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27 February 2007

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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 Former Yugoslavia since 1991

Case No. IT-06-90-PT

Date: 27 February 2007

Original: English

IN TRIAL CHAMBER I

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

Registrar: **Mr. Hans Holthuis**

Decision of: **27 February 2007**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

DECISION ON CONFLICT OF INTEREST 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 Slokovic 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");

NOTING the Appeals' Chamber "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 ("Appeal Motion"), regarding the conflict of interest arising from Mr. Miroslav Šeparović's ("Šeparović") representation, to the Trial Chamber [1];

RECALLING that the conflict of interest posed by Šeparović's representation was first raised in "Defendant Ante Gotovina's Response in Opposition to the Prosecution's Consolidated Motion to Amend the Indictment and for Joinder" of 4 April 2006, ("Gotovina Response to Joinder Motion")[2];

NOTING the Appeals' Chamber "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") that preceded the Decision of 12 January 2007, which confirmed the "Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder" of 14 July 2006 ("Decision of 14 July 2006") that the conflict of interest caused by the Šeparović representation would not be avoided if the cases were not joined;

NOTING that attached as Annex I to the Appeal Motion, Šeparović included his signed statement dated 2 November 2006 ("Šeparović Statement");

NOTING "Defendant Ante Gotovina's Response to Appellant Mladen Markač's Motion for Clarification of the Appeals Chamber's Decision from 25 October 2006" of 22 November 2006 ("Gotovina Response to Appeal Motion");

NOTING the Advisory Opinion of the Disciplinary Council of the Association of Defence Counsel of the Tribunal ("ADC Disciplinary Council") of 17 January 2007, sent to the Trial Chamber on 18 January 2007 ("Advisory Opinion");

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[1] Decision of 12 January 2007, p. 4.
[2] Gotovina Response to Joinder Motion, para. 8-9; para. 63-74.

BEING SEIZED of "Defence Counsel Miroslav Šeparović's Submission re Conflicts of interest" of 14 February 2007 ("Šeparović Submission");

BEING SEIZED of the "Prosecution's Submission Regarding Potential Conflict of Interest of Defence Counsel" of 14 February 2007 ("Prosecution Submission") in which it said that faced with potential and foreseeable conflicts of interest, which have been identified by both the Appeals Chamber and the ADC Disciplinary Council's Advisory Opinion, "it is incumbent on the Trial Chamber to act swiftly and take appropriate measures to protect the fairness of trial and the integrity of the proceedings";[3]

CONSIDERING that in its Decision of 12 January 2007, the Appeals Chamber stated that in its earlier Decision of 25 October 2006,

> ..it did not make a finding with respect to the actual existence of a conflicts of interest 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 conflicts of interest arising ... 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 his client, the Accused Markač[4];

RECALLING that in its initial submissions, the Gotovina Defence held that Šeparović was a crucial witness for the Gotovina Defence[5] and that it intended to prove that Gotovina had no authority and no power to influence the justice system and that he could not have participated in the alleged joint criminal enterprise; as Minister of Justice at the time, Šeparović would explain that Gotovina did not have the authority to investigate or punish his military sub-ordinates for criminal acts[6]; furthermore, it claimed that Šeparović was the only living witness who could testify as to whether the former Croatian President Tudjman was part of a conspiracy to conceal and condone criminal acts[7];

NOTING that in the Šeparović Statement, Šeparović confirms that he was Minister of Justice at the time of the alleged crimes;

CONSIDERING that in the Decision of 25 October 2006, the Appeals Chamber held that:

> [...] even if it is established that Markač and his subordinates were under the authority of the Ministry of Interior rather than the Ministry of Defence, Šeparović's testimony as to the military justice system allegedly being under the

[3] Prosecution Submission, para. 1.
[4] Decision of 12 January 2007, p. 4.
[5] Gotovina Response to Joinder Motion, para. 65; para. 8-9 and 63-74.
[6] Gotovina Response to Joinder Motion, para. 66.
[7] Gotovina Response to Joinder Motion, para. 67.

