



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-06-90-AR73.1
Date: 4 May 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mohamed Shahabuddeen
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Hothuis

Decision: 4 May 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

**DECISION ON MIROSLAV ŠEPAROVIĆ'S INTERLOCUTORY
APPEAL AGAINST TRIAL CHAMBER'S DECISIONS ON
CONFLICT OF INTEREST AND FINDING OF MISCONDUCT**

Office of the Prosecutor

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Ms. Laurie Sartorio

Counsel for Mladen Markač

Mr. Miroslav Šeparović
Mr. Goran Mikuličić

Counsel for Ante Gotovina

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Mr. Cedo Prodanović
Ms. Jadranka Sloković

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991 (“International Tribunal”) is seized of “Appellant Miroslav Šeparović’s Consolidated Interlocutory Appeal Against Trial Chamber’s Decision on Conflict of Interest of Attorney Miroslav Šeparović and Against Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Šeparović” filed on 20 March 2007 (“Appeal”), by Miroslav Šeparović (“Appellant”).

I. PROCEDURAL BACKGROUND

2. On 20 February 2006 the Prosecution filed a consolidated motion to amend the Indictments against Mladen Markač, Ivan Čermak and Ante Gotovina and to jointly charge and try these three accused.¹ Gotovina objected to the proposed amendments and joinder of indictments arguing, *inter alia*, that a conflict of interest arises between himself and Markač because of his intention to call Markač’s Counsel, the Appellant, as a “crucial witness” due to his previous capacity as Minister of Justice of the Republic of Croatia at the time of the alleged commission of the crimes in the Indictment.² He further submitted that the Appellant’s testimony is expected to be “exculpatory”, in that he has “vital information concerning several of the most serious allegations against Gotovina” together with knowledge of the functioning of the military and civilian systems of criminal justice throughout the Republic of Croatia.³ Thus his right to fair trial and due process would be violated by the proposed joinder.⁴

3. On 17 July 2006, the Trial Chamber granted the Prosecution request to join the case against Markač and Čermak⁵ with that of Gotovina⁶ pursuant to Rule 48 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”). With respect to a possible conflict of interest, the Trial Chamber reasoned that the matters to which the Appellant is expected to testify as regards the military courts in the Republic of Croatia being under the supervision of the Ministry of Justice rather than the Ministry of Defence appear to be of equal importance to Markač’s defence and therefore held that “while a conflict of interest on the part of Mr. Šeparović may arise if the

¹ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 20 February 2006 (“Joinder Indictment”), para. 98.

² *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, Defendant Ante Gotovina’s Response in Opposition to the Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 4 April 2006 (“*Gotovina’s* Opposition to Joinder”), para. 8. See also *Gotovina’s* Opposition to Joinder, para. 63 ff.

³ *Gotovina’s* Opposition to Joinder, paras 8, 64-66.

⁴ *Gotovina’s* Opposition to Joinder, para. 1.

⁵ IT-01-45-PT.

⁶ IT-03-73-PT.

assertions of the Gotovina Defence are true, this conflict would not be resolved” if joinder was denied.⁷

4. All three accused appealed the Trial Chamber Decision on Joinder.⁸ On 25 October 2006, the Appeals Chamber dismissed these appeals.⁹ With regard to the potential Gotovina-Separović conflict of interest pursuant to Article 26 of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal (“Code of Professional Conduct”), the Appeals Chamber found that Gotovina failed to demonstrate that the Trial Chamber made a discernible error and that the Trial Chamber reasonably concluded that the conflict of interest caused by the assignment of the Appellant as Counsel to Markač would not be avoided by ordering that the two cases be tried separately.¹⁰ The Appeals Chamber further stated that “unless [the Appellant] can demonstrate that his withdrawal would cause a substantial hardship to Markač, the Appeals Chamber expects that he will withdraw”.¹¹

5. On 8 November 2006, Markač filed a request for clarification of the Appeals Chamber Decision on Joinder, specifically with regard to the above holding concerning the Appellant’s withdrawal.¹² On 12 January 2007, the Appeals Chamber remitted to the Trial Chamber for further consideration consistent with its Clarification Decision and the Appeals Chamber Decision on Joinder, Markač’s submissions relating to the question of whether the Appellant will in fact be a “necessary witness” in terms of Article 26 of the Code of Professional Conduct in this trial.¹³ On 17

⁷ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, and *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006 (“Trial Chamber Decision on Joinder”), para. 80. The Joinder Indictment was subsequently filed on 24 July 2006, and was further amended on 6 March 2007 in accordance with Order Pursuant to Rule 73bis(D) to Reduce the Indictment, 21 February 2007.

