

IN THE TRIAL CHAMBER

Before:

Judge Richard May, Presiding

Judge Mohamed Bennouna

Judge Patrick Robinson

Registrar:

Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:

25 March 1999

PROSECUTOR

v.

**BLAGOJE SIMIC
MILAN SIMIC
MIROSLAV TADIC
STEVAN TODOROVIC
SIMO ZARIC**

**DECISION ON THE PROSECUTION MOTION TO RESOLVE CONFLICT
OF INTEREST REGARDING ATTORNEY BORISLAV PISAREVIC**

The Office of the Prosecutor

Ms. Anne-Birgitte Haslund

Ms. Mary MacFadyen

Ms. Nancy Paterson

Counsel for the accused

Mr. Branimir Avramovic, for Milan Simic

Mr. Igor Pantelic, for Miroslav Tadic

Mr. Deyan Ranko Brashich, for Stevan Todorovic

Mr. Borislav Pisarevic, for Simo Zaric

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former

Yugoslavia since 1991 ("International Tribunal") is the "Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarevic" filed by the Office of the Prosecutor ("Prosecution") on 16 December 1998, together with the "Defence Response on Prosecutor s Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarevic," filed by counsel for the accused, Simo Zaric ("Defence") on 21 January 1999.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties heard on 23 February 1999 and 4 March 1999,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Arguments of the Parties

1. The Prosecution seeks to resolve the issue of an alleged conflict of interest regarding defence counsel, Mr. Pisarevic, prior to the commencement of the trial by determining whether he is likely to be called as a witness at trial. Indeed, the Prosecution notes that if Mr. Pisarevic is called as a witness during trial then a conflict of interest would arise under Article 16 of the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal ("Code of Conduct")¹ and consequently he should be disqualified from appearing as counsel for the accused, Simo Zaric.² Alternatively, if he is not likely to be a witness, the Prosecution submits that 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, the accused, Simo Zaric claimed that he had been denied a fair trial. The Prosecution further proposes that, together with a waiver from all the accused, the Trial Chamber should require Mr. Pisarevic to be assisted by co-counsel who would conduct the questioning of witnesses in circumstances where a direct conflict of interest exists concerning Mr. Pisarevic.

2. The Prosecution submits that Mr. Pisarevic s personal knowledge of certain facts to be addressed at trial makes him a compellable witness, both for the accused and the Prosecution, and interferes with his ability to act as defence counsel and perform his duties with impartiality. The Prosecution identifies four factual situations in relation to which Mr. Pisarevic could be called to testify at trial. In paragraph II(A) of the Motion, the Prosecution notes that Mr. Pisarevic allegedly concealed a prospective witness, Sulejman Tihic, in his home on the night of the alleged Serb attack on the town of Bosanski Samac and that he spoke with two of the accused, Simo Zaric and Blagoje Simic, about whether Mr. Tihic should surrender to the Serb authorities. Later, the Prosecution states that Mr. Pisarevic was present when Mr. Tihic was allegedly arrested at gunpoint by the accused Stevan Todorovic. In paragraph II(B) of the Motion, the Prosecution notes that Mr. Pisarevic was a leading citizen in Bosanski Samac, and participated in the governmental and political affairs of the municipality as President of the Party of Democratic Changes (SDP). In this capacity, the Prosecution alleges that Mr. Pisarevic attended several meetings where political issues were discussed among the ethnic groups; in addition witnesses will testify that he frequently took the side of the Serbs and that he had advance knowledge of the alleged Serb attack on Bosanski Samac. Accordingly, the Prosecution claims that Mr. Pisarevic is a witness to and participant in the ongoing power struggle between the parties to the conflict, and that his presence makes him a potential witness to the preparation, planning or execution of the offence of persecution. In paragraph II(C) of the Motion, the Prosecution alleges that Mr. Pisarevic represented a prospective witness, Omer Nalic, in a Serb military court in Bijelina, and that a false confession, alleged to have been forcibly

