



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: 5 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: 5 April 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

**DECISION ON CONFLICT OF INTEREST OF
ATTORNEYS ČEDO PRODANOVIĆ AND JADRANKA
SLOKOVIĆ**

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. In the present decision, the views expressed by the Judges of the Trial Chamber are held in common, unless otherwise indicated through reference to the “Majority”. Judge Orić will file a Dissenting Opinion which discusses his reasons for disagreeing with the Majority.

2. The conflict of interest issue posed by Mr. Čedo Prodanović’s (“Prodanović”) and Ms. Jadranka Sloković’s (“Sloković”) (collectively “Prodanović/Sloković”) dual representation of the Accused Ivan Čermak (“Čermak”) in these proceedings and Rahim Ademi (“Ademi”) in proceedings in Croatia pursuant to a Rule 11*bis* referral¹ 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”). Gotovina opposed the joinder of his case with that of Čermak’s and the Accused Mladen Markač’s (“Markač”). He argued, *inter alia*, that this potential conflict of interest would prejudice him.² On 25 October 2006, the Appeals Chamber, in its “Decision on Interlocutory Appeals against the Trial Chamber’s Decision to Amend the Indictment and for Joinder” (“Decision of 25 October 2006”), confirmed Trial Chamber II’s “Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder” of 14 July 2006 (“Decision of 14 July 2006”). The Decision of 14 July 2006 had held that any conflict of interest arising out of the Prodanović/Sloković representation was not such as to prevent the joinder of the cases of Markač, Čermak and Ante Gotovina (“Gotovina”).³

3. The Trial Chamber notes the Advisory Opinion of the Disciplinary Council of the Association of Defence Counsel of the Tribunal of 17 January 2007, received on 18 January 2007⁴ and the “Notice to the Trial Chamber concerning Undertakings provided by Ivan Čermak and Rahim Ademi” of 8 February 2007. Two undertakings, signed by the Accused Čermak (“Čermak Undertaking”) and Rahim Ademi (“Ademi Undertaking”) respectively (collectively “Čermak and Ademi Undertakings”), were attached. The Trial Chamber is seized of the “Submission to the Trial Chamber concerning the Alleged Conflict of Interest affecting Counsel Čedo Prodanović and Jadranka Sloković” of 14 February 2007 (“Prodanović/Sloković Submission”) and the “Prosecution’s Submission Regarding Potential Conflict of Interest of Defence Counsel” of 14 February 2007 (“Prosecution Submission”). It is also seized of Prodanović’s and Sloković’s further “Submission concerning the Prosecution’s Submission regarding Potential Conflict of Interests of

¹ *Prosecutor v. Rahim Ademi et al*, “Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11*bis*”, Case No. IT-04-78-PT, 14 September 2005.

² Gotovina Response to Joinder Motion, paras 5-7, 54-62.

³ Decision of 14 July 2006, paras 63-64;71.

⁴ Advisory Opinion of the Disciplinary Council of the Association of Defence Counsel of the Tribunal, paras 3, 6, 11,13, 16-17, 33-50, 53.

Defence Counsel” which was filed confidentially on 15 February 2007 (“Prodanović/Sloković Further Submission”).

4. The issue of conflict of interest arises out of Prodanović’s and Sloković’s dual representation of Čermak and Ademi. Gotovina contended that one of Čermak’s defence strategies could be to argue that Gotovina, who was Čermak’s commanding officer, was in fact responsible for certain alleged crimes.⁵ According to Gotovina,

During Operation Storm, General Ademi was General Gotovina’s Chief of Staff and second-in-command to the Commander of the Split Military District. Given General Ademi’s place in the chain of command as General Gotovina’s immediate subordinate, the charges against General Gotovina in the proposed Joinder Indictment could be applied against General Ademi.⁶

Furthermore, Gotovina claims he will show that he was on honeymoon during the crucial time in which the charged crimes were allegedly committed and that during his leave of absence, General Ademi was Acting Commander of the Split Military District.⁷ The Gotovina Defence has already indicated that it considers him a crucial witness⁸ and it also raises the point that should Prodanović and Sloković cross-examine their client Ademi in the current proceedings, they may be privy to confidential information which could harm Ademi by challenging his credibility, if used, and which could harm Čermak, if not used.⁹

5. Prodanović and Sloković argue that conclusions as to the substance of Čermak’s defence strategy are without merit. They have never mentioned such a defence as possible and they hold that the defences of all Accused can run in parallel.¹⁰ Furthermore, Prodanović and Sloković argue that even if such a defence strategy was in Čermak’s interest, it is highly unlikely in the context of the allegation of joint criminal enterprise with which all Accused are charged¹¹ that this would be a successful defence. Prodanović and Sloković state further that Ademi’s chance to appear as a witness is very low. He will not be called as a witness for Čermak or for Markač, the possibility that he is called by the Trial Chamber is at best, at this time, remote and the Prosecution has not included him in its witness list. Prodanović and Sloković argue that since the underlying events material to the proceedings against Ademi in Croatia are unrelated to the events in the proceedings against Čermak, they would be able to cross-examine Ademi, even aggressively.¹² They state that

⁵ Gotovina Response to Joinder Motion, paras 54 and 61.