⁸ Appellant Mladen Markač’s Interlocutory Appeal From the Trial Chamber’s Decision on Prosecution’s Consolidated Motion to Amend the Indictment and For Joinder, 21 August 2006; Appellant Ivan Čermak’s Interlocutory Appeal Against the Trial Chamber’s Decision on Prosecution’s Consolidated Motion to Amend the Indictment and For Joinder, 23 August 2006; Brief of Interlocutory Appellant Ante Gotovina, 25 August 2006 (“Gotovina’s Joinder Appeal”). On 14 August 2006, the Trial Chamber granted the Appellants’ request for certification to appeal the Impugned Decision pursuant to Rule 73(B) (*Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, Decision on Defence Applications for Certification to Appeal Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 14 August 2006).

⁹ *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-AR73.1, *Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-03-73-AR73.1 and IT-03-73-AR73.2, Decision on Interlocutory Appeal Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006 (“Appeals Chamber Decision on Joinder”).

¹⁰ Appeals Chamber Decision on Joinder, paras 24, 31-32.

¹¹ *Ibid.*, para. 34.

¹² *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1 and IT-03-73-AR73.2, Appellant Mladen Markač’s Motion for Clarification of the Appeals Chamber’s Decision from 25 October 2006, 8 November 2006 (“Clarification Motion”).

¹³ *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1 and IT-03-73-AR73.2, Decision on Appellant Mladen Markač’s Motion for Clarification, 12 January 2007 (“Clarification Decision”).

January 2007, the Disciplinary Counsel of the ADC issued an advisory opinion that a conflict existed.¹⁴

6. At a Status Conference held on 9 February 2007, the Appellant indicated that he did not intend to withdraw from the case as he considers that there is no conflict of interest.¹⁵ Pursuant to a request from the Trial Chamber,¹⁶ written submissions were filed by the Appellant, the Prosecution and Čermak on 14 February 2007 to indicate their respective positions regarding the potential conflict of interest.¹⁷

7. The Trial Chamber rendered the First Impugned Decision on 27 February 2007. It held that a conflict of interest existed because : (1) the Appellant has a personal interest in this case which disqualifies him as counsel pursuant to Article 14(D)(iv)(2) of the Code of Professional Conduct and (2) due to his personal knowledge, he is likely to be called as a witness.¹⁸ It warned the Appellant that by persisting in representing Markač in spite of the repeated notices given to him, he “has jeopardised his client’s interests by not withdrawing earlier in the proceedings, and thus, in gross negligence, has failed to meet the standard of professional ethics required in the performance of his duties before this Tribunal”.¹⁹ The Trial Chamber further called upon the Appellant “to show cause why the Trial Chamber should not determine that this behaviour does not amount to misconduct under Rule 46 and why it should not proceed against him there under.”²⁰ At a hearing held on 28 February 2007, the Appellant submitted that his conduct did not amount to misconduct in that he did not behave inappropriately in advocating his standpoint.²¹

8. On 5 March 2007, the Appellant submitted a request for certification to appeal the First Impugned Decision.²²

¹⁴ Response, para. 10. The Appeals Chamber has confirmed with the Registry that this advisory opinion was not filed.

¹⁵ Status Conference, 9 February 2007, T. 103-105.

¹⁶ Status Conference, 9 February 2007, T. 114.

¹⁷ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Prosecution’s Submission Regarding Potential Conflict of Interests of Defence Counsel, 14 February 2007 (“Prosecution’s Conflict of Interest Submission”); *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Submission to the Trial Chamber Concerning the Alleged Conflict of Interest Affecting Counsel Čedo Prodanović and Jadranka Sloković, 14 February 2007 (“Čermak’s Conflict of Interest Submission”); *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Defence Counsel Miroslav Šeparović’s Submission Re Conflict of Interests, 14 February 2007 (“Appellant’s Conflict of Interest Submission”).

¹⁸ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Conflict of Interest of Attorney Miroslav Šeparović, 27 February 2007 (“First Impugned Decision”), p. 10.

¹⁹ First Impugned Decision, p. 10.

²⁰ *Ibid.*

²¹ Motion Hearing, 28 February, 2007, T. 173-6.

