military Police."[157]

[152] *Id*., para. 19.
[153] *Id*., para. 18.
[154] *Id*.
[155] *Id*., para. 43.
[156] *Id*., para. 46.
[157] *Id*., para. 47.

ISSUE:

Whether a conflict of interest would preclude Counsel from representing the Accused due to their representation of other clients at the ICTY who were charged with similar crimes and were allegedly in a superior-subordinate relationship with the Accused.

DECISION:

The Trial Chamber barred Mr. Olujić from representing Stojić, and confirmed the appointment of Mr. Par as Co-Counsel for Prlić and Mr. Jonjić as lead Counsel for Čorić.[158] The Trial Chamber invited Stojić to appoint another Lead Counsel within one month and stated that in the meantime, Mr. Olujić shall continue to represent Stojić.

STANDARD:

In determining whether Counsel should be barred from representing a client, the Trial Chamber found that it must:

- "assess factors such as the objective likelihood of conflict [of interest] and the harm that could be caused to the accused and the proceedings, especially in cases, as this one, which concern several accused;"
- "further explore whether counsel is aware of all potential conflicts of interest and has properly assessed their possible consequences;"
- after reviewing the previous elements, must determine "whether the risks and damage that could be caused are such as to jeopardise the right of the accused to a fair and expeditious trial or proper administration of justice;" and
- if the answer is yes, take "the appropriate measures to restore or protect the fairness of trial and the integrity of the proceedings."[159]

<u>Determination of a conflict of interest</u>

The Trial Chamber did not clearly provide which standard it applied. However it held that a "conflict of interest would be obvious in cases where counsel represents two accused, who are, at least partly, charged with the same criminal acts, committed during the same period of time

[158] *Id.*, p. 14.
[159] *Id.*, para. 16.

and in the same area."[160] The Trial Chamber then used several factors in finding that a conflict of interest did or did not exist. These factors are:

- Whether "both accused are charged with the same criminal acts;"[161]
- Whether both accused are "linked by a relatively close superior-subordinate relationship at the relevant time;"[162]
- Whether the counsel's behavior and statements regarding the interests of his or her clients are "in contradiction with [his] professional obligations."[163]

The Trial Chamber was not clear on the likelihood for potential conflicts of interest required to prevent Counsel from representing a client. The Trial Chamber confirmed the appointment of counsels where it found that the risk of conflict of interest was "acceptably low."[164] On the contrary, the Trial Chamber barred the Counsel from representing his client where it found that the risk of conflict of interest was "very likely."[165]

RATIONALE:

The Trial Chamber recalled that the right to choose counsel is a fundamental right of the Accused, though it is not without limits.[166] It held that "[a]ctual or potential conflict of interest is [a] limit to the accused's choice,"[167] however, "[t]his matter should primarily be a matter of assessment by counsel."[168] Finally, the Trial Chamber noted that it would normally presume that Counsel has complied with his or her professional obligations.[169]

Regarding the alleged superior-subordinate relationship, the Trial Chamber found:

- Relationship between Stojić and Rajić: "[t]he mere fact that one accused is charged as a civilian authority while the other is charged as a military authority does not exclude the existence of a superior-subordinate relationship between them."[170]

[160] *Id*., para. 29.
[161] *Id*. *See also* para. 43.
[162] *Id*., para. 29. *See also* para. 43.
[163] *Id*., para. 29. *See also* para. 52.
[164] *Id*., paras. 43, 52.
[165] *Id*., para. 30.
[166] *Id*., paras. 10-11.
[167] *Id*., para. 13.
[168] *Id*., para. 14.
[169] *Id*., para. 14.
[170] *Id*., para. 29.

- Relationship between Prlić and Martinović: "[w]hile, according to their indictments, a superior-subordinate relationship does exist between the two accused, the apparent remoteness of one from the other in the alleged hierarchy ensures that the likelihood for potential conflict of interest between them is acceptably low.[171]

- Relationship between Čorić and Ljubičić: "[t]he two accused are also linked with an alleged superior-subordinate relationship, albeit quite remote."[172]

Regarding the likelihood of a conflict of interest, the Trial Chamber found:

- Representation of Stojić by Mr. Olujić: "a conflict of interest is very likely to arise and that such likelihood will very likely prevent Mr. Olujić from defending Mr. Stojić, in the best of his interests;"[173]

- Representation of Prlić by Mr. Par: "[w]hile, according to their indictments, a superior-subordinate relationship does exist between the two accused, the apparent remoteness of one from the other in the alleged hierarchy ensures that the likelihood for potential conflict of interest between them is acceptably low;"[174]

- Representation of Čorić by Mr. Jonjić: "a risk of conflict of interest does exist," "[h]owever this risk is acceptably low and the Trial Chamber is satisfied, following the Hearing, that counsel properly assessed the risks and fully advised his clients." The Trial Chamber took into consideration the fact that the "Registrar, after consulting with counsel and the accused he represented, concluded that the risk for potential conflict of interest was not such as to interfere with the proper administration of justice."[175]

SUBIDIARY QUESTIONS OF THE WRITTEN CONSENTS / COUNSEL ASSESSMENT:

- Representation of Stojić:
    - "The 'unconditional' consent expressed by Mr. Stojić at his initial appearance and the Written Consent submitted by Ivica Rajić cannot have the effect of

[171] *Id*., para. 43.
[172] *Id*., para. 52.
[173] *Id*., para. 30.
[174] *Id*., para. 43.
[175] *Id*., para. 52.

validating the appointment if the Trial Chamber is convinced that the interests of justice dictates [sic] otherwise."[176]

- Representation of Prlić:
    - The Trial Chamber acknowledged that Martinović "submitted a written consent for his defence counsel to also represent Mr. Prlić, under the understanding that no conflict of interest existed between the two defences."[177] Furthermore Prlić expressed and reiterated his "belief that any conflict of interest will be avoided."[178] The Trial Chamber found that it "is satisfied that the Accused, Mr. Jadranko Prlić, exercised his right to choose counsel in full knowledge of the relevant facts."[179]
    - The Trial Chamber stated that it "must give credit to the assessment conducted by counsel."[180]
- Representation of Čorić:
    - The Trial Chamber found that it "is satisfied, following the Hearing, that counsel properly assessed the risks and fully advised his clients."
    - "Under these circumstances, the Trial Chamber must give credit to the assessment conducted by counsel."[181]

[176] *Id*., para. 32.
[177] *Id*., para. 44.
[178] *Id*.
[179] *Id*.
[180] *Id*., para. 43.
[181] *Id*., para. 52.

***Prosecutor v. Prlić et al.*, IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for appointment of Counsel, 24 November 2004[182]**

FACTS:

See above summary.[183]

In the Indictment brought against Stojić, "Ivica Rajić [and] the 'Maturice' and 'Apostoli' units, are mentioned among those who took part" in the Vareš and Stupni Do acts allegedly committed between October 1993 and December 1993.

According to the Impugned Decision, "Mr. Olujić had admitted that Mr. Ivica Rajić's defence strategy was to blame higher-up authorities." However Stojić argued that such an admission was interpreted or translated incorrectly and asserted that Rajić would not shift guilt to his superior.[184]

The OTP argued that Stojić was charged for acts "committed by Ivica Rajić, based upon a de jure and de facto authority over him and … for crimes committed in Vares and Stupni Do pursuant to Ivica Rajić's orders."[185]

Stojić conceded that both he and Rajić were charged with crimes connected with the same events, but submitted that it was not true that he and Rajić were accused of the same criminal acts. The OTP responded that "all the crimes for which Ivica Rajić ha[d] been charged in the amended indictment can also be found … in the indictment against [the Accused]."[186]

ISSUE:

Whether Counsel for an Accused would be precluded from representing him due to his concurrent representation of another Accused at the ICTY and both Accused were alleged to have been in a close superior-subordinate relationship and were charged with the same crimes.

DECISION:

[182] *Prosecutor v. Prlić et al*. IT-04-74-AR73.1, Decision on Appeal by Bruno Stojić Against Trial Chamber's Decision on Request for Appointment of Counsel, 24 November 2004 ("Prlić Appeals Chamber Decision"), *available at* http://www.icty.org/x/cases/prlic/acdec/en/041124.htm.
[183] Stojić requested certification to appeal the Impugned Decision. The Trial Chamber granted the request for certification and suspended the execution of its Decision. *See Prosecutor v. Prlić et al*., Certification for Appeal of Decision on Conflict of Interest Revoking Counsel of Accused Stojić, 1 September 2004.
[184] Prlić Appeals Chamber Decision, para. 10.
[185] *Id*.
[186] *Id*., para. 11.

The Appeals Chamber dismissed the appeal and affirmed the Impugned Decision.[187] It found that Mr. Olujić was precluded from representing Stojić.

Judge Mumba attached a Separate Opinion to the Decision. Judges Shahabuddeen, Schomburg, and Weinberg de Roca attached a Declaration, which replies to the Separate Opinion. The Decision, the Separate Opinion and the Declaration were issued the same date.

STANDARD:

The Appeals Chamber did not expressly state which standard it applied. It stated "[a] conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice."[188]

The Appeals Chamber used certain factors in determining whether a conflict of interest existed:

- Whether there are "sufficient elements" to "reasonably conclude that both accused are charged with the same criminal acts;"[189]
- Whether both Accused were "allegedly linked by a relatively close superior-subordinate relationship at the relevant time;"[190] and
- Whether the Counsel's behavior and statements regarding the interests of his clients are "in contradiction with [his] professional obligations."[191]

The Appeals Chamber was not clear on the minimum level of conflict of interest required to bar a Counsel from representing his client. However, the Appeals Chamber barred Mr. Olujić from representing his client because it was convinced that there was a substantial conflict of interests.[192]

RATIONALE:

The Appeals Chamber recalled that an Accused is entitled to legal assistance of his own choosing, however this guarantee is not without limits.[193]

[187] *Id*., para. 33.
[188] *Id*., para. 22.
[189] *Id*.
[190] *Id*.
[191] *Id*., para. 30.
[192] *Id*.
[193] *Id*., para. 19.

