**UNITED NATIONS**

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: IT-01-45-AR73.1
IT-03-73-AR73.1
IT-03-73-AR73.2

Date: 25 October 2006

Original: English

**BEFORE THE APPEALS CHAMBER**

**Before:** **Judge Fausto Pocar, Presiding**
**Judge Mohamed Shahabuddeen**
**Judge Liu Daqun**
**Judge Andrésia Vaz**
**Judge Theodor Meron**

**Registrar:** **Mr. Hans Holthuis**

**Decision of:** **25 October 2006**

**PROSECUTOR v. ANTE GOTOVINA**

**PROSECUTOR v. IVAN ČERMAK AND MLADEN MARKAČ**

# DECISION ON INTERLOCUTORY APPEALS AGAINST THE TRIAL CHAMBER'S DECISION TO AMEND THE INDICTMENT AND FOR JOINDER

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Mr. Miroslav Šeparović and Mr. Goran Mikuličić for Mladen Markač
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**The Office of the Prosecutor:**

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1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Appeals Chamber" and "International Tribunal", respectively) is seized of "Appellant Mladen Markač's Interlocutory Appeal From the Trial Chamber's Decision on Prosecution's Consolidated Motion to Amend the Indictment and For Joinder" filed on 21 August 2006 ("Markač Appeal"), "Appellant Ivan Čermak's Interlocutory Appeal Against the Trial Chamber's Decision on Prosecution's Consolidated Motion to Amend the Indictment and For Joinder" filed on 23 August 2006 ("Čermak Appeal"),[1] and the "Brief of Interlocutory Appellant Ante Gotovina" filed on 25 August 2006 ("Gotovina Appeal"),[2] (collectively "Appellants" and "Appeals").

## I. BACKGROUND

2. On 14 July 2006, the Trial Chamber granted, in part, the Prosecution's motion to amend the indictment against Gotovina and that against Čermak and Markač pursuant to Rules 50(A) of the Rules of Procedure and Evidence of the International Tribunal ("Rules") and its request to join Gotovina's case[3] with that of Čermak and Markač[4] pursuant to Rule 48 of the Rules.[5] Attached to its motion, the Prosecution included a proposed indictment incorporating all of its requested amendments to the *Gotovina* Amended Indictment[6] as well as to the *Čermak and Markač* Amended Indictment[7] and joining them into one single indictment ("Joinder Indictment").

3. In the Impugned Decision, the Trial Chamber accepted all the amendments proposed by the Prosecution to the *Gotovina* Amended Indictment and the *Čermak and Markač* Amended Indictment, with the exception of those pleading "direct and/or indirect co-perpetration" as a mode of liability.[8] With regard to the amendments accepted, the Trial Chamber found that many of them did not contain new factual allegations as they were similar to factual allegations already charged.[9] In those instances where the Trial Chamber found that the amendments amounted to new factual

[1] The Čermak Appeal was timely filed with the Registry on 21 August 2006; however, the Registry re-filed the appeal on 23 August 2006 for purposes of placing it under a separate case number from that of the Markač Appeal.
[2] On 21 August 2006, the Appeals Chamber granted Gotovina a four-day extension of time for filing his appeal. *See* Decision on Request for Extension of Time, 21 August 2006.
[3] Case No. IT-01-45-PT.
[4] Case No. IT-03-73-PT.
[5] *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 ("Impugned Decision").
[6] Confirmed on 24 February 2004
[7] Filed on 15 December 2005.
[8] Impugned Decision, paras. 26, 40, 80
[9] *Id.*, para. 41.

allegations against Gotovina, Čermak and Markač, the Trial Chamber was satisfied that the supporting material presented by the Prosecution met the standard of a *prima facie* case required by Article 19(1) of the Statute of the International Tribunal ("Statute").[10] Finally, the Trial Chamber found that some of the amendments proposed to the *Gotovina* Amended Indictment included new charges but that these would not result in prejudice to Gotovina or undue delay.[11]

4. With regard to the question of joinder, the Trial Chamber held that the requirements of Rule 48 were met, finding that the acts and omissions alleged in the *Gotovina* Amended Indictment and the *Čermak and Markač* Amended Indictment related to the "same transaction."[12] The Trial Chamber further found that certain factors militated in favour of joinder in that a joint trial would not result in a conflict of interests giving rise to serious prejudice; would not adversely affect the right to a fair trial without undue delay; and would serve the interests of justice including promoting judicial economy, minimizing hardship to witnesses, and ensuring consistency of proceedings.[13]