obtained from Mr. Nalic by Simo Zaric, was used as evidence against Mr. Nalic. At the trial Mr. Nalic will testify about this event, among others. Consequently, according to the Prosecution, Mr. Pisarevic will have to cross-examine a witness whom he may have previously represented in a sham proceeding before a Serb military court. In paragraph II(D) of the Motion, the Prosecution notes that Mr. Pisarevic not only represented some of the Prosecution's prospective witnesses, including Hasan Bicic, Muhamed Bicic and Perica Misic, but he also saw Hasan Bicic, and Perica Misic in the custody of Milan Simic after they were alleged to have been beaten by Milan Simic, among others. The Prosecution argues that both the accused, Milan Simic, and the Prosecution could call Mr. Pisarevic to deny or to corroborate the testimony of these witnesses. The Prosecution further submits that the witnesses, Mr. Bicic and Mr. Misic, saw Mr. Pisarevic wearing a uniform, suggesting his association with the Serb forces occupying the town.

3. The Prosecution bases its argument on the following legal grounds: First the Prosecution argues that, according to Article 16 of the Code of Conduct, a lawyer must not act as an advocate in a trial where he is likely to be called as a necessary witness unless the testimony relates to an uncontested issue, or where the lawyer's disqualification would work a substantial hardship to the client. Therefore, in view of the fact that Mr. Pisarevic is likely to be called as a witness at trial, the Prosecution contends that he should be disqualified as counsel for the accused, Simo Zaric. The Prosecution submits that disqualification of Mr. Pisarevic at this stage of the proceedings would not result in substantial hardship to the accused, Mr. Zaric, because the date of commencement of the trial is still distant. The Prosecution further notes that defence counsel has a duty under Article 9(2) of the Code of Conduct to ensure that no conflict of interest arises and under Article 9(5) of the Code of Conduct, in the event of a conflict arising, to take all necessary steps to remove the conflict, which may include self-disqualification. The Prosecution notes that the 1991 Code of Professional Ethics for Attorneys of the Bar Association of Serbia makes no provision for waivers should a conflict of interest arise.

4. The Prosecution asserts that, while under Article 9(5) of the Code of Conduct the accused could waive his right to a "conflict free" counsel and proceed to trial represented by Mr. Pisarevic, such a waiver might not withstand scrutiny on appeal. Indeed, the Prosecution argues that the right of the accused to be represented by counsel of his choice must be secondary to the fair trial rights of all the accused and the integrity of the proceedings. The Prosecution further notes that Mr. Pisarevic's personal knowledge of certain of the events at issue in this case could affect his ability to perform his duties as an advocate, for example, his ability to cross-examine certain Prosecution witnesses effectively and with impartiality. In this regard, the Prosecution notes that in the *Wheat* case³, the Supreme Court of the United States held that a criminal defendant's right to counsel of his choice is not absolute, but rather, the constitutional guarantee is one of effective legal representation. The Prosecution further notes that in the *Croissant* case⁴, the European Court of Human Rights stated that although courts must take into account the defendant's choice of counsel, a defendant's preferences may be overridden where relevant and sufficient grounds exist for doing so in the interests of justice.

5. In response, the Defence submits that the Prosecution's motion is unlawful and that it should be dismissed by this Trial Chamber. Indeed, the Defence claims that the facts alleged by the Prosecution are untrue, that no conflict of interest exists, and further that none of the accused intend to call Mr. Pisarevic as a witness. In addition, the Defence claims that the Prosecution is not authorised to submit a proposal for disqualification of counsel for the accused, as it is only the Trial Chamber that has jurisdiction to address a conflict of interest, if and when it occurs during the trial.