Regarding the jurisdiction to issue a decision regarding conflict of interest

The Appeals Chamber "reject[ed] the reasoning that 'because the interests of the accused are not defined by the Prosecution or the Trial Chamber, but by the accused themselves,' the Trial Chamber erred in making a finding as to whether a conflict of interests was likely to arise."[194]

"The Appeals Chamber "recalls[ed] that the issue of qualification, appointment and assignment of counsel, is open to judicial scrutiny," and added that "a conflict of interests between Mr. Ivica Rajić and the Appellant would affect the fairness of the proceedings. This concerns, first, the responsibility of the Trial Chamber to ensure that the trial is fair, and secondly, the right of the Appellant and of Ivica Rajić to a fair trial."[195]

Regarding the determination of a conflict of interest

The Appeals Chamber found that:

- "there were sufficient elements before the Trial Chamber for it to reasonably conclude that both accused are charged with the same criminal acts;"
- both Accused "were allegedly linked by a relatively close superior-subordinate relationship at the relevant time."[196]
- the Trial Chamber was correct to conclude that Mr. Olujić "implicitly admit[ted] … that he may not be able to diligently and promptly protect his client's best interests as expected and required of counsel."[197]
- the Trial Chamber did not err in finding that "a conflict of interest is very likely to arise, and that such likelihood will very likely prevent Mr. Olujić from defending the [Accused] in the best of his interests."[198]

"The Appeals Chamber reject[ed] the assertion that, because Ivica Rajić [was] charged as a military authority, as opposed to the Appellant who [was] accused 'only' as a civilian authority, any risk of conflict of interests between the two accused is excluded." The Appeals Chamber added that it "consider[ed] that, in a case of this kind, safeguarding the interests of justice

[194] *Id*., para. 20.
[195] *Id*., para. 21.
[196] *Id*., para. 24.
[197] *Id*., para. 30.
[198] *Id*., para. 24.

requires not only the existence of a mechanism for removing conflicts of interests after they have arisen but also the prevention of such conflicts before they arise"[199]

As the Appeals Chamber found that a conflict of interest was actual, as opposed to potential, it did not answer the question of the likelihood for potential conflict of interest required to prevent Counsel from representing a client.

SUBIDIARY QUESTION OF THE WRITTEN CONSENTS/COUNSEL ASSESSMENT:

The Appeals Chamber held that the consent provided by a client or former client to remove a conflict of interest should be regarded as fully informed; however this consent is not exclusive of there being no conflict of interest.[200]

The Appeals Chamber found that the Registry expressly stated that it was not convinced that the clients were conscious of all possible implications.[201]

The Appeals Chamber found that Mr. Olujić implicitly admitted that he may not be able to diligently and promptly protect his clients' best interests as expected and required of counsel.[202]

SEPARATE OPINION OF JUDGE MUMBA

Judge Mumba stated that she "support[ed] the decision to dismiss the interlocutory appeal." She reasoned that "counsel may be overburdened and may not have sufficient time to get instructions from each client and adequately prepare for trial as the trial progresses."[203]

<u>Regarding the conflict of interest</u>

Judge Mumba stated that in her view:

- "it is of the utmost importance … that caution should be exercised in the intervention as to choice of counsel for accused persons;"
- an "accused person's right to choose counsel is inherent in the right to a fair trial, albeit not absolute;"

[199] *Id*., para. 25.
[200] *Id*., para. 27.
[201] *Id*.
[202] *Id*., para. 30.
[203] Separate Opinion of Judge Mumba, para. 1.

- "[i]n a number of cases in this Tribunal charges overlap, but that does not give any right to decide the strategy of the Defence case;"

- "[t]he discussion of the possible scenarios for conflict of interest in the impugned decision hinge … on mere speculation;"

- "[n]o iota of evidence was adduced to allow for the level of interference in the strategy of the Defence case as was pleaded by the Prosecution;"

- "[t]he accused persons concerned gave informed consent;"[204] and

- "the Trial Chamber's obligation is to keep the lines of adversary clear during the trial. In addition, the analysis by the Trial Chamber, of the possible defences available to the accused persons, presents a misunderstanding of the duties of Defence counsel as the Prosecution's perception of a conflict of interest is based on the allegations contained in an indictment that has yet to be proved, and to accept that line of reasoning is … a misdirection."[205]

DECLARATION OF JUDGE SHAHABUDDEEN, JUDGE SCHOMBURG AND JUDGE WEINBERG DE ROCA

Judges Shahabuddeen, Schomburg and Weinberg de Roca emphasized that they agreed that the Appeals Chamber should not decide against representation by Counsel on the basis of mere speculation that there is a conflict of interests. They stated that they would not have given their support to the decision if it were based on mere speculation.[206]

Regarding the conflict of interest

The three judges considered "[i]n a case of this kind, it appears that a distinction may be usefully drawn between reasonable foresight and mere speculation, and that reasonable foresight is a sufficient basis of decision."[207]

They stated that "[t]he facts indicate that, at his trial, the [Accused] could be taking a position which will be at variance with that of another accused who is also being represented by the

[204] *Id.*, para. 3.
[205] *Id*.
[206] Declaration of Judge Shahabuddeen, Judge Schomburg and Judge Weinberg de Roca, para. 1.
[207] *Id*., para. 2.

same counsel. If the [Accused] does so, there will be a conflict of interests on the part of counsel."[208]

The Judges added that "[c]onflict of interests rules vary in national jurisdictions." After a review of the German system, the Judges stated that the principle of the provision "Advocates may not look after the interests of two or more parties if their interests conflict, or if developments are likely to bring them into conflict"[209] "looks like a reasonable basis for determining what is required by the interests of justice; it admits reasonable foresight."[210]

Regarding the consent of the Accused

"The fact that the [Accused], for any reason deemed sufficient to him, nevertheless agreed to common representation does not relieve the Appeals Chamber of its responsibility to ensure that, in the interests of justice, his case can be put forward, as from its very commencement, without any kind of inhibition resulting from retaining the same counsel."[211]

[208] *Id*.
[209] Rule 7 of the Dutch Code of Conduct of Advocates 1992 (*Gedragsregels*, 1992).
[210] Declaration of Judge Shahabuddeen, Judge Schomburg and Judge Weinberg de Roca, para. 4.
[211] *Id*., para. 3.

***Prosecutor v. Delić*, IT-04-83-PT, Decision on Motion Seeking Review of the Registry Decision stating that Mr. Stéphane Bourgon cannot be Assigned to Represent Rasim Delić, 10 May 2005**[212]

FACTS:

The Registry informed the Accused Delić that Mr. Stéphane Bourgon could not be assigned as his Counsel due to Mr. Bourgon's representation of Hadžihasanović. Delić and Hadžihasanović were both charged under Article 7(3) of the ICTY Statue in relation to events which allegedly took place in Maline/Bikoši, Bosnia and Herzegovina, in June 1993. It was alleged that, at the relevant time, as the Commander of the ABiH 3rd Corp's unit, Hadžihasanović was a direct subordinate of Rasim Delić, Commander of the Main Staff.[213]

Delić sought review of the Registry's decision. The OTP submitted that in light of the overlap between the *Hadžihasanović* case and the *Delić* case, as well as the nature of the responsibility alleged, the motion seeking review should be refused.[214]

ISSUE:

Whether an irreconcilable conflict of interest would exist due to the dual representation of two Accused who were charged with the same criminal acts and linked by a relatively close superior subordinate relationship.

DECISION:

The Accused's motion seeking review of the Registry decision was dismissed. The Trial Chamber was satisfied that the Registry's determination that a conflict of interest might arise in this case was a reasonable conclusion on the basis of the material before it.[215]

STANDARD:

The Trial Chamber cited Article 14(C)–(E) of the 2002 ICTY Code of Conduct in holding that "[a] conflict of interests between an attorney and a client arises in any situation where, by

[212] *Prosecutor v. Delić*, IT-04-83-PT, Decision on Motion Seeking Review of the Registry Decision Stating that Mr. Stéphane Bourgon Cannot be Assigned to Represent Rasim Delić, 10 May 2005, *available at* http://www.icty.org/x/cases/delic/tdec/en/050510.htm.
[213] *Id*., p. 4.
[214] *Id*., p. 2.
[215] *Id*., p. 5.

reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice."[216]

RATIONALE:

The Trial Chamber considered that Delić and Hadžihasanović were charged with the same criminal acts (the Maline/Bikoši charges) and linked by a relatively close superior-subordinate relationship at the relevant time. It was alleged that, at the relevant time, as the Commander of the ABiH 3rd Corp's unit, Hadžihasanović was *a direct subordinate* of Delić, Commander of the Main Staff.[217]

The Trial Chamber noted the Registry's consideration that there was a real possibility that Delić's Defence to the Maline/Bikoši charges may become opposed to that of Hadžihasanović and, in such a scenario, the Registry determined that Mr. Bourgon would be placed in a conflict of interest situation which would require him to withdraw from one or both cases.[218]

[216] *Id.*, p. 3-4.
[217] *Id*., p. 4.
[218] *Id*.

***Prosecutor v. Gotovina et al.*, IT-06-90-PT, Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 5 April 2007[219]**

FACTS:

The conflict of interest issue posed by Mr. Čedo Prodanović's and Ms. Jadranka Sloković's dual representation of the Accused Čermak in these proceedings and the Accused Ademi in proceedings in Croatia, was first raised in "Defendant Ante Gotovina's Response in Opposition to the Prosecution's Consolidated Motion to Amend the Indictment and for Joinder."[220]Gotovina asserted that Ademi was Gotovina's immediate subordinate and may appear as a witness for Gotovina. Gotovina argued that his case should not be joined with Čermak's, as this would cause a conflict of interest which would prejudice him. The Trial Chamber noted that Ademi had not been charged before the ICTY with any offense arising out the events alleged in the proposed joinder.[221] The Trial Chamber found that were a conflict of interest to arise, it could be remedied by a change of counsel and is not a reason to disallow the joinder.[222] The Appeals Chamber affirmed the Trial Chamber's decision.[223] It stated that:

> it is not certain at this stage in the proceedings that Prodanović's and Sloković 's duty of loyalty to Čermak will be compromised because they will be unable to effectively cross-examine their other client, Ademi, due to a desire to avoid causing Ademi to incriminate himself. As the Trial Chamber noted, they will be cross-examining Ademi with regard to events and crimes for which he has not been charged and which took place nearly two years after the incidents for which he is charged in Croatia. Nor is it clear that Prodanović and Sloković will be unable to effectively cross-examine Ademi in defense of Čermak without revealing privileged attorney-client communication arising out of representing Ademi in Croatia.[224]

The Disciplinary Council of the ADC then submitted an advisory opinion to the Trial Chamber, which, according to Mr. Prodanović and Ms. Sloković, stated that the Disciplinary Council found a conflict might only arise if Ademi is called as a witness having *adverse* interests to Čermak *and* if there is a need to aggressively cross-examine him in favor of Čermak.[225]

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[219] *Prosecutor v. Gotovina et al*., IT-06-90-PT, Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 5 April 2007 ("Prodanović and Sloković TC Decision"), *available at* http://www.icty.org/x/cases/gotovina/tdec/en/070405.pdf.
[220] *Id.*, para. 2.
[221] *Prosecutor v. Gotovina, Prosecutor v. Čermak & Markač*, IT-03-73-PT, IT-01-45-PT, Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006, para. 64.
[222] *Id.*
[223] *Prosecutor v. Gotovina, Prosecutor v. Čermak & Markač*, IT-03-73-AR73.1, IT-03-73-AR73.2, IT-01-45-AR73.1, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006, paras. 27-30.
[224]*Id.*, para. 27.
[225] Prodanović and Sloković TC Decision, paras. 3, 5.