5. On 14 August 2006, the Trial Chamber granted the Appellants' request for certification to appeal the Impugned Decision pursuant to Rule 73(B).[14] The Appellants subsequently filed their Appeals requesting that the Appeals Chamber reverse the Impugned Decision and order that Čermak and Markač be tried separately from Gotovina. Gotovina and Čermak also request a reversal of the order granting the Prosecution leave to amend and file the Joinder Indictment.[15] The Prosecution filed its response on 8 September 2006.[16] Gotovina and Čermak filed their replies on 12 September 2006 and 15 September 2006, respectively.[17] Markač did not file a reply.

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[10] *Id.*, para. 42.
[11] *Id.*, paras. 16, 54.
[12] *Id.*, paras. 57-61.
[13] *Id.*, paras. 71,73, 75-76, 78, 80.
[14] *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-PT, *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-PT, Decision on Defence Applications for Certification to Appeal Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 August 2006.
[15] Čermak Appeal, para. 21; Markač Appeal, para. 29; Gotovina Appeal, para. 65. Čermak and Markač further request an oral hearing on their appeals *see* Čermak Appeal, para. 22; Markač Appeal, para. 30. The Appeals Chamber denies the request, noting that neither Čermak nor Markač provide reasons substantiating this request. It is not the usual practice of the Appeals Chamber to orally hear parties on review of an interlocutory appeal, and the Appeals Chamber finds that it was fully able to come to a reasoned decision on the basis of the parties' written submissions alone.
[16] *Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-03-73-AR73.1., IT-03-AR73.2, and *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-AR73.1, Prosecution's Consolidated Response to Interlocutory Appeals of the Trial Chamber's Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 8 September 2006 ("Prosecution Consolidated Response"). The Prosecution Consolidated Response was timely filed and is not oversized in light of the Appeals Chamber's Decision on Prosecution's Motion for Leave to File a Consolidated Response Brief and for an Extension of Time and Word Limits, 5 September 2006, p. 3.
[17] *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-AR73.1, Appellant Ante Gotovina's Reply in Support of his Interlocutory Appeal, 12 September 2006 ("Gotovina Reply"); *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-AR73.2, Reply on Behalf of Appellant Ivan Čermak to Prosecution Response Brief, 15 September 2006

## II. STANDARD OF REVIEW

6. As clearly stated under Rule 50(A)(ii) of the Rules, a Trial Chamber's decision to grant leave to amend an indictment is an exercise of its discretion.[18] Likewise, a Trial Chamber's decision to join two or more persons accused of the same or different crimes under one indictment pursuant to Rule 48 is a discretionary one.[19] When reviewing a Trial Chamber's discretionary decision,

> 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. The party challenging a discretionary decision by the Trial Chamber must demonstrate that the Trial Chamber has committed a discernible error resulting in prejudice to that party. 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.[20]

## III. AMENDMENT OF THE INDICTMENTS

### A. Applicable Law

7. Rule 50(A)(i)(c) provides that following the assignment of a case to a Trial Chamber, the Prosecution may only amend an indictment with leave of the Chamber. Pursuant to Rule 50(A)(ii),

> [i]ndependently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1 of the Statute to support the proposed amendment.

Article 19(1) of the Statute requires the Trial Chamber to be satisfied that the Prosecutor has established a *prima facie* case.

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("Čermak Reply"). The Čermak Reply was timely filed in light of the Appeals Chamber's Decision on Ivan Čermak's Motion for Variation of Time Limits, 14 September 2006.

[18] Rule 50(A)(ii) states that "[i]ndependently of any other factors relevant *to the exercise of the discretion*, leave to amend an indictment shall [. . .]." (Emphasis added). *See also Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003 ("*Karemera et al.* Decision on Amendment of the Indictment"), para. 9.

[19] *Prosecutor v. Vinko Pandurević & Milorad Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006 ("*Pandurević* Decision on Joinder") para. 5; *Prosecutor v. Zdravko Tolimir, Radivoje Miletić & Milan Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("*Miletić* Decision on Joinder"), para. 5.

[20] *Id.* para. 6 (internal citations and quotation marks omitted). The Appeals Chamber will also consider whether the Trial Chamber "has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations . . ." *Id.*, fn. 20.

