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① 3091 - ① 3086  
13 November 2007

Case No. IT-06-90-PT  
*Prosecutor v. Ivan Čermak*

**PUBLIC  
DECISION**

**THE DEPUTY REGISTRAR,**

**NOTING** the Statute of the Tribunal as adopted by the Security Council under Resolution 827 (1993) ("Statute"), and in particular Article 21 thereof;

**NOTING** the Rules of Procedure and Evidence as adopted by the Tribunal on 11 February 1994, as subsequently amended ("Rules"), and in particular Rule 44 thereof;

**NOTING** the Code of Professional Conduct for Counsel Appearing Before the International Tribunal (IT/125 REV.2) ("Code of Conduct");

**NOTING** that Ivan Čermak ("Accused") was transferred to the seat of the Tribunal on 11 March 2004;

**CONSIDERING** that on 11 March 2004, the Accused executed a power of attorney authorizing Mr. Čedo Prodanović, attorney at law from Croatia, to act on his behalf in proceedings before the International Tribunal and stated that he would not apply for Tribunal legal aid;

**CONSIDERING** that on 12 March 2004, the Accused executed another power of attorney authorizing Ms. Jadranka Sloković, attorney at law from Croatia, to act on his behalf in proceedings before the International Tribunal;

**NOTING** that on 20 February 2006, the Prosecution filed a consolidated motion to amend the Indictments against the Accused, Mladen Markač and Ante Gotovina and to jointly charge and try these three accused (“Prosecution Motion”);

**NOTING** that on 4 April 2006, the accused Ante Gotovina filed his “[...] Response in Opposition to the Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder”, opposing the Prosecution Motion, arguing, *inter alia*, that the joinder would create a conflict of interest since the Accused’s counsel also represented Rahim Ademi, whom Mr. Gotovina intended to call as a witness “critical to his defence”;

**NOTING** that on 14 July 2006, the Trial Chamber issued its “Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder” (“14 July 2006 Decision”), concluding that there was “no factual basis on which it is demonstrated that a conflict of interest will arise between the two accused” and ordering that the case of *Prosecutor v. Ante Gotovina*, case No. IT-01-45-PT, and the case of *Prosecutor v. Ivan Čermak and Mladen Markač*, case No. IT-03-73-PT, be jointly tried;

**NOTING** that on 25 October 2006, the Appeals Chamber issued its “Decision on Interlocutory Appeals against the Trial Chamber’s Decision to Amend the Indictment and for Joinder”, in which it confirmed the 14 July 2006 Decision on the joinder but found a potential conflict of interest in Mr. Prodanović and Ms Sloković’s dual representation of the Accused and Mr. Rahim Ademi;

**NOTING** that on 8 February 2007, counsel for the Accused filed a “Notice to the Trial Chamber Concerning Undertakings Provided by Ivan Čermak and Rahim Ademi” by which both clients undertook not to raise their counsel’s dual representation as a legal impediment affecting their respective right to a fair trial;

**CONSIDERING** that on 5 April 2007, the Trial Chamber issued its “Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković” (“Decision on Conflict of Interest”) and held that the representation of both the Accused and Mr. Ademi by Mr. Prodanović and Ms. Sloković raised a conflict of interest under Article 14(D)(i) of the Code of Conduct and ordered them to withdraw as counsel, but held that both counsel should stay on the case until such time as a new defence team was able to certify that it can take over the Accused’s defence;

**CONSIDERING** that on 29 June 2007, the Appeals Chamber issued its "Decision on Ivan Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorney's Čedo Prodanović and Jadranka Sloković" upholding the Trial Chamber's Decision on Conflict of Interest;

**CONSIDERING** that on 6 September 2007, the Accused executed a power of attorney authorising Mr. Steven Kay, QC from the United Kingdom, and Mr. Andrew Cayley, barrister from the United Kingdom, to act on his behalf in proceedings before the International Tribunal;

**NOTING** that on 27 September 2007, the Deputy Registrar admitted Mr. Kay pursuant to Rule 44(A) of the Rules, to represent the Accused in proceedings before the Tribunal;

**CONSIDERING** that the Registrar was aware of Mr. Cayley's previous employment at the Tribunal's Office of the Prosecutor ("OTP");

**NOTING** Article 14(C) of the Code of Conduct which reads as follows:

Counsel shall not represent a client in connection with a matter in which counsel participated personally and substantially as an official or staff member of the Tribunal [...], unless the Registrar determines, after consultation with the parties and taking into account the views of the Chamber, that there is no real possibility shown that a conflict between the former and the present assignment exists.

