



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: 18 April 2007

Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Bakone Justice Moloto, Pre-Trial Judge  
Judge Alphons Orié  
Judge Christine Van den Wyngaert

**Registrar:** Mr. Hans Holthuis

**Decision of:** 18 April 2007

**PROSECUTOR**

**v.**

**ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ**

**JUDGE ORIE'S DISSENTING OPINION ON DECISION  
ON CONFLICT OF INTEREST OF ATTORNEYS ČEDO  
PRODANOVIĆ AND JADRANKA SLOKOVIĆ OF 5  
APRIL 2007**

**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

1. As indicated in the “Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković” of 5 April 2007 (“Decision”), I respectfully disagree with the majority of the judges and set forth my reasons in this dissenting opinion.

2. The Decision notes that Rahim Ademi (“Ademi”) and the Accused Ivan Čermak (“Čermak”) are represented by counsel Čedo Prodanović (“Prodanović”) and Jadranka Sloković (“Sloković”) in separate proceedings which are unrelated and which concern different events occurring at different times.<sup>1</sup> Čermak has two co-accused, the Accused Ante Gotovina (“Gotovina”) and Mladen Markač (“Markač”).

3. It has never been suggested that Čermak could have an interest in the proceedings against Ademi. It is apparent, however, that Ademi was Gotovina’s Chief of Staff and his second-in-command during the time covered by the indictment which charges Čermak, Gotovina and Markač with certain crimes (“Indictment”).<sup>2</sup> Therefore, a real possibility exists for Ademi to be implicated in the case against the three Accused. He could be called as a witness or he could be the subject of an attempt by any of the Accused to shift responsibility for events referred to in the Indictment.

4. Under Article 14(A) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal (“Code”), a counsel owes a duty of loyalty to his or her clients. If in the course of representing a client a conflict arises between, on the one hand, this duty of loyalty owed to the client and, on the other hand, the counsel’s own interests or the interests of another present or former client of counsel, then pursuant to Article 14 (D) of the Code such a conflict is presumed to adversely affect the representation of counsel on behalf of the client or clients involved. For this reason, counsel is duty-bound before representing a client to consider whether the representation would compromise, or reasonably be expected to compromise, his or her duty of loyalty towards any other client. If so, he or she should refuse such representation.

5. By way of background, Prodanović and Sloković have been providing legal services to Čermak since his second interview with the Office of the Prosecutor in 1999.<sup>3</sup> From the record, it appears that Prodanović (and later Sloković) has been representing Ademi since 2001, first in proceedings before this Tribunal and then in proceedings in Croatia following the referral of Ademi’s case under Rule 11*bis*. The issue of a conflict of interest involving Prodanović and

<sup>1</sup> Decision, para. 9.

<sup>2</sup> Decision, para. 10.

<sup>3</sup> “Submission to the Trial Chamber concerning the Alleged Conflict of Interest Affecting Counsel Čedo Prodanović and Jadranka Sloković”, 14 February 2007, para. 22.

Sloković representing Čermak and Ademi was first raised in April 2006 within the context of joining the Gotovina case with the Markač and Čermak case.

6. Whether the duty of loyalty could result in a conflict of interest when Prodanović and Sloković accepted to represent Ademi is not relevant to a determination of the ultimate matter before the Trial Chamber. Likewise, whether counsel from that time forward acted diligently, pursuant to Article 14(B) of the Code, to ensure that no conflict of interest would arise is not the essence of the matter. The Trial Chamber does not function primarily as a disciplinary court. It is the Trial Chamber's role to determine whether there are compelling reasons which would justify intervening in the attorney-client relationship to ensure that there is no prejudice to the administration of justice, and in particular to protect Čermak's right to a fair trial. In so doing, the Trial Chamber should weigh the interference with an accused's right to counsel of choice against the need to ensure the accused's right to a fair trial.

7. A compelling reason for the Trial Chamber to intervene in Čermak's choice of counsel would exist if divided loyalties would cause Prodanović's and Sloković's representation of Čermak to place his right to a fair trial in jeopardy. Although the right to be represented by counsel of choice is among the fundamental rights of an accused, there may be circumstances in which representation by counsel of choice, due to a conflict of interest, may irreversibly prejudice the administration of justice. It is especially in such cases that the Trial Chamber should intervene and ensure the fairness of trial by restoring the conditions for an effective defence.