²² *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Request for Certification to File Interlocutory Appeal against the Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Šeparović, 12 March 2007 (“Request for Certification”). Čermak filed *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Ivan Čermak’s Response to the Request for Certification to File Interlocutory Appeal against the Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Šeparović, on 14 March 2007 (“Čermak’s Response to Certification Request”).

9. On 6 March 2007, the Trial Chamber rendered a decision in which it refused the Appellant audience before the Trial Chamber, found that he is no longer eligible to represent Markač in this case before the Trial Chamber pursuant to Rule 44 of the Rules, and ordered Markač to immediately engage new counsel (“Second Impugned Decision”).²³ On 12 March 2007, the Appellant requested leave to appeal the Second Impugned Decision. Certification to appeal the First and Second Impugned Decisions was granted by the Trial Chamber on 13 March 2007.²⁴

10. The Appellant filed his Appeal on 20 March 2007;²⁵ the Prosecution filed its response on 27 March 2007;²⁶ the Appellant did not file a reply. Additionally, the Appellant requested the Trial Chamber to suspend the procedural consequences of the First Impugned Decision.²⁷ This request was partly granted by the Trial Chamber which suspended measures ordered to be taken in the First Impugned Decision pending final resolution by the Appeals Chamber.²⁸

II. STANDARD OF REVIEW

11. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber’s decision.²⁹ Since decisions on matters relating to the calling of witnesses and assignment of counsel at trial fall squarely within the discretion of the Trial Chamber,³⁰ the question before the Appeals Chamber is not whether it “agrees with that decision” but “whether the Trial Chamber has correctly exercised its discretion in reaching that decision.”³¹ The party challenging a discretionary decision by the Trial Chamber must demonstrate that the Trial Chamber has

²³ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Finding of Misconduct of Attorney Miroslav Šeparović, 6 March 2007 (“Second Impugned Decision”), pp. 2 and 7.

²⁴ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Request for Certification to File Interlocutory Appeal against the Trial Chamber’s Decision on Conflict of Interest and on Request for Certification to File Interlocutory Appeal against the Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Šeparović, 13 March 2007.

²⁵ *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-AR73.1, Appellant Miroslav Šeparović’s Consolidated Interlocutory Appeal Against Trial Chamber’s Decision on Conflict of Interest of Attorney Miroslav Šeparović and Against Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Šeparović, 20 March 2007. An Addendum was filed on 22 March 2007 (Appellant Miroslav Šeparović’s Addendum to Consolidated Interlocutory Appeal Against Trial Chamber’s Decision on Conflict of Interest of Attorney Miroslav Šeparović and Against Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Šeparović).

²⁶ Prosecution’s Response Brief to Šeparović’s consolidated Interlocutory Appeal, 27 March 2007 (“Response”).

²⁷ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Attorney Miroslav Šeparović’s Request for Suspending the Procedural Consequences from the Trial Chamber’s Decision on Conflict of Interest and on Misconduct of Attorney Miroslav Šeparović, 20 March 2007.

²⁸ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision Suspending Execution of the Trial Chamber’s Decision of 6 March 2007, 26 March 2007, p. 3.

²⁹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release, 16 April 2007 (“Lukić Provisional Release Decision”), para. 4; *Prosecutor v. Mico Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005 (“Stanišić Provisional Release Decision”), para. 6.

³⁰ Clarification Decision, p. 4. See also, *Slobodan Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004 (“Milošević Decision on Defence Counsel”), para. 9.

committed a “discernible error”.³² The Appeals Chamber will overturn a Trial Chamber’s exercise of its discretion where it is found to be “(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion”.³³

III. PRELIMINARY ISSUE

12. As a preliminary matter, the Appeals Chamber notes that in support of his submissions on appeal, the Appellant filed 7 Annexes and a letter.³⁴ The Prosecution objects to their filing, submitting that the Appellant has improperly filed evidence for the first time on appeal without seeking leave of the Appeals Chamber to do so.³⁵ The Appeals Chamber notes that most of the Annexes, that is, except Annexes 2 and 3 in the addendum, are being introduced for the first time on appeal. In order for the said information to become part of the record, they have to be admitted as additional evidence pursuant to Rule 115 of the Rules.³⁶ Because the Appellant has failed to move for their admission pursuant to Rule 115, they will not be considered by the Appeals Chamber.

