



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

Case No. IT-06-90-AR73.2
Date: 29 June 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Hothuis

Decision: 29 June 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON IVAN ČERMAK'S INTERLOCUTORY APPEAL
AGAINST TRIAL CHAMBER'S DECISION ON CONFLICT OF
INTEREST OF ATTORNEYS ČEDO PRODANOVIĆ AND
JADRANKA SLOKOVIĆ**

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of “Ivan Čermak’s Interlocutory Appeal against Trial Chamber’s Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković” filed on 4 May 2007 (“Appeal”), by Counsel for Ivan Čermak (“Appellant”).
2. Ante Gotovina responded on 11 May 2007¹ and the Prosecution filed its response on 14 May 2007.² In conformity with the Appeals Chamber’s Decision of 16 May 2007,³ the Appellant filed his consolidated reply on 18 May 2007.⁴

I. PROCEDURAL BACKGROUND

3. On 20 February 2006 the Prosecution filed a consolidated motion to amend the Indictments against Mladen Markač, Ivan Čermak and Ante Gotovina (“Gotovina”) and to jointly charge and try these three accused.⁵ Gotovina objected to the said motion arguing, *inter alia*, that the joinder would create a conflict of interests between himself and the Appellant, as the Appellant’s Counsel, Čedo Prodanović and Jadranka Sloković (“Prodanović” and “Sloković”, respectively or “Counsel” when used jointly), also represented Rahim Ademi (“Ademi”), who is currently awaiting trial in Croatia following his transfer from the International Tribunal pursuant to Rule 11*bis* of the Rules of Procedure and Evidence of the International Tribunal (“Rules”).⁶ More specifically, Gotovina claimed that he intended to call Ademi as a witness “critical to his defence”, since during and after “Operation Storm” Ademi was Gotovina’s “second-in-command as chief of staff to the Commander of the Split Military District, and became Acting Commander of the Split Military District from on or about 9 August 1995 to on or about 15 August 1995 while General Gotovina was away on his

¹ Defendant Ante Gotovina’s Response in Opposition to Ivan Čermak’s [*sic*] Interlocutory Appeal against the Trial Chamber’s Decision on Conflict of Interest of Attorneys Čedo Prodanović [*sic*] and Jadranka Sloković [*sic*], 11 May 2007 (“Gotovina’s Response”).

² Prosecution’s Response Brief to Ivan Čermak’s Interlocutory Appeal against Trial Chamber’s Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 14 May 2007 (“Prosecution’s Response”).

³ Decision on Ivan Čermak’s Urgent Motion for Leave to File a Consolidated Reply to Responses Filed by the Prosecutor and Ante Gotovina, 16 May 2007.

⁴ Ivan Čermak’s Consolidated Reply to the Prosecutor and Ante Gotovina’s Responses to Ivan Čermak’s Interlocutory Appeal against the Trial Chamber’s Decision on Conflict of Interests of Attorneys Čedo Prodanović and Jadranka Sloković, 18 May 2007 (“Reply”).

⁵ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 20 February 2006; see subsequently, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Joinder Indictment Modified by Order Pursuant to Rule 73Bis (D) to Reduce the Indictment, 21 February 2007, filed on 6 March 2007 (“Joinder Indictment”), para. 98.

⁶ *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, Defendant Ante Gotovina’s Response in Opposition to the Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 4 April 2006 (“Gotovina’s Opposition to Joinder”), paras 5-7 and 54-62.

honeymoon”.⁷ According to Gotovina, the Appellant’s Counsel indicated that their defence line may contend that Gotovina was the Appellant’s “commanding officer and therefore certain incidents alleged in the Indictments were outside the scope of Čermak’s duties, and thus the responsibility of Gotovina”.⁸ Gotovina anticipated that Ademi’s testimony would rebut this potential defense of the Appellant.⁹ The joinder would impair on Gotovina’s ability to call this witness, since, *inter alia*, the Appellant’s Counsel “would be privy to attorney-client privileged information that could be used to undermine the credibility of Ademi”.¹⁰

4. On 14 July 2006, the Trial Chamber granted the Prosecution request to join the case against Mladen Markač and Ivan Čermak¹¹ with that of Ante Gotovina¹² pursuant to Rule 48 of the Rules. With respect to a possible conflict of interest between Gotovina and the Appellant as a result of the joinder, the Trial Chamber noted that no charges arising out of the events alleged in the proposed Joinder Indictment had been brought against Ademi either in the International Tribunal or in the Republic of Croatia and concluded that “there is no factual basis on which it is demonstrated that a conflict of interests will arise between the two Accused”.¹³

5. All three accused appealed the Trial Chamber’s Decision on Joinder.¹⁴ On 25 October 2006, the Appeals Chamber dismissed these appeals.¹⁵ With regard to the potential Gotovina-Čermak conflict of interest the Appeals Chamber found that (i) it was uncertain at that stage in the proceedings “that Prodanović 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” or that they “will be unable to effectively cross-examine Ademi in defense of Čermak without revealing privileged attorney-client communication arising out of representing Ademi in Croatia”;¹⁶ (ii) even if such conflict of interest arose, it would be with regard to the simultaneous representation of the Appellant and Ademi “regardless of joinder

⁷ Gotovina’s Opposition to Joinder, paras 6 and 56.

⁸ *Ibid.*, paras 6 and 54-55, 57.

⁹ *Ibid.*, paras 6 and 54-55, 57.

¹⁰ *Ibid.*, paras 7, 60.

¹¹ IT-03-73-PT.

¹² IT-01-45-PT.

¹³ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT and *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, Decision on Prosecution’s Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006 (“Decision on Joinder”), para. 64. The Joinder Indictment was filed on 24 July 2006, and was further amended on 6 March 2007 in accordance with Order Pursuant to Rule 73bis(D) to Reduce the Indictment, 21 February 2007.

¹⁴ Appellant Mladen Markač’s Interlocutory Appeal From the Trial Chamber’s Decision on Prosecution’s Consolidated Motion to Amend the Indictment and For Joinder, 21 August 2006; Appellant Ivan Čermak’s Interlocutory Appeal Against the Trial Chamber’s Decision on Prosecution’s Consolidated Motion to Amend the Indictment and For Joinder, 23 August 2006; Brief of Interlocutory Appellant Ante Gotovina, 25 August 2006 (“Gotovina’s Joinder Appeal”).

¹⁵ *Prosecutor v. Ante Gotovina* and *Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006 (“Appeals Chamber Decision on Joinder”).

¹⁶ *Ibid.*, para. 27.

of Čermak's case with Gotovina's";¹⁷ (iii) even if the Appellant's Counsel were to choose between their two clients, it was not sure that they would choose Ademi over the Appellant;¹⁸ and (iv) even if they were to make such choice, it would not cause serious prejudice to the Appellant as he would still have the possibility to choose another counsel to represent him before the commencement of the trial.¹⁹

6. On 17 January 2007, the Disciplinary Council of the Association of Defence Counsel of the International Tribunal ("Disciplinary Council") issued its confidential Advisory Opinion on the issues related to possible conflicts of interests in the present case ("Advisory Opinion"). With respect to Prodanović and Sloković, the Disciplinary Council concluded that (i) there is "no current conflict of interest" in relation to their representation of the Appellant and Ademi;²⁰ (ii) there is "an appreciable risk of conflict of interest arising in future" and it is "reasonably to be expected that such a conflict would adversely affect their representation" of either accused;²¹ (iii) if such conflict were to arise, it is likely to be "one that would require compulsory withdrawal under Article 14(D), as opposed to the possibility of management under 14(E)ii2 by obtaining the consent of both clients to that course";²² and (iv) while no criticism can be made of Prodanović and Sloković at this point, "if they were to *continue* to risk a conflict of interest arising with knowledge of this advisory opinion, [they would] be guilty of misconduct under Article 14(B) or (D)".²³ The Trial Chamber ordered the disclosure of the Advisory Opinion to "all Defence counsel, their clients and the Prosecution" on 26 January 2007.²⁴

7. On 8 February 2007 Prodanović and Sloković filed Appellant's and Ademi's Undertakings "for the purpose of dealing with the matter of the potential conflict of interest in the current proceeding", by which both the Appellant and Ademi undertook not to raise their Counsel's dual representation as a legal impediment affecting their respective right to a fair trial.²⁵

¹⁷ *Ibid.*, paras 28-29.

¹⁸ *Ibid.*, para. 30.

¹⁹ *Ibid.*, para. 30.

²⁰ Advisory Opinion, para. 45.

²¹ *Ibid.*, para. 46.