Shortly thereafter, Mr. Prodanović and Ms. Sloković submitted a Notice attaching undertakings by Čermak and Ademi. Ademi affirmed that Mr. Prodanović and Ms. Sloković advised him of the possibility of his being called as a witness in the *Gotovina* case and of the possibility they might have to cross-examine him. He stated that he discussed with his counsel the potential impact this could have on their ability to represent him. He confirmed that he was Gotovina's chief of staff during the time of the alleged crimes with which Čermak was charged. He stated that he would not voluntarily testify in proceedings against Čermak and that he never discussed any events related to the relevant timeframe with his counsel and did not intend to do so, since it was unrelated to the charges he faced in Croatia. Čermak confirmed that his counsel discussed the possibility Ademi might be called as a witness and the potential impact their having to cross-examine Ademi might have on their ability to represent Čermak. Čermak stated that he did not consider his counsel's representation of Ademi would affect their ability to represent him effectively.[226] Mr. Prodanović and Ms. Sloković argued that no conflict existed or would be likely to arise.[227]

The OTP argued that the undertakings should not be accepted and that Čermak's was not fully informed. It asserted that even if Mr. Prodanović and Ms. Sloković were to withdraw from representing Ademi, they would still require assistance of an additional Co-Counsel to ensure that Ademi is not cross-examined using privileged information from a former client.[228]

ISSUE:

Whether Counsel may represent two Accused in two separate cases when one Accused was alleged to be the direct superior of the other during the time of the crimes alleged in the indictment and the Accused were charged with different crimes.

DECISION:

The majority found that Mr. Prodanović's and Ms. Sloković's continued representation of both Čermak and Ademi was not in the interests of both Čermak and Ademi and was likely to irreversibly prejudice the administration of justice.[229]

[226] *Id.*, para. 6.
[227] *Id.*, para. 5.
[228] *Id.*, para. 7.
[229] *Id.*, para. 22.

The majority found that the suggestion by Mr. Prodanović and Ms. Sloković to employ a third Counsel who would cross examine Ademi if he were to be called as a witness would not remedy the conflict of interest arising from the duty of loyalty owed to both Ademi and Čermak.[230]

The majority ordered that Mr. Prodanović and Ms. Sloković withdraw as Čermak's Counsel, but stay on until such time as a new Defence team was able to certify that it could take over Čermak's defence.[231]

STANDARD:

The Trial Chamber applied Article 14(D)(i) of the 2006 ICTY Code of Conduct, which states:

> 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.[232]

With reference to the likelihood of Ademi being called as a witness for Gotovina, the standard used was whether there was a "real possibility" that Ademi would be called.[233]

RATIONALE:

The Trial Chamber noted that there appeared to be a "commander-subordinate" relationship between Gotovina and Ademi, then during Gotovina's absence, between Ademi and Čermak and this raised a conflict of interest under Article 14(D)(i) of the 2006 ICTY Code of Conduct.[234] The Trial Chamber also stated that there would be a real possibility that Ademi would be called as a witness given his position as second in command to Gotovina within the relevant timeframe.[235]

The Trial Chamber accepted that it is primarily for Counsel to assess a conflict of interest because Counsel are the closest to the case and are expected to make informed decisions regarding client interests.[236] The Trial Chamber noted, however, that Mr. Prodanović and Ms. Sloković did not address the allegation that Ademi, as Gotovina's second in command, may have been in charge temporarily in Gotovina's absence, when certain alleged crimes with which Čermak was charged were committed.[237]

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[230] *Id*., para. 23.
[231] *Id*., para. 25.
[232] *Id.*, para. 10.
[233] *Id.*, para. 14.
[234] *Id*., para. 10.
[235] *Id*., para. 12.
[236] *Id.*
[237] *Id.*

If Ademi were to be called as a witness, the Trial Chamber considered the issue to be one of loyalty to clients. The Trial Chamber considered the question was whether Mr. Prodanović's and Ms. Sloković's attitude to Ademi as a witness would be materially different if he were not a client.[238] The Trial Chamber concluded that even if Ademi's evidence was not adverse to Čermak, the fact that Mr. Prodanović's and Ms. Sloković's role would change from being Ademi's Defence Counsel to cross examiner, may inhibit Mr. Prodanović and Ms. Sloković when representing Čermak.[239]

The Trial Chamber found that given that Ademi was a crucial witness for Gotovina, the value of Ademi's testimony would be all the higher.[240]

The Trial Chamber noted that Ademi stated that he never discussed events relating to the *Gotovina* case with Mr. Prodanović and Ms. Sloković and Mr. Prodanović and Ms. Sloković confirmed that Ademi gave them no confidential information concerning Čermak.[241] Also, Mr. Prodanović and Ms. Sloković implied that they did not intend to raise as a defence that Gotovina (and therefore also Ademi) was Čermak's superior. The Trial Chamber stated that this was not the point; the point was whether that defence was available to Čermak.[242] The Trial Chamber held that unless all defences remained available to Čermak, uncompromised by his Counsel's duty of loyalty to Ademi, the administration of justice would be adversely impacted.[243]

Trial Chamber also found that the undertaking provided by Ademi and Čermak, consenting to the joint representation by Mr. Prodanović and Ms. Sloković, was not fully informed. For example, the Trial Chamber considered that Ademi's undertaking made no reference to the details of Čermak's case and how he might be implicated as Gotovina's second in command during the relevant timeframe.[244] The Trial Chamber also considered Čermak's undertaking did not refer to the "potential defence which could be raised in light of the information that Ademi was Gotovina's Chief of Staff and second in command and was allegedly Acting

[238] *Id.*, para. 13
[239] *Id.*
[240] *Id.*, para. 16.
[241] *Id.*, para. 17.
[242] *Id.*, para. 19.
[243] *Id*.
[244] *Id.*, para. 20.

Commander of the Split Military District in Gotovina's stead."[245] The Trial Chamber found that Counsel were duty bound to discuss those issues with the Accused.

The Trial Chamber found that employing a third Counsel to cross-examine Ademi, if he were to be called as a witness, would not remedy the conflict arising from the duty of loyalty owed to both Ademi and Čermak. Further, the Trial Chamber found that a third Counsel would be on the same Defence team and so would be tainted by the conflict of interest.[246]

[245] *Id.*, para. 21.
[246] *Id.*, para. 23.

***Prosecutor v. Gotovina et al.*, IT-06-90-PT, Judge Orie's Dissenting Opinion on Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 18 April 2007**[247]

DISSENTING OPINION:

Judge Orie stated that he would allow Mr. Prodanović and Ms. Sloković to continue to represent Čermak in this case, subject to the following conditions:[248]

1. Counsel should cease to further represent Ademi;

2. A third Counsel should be hired to perform any duties directly related to the involvement that Ademi may have in the *Gotovina* case.[249]

RATIONALE:

Judge Orie stated that it had never been suggested that Čermak would have an interest in proceedings against Ademi. However, he found it apparent that Ademi, being Gotovina's Chief of Staff and his second in command during the time covered by Čermak's indictment, had a real possibility of being implicated the *Gotovina* case.[250] Judge Orie stated that Counsel owes a duty of loyalty to clients; therefore, Counsel was duty bound to consider whether the representation would compromise, or reasonably be expected to compromise, Counsel's duty of loyalty towards any client. Were this to be the case, Judge Orie noted that Counsel should refuse such representation.[251]

Judge Orie explained:

> Whether the duty of loyalty could result in a conflict of interest when Prodanović and Sloković accepted to represent Ademi is not relevant to a determination of the ultimate matter before the Trial Chamber. Likewise, whether counsel from that time forward acted diligently, pursuant to Article 14(B) of the Code, to ensure that no conflict of interest would arise is not the essence of the matter. The Trial Chamber does not function primarily as a disciplinary court. It is the Trial Chamber's role to determine whether there are compelling reasons which would justify intervening in the attorney-client relationship to ensure that there is no prejudice to the administration of justice, and in particular to protect Čermak's right to a fair trial. In so doing, the Trial Chamber

[247] *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Judge Orie's Dissenting Opinion on Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 18 April 2007.
[248] *Id.*, para. 17.
[249] *Id.*, para. 14.
[250] *Id.*, para. 3.
[251] *Id.*, para. 4.

> should weigh the interference with an accused's right to counsel of choice against the need to ensure the accused's right to a fair trial.[252]

Judge Orie stated that a compelling reason for the Trial Chamber to intervene in Čermak's choice of Counsel would exist if divided loyalties would cause Mr. Prodanović's and Ms. Sloković's representation of Čermak to place his right to a fair trial in jeopardy.[253]

Judge Orie stated that a conflict of loyalty would materialize if Counsel finds himself in a dilemma as to whether to use information gained confidentially from his professional relationship with one or both of his clients.[254] In the absence of any shared information of a confidential character, Judge Orie concluded that duty of loyalty owed to both clients was in jeopardy only in the abstract. Judge Orie stated that one client, however, may continue to be uneasy at the prospect of his Counsel being involved in a case that he might also be involved.[255]

Judge Orie further stated that the discontinuation of dual representation would be the best course of action.[256] Since Ademi gave his consent for Counsel to continue to represent Čermak, Judge Orie found no compelling reason to prohibit Counsel from continuing to represent Čermak under certain conditions. The first condition was that Counsel should cease from representing Ademi and any further contact with Mr. Prodanović and Ms. Sloković should be avoided to prevent Ademi's perception "being clouded regarding the true relationship with his, by then, former Counsel."[257] The second condition was that a third counsel should be hired in Čermak's case with the specific task of performing any duties that are directly related to any involvement that Ademi.[258]

Judge Orie concluded that there was no sufficient reason to doubt that the undertakings provided by Čermak and Ademi were informed. Judge Orie further concluded that the expression of consent does not have to set out in detail all potential situations that might arise and that are covered by such consent.[259]

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[252] *Id.*, para. 6.
[253] *Id.*, para. 7.
[254] *Id.*, para. 10.
[255] *Id.*, para. 11.
[256] *Id.*, para. 13.
[257] *Id.*, para. 14.
[258] *Id.*
[259] *Id.*, para. 16.

***Prosecutor v. Gotovina et al.*, IT-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007[260]**

FACTS:

See above summary

ISSUE:

Whether the Trial Chamber:

1. failed to give sufficient weight to and draw appropriate inference from the fact that Counsel's other client did not provide Counsel any privileged information which would be useful to the Accused in his Defence;

2. misdirected itself regarding the degree of Counsel's duty of loyalty;

3. erred in law by concluding both clients' undertakings were not fully informed;

4. committed a discernable error by ordering Counsel to withdraw from the case when less severe measures were available, including Counsel's withdrawal from their other client's case and retaining the services of a third Counsel; and

5. erred in law by failing to give sufficient consideration to the hardship for the Accused as a result of Counsel's withdrawal from his Defence.[261]

DECISION:

Having found that the Trial Chamber did not err, the Appeals Chamber dismissed the Appeal in its entirety.[262]

STANDARD:

The Appeals Chamber quoted Article 14 of the 2006 ICTY Code of Conduct.[263] It then considered whether a conflict of interest "can be reasonably anticipated."[264] It stated that

[260] *Prosecutor v. Gotovina et al*., IT-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007, *available at* http://www.icty.org/x/cases/gotovina/acdec/en/070629.pdf.
[261] *Id.*, para. 13.
[262] *Id.*, para. 57.
[263] *Id.*, para. 15.
[264] *Id.*, para. 23.