8. In addition, when considering whether to allow the Prosecution to amend the indictment, the overall consideration for the Trial Chamber is that of ensuring the accused's right to a fair hearing enshrined in Article 21(2) of the Statute.[21] The Appeals Chamber has held that the right of the accused to be informed promptly of the charge against him under Article 21(4)(a) of the Statute and the right to be tried without undue delay under Article 21(4)(c) of the Statute constitute two relevant factors to be taken into consideration by a Trial Chamber in this context.[22] These factors may be interpreted according to the following general principles:

> firstly, the accused's right to be informed promptly of the charges against him has to be assessed in light of the general requirement of fairness to the accused; secondly, that the information provided to the accused must enable him to prepare an effective defence; thirdly, that the accused must be tried without undue delay; and fourthly, that the requirement[s] must be interpreted according to the special features of each case.[23]

9. In determining whether delay resulting from the filing of an amended indictment would be "undue", a Trial Chamber not only takes into consideration its effect on the course of the proceedings to date, but also its effect on the overall proceedings in a case.[24] Finally, "the determination whether proceedings will be rendered unfair by the filing of an amended indictment must consider the risk of prejudice to the accused" such as inadequate time for preparing a defence to the amended indictment.[25]

### B. Discussion

10. Čermak argues that the Trial Chamber erred because important amendments to the *Čermak and Markač* Amended Indictment should have been decided upon in accordance with Rule 50 first, "after which a decision on the possible joinder with the case of general Gotovina should have been rendered."[26] By considering both issues together, the Trial Chamber skipped "the indictment amendment procedure in a manner which masks the amendment with the joinder [and] constitutes a serious infringement of procedure with consequences for the rights of the defence and fair trial."[27]

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[21] *Prosecutor v. Kovačević,* Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber Order of 29 May 1998, 2 July 1998 ("*Kovačević* Decision on Amendment of the Indictment"), para. 30; *Karemera et al.* Decision on Amendment of the Indictment, para. 13.
[22] *Kovačević* Decision on Amendment of the Indictment, para. 30.
[23] *Ibid.*
[24] *Karemera et al.* Decision on Amendment of the Indictment, para. 15.
[25] *Id.*, para. 28.
[26] Čermak Appeal, para. 16.
[27] *Ibid.* (internal quotation marks omitted).

As a result, Čermak contends that although paragraphs 18(d) and 20(c) of the proposed Joinder Indictment constitute very important amendments, the Trial Chamber erred in the Impugned Decision by considering them to be "similar allegations" to those in the original *Čermak and Markač* Amended Indictment.[28] Čermak further argues that because the Trial Chamber in the *Čermak and Markač* case is different from that which rendered the Impugned Decision, the amendment of charges in conjunction with the decision on joinder "prevents the defence from being heard in the process of the amendment in front of the Chamber authorized for the conduct of proceedings and from opposing the Indictment amendment", which he argues violates the principle of a fair trial.[29]

11. The Appeals Chamber does not agree. First, Čermak fails to provide a basis in the Rules or in the jurisprudence of the International Tribunal in support of the proposition that it is required procedure for a Trial Chamber to consider amendments to the indictment first, separate from deciding on the issue of joinder. Furthermore, Čermak fails to demonstrate how addressing both issues together in one decision inevitably leads to a Trial Chamber skipping the appropriate analysis under Rule 50 of the Rules for determining whether proposed amendments to an indictment should be granted under the principle of a fair trial. In this case, in the Impugned Decision, the Trial Chamber first considered each of the Prosecution's proposed amendments to the *Gotovina* Amended Indictment and the *Čermak and Markač* Amended Indictment to establish whether they could be granted after weighing the appropriate factors to be considered under Rule 50 of the Rules. Each of the parties had an opportunity to provide written objections to the proposed amendments and the Trial Chamber thoroughly considered each amendment and the arguments of the Defence before reaching its decision. Only after deciding on the proposed amendments to the separate amended indictments, did the Trial Chamber then turn to consider whether the two cases could be joined under Rule 48 of the Rules. Čermak fails to demonstrate that the Trial Chamber was improperly influenced by its subsequent consideration of the joinder question when concluding that the amendments to the *Čermak and Markač* Amended Indictment found in paragraphs 18(d) and 20(c) of the proposed Joinder Indictment were similar to allegations in the original *Čermak and Markač* Amended Indictment and thus should be granted. The Appeals Chamber does not find that the Trial Chamber's conclusion was patently incorrect or so unreasonable as to constitute a discernible error.

