



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-06-90-PT

Date: 6 March 2007

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Christine Van den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Decision of: 6 March 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

**DECISION ON FINDING OF MISCONDUCT OF
ATTORNEY MIROSLAV ŠEPAROVIĆ**

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Laurie Sartorio

Counsel for the Accused:

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

TRIAL CHAMBER I (“Trial Chamber”) of the 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 (“Tribunal”);

RECALLING the Appeals Chamber’s “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”), confirming the “Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder” of 14 July 2006 which held that the likely conflict of interest arising from Mr. Miroslav Šeparović’s (“Šeparović”) representation of the Accused Mladen Markač (“Accused Markač”) would not be avoided if the cases against the Accused Mladen Markač, Ivan Čermak and Ante Gotovina were not joined for trial;

NOTING the Appeals Chamber’s “Decision on Appellant Mladen Markač’s Motion for Clarification” of 12 January 2007 (“Decision of 12 January 2007”), wherein it remitted the submissions made in the “Appellant Mladen Markač’s Motion for Clarification of the Appeals’ Chamber’s Decision from 25 October 2006” of 7 November 2006 regarding the likely conflict of interest caused by the Šeparović representation to the Trial Chamber¹;

RECALLING the warning given to Šeparović under Rule 46(A) of the Rules of Procedure and Evidence (“Rules”) following the Trial Chamber’s finding of an actual conflict of interest in its “Decision on Conflict of Interest of Attorney Miroslav Šeparović” (“Decision on Conflict of Interest”) of 27 February 2007;

RECALLING the hearing of 28 February 2007 (“Hearing”) wherein Šeparović was ordered to show cause why the Trial Chamber should not determine that his behaviour - which was the basis of its finding in the Decision on Conflict of Interest - amounts to misconduct under Rule 46 of the Rules and why it should not proceed against him thereunder;

CONSIDERING Šeparović’s assertion that his behaviour was neither inappropriate nor contrary to his client’s interest, and his request that the Trial Chamber not take any further measures against him²;

NOTING, with respect to the subject matter of the conflict of interest, the issue identified by the Appeals Chamber as relevant for trial concerning whether the Ministry of Justice or the Ministry of Defence of the Government of Croatia was responsible for the military court system during the timeframe charged in the Indictment;

¹ Decision of 12 January 2007, p. 4.

NOTING that each accused is charged in the Indictment with and alleged to be criminally responsible for the criminal acts and/or omissions of his subordinates which he knowingly failed to prevent or punish, and that Šeparović held the position of Minister of Justice during the charged timeframe;

NOTING that at the Hearing, Šeparović stated that he would not be raising a defence on behalf of the Accused Markač which would involve shifting responsibility from the Ministry of Defence to the Ministry of Justice, and further that such a defence could only be raised by the Accused Markač, who has indicated that he would not do so and has signed a statement of consent for Šeparović to continue representing him;

NOTING that the shifting of responsibility from the Ministry of Defence to the Ministry of Justice is a potential defence that all Accused in the case, including the Accused Markač, may consider raising;

NOTING that such potential defence is categorically and apparently irreversibly excluded at this stage by Šeparović, as he envisions his continued representation of the Accused Markač;

CONSIDERING that Šeparović has not denied the finding in the Decision on Conflict of Interest that he has personal knowledge of whether the Ministry of Defence or the Ministry of Justice had power over the military courts, and further that as a member of the government of Croatia during the charged timeframe, he was in a prominent governmental position in which it would be reasonably likely to interact with persons who may have known of or participated in the alleged joint criminal enterprise of which the Accused Markač and his co-accused are charged with being members³;

CONSIDERING FURTHER that such personal knowledge and likely interaction make it probable that Šeparović would be called as a witness at trial and that his continued representation of the Accused Markač places him in a situation of having his professional judgement adversely affected by divided loyalties;

FINDING that the continued representation of the Accused Markač by Šeparović will foreclose a potential defence which might reasonably be raised at trial;

² Transcript of Hearing ("T"), p. 173, l. 9-13.

³ Indictment, para.16, 19-21.

CONSIDERING that the Trial Chamber is not persuaded that the Accused Markač's consent, no matter how fully informed it may be, remedies the conflict of interest under Article 14 (D)(iv)(2) of the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal ("Code") and finds that the continuing conflict of interest will prejudice the administration of justice and the integrity of this trial⁴;

NOTING that the *Prosecutor v. Simić et al*⁵ decision ("*Simić Decision*") on which Šeparović relies in support of his position is not authority for determining conflict of interest arising under Article 14(D)(iv)(2) of the Code, as it considered a conflict of interest arising exclusively under Article 26 of the Code⁶;

NOTING FURTHER that the current Article 14(E) of the Code,⁷ which states that where a conflict of interest arises, counsel shall, *inter alia*,

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 justice⁸,

at the time of the *Simić Decision*, read

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 Code⁹;

CONSIDERING that the current Article 14(E) of the Code places stricter terms than the corresponding Article it replaced, on the use of a client's consent to remedy a conflict of interest situation;

NOTING that the relevant jurisprudence of this Tribunal stresses the importance of preventing conflicts of interest from arising in the furtherance of the administration of justice¹⁰;

RECALLING that in the *Prosecutor v. Prlić et al* decision ("*Prlić Decision*"), the Trial Chamber considered that the consent given by the accused did not

⁴ Decision on Conflict of Interest, p. 8.