"where a Chamber can reasonably expect that, due to a conflict of interest, a counsel 'may be reluctant to pursue a line of defence, to adduce certain items in evidence, or to plead certain mitigating factors at the sentencing stage, in order to avoid prejudicing another client', it can no longer presume that counsel has fulfilled his or her professional obligations under the Code of Conduct and has the power and the duty to intervene in order to guarantee or restore the integrity of the proceedings without delay."[265]

RATIONALE:

The Appeals Chamber acknowledged that neither Čermak nor Ademi provided Counsel with confidential information that could be used to the detriment of the other. But it considered that this must be weighed alongside other factors.[266]

The Trial Chamber had held that what mattered most was whether all lines of defence remained open to Čermak, despite being represented by Mr. Prodanović and Ms. Sloković. The Appeals Chamber agreed and concluded that Mr. Prodanović's and Ms. Sloković's duty of loyalty *vis-à-vis* Ademi was at serious risk, regardless of the fact that no confidential information had been provided that could be useful to Čermak or Ademi's Defence.[267]

The Appeals Chamber found that it was not satisfied that Čermak had identified any discernable error in the Trial Chamber's conclusion in that regard. The Appeals Chamber found that the dual representation of Čermak and Ademi by Mr. Prodanović and Ms. Sloković had a potential for a conflict of interest given that Ademi was Gotovina's second in command and therefore exercised subordinate functions with regards to Čermak.[268]

The Appeals Camber recalled that consent provided by an affected client or former to remove a conflict of interest should be regarded as fully informed in absence of evidence to the contrary. However, it concluded that such "presumption can only be made in this case if Čermak and Ademi had been aware of *all possible implications and possible limitations* that their dual representation would have on their Defence strategies."[269]

[265] *Id.*
[266] *Id.*
[267] *Id.*, para. 22.
[268] *Id*.
[269] *Id*., para. 33 (emphasis in original).

The Appeals Chamber concluded that Čermak and Ademi were not aware of all possible implications, and having examined the undertakings, the Appeals Chamber was not satisfied that the Trial Chamber had made a discernable error.[270]

Having concluded that the simultaneous representation of Čermak and Ademi by Mr. Prodanović and Ms. Sloković raised "a high risk of a conflict of interest" due to the fact that the Counsel would be limited in their choice of defence strategies in order to conform to their duty of loyalty, the Appeals Chamber concluded that even if Mr. Prodanović and Ms. Sloković withdrew from Ademi's defence, they would still be unable to represent Čermak to the best of his interests as they would remain bound by their duty of loyalty to Ademi as a former client. The Appeals Chamber stated this "potential conflict of interest is even more contoured considering the high probability that Ademi will be called as witness" in the *Gotovina* case.[271]

The Appeals Chamber did not address the possibility of engaging a third lawyer for the purpose of cross examining Ademi because it had already established that a conflict was likely to arise even if Ademi was not called to testify.[272]

The Trial Chamber did not consider the hardship element when ordering the Counsel to withdraw from Čermak's representation and the Appeals Chamber was not convinced that it was obliged to do so to the point where such an omission would constitute an abuse of discretion. The Appeals Chamber found that the question of prejudice was indeed discussed by the Trial and Appeals Chambers in their previous decisions related to the impact of the joinder on the Appellant's right to have counsel of his choice.[273]

The Appeals Chamber found that, even though the replacement of Counsel is generally likely to cause inconveniences such as a delay in the proceedings, if the conflict of interests regarding the representation of Čermak and Ademi were not resolved at the present stage of the proceedings, the administration of justice might be seriously prejudiced and have more disastrous consequences in future.[274]

[270] *Id.*
[271] *Id.*, para. 48.
[272] *Id.*, para. 49.
[273] *Id.*, para. 54-55.
[274] *Id.*, para. 55.

The Appeals Chamber also noted that no imminent date had been set for the start of the trial and it was not likely to commence within the six months that Čermak stated was necessary for new Counsel to familiarize themselves with the case.[275]

DISSENTING OPINION OF JUDGE SHAHABUDDEEN:

Judge Shahabuddeen did not articulate a standard for determining conflict of interest. He expressed the view that Mr. Prodanović and Ms. Sloković were entitled to represent Čermak unconditionally and the Appeal should be allowed because:[276]

1. The cases against Čermak and Ademi were unrelated in time and subject matter.[277]
2. Mr. Prodanović and Ms. Sloković had not received any confidential information from Ademi that could harm Čermak.[278]
3. Čermak's written consent was duly obtained.[279]
4. Čermak's written consent was informed.[280]

[275] *Id.*
[276] *Id.*, Dissenting Opinion of Judge Shahabuddeen, para. 8.
[277] *Id.*, para. 2.
[278] *Id.*, para. 3.
[279] *Id.*, para. 5.
[280] *Id.*, para. 6.

IV. Conflicts arising because of counsel's former representation of another client

***Prosecutor v. Delalić et al.*, IT-96-21-A, Order Regarding Esad Landžo Request for Removal of John Ackerman as Counsel on Appeal for Zenjil Delalić, 6 May 1999**[281]

FACTS:

Mr. John Ackerman acted as Lead Counsel for the Accused Landžo in the course of the trial proceedings and was assigned as Counsel on Appeal for Delalić.[282]

Landžo alleged that Mr. Ackerman, in his position as Lead Counsel for Landžo, was privy to confidential information that could be detrimental to Landžo's Appeal,that inconsistent defences existed between Landžo and Delalić throughout the trial, and that in view of these facts Mr. Ackerman's representation of Delalić gave rise to a conflict of interest.[283]

ISSUE:

Whether a conflict of interest arises where Counsel represents an Accused on Appeal and had formerly represented a Co-Accused during the trial and the Co-Accused alleges that the Counsel possessed confidential information that could be detrimental to him.

DECISION:

The Appeals Chamber held that the material before it did not disclose the existence of a conflict of interest or any other ground for holding that John Ackerman was in contravention of the standards of conduct. Landžo's request was denied.[284]

STANDARD:

The Appeals Chamber did not explicitly mention what standard it applied, although it looked to Articles 9 of the 1997 ICTY Code of Conduct, Rule 1.06 of the Texas Disciplinary Rules of

[281] *Prosecutor v. Delalić et al.*, IT-96-21-A, Order regarding Esad Landžo's Request for Removal of John Ackerman as Counsel on Appeal for Zenjil Delalić, 6 May 1999 ("Delalić Decision"), *available at* http://www.icty.org/x/cases/mucic/tord/en/90506DS37199.htm.
[282] *Id*., p. 2.
[283] *Id*.
[284] *Id.*, p. 3.

Professional Conduct,[285] and Rules 44(B) and 46(A) of the ICTY Rules of Procedure and Evidence (as amended 4 December 1998).[286]

RATIONALE:

The Appeals Chamber held that the material before it did not show the existence of a conflict of interest or any other ground for holding that Mr. Ackerman was in contravention of the standards of conduct set out in Rules 44(B) and 46(A) of the Rules of Procedure and Evidence.[287]

[285] Texas Disciplinary Rules of Professional Conduct, Rule 1.06 states:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph

(c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers firm; or

(2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests.

[286] Delalić Decision, p. 3; ICTY Rules of Procedure and Evidence, IT/32/Rev. 14, as amended 4 December 1998. The Rules utilized by the Chamber in the 1998 version of the Rules are not reflective of the current version. Rule 44(B) stated: "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 Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel." Rule 46(A) stated: "A Chamber may, after a warning, refuse audience to counsel if, in its opinion, the conduct of that counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings."

[287] Delalić Decision, p. 3.

***Prosecutor v. Martić,* IT-95-11-PT, Decision on Appeal against Decision of Registry, 2 August 2002[288]**

FACTS:

Mr. Srahinja Kastratović was selected by the Accused Martić to represent him. Mr. Kastratović had previously represented the Suspect Simatović when he was interviewed by the OTP. The OTP provided the Registry with information that Simatović and Martić were both named as members of a JCE along with Slobodan Milošević and that there was "a strong indication that the accused and the suspect 'closely co-operated in the commission of the crimes.'"[289] The Registry assigned Mr. Kastratović on a provisional basis, but then removed him finding that he had not provided information clarifying or neutralizing the potential conflict of interest.[290]

ISSUE:

Whether the Registry erred in finding a conflict of interest precluded Counsel's representation of an Accused due to his former representation of a Suspect, where the OTP intended to amend the indictment against the Accused to include participation in a joint criminal enterprise with the Suspect.

DECISION:

The Trial Chamber remitted the matter to the Registry, directing it to revisit its Decision, take into account the considerations set out in this Decision, and to issue a new decision.[291]

STANDARD:

The Trial Chamber considered that a conflict of interest could exist only as provided in 9(3)(c)(iii) of the 1997 ICTY Code of Conduct if "the matter is the same or substantially related to another matter in which Counsel had formerly represented another client and the interests of the Client are materially adverse to the former client, unless the former client consents after Consultation."[292]

The Chamber considered that the Registry Directive on Assignment of Defence Counsel does not exclude Counsel being assigned to more than one Suspect/Accused at a time, provided such

[288] *Prosecutor v. Martić*, IT-95-11-PT, Decision on Appeal Against Decision of Registry, 2 August 2002 ("Martić Decision"), *available at* http://www.icty.org/x/cases/martic/tdec/en/09122227.htm.
[289] *Id*., p. 3.
[290] *Prosecutor v. Martić*, IT-95-11-PT, Decision, 31 May 2002; *Prosecutor v. Martić*, IT-95-11-PT, Decision, 14 June 2002.
[291] Martić Decision, p. 9.
[292] *Id.*, p. 7.

assignment "would neither cause prejudice to the Defence of either Accused, nor a potential conflict of interest."

