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UNITED NATIONS

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

Case Nos: IT-01-45-AR73.1
IT-03-73-AR73.1
IT-03-73-AR73.2

Date: 12 January 2007

Original: English

BEFORE THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision of: **12 January 2007**

PROSECUTOR v. ANTE GOTOVINA

PROSECUTOR v. IVAN ČERMAK AND MLADEN MARKAČ

DECISION ON APPELLANT MLADEN MARKAČ'S MOTION FOR CLARIFICATION

Counsel for the Appellants:

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

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Laurie Sartorio

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THE APPEALS 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 ("Appeals Chamber" and "International Tribunal", respectively),

RECALLING the "Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder" of 25 October 2006 ("Decision of 25 October 2006"), in which the Appeals Chamber affirmed the Trial Chamber's joinder of the *Prosecutor v. Gotovina* case[1] with the *Prosecutor v. Čermak and Markač* case[2] and considered the possibility of a conflict of interests on the part of Mladen Markač's Counsel, Miroslav Šeparović ("Šeparović"), under Article 26 of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal ("Code of Professional Conduct"),[3] if he continued representing Markač whether in a separate or joint trial;[4]

RECALLING in particular that, in the Decision of 25 October 2006, the Appeals Chamber (1) affirmed the Trial Chamber's finding with respect to the possibility of Šeparović being a necessary witness for the *Gotovina* case as well as the *Čermak and Markač* case[5] and (2) stated that, under such a conflict of interests, it expected that this would be a basis for Šeparović requesting withdrawal as Markač's Counsel in compliance with his ethical and professional obligations "unless Šeparović can demonstrate that his withdrawal would cause a substantial hardship to Markač";[6]

BEING SEIZED of "Appellant Mladen Markač Motion for Clarification of the Appeals Chamber's Decision from 25 October 2006" filed by Counsel for Markač on 8 November 2006 ("Motion"), wherein Markač (1) contests that Šeparović will be a necessary witness in this joint case;[7] (2) claims that withdrawal of Šeparović as his Counsel will pose more than a "substantial hardship" to him;[8] and (3) requests clarification from the Appeals Chamber as to "what would be the appropriate procedure to resolve that issue in the light of fair trial and, above all, in the light of fundamental

[1] Case No. IT-01-45-PT.
[2] Case No. IT-03-73-PT.
[3] IT/125, Rev. 2, as amended on 29 June 2006.
[4] Decision of 25 October 2006, paras. 24, 31-35
[5] *Id.*, paras. 32-33.
[6] *Id.*, para. 34.
[7] Motion, para. 4
[8] *Id.*, paras. 5-6.

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right to have a counsel of one's choice", in other words, whether to bring it before the Trial Chamber or the Appeals Chamber;[9]

NOTING "Defendant Ante Gotovina's Response to Appellant Mladen Markač's Motion for Clarification of the Appeals Chamber's Decision from 25 October 2006" filed by Counsel for Ante Gotovina ("Response") on 22 November 2006, wherein Gotovina argues that the Appeals Chamber's Decision of 25 October 2006 was "procedurally premature" and requests that the "Appeals Chamber revoke its request to Mr. Šeparović that he withdraw from the proceedings, and remand this issue back to the Trial Chamber for further proceedings consistent with the Rules of Procedure and Evidence and the Code of Professional Conduct for Counsel Appearing Before the International Tribunal";[10]

CONSIDERING that the Response was filed out of time and that Gotovina has failed to advance any argument demonstrating good cause for the late filing;[11]

CONSIDERING further that the Response is outside of the scope of a proper response in that, with respect to Markač's Motion, it fails to "clearly state whether or not the interlocutory appeal is opposed and the grounds therefor";[12] goes beyond the clarification request raised in the Motion by advancing new arguments on the merits of Šeparović's status as Counsel for Markač; and effectively requests relief from the Appeals Chamber in the form of reconsideration of its Decision of 25 October 2006;

FINDING that, in any event, Gotovina fails to demonstrate that there was a clear error of reasoning in the Decision of 25 October 2006 or that it is necessary to reconsider that Decision in order to prevent an injustice;[13]

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[9] *Id.*, paras. 1, 3, 7.
[10] Response, paras. 3, 10.
[11] The Appeals Chamber considers that paragraph 10 of the Practice Direction on the Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal" (IT/155/Rev. 3), 16 September 2005 ("Practice Direction"), governs motions for clarification of a decision of the Appeals Chamber on an interlocutory appeal. Thus, the Response was due by 20 November 2006.
[12] Practice Direction, para. 10.
[13] *See Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-AR72.1, Decision on Motion for Reconsideration of the "Decision on the Interlocutory Appeal Concerning Jurisdiction" Dated 31 August 2004, 15 June 2006, para. 9.

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CONSIDERING that in the Decision of 25 October 2006, the Appeals Chamber did not make a finding with respect to the actual existence of a conflict of interests for Šeparović as Counsel for Markač in this joint case due to being a necessary witness, but (1) affirmed the Trial Chamber's finding as to the likelihood of such a conflict of interests arising in the context of its consideration on the question of joinder and (2) held that, in the face of such likelihood, it expected Šeparović to seek withdrawal as Counsel for Markač pursuant to Article 26 of the Code of Professional Conduct unless he could show that this would pose a substantial hardship for Markač;

CONSIDERING that Trial Chamber I is presently seized of the *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač* case[14] and has not yet determined whether Šeparović will in fact be a necessary witness for this joint trial such that he should withdraw as Counsel for Markač in compliance with his professional and ethical responsibilities;

CONSIDERING that pursuant to Article 25 of the Statute of the International Tribunal, the role of the Appeals Chamber is to hear appeals from decisions taken by the Trial Chamber and it does not dispose of matters that have not been raised in the first instance;

CONSIDERING further that decisions on matters relating to the calling of witnesses and assignment of counsel at trial fall squarely within the discretion of the Trial Chamber drawing from the Trial Chamber's "organic familiarity with the day-to-day conduct of the parties and practical demands of the case";[15]

ON THE BASIS OF THE FOREGOING, HEREBY REMITS the submissions in Markač's Motion[16] relating to the question of whether his Counsel, Šeparović, will in fact be a necessary witness in his trial to Trial Chamber I for further consideration consistent with this Decision and the Decision of 25 October 2006.

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[14] *See Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Order Reassigning a Case to a Trial Chamber, 22 November 2006.
[15] *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, para. 9.
[16] *See* Motion, para. 4.

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Done in English and French, the English text being authoritative. 126

Dated this 12th day of January 2007,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

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