²² *Ibid.*, para. 47.

²³ *Ibid.*, paras 50 and 53 (emphasis in the original).

²⁴ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, *Confidential and Ex Parte* Order to Disclose Letter Containing the Advisory Opinion of the Association of Defence Counsel Dated 18 January 2007, 26 January 2007. The Appeals Chamber notes that, while the Advisory Opinion remains a confidential document, it can be referred to and quoted in the present public Decision inasmuch as it has been cited, in relevant parts, by the Trial Chamber in its public Impugned Decision (para. 3) and by the parties in their submissions at trial and on appeal (*cf.* in particular, Appeal, para. 11; Prosecution's Response, para. 8).

²⁵ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Notice to the Trial Chamber Concerning Undertakings Provided by Ivan Čermak and Rahim Ademi, 8 February 2007 ("Notice of Undertakings", "Appellant's Undertaking" and "Ademi's Undertaking", respectively).

8. The Trial Chamber rendered the Impugned Decision on 5 April 2007.²⁶ In its findings on the existence of a conflict of interests, the Trial Chamber relied, *inter alia*, on the Advisory Opinion as well as the Appellant's and Ademi's Undertakings.²⁷ It held that, in view of a commander-subordinate relationship between Gotovina and Ademi, on the one hand, and the Appellant on the other, the representation of both Ademi and the Appellant by Prodanović and Sloković raised a conflict of interest under Article 14(D)(i) of the Code of Professional Conduct for Counsel Appearing before the International Tribunal²⁸ ("Code of Conduct").²⁹

9. On 25 April 2007, the Appellant submitted a request for certification to appeal the Impugned Decision.³⁰ On 27 April 2007, the Trial Chamber granted the said request.³¹

10. On 22 May 2007, the Prosecution notified the Appeals Chamber that on 17 May 2007 it identified, in compliance with the Trial Chamber's decision of 19 March 2007, Ademi as one of the "key military figures" of the joint criminal enterprise ("JCE") alleged in the Joinder Indictment.³² The Appellant responded on 31 May 2007 opposing the Notice "on the basis that it has no bearing or relevance to the [...] Appeal and is nothing more than a supplementary attempt to influence the Appeals Chamber".³³ The Appeals Chamber notes that on 17 May 2007, the Prosecution filed the public "Motion to Amend the Indictment" seeking, *inter alia*, revisions of the pleading of the JCE in light of the new case-law of the Appeals Chamber, notably in relation with its judgement in the *Prosecutor v. Brđanin* case.³⁴ The Trial Chamber has not yet rendered a decision on the Proposed Amended Joinder Indictment.

²⁶ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 5 April 2007 ("Impugned Decision"). See also, *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Judge Orić's Dissenting Opinion on decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković of 5 April 2007, 18 April 2007 ("Judge Orić's Dissenting Opinion").

²⁷ Impugned Decision, paras 3 and 6.

²⁸ IT/125 Rev.2, 29 June 2006 promulgated by the Registrar on 11 July 2006.

²⁹ Impugned Decision, para. 10.

³⁰ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Ivan Čermak's Request for Certification to File Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 25 April 2007.

³¹ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Decision on Request for Certification to File Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 27 April 2007.

³² Confidential Prosecution's Notice Regarding Ivan Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 22 May 2007 ("Notice"), paras 1-2.

³³ Confidential Ivan Čermak's Response to Prosecution's Notice Regarding Ivan Čermak's Interlocutory Appeal against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 31 May 2007 ("Response to Notice"), para. 1.

³⁴ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Public Filing Motion to Amend the Indictment, 17 May 2007 and Annex A ("Proposed Amended Joinder Indictment"). Paragraph 15 of the Proposed Amended Joinder Indictment lists four persons who allegedly participated in the same JCE as the co-accused in the present case: Franjo Tuđman, Gojko Šušak, Janko Bobetko and Zvonimir Červenko. On the same date, the Prosecution filed a "Clarification of Indictment" listing another seven names, including Rahim Ademi, as "key military or political figures among the many persons who were members of the JCE" (*Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Confidential Clarification of Indictment, 17 May 2007 ("Clarification to the Proposed Amended Joinder Indictment")).

II. STANDARD OF REVIEW

11. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.³⁵ Since decisions on matters relating to the calling of witnesses and assignment of counsel at trial fall squarely within the discretion of the Trial Chamber,³⁶ the question before the Appeals Chamber is not whether it "agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."³⁷ The party challenging a discretionary decision by the Trial Chamber must demonstrate that the Trial Chamber has committed a "discernible error".³⁸ The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".³⁹

III. PRELIMINARY MATTERS

12. In his Reply, the Appellant contests Gotovina's standing for filing a response to the Appeal as such right is reserved for the "opposite party", which in this instance, according to the Appellant, is the Prosecution.⁴⁰ The Appellant further submits that in order to be granted such standing, Gotovina should have shown specific interest in the matter which he failed to do.⁴¹ The Appeals

Following the motions from Gotovina and Mladen Markač seeking to lift the confidentiality of the Clarification to the Proposed Amended Joinder Indictment (*Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, *Confidential* Defendant Ante Gotovina's Emergency Motion to Lift the Confidentiality of Prosecution's Clarification of Indictment Filed 17 May 2007, 22 May 2007; *Confidential* Defendant Mladen Markač's Joinder to Defendant Ante Gotovina's Emergency Motion to Lift the Confidentiality of Prosecution's Clarification of Indictment Filed 17 May 2007, 24 May 2007), the Trial Chamber lifted the confidential status of the Clarification to the Proposed Amended Joinder Indictment. *See also, Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Public Order to the Prosecutor under Rule 77, 1 June 2007.

³⁵ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.1, Decision on Miroslav Šeparović's Interlocutory Appeal against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007 ("4 May 2007 Decision"), para. 11; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber's Decision on Sredoje Lukić's Motion for Provisional Release, 16 April 2007 ("Lukić Provisional Release Decision"), para. 4; *Prosecutor v. Mico Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("Stanišić Provisional Release Decision"), para. 6.

³⁶ 4 May 2007 Decision, para. 11; *Prosecutor v. Ante Gotovina*, and *Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos IT-01-45-AR73.1, IT-03-73-AR73.1 and IT-03-73-AR73.2, Decision on Appellant Mladen Markač's Motion for Clarification, 12 January 2007, p. 4. *See also, Slobodan Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("Milošević Decision on Defence Counsel"), para. 9.

³⁷ 4 May 2007 Decision, para. 11.

³⁸ *Ibid.*, para. 11.

³⁹ *Ibid.*, para. 11; *Milošević* Decision on Defence Counsel, para. 10, *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No.2) on Assignment of Counsel, 8 December 2006, para. 16.

⁴⁰ Reply, para. 3 citing Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, IT/155/Rev.3, 16 September 2005 ("Practice Direction"), para. 10.

⁴¹ Reply, para. 3. The Appellant also notes that at the Status Conference of 9 February 2007, Gotovina's Counsel stated, with respect to the alleged conflict of interest at stake, that he would "render no opinion about that whatsoever [...]"

Chamber finds that, while the Practice Direction does not specifically provide for the possibility for a co-accused to file submissions in appeals proceedings initiated by another co-accused, it is clear from the procedural background of the case that Gotovina does have a specific interest in the matter and it is therefore in the interests of justice to consider Gotovina's Response as validly filed. Moreover, the Appeals Chamber notes that the Appellant suffers no prejudice from such finding since he was granted the opportunity to reply to Gotovina's Response.⁴²

IV. DISCUSSION

13. The Appellant essentially raises five grounds of appeal. In particular, he argues that (i) the Trial Chamber failed to give sufficient weight to and draw appropriate inference from the fact that Ademi did not provide to Prodanović and Sloković any privileged information which would be useful for the Appellant in his defence;⁴³ (ii) the Trial Chamber misdirected itself regarding the degree of counsel's duty of loyalty;⁴⁴ (iii) the Trial Chamber erred in law by concluding the Appellant's and Ademi's Undertakings were not fully informed;⁴⁵ (iv) the Trial Chamber committed a discernible error by ordering Prodanović and Sloković to withdraw from the case whereas less severe measures were available,⁴⁶ including Prodanović's and Sloković's withdrawal from Ademi's defence and retaining the services of a third counsel;⁴⁷ and (v) the Trial Chamber erred in law by failing to give sufficient consideration to the hardship for the Appellant as a result of Prodanović's and Sloković's withdrawal from his defence.⁴⁸

14. Both Gotovina and the Prosecution object to the Appeal in its entirety.⁴⁹

since General Gotovina really isn't part of this" – *ibid.*, footnote 5 citing Status Conference, 9 February 2007 (Private Session), T. 93. The Appeals Chamber finds this argument to be misleading since Gotovina's Counsel did offer his position on the issue of conflicts of interest in this case (T.91-T.93) and his above-cited remark in fact concerned the issue of whether those matters should be discussed in private or public session (T.93, lines 6-17).