RATIONALE:

The Trial Chamber considered that under the jurisprudence of the Tribunal, the choice of counsel of all Accused should be respected unless well-founded reasons exist not to assign counsel of choice.[293]

The Trial Chamber considered that under Article 9(3)(c)(iii) of the 1997 ICTY Code of Conduct, informed consent of the former client, obtained after consultation, can remove a conflict of interest.[294] The Trial Chamber considered that such consent should generally be regarded as fully informed in the absence of evidence to the contrary.[295]

The Trial Chamber considered that the Registry did not provide any information as to the nature of the conflict of interest.[296] The Trial Chamber also considered that the fact that Martić and Simatović are charged as co-Accused in the same case does not necessarily create a conflict of interest.[297]

The Trial Chamber found that the Registry did not properly consider the statements submitted by Simatović and Martić. It noted that the Registry had failed to provide the statements to the Trial Chamber despite the Chamber's order to provide further information.[298]

The Trial Chamber reasoned that it appeared that both Simatović and Martić independently discussed the conflict of interest with Mr. Kastratović and that both Simatović and Martić, on the basis of such consultations, clearly consented to Mr. Kastratović representing Martić.[299]

The Trial Chamber found that the Registry did not put forward information as to any other obstacles that could prevent Mr. Kastratović from fulfilling all other obligations under the 1997 ICTY Code of Conduct as set out in Article 9(5)(b)(ii).[300]

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[293] *Id.*, p. 5-6.
[294] *Id.*, p. 7.
[295] *Id.*
[296] *Id.*, p. 7-8.
[297] *Id.*, p. 8.
[298] *Id.*, p. 7.
[299] *Id.*
[300] 1997 ICTY Code of Conduct, Art. 9(5)(b)(ii): "Where a conflict of interest does arise, Counsel must … (ii) obtain the full and informed consent of all potentially affected Clients to continue the representation, so long as Counsel is able to fulfill all other obligations under the code."

***Prosecutor v. Tolimir et al.*, IT-05-88-PT, Decision on Appointment of Co-Counsel for Radivoje Miletić, 28 September 2005**[301]

FACTS:

Mr. Petrušić was formerly Krstić's Lead Counsel, and was selected to be Co-Counsel for Miletić. Krstić was already convicted by this time.

Miletić is alleged to have been the most senior Operations Officer holding the post of Chief of Operations and Training of the Main Staff of the Army of Republika Srpska. Krstić was Commander of the Drina Corps. There was alleged cooperation between the Main Staff and the Drina Corps. Miletić and Krstić are alleged to have participated in the same joint criminal enterprise.[302]

The Registrar refused to assign Mr. Petrušić as the Accused Miletić's Co-Counsel,[303] *inter alia,* because:

- "The Registry believes that Mr. Petrušić's representation of General [Miletić] would conflict with his former representation of General Krstić and, such, would be contrary to the interests of Justice;"[304]

- "[T]here is a real possibility that [the] client's interest require 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." "[T]he Registry has assessed that the likelihood of a conflict of interest arising is reasonably high;"[305]

- "[S]hould an actual conflict situation arise, … 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."[306]

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[301] *Prosecutor v. Tolimir et al*., IT-05-88-PT, Decision on Appointment of Co-Counsel for Radivoje Miletić, 28 September 2005 ("Popović First TC Decision"), *available at* http://www.icty.org/x/cases/popovic/tdec/en/050928.htm. The *Tolimir*, *Miletić* and *Gvero* case (*Tolimir et. al*) was joined with *Popović et al*. *See Popović et al.*, IT-05-88-T, Decision on Motion for Joinder, 20 July 2007.
[302] Popović First TC Decision, paras. 5, 29.
[303] Mr. Petrušić was originally Miletić's choice of Lead Counsel, but he did not meet the language requirement for assignment. *Id.*, para 2.
[304] *Id*., para. 4.
[305] *Id*., para. 7.
[306] *Id*., para. 8.

Miletić appealed to the Trial Chamber and provided consent to Mr. Petrušić being assigned. Mr. Petrušić provided a declaration to the effect that he is not in possession of confidential information from his former representation of Krstić.[307]

ISSUE:

Whether Counsel would be precluded from representing the Accused as Co-Counsel due to his former representation of another Accused who was alleged to have been part of the same joint criminal enterprise and had faced similar charges.[308]

DECISION:

The Trial Chamber dismissed the Motion for Review of the Registrar's Decision, stating that it was not persuaded that "the interests of justice would be served by waiving the normal language qualification."[309] Therefore Mr. Petrušić was precluded from representing Miletić as Co-Counsel.

The Trial Chamber also found that "there remain[ed] a clear potential conflict of interest" should Mr. Petrušić be assigned as Co-Counsel, and that the "potential consequences … remain[ed] significant, should conflict actually arise."[310]

STANDARD:

As Mr. Petrušić did not meet the language qualification of the Rules and Directive, the Trial Chamber held that the Registrar may only admit a Counsel who does not speak one of the two working languages of the Tribunal "at the request of the Accused *and* where the interests of justice so *demand*."[311]

Determination of the interests of justice:

The Trial Chamber did not clearly establish or apply a standard in order to determine whether representation is contrary to the interests of justice, stating only that "[n]ecessarily, the interests of justice must be viewed in light of the particular case."[312]

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[307] *Id.*, paras. 1, 33.
[308] The Trial Chamber considered the issue of Mr. Petrušić's language qualification. As he did not meet this qualification, the Trial Chamber considered whether it would be in the interest of justice to appoint him as Co-Counsel for Miletić. Therefore the Trial Chamber considered whether Mr. Petrušić's former representation of Krstić would create a conflict of interest. The language qualification issue will not be fully addressed herein as it is not directly relevant.
[309] Popović First TC Decision, paras. 37-38.
[310] *Id*., para. 35.
[311] *Id*., para. 22 (emphasis in original).
[312] *Id*.

The Trial Chamber took into consideration:

- The ability to speak the native language of the Accused when the Lead Counsel does not;[313]

- The likelihood of a conflict of interest to arise (in this case the Trial Chamber found that "the assessment by the Registrar that the likelihood of such conflict arising is reasonably high would appear to overvalue that likelihood");[314]

- The consequences of a potential conflict of interest;[315]

- The counsel's awareness of confidential information from the former representation.[316]

The Trial Chamber gave little weight to:

- The fact that Mr. Petrušić "has had the experience of representing Krstić on the trial of charges some of which were the same or similar to those facing the Accused" and that he "has a familiarity with the geographic region and many of the relevant facts and background circumstances;"[317]

- Krstić's consent, noting that the "consent of a former client to his counsel for representation of an Accused is not conclusive of there being no conflict of interest."[318]

Determination of the conflict of interest:

Unlike the Registry, which seemed to apply the "real possibility" test,[319] the Trial Chamber did not clearly articulate which standard it applied.

The Trial Chamber used several factors in considering whether a conflict of interest would preclude representation:

- The similarity of the charges against the Accused and the former client;

[313] *Id*., para. 25.
[314] *Id*., para. 35.
[315] *Id*., paras. 32, 35.
[316] *Id*., para. 33.
[317] *Id*., para. 24.
[318] *Id*., para. 32.
[319] *Id*., paras. 7, 30.

- Both the Accused and the former client allegedly participated in the same joint criminal enterprise;
- The fact that "the case against General Krstić in this Tribunal has been concluded;"
- The fact that "it cannot be said … that General Krstić can no longer be at risk of prosecution;"[320]
- The "consent by General Krstić to Mr. Petrušić acting for the Accused;"[321]
- The fact that Mr. Petrušić provided a declaration "to the effect that there [was] no information he had from General Krstić which 'did not come to light' in the Krstić trial;"
- The fact that Krstić "might be called a Prosecution witness;"
- The fact that Mr. Petrušić might be called as a witness; and
- The possibility of an agreement with the OTP.[322]

The Trial Chamber did not mention a superior-subordinate relationship as one of the factors. However the Registry found that the Drina Corps was "directly subordinated to the Main Staff at the relevant time."[323]

The Trial Chamber did not consider the fact that Miletić consented to Mr. Petrušić being assigned to be a relevant factor, as it considered that the issue was whether "Mr. Petrušić will be led into conflict with his professional responsibilities to his former client."[324]

RATIONALE:

The Trial Chamber then found that the appointment of Co-Counsel is "not a matter involving the legal right of the Accused to be represented by counsel of his own choosing." However, it stated that the Registrar should take into account any preference expressed by the Accused in the interest of fairness.[325]

[320] *Id*., para. 31.
[321] *Id*., para. 32.
[322] *Id*., para. 33.
[323] *Id*., para. 5.
[324] *Id*., para. 33.
[325] *Id*., para. 21.

Regarding the language qualification, the Trial Chamber found that Mr. Petrušić did not meet the language qualification. Then, it held that "[u]nless the Registrar is so persuaded and exercises his discretion to waive the language qualification in this case, Mr. Petrušić is not qualified to appear before the Tribunal." It held, therefore, that Mr. Petrušić could only be assigned if it is in the interest of justice.[326]

The Trial Chamber recalled the Decision of the Registry and found that "the Chamber is not persuaded that … the Registrar fell into a factual error."[327]

The Trial Chamber found that there are matters "which have not been expressly referred to in the Decision of the Registrar, which appear[ed] to the Chamber to be relevant of the degree of risk of a conflict arising."[328] These matters included the fact that Krstić's case had been concluded, Krstić consented to Mr. Petrušić's representation of Miletić, and Miletić consented to Mr. Petrušić's representation.[329]

The Trial Chamber found that "the most that can be said … 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."[330]

The Trial Chamber found that it was not persuaded "that the interests of justice would be served by waiving the normal language qualification in this case."[331]

[326] *Id*., para. 23.
[327] *Id*., paras. 29-30.
[328] *Id*., para. 31.
[329] *Id.*, paras. 31-33.
[330] *Id*., para. 35.
[331] *Id*., para. 37.

***Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Miletić, 20 February 2007[332]**

FACTS:

After the Trial Chamber issued a second decision in which it directed the Registry to reconsider its decision denying the assignment of Mr. Petrušić,[333] the Registry informed Lead Counsel that it had reconsidered, but remained unconvinced that the assignment would be in the interest of justice. Lead Counsel filed a request for review of the Registry's decision.

ISSUE:

Whether Counsel would be precluded from representing the Accused as Co-Counsel due to his former representation of another Accused who was alleged to have been part of the same joint criminal enterprise and had faced similar charges.

DECISION:

The Trial Chamber found that "the only course of action available to the Trial Chamber at this stage which would duly guarantee that justice is both done and seen to be done is the assignment of Mr. Petrušić as co-counsel for the Accused."[334] The Trial Chamber ordered the Registry to assign Mr. Petrušić as Co-Counsel for Miletić.

STANDARD:

The Trial Chamber did not discuss the issue of whether a conflict of interest existed.

RATIONALE:

The Trial Chamber mainly considered whether Miletić's representation by Mr. Petrušić would promote or hinder the expeditious conduct of the proceedings, and is in accordance with the principle that justice should not only done but should also be seen to be done.[335]

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[332] *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletić, 20 February 2007, *available at* http://www.icty.org/x/cases/popovic/tdec/en/070220.pdf.

[333] This decision is not publicly available, but was summarized in the present decision: "NOTING the 'Decision on Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletić' issued confidentially by the Trial Chamber on 16 November 2006 …, in which the Registry was directed to reconsider its decision denying the assignment of Mr. Petrušić as co-counsel for the Accused in light of the fact that it had 'attached too much weight to the potential of a conflict of interest stemming from Mr. Petrušić's former representation of Radislav Krstić and failed to address the possible perception of inconsistency amongst counsel in the present case."