> control of the Ministry of Justice may be important for Markač's case given that the question of whether the Special Police were also subject to the jurisdiction of the military or civilian courts is a matter of fact to be determined at trial. Furthermore, Šeparović's testimony appears to be necessary and relevant for Čermak as well given that he is alleged to be in the same military chain of command as Gotovina. Finally, the Appeals Chamber notes that Gotovina states that Šeparović is the only living witness who will be able to testify as to whether deceased President Tudjman, Šeparović's direct superior, "ever suggested or ordered that the criminal justice system of the Republic of Croatia should conceal or condone criminal activity against Serbian civilians or property." Such testimony is likely to be relevant and necessary with respect to the cases of all three Appellants who are all charged with participating in the joint criminal enterprise by "failing to establish and maintain law and order among, and discipline of, his subordinates, and neither preventing nor punishing crimes committed by them against the Krajina Serbs."...given the likelihood that on the basis of the allegations by the Prosecution against both Čermak and Markač, Šeparović's testimony will be relevant and necessary for their defence, it was reasonable for the Trial Chamber to conclude that a conflict of interests for Šeparović would arise regardless of whether joinder was granted, even if they have not yet expressed any intention of calling Šeparović as a witness.[8]

RECALLING that Šeparović states that

> the military courts were not under the authority of the Ministry of Justice, neither they were [sic] subordinated to this Ministry. Military Courts were established through the so called institutions of war of the President of the Republic of Croatia from the year 1991. Six military courts and military prosecutor's offices were founded, what [sic] was the number of the operative military zones existing at that time, too. The persons appointed to the judges of the military courts, and that on the basis of the war schedule being established by the Minister of Defence, were the judges of the existing municipal and district courts. So, they were the specialised courts being the part of the judicial authority, exclusively governed by the Supreme Court and not in any way by the Ministry of Justice[9];

RECALLING further that Šeparović claims he is not a necessary witness and refers to unidentified documentary evidence and indicates his

> ex-deputy and the assistants of the Minister of Justice, who are the experts competent for discoursing [sic] the organization and operation of the military courts [10],

among the other potential witnesses who could testify in his stead;

[8] Decision of 25 October 2006, para. 32-33.
[9] Šeparović Statement, p. 1-2.
[10] Šeparović Statement, p. 1; Šeparović Submission, para. 13.

NOTING FURTHER that Šeparović

> points out that, as regards the role and the operation of the military courts, I had never had any conversation, either before the operation Storm or at the time of its duration or afterwards, neither with the late President Tudman nor with the Minister of Defence Gojko Šušak, not with the chiefs of the staff the generals Bobetko and Červenko, and not with the defendants being mentioned in the Indictment as the members of the joint criminal enterprise. Likewise, neither the President Tudman, nor any other person had ever ordered or suggested to me, that the system of justice should not prosecute the criminal acts against the Serbian civilians and their property.[11]

NOTING that Šeparović contends that the Ministry of Defence and not the Ministry of Justice was responsible for the military courts[12];

CONSIDERING that the Appeals Chamber has considered this issue, of whether the Ministry of Defence or the Ministry of Interior was responsible for the military police and whether the military justice system fell under the responsibility of the Ministry of Justice, as a relevant one[13];

NOTING that Article 14 of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal ("Code") states that "...counsel or his firm shall not represent a client with respect to a matter if, counsel's professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected by...counsel's own ...personal interests."[14]

CONSIDERING that the Trial Chamber cannot accept that the professional judgement of Šeparović, lead counsel for the Accused Markač but also Minister of Justice at the time of the alleged crimes in this Indictment, may not reasonably be affected by his own personal interests;

CONSIDERING that it is obvious that one of the alternatives presented by the contested issue, whether it is the Ministry of Defence or Ministry of Justice who was responsible for the military courts, may affect the personal interests of the former Minister of Justice, Šeparović;

CONSIDERING with great concern that Šeparović presents his personal position, makes substantive comments on the contested issue, and purports to resolve it by voluntarily providing a solution in anticipation[15];

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[11] Šeparović Statement, p. 2.
[12] Ibid., p. 1-2.
[13] Decision of 25 October 2006, para. 32.
[14] Code, Article 14 (D)(iv)(2).
[15] Šeparović Statement, p. 1-2.