IV. SUBMISSIONS OF THE PARTIES AND DISCUSSION

13. The Appellant essentially raises five grounds of appeal. He argues that the Trial Chamber erred (1) in finding him to be a “necessary witness” pursuant to Article 26 of the Code of Professional Conduct; (2) in finding that he had a personal interest in the case; (3) in failing to find that his withdrawal would cause Markač substantial hardship; (4) in failing to find, in line with a decision in *Prosecutor v. Blagoje Simić*,³⁷ that his client’s consent resolved any conflict of interest

³¹ *Lukić* Provisional Release Decision, para. 4; *Stanišić* Provisional Release Decision, para. 6.

³² *Lukić* Provisional Release Decision, para. 5; *Stanišić* Provisional Release Decision, para. 6.

³³ *Milošević* Decision on Defence Counsel, para. 10, *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber’s Decision (No.2) on Assignment of Counsel, 8 December 2006, para. 16.

³⁴ The Annexes consist of two statements filed by the Appellant (“Annex 1”); two statements by Mladen Markač (“Annex 2”); a statement by former deputy President of the Court Martial in Split, Mr Zoran Matulović (“Annex 3”); a letter signed by the Deputy Attorney General of Croatia, Mr Lazo Pajić (“Annex 4”); a Decision of the House of Representatives of the Croatian Parliament and a State Bureau of Statistics Decree and a Directive on the Internal Structure of the Ministry of Justice (“Annex 5”); a Decree on the Postings and Repeal of the War Postings of the Judges in court Martial in Split (“Annex 6”); a letter from the President of the Court Benko Velčić and a letter from the Assistant Minister of Justice, Ivan Lovrić (“Annex 7”). In addition, the Appellant filed a letter from Ms. Carla Del Ponte, see Appellant Miroslav Šeparović’s Addendum to Consolidated Interlocutory Appeal Against Trial Chamber’s Decision on Conflict of Interest of Attorney Miroslav Šeparović and against Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Šeparović, 3 April 2007.

³⁵ Response, para. 14.

³⁶ *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, 1 September 2005, para. 37.

³⁷ *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-PT, Decision on Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević, 25 March 1999 (“*Simić* Case”).

and (5) in failing to weigh the overall interests of justice and the right of the Appellant to a fair trial.³⁸

14. In addition, the Appellant requests an oral hearing for the purpose of advancing arguments relating to this ground of appeal.³⁹ In view of the extensive submissions made and filed by the parties before both the Trial Chamber and the Appeals Chamber⁴⁰ and the substantial discussion in the First and Second Impugned Decisions of the issues now under appeal, the Appeals Chamber does not consider it necessary to hold an oral hearing on the Appeal.

A. Alleged error in finding that the Appellant is a “necessary witness”

(a) Arguments of the Parties

15. The Appellant submits that other potential witnesses, such as the former President of the Split Military Court, Mr. Matulović, could provide the same evidence as he would provide in his anticipated testimony.⁴¹ He also submits that “the alleged contested issue relating to the question of the authority over the civil and military court system and the organization of the Croatian judicial system *tempore criminis* is very clearly defined in the relevant Croatian legislation and the practice implementation.”⁴² Further, he argues that Čermak has affirmed that he is not a “necessary witness”,⁴³ and that although Gotovina did not explicitly state his position in that respect, he repeatedly stressed that Markač has a fundamental right to counsel of his choice,⁴⁴ which in the Appellant’s view implicitly means that he should not be disqualified from this case.⁴⁵ Regarding the Prosecution’s position, the Appellant submits that it is significant that his name was never listed as a potential witness nor was any attempt to approach him made for the purpose of interviewing or obtaining some information from him concerning the indictment or its supporting material.⁴⁶

³⁸ Appeal, paras 19 and 33.

³⁹ Appeal, para. 30.

⁴⁰ See *Supra* paras 1-9.

⁴¹ Appeal, paras 23-24.

⁴² Appeal, para. 23.

⁴³ Appeal, para. 25, referring to Accused Ivan Čermak’s Response to the Request for Certification to File Interlocutory Appeal Against Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Šeparović, 14 March 2007, para. 2. The Appeals Chamber notes the Accused Ivan Čermak’s submission therein that “Ivan Čermak further submits that he does not regard Miroslav Šeparović as a necessary witness as the facts needed for determination of his case can be obtained elsewhere. He also affirms that he does not intend to call Miroslav Šeparović as a witness as his testimony at this point does not seem either unobtainable elsewhere, relevant or material to establishing the defence for Ivan Čermak.”