[334] *Id.*, p. 4.

[335] *Id.*, p. 2-3.

The Trial Chamber noted that "whatever reasons the Registry may have had for granting co-counsel status to a member of another defence team in the present case while denying it to Mr. Petrušić, *de facto* inconsistency both appear to exist and in fact exist between their cases and this may further affect the perception of justice."[336]

[336] *Id*., p. 3.

***Prosecutor v. Perišić*, IT-04-81-PT, Decision by the Registrar assigning Mr. Slijepčević as Co-Counsel, 7 April 2006[337]**

FACTS:

Counsel for the Accused Perišić, Mr. James Counsel, requested the Registry to Assign Mr. Dušan Slijepčević as his Co-Counsel and Perišić joined in this request.[338]

Mr. Slijepčević previously acted as Co-Counsel for Obrenović. The proceedings against Obrenović were completed and Mr. Slijepčević's representation ended.[339]

Perišić was alleged to have been the Chief of the General Staff of the Yugoslav Army, while Obrenović was alleged to have been the Chief of Staff and Deputy Commander of the Zvornik Brigade.[340] Perišić was alleged to have provided the Army of Republika Srpska with the officers, including Obrenović, who were involved in crimes in Srebrenica.[341]

ISSUE:

Whether a conflict of interest would preclude a Co-Counsel's representation of an Accused due to his previous representation as Co-Counsel of a different Accused, whose trial was complete, but who had been in an alleged superior-subordinate relationship and charged with similar crimes as the first Accused.

DECISION:

The Registry found that the interests of Perišić and Obrenović were not materially adverse and that the possibility of their interests becoming materially adverse in the future was acceptably low, so he assigned Mr. Slijepčević as Co-Counsel to Perišić.[342]

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[337] *Prosecutor v. Perišić*, IT-04-81-PT, Decision, 7 April 2006 ("Perišić Registry Decision"), *available at* http://www.icty.org/x/cases/perisic/regdec/en/060407e.htm.
[338] *Id*., p. 2.
[339] *Id*. Mr. Slijepčević actually continued to represent Obrenović when Obrenović testified in other ICTY cases, but this fact does not appear to have been considered by the Registry. *See Prosecutor v. Obrenović*, IT-02-60-T, Annex A to the Joint Motion for Consideration of Plea Agreement between Dragan Obrenović and the Office of the Prosecutor Plea Agreement, paras. 9-10.
[340] *See Prosecutor v. Perišić*,IT-04-81, Second Amended Indictment, 26 September 2005, p. 2; *Prosecutor v. Obrenović*,IT-01-43, Initial Indictment, 16 March 2001, p. 1-2; *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Second Amended Indictment, 27 May 2002, p. 2-3.
[341] *Prosecutor v. Perišić*,IT-04-81-T, Judgement, 6 September 2011, para. 1604.
[342] Perišić Registry Decision, p. 2.

STANDARD:

The Registry considered whether the matters were substantially related, and whether the interests of the Accused were materially adverse to those of the former client or were likely to become materially adverse in the future.[343]

RATIONALE:

The Registry considered that, although there is was a nexus between the charges brought against Perišić and Obrenović, they were not charged with the same acts or omissions in relevant to the events in Srebrenica.[344]

The Registry considered that a superior-subordinate relationship allegedly existed between Perišić and Obrenović at the relevant time, though it considered that the superior-subordinate relationship was remote and therefore may not necessarily cause a conflict of interest.[345]

The Registry considered that, although there was a possibility that Obrenović would be called to testify as a Prosecution witness in Perišić's case, Mr. Slijepčević and Mr. Castle had agreed that if this were to happen, Mr. Slijepčević would take no part in the examination of Obrenović or in the preparation of that examination.[346]

In addition, the Registry noted that it had fully informed Perišić and his Counsel of the effect that Mr. Slijepčević's former representation of Obrenović could have on his ability to act for Perišić and that after being so informed, Perišić consented in writing to Mr. Slijepčević acting as his Co-Counsel.[347]

[343] *Id*.
[344] *Id*.
[345] *Id*.
[346] *Id*., p. 3.
[347] *Id*.

***Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojević as Legal Associate, 20 April 2009[348]**

FACTS:

On 4 February 2009, the Accused Karadžić, who was representing himself, sought assignment of Mr. Marko Sladojević as Legal Associate in his Defence team. The Registry refused the assignment because Mr. Sladojević was already assigned as a Legal Associate on the Defence team of Momčilo Krajišnik. On 17 March 2009, the Appeals Chamber in the *Krajišnik* case issued its Judgement.[349]

On 24 March 2009, Karadžić filed a request for judicial review of the Registry decision.

Karadžić was alleged to have been the founding member of the Serbian Democratic Party (SDS); President of the SDS until his resignation on 19 July 1996; Chairman of the National Security Council of the so-called Serbian Republic of Bosnia and Herzegovina (later Republika Srpska - "RS"); President of the three-member Presidency of the RS from its creation on 12 May 1992 until 17 December 1992, and thereafter President of the RS and Supreme Commander of its armed forces.[350]

Karadžić was *inter alia* charged for having committed in concert with others, planned, instigated, ordered and/or aided and abetted persecutions on political and/or religious grounds against Bosnian Muslims and/or Bosnian Croats in the following municipalities: Banja Luka, Bijeljina, Bosanski Novi, Bratunac, Brčko, Foča, Hadžići, Ilidža, Ključ, Novi Grad, Novo Sarajevo, Pale, Prijedor, Rogatica, Sanski Most, Sokolac, Višegrad, Vlasenica, Vogošća and Zvornik as well as persecutions of the Bosnian Muslims of Srebrenica.[351]

The Appeals Chamber found that "Krajišnik intervened and exerted direct influence at all levels of Bosnian-Serb affairs, including military operations, and that he was "number two" in terms of power and influence in the Republika Srpska."[352]

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[348] *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojević, 20 April 2009 ("Karadžić Decision"), *available at* http://www.icty.org/x/cases/karadzic/tdec/en/090420.pdf.
[349] *Prosecutor v. Krajišnik et al*., IT-00-39-A, Judgement, 17 March 2009.
[350] *Prosecutor v. Karadzic*, IT-95-5/18-PT, Third Amended Indictment, 29 February 2009, paras. 2-3.
[351] *Id*., paras. 36-37.
[352] *Prosecutor v. Krajišnik et al*., IT-00-39-A, Judgement, 17 March 2009, para. 815.

The Appeals Chamber "upheld Krajišnik's convictions for deportation in Zvornik, Banja Luka and Prnjavor, and for forcible transfer in Bijeljina, Bratunac, Zvornik, Bosanska Krupa, Sanski Most, Trnovo and Sokolac, as well as for persecution on the basis of the afore-mentioned crimes. These crimes encompass the forcible displacement of several thousands of Muslim and Croat civilians, among them women, children and elderly persons, throughout the period of April to December 1992."[353]

ISSUE:

Whether a Legal Associate would be precluded from joining an Accused's Defence team due to a conflict of interest resulting from his former participation in another Accused's Defence team as Legal Associate where the charges were similar.

DECISION:

The Trial Chamber found the Registry's denial of Mr. Sladojević's assignment unreasonable and ordered the Registry to assign Mr. Sladojević as Legal Associate for Karadžić with immediate effect.[354]

STANDARD:

The Trial Chamber did not articulate a standard for determining the existence of a conflict of interest. It used the general standard of review set out by the Appeals Chamber in *Kvočka*.[355]

RATIONALE:

The Trial Chamber did not consider the absence of Lead Counsel exercising control over legal support staff (a factor considered by the Registry) to be decisive. It found that "[a]dequate mechanisms for the protection of confidential information are available" in order to protect the confidentiality of information, and for the Tribunal to initiate contempt proceedings when the confidentiality is breached.[356]

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[353] *Id*.

[354] Karadžić Decision, paras. 18, 19.

[355] *Id.*, paras. 9-10, *citing Prosecutor v. Kvočka et al*., IT-98-30/1-A, Decision on Review of the Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003, para. 13:

> According to this standard, an administrative decision will be quashed if the Registry, in making the decision:
> (a) has failed to comply with the requirements of the relevant legal authorities; or
> (b) has failed to observe the basic rules of natural justice and procedural fairness towards the person affected by the decision; or
> (c) has taken into account irrelevant material or failed to take into account relevant material; or
> (d) has reached a conclusion that is unreasonable, in the sense that it is a conclusion which no sensible person who has properly applied his mind to the issue could have reached.

[356] *Id*., para. 15.

The Trial Chamber noted that both Karadžić and Krajišnik knowingly took the risk that Mr. Sladojević might face a conflict of interest if he were assigned as Karadžić's Legal Associate.[357]

The Trial Chamber noted that the Registry did not raise any objections to the assignment of Mr. Sladojević to the Gvero defence team in the *Popović et al*. case despite his existing assignment as a legal associate of Krajišnik, who testified in the *Popović et al*. case.[358]

The Trial Chamber found that "there is no reason why the Registry should have come to a different conclusion with regard to the assignment of Mr. Sladojević as a legal associate of the Accused, particularly as the trial and appeal phases of the *Krajišnik* case are now complete and the possibility of review proceedings is remote."[359]

[357] *Id*., para. 16.
[358] *Id*., para. 17.
[359] *Id*.

ICC CASES

***Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Decision on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team", 7 May 2010[360]**

FACTS:

Proceedings:

Mr. Nkwebe Liriss, Lead Counsel for the Accused Bemba, informed the Registry of the appointment of Mr. Nicholas Stuart Kaufman as a Defence team Legal Consultant.[361] The Registry informed the OTP of the appointment, since Mr. Kaufman had previously worked as an OTP Trial Lawyer, and, more poignantly, had worked on cases from the Democratic Republic of the Congo and Uganda.[362]

The OTP objected to the appointment, stating it violated Articles 12 and 16 of the International Criminal Court Code of Professional Conduct for Counsel ("ICC Code of Conduct"). The OTP asserted that while working for the OTP, Mr. Kaufman had full access to confidential information in *all* cases, including some that are not available to Bemba or his Counsel.[363]

The Registry confirmed Mr. Kaufman's appointment to the Bemba Defence team, and included the OTP's opposition to the appointment in Mr. Kaufman's appointment letter.[364]

The OTP filed a request to invalidate Mr. Kaufman's appointment. The OTP alleged that Mr. Kaufman: a. was aware of the strengths and weaknesses of the *Bemba* case; b. would be aware of the prosecutorial strategy through formal meetings and informal discussions with former OTP colleagues; c. shared an office with the OTP *Bemba* Trial Lawyer while working for the OTP; d. participated in discussion on prosecutorial policies, including on the mode of liability and the disclosure in *Bemba*;[365] and e. was aware of the sealed application for the *Bemba arrest warrant*, which had not been disclosed to the Defence.[366]

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[360] *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Decision on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team", 7 May 2010 ("Bemba Decision"), *available at* http://www.icc-cpi.int/iccdocs/doc/doc868447.pdf.
[361] *Id.*, para 1.
[362] *Id*., para. 2.
[363] *Id.*, para. 3.
[364] *Id*., para. 10.
[365] *Id*., para. 17.
[366] *Id*., para. 18.