⁴² Decision on Ivan Čermak's Urgent Motion for Leave to File a Consolidated Reply to Responses Filed by the Prosecutor and Ante Gotovina, 16 May 2007, pp. 3-4.

⁴³ Appeal, paras 30(i) and 31; Reply, paras 7(2), 13-14, and 18-20.

⁴⁴ Reply, paras 7(1) and 8-14. The Appeals Chamber notes that this ground does not appear as a separate ground of appeal set out in the Appeal. However, the Appeals Chamber accepts it as validly pleaded in light of the fact that it is closely interlinked with the grounds listed in the Appeal and was further developed in the Reply following the arguments exposed in Gotovina's and Prosecution's Responses. Moreover, the Appeals Chamber notes that this issue is closely related to and intertwined with the Appellant's submissions on privileged information. Therefore, the Appeals Chamber will address these grounds in combination.

⁴⁵ Appeal, paras 30(iii) and 35; Reply, para. 7(5).

⁴⁶ *Ibid.*, paras 30(ii), 32-34 and 36; Reply, para. 7(3).

⁴⁷ *Ibid.*, paras 30(iv) and 32.

⁴⁸ *Ibid.*, paras 30(v) and 37-38; Reply, paras 7(6) and 30-32.

⁴⁹ Gotovina's Response, para. 27; Prosecution's Response, para. 30.

A. Applicable Law

15. Article 14 of the Code of Conduct reads in relevant parts:

- (A) Counsel owes a duty of loyalty to a client. [...]
- (B) Counsel shall exercise all care to ensure that no conflict of interest arises. [...]
- (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;
 - (ii) representation of another client will be, or may reasonably be expected to be, adversely affected by such representation;
 - (iii) the matter is the same or substantially related to another matter in which counsel or his firm had formerly represented another client ("former client"), and the interests of the client are materially adverse to the interests of the former client; [...].
- (E) 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 steps necessary to remove the conflict; or
 - (2) 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 justice.

16. The Appeals Chamber also recalls that a conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice.⁵⁰ Safeguarding the interests of justice requires the prevention of potential conflicts of interest before they arise.⁵¹ If a Chamber determines that the risks and damage that could be caused are such as to jeopardise the right of the accused to a fair and expeditious trial or proper administration of justice, it takes the appropriate measure to restore and protect the fairness of trial and the integrity of the proceedings.⁵² It has been held that such measures can include ordering the withdrawal of counsel.⁵³

⁵⁰ 4 May 2007 Decision, para. 23 citing *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 ("Prlić Appeal Decision"), para. 22.

⁵¹ *Ibid.*, para. 25.

⁵² See *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-PT, Decision on Requests for Appointment of Counsel, 30 July 2004 ("Prlić Trial Decision"), para. 16.

⁵³ *Prosecutor v. Željko Mejačić et al.*, Case No. IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004 ("Mejačić Decision"), para. 7; *Prlić Trial Decision*, para. 16.

B. Duty of loyalty and Privileged Information

1. Submissions of the Parties

17. The Appellant submits that, in light of Ademi's explicit confirmation that he did not provide Prodanović and Sloković with "any confidential information which would be useful for Čermak in his defense there were other measures open to the Trial Chamber to take".⁵⁴ In the Appellant's view, the fact that no such confidential information was shared by Ademi with counsel "demonstrates that there is no substantial relationship between the two cases".⁵⁵ The Appellant also argues that the issue of whether such information was shared or not is a decisive factor in a decision as to whether there is a breach of loyalty to a current or former client.⁵⁶ The Prosecution responds that "the Trial Chamber's concern went beyond the possible use of confidential information to Counsel's duty of loyalty to Mr. Ademi".⁵⁷ Both Gotovina and the Prosecution argue that the conflict of interest exists regardless of whether such privileged information was indeed transmitted by Ademi to his Counsel.⁵⁸

18. Referring to Judge Orić's Dissenting Opinion, the Appellant submits that in the absence of any confidential information in Counsel's possession, "the duty of loyalty to both clients would be in jeopardy 'only in the abstract' and that the conflict of loyalty had not resulted in a concrete conflict of interest".⁵⁹ He argues that the conflict of loyalty at stake "was an unforeseen consequence of the Prosecutor's indictment policy as opposed to counsel's failure to predict that such a conflict would arise".⁶⁰ In this sense, the Appellant insists that Ademi and he were indicted for unrelated crimes, since before the joinder Čermak was not prosecuted for Operation Storm charges, which had only been filed with respect to Gotovina, and Ademi was indicted for crimes committed in Medak Pocket which are "geographically and temporally unconnected to the Storm investigation".⁶¹

19. Gotovina and the Prosecution argue that because of the duty of loyalty with respect to Ademi, it would be impossible for Prodanović and Sloković to pursue a line of defence in favour of the Appellant as it would implicate Ademi and "potentially subject him to another war crimes indictment in Croatia".⁶² Gotovina further argues that such conflict of interest has already been

⁵⁴ Appeal, para. 31.

⁵⁵ Reply, para. 14.

⁵⁶ *Ibid.*, paras 13-14.

⁵⁷ Prosecution's Response, para. 20.

⁵⁸ Gotovina's Response, paras 13-14; Prosecution's Response, para. 20.

⁵⁹ Appeal, para. 31 citing Judge Orić's Dissenting Opinion, para. 11; Reply, para. 19.

⁶⁰ Appeal, para. 26.

⁶¹ *Ibid.*, para. 26; *see also* Reply, paras 8-14.

⁶² Gotovina's Response, para. 14; Prosecution's Response, para. 20.

demonstrated as it has forced the Appellant's Counsel "to abandon a potential defence of Čermak which they had already advanced to the Trial Chamber".⁶³

20. In his Reply, the Appellant argues that the Trial Chamber erroneously speculated on the defences open to the Appellant which are issues that lie within the professional judgement of the Counsel⁶⁴ and elaborates on his understanding of the duty of loyalty with respect to a former client.⁶⁵ The Appeals Chamber will address the latter issue under the third ground of appeal below.

2. Analysis

21. The Appeals Chamber has already held that if a conflict of interest were to arise for Prodanović and Sloković with respect to the dual representation of the Appellant and Ademi, it would exist regardless of whether or not Gotovina or the Appellant decided to call on Ademi as a witness, since their duty of loyalty to Ademi would prevent them from making any arguments incriminating Ademi in order to defend Čermak.⁶⁶ It is therefore unnecessary to address the issues concerning Ademi's potential appearance as a witness in this case for the purposes of the present Decision.

22. In the Impugned Decision, the Trial Chamber held that this duty of loyalty would indeed be breached due to "a commander-subordinate relationship between Gotovina and Ademi, his second-in-command, on the one hand, and Čermak on the other".⁶⁷ The Trial Chamber also noted that Prodanović and Sloković "have neither explicitly excluded nor adopted" a line of defence for the Appellant that would incriminate Ademi.⁶⁸ It went on to observe "with some concern" 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".⁶⁹ Finally, the Trial Chamber held that what mattered most, at that point, was not whether Prodanović and Sloković would indeed raise this line of defence, but whether "all potential defences remain[ed] available to Čermak".⁷⁰ In these circumstances, the Trial Chamber was not satisfied that the Appellant's Counsel have demonstrated a "complete analysis of the matter"⁷¹ and concluded that their duty of loyalty *vis-à-vis* Ademi was at serious risk regardless the fact that no

⁶³ Gotovina's Response, para. 14.

⁶⁴ Reply, para. 14.

⁶⁵ *Ibid.*, paras 8-14.

⁶⁶ Appeals Chamber Decision on Joinder, paras 28-29.

⁶⁷ Impugned Decision, para. 10.

⁶⁸ *Ibid.*, para. 11.

⁶⁹ *Ibid.*, para. 12.

⁷⁰ *Ibid.*, para. 19.