[28] *Id.*, paras. 13-15.
[29] *Id.*, para. 16.

12. Furthermore, the Appeals Chamber does not agree that there is any requirement under the Rules or jurisprudence of the International Tribunal that the Trial Chamber originally assigned to a case is the only Trial Chamber authorized to consider any proposed amendments to the indictment. Under Rule 50(A)(i)(c) of the Rules, the Prosecution must seek leave for proposed amendments from the Trial Chamber or a Judge of that Chamber to which a case has been assigned. Here, Rule 50 was complied with because the President of the International Tribunal reassigned both the *Čermak and Markač* and *Gotovina* cases to Trial Chamber II for purposes of considering the Prosecution's motion on amendment to the indictments and joinder.[30] A Trial Chamber is fully capable of properly applying the principles of Rule 50 and determining whether amendments to the indictment should be granted, and it is irrelevant to that purpose whether or not the Trial Chamber considering proposed amendments was the Trial Chamber originally assigned to the case. In any event, the Appeals Chamber notes that two of the three Judges rendering the Impugned Decision were previously assigned to the *Čermak and Markač* case.[31]

13. Gotovina argues that the Trial Chamber erred by failing to reject the Prosecution's new charges against him regarding the alleged expulsion of the "Krajina" Serbs since, in his view, the Prosecution is putting forth an inconsistent and irreconcilable theory to that advanced in the *Milošević* case, thereby violating his rights to due process and fundamental fairness.[32] Gotovina contends that, in *Milošević,* the Prosecution argued that Milošević evacuated the Krajina Serbs from Croatia as part of a joint criminal enterprise to resettle areas of eastern Bosnia and Kosovo that had been ethnically cleansed.[33] Furthermore, the Prosecution in *Milošević* introduced into evidence a witness who, on direct examination, testified that the Croatian Army did not ethnically cleanse the Serbs from Croatia.[34] Gotovina submits, referring to United States case law, that the Trial Chamber committed an error of law by failing to hold that the Prosecution's use of inconsistent, irreconcilable theories to convict two defendants for the same crime constitutes a due process violation.[35] Gotovina also contends that the Trial Chamber committed an error of fact in its conclusion that the factual basis for the charges against Gotovina, as presently known by the Trial Chamber, does not support Gotovina's argument with respect to irreconcilable theories advanced by

[30] *Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-PT, IT-03-73-PT, Order Referring the Joinder Motion, 23 February 2003.
[31] *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-I, Order Assigning a Case to a Trial Chamber, 9 March 2004. *See also Prosecutor v. Gotovina et al.,* Case No. IT-06-90-PT, Order Reassigning a Case to a Trial Chamber, 14 August 2006.
[32] Gotovina Appeal, para. 50; Gotovina Reply, para. 19.
[33] *Ibid.*
[34] Gotovina Appeal, paras. 51-56; Gotovina Reply para. 21.
[35] Gotovina Appeal, paras. 57-60, 63; Gotovina Reply paras. 19, 23.

the Prosecution, and it also failed to give a reasoned opinion for that conclusion.[36] Finally, Gotovina argues that the Trial Chamber failed to sufficiently consider whether the Prosecution's arguments in *Milošević* and in his case are indeed inconsistent and to give weight or sufficient weight to that issue.[37]

14. The Appeals Chamber finds that Gotovina fails to demonstrate that the Trial Chamber erred in concluding that the factual basis, as known to it at this stage in the proceedings, does not support Gotovina's allegation of inconsistent theories in two different cases with respect to the same incidents.[38] Under Counts 2 and 3 of the proposed Joinder Indictment, Gotovina is charged

> with forcible transfer and/or deportation of the Serb population from the Krajina region "by the threat and/or commission of violent and intimidating acts (including plunder and destruction of property), the effect of which was to displace, transfer or deport the Krajina Serbs from the area (including causing them to flee or leave the area) and/or to prevent them from returning."[39]