8. Both the Appeals Chamber in its "Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder" of 25 October 2006 ("Appeals Chamber Decision") and the Disciplinary Council ("Disciplinary Council") of the Association of Defence Counsel's ("ADC") advisory opinion of 17 January 2007 ("Advisory Opinion") point to the substantial possibility of a conflict of interest arising in this case, but both also acknowledge that no conflict of interest existed at the time of the decision and advisory opinion. The Disciplinary Council of the ADC indicated certain factors which were unknown or uncertain at the time, such as,

- the case was not ready for trial
- no date for commencement of trial had been set
- whether the loyalty that Prodanović and Sloković owe to Čermak would be compromised by an inability to cross-examine Ademi aggressively
- whether the loyalty that Prodanović and Sloković owe to Ademi would be compromised if they were unable to cross-examine him without revealing confidential information he may have disclosed to them

- the observation that it was at the time premature to conclude that Čermak did not intend to call Ademi as a witness because.<sup>4</sup>

9. With regard to these unknown or uncertain factors, I make the following observations:

- Whether or not there will be a need for Čermak's counsel to cross-examine Ademi, if he is called as a witness, will depend on the evidence he can be expected to give, which most likely, in turn, will depend on who calls him as a witness. There are therefore many variables. Čermak and his counsel appear determined to exclude the possibility of calling Ademi as a witness or to use him as a scapegoat in their defence strategy. One might consider it risky to exclude a defence strategy early in the proceedings and be so sure that the interests of Čermak and Ademi will not be adversely affected by counsel's continued representation of both. However, as the Decision, referring to the Appeals Chamber, has noted, it is primarily for counsel to assess a conflict of interest issue because, being closest to the case, counsel is expected to be able to make the most informed judgement with regard to his/her client's interest.<sup>5</sup> I therefore am hesitant to speculate, at this advanced stage of the proceedings, on whether any defence strategy could be developed, which may better serve Čermak but at the same time implicate Ademi.
- After the matter was considered by the Appeals Chamber and the Disciplinary Council of the ADC, both Ademi and his counsel have confirmed that there has been no disclosure of confidential information by Ademi which could be relevant to Čermak's defence.
- With regard to timing, we are now closer to the commencement of the trial than when the Appeals Chamber and Disciplinary Council of the ADC issued their Appeals Chamber Decision and Advisory Opinion respectively.

10. Concretely, a conflict of loyalty would materialize if counsel finds himself in a dilemma as to whether to use any information he has confidentially gained in his professional relationship with one or both of his clients. Such a dilemma would arise if, for example, the information favours client A but is detrimental to client B. If no such information is in counsel's hands, it may still be advisable (i) not to accept instructions from client B or (ii) to discontinue the representation of client B, in a case in which client A might be drawn in. Nevertheless, as long as client A has not provided information that would impair counsel's ability to conduct client B's case as any other

<sup>4</sup> Disciplinary Council of the ADC's Advisory Opinion of 17 January 2007, para 36, quoting the Appeals Chamber Decision, paras 27-29.

counsel might have done, I do not consider it mandatory *per se* for counsel to discontinue to represent client B.

11. Had Ademi shared confidential and relevant information with his counsel, the dilemma might be whether to use it and be disloyal to Ademi or not to use it and be disloyal to Čermak. In the absence of any shared information of a confidential character, I consider the duty of loyalty to both clients to be in jeopardy only in the abstract. The conflict of loyalty has not resulted in a concrete conflict of interest. In such circumstances, however, the other client may still experience unease that his counsel is in proceedings in which he might also become involved. I come back to this point in paragraph 13 below.

12. The Disciplinary Council of the ADC has expressed its opinion that the duty of loyalty to both Ademi and Čermak is incompatible with the continuation of representation of both clients.<sup>6</sup> I agree, although for me, like for the majority in the Decision, the possibility that Ademi is called as a witness is not the decisive factor.<sup>7</sup> Nor is it the possibility that Ademi may be implicated in the case.<sup>8</sup> A decisive factor for me to order that Prodanović and Sloković withdraw at this phase of the proceedings from Čermak's representation would have been that Ademi shared confidential information relevant to Čermak's defence with his counsel. As has clearly been explained by the ADC's Disciplinary Council in its Advisory Opinion, there are procedural uncertainties in this case to some extent beyond the control of counsel.<sup>9</sup> Another accused, the Office of the Prosecutor or the Trial Chamber may decide to call Ademi as a witness. The procedural developments in the twelve months prior to the Decision are such that counsel might further explore the circumstances around Ademi's position as Gotovina's Chief of Staff and his second-in-command at the time of the Indictment. Even if counsel currently firmly believe that in the exercise of their duties as defence counsel to Čermak, they have nothing to reveal which is unfavourable to Ademi, irrespective of its source, their role vis-à-vis Ademi would still be equivocal. In such an eventuality, there should be no shadow of doubt as to where counsel's loyalty lies. Counsel's role should be transparent to both Ademi and Čermak. Both have given Undertakings wherein they consent to Prodanović's and Sloković's continuing to represent them.<sup>10</sup> In view of the uncertainties, the possible need for further

<sup>5</sup> Decision, para. 12, referring to *Prosecutor v. Prlić*, "Decision on Requests for Appointment of Counsel", Case No.: IT-04-74-PT, 30 July 2004, para. 14.