⁷¹ *Ibid.*, para. 12.

confidential information potentially useful to the Appellant had been provided by Ademi to Prodanović and Sloković.⁷²

23. The Appeals Chamber is not satisfied that the Appellant has identified any discernible error in the Trial Chamber's conclusion in this regard. At the outset, the Appeals Chamber notes that the Trial Chamber was satisfied that no confidential information that would be potentially useful to the Appellant came into Prodanović's and Sloković's possession through Ademi.⁷³ However, in light of the findings below, the Appeals Chamber agrees with the Trial Chamber that, in the circumstances of the present case, the fact that Ademi did not provide his Counsel with any such confidential information is without bearing, since this factor is not the only basis on which a conflict of interest can be reasonably anticipated.⁷⁴ Indeed, where a Chamber can reasonably expect that, due to a conflict of interest, a counsel "may be reluctant to pursue a line of defence, to adduce certain items in evidence, or to plead certain mitigating factors at the sentencing stage, in order to avoid prejudicing another client", it can no longer presume that counsel has fulfilled his or her professional obligations under the Code of Conduct and has the power and the duty to intervene in order to guarantee or restore the integrity of the proceedings without delay.⁷⁵

24. Also, while it is true that such conflicts of interest are more obvious in cases where counsel represents two accused who are, at least partly, charged with the same criminal acts, committed during the same period of time and in the same area,⁷⁶ this is clearly not the only situation where a conflict of interest may arise. In this regard, the Appeals Chamber emphasizes that the provisions of Article 14(D)(i) and (ii) of the Code of Conduct do not require that there be substantial relationship between matters in which the current clients are represented – what is prohibited is a simultaneous representation that will, or may reasonably be expected to, adversely affect the representation of either client.

25. In the present case, the Appellant, as Commander of the Knin Garrison, which encompassed a number of municipalities of the Krajina region, is charged for crimes committed under articles 3, 3(b), 3(e), 5(a), 5(d), 5(h), 5(i), 7(1) and 7(3) of the Statute of the International Tribunal ("Statute")

⁷² *Ibid.*, paras 17-18.

⁷³ *Ibid.*, para. 17.

⁷⁴ *Cf.* First *Miletić* Decision, para. 33.

⁷⁵ *See Prlić* Trial Decision, paras 15-16. *See also Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000): "'adverse effect' may be established with evidence that 'some plausible alternative defense strategy or tactic' could have been pursued, but was not because of the actual conflict impairing counsel's performance"; *Holloway v. Arkansas* 435 U.S. 475, 489-490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978): "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing [...] [A] conflict may [...] prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favourable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another".

⁷⁶ *See Prlić* Trial Decision, para. 16; *see also Prlić* Appeal Decision, para. 24.

in the framework of the JCE related to the Operation Storm from at least July 1995 to about 30 September 1995.⁷⁷ Under the same Joinder Indictment, Gotovina is charged for the same crimes as Commander of the Split Military District of the *Hrvatska Vojska* (“HV”) “and the overall operational commander of Operation Storm in the southern portion of the Krajina region”.⁷⁸ According to the Joinder Indictment, the Split Military District included the Knin Garrison.⁷⁹ Therefore, the Appellant is alleged to be Gotovina’s subordinate. It is true that the latest version of the indictment against Ademi before the International Tribunal only deals with the Medak Pocket military operation, which allegedly occurred from 9 September 1993 to on or about 17 September 1993 and of which he allegedly was Acting Commander.⁸⁰ The Appeals Chamber notes that the Current Ademi Indictment of 22 November 2006 filed by the State Prosecutor before the Zagreb County Court also only deals with the Medak Pocket military operation but refers to a chain of command “made of Supreme commander Tuđman, Minister of Defence Šušak, General Bobetko, Naval Captain Domazet, General Markač, Rojs Ćesić, Gotovina, second accused Mirko Norac and others”.⁸¹ On 7 February 2007, the Zagreb County Court found that the Current Ademi Indictment became “legally effective” at the moment of its confirmation by the International Tribunal (*i.e.* on 30 July 2004) and no objections against it were permissible as of that date.⁸² It is unclear, at this stage, whether the fact that the Prosecution presently seeks to include Ademi in the list of key participants of the JCE pleaded under the Proposed Amended Joinder Indictment in the present case will have any bearing on the Current Ademi Indictment in Croatia. However, the Appeals Chamber finds that the current dual representation of the Appellant and Ademi by the same Counsel has a clear potential for a conflict of interest in this case, since it may, in any event, reasonably be expected to adversely affect the representation of either or both clients.⁸³

⁷⁷ Joinder Indictment, paras 6, 12-18, 20, 25-26 (with reference to the Medak Pocket Operation), 37 and 49-54 (*cf.* Proposed Amended Joinder Indictment, paras 6, 12-15, 17, 19, 24, 36 and 48-53). The Appeals Chamber also notes that the original version of the indictment against the Appellant also charged him for participation in the JCE (under modes of responsibility provided for by Articles 7(1) and 7(3) of the Statute) in the southern portion of the Krajina region during Operation Storm (*Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-I, Indictment, 19 February 2004, paras 4, 10-11, 15, 17-18; *see also* paras 55-56 with respect to Gotovina).

⁷⁸ Joinder Indictment, paras 4, 12-19, 37 and 49-54 (*cf.* Proposed Amended Joinder Indictment, paras 4, 12-15, 18, 36 and 48-53).

⁷⁹ Annex A to Joinder Indictment and to Proposed Amended Joinder Indictment.

⁸⁰ *Prosecutor v. Rahim Ademi and Prosecutor v. Mirko Norac*, Case No. IT-01-46-PT & IT-04-76-I, Consolidated Indictment, 27 May 2004, paras 4-5, 13, 28-35. *See also*, *Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, 14 September 2005 (“*Ademi Referral Decision*”), paras 15-17.

⁸¹ Indictment of County Prosecutor to the Zagreb County Court, K-DO-349/05, 22 November 2006, CLSS translation OTP110317 (“*Current Ademi Indictment*”), p. 70.

⁸² Zagreb County Court, Case No. Kv-rz-2/07, Ruling K-rz-1/06, 7 February 2007 (unofficial translation by the Organization for Security and Co-operation in Europe).

The Appeals Chamber also notes that the trial in relation to Ademi commenced, as scheduled, on 18 June 2007 (Zagreb County Court, Case No. K-rz-1/06, Order [unofficial translation by the International Tribunal’s Outreach Office]).

⁸³ *Cf. Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-05-88-PT, Decision on Appointment of Co-Counsel for Radivoje Miletić, 28 September 2005 (“*First Miletić Decision*”) (confidentiality lifted by Order of 30 September 2005), para. 29.

26. Indeed, while the Appellant and Ademi are currently charged with crimes committed in the course of two distinct military operations lead by the HV, given the nature of the factual basis of the charges for which the Appellant is now indicted, it cannot be said that the Current Ademi Indictment has exhausted charges against him and that there is no risk of Ademi being prosecuted in respect of the Operation Storm before any of the competent jurisdictions.⁸⁴ In fact, being an indictable member of the same JCE as the Appellant, Ademi may be viewed as much a potential witness as a potential co-defendant.

27. In this regard, what is particularly pertinent in the instant case is the fact that, in the relevant period in 1995, Ademi claims to have been Gotovina's second-in-command⁸⁵ and therefore exercised commander-subordinate functions with respect to the Appellant. In this situation, the Appellant's Counsel simultaneously representing Ademi are bound by their duty of loyalty to exclude any defence strategy that would result in implicating Ademi with respect to the crimes charged on the Appellant, and this is regardless of whether Ademi is currently being prosecuted for such crimes.⁸⁶

28. Finally, the Appeals Chamber considers that, in a case of this kind, "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".⁸⁷ It was hence not unreasonable for the Trial Chamber to find that the dual representation by Prodanović and Sloković risks to considerably prejudice the Appellant as it would limit the choice of defence strategies due to his Counsel's duty of loyalty to Ademi and that they therefore would not be able to serve best the Appellant's interests.

29. Consequently, the Appeals Chamber dismisses the first and the second grounds of Appeal subject to its considerations below in relation to the duty of loyalty to a former client.

C. Appellant's and Ademi's Undertakings

1. Submissions of the Parties

30. The Appellant submits that the Trial Chamber erred in concluding that the Appellant's and Ademi's Undertakings were inadequate and suggests that, in any case, it should have instructed the

⁸⁴ Cf. First *Miletić* Decision, para. 31.

⁸⁵ Ademi's Undertaking, p.1, para. 5; *see also* Response to Notice, para. 10: "Ademi has already been implicated by reason of his position as Gotovina's deputy commander during Operation Storm. The Prosecutor's Notice on the new status of Rahim Ademi in this case does not have any additional impact on counsel's duty to his as a (former) client represented in a *distinct matter*" (emphasis in the original).