CONSIDERING that in attempting to do so, the sources he refers to are vague and mainly unidentified, but appear to include his own personal knowledge of the existence or absence of conversations he may have had with individuals such as Tudjman, Šušak, Bobetko, Červenko and defendants who allegedly have participated in the joint criminal enterprise[16]; Šeparović's personal knowledge includes the denial of any instructions not to prosecute the criminal acts committed against the Serbian civilians and their property ever given to him by Tudjman;

CONSIDERING that it appears from the Indictment[17] that the failure to take reasonable measures to prevent such crimes or to punish the perpetrators thereof, is a relevant issue for the determination of criminal responsibility under Article 7(3) of the Statute and that the issue identified by the Appeals Chamber as to who is responsible for the functioning of the military courts, is intrinsically linked to the alleged failure to punish;

CONSIDERING that it is plausible that the alternative so strongly denied by Šeparović – that the Ministry of Justice was responsible for the military courts – has the potential of exculpating the Ministry of Defence and in turn, be relevant evidence for the determination of criminal responsibility of the Accused;

CONSIDERING that in spite of Šeparović's statement that

> the beginning of the Storm took me over [sic] at the summer leave, and the ex-Prime Minister Nikica Valentić called me then by phone and requested my immediate return to Zagreb[18],

the fact that his presence was requested at the seat of government in Zagreb at the beginning or immediately after the beginning of Operation Storm, is significant in itself;

CONSIDERING that Šeparović has strongly denied he will be a necessary witness under Article 26 of the Code, which prohibits counsel from acting as an advocate in a proceeding in which counsel is likely to be a necessary witness, unless such counsel falls under one of the exceptions listed;

CONSIDERING that one of the arguments that Šeparović makes in the Šeparović Statement, that the Prosecution never took any initiative to call him as a witness is misconceived, since if Gotovina's Defence has shown an interest in calling Šeparović as a defence witness, such testimony cannot reasonably be assumed to support the Prosecution's case;

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[16] It is unclear whether by such "defendants", Šeparović means his client, the Accused Markač and his co-accused in this case.
[17] Indictment, para. 47.
[18] Šeparović Statement , p. 2.

CONSIDERING that the Gotovina Defence has not waived its right to call Šeparović as a witness and has rebutted such allegations made in the articles quoted by Šeparović[19], as a misquote and inaccurate;[20]

CONSIDERING that the Trial Chamber interprets the rationale of Article 26 of the Code as that of preventing the occurrence of a situation where an advocate ends up on the witness stand, a situation which could affect the advocate from performing his duty as counsel to the best of his ability and "...it cannot be known as yet whether the Trial Chamber itself might choose to call him as its own witness or whether the Prosecution might choose to call him as an additional witness or a rebuttal witness" [21]or if Gotovina or Čermak will call him as a witness; while such a determination may be simple to make in a single-accused case, the issue becomes more intricate and complex where there are several accused, where reasonable foresight into potential future situations may be harder to make;

CONSIDERING that since no witness indicated by Šeparović occupied the same level of responsibility in the Croatian government at the time of Operation Storm as Šeparović had, none of these could be expected to have the same knowledge as Šeparović;

RECALLING the Accused Markač's Appeals Motion wherein he claims that Šeparović's withdrawal as Counsel will pose more than a "substantial hardship" to him[22];

NOTING that, Šeparović claims that since the trial date is fixed for the near future, his withdrawal would influence the equality of arms and that if new lead counsel were introduced to the defence now, it would not have adequate time to properly prepare itself for the trial and compensate in a few months for four years of Šeparović's preparation;[23]