6. The Defence responds in the following way to the factual allegations made by the Prosecution. First, Mr. Pisarevic denies any involvement in the governmental affairs of Bosanski Samac, stating

that he acted as leader of the opposition party. Second, Mr. Pisarevic denies that the prospective witness, Mr. Tihic, was concealed in his home the night of the alleged attack on Bosanski Samac, claiming instead that it was the day after the attack. Third, the Defence notes that the allegations contained in paragraphs II(B) and II(C) of the Prosecution's motion relating to Mr. Pisarevic's personal knowledge concerning events described by witnesses, Mr. Tihic and Mr. Nalic, are incorrect. Similarly, the Defence claims that the allegations in paragraph II(D) of the Prosecution's motion are incorrect. Although Mr. Pisarevic concedes that he saw the witnesses, Hasan Bicic and Perica Mistic, in the custody of one of the accused, Milan Simic, he claims that he was not able to see any injuries in the dark. The Defence further denies that the witnesses, Mr. Bicic and Mr. Mistic ever stated that Mr. Pisarevic was wearing a uniform.

B. Analysis

The issues raised by the Motion may be conveniently considered under the following headings:

I. What is a conflict of interest?

II. Does the participation of Mr Pisarevic in the trial as an attorney for the accused, Simo Zaric, raise a conflict of interest?

III. How is the matter to be disposed of, if it is dealt with at the pre-trial stage?

I. What is a conflict of interest?

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.

Most systems of law⁵ have rules governing the participation of an attorney in a trial when there is a conflict of interest between the attorney and the client; such a conflict affects the essential fairness of the trial, and in respect of the Tribunal, implicates, first, the responsibility of the Trial Chamber under Article 20, paragraph 1, to "ensure that a trial is fair } with full respect for the rights of the accused)", and secondly, the right of the accused under Article 21, paragraph 2, of the Statute to a fair trial.

Additionally, sub-Rule 44(B) provides that counsel are subject to the Code of Conduct. While the Code of Conduct does not define a conflict of interest in specific terms, Article 9 thereof sets out the responsibilities of counsel in a situation of a conflict of interest. Generally, that Article requires counsel to act at all times in the best interests of the client and to exercise all care to ensure that a conflict of interest does not arise in the course of representing a client.⁶

II. Does the participation of Mr Pisarevic in the trial as an attorney for the accused, Simo Zaric raise a conflict of interest?

The Trial Chamber has considered carefully the written submissions and oral arguments of the Prosecution as to the circumstances which give rise to a conflict, actual or potential, as well as the Defence response.⁷ Essentially, Mr Pisarevic has sought to deny the factual basis of the allegations made by the Prosecution. Even so, he has not denied all of those allegations.⁸

The purpose of the four illustrations⁹ given by the Prosecution is to highlight the possibility of a conflict arising for the reason that Mr Pisarevic might be called as a witness either for the Prosecution or by one of the accused other than Mr. Zaric; for example, if the witness, Mr. Tihic had been concealed in Mr Pisarevic's house, whether in the day or night, it is conceivable that he could be called to testify as to this event by the Prosecution or by one of the accused other than Mr. Zaric. Such an event would clearly make his representation of the accused, Mr Zaric, incompatible with the best interests of justice. Article 16 of the Code of Conduct prohibits counsel from appearing in a trial in which he is likely to be a necessary witness, except where the testimony relates to an uncontested issue or where substantial hardship would result from his non-appearance. The difference between the Prosecution and Mr Pisarevic as to the factual bases of the conflict of interest shows that, at any rate, the first limb of the exception – an uncontested issue – does not apply.

The Trial Chamber has also considered the weight to be attached to the statements made during the hearing by or on behalf of all four accused, including Simo Zaric, who is represented by Mr Pisarevic.

Mr. Zaric expressed confidence in Mr. Pisarevic and stated that "in no stage of the proceedings can a conflict of interest occur" between Mr. Pisarevic and himself.¹⁰

Counsel for Mr Todorovic said that he did not intend to call Mr Pisarevic as a witness either in chief or in rebuttal.¹¹

Mr. Miroslav Tadic said that there was no conflict of interest between Mr. Pisarevic and himself.¹²

Counsel for Mr. Milan Simic stated that he would not call Mr. Pisarevic as a witness but reserved the right to examine him should he be called to testify.¹³