⁸⁶ Cf. *Prlić* Appeal Decision, para. 24.

⁸⁷ *Ibid.*, para. 25 (emphasis added).

Counsel to address such inadequacies, in particular by having the Appellant's consent confirmed during the Status Conference held on 9 February 2007.⁸⁸ According to Prodanović and Sloković, both the Appellant and Ademi provided their free consent which clearly demonstrates that "they understood the potential nature of a conflict of interest arising".⁸⁹

31. Gotovina responds that the Undertakings only concern "the issue of Ademi's appearance as a witness at trial" and do not address the matter of pursuing "a defense of Čermak which would potentially incriminate Ademi".⁹⁰ He further notes that Ademi never provided "a waiver which would allow Prodanović and Sloković to withdraw from their representation of him on the eve of his trial in Croatia".⁹¹ The Prosecution also submits that both Undertakings are deficient in that the Appellant did not refer to the possible defences that could be raised in light of the commander-subordinate relationship and Ademi's Undertaking did not contemplate the Counsel's potential withdrawal from his case.⁹² It adds that, in any case, it would be hardly possible to get the Appellant's fully informed undertaking at this stage of proceedings and that it was within the Trial Chamber's discretion to consider whether his Undertaking could outweigh the interests of the administration of justice.⁹³

2. Analysis

32. The Trial Chamber was not satisfied that the Appellant's and Čermak's Undertakings would constitute an appropriate measure in the presence of a conflict of interest in this case, notably because (i) "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 events pleaded in the Joinder Indictment;⁹⁴ (ii) the Appellant's Undertaking does 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".⁹⁵ The Trial Chamber found that Prodanović and Sloković were "duty-bound" to discuss these matters with both of their clients and held that these lacunae showed that the Undertakings were not fully informed for the purposes of Article 14(E) of the Code of Conduct.⁹⁶

⁸⁸ Appeal, para. 35.

⁸⁹ *Ibid.*, para. 12.

⁹⁰ Gotovina's Response, paras 20, 22.

⁹¹ *Ibid.*, para. 20.

⁹² Prosecution's Response, paras 21 and 23.

⁹³ *Ibid.*, paras 22 (citing the Advisory Opinion, para. 44) and 24.

⁹⁴ Impugned Decision, para. 20.

⁹⁵ *Ibid.*, para. 21.

⁹⁶ *Ibid.*, paras 20-22.

33. The Appeals Chamber recalls that “consent provided by a potentially affected client or former client to remove a conflict of interests upon consultation with the counsel should generally be regarded as fully informed in the absence of an indication to the contrary”.⁹⁷ However, such presumption could only be made in this case if the Appellant and Ademi had been fully conscious of *all possible implications, and possible limitations* that their simultaneous representation could impose upon either of their defence strategies.⁹⁸ Having examined both Undertakings, the Appeals Chamber is of the view that the Appellant has not demonstrated any discernible error in the Trial Chamber’s findings, as they did not refer to any discussion on possible implications of such dual representation on any of the defence strategies with the exception of Ademi being potentially called as a witness in the present case.

34. The Appeals Chamber also disagrees with the Appellant’s argument that the Trial Chamber should have ordered the Counsel to present new, more satisfactory, undertakings before rendering the Impugned Decision. The Trial Chamber was under no obligation to do so since the duty to inform promptly and fully each potentially affected client (current or former) and to take all steps to remove it or to obtain the full and informed consent of the said persons lies squarely upon the counsel.⁹⁹ The Trial Chamber decided on the matter taking into account the Undertaking that had been submitted to it by Prodanović and Sloković “for the purpose of dealing with the matter of the potential conflict of interest in the current proceeding”.¹⁰⁰

35. In any case, the Appeals Chamber recalls that such consent, even if found to be fully informed, is not conclusive of there being no conflict of interest.¹⁰¹ The fact that the Appellant agreed to common representation does not relieve the Trial Chamber of its responsibility to ensure that the integrity of the proceedings would be preserved if such representation is maintained.¹⁰² In

⁹⁷ Prlić Appeal Decision, para. 27 citing *Prosecutor v. Milan Martić*, Case No.: IT-95-11-PT, 2 August 2002, Decision on Appeal Against Decision of Registry, p. 7.

⁹⁸ Cf. Prlić Appeal Decision, para. 27 (emphasis added).

Also compare with *Wheat v. United States*, 486 U.S. 153, 162-163: “The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials [...] A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored on the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them”.

⁹⁹ Article 14(E) of the Code of Conduct.

¹⁰⁰ Notice of Undertakings, para. 2.

¹⁰¹ Prlić Appeal Decision, para. 27; First Miletić Decision, para. 32.

¹⁰² See *supra*, para. 16.

Also compare: *United States v. Vasquez*, 995 F.2d 40, 45 (5th cir. 1993); *Wheat v. United States*, 486 U.S. 153, 162-163, 108 S.Ct. 1692, 1698-1699; *United States v. Medina*, 161 F.3d 867, 870 (5th Cir.1998), *United States v. Rico*, 51 F.3d 495, 511 (5th Cir. 1995): “In determining the validity of a waiver, the district court is afforded ‘substantial latitude in refusing waivers of conflicts of interest not only if an actual conflict is demonstrated, but in cases where a potential for conflict exists which may result in an actual conflict as the trial progresses’. The court must also evaluate the potential effect on the integrity of the judicial system”.

the present case, the Trial Chamber concluded otherwise and the Appeals Chamber has found no error in such conclusion.¹⁰³ Moreover, the Appeals Chamber finds that the Appellant's consent is in fact of no relevance to the present issue, as the point of concern is whether, by participating in the Appellant's defence, Prodanović and Sloković will be led into conflict with *their* professional responsibilities to Ademi.¹⁰⁴

36. The third ground of appeal is therefore dismissed.

D. Measures to Remedy the Conflict of Interest

1. Submissions of the Parties

37. The Appellant submits that the Trial Chamber erred in concluding that Prodanović and Sloković must withdraw from the Appellant's representation, since it should have (i) offered them the opportunity to decide from which case to withdraw;¹⁰⁵ and (ii) take into account the general principle of proportionality in imposing such measures.¹⁰⁶ The Appellant adds that even if the Trial Chamber's conclusion on the potential conflict of interest were to be confirmed, other, less drastic, measures were available to the Trial Chamber as means to avoid or resolve it, such as giving the Counsel the possibility to withdraw from Ademi's representation and appointing a third counsel engaged by the Appellant for the purposes of cross examination of Ademi should he be called as a witness in this case.¹⁰⁷ Finally, he argues that in deciding which case the Counsel should withdraw, the Trial Chamber had no jurisdiction to consider the possible implications of the dual representation for Ademi's case.¹⁰⁸

38. Gotovina responds that the Trial Chamber correctly imposed the Counsel's withdrawal from the Appellant's case since "the continued representation of Ademi will not have any impact on Prodanovic and Slokovic's duty of loyalty to Cermak, provided that Slokovic and Prodanovic do not advise Ademi concerning his testimony in this case [*sic*]".¹⁰⁹ He explains that, should

In the UK, such consent may also be found insufficient to save the professional from breaching fiduciary obligations to act for one client without being inhibited by the existence of the other client, and to avoid any actual conflict (whereby it is impossible to fulfil obligations to one client without breaching obligations to the other) (*see Hollander C. and Salzedo S., Conflicts of Interest & Chinese Walls* (London: Sweet & Maxwell, 2000), 98, 117–18).

The French case-law also defines situations where a client's consent is without bearing on the counsel's duty of loyalty: "[...] *puisque les intérêts pécuniaires des deux époux étaient en opposition, l'accord allégué de M. Y... étant sans portée, en l'espèce, sur le devoir de prudence qui s'imposait à l'avocat [...]*" (*Cour de Cassation, Ière ch. civile, 20 Janvier 1993, Bull. 1993 I No 22, p. 14*).

¹⁰³ See *supra*, para. 28.

¹⁰⁴ Cf. First *Miletić* Decision, para. 33.

¹⁰⁵ Appeal, para. 32.

¹⁰⁶ *Ibid.*, para. 33.

¹⁰⁷ *Ibid.*, paras 33 and 36.

¹⁰⁸ *Ibid.*, para. 32.

¹⁰⁹ Gotovina's Response, para. 15.