⁴⁴ Appeal, para. 25, referring to Defendant Ante Gotovina’s Response to Request for Certification to File Interlocutory Appeal Against Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Šeparović, 13 March 2007, paras 2, 8, 9.

⁴⁵ Appeal, para. 25.

⁴⁶ Appeal, para. 25.

16. In response, the Prosecution points out that Gotovina considers the Appellant a crucial witness and has not abandoned his intention to call him to testify.⁴⁷ Further, the Prosecution argues that there is no showing that the proffered evidence and the proposed substitute witness, Mr. Matulović or anyone else at the same rank in the Croatian government, has the same knowledge as the Appellant. It submits that proposing a substitute does not circumvent the Trial Chamber's finding of the Appellant's level and knowledge.⁴⁸ As a result, it submits that the proposed substitute witness and evidence contained in the annexes do not establish that the Appellant is not likely to be a necessary witness.⁴⁹

(b) Discussion

17. In its Decision on Joinder, the Appeals Chamber affirmed the Trial Chamber's finding with respect to the *possibility* of the Appellant being a necessary witness for the Gotovina case as well as the Čermak and Markač case.⁵⁰ After the question of whether the Appellant would in fact be a "necessary witness" was remitted to the Trial Chamber, pursuant to the Clarification Decision, the Trial Chamber found that it "reasonably foresees the *likelihood* that the Appellant will be called as a witness in this case because of his position as former Minister of Justice at the time of alleged crimes".⁵¹

18. The Appeals Chamber finds no error in this conclusion. Article 26 of the Code of Professional Conduct only envisages that "Counsel shall not act as an advocate in a proceeding in which counsel is *likely* to be a necessary witness".⁵² The Appeals Chamber notes that because their trials have been joined, Gotovina, Cermak and Markač are in the same proceeding. Although the Prosecution did not envisage calling the Appellant as a witness, and Markač and Čermak appear to hold the view that their respective defence strategies will not involve calling the Appellant as a witness,⁵³ Gotovina has not ruled out the possibility of calling him as a witness.⁵⁴ Further, the Trial Chamber has not ruled out at this stage that it might choose to call him as a witness.⁵⁵

⁴⁷ Response, para. 13.

⁴⁸ Response, para. 15.

⁴⁹ Response, para. 15.

⁵⁰ Appeals Chamber Decision on Joinder, paras 32-33; Clarification Decision, p. 2.

⁵¹ Impugned Decision, p. 8 (emphasis added).

⁵² Emphasis added.

⁵³ Čermak's Response to Certification Request, para. 2; Request for Certification, Annex 2, Statement of Mladen Markač, p. 1.

⁵⁴ Gotovina's Opposition to Joinder, para. 8; Gotovina's Response to Certification Request, paras 8-9. The Appeals Chamber notes that in the Motion Hearing held on 28 February 2007, T. 172, Counsel for Gotovina asked the Trial Chamber, "I, of course, saw the Court's decision yesterday that was published, and my question to the Chamber is at this point would alter the Chamber's decision if General Gotovina decides not to call Mr. Separovic as a witness".

⁵⁵ First Impugned Decision, p. 7.

19. In addition, should the Appellant be called to testify, the Trial Chamber is not precluded from using his evidence in support of or against Čermak or Markač.⁵⁶ The Appeals Chamber recalls that the Trial Chamber found that the cases of the three accused are inherently connected because they took place in the same geographic area, in the same time period and in the course of the same military operation, and that they were allegedly committed pursuant to the same joint criminal enterprise of which all three accused are alleged to be members.⁵⁷ On the basis of this factual nexus some of the evidence, including that of the Appellant, may be the same.

20. The Appeals Chamber finds that the Appellant has failed to demonstrate that there was an error in the exercise of the Trial Chamber's discretion. This argument is accordingly dismissed.