Notwithstanding the assurances of confidence in Mr. Pisarevic given by the accused, Mr. Zaric, and the statements by the other accused that they would not call Mr. Pisarevic as a witness, or that there was no conflict of interest, the Trial Chamber is bound to say that at the end of the day it is left with a picture of Mr. Pisarevic as an attorney who had personal knowledge of, and was intimately involved in many of the events at issue in this trial. The Trial Chamber notes that the Prosecution has not stated that she would not call Mr. Pisarevic as a witness; on the contrary, the Prosecution's written submissions highlighted the possibility that Mr. Pisarevic could be called as a witness for the Prosecution, and in her oral arguments she stated:

) at this point no one can indicate that they intend to call Mr. Pisarevic as a witness. However, I can see a likelihood, especially from what Mr. Pisarevic has described regarding his knowledge of these events, that he will be a necessary witness with respect to some events.¹⁴

On the basis of the submissions, written and oral, of the Prosecution and the Defence the Trial Chamber finds that there is a potential for conflict arising at the trial between Mr Pisarevic and his client.

II. The Disposition of the Matter.

Article 9(5) of the Code of Conduct sets out a mechanism for dealing with a conflict of interest. It

provides:

"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 all steps necessary 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."

This is an appropriate mechanism for dealing with the conflict at this stage. In the circumstances of this case, paragraph (b)(ii) is applicable. In terms of the proviso to that paragraph, the Trial Chamber finds that the consent of Mr Pisarevic's client is compatible with the continued discharge of Mr Pisarevic's other obligations under the Code of Conduct. Moreover, in determining that Article 9(5)(b)(ii) of the Code of Conduct is appropriate, the Trial Chamber has given due weight to the right of the accused to counsel of his choice pursuant to Article 21, paragraph 4(b) of the Statute. Mr. Pisarevic must, therefore, obtain the full and informed consent of his client to continue the representation.

III. DISPOSITION

For the foregoing reasons

PURSUANT TO Rule 72 of the Rules of Procedure and Evidence of the International Tribunal,

THE TRIAL CHAMBER DECIDES that in order for Mr. Pisarevic to continue his representation of the accused, Simo Zaric, he must obtain, within 7 days of this decision, Mr. Zaric's full and informed written consent, and transmit it to the Trial Chamber.

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

Richard May
Presiding

Dated this twenty fifth day of March 1999
At The Hague
The Netherlands

1. The Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, IT/125, 12 June 1997.
3. *Wheat v. United States*, 486 U.S. 153 (1988).
4. *Croissant v. Germany*, 16 E.H.H.R. 135, 25 September 1992.
5. See Rule 1.7 of the American Bar Association Model Rules of Professional Conduct (1992 Ed.) on "Conflict of Interest: General Rule", setting out the circumstances in which a lawyer should not represent a client, and paragraph 464, Vol. 3(1) of Halsbury's Laws of England: "there are certain occasions when a Barrister should decline to accept instructions or may be obliged to withdraw from a case because of circumstances which would render it difficult for him to maintain his professional independence or would otherwise make his representation of the client incompatible with the best interests of justice". Article 3.2 of the "Code of Professional Conduct of the European Community" provides: "The lawyer should, except with the consent of the parties, abstain from representing any client when there is a conflict of interest)"
6. See Article 9(1) and 9(2) of the Code of Conduct.
7. See paras. 2, 5 and 6 of this Decision.
8. For example, he has not denied: The fact that the witness Mr. Tihic was concealed in his house, though he contends that this took place in the day, and not in the night, as the Prosecution alleged; that he was present when Mr. Tihic was arrested by Mr. Todorovic; that he saw the witnesses Mr. Bicic and Misic in the custody of Milan Simic; that he acted as the attorney for Mr. Nalic in a Serb military court in Bijeljina.
9. See para. 2 of this Decision.
10. *Prosecutor v. Simic et al.*, Case No. IT-95-9-PT, Transcript of pre-trial hearing, March 4 1999, T.328-329.
11. *Ibid.*, T. 327.
12. *Ibid.*, T. 330.
13. *Ibid.*, T. 330.
14. *Ibid.*, T. 226.