The Trial Chamber ordered that Mr. Kaufman was to be denied access to confidential documents in the case record on a provisional basis only, pending the substantive resolution of the issue.[367]

ISSUE:

Whether a former OTP Trial Lawyer can then work as a Defence team Legal Consultant, when it was alleged that he, as part of his former OTP position, had full access to prosecution materials, which could have included OTP materials relating to the case in which he is now employed for the Defence.

DECISION:

The Trial Chamber denied the OTP's request and Mr. Kaufman was reauthorized full access to the case record.[368] The Trial Chamber found that there was a lack of proof that Mr. Kaufman was in possession of material that created a conflict of interest.[369]

STANDARD:

The standard applied was Article 16 of the ICC Code of Conduct,[370] which states:

> Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before Counsel's own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.

RATIONALE:

As Mr. Kaufman was appointed as Legal Consultant, the Trial Chamber considered that he may not be regarded as practicing at the court within the meaning of Article 1 of the ICC Code of Conduct.[371] The Trial Chamber noted that ordinarily consultants do not represent the Accused in Court or make oral submissions before the Chamber on his behalf, unless expressly

[367] *Id*., para. 14.
[368] *Id*., para. 47.
[369] *Id.*, para. 45.
[370] *Id*., para. 38.
[371] *Id*., para. 35.

authorized to do so.[372] Accordingly, the Trial Chamber found that Article 12(1)(b) of the ICC Code of Conduct[373] does not apply to Mr. Kaufman, as the OTP had alleged.[374]

The Trial Chamber examined Defence Counsel's responsibility to ensure that a conflict of interest does not arise pursuant to Article 16(1) of the ICC Code of Conduct.[375] The Trial Chamber noted that pursuant to Article 7(4) of the ICC Code of Conduct, Counsel is required to supervise the work of his Defence team, and thus is responsible for ensuring that all members of his staff comply with the ICC Code of Conduct.[376]

The OTP asserted that Mr. Kaufman became aware of confidential information relevant to the case during his employment with the OTP without specifying particulars or producing convincing supporting evidence. Mr. Kaufman wholly rejected the assertions.[377]

However, the Trial Chamber found that none of the OTP's suggestions demonstrated that a conflict of interests necessarily existed. The Trial Chamber held that given the general nature of the OTP's assertions it was impossible to conclude Mr. Kaufman was in possession of information leading to a conflict of interest; instead the OTP suggested only the possibility.[378]

The Trial Chamber found that the combination of lack of any proof that Mr. Kaufman was in possession of material that created a conflict of interests and his unequivocal assertions that he was unaware of any relevant confidential information together resolved this application. Absent any reasons for doubting Mr. Kaufman's integrity, the Chamber held it was entitled to rely on his clear undertakings, particularly given his position as one of the Lawyers listed as Counsel. The Trial Chamber found no persuasive indications that a conflict of interests existed or that his appointment was prejudicial to the ongoing proceedings.[379]

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[372] *Id*.

[373] ICC Code of Conduct, Art. 12(1)(b):

> Counsel shall not represent a client in a case in which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

[374] Bemba Decision, para. 37.

[375] Article 16(1) of the ICC Code of Conduct states:

> Counsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client's interests before Counsel's own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.

[376] Bemba Decision, para. 38.

[377] *Id*., para. 43.

[378] *Id*.

[379] *Id*., para. 45.

***Prosecutor v. Banda Abakaer Nourain & Jerbo Jamus*, ICC-02-05-03-09, Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence, 30 June 2011[380]**

FACTS:

A former OTP Trial Lawyer, Mr. Ibrahim Yillah, was appointed as Associate Defence Counsel in the *Banda and Jerbo* case. The OTP filed a motion requesting the Chamber to invalidate Mr. Yillah's appointment.[381] Mr. Karim Khan and Mr. Nicholas Koumjian represented Mohammed Banda and Saleh Jerbo jointly as Lead Counsel and Co-Counsel respectively.

The OTP contended that as a Trial Lawyer for the OTP, Mr. Yillah was exposed to and could have participated in or just overheard formal and informal office discussions concerning confidential information relating to the *Banda and Jerbo* case. He directly participated in discussions that inherently included confidential discussions of the strengths and weaknesses of the various cases.[382]

The OTP submitted that in this sort of circumstance, a former OTP lawyer should be barred for a period of time, no shorter than one year, from working for the Defence in any case before the ICC.[383]

The OTP submitted that lawyers and investigators frequently confer amongst themselves and seek advice on investigative and prosecutorial tactics and policies.[384] The OTP alleged that the course of Mr. Yillah's former employment, formal and informal discussions occurred that included confidential investigative strategies, charging strategies for potential suspects and strategies for the preparation of cases.[385]

ISSUE:

Whether a former OTP Trial Lawyer can act as Associate Counsel for Defence, when it was alleged that he, in his former OTP position, had full access to prosecution materials, which

[380] *Prosecutor v. Banda & Jerbo*, ICC-02-05-03-09, Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence, 30 June 2011, *available at* http://www.icc-cpi.int/iccdocs/doc/doc1100940.pdf.
[381] *Id.*, para. 2.
[382] *Id*., paras. 2, 16.
[383] *Id*., para. 3.
[384] *Id*.
[385] *Id*.

could have included OTP materials relating to the case in which his is now employed for the Defence.

DECISION:

The Trial Chamber denied the OTP's request. The Trial Chamber found no persuasive indications that a conflict of interest existed or that Mr. Yillah's appointment was prejudicial to the proceedings.[386]

STANDARD:

The Trial Chamber applied Article 12 of the ICC Code of Conduct:

> Counsel shall not represent a client in a case in which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

The Trial Chamber considered, when interpreting this standard, "confidential information" means more than "*de minimis* confidential information."[387]

RATIONALE:

Mr. Yillah was expected to represent, under the supervision of the Lead Counsel, the Accused in Court. The Trial Chamber thus found that Mr Yillah could be viewed as a "Defence Counsel … practising at the … Court" within the meaning of Article 1 of the ICC Code of Conduct. The Trial Chamber concluded as a result that Articles 12(l)(b) and 16 of the ICC Code of Conduct were applicable.[388]

The Trial Chamber agreed with the OTP that the test under Article 12(l)(b) of the ICC Code of Conduct does not require that the prior involvement was "substantial." The determinative issue for the Trial Chamber was whether Counsel became aware of more than "*de minimis* confidential information" relevant to the case which a member of the Defence team should not possess.[389]

The Trial Chamber considered that under Article 16 of the ICC Code of Conduct, it is Defence Counsel's responsibility to ensure that a conflict of interest does not arise, including a conflict

[386] *Id*., para. 22.
[387] *Id.*, para. 16.
[388] *Id.*, para. 10.
[389] *Id.*, para. 16.

that concerns a member of the Defence team; Counsel shall supervise the work of the Defence team, to ensure, *inter alia*, they comply with the Code.[390]

In the event of a dispute that may cause unfairness in the proceedings, the Trial Chamber found that it had responsibility to resolve the matter pursuant to Article 64(2) of the Statute. The Trial Chamber held that it had statutory responsibilities for ensuring that the trial is fair and for adopting such procedures as were necessary to facilitate the fair conduct of the proceedings.[391] The Trial Chamber found that although the OTP alleged that Mr. Yillah became aware of confidential information relevant to the present case during his OTP employment, no proof – particulars or supporting material – were provided.[392]

The Trial Chamber found that although Mr. Yillah's prior employment with the OTP may have provided him insight into the functioning of the OTP and knowledge pertaining to certain ongoing investigations, the OTP did not demonstrate that Mr. Yillah had confidential information relating to this specific case. Instead, the OTP only suggested the possibility.[393]

The Trial Chamber found that as a result, the combination of lack of any proof that Mr. Yillah was effectively in possession of confidential material and his unequivocal assertions that he was unaware of any relevant confidential materials settled the matter: "[a]bsent any reasons for doubting Mr. Yillah's integrity, the Trial Chamber is entitled to rely on his undertakings."[394]

[390] *Id.*, para. 11.
[391] *Id.*, para. 12.
[392] *Id*., para. 20.
[393] *Id*., para. 21.
[394] *Id*., para. 22.

***Prosecutor v. Banda Abakaer Nourain & Jerbo Jamus*, ICC-02/05-03/09, Judgment on the Appeal of the Prosecutor against the Decision of Chamber IV of 30 June 2011 Entitled "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence", 11 November 2011[395]**

FACTS:

See above summary.

ISSUES:

Whether a former OTP Trial Lawyer can then work as Associate Counsel for Defence, when it was alleged that he, as part of his former OTP position, had full access to prosecution materials, which could have included OTP materials relating to the case in which his is now employed for the Defence.

Whether the Trial Chamber erred in interpreting the words "being privy to confidential information" under Article 12(1)(b) of the ICC Code of Conduct and whether it gave excessive weight to the assertion of Mr. Yillah that he was unaware of any relevant confidential information.

DECISION:

The Appeals Chamber, having found that the Trial Chamber did not err, dismissed the Appeal.[396]

STANDARD:

The Appeals Chamber found that the Trial Chamber correctly drew upon the provisions of Article 12(1)(b) of the ICC Code of Conduct.[397]

RATIONALE:

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[395] *Prosecutor v. Banda & Jerbo*, ICC-02/05-03/09 OA, Judgment on the Appeal of the Prosecutor against the Decision of Chamber IV of 30 June 2011 Entitled "Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence", 11 November 2011 ("Banda & Jerbo AC Judgement"), *available at* http://www.icc-cpi.int/iccdocs/doc/doc1266895.pdf.

[396] *Id.*, para. 35.