⁶ *Ibid.*, para. 55.

⁷ *Ibid.*, para. 56.

⁸ Gotovina Response to Joinder Motion, para. 55.

⁹ Gotovina Response to Joinder Motion, para. 60.

¹⁰ Prodanović/Sloković Submission, para. 8.

¹¹ *Ibid.*

¹² Prodanović/Sloković Submission, para. 14.

the Appeals Chamber, the Trial Chamber and the ADC Disciplinary Council agree that such a conflict might arise only if Ademi is called as a witness having *adverse* interests to Čermak *and* if there is a need to aggressively cross-examine him in favour of Čermak.¹³ With regard to the possession and use of Ademi's confidential information, Prodanović and Sloković declare that Ademi revealed nothing in confidence to them which would be useful to Čermak.¹⁴ Furthermore, they argue that a third counsel could be hired to handle the unlikely possibility that they may need to challenge Ademi's credibility should his cross-examination be necessary.¹⁵

6. In his Undertaking, Ademi confirms that he was informed by Prodanović and Sloković on the possibility of his being called as a witness in Čermak's case, and of their having to cross-examine him. Ademi states that he has openly and thoroughly discussed with his counsel the potential impact this could have on their ability to represent him.¹⁶ Ademi confirms that he was Gotovina's Chief of Staff during the events which were the background of the alleged crimes for which Čermak is indicted,¹⁷ that he will not testify voluntarily in the proceedings against Čermak¹⁸ and he also states that he never discussed any event related to the Relevant Timeframe with his counsel and does not intend to do so since it is unrelated to the charges he is facing in Croatia.¹⁹ On the other hand, Čermak confirms that his counsel have discussed the possibility that Ademi is called as a witness for one of the parties in the case, that they would have to cross-examine Ademi and the potential impact this could have on their ability to represent him. Čermak declares that he considers that his counsel's representation of Ademi would not affect their ability to cross-examine Ademi in his defence or to represent him effectively.²⁰

7. The Prosecution holds that the Čermak and Ademi Undertakings should not be accepted and that Čermak's consent is not full and informed.²¹ Furthermore, it notes that even if Prodanović and Sloković were to withdraw as counsel to Ademi in Croatia,

[...] they would still need to obtain the assistance of an additional co-counsel to ensure that Mr. Ademi is not cross-examined using privileged information from a former client were he to be called as a witness.²²

8. In its Decision of 25 October 2006, the Appeals Chamber affirmed Trial Chamber II's decision on the alleged conflict, and stated that

¹³ Prodanović/Sloković Submission, para. 13.

¹⁴ Prodanović/Sloković Submission, paras 9-10.

¹⁵ Prodanović/Sloković Submission, para. 14.

¹⁶ Ademi Undertaking, p. 1, paras 2-4, 6.

¹⁷ Ademi Undertaking, p. 1, para. 5.

¹⁸ Ademi Undertaking, p. 2 (a). *See also* Prodanović/Sloković Submission, para. 13.

¹⁹ Ademi Undertaking, p. 1, para. 5.

²⁰ Čermak Undertaking, p.1, paras 2-5; p. 2 (a) – (b).

²¹ Prosecution Submission, paras 14-16.

²² *Ibid.*, para. 17.

However, it is not certain at this stage in the proceedings that Prodanović's and Sloković's duty of loyalty to Čermak will be compromised because they will be unable to effectively cross-examine their other client, Ademi, due to a desire to avoid causing Ademi to incriminate himself. As the Trial Chamber noted, they will be cross-examining Ademi with regard to events and crimes for which he has not been charged and which took place nearly two years after the incidents for which he is charged in Croatia. Nor is it clear that Prodanović and Sloković will be unable to effectively cross-examine Ademi in defence of Čermak without revealing privileged attorney-client communication arising out of representing Ademi in Croatia.²³