The Appeals Chamber notes that Gotovina cites excerpts from the Prosecution's opening statement in *Milošević* as well as the statement of Prosecution Witness Peter Galbraith in support of his argument that the Prosecution intended to prove "not only that Milošević used the Krajina Serbs to resettle areas of eastern Bosnia and Kosovo, but also that Milošević's JCE had removed the Krajina Serbs from Croatia before Croatian forces arrived."[40] However, in the Prosecution's opening statement, the Prosecution merely stated that Milošević stopped supporting the Serbs in the Krajina and allowed it to fall back into the hands of Croatia, not that he actively evacuated them for purposes of funnelling them to Kosovo. Rather, after thousands of Serb refugees crossed into Serbia, he then directed them to Kosovo.[41] Furthermore, although Prosecution Witness Galbraith testified that the Croats did not engage in ethnic cleansing in the Krajina, the basis for his conclusion was that the population had already left before the Croats arrived "*probably rightly fearing what the Croatians might do.*"[42] The Appeals Chamber fails to see how these two excerpts from the *Milošević* trial demonstrate that the Prosecution's theory of the case was that Milošević was responsible for evacuating the Serbs from the Krajina. The Appeals Chamber is not persuaded that these two excerpts demonstrate that the Trial Chamber erred in failing to find that the

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[36] Gotovina Appeal para. 62; Gotovina Reply para. 22.
[37] *Ibid.*
[38] Impugned Decision, para. 48.
[39] As cited in *id.*, para. 45.
[40] Gotovina Appeal, para. 56.
[41] *Id.*, para. 52.
[42] *Id.*, para. 55 *citing Prosecutor v. Milošević*, Case No. IT-02-54, Hearing of 25 June 2003, T. 21,112-113 (emphasis added).

Prosecution's allegations in the *Milošević* and *Gotovina* cases as to who was responsible for the displacement of the Krajina Serbs were inconsistent.

15. Furthermore, the Appeals Chamber does not agree that the Trial Chamber failed to provide a reasoned opinion for this conclusion. It explained that it came to that conclusion on the basis of all of the facts known to it at this stage in the proceedings. Because the Trial Chamber did not find a factual basis for Gotovina's argument of inconsistent theories by the Prosecution, it did not need to weigh that factor in determining whether to accept the Prosecution's proposed amendments to the *Gotovina* Amended Indictment. Likewise, it was not required to consider whether inconsistent theories advanced by the Prosecution in two separate cases constitute a due process violation under international law having found that there was no factual basis demonstrating the existence of inconsistent theories.

## IV. JOINDER

### A. Applicable Law

16. Rule 48 of the Rules provides that, "[p]ersons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." Accordingly, in considering whether to join the cases of two or more persons, the Trial Chamber must determine whether the accused "are charged with: (1) having committed crimes, regardless of whether those crimes are alleged to be the same crimes, (2) in the course of the same transaction."[43] Rule 2 of the Rules defines "transaction" as "[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan." Neither Rule 2 nor Rule 48 require that the events constituting the "same transaction" take place at the same time or that they be committed together.[44] "In deciding whether charges against more than one accused should be joined pursuant to Rule 48, the Trial Chamber should base its determination upon the factual allegations contained in the indictments and related submissions."[45]

17. Where a Trial Chamber finds that the requirements of Rule 48 are met, it then considers various factors, which it weighs in exercising its discretion to grant joinder or to leave the cases to be tried separately.[46] Rule 82(A) provides that "[i]n joint trials, each accused shall be accorded the

[43] *Pandurević* Decision on Joinder, para. 7; *Miletić* Decision on Joinder, para. 7 (internal quotation marks omitted).
[44] *Ibid.*
[45] *Ibid.* (internal citation and quotation marks omitted).
[46] *Pandurević* Decision on Joinder, para. 8; *Miletić* Decision on Joinder, para. 8.

same rights as if such accused were being tried separately." Rule 82(B) further provides that a Trial Chamber "may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice." Therefore, in light of Rule 82, it is appropriate for a Trial Chamber deciding a motion for joinder pursuant to Rule 48 to consider and weigh the following: "(1) protection of the rights of the accused pursuant to Article 21 of the Statute; (2) avoidance of any conflict of interests that might cause serious prejudice to an accused; and (3) protection of the interests of justice."[47] Factors that a Trial Chamber may look to in the interests of justice include "(1) avoiding the duplication of evidence; (2) promoting judicial economy; (3) minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence; and, (4) ensuring consistency of verdicts."[48]