[397] *Id.*, para. 31. ICC Code of Conduct, Art. 12(1)(b) states:

> Counsel shall not represent a client in a case in which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

The Appeals Chamber found that the Trial Chamber correctly interpreted the words "privy to confidential information" as "being aware of" or being in "possession" of confidential information.[398]

The Appeals Chamber held that Article 12(1)(b) of the ICC Code of Conduct does not expressly contain a *de minimis* requirement. The Appeals Chamber recalled that the Trial Chamber unequivocally concluded that it had not been established that Mr. Yillah had knowledge of *any* confidential information – be it *de minimis* or otherwise.[399] Accordingly, the Appeals Chamber held the fact that the Trial Chamber required the information to be more than *de minimis* was irrelevant for the Trial Chamber's rejection of the OTP request.[400]

[398] Banda & Jerbo AC Judgment, para. 32.
[399] *Id.*, para. 34.
[400] *Id.*

***Prosecutor v. Muthaura et al*., ICC-01/09-02/11, Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 20 July 2011[401]**

FACTS:

Mr. Essa Faal was a former Senior Trial Lawyer for the OTP in relation to the Darfur cases. He resigned from that position 31 March 2011. On 22 April 2011, Mr. Faal joined the Muthaura Defence team.[402]

Judge Ekatrina Trendafilova (Single Judge of the Pre-Trial Chamber) ordered the OTP and the Registrar to submit observations on a possible impediment to Mr. Essa Faal's assignment to the Muthaura Defence team.[403]

The OTP filed observations and the Registry prepared a report to prove the existence of a conflict of interest. The OTP took the position that Mr. Faal's continued representation of Muthaura would cause a conflict of interest. The Registry's report dealt with (a) whether Mr. Faal received notification emails sent by Ms. Shyamala Alagendra concerning the Kenya situation (of which the *Muthaura*case was a part); (b) whether he viewed confidential and under seal documents concerning the Kenya situation and related cases; and (c) whether he had real time access to the transcripts of "closed proceedings."[404]

After the Defence submitted its response requesting the Single Judge to dismiss the objections contained in the OTP Observations, the OTP filed a Reply requesting the Single Judge invalidate Mr. Faal's appointment because of the existence of an alleged conflict of interest.[405]

ISSUE:

Whether a former OTP Senior Trial Lawyer is barred from joining a Defence team on the Kenya due to a conflict of interest arising from his former employment with the OTP on the Darfur situation.

DECISION:

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[401] *Prosecutor v. Muthaura et al*., ICC-01/09-02/11, Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 20 July 2011 ("Muthaura First PTC Decision"), *available at* http://www.icc-cpi.int/iccdocs/doc/doc1123821.pdf.
[402] *Prosecutor v. Muthaura et al*., ICC-01/09-02/11 OA3, Judgment on Appeal of the Prosecutor against the Decision of Pre-Trial Chamber II dated 20 July 2011 entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 10 November 2011, para. 4.
[403] Muthaura First PTC Decision, para. 3.
[404] *Id*., para. 4.
[405] *Id*., paras. 8-9.

The Single Judge rejected the OTP's request because the OTP failed to satisfy the required standard of proof that Mr. Faal was aware of more than *de minimis* confidential information.[406]

STANDARD:

The Single Judge considered Article 12(1)(b) of the ICC Code of Conduct[407] to be the relevant test in considering a conflict of interest,[408] and concluded the core issue was not actually whether there was an appearance of a conflict of interest, but whether Mr. Faal was "privy to confidential information as a staff member of the Court relating to the case."[409]

RATIONALE:

In interpreting the word "privy to confidential information" under Article 12(1)(b) of the ICC Code of Conduct, the Single Judge held that a person must be aware of more than *de minimis* confidential information. The facts presented should reveal that Defence Counsel was aware of confidential information of some significance to the *Muthaura* case. Only this would cause the Single Judge to invalidate the Defence Counsel's involvement with the Defence.[410]

The Single Judge considered the annexes appended to the OTP's observations, and found that there "was a lack of proof that Mr. Faal *actually was aware* of confidential information concerning the case of *Proscutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, let alone *de minimis* information."[411]

The Single Judge concluded that the information provided by the OTP concerning alleged discussions between Mr. Faal and the *Muthaura* OTP Trial Lawyer (in Mr. Faal's former capacity as Senior OTP Trial Lawyer) as to the "case hypothesis" was too general in nature. She found that this does not in itself sufficiently prove that he was privy to confidential information related to the case against Muthaura within the meaning of Article 12(l)(b) of the

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[406] *Id*., para. 29.

[407] Art. 12(1)(b) states:

> Counsel shall not represent a client in a case: in which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

[408] Muthaura First PTC Decision, para. 14-15.

[409] *Id.*, para. 16.

[410] *Id.*, para. 17 (the PTC decision contains a typo concerning the numbering, this is the 17 before para. 18).

[411] *Id*., para. 17 (the PTC decision contains a typo concerning the numbering, this is the 17 after para. 18).

Code of Conduct.[412] She found that there were no concrete facts that revealed Mr. Faal to be privy to confidential information concerning the *Muthaura* case.[413]

The Single Judge also concluded that a "case hypothesis" is subject to change. Even if Mr. Faal had witnessed OTP case hypothesis discussions when he worked for the OTP, the case hypothesis would have evolved, making the information he had gained irrelevant[414]

[412] *Id.*, para. 20.
[413] *Id.*
[414] *Id*.

***Prosecutor v. Muthaura et al*., ICC-01/09-02/11OA3, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber II Dated 20 July 2011 entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence," 10 November 2011[415]**

FACTS:

See above summary.

ISSUES:

The OTP sought to appeal the decision on two grounds:

(1) Whether, as a matter of law, OTP lawyers may join a defence team in a case that was open at the time when the person worked for the OTP or whether the person should be deemed as being privy to confidential information related to the case under Article 12(1)(b) of the ICC Code of Conduct; and

(2) Whether the correct test to determine that a person is "privy to confidential information" under Article 12(1)(b) of the ICC Code of Conduct is whether that person has become aware of more than the *de minimis* confidential information related to the relevant case.[416]

DECISION:

The Appeals Chamber directed the Pre-Trial Chamber to decide anew on the question of whether to invalidate the appointment of Mr. Faal in light of the present judgment. The Pre-Trial Chamber would need to first clarify whether Mr. Faal was aware of was any confidential information. If he was aware, it would need to determine whether it is nevertheless in the interests of justice that Mr. Faal should be part of the defence.[417]

STANDARD:

The Appeals Chamber applied Article 12(1)(b) of the ICC Code of Conduct and considered: (i) whether counsel was aware of any confidential information relating to the case, and (ii) if so, whether it was nevertheless in the interests of justice for Counsel to be permitted to represent the Accused.[418]

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[415] *Prosecutor v. Muthaura et al*., ICC-01/09-02/11 OA3, Judgment on Appeal of the Prosecutor against the Decision of Pre-Trial Chamber II dated 20 July 2011 entitled "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence", 10 November 2011, *available at* http://www.icc-cpi.int/iccdocs/doc/doc1266155.pdf.
[416] *Id.*, para. 11.
[417] *Id*., para. 72.
[418] *Id*., para. 67.

The Appeals Chamber found that whether information was "*de minimis*" was only one factor, when considering whether it is in the interests of justice for Counsel to represent an Accused.[419]

RATIONALE:

The Appeals Chamber interpreted the words "was privy to" within Article 12(1)(b) of the ICC Code of Conduct as meaning that a person "has knowledge of something secret or private that has been shared with him or her" and not that the person merely had the possibility to become aware of the relevant confidential information.[420]

The Appeals Chamber held that for a conflict to arise based on Counsel being "privy to confidential information" as a staff member of the Court (within the meaning of Article 12(1)(b) of the ICC Code of Conduct), Counsel must have had actual knowledge of confidential information relating to the case in which Counsel seeks to appear.[421] The Appeals Chamber found the phrase "privy to confidential information" is clear and unambiguous and need not be clarified. To require the shared information to be "more than *de minimis*" or "of some significance" alters the meaning of the phrase. [422]

The Appeals Chamber held that nothing in Article 12 of the ICC Code of Conduct indicates that there should be a general bar on former OTP staff members representing Accused.[423]

The Appeals Chamber then proceeded on the basis that the Pre-Trial Chamber concluded that, while Mr. Faal was aware of some confidential information, that information was no more than *de minimis*, but found that permitting impediments to representation to be lifted, if deemed to be justified in the interests of justice, "is consistent with ensuring that a trial is fair and protecting the integrity of the proceedings."[424]

[419] *Id*., para. 70.
[420] *Id*., para. 53.
[421] *Id*., para. 64.
[422] *Id*., para. 65.
[423] *Id*., para. 58.
[424] *Id*., para. 42.

***Prosecutor v. Muthaura et al*., ICC-01/09-02/11, Second Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 9 March 2012[425]**

FACTS:

See above summaries.

ISSUE:

Whether a former OTP Senior Trial Lawyer may be permitted to represent an Accused where he was alleged to be aware of confidential information relating to the case in which he seeks to appear.

DECISION:

The Single Judge of the Pre-Trial Chamber rejected the OTP's request to invalidate the appointment of Mr. Faal as a member of the Defence team for Mr. Muthaura,[426] as the OTP had failed to prove that Mr. Faal had knowledge of something secret or private that was shared with him while he was a member of the OTP.

STANDARD:

Article 12(1)(b) was the standard applied. It states:

> Counsel shall not represent a client in a case in which counsel was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear. The lifting of this impediment may, however, at counsel's request, be ordered by the Court if deemed justified in the interests of justice. Counsel shall still be bound by the duties of confidentiality stemming from his or her former position as a staff member of the Court.

RATIONALE:

The Single Judge noted that the Appeals Chamber had clarified that Article 12(1)(b) of the ICC Code of Conduct refers to whether Counsel was privy to *any* confidential information relating to the case in which Counsel seeks to appear. The Single Judge noted that Counsel is considered to be "privy" to confidential information in a case when he or she "has something of secret or private that has been shared with him or her" and that the party challenging the

[425] *Prosecutor v. Muthaura et al*., ICC-01/09-02/11, Second Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence, 9 March 2012, *available at* http://www.icc-cpi.int/iccdocs/doc/doc1367775.pdf.
[426] *Id.*, para. 46.

assignment of Counsel concerned must prove that counsel once had knowledge of confidential information relating to the case.[427]

The Single Judge considered that factors such as the *de minimis* nature of confidential information, the rights of the Accused, Counsel's position within the defence team, and concerns of overall fairness or the appearance of impropriety may be taken into consideration when determining what might be "in the interests of justice."[428]

The Single Judge reviewed the Annexes provided by the OTP and found that the communications did not provide any relevant information as to whether Mr. Faal was privy to any confidential information.[429]

The Single Judge then considered whether the alleged discussions Mr. Faal could have had concerning the case hypothesis would amount to "knowledge of something secret or private that has been sharedwith" Mr. Faal. The Single Judge found that the case hypothesis was in the initial stage and did not appear to have contained any confidential information. By the time Mr. Faal joined the Muthaura Defence, the case hypothesis of the OTP was already revealed in its request to summon the suspects in the case.[430]

As for the remaining information advanced by the OTP, the Single Judge found that the evidence lacked specificity as to the content, time or place of such conversations. The Single Judge found due to that the generality of the OTP's declarations and the categorical denials of Mr. Faal, the information provided by the OTP remained a mere allegation unsupported by concrete facts. The information and communications contained in the Annexes were not sufficient to reach a conclusion that Mr. Faal was privy to confidential information in the Kenya case.[431]

[427] *Id*., para. 15.
[428] *Id*., para. 16.
[429] *Id*., para. 22.
[430] *Id*., para. 25.
[431] *Id*., paras. 26, 29, 32-35.