The Appeals Chamber further noted that in the event that Prodanović and Sloković do find that their duty of loyalty to Ademi is compromised by their representation of Čermak, it would not necessarily lead to Čermak having to forego his right to counsel of choice. However, the Appeals Chamber also recalled that while the right to choose counsel is a fundamental right under Article 21(4) (b) and (d) of the Statute, this right is not without limits.²⁴

9. Čermak and Ademi are charged with having committed, directly or indirectly, different alleged crimes at different times. Ademi is charged individually and as a superior with crimes against humanity and war crimes allegedly committed between 9 and 17 September 1993, in the vicinity of Gospić and in the Medak Pocket region, before, during and after the "Pocket 93" military operation took place.²⁵ On the other hand, in the indictment against him ("Indictment"), Čermak is charged, individually, as a superior and/or through participating in and furthering a joint criminal enterprise, with crimes against humanity and war crimes allegedly committed from at least July 1995 to 30 September 1995, in southern Republika Srpska Krajina, in the course of Operation Storm.²⁶

10. In spite of the different underlying indictments, Ademi's position and possible activities at the time covered by the Indictment ("Relevant Timeframe") are relevant to these proceedings. Ademi confirms that he

[...] held the position of Chief of Staff of General Ante Gotovina during the events for which proceedings have been instituted against Ivan Čermak and him [Gotovina] before the ICTY [...].²⁷

The Trial Chamber notes that there appears to be a commander-subordinate relationship between Gotovina and Ademi, his second-in-command, on the one hand, and Čermak on the other. This situation and the representation of both Ademi and Čermak by Prodanović and Sloković raises a conflict of interest which falls under Article 14 (D)(i) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal ("Code") which states that:

²³ Decision of 25 October 2006, para 27.

²⁴ *Ibid.*, para 30.

²⁵ County State Prosecutor's Office in Zagreb, Croatia, Indictment against Rahim Ademi and Mirko Norac, Zagreb County Court, No. K-DO-349/05 of 22 November 2006, filed on 28 December 2006.

²⁶ Reduced Joinder Indictment Pursuant to Rule 73Bis Order of 21 February 2007, 6 March 2007.

²⁷ Ademi Undertaking, p. 1, para. 5.

(D) Counsel or his firm shall not represent a client with respect to a matter if:

- (i) such representation will be, or may reasonably be expected to be, adversely affected by representation of another client.

11. The Trial Chamber further recalls the Appeals Chamber's statement that

[...] given Ademi's place in the chain of command as Gotovina's immediate subordinate, there is a substantial possibility that an important defence strategy in Čermak's interests will be to argue that "command responsibility for alleged wrongful acts lies with Ademi and Gotovina as Commanders of the Split Military District" and not with him. As such, Prodanović and Sloković will face a conflict of interests in representing Čermak vis-à-vis their duty of loyalty to Ademi whereby they may have to make arguments incriminating their client Ademi in order to defend Čermak whether or not Čermak's case is joined with Gotovina's.²⁸

The Trial Chamber notes that Prodanović and Sloković have neither explicitly excluded nor adopted such potential line of defence for Čermak, though they said that

Gotovina's Defence, the Appeals Chamber and the Disciplinary Council adopt a position that there is a substantial possibility that an important defence strategy in Čermak's interest will be to argue that responsibility for acts lies with Gotovina (implying Ademi) as a commander of the Split Military District although facts indicate otherwise.²⁹

12. Furthermore, the Trial Chamber considers that there is a real possibility that Ademi will be called as a witness given his position as second-in-command to Gotovina at the Split Military District within the Relevant Timeframe, especially in the light of Gotovina's allegation that Ademi acted in his stead for some time during the Relevant Timeframe.³⁰ If Ademi is called as a witness, Prodanović and Sloković argue that they can cross-examine him, even aggressively, primarily because the underlying events giving rise to the two indictments with which their two clients, Čermak and Ademi, are charged are unrelated.³¹ The Trial Chamber accepts that 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 more informed judgement with regard to his/her client's interest.³² The Trial Chamber notes with some concern, however, that Prodanović and Sloković have not addressed the allegation that Ademi, as Gotovina's Chief of Staff and his second-in-command, may have been in charge temporarily in Gotovina's absence, when certain alleged crimes with which Čermak is charged during the Relevant Timeframe were committed.³³ Just emphasizing the separate and distinct factual events underlying the two indictments of their respective clients does not reflect a complete analysis of the matter by counsel.

²⁸ Decision of 25 October 2006, para. 28.

²⁹ Prodanović/Sloković Submission, para. 8.

³⁰ See para. 4 *supra*.

³¹ Prodanović/Sloković Submission, para. 14.