RECALLING that the Appeals Chamber has already indicated that it does not consider the right of an accused to choose counsel as absolute but as having limits, such as where a conflict of interest exists, unless *inter alia*, his withdrawal will cause "substantial hardship" to such an accused[24];

CONSIDERING that the Trial Chamber, due to the compelling circumstances of Separovic's own personal interest in the case, finds that the harm caused to the Accused Markac and to the integrity of the proceedings -- if Separovic 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

[19] Ibid., p. 2 and Annex III.
[20] Gotovina Response to Appeal Motion, para.6, Fn. 3.
[21] ADC Disciplinary Council's Advisory Opinion, para. 25. The Advisory Opinion is not binding on this Trial Chamber but it is considered authoritative.
[22] Appeals Motion, Annex II; Šeparović Submission, para. 14 -15.
[23] Šeparović Submission, para. 15.

Accused Markac as a result of Separovic's withdrawal as counsel, no matter how substantial, it need not further consider the extent of hardship which might be suffered by the Accused Markac, in accordance with Article 26(iii);

NOTING FURTHER Šeparović's claim that the fundamental right of an Accused, pursuant to Article 21(4)(b) of the Statute, also includes the right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing,[25] and that Markač's Statement of 2 November 2006 ("Markač Statement"), should be treated as full and informed written consent.[26]

CONSIDERING that the letter of Article 14 (E)(ii) (2) of the Code can only be considered in the light of its spirit, and the giving of consent by the Accused Markač cannot cure the conflict of interest between the Accused Markač and Šeparović, the latter in his dual role as counsel and ex-Minister of Justice,[27] and as such is insufficient to remedy the conflict under Article 14 of the Code since such consent is likely to irreversibly prejudice the administration of justice[28];

NOTING that while the withdrawal of Šeparović as counsel for the Accused Markač may impact the preparation of the Accused Markač's case negatively, the Trial Chamber does not accept the argument that Šeparović's withdrawal would necessarily entail the withdrawal of his co-counsel since co-counsel is under a duty not to withdraw his representation of a client, unless one of the exceptions, which are not relevant to this case, apply[29];

RECALLING the Prlić Decision, wherein the Trial Chamber found that if a Trial Chamber determines,

> [...] from the beginning of the case or at its earlier stage, that there is a substantial likelihood that such conflict will arise in the course of the proceedings, it should not allow such risk to be taken, unless there are compelling reasons to do so. A distinction should be made in this regard between avoidable and unavoidable risks.[30]

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[24] Decision of 25 October 2006, para. 33.
[25] Šeparović Submission, para. 20.
[26] Šeparović Submission, para. 21. The Markač Statement was filed as Annex II to the Appeals Motion.
[27] The conflict between Šeparović and the Accused Markač may arise depending on who calls Šeparović as a witness.
[28] Code, Article 14(E)(ii)(2).
[29] Code, Article 9(B).
[30] Prosecutor v. Jadranko Prlić et, Case No.: IT-04-74-PT, "Decision on Requests for Appointment of Counsel", 30 July 2004 ("Prlić Decision") Para. 31.

RECALLING FURTHER that the Prlić Decision held that the

> Trial Chamber has a statutory obligation, as set forth in Articles 20 and 21 of the Statute of the Tribunal, to ensure the fair and expeditious conduct of the proceedings, with full respect of [sic] the rights of accused. The existence or risk of conflict of interest may impact on the conduct of the trial.[31]

RECALLING the Hadžihasanović Decision, in which the Trial Chamber held that it is the duty of the Trial Chamber to make sure that the proceedings would not be halted by foreseeable, and therefore avoidable, risks and that

> [...] the Chamber cannot wait until foreseeable harm is done to the proceedings. It is for the Chamber to prevent such foreseeable harm;[32]
>
> [...] Counsel's duty [to ensure, before accepting to represent a client, that he will be in a position to defend this client in full independence and with loyalty] is not exclusive of the Trial Chamber's inherent powers deriving from its duty to ensure the right of the accused to a fair and expeditious trial and proper administration of justice.[33]