### B. Same Transaction

18. Čermak and Markač argue that the Trial Chamber erred in finding that their case and that against Gotovina relate to the "same transaction" as defined under Rule 2 for the purpose of joining the trials together in accordance with Rule 48.[49] Čermak asserts that the crimes for which he and the other Appellants are charged cannot, by their very nature, be part of the "same transaction" since his participation in the alleged joint criminal enterprise is said to have commenced at a different time.[50] In particular, Čermak argues that since it is not alleged that he was operatively engaged as commander before 5 August 1995, he could in no way participate in the planning and execution of military operations in the exercise of his authority for the Krajina region prior to that time as put forward by the Prosecution in relation to Gotovina.[51] Furthermore, he claims that after 5 August 1995, he did not participate in the joint criminal enterprise as alleged by the Prosecution. Thus, the alleged joint criminal enterprise with Gotovina cannot include him and subsequently, the same transaction forming the basis for joinder does not exist.[52]

19. Markač claims that the Trial Chamber came to an incorrect conclusion of fact when it found that the "same transaction" requirement is satisfied in this case and that it abused its discretion in

[47] *Ibid.*
[48] *Pandurević* Decision on Joinder, para. 8 & fn. 20.
[49] Čermak Appeal, paras. 19-21; Markač Appeal, para. 25.
[50] Čermak Appeal, para. 20.
[51] *Ibid.*
[52] *Ibid.*

interpreting the phrase unfairly in an overly broad manner.[53] He contends that the Trial Chamber interpreted "same transaction" far too widely to include all accused of Croat ethnicity in the "ethnic cleansing" of the Krajina Serb population but, in fact, most of the allegations in the Joinder Indictment refer to Gotovina in his capacity as military commander and do not relate to himself as a Special Police commander.[54]

20. In the Impugned Decision, the Trial Chamber concluded that the Appellants are charged with having participated in the "same transaction", finding that the alleged acts and omissions in the *Čermak and Markač* Amended Indictment and in the *Gotovina* Amended Indictment are inherently connected because: (1) they took place in the same geographic area, in the same time period and in the course of the same military operation; and (2) they were committed pursuant to the same joint criminal enterprise of which all three Appellants are alleged to be members.[55] Furthermore, the Trial Chamber considered that the involvement of the Appellants in their respective roles as commanders in the events forming the basis of the two Amended Indictments appeared to be sufficiently interconnected.[56]

21. The Appeals Chamber finds that Čermak and Markač have failed to demonstrate that the Trial Chamber erred in its conclusion that the charges against the Appellants arise from the "same transaction." With respect to Čermak's arguments, the Appeals Chamber emphasizes that "the Trial Chamber is not required, at this stage in the proceedings, to determine whether there is sufficient evidence put forward by the Prosecution to support the allegations made against an accused in the indictment."[57] Furthermore, there is no requirement that the acts or omissions alleged to form the same transaction took place at the same "exact" time or were committed together in the same "exact" place. What is essential is that there are factual allegations in the indictment sufficient to support a finding that the alleged acts or omissions form part of a common scheme, strategy or plan.[58] In the Impugned Decision, the Trial Chamber found that the acts or omissions alleged against all of the Appellants took place in the same geographic area and time period, were part of the same military operation, and were committed as part of the same joint criminal enterprise.[59] The

[53] Markač Appeal, para. 25.
[54] *Ibid.*
[55] Impugned Decision, para. 59.
[56] *Id.*, para. 60.
[57] *Pandurević* Decision on Joinder, para. 13.
[58] *Id.*, paras. 7, 17.
[59] The Appeals Chamber agrees with the Trial Chamber that an accused may be found to have participated in a joint criminal enterprise even after its establishment. *See e.g., Prosecutor v. Miroslav Kvocka et al.*, Case No. IT-98-30/1-A, Judgement, 25 February 2005, at pp. 199-222, 243, in which the Appeals Chamber upheld the Trial Chamber's finding that Omarska Camp operated as a joint criminal enterprise from the end of May 1992 when it was established to the end

Trial Chamber also found that the involvement of the Appellants in their respective roles as commanders in the events alleged in their indictments appeared to be sufficiently interconnected. These findings are a sufficient basis for the Trial Chamber to conclude that the charges against the Appellants arose from the "same transaction".

22. As for Markač's submissions, the Appeals Chamber agrees with the Trial Chamber in *Kordić and Čerkez* that the particular role that an accused is alleged to have played in the "same transaction" is not determinative.[60] The acts or omissions alleged against an accused may be found to be part of the "same transaction" with another accused so long as there are other factual allegations in the indictment sufficient to support a finding that they form part of a common scheme, strategy or plan. Nor is there any specific requirement that an accused is alleged to have made a substantial contribution to the joint criminal enterprise.[61] In this case, as noted above, the Trial Chamber found the requisite sufficient factual allegations.

