



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

Case No. IT-01-45-PT
IT-03-73-PT
Date: 14 August 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Kevin Parker
Judge Christine Van Den Wyngaert

Registrar: Mr. Hans Holthuis

Decision: 14 August 2006

PROSECUTOR v. ANTE GOTOVINA

PROSECUTOR v. IVAN ČERMAK AND MLADEN MARKAČ

**DECISION ON DEFENCE APPLICATIONS FOR
CERTIFICATION TO APPEAL DECISION ON
PROSECUTION'S CONSOLIDATED MOTION TO AMEND
THE INDICTMENT AND FOR JOINDER**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Laurie Sartorio

Counsel for the Accused:

Mr. Čedo Prodanović and Ms. Jadranka Sloković for Ivan Čermak
Mr. Miroslav Šeparović and Mr. Goran Mikuličić for Mladen Markač
Mr. Luka S. Mišetić and Mr. Gregory Kehoe for Ante Gotovina

1. This decision of Trial Chamber II (“Trial Chamber”) is in respect of Ivan Čermak’s, Mladen Markač’s, and Ante Gotovina’s applications for certification for interlocutory appeal from the Trial Chamber’s “Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder” of 14 July 2006.

A. Background

2. On 20 February 2006 the Office of the Prosecutor (“Prosecution”) filed “Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder” in both *Prosecutor v. Ivan Čermak and Mladen Markač* (“Čermak and Markač case”) and *Prosecutor v. Ante Gotovina* (“Gotovina case”). On 23 February 2006 the President of the Tribunal issued an order assigning this Trial Chamber to hear the Prosecution’s consolidated motion and all motions related to joinder of the Čermak and Markač case with the Gotovina case.

3. On 14 July 2006 this Trial Chamber issued its “Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder” granting in part the Prosecution’s consolidated motion, ordering that the Čermak and Markač case and the Gotovina case be joined, and instructing the Registrar to assign a common case number.

4. Ivan Čermak, Mladen Markač, and Ante Gotovina filed applications for certification for interlocutory appeal from the Trial Chamber’s decision on 21, 20 and 21 July 2006, respectively. On 28 July 2006 the Prosecution filed its consolidated response opposing all three applications for certification. On 4 August 2006 Ante Gotovina filed a motion for leave to file a reply and a reply in support of his request for certification.

B. Rules on certification for interlocutory appeal

5. Decisions on motions, other than preliminary motions, are without interlocutory appeal save with certification by the Trial Chamber. Pursuant to Rule 73(B) of the Rules a Chamber may grant such certification “if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution of the Appeals Chamber may materially advance the proceedings.” The effect of Rule 73(B) is to preclude certification unless both of its cumulative conditions are satisfied,¹ but in a case where they are satisfied, certification remains in the discretion of the Trial Chamber.²

¹ See for example *Prosecutor v. Milošević*, Case No.: IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceedings, 20 June 2005 (“Milošević Decision”), para 2;

C. Arguments

6. Ante Gotovina submits that the Chamber erred in its decision allowing amendment of the Indictment and joinder. In particular it is submitted that (i) the Chamber erred in determining that the factual basis as it is known to it does not support the conclusion that the Prosecution's theories in the *Milošević* case are inconsistent with its theories in the *Gotovina* case and that the Appeals Chamber should determine whether the use of inconsistent and irreconcilable theories by the Prosecution amounts to a violation of the Accused's due process rights under international law; (ii) that the Appeals Chamber should determine the proper standards required for withdrawing a charge from an indictment and for reintroducing the charge into a subsequent indictment; and (iii) that the Appeals Chamber should determine whether joinder violates Ante Gotovina's rights under Article 21(4)(e) of the Statute to call witnesses on his behalf. It is submitted further that the requirements of Rule 73 are met as the alleged errors impinge on Ante Gotovina's right to fair trial and that an immediate resolution of these issues would materially advanced the proceedings.