<sup>6</sup> Advisory Opinion, paras 40-41.

<sup>7</sup> Decision, para. 14.

<sup>8</sup> Decision, para. 18.

<sup>9</sup> Advisory Opinion, para. 40.

<sup>10</sup> Undertakings filed in the "Notice to the Trial Chamber Concerning Undertakings Provided by Ivan Čermak and Rahim Ademi", 8 February 2007.

inquiry concerning Ademi's position and the absolute need for transparency, representation of Ademi would be irreconcilable with the further representation of Čermak.

13. Discontinuation of dual representation requires a choice about whether to discontinue both relationships or one of them and which one. The issue for the Trial Chamber is whether to discontinue the representation of Čermak. Even in the present circumstances, where Ademi has shared no confidential information with counsel relevant to the Čermak defence, Ademi's consent for the continued representation by his counsel of Čermak is vital. Absent such consent, Ademi might interpret a situation wherein he is giving evidence in proceedings where his counsel is representing Čermak, as his counsel's failure of their duty of loyalty towards him. That possibility should in itself prohibit counsel from representing Čermak without Ademi's consent, even if Ademi's evidence would be unrelated to Ademi's own case. In other words, if a client experiences any dealings, direct or indirect, of his counsel, in the latter's capacity as counsel for another client, as a violation of the duty of loyalty which that counsel owes to him, the client's concerns should be respected and counsel should withdraw.

14. In the present situation, since Ademi has given his consent for his counsel to continue to represent Čermak, I find no compelling reason to prohibit counsel to continue the representation of Čermak under certain conditions.<sup>11</sup> The first condition would be that the dual representation ends which means that counsel would cease to further represent Ademi. While Ademi, being aware of the possibility that he may be called as a witness in this case and having confirmed that he has not shared any confidential information with his counsel, has consented to the continued representation of Čermak by Prodanović and Sloković, direct dealings with his, by then, former counsel should be avoided, since it might cloud Ademi's perception of the true relationship with his, by then, former counsel. Therefore the hiring of a third counsel on the Čermak defence with the specific task of performing any duties that are directly related to any involvement that Ademi may have in this case would be the second condition.

15. Should we anticipate the resolution of a conflict of interest under Article 14(E) of the Code if the conflict of interest does not yet exist?<sup>12</sup> In balancing the need for the Trial Chamber to

<sup>11</sup> This is unlike the conflict of interest situations that arose with regard to Attorney Olujić in *Prosecutor v. Prlić et. al.* ("Decision on Requests for Appointment of Counsel", IT-04-74-PT, 30 July 2004) case and with regard to Attorney Šeparović in these proceedings ("Decision on Conflict of Interest of Attorney Miroslav Šeparović", 27 February 2007). In the former case, both clients represented by Mr. Olujić were charged with the same criminal acts and were allegedly linked by a close superior-subordinate relationship. In the latter case, the Trial Chamber found Mr. Šeparović had a personal interest in the case.

<sup>12</sup> Advisory Opinion, paras 42-44, discussing the applicability of Article 14(E) of the Code to a potential conflict of interest.

interfere with the accused's right to be represented by counsel of choice and the need to avoid irreversible prejudice to the administration of justice, the potential nature of the conflict of interest at hand is relevant. It assists in assessing whether the withdrawal of Čermak's counsel from his representation is the appropriate remedy in the purely abstract conflict of loyalty that presently exists. In my opinion, the fact that it is still only a potential conflict of interest tilts the scales in favour of the view that further representation of Čermak by Prodanović and Sloković, under the conditions I mention in paragraph 14 above, is a sufficient remedy and will not result in irreversible prejudice to the administration of justice.

16. I have no reason to doubt that the consent given by both Čermak and Ademi are sufficiently informed.<sup>13</sup> The expression of consent does not have to set out in full detail all potential situations that might arise and that are covered by such consent. I further consider both Ademi and Čermak sufficiently competent so as not to be easily misled.

17. For the foregoing reasons, I would allow Prodanović and Sloković to continue representing Čermak in this case, subject to the conditions laid down in paragraph 14 above.

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



Judge Alphons Orie

Dated this eighteenth day of April 2007

At The Hague

The Netherlands

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<sup>13</sup> See fn 8 *supra*.