B. Alleged error in finding that the Appellant has a personal interest in the case

(a) Arguments of the Parties

21. The Appellant submits that the Trial Chamber erred in finding that he has a personal interest in this case which disqualifies him as counsel under Article 14(D)(iv)(2) of the Code of Professional Conduct.⁵⁸ In his view, this finding is not legally or factually correct because the Appellant's only and primary interest is that of his client, Markač.⁵⁹ Further, he submits that the Trial Chamber's finding is only based on unfounded speculation that he, as former Minister of Justice, "could decline his hypothetical responsibility and place it on the Ministry of Defence" whereas the question of the responsibility of the Croatian judicial system is not an issue in the Joinder Indictment and that because he has not been indicted or suspected of the alleged crimes, the fact that he was Minister of Justice does not disqualify him as Defence Counsel.⁶⁰ The Prosecution responds that the Trial Chamber acted within its discretion.⁶¹

(b) Discussion

22. The Appeals Chamber recalls that, in the First Impugned Decision, the Trial Chamber also addressed the issue as to whether the Appellant had a personal interest in the case and concluded in

⁵⁶ See *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of the Accused, 27 January 2006, paras 14 and 15.

⁵⁷ Appeals Chamber Decision on Joinder, para 20; Trial Chamber Decision on Joinder Decision, para. 59.

⁵⁸ Appeal, para. 27 and 29, referring to and quoting the *Simić* Case, p. 6, in which the Trial Chamber held, "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 interest of the client and the wider interests of justice."

⁵⁹ Appeal, para. 27.

⁶⁰ Appeal, para. 27. See also, Appeal, para. 28.

⁶¹ Response, para. 20.

this regard that it could not “accept [that] the professional judgement of Šeparović, lead counsel for the Accused Markač but also Minister of Justice at the time of the alleged crimes in this Indictment, may not reasonably be affected by his own personal interests”.⁶² In reaching this conclusion the Trial Chamber referred to the recent declarations made by the Appellant in connection with the issue of “whether the Ministry of Defence or the Ministry of Interior was responsible for the military police and whether the military justice system fell under the responsibility of the Ministry of Justice” and considered it to be relevant to its decision on the existence of a conflict of interest.⁶³ It further held that “it is obvious that one of the alternatives presented by the contested issue, whether it is the Ministry of Defence or Ministry of Justice who was responsible for the military courts, may affect the personal interests of the former Minister of Justice, Šeparović”.⁶⁴

23. Article 14(A) of the Code of Professional Conduct provides:

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, organisation or State.

The Appeals Chamber also recalls 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.⁶⁵

24. As noted above, the Appellant has not denied personal knowledge of the relevant information which he has presented in his submissions that the Ministry of Justice was not responsible for the military courts.⁶⁶ In these circumstances, the Appeals Chamber agrees with the Trial Chamber that his denial at this early stage of proceedings that it was the Ministry of Justice that was responsible for the military courts, thereby eliminating a defence strategy that was otherwise open to Markač, may be considered a significant indication of a conflict of interest. Therefore, the Appeals Chamber is of the view that the Appellant has failed to demonstrate that the Trial Chamber committed a discernible error in this respect.

25. This ground of appeal is accordingly dismissed.

⁶² First Impugned Decision, p. 5.

⁶³ First Impugned Decision, p. 5.

⁶⁴ First Impugned Decision, p. 5.

⁶⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. 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 (“*Stojić Decision*”), para. 22; *Simić Decision*, p. 6.

⁶⁶ Misconduct Decision, p. 3. The Appeals Chamber further notes that in the Appellant’s Conflict of Interest Submission, para. 13, the Appellant argued that he is “not the only one who can relevantly testify about the judicial system *tempore criminis*”.

C. Alleged error in failing to consider that the Appellant's withdrawal would cause Markač "substantial hardship"

(a) Arguments of the Parties

26. The Appellant submits that Markač has already suffered substantial hardship which will be even greater if the Appeals Chamber upholds his withdrawal from this case.⁶⁷ He adds that this hardship is of a kind that undoubtedly affects the fairness of trial and equality of arms and thus places him at a substantial disadvantage in relation to his opponent.⁶⁸ He submits that he is Markač's attorney of his free choosing, has his confidence and trust, has already spent four years representing him from the time of his very first interview with Prosecution investigators and has spent numerous hours preparing for the trial.⁶⁹ Additionally, some important potential witnesses for the Defence promised to testify only if the Appellant was Markač's attorney.⁷⁰ He further submits that Markač has contacted some Croatian criminal lawyers, but was unable to get an agreement for representation.⁷¹

27. In response, the Prosecution submits that the Trial Chamber's decision to withdraw the Appellant as Counsel for Markač was based on "a full year of decisions and procedural history".⁷² It points out that the conflict of interest was raised as early as 4 April 2006 by Gotovina, and further submits that had the Appellant withdrawn after the joinder motion had been granted, there would have been at least seven months for new counsel to prepare for the trial and that existing co-counsel is not prohibited from continuing to represent Markač.⁷³

(b) Discussion

28. As noted by the Trial Chamber, due to the compelling circumstances of the Appellant's own personal interest in this case, the harm caused to Markač and the integrity of the proceedings if the Appellant were to continue as his counsel in the proceedings would clearly and demonstrably outweigh any hardship suffered by Markač as a result of the Appellant's withdrawal as his counsel.⁷⁴ Furthermore, the Appeals Chamber notes that the Markač is also represented by co-counsel who will likely continue to represent him in the absence of one of the exceptions under Article 9(B) of the Code of Professional Conduct.