³² *Prosecutor v. Prlić*, "Decision on Requests for Appointment of Counsel", Case No.: IT-04-74-PT, 30 July 2004, para. 14.

³³ See para. 4 *supra*.

13. The issue at stake is one of loyalty. The ability to aggressively cross-examine Ademi is not the main question but it may be an aspect of the duty of loyalty which Prodanović and Sloković owe to Ademi. The question is whether Prodanović's and Sloković's attitude to Ademi as a witness would be materially different if he were not their client. Even if the content of Ademi's evidence does not adversely affect Čermak, the fact that Prodanović's and Sloković's role changes from being Ademi's defence counsel to his cross-examiner, may inhibit Prodanović and Sloković when representing Čermak.³⁴

14. The Trial Chamber reiterates that there is a real possibility that Ademi is called as a witness in the proceedings. However, it holds that the conflict of interest does not depend on whether Ademi is called as a witness in the proceedings or not, and recalls that the Appeals Chamber held that

[...] if a conflict of interests does arise for Prodanović and Sloković with respect to their clients Čermak and Ademi, it will exist in the Čermak and Markač case whether or not they decide to call Ademi as a witness.³⁵

15. Furthermore, the Trial Chamber holds that counsel's duty of loyalty to a client should be interpreted more widely than Prodanović's and Sloković's restrictive interpretation. The Trial Chamber holds that counsel's duty of loyalty to a client³⁶ affects both present and former clients. A client should trust in and feel comfortable with his/her attorney's conduct at any time, in any place. Indeed, the Appeals Chamber, in its Decision of 25 October 2006 held that

[...] counsel's duty of loyalty to a client extends even to cases where a client is not a party to the litigation.³⁷

16. The Trial Chamber also finds that Prodanović's and Sloković's argument that withdrawal from Čermak's defence because of the unlikely chance that one witness, meaning Ademi, could be called, when hundreds of witnesses are planned to testify, causing Čermak significant and unnecessary hardship, is misconstrued.³⁸ The value of a testimony is not a question of number but of its content and its implications. In Ademi's case, it may well be that his potential testimony is relevant for Čermak's defence and cannot be replaced by the testimony of other witnesses.

³⁴ The Trial Chamber is not persuaded that the Appeals Chamber, Trial Chamber II and the ADC Disciplinary Council found that such a conflict might only arise if Ademi is called as a witness having *adverse* interests to Čermak *and* if there is a *need to aggressively cross-examine* him in favour of Čermak as Prodanović and Sloković contend. *See* para. 5, *supra*.

³⁵ Decision of 25 October 2006, para. 29, emphasis in original removed.

³⁶ Article 14(A) of the Code.

³⁷ Decision of 25 October 2006, para. 27.

³⁸ Prodanović/Sloković Submission, para. 12.

17. With regard to the use or non-use of Ademi's confidential information which Prodanović and Sloković may possess,³⁹ the Trial Chamber notes that in his Undertaking, Ademi states that he never discussed any event related to the Relevant Timeframe with his counsel and does not intend to do so since it is unrelated to the charges he is facing in Croatia.⁴⁰ Furthermore, Prodanović and Sloković have confirmed that no confidential information was given to them by Ademi which would be useful to Čermak.⁴¹ The Trial Chamber, recalling counsel's duty of loyalty and of candour to the Tribunal under Articles 14(A) and 23 respectively of the Code, is satisfied that no such confidential information is in Prodanović's and Sloković's possession.

18. The Trial Chamber holds that since Ademi appears to have been Čermak's superior during the Relevant Timeframe⁴², there is a very real risk that Ademi will be implicated in the case, thus placing Prodanović and Sloković in the awkward position of defending Čermak while having to remain loyal to Ademi.

19. Furthermore, Prodanović and Sloković imply that they do not intend raising as a defence the fact that Gotovina (and therefore also Ademi) was Čermak's superior.⁴³ The point, however, is not whether they will raise such a defence, but whether all potential defences remain available to Čermak. Unless all potential defences remain available to him, uncompromised by his counsel's duty of loyalty to Ademi, the administration of justice will be adversely impacted.

20. Faced with this situation, the Majority considers that Article 14 (E) of the Code is relevant here –

Where a conflict of interest does arise, counsel shall:

(i) promptly and fully inform each potentially affected present and former client of the nature and extent of the conflict; and

(ii) either:

(1) take all necessary steps to remove the conflict; or

(2) obtain 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 justice.

With regard to the requirement to fully inform each affected client of the conflict, the Majority considers that in his Undertaking, Ademi stated that he had not discussed his role in the events

³⁹ See para. 4 *supra*.

⁴⁰ See para. 6 *supra*.