Prodanović and Sloković choose to withdraw from Ademi’s defence they would nevertheless face a breach of duty of loyalty to their former client by continuing to represent the Appellant.¹¹⁰ Gotovina further submits that withdrawing from Ademi’s case while his trial is scheduled to commence imminently would have a material adverse effect on Ademi’s interests contrary to Article 9(B) of the Code of Conduct.¹¹¹ With references to American case-law, Gotovina argues that abandoning Ademi at this stage of proceedings would be contrary to the “hot potato” rule according to which “[a] firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client”.¹¹² He suggests that allowing Prodanović and Sloković to withdraw from Ademi’s defence in these circumstances “would diminish public confidence in the [International] Tribunal, particularly with Ademi’s upcoming trial and in light of the possibility that Ademi’s lawyers eventually may attempt to implicate him”.¹¹³ Finally, Gotovina submits that the engagement of a third attorney to cross-examine Ademi would not be a satisfactory solution, as such third attorney would be precluded from implicating Ademi just as Prodanović and Sloković due to their duty of loyalty to the latter.¹¹⁴ Moreover, Prodanović and Sloković would similarly be precluded from raising a defence implicating Ademi throughout the trial, including in closing argument.¹¹⁵

39. The Prosecution also submits that it was not unreasonable for the Trial Chamber to find that the Counsel’s withdrawal from the Appellant’s defence was the only option.¹¹⁶

40. In his Reply, the Appellant argues that the Counsel’s duty of loyalty to Ademi would not be violated if they withdrew from the representation of the latter and continued to represent the Appellant.¹¹⁷ He explains that the duty to decline representation of a client where counsel must take a position adverse to a former client only applies to “substantially related matters and is therefore a matter of degree”.¹¹⁸ Since, according to the Appellant, the present case is not substantially related to Ademi’s case, the implications for the former client in the current proceedings are no more than speculative”.¹¹⁹

41. The Appellant further reiterates that the provisions of the Code of Conduct do not apply to Ademi’s case and that the Trial Chamber had no jurisdiction to consider the issues related to his

¹¹⁰ *Ibid.*, para. 15.

¹¹¹ *Ibid.*, para. 16.

¹¹² *Ibid.*, para. 17.

¹¹³ *Ibid.*, para. 18.

¹¹⁴ *Ibid.*, para. 23.

¹¹⁵ *Ibid.*, para. 23.

¹¹⁶ Prosecution’s Response, para. 27.

¹¹⁷ Reply, para. 8.

¹¹⁸ *Ibid.*, paras 9 (emphasis omitted), 10-13 citing Article 14(D)(iii) of the Code of Conduct, Rule 1.9(a) of the American Bar Association Model Rules of Professional Conduct and related American case-law.

¹¹⁹ Reply, para. 9.

representation.¹²⁰ He adds that the Appeals Chamber should not take into account Gotovina's arguments in connection to the potential withdrawal from Ademi's case, as these matters are outside its jurisdiction and knowledge.¹²¹ The Appellant insists that, in accordance with the Appeals Chamber Decision on Joinder, the Trial Chamber should have allowed the Counsel to decide for themselves from which case to withdraw in conformity of their duty of loyalty.¹²²

2. Analysis

42. Having reached the conclusion that the dual representation must be terminated, the Trial Chamber held that because "it has not been suggested that Čermak may be implicated in Ademi's case or be called as a witness in it" since their cases "are temporally and spatially separated", there was no need for Prodanović and Sloković to withdraw from Ademi's defence.¹²³ Therefore, it ordered that Prodanović and Sloković withdraw from representing the Appellant.¹²⁴ The Trial Chamber also considered that engaging a third attorney to represent the Appellant when dealing with Ademi's potential testimony in this case would not be sufficient to avoid the conflict of interest, as such attorney would be on the same defence team as Prodanović and Sloković which is equivalent to the position of a co-member of "firm" in the sense of Article 14(D) of the Code of Conduct.¹²⁵

43. The Appeals Chamber considers that there is, at this stage, no need for it to address the question as to whether it has jurisdiction to consider matters related to Ademi's representation in the proceedings in Croatia. What is important in this instance is to examine whether the alternative solutions suggested by the Appellant, namely his Counsel's withdrawing from Ademi's defence and engaging a third counsel to cross-examine Ademi were he to testify in the present case, would be sufficient to ensure that the Appellant's representation is not impaired by the identified conflict of interest. Moreover, the Appeals Chamber notes that Article 14(D) of the Code of Conduct prohibits a representation with an adverse effect on either of the clients, regardless of whether they are represented in matters before the International Tribunal or other jurisdictions. At the same time, the Appeals Chamber emphasizes that Prodanović and Sloković have, at this stage, neither withdrawn from Ademi's defence, nor obtained a fully informed consent from Ademi with respect to the successive representation of the Appellant if Ademi's representation is terminated.¹²⁶ Therefore, the present discussion is rather hypothetical and is solely based on the Appellant's implicit suggestion

¹²⁰ *Ibid.*, para. 28.

¹²¹ *Ibid.*, para. 29.

¹²² *Ibid.*, para. 28.

¹²³ Impugned Decision, para. 24.

¹²⁴ *Ibid.*, para. 25.

¹²⁵ *Ibid.*, para. 23.

¹²⁶ Article 14(E)(ii)(2) of the Code of Conduct.

that had the Trial Chamber left the Counsel the choice to decide from which representation to withdraw, they would have withdrawn from Ademi's.¹²⁷

(a) Withdrawal from Ademi's defence

44. The Appeals Chamber turns to consider whether withdrawal from Ademi's defence would allow Prodanović and Sloković to represent the Appellant to the best of his interests without breaching their duty of loyalty to Ademi under Article 14(D). While the said provision does not seem to distinguish between the duty of loyalty to a current and a former client,¹²⁸ the Appeals Chamber observes that a conflict of interest may be more difficult to discern when it arises from the context of successive or serial representation rather than concurrent representation. Parties made extensive references to national case-law and the Appeals Chamber finds it instructive to have a brief overview of underlying principles with respect to a counsel's duty of loyalty to a former client in national jurisdictions.

45. According to the relevant US and UK case-law on the matter, a conflict of interest *vis-à-vis* a former client exists when the subject matter of the two representations are substantially related so as to put at risk the confidences received from that client.¹²⁹ It is however important to note that such conflict of interest is considered to exist in *all* situations "when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client".¹³⁰ Generally, it would be a case-by-case assessment by the judiciary of the character and extensiveness of the prior

¹²⁷ See *supra*, para. 37.

¹²⁸ The Appeals Chamber notes that the provisions of Article 14(D)(i) and (ii) of the Code of Conduct applicable to simultaneous representations do not require that the matters be substantially related, while Article 14(D)(iii) applicable to successive representations refers to both factors – substantial relationship and the materially adverse effect to the interests of the former client. However, Article 14(D) does not seem to differentiate the scope of the duty of loyalty that a counsel owes to a current or former client. *Also cf.* First *Miletić* Decision, paras 28-37.

¹²⁹ *Perillo v. Johnson*, 205 F.3d 775, 798 (5th Cir. 2000); *Westinghouse v. Gulf*, 588 F.2d 221, 223-226; *Silver Chrysler v. Chrysler Motors* 518 F.2d 751, 754-756, *Santacroce v. Neff*, 134 F. Supp.2d 366, 372; *American Airlines v. Sheppard, Mullin, Richter & Hampton*, 96 Cal.App.4th 1017, 1019; *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1028-1029 (1981); *Steel v. General Motors Corp.*, 912 F.Supp. 724, 735 (D.N.J. 1995); *see also* ABA Model Rules of Professional Conduct, 1983, Rule 1.9. For the UK, *see e.g. Bolkiah v. KPMG* [1999] 2 AC 222 (Lord Millett).

It is also important to note that, in US case-law, the court generally presumes that confidential information was provided to the counsel by the former client and only needs to ensure that such information will not be used or disclosed in the current representation (*Westinghouse v. Gulf*, 588 F.2d 221, 224; *American Airlines v. Sheppard Mullin, Richter & Hampton*, 96 Cal.App.4th 1017, 1038-1039); *Gray v. Commercial Union Insur. Co.*, 191 N.J.Super. 590, 598, 468 A.2d 721, 726 (App.Div.1983).