⁶⁷ Appeal, para. 26.

⁶⁸ Appeal, para. 21.

⁶⁹ Appeal, paras 19 and 26.

⁷⁰ Appeal, para. 26.

⁷¹ Appeal, para. 26.

⁷² Response, para. 7.

⁷³ Response, para. 8. *See also Supra* para. 1.

⁷⁴ Impugned Decision, pp. 7 and 8.

29. The Appeals Chamber further finds that, even though the Appellant's withdrawal will inevitably cause a delay in the proceedings, there could be greater hardship to Markač at a later stage of the proceedings, should the conflict of interest regarding the Appellant's representation of Markač not be resolved at the present stage. The Appeals Chamber notes in this respect that, for example, Gotovina's Defence has not waived his right to call the Appellant as a witness⁷⁵ and that therefore the Appellant could still face withdrawal pursuant to Article 26 of the Code of Professional Conduct. The Appeals Chamber is of the view that such situation is likely to irreversibly prejudice the administration of justice.

30. Accordingly, the Appeals Chamber finds that the Appellant has failed to demonstrate the existence of a discernible error in the Trial Chamber's Decision. This ground of appeal is dismissed.

D. Alleged failure to recognize the *Simić* case as a precedent with respect to curing the alleged conflict of interest

(a) Arguments of the Parties

31. The Appellant submits that a remedy for the alleged conflict of interest is already established in the jurisprudence of the tribunal⁷⁶ and that the First Impugned Decision erred in failing to consider it.⁷⁷ He refers to a decision in the *Simić* case, where the Trial Chamber found, when faced with a similar conflict, that the full and informed consent of a counsel's client was an appropriate remedy for continued representation.⁷⁸ The Appellant submits that the situation of counsel in the *Simić* case was much worse than his.⁷⁹ He argues that, although the current Article 14(E) of the Code of Professional Conduct has different wording from that of the former Article 9(5), the point in both is that consent of the accused must not generate further obstruction of justice.⁸⁰ He concludes that the Trial Chamber failed to take into account relevant precedent and in so doing failed to fulfil its statutory obligation to treat all people equally before the Tribunal.⁸¹ The Prosecution responds that Article 14 of the Code of Professional Conduct does not allow for the possibility that client waiver may cure a conflict if "such consent is likely to irreversibly prejudice the administration of justice."⁸²

⁷⁵ Defendant Gotovina's Response to Appellant Mladen Markač's Motion for Clarification of the Appeals Chamber's Decision from 25 October 2006, 22 November 2006.

⁷⁶ Appeal, para. 29.

⁷⁷ Appeal, para. 21.

⁷⁸ Appeal, paras 29 and 30.

⁷⁹ Appeal, para. 30.

⁸⁰ Appeal, para. 32.

⁸¹ Appeal, para. 32.

⁸² Response, para. 17.

(b) Discussion

32. The Appeals Chamber agrees with the Trial Chamber that the giving of consent by Markač could not cure the conflict of interest between Markač and the Appellant in relation to his position as Minister of Justice *tempore criminis*.⁸³ 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.⁸⁴ Although the Trial Chamber resolved the conflict of interest in the *Simić* case by consent, the Trial Chamber in the present case was not bound to follow the *Simić* case.⁸⁵ In any event, the present case is distinguishable from that of *Simić*. First, the Appeals Chamber notes that the applicable provisions are different. At the time the decision in the *Simić* case was rendered, the Trial Chamber applied Article 9(5) of the Code of Professional Conduct which read:

(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 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 fulfill all other obligations under this Code.⁸⁶

Article 9(5) of the Code of Professional Conduct has since been amended and currently provides, as Article 14 (E) of the Code of Professional Conduct:

Where a conflict of interest does arise, counsel shall:

i. promptly and fully inform each potentially affected present and former client of the nature and extent of the conflict; and

ii. either:

1. take all steps necessary to remove the conflict; or

2. obtain the full and informed consent of all potentially affected present and former clients to continue the representation unless such consent is likely to irreversibly prejudice the administration of justice.⁸⁷

⁸³ Impugned Decision, p. 8.