CONSIDERING that apart from the conflict of interest arising out of Šeparović's personal interest the Trial Chamber reasonably foresees the likelihood that Šeparović will be called as a witness in the case because of his position of ex-Minister of Justice at the time of the alleged crimes;

CONSIDERING that if Šeparović were to be called as a witness, in the light of his personal knowledge, once trial has commenced[34], this could harm both the Accused Markač, the integrity of the proceedings and the administration of justice, especially in this multi-accused trial;

NOTING that the Prlić Appeals Decision held that

> [...] safeguarding the interests of justice requires not only the existence of a mechanism for removing conflicts of interests after they have arisen, but also the prevention of such conflicts before they arise; [35]

CONSIDERING that in its Decision of 25 October 2006, the Appeals Chamber noted that it "expects" that Šeparović will withdraw in compliance with his ethical and professional obligations[36];

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[31] Prlić Decision, para. 15.
[32] Prosecutor v. Enver Hadžilhasanović et al, Case No.: IT-95-9-PT, Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević, 25 March 1999, ("Hadžilhasanović Decision"), para. 44-45.
[33] Hadžilhasanović Decision, para. 23.
[34] Prlić Decision, para. 16.
[35] Prosecutor v. Jadranko Prlić et, 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 ("Prlić Appeals Decision"), para. 25.
[36] Decision of 25 October 2006, para. 34.

RECALLING Šeparović's claim that he does not intend to withdraw as Counsel for the Accused Markač since, he considers there is no conflict of interest[37];

CONSIDERING that in the same Decision of 25 October 2006, the Appeals Chamber continues that, should Šeparović

> ...fail to withdraw, pursuant to Rule 46 of the Rules and Article 38 of the Code, the Trial Chamber may find that he is engaging in misconduct in violation of the Code and upon such a finding, the Trial Chamber may, after giving Šeparović a warning, refuse him audience or determine, after giving him the opportunity to be heard, that he is no longer eligible to represent a suspect or accused before the International Tribunal.[38]

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

HEREBY FINDS that there is a conflict of interest with regard to Šeparović representation because

(i) Šeparović has a personal interest in the case which disqualifies him as counsel under Article 14(D) (iv)(2) and

(ii) because of his personal knowledge, Šeparović is likely to be called as a witness;

WARNS Šeparović that by persisting in representing the Accused Markač in spite of the repeated notices given him by the Decision of 14 July 2006, the Decision of 25 October 2006 and the Decision of 12 January 2007[39], Šeparović has jeopardised his client's interests by not withdrawing earlier in the proceedings, and thus, in gross negligence, has failed to meet the standard of professional ethics required in the performance of his duties before this Tribunal;

CALLS UPON Šeparović and affords him the opportunity to be heard on Wednesday 28 February 2007 at 1600 hours in Courtroom 1 of the Tribunal to show cause why the Trial Chamber should not determine that his behaviour does not amount to misconduct under Rule 46 and why it should not proceed against him there under;

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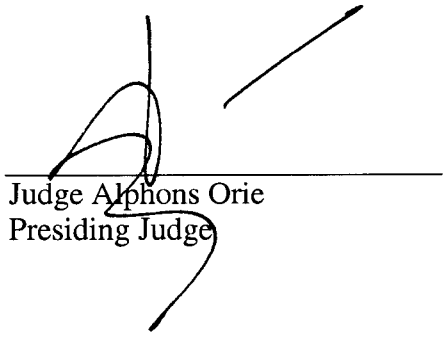
[37] Šeparović Submission, p. 2.
[38] Ibid., para. 35.
[39] Note also the conclusions of the ADC Disciplinary Council's Advisory Opinion of 17 January 2007.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-seventh day of February 2007
At The Hague,
The Netherlands

[Seal of the Tribunal]