⁵ Case No.: IT-95-9-PT, "Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević", 25 March 1999

⁶ Formerly Article 16 of the Code.

⁷ Formerly Article 9(5) of the Code.

⁸ Emphasis added.

⁹ Emphasis added.

¹⁰ Case No.: IT-04-74-PT, "Decision on Requests for Appointment of Counsel", 20 July 2004); *Prosecutor v. Enver Hadžihasanović et al*, Case No.: IT-95-9-PT; *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.

have the effect of validating the appointment if the Trial Chamber is convinced that the interests of justice dictates [sic] otherwise.¹¹;

CONSIDERING that the Trial Chamber's finding in its Decision on Conflict of Interest is based on Article 14 of the Code, which addresses the issue of conflict of interest in the context of obligations of counsel to clients, rather than exclusively on Article 26 of the Code, which addresses the procedural effect of a specific conflict of interest situation which may arise, that being counsel as a necessary witness;

NOTING that Šeparović's argument that his knowledge was not exclusive and that he was thus not a necessary witness under Article 26 of the Code, does not address the conflict of interest which exists under Article 14 of the Code;

NOTING FURTHER that the applicability of the resolutions provided for by Article 26 of the Code as an exception to the rule contained therein should be considered in the context of the specific nature of the underlying conflict of interest;

NOTING also that whether substantial hardship would be caused to the Accused Markač should Šeparović withdraw, is irrelevant to the finding under Article 14 of the Code since, as the Trial Chamber has already stated in its Decision on Conflict of Interest,

Due to the compelling circumstances of Šeparović's own personal interest in the case, finds that the harm caused to the Accused Markač and to the integrity of the proceedings -- if Šeparović were to continue to act as counsel in violation of Article 14(D)(iv)(2) of the Code -- would clearly and demonstrably outweigh any hardship suffered by the Accused Markač as a result of Šeparović's withdrawal as counsel, no matter how substantial, it need not further consider the extent of hardship which might be suffered by the Accused Markač, in accordance with Article 26(iii).¹²

CONSIDERING nonetheless, that provided good cause be shown, the Trial Chamber will consider taking measures to ensure that Šeparović's withdrawal from the case, at this stage of the proceedings, does not have an adverse effect on the fairness and expeditiousness of trial;

NOTING that Šeparović stated, while quoting from the Appeals Chamber Decision of 12 January 2007, on his possible withdrawal that

Šeparović as a necessary witness is expected to withdraw from the case unless he can prove that General Markač will suffer as a result and pursuant to Article 26 of the Code of Conduct, I stated

¹¹ *Prlić* Decision, para. 32.

¹² Decision on Conflict of Interest, p. 7.

that my client would suffer hardship were his counsel to withdraw at this stage of the proceedings.¹³

RECALLING that the Appeals Chamber, in the same Decision of 12 January 2007 also held 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";¹⁴

CONSIDERING that the Trial Chamber, in the exercise of its discretion and in keeping with the spirit of the Appeals Chamber's Decision of 25 October 2006 and Decision of 12 January 2007, has considered the conflict of interest posed by Šeparović's representation in the light of all relevant provisions of the Code, rather than exclusively on Article 26 of the Code;

¹³ T., p. 173, l.14-20.

PURSUANT TO Articles 20 and 21 of the Statute, Rule 46(A) of the Rules and Articles 9, 14, 26 and 38 of the Code,

AFFIRMS its finding in the Decision on Conflict of Interest;

REFUSES Šeparović audience before the Trial Chamber and determines that he is no longer eligible to represent the Accused Markač in this case before the Tribunal, pursuant to Rule 44 of the Rules;

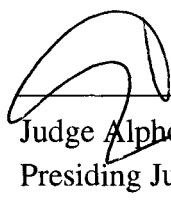
ORDERS the Accused Markač to immediately engage new counsel to represent him in Šeparović's stead;

ORDERS Šeparović to assist the Accused Markač's new counsel, until such time as the latter is able to certify that he or she is ready to fully take over the case, pursuant to Article 9(C) and (D) of the Code;

ORDERS new counsel to inform the Trial Chamber as soon as practical, and no later than 30 March 2007, on how much time he or she needs to fully take over the case;

INVITES the parties to indicate, by no later than 30 March 2007, what measures the Trial Chamber could take to ensure that the principle of a fair and expeditious trial continues to be upheld.

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



Judge Alphons Orie
Presiding Judge

Dated this sixth day of March 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

¹⁴ Decision of 12 January 2007, p. 4. Emphasis added.