⁸⁴ *Stojić* Decision, para. 27.

⁸⁵ *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2004, para. 114 (“The Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.”)

⁸⁶ Emphasis added.

⁸⁷ Emphasis added.

33. The Appeals Chamber has already found that the Appellant's further representation of Markač is likely to irreversibly prejudice the administration of justice.⁸⁸ In addition, whereas in the *Simić* case, all the co-accused stated that there was no conflict of interest between them and counsel, Gotovina, in the present case, has not waived his right to call the Appellant as a witness and has clearly indicated that there is, in his view, a conflict of interest.⁸⁹

34. In light of the foregoing, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber committed a discernible error by not considering consent by Markač a remedy to the conflict of interest. Accordingly, this ground of appeal is dismissed.

E. Error in weighing the overall interests of justice and the rights of the accused to consent to continued representation by the Appellant

(a) Arguments of the Parties

35. The Appellant submits that the fact that he, as former Minister of Justice was representing Markač in the "Operation Storm case" was very well known to the Tribunal's authorities for a long period of time.⁹⁰ He submits that no one ever raised the question of a possible conflict of interest, and no former motion was ever filed to disqualify him as counsel for Markač.⁹¹ He points out that now he is facing disqualification from the case less than two months before the beginning of the trial⁹² and argues that Markač's right to a fair trial is dangerously jeopardized.⁹³

36. The Prosecution recalls that the Trial Chamber was particularly concerned that the Appellant has a personal interest in the issue of whether the Ministry of Justice or the Ministry of Defence controlled or administered the military courts.⁹⁴ It submits that this decision was founded on a concern for the integrity of the proceedings and the interests of justice⁹⁵ and that the Trial Chamber did not abuse its discretion.⁹⁶

⁸⁸ See *supra*, para. 28.

⁸⁹ *Gotovina's* Opposition to Joinder, para. 8.

⁹⁰ Appeal, para. 33.

⁹¹ Appeal, para. 33.

⁹² Appeal, para. 33.

⁹³ Appeal, para. 33. Markač's further argument that "the proper administration of justice has been driven into a dead-end" by denying him equal treatment before the Tribunal and the right to counsel of his own choosing" is unsubstantiated and will not be discussed further.

⁹⁴ Appeal, para. 18.

⁹⁵ Appeal, para. 20.

⁹⁶ Appeal, para. 20.

(b) Discussion

37. As previously stated by the Appeals Chamber, in principle, the choice of any accused regarding his defence counsel in proceedings before the International Tribunals should be respected unless there are sufficient grounds to override the accused's preference in the interests of justice.⁹⁷ When the fairness of the trial which is one of the fundamental rights of the accused also provided for in Article 21 of the Statute is at stake, as is suggested in the present case, the accused's choice might be overridden.⁹⁸ It is established jurisprudence that one of the limits to the accused's choice is the existence of a conflict of interest affecting his counsel.⁹⁹

38. In the present case, the Appellant, as counsel, has been found to have a personal interest on account of his previous position as Minister of Justice.¹⁰⁰ Further, because he has personal knowledge directly relevant to the crimes allegedly committed by the three accused in the Indictment, he is likely to be called as a necessary witness for one of the accused. Such a conflict affects the essential fairness of the trial to all accused persons in this case. Cumulatively, these factors make his continued representation of Markač incompatible with the best interests of justice. Accordingly, this ground of appeal is dismissed.

V. DISPOSITION

On the basis of the foregoing, the Appeals Chamber,

DISMISSES the Appellant's appeal in its entirety.

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

Done this 4th day of May 2007
At The Hague,
The Netherlands.


Judge Liu Daqun
Presiding Judge

[Seal of the International Tribunal]

⁹⁷ *Stojić* Decision, para. 19; Appeals Chamber Decision on Joinder, para. 30.

⁹⁸ *Stojić* Decision, para. 19.

⁹⁹ *Stojić* Decision, para. 19; see also *Prosecutor v. Željko Mejačić et al*, Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004, para. 8.

¹⁰⁰ First Impugned Decision, pp. 9, 10; see para. 24 *supra*.