**CONSIDERING** the Trial Chamber's "Order to the Prosecution Concerning the Alleged Conflict of Interest of Attorney Gregory Kehoe" dated 25 July 2007 ("Order to the Prosecution"), in which the Trial Chamber held that "it is the Registrar's duty, *when aware of proposed counsel's previous participation in a specific matter* [as a staff member of the Tribunal], to make a determination pursuant to Article 14(C) Code [of Conduct] and to follow the procedure therein [...]" (emphasis in original);

**CONSIDERING** that in the present case, the Registrar was aware of Mr. Cayley's former employment with the OTP, but had no reason to believe that he worked on the matter at hand;

**CONSIDERING** that, in light of Article 14(C) of the Code of Conduct in conjunction with the Order to the Prosecution, the Registrar nevertheless sought to confirm that Mr. Cayley did not participate personally and substantially in this case before admitting him as a counsel to Mr. Čermak;

**CONSIDERING** that the Registrar requested Mr. Cayley and the OTP to comment on whether, while employed at the Tribunal, Mr. Cayley participated personally and substantially in the case against Mr. Čermak and his co-accused, and if so, whether there was a real possibility of a conflict of interest arising;

**CONSIDERING** that on 5 October 2007, the Registrar received the OTP's comments ("OTP Comments") which, after consultation with the OTP, he forwarded in redacted form to Mr. Cayley, to give him an opportunity to respond in accordance with basic principles of natural justice and procedural fairness;

**CONSIDERING** Mr. Cayley's response to the OTP's Comments submitted to the Registrar on 23 October 2007;

**NOTING** that the Registrar also received submissions from Mr. Kay on 21 October 2007, and from Mr Cayley's wife, a current employee of the OTP, on 29 October 2007;

**CONSIDERING** that after a thorough review of the submissions received, the Registrar is satisfied that as a staff member of the OTP, Mr. Cayley did not participate *personally* in the matter at hand;

**CONSIDERING** that the Registrar's analysis under Article 14(C) of the Code of Conduct should normally end here as "personal *and* substantial" participation need to be established cumulatively to trigger a conflict of interest analysis by the Registrar under that provision;

**CONSIDERING**, however, that because some of the information provided by the OTP suggested that Mr. Cayley may have been involved indirectly in certain aspects of the case mainly by participating in OTP senior staff meetings, out of caution, the Registrar has also analysed whether Mr. Cayley could be said to have been *substantially* involved in the matter at hand;

**CONSIDERING** that as a matter of principle, the Registrar is not convinced that a lawyer's mere presence at meetings such as the OTP senior staff meetings alone could amount to that lawyer's substantial participation in a case under Article 14(C) of the Code of Conduct and that, even if it could, which it does not, any ensuing potential conflict will most likely be able to be waved by the client;

**CONSIDERING** further that based upon an analysis of the specific facts of the present case, the Registrar is satisfied that Mr. Cayley did not participate *substantially* in the matter while employed at the OTP;

**CONSIDERING** that the Registrar is satisfied that Mr. Cayley did not participate “personally and substantially” in the present case while employed at the OTP and that therefore, there is no need for the Registrar to determine if there is a real possibility of a conflict between the “former and present assignment” under Article 14(C) of the Code of Conduct;

**NOTING** that in the OTP Comments, the OTP has also raised other concerns which, in the OTP’s view, may prevent Mr. Cayley from acting as counsel for the Accused;

**CONSIDERING** that such concerns go beyond the Registrar’s conflict of interest analysis under Article 14(C) of the Code of Conduct;

**CONSIDERING** that, aside from the determination under Article 14(C) of the Code of Conduct as outlined above, the Registrar’s role in admitting counsel privately retained by an accused under Rule 44 of the Rules is limited to vetting the counsel’s qualifications and that the language of the Rule does not allow for the exercise of any discretion where the qualification requirements are fulfilled;

**CONSIDERING** that the Registrar is satisfied that Mr. Cayley fulfils the qualification requirements of Rule 44(A) of the Rules;

**CONSIDERING** furthermore that to the extent that the issues raised by the OTP concern the administration of justice and the public perception of the proceedings, they require a judicial determination after a proper hearing of all interested parties, including the accused if necessary, and that an administrative review of counsel’s qualifications under Rule 44(A) of the Rules cannot provide the publicity and transparency required for dealing with matters of such importance to the trial proceedings;

**CONSIDERING** that in any event, the Registrar is not satisfied that the information before him shows that Mr. Cayley has engaged in conduct prohibited under Rule 44(A)(vi) of the Rules;



**CONSIDERING** therefore that the Registrar is satisfied that there is no impediment to Mr. Cayley's appointment as counsel to the Accused under Rule 44 of the Rules;

**CONSIDERING** the Accused's right to "defend himself [...] through legal assistance of his own choosing" enshrined in Article 21(d) of the Statute;

**NOTING** Mr. Cayley's obligations under the Statute, the Rules, and the Code of Conduct;

**DECIDES** pursuant to Rule 44(A) of the Rules, to admit Mr. Cayley to represent the Accused before the Tribunal, effective as of the date of this decision.

John Stocking  
Deputy Registrar



Dated this 12<sup>th</sup> day of November 2007  
At The Hague,  
The Netherlands.