⁴¹ See para. 5 *supra*.

⁴² See paras 4, 6, 10 *supra*.

underlying Čermak's case with Prodanović and Sloković. Ademi mentioned he had discussed the possibility of his being called as a witness in Čermak's case, his counsel's need to cross-examine him as Čermak's defence counsel in that eventuality and the potential impact this could have on their ability to represent him.⁴⁴ Ademi's Undertaking makes no reference to the details of Čermak's case and how he might be implicated as Gotovina's second-in-command during the Relevant Timeframe, and to that extent, the Majority considers it was made without him having complete information at hand. The Majority holds that Prodanović and Sloković were in fact duty-bound to discuss with Ademi the details of Čermak's case and how he might be implicated as Gotovina's second-in-command during the Relevant Timeframe.

21. Similarly, Čermak's Undertaking referred only to the possibility of Ademi being called as a witness to testify in his proceedings, to the fact that his counsel would need to cross-examine Ademi, whom they also represent and to the potential impact this could have on their ability to represent him.⁴⁵ Čermak's Undertaking did not refer to the potential defence which could be raised on his behalf in the light of information that Ademi was Gotovina's Chief of Staff and second-in-command and was allegedly Acting Commander of the Split Military District in Gotovina's stead when the latter was temporarily absent. Again, the Majority holds that Prodanović and Sloković were in fact duty-bound to discuss this potential defence with Čermak,

22. For the foregoing reasons, the Majority contends that Čermak's and Ademi's Undertakings are not fully informed and holds that the conflict of interest posed by Prodanović's and Sloković's continued representation of both Čermak and Ademi is not in the interests of Čermak and Ademi and is likely to irreversibly prejudice the administration of justice.

23. Furthermore, the Majority holds that the suggestion by Prodanović and Sloković to employ a third counsel who would cross-examine Ademi if he were to be called as a witness⁴⁶ will not remedy the conflict arising from the duty of loyalty owed to both Ademi and Čermak. The uncompromised potential defence of shifting responsibility for certain alleged crimes onto Gotovina and Ademi would still remain unavailable to Čermak even if a third counsel is employed since such a third counsel would be on the same defence team as Prodanović and Sloković who are tainted with the conflict of interest. As stated above, Article 14(D) of the Code sets out that

⁴³ See para. 5 *supra*.

⁴⁴ See para. 6 *supra*.

⁴⁵ *Ibid.*

⁴⁶ See para. 5 *supra*.

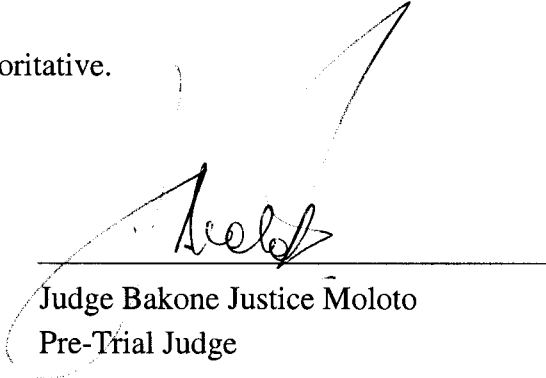
Counsel or his *firm* shall not represent a client with respect to a matter [...].⁴⁷

One can easily analogise the role of third counsel (and co-counsel) on a trial defence team with that of a co-member of a firm. The conflict which taints counsel also taints those whom counsel engage as co-counsel. Thus, the third counsel would by necessity be disqualified from representing Čermak .

24. Considering both Article 14(D)(i) and 14(E) of the Code and the fact that Ademi may be implicated in this case, the Majority finds that the dual representation must be terminated. The Majority notes that it has not been suggested that Čermak may be implicated in Ademi's case or be called as a witness in it. Indeed, it is submitted by Prodanović and Sloković that Čermak's and Ademi's cases are temporally and spatially separated.⁴⁸ It is therefore unnecessary for Prodanović and Sloković to withdraw as Ademi's counsel. Prodanović and Sloković must therefore withdraw from Čermak's representation.

25. Pursuant to Articles 20 and 21 of the Statute, Rule 54 of the Rules of Procedure and Evidence and Article 14 of the Code and the foregoing reasons, the Majority orders that Prodanović and Sloković withdraw as Čermak's counsel in this case, but stay on the case until such time as a new defence team is able to certify that it can take over Čermak's defence.

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



Judge Bakone Justice Moloto
Pre-Trial Judge

Dated this fifth day of April 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

⁴⁷ Emphasis added.

⁴⁸ Prodanović/Sloković Submission, para. 10.