¹³⁰ *See, e.g. Perillo v. Johnson*, 205 F.3d 775, 781 and 798 (5th Cir. 2000) citing *United States v. Alvarez*, 580 F.2d 1251, 1255, 1258 (5th Cir. 1978); *see generally Enoch v. Gramley*, 70 F.3d 1490, 1496 (7th Cir.1995); *Maiden v. Bunnell, Vvan De Kamp*, 35 F.3d 477, 480 (9th cir. 1994); *Westinghouse v. Gulf*, 588 F.2d 221, 224. *See also* on the "duty of undivided loyalty", "fiduciary relation" and "appearance of professional impropriety": *Harte Biltmore Ltd. v. First Pennsylvania Bank*, 655 F. Supp. 419, 421-422; *State of N.J. in the interest of S.G.*, 175 N.J. 138 (2003); *Santacroce v. Neff*, 134 F. Supp.2d 366, 370; *American Airlines v. Sheppard Mullin, Richter & Hampton*, 96 Cal.App.4th 1017, 1044; *Steel v. General Motors Corp.*, 912 F.Supp. 724, 740-741 (D.N.J. 1995).

representation to ensure that the interests of both former and current clients are preserved.¹³¹ In any case, doubts as to the existence of an asserted conflict of interest with respect to a former client should be resolved in favour of disqualification.¹³²

46. As a general principle in French law, apart from confidentiality issues, a counsel can only accept a new representation in which he or she may be led to plead against a former client where such new case is *entirely* different from the previous one, so as to fully conform to his or her duty of loyalty.¹³³ Similar principles are provided for by the Code of Conduct for European Lawyers, according to which a lawyer “must [...] refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client”.¹³⁴

47. While the Croatian Attorney’s Code of Ethics is only explicit with respect to prohibiting legal assistance to an adverse party in a subsequent representation, it provides for duties of faithfulness and loyalty to a client which do not necessarily cease with the end of representation.¹³⁵ In Bosnia and Herzegovina, it is impermissible to represent clients with conflicting interests, and should such a conflict (or risk of infringing the confidentiality of information or the attorney’s

¹³¹ *Perillo v. Johnson*, 205 F.3d 775, 799 (5th Cir. 2000) citing *Vega v. Johnson*, 149 F.3d 354, 360 (5th Cir. 1998); *Satellite Fin. Planning v. 1st Nat. BK. Wilmington*, 652 F.Supp. 1281, 1285 (D.Del.1987).

¹³² *Westinghouse v. Gulf*, 588 F.2d 221, 225; *International Business Machines Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978); *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *Sitz v. Bethlehem Steel Corp.*, 650 F.Supp. 914, 916 (D.Md. 1987).

¹³³ *Hamelin J., Nouvel abrégé des règles de la profession d’avocat* (Daloz 1968) : « ... dès lors qu’un avocat accepte de plaider une cause qui n’est pas entièrement distincte de celle à propos de laquelle il avait été précédemment consulté, il peut porter atteinte à la délicatesse qu’il doit observer et commettre un manquement professionnel pouvant être sanctionné par la Cour. » A counsel can neither accept a new representation when the counsel’s knowledge of his or her former client’s case can be of unjustifiable benefit to the new client (*Décret No 91-1197 du 27 novembre 1991 organisant la profession d’avocat, article 155 ; Règlement Intérieur Unifié (R.I.U.) des Barreaux de France, (Décision à caractère normatif n° 2004-001 du Conseil National des Barreaux instituant le Règlement intérieur unifié (R.I.U.) des Barreaux de France, article 4.3* : « [...] Il [l’avocat] ne peut accepter l’affaire d’un nouveau client si le secret des informations données par un ancien client risque d’être violé ou lorsque la connaissance par l’avocat des affaires de l’ancien client favoriserait le nouveau client de façon injustifiée. [...] »).

See also, *Cour de cassation, 1^{ère} Ch. civile, 30 juin 1981, Bull. des arrêts C. Cass. Ch. civile I No 237 Dalloz, 1982, p. 165* : « [...] la prohibition édictée par l’article 84 du Décret du 9 juin 1972 [d’assister ou représenter des parties ayant des intérêts opposés] n’exige pas pour son application l’identité des affaires, mais la seule existence d’intérêts opposés [...] » ; *Cour de Cassation, 1^{ère} Ch. civile, 20 Janvier 1993, Bull. 1993 I No 22, p. 14* : « [...] en retenant que M. X..., dès lors qu’il avait été le conseil commun des époux Y..., dans une procédure de divorce par requête conjointe devait refuser d’être ensuite le conseil de Mme Z... dans une autre procédure de divorce pour faute puisque les intérêts pécuniaires des deux époux étaient en opposition [...] la cour d’appel a pu estimer que M. X... avait manqué à la délicatesse qui s’imposait à lui [...] » (emphasis added).

¹³⁴ 28 October 1988 as amended on 19 May 2006, Article 3.2.2; see also Article 3.2.3: “must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer’s independence may be impaired” (emphasis added).

¹³⁵ The Attorney’s Code of Ethics, (adopted at the Assembly of the Croatian Bar Association on 18 February 1995 with amendments of 12 June 1999), Articles 40-61.

independence) arise during litigation, the attorney has an obligation to return the power of attorney to *all* the parties involved.¹³⁶

48. Having concluded that the simultaneous representation of the Appellant and Ademi by Prodanović and Sloković raises a high risk of a conflict of interest due to the fact that the Counsel would be limited in their choice of defence strategies in order to conform to their duty of loyalty,¹³⁷ the Appeals Chamber is of the view that, even if Prodanović and Sloković withdrew from Ademi's defence, they would still be unable to represent the Appellant to the best of his interests as they would remain bound by their duty of loyalty to Ademi as a former client.¹³⁸ This potential conflict of interest is even more contoured considering the high probability that Ademi will be called as witness in the present case.¹³⁹

(b) Third lawyer

49. As the Appeals Chamber has already held that the conflict of interest is very likely to arise even if Ademi is not called to testify in the present case¹⁴⁰ and if the Counsel withdrew from Ademi's defence,¹⁴¹ there is no need to address the possibility of engaging a third lawyer for the purposes of cross-examination of Ademi. In any case, in light of the Appeals Chamber's findings above, this solution would not be sufficient to satisfy the duty of loyalty to a current or former client as it would constitute too limited an understanding thereof.¹⁴² The Appeals Chamber also agrees with the observation made in a different case that "the defence cannot be compartmentalised, as is suggested, to get around a conflict situation".¹⁴³

(c) Conclusion

50. In light of the foregoing, the Appeals Chamber dismisses the fourth ground of Appeal in its entirety.

¹³⁶ *Kodeks advokatske etike advokata FBiH*, 5 November 2004 as amended on 4 May 2005, Article 21 (emphasis added).

¹³⁷ *See supra*, paras 27-28.

¹³⁸ In this sense, the Appeals Chamber agrees with the Impugned Decision that counsel's duty of loyalty to a client under Article 14(A) of the Code of Conduct affects both present and former clients (Impugned Decision, para. 15).

¹³⁹ *Cf. Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, *Confidential* Decision on Request for Review of the Registry Decision on the assignment of Co-Counsel for Radivoje Miletić, 16 November 2006 ("Second *Miletić* Decision"), paras 29-30.

¹⁴⁰ *See supra*, para. 22.

¹⁴¹ *See supra*, para. 48.

¹⁴² *Cf. First Miletić* Decision, para. 35.

¹⁴³ *Ibid.*, para. 34.

E. Hardship Caused to the Appellant

1. Submissions of the Parties

51. The Appellant finally argues that the Trial Chamber erred in failing to pay sufficient regard to the hardship that the removal of Counsel would cause to the Appellant. He explains that the relationship of trust between the Appellant his Counsel who have been acting for him for the past eight years, predates his charges before the International Tribunal and was the crucial factor in his choice of counsel in the present case.¹⁴⁴ He also argues that the withdrawal of Prodanović and Sloković at this stage would result in considerable financial burden for the Appellant who, in addition to the funds already spent on his defence in this case, will have to bear the costs of instructing the new counsel who will have no familiarity with the case.¹⁴⁵ He adds that the removal of his current Counsel and appointment of the new ones would necessarily delay the commencement of the trial for at least six months and thus prejudice his right to an expeditious trial.¹⁴⁶ The Appellant finally emphasizes that all this hardship would be borne by him in “a situation in which he is blameless”.¹⁴⁷

52. Referring to the Impugned Decision and the Appeals Chamber Decision on Joinder, Gotovina responds that the Appellant’s “long-term interests are better served by counsel who are not limited in the defences that they are able to advance on his behalf, despite the short-term hardships that will result from having to obtain new counsel”.¹⁴⁸ The Prosecution takes a similar position and adds that Article 14 of the Code of Conduct does not contain a “substantial hardship” exception.¹⁴⁹

53. In his Reply, the Appellant accepts the absence of the notion of “substantial hardship” in the relevant provision of the Code of Conduct, but insists that in a case where the conflict of interest at stake is only a potential one, the Trial Chamber should have taken the Appellant’s hardship into account as a relevant factor in deciding on measures necessary to prevent or remove such conflict.¹⁵⁰

¹⁴⁴ Appeal, para. 37.