7. Ivan Čermak submits that (i) joinder of the *Čermak and Markač* case with the *Gotovina* case would allow for the introduction of important amendments to the Indictment contrary to the relevant rules, (ii) that the crimes allegedly committed by Ivan Čermak and the crimes allegedly committed by Mladen Markač and Ante Gotovina "cannot by their very nature be a part of the same transaction", (iii) that joinder would violate Ivan Čermak's right to expeditious trial without undue delay, and (iv) that differences in the defences of the three Accused can be such that a joint trial would become "contrary to fair trial because they can lead to defence conflict of interests."

8. Mladen Markač submits that (i) joinder would prejudice and endanger his right to have a fair and expeditious trial, (ii) that it may lead to a conflict of interests as Mladen Markač may call Ante Gotovina to testify in his defence, and (iii) that concurrent presentation of evidence by all three Accused in a single trial could be unfair as most of the allegations in the proposed Joinder Indictment which refer to Ante Gotovina do not relate to Mladen Markač.

9. The Prosecution submits, *inter alia*, that an applicant must identify an error or issue in the Trial Chamber's decision that would normally give rise to an appeal rather than merely relying on arguments raised in the initial submissions. It submits further that the three Accused reiterate arguments raised in their initial submissions on the matter before the Chamber, that they have failed to demonstrate how the Chamber erred in its ruling, that they have failed to satisfy the cumulative criteria of Rule 73(B), and that certification to appeal would only serve to delay the proceedings

Prosecutor v. Popović et al., Case No.: IT-05-86-PT, Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal, 6 October 2005, para 6.

unnecessarily. Ante Gotovina replies that the law of the Tribunal does not require that an applicant seeking certification to appeal prove an error before certification to appeal can be granted.

D. Discussion

10. A request for certification is not concerned with whether a decision was correctly reasoned or not, which is a matter for appeal, whether interlocutory or after final judgement has been rendered.³ Therefore, in the present circumstances, the Chamber will not consider those arguments advanced by all three Accused that concern the reasoning of its decision.

11. Nevertheless, in the present circumstances the Chamber is satisfied that the criteria of Rule 73(B) have been met. A joint trial can be expected to have a significant effect on the overall conduct of the proceedings. It may also have an impact on the ability of one or more Accused to exercise the right to call or examine witnesses. In the Chamber's view, these issues may significantly affect the fair and expeditious conduct of the proceedings.

12. Further, in the view of the Chamber, an immediate resolution of some disputed issues by the Appeals Chamber could well materially advance the proceedings. Both cases are still in the pre-trial stage. There is no present prospect of an immediate or early start of the trial in either case. A determination by the Appeals Chamber that the Trial Chamber's decision is flawed, issued at this stage will minimize the consequences of the decision and will considerably affect the preparation of the two cases for trial and the overall conduct of the proceedings.

13. The Chamber is conscious that the issues which have persuaded it to certify for interlocutory appeal relate primarily to the question of joinder rather than to the question of amendment of the existing indictments. Nevertheless, the two questions are dealt with in the one decision and in part are interrelated.

14. Finally, in the exercises of its discretion the Chamber is persuaded that certification for interlocutory appeal of its Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder of 14 July 2006 should be granted.

E. Disposition

For the foregoing reasons and pursuant to Rules 73 and 126*bis* of the Rules, the Trial Chamber:

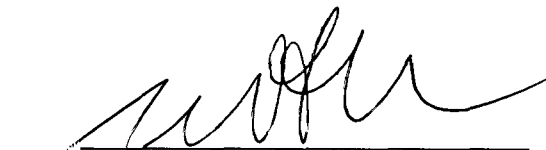
² *Prosecutor v. Strugar*, Case No.: IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para 2.

³ *Milošević* Decision, para 4.

- (1) **GRANTS** Ante Gotovina's motion for leave to file reply in support of his request for certification;
- (2) **GRANTS** certification for interlocutory appeal from the Trial Chamber's "Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder" of 14 July 2006.

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

Dated this fourteenth day of August 2006
At The Hague
The Netherlands



Judge Carmel Agius
Presiding Judge

[Seal of the Tribunal]