¹⁴⁵ *Ibid.*, para. 37.

¹⁴⁶ *Ibid.*, para. 38.

¹⁴⁷ *Ibid.*, para. 37.

¹⁴⁸ Gotovina’s Response, paras 24-25.

¹⁴⁹ Prosecution’s Response, paras 28-29.

¹⁵⁰ Reply, para. 30.

2. Analysis

54. In the Impugned Decision, the Trial Chamber concluded that the conflict of interest posed by continued dual representation by Prodanović and Sloković of both the Appellant and Ademi “is likely to irreversibly prejudice the administration of justice”.¹⁵¹ The Trial Chamber did not consider the hardship element when ordering the Counsel to withdraw from the Appellant’s representation and the Appeals Chamber is not convinced that it was obliged to do so to the point where such an omission would constitute an abuse of discretion. The Appeals Chamber recalls that the question of prejudice was indeed discussed by the Trial and Appeal Chambers in their previous decisions related to the impact of the joinder on the Appellant’s right to have a counsel of his choice.¹⁵² In the present instance, there is nothing that would oblige the Trial Chamber to consider this factor in relation to the conflict of interest.

55. The Appeals Chamber reiterates that “[o]ne of the limits to the accused’s choice [of counsel] is a conflict of interest affecting his counsel”.¹⁵³ It further finds that, even though the replacement of counsel is generally likely to cause obvious inconveniences, including a delay in the proceedings, if the conflict of interests regarding the representation of the Appellant and Ademi is not resolved at the present stage of the proceedings, the administration of justice may be seriously prejudiced and have much more disastrous consequences in future.¹⁵⁴ The Appeals Chamber also notes that no imminent date has been established for the commencement of the trial in this case and, considering the current trial schedule of the International Tribunal,¹⁵⁵ it is not likely to commence within the next six months which the Appellant affirms to be necessary for the new counsel to get familiarized with the case.

56. The fifth ground of Appeal is therefore dismissed.

¹⁵¹ Impugned Decision, para. 22.

¹⁵² Decision on Joinder, para. 64 and Appeals Chamber Decision on Joinder, para. 30. The Appeals Chamber then noted that any potential prejudice arising from having new counsel (situation that could arise regardless the joinder) could be mitigated by allowing additional time.

¹⁵³ Appeals Chamber Joinder Decision, para. 30 citing *Prosecutor v. Željko Mejačić et al.*, Case No IT-02-65-AR73.1, Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simić, 6 October 2004 (“*Mejačić Decision*”), para. 8.

¹⁵⁴ See *supra*, para. 16; cf. *Prlić Appeal Decision*, para. 32; *Mejačić Decision*, para. 14. Also compare with *Steel v. General Motors Corp.*, 912 F.Supp. 724, 746 (D.N.J. 1995): “The court emphasised that ‘only in extraordinary cases should a client’s right to counsel of his or her choice outweigh the need to maintain the highest of the profession.’”

¹⁵⁵ See Assessment and Report of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Council Resolution 1534 (2004), S/2007/283, 16 May 2007, paras 5 and 14 and Enclosures II, IV, XII.


V. DISPOSITION

57. On the basis of the foregoing, the Appeals Chamber (Judge Shahabuddeen dissenting),

DISMISSES the Appeal in its entirety.

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

Done this 29th day of June 2007
At The Hague, The Netherlands



Judge Andréia Vaz
Presiding Judge

Judge Shahabuddeen appends a dissenting opinion.

[Seal of the International Tribunal]

DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. The question raised in this interlocutory appeal by Čermak is whether defence counsel are entitled to represent a client if their representation of another client in a different case may prevent them from putting forward all the defences possible in the case of the first client. To that, the answer is in the negative: defence counsel are not so entitled. It is a fundamental rule that counsel are to be zealous in the representation of a client; they are not to be unreasonably inhibited from advancing his case. My opinion, however, is that in the instant case there will be no such inhibition.

A. The cases of Čermak and Ademi are different

2. The case against Čermak and that against Ademi call for separate conclusions by different courts as to guilt on temporally and spatially distinct facts. There is no common basis between the two cases. Defence counsel, Mr Prodanović and Mr Sloković (Prodanović and Sloković), are representing Čermak in Čermak's case and Ademi in Ademi's case. In principle, nothing prevents defence counsel from so acting. Further, but subject to the following, there is no reason why they cannot submit that Ademi does not have criminal responsibility in his own case, but that he has criminal responsibility in the case of Čermak. I may add that Ademi is not an accused in Čermak's case and that Prodanović and Sloković are not representing him in that case.

B. Defence counsel are not inhibited by any information from Ademi, because they do not have any such information

3. Prodanović and Sloković will only be inhibited from submitting that Ademi has criminal responsibility in the case of Čermak if there was an inhibiting element in any confidential information given by Ademi to Prodanović and Sloković in Ademi's case. But, in paragraph 17 of its decision of 5 April 2007, the Trial Chamber states explicitly that it "is satisfied that no such confidential information is in Prodanović's and Sloković's possession". Prodanović and Sloković, not being in possession of the confidential information, cannot be inhibited by anything in it.

C. Defence counsel are not inhibited by their position on Ademi's criminal responsibility

4. If there is no confidential information involved, will Prodanović and Sloković be inhibited in Čermak's case by virtue of the mere fact that they are also representing Ademi in Ademi's case? Though the two cases are different, they are pending at the same time; so it may be awkward for their counsel to submit that Ademi does not have criminal responsibility in one case but that he has

criminal responsibility in the other. It is not certain that Ademi will be called as a witness in Čermak's case, but, assuming that he is called, the Trial Chamber observes, in paragraph 13 of its decision, that 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". This reflects the view that a conflict of interest includes not only an actual conflict of interest but potential ones also. I will not go into the question whether the awkwardness involved in this case rises to the level of a conflict of interest; for purposes of the present argument, I assume that it does.

5. If so, that is a usual situation in which defence counsel seeks the consent of his client to continuation of representation. Such consent was duly obtained in this case. In fact, consents were obtained from both Ademi and Čermak; they were both obtained in writing; and both texts made it clear that Ademi and Čermak took the view that Prodanović and Sloković would not be placed in a "conflict of interest situation" if Ademi was called as a witness in Čermak's case and had to be cross-examined by Prodanović and Sloković.¹ In my view, the consents so given to dual representation would hold good even if the question of incrimination of Ademi was raised through evidence other than Ademi's; it is the substance which matters. But the majority in the Trial Chamber rejected the consents for not having been informed. Was that correct?

D. Whether the written consents to dual representation were informed

6. In reading the consents, I find value in an observation which Judge Orić made in paragraph 17 of his dissenting opinion. This observation, which in my opinion reflects the practice, runs as follows (footnote omitted):

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

With respect, I am not persuaded by an overcritical analysis which seeks to make good the proposition that the consents were not informed. Both consents authorised continuation of "dual representation" in circumstances in which it was clear that there could be divergent interests; that is

¹ Paragraphs (b) and (c) of Ademi's consent of 6 February 2007 stated as follows:

- b. Even if I was ordered to testify for one of the parties in those proceedings involving my Counsel – representing one of the Co-Accused, i.e. Ivan Čermak – I take the view that my Counsel would not be placed in a conflict of interest situation by having to cross-examine me; and, in any event,
- c. I HEREBY UNDERTAKE not to raise my Counsel's dual representation of Ivan Čermak and myself as a legal impediment affecting my right to a fair trial in the Republic of Croatia and accordingly waive my right to do so.

Čermak's consent of 7 February 2007 was to similar effect.

the material point. Without entering into further details, I join Judge Orić in holding that the consents were informed.

E. Conclusion

7. Prodanović and Sloković not having acquired any confidential information from Ademi, there is no reason to trouble on that account. The concern is only with the integrity of any evidence given by Ademi in Čermak's case, as that evidence may be affected by the fact that Prodanović and Sloković are representing Ademi in Ademi's case. But the consent of Ademi shows that he is willing to be cross-examined by Prodanović and Sloković despite his relationship to them. As to other evidence (Ademi may not be called as a witness in Čermak's case), this is a matter for defence counsel in the ordinary way.

8. In my view, Prodanović and Sloković are entitled unconditionally to represent Čermak. I would allow Čermak's interlocutory appeal.

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

29 June 2007

The Hague

The Netherlands



Mohamed Shahabuddeen

[Seal of the International Tribunal]