### C. Conflict of Interests

23. The Appellants each claim that the Trial Chamber erred by finding that joinder of their cases would not give rise to a conflict of interests causing them serious prejudice.[62] First, Gotovina asserts that joinder creates a conflict of interests between himself and Čermak, as Čermak's Counsel, Čedo Prodanović and Jadranka Sloković, also represent Rahim Ademi, who is currently pending trial in Croatia following his transfer from the International Tribunal pursuant to Rule 11*bis*. Gotovina claims that Ademi was previously his Chief of Staff and second in command during Operation Storm and, consequently, is a "crucial witness" in his defence.[63] In particular, Gotovina submits that the evidence will show that from 5 August to 18 August 1995, when several crimes are alleged to have taken place, Ademi was the highest-ranking officer on duty in the Split Military District while he was on leave of absence.[64] Gotovina argues that Čedo Prodanović and Jadranka Sloković would be put in the situation of cross-examining their own client (Ademi) for

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of August 1992 when it was closed and that Dragoljub Prcac was criminally responsible for participating in that joint criminal enterprise notwithstanding his arrival at the Omarska Camp on 15 July 1992, some time after its establishment. *See Prosecutor v. Miroslav Kvocka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001, paras. 2, 320-321, 460, 464, 468-471.

[60] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/1-PT, Decision on Accused Mario Čerkez's Application for Separate Trial, 7 December 1998, para. 10.

[61] *Cf. Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 97.

[62] Čermak Appeal, para. 24; Čermak Reply, paras. 3-10; Markač Appeal, para. 24; Gotovina Appeal, para. 17; Gotovina Reply, paras. 2-16.

[63] Gotovina Appeal, para. 19.

[64] *Ibid.*

purposes of defending another client (Čermak) while being privy to privileged attorney-client communications between them and Ademi that could be used to undermine Ademi's credibility.[65] Furthermore, "Prodanović's and Sloković's representation of Čermak could potentially be compromised by the attorneys' unwillingness or inability to elicit testimony from Ademi that, while potentially favourable to Čermak, could tend to incriminate Ademi."[66] Such testimony would be in support of Čermak's potential defence strategy that "command responsibility for alleged wrongful acts lies with Ademi and Gotovina as Commanders of the Split Military District" and not with him.[67] Gotovina contends that Prodanović's and Sloković's simultaneous representation of Čermak and Ademi would be in violation of Article 14 of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal,[68] which prohibits counsel from representing a client "with respect to a matter if such representation will be, or may reasonably be expected to be, adversely affected by representation of another client."[69]

24. Gotovina also argues that a conflict arises between himself and Markač because of his intention to call Markač's Counsel, Miroslav Šeparović, as a "crucial witness" for his defence, due to his former capacity as Minster of Justice of the Republic of Croatia during the relevant time period covered by the proposed Joinder Indictment.[70] Gotovina contends that Šeparović's testimony will exculpate him from certain allegations against him in the proposed Joinder Indictment because it will show that

> General Gotovina had no authority under Croatian law to investigate or punish military subordinates for criminal acts; that investigation and punishment of criminal activity was the responsibility of the military and civilian prosecutors and courts who were under Attorney Šeparović's supervision in his capacity as Minister of Justice; that the military and civilian courts fulfilled their function in accordance with Croatian law; and that General Gotovina has no ability to influence the work of the Croatian military and civilian criminal justice system.[71]

Furthermore, Gotovina argues that Šeparović's testimony is essential to his case because Šeparović is the only living witness who can testify whether deceased President Franjo Tudjman "was part of a conspiracy to conceal and condone criminal activity in order to advance the alleged Joint Criminal

[65] *Id.*, para. 28.
[66] *Ibid.*
[67] *Id.*, para. 23.
[68] IT/125, Rev. 2, 29 June 2006.
[69] Gotovina Appeal, para. 22.
[70] *Id.*, paras. 34-39.
[71] *Id.*, para. 38.

Enterprise" as alleged in the proposed Joinder Indictment.[72] Gotovina submits that if his case is joined with Markač's case, Šeparović will be forced into a potential violation of Article 26 of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, which prohibits counsel from acting in a proceeding in which counsel is likely to be a necessary witness except in certain circumstances, which Gotovina contends do not apply to Šeparović.[73]

25. In sum, Gotovina asserts that his right to obtain the attendance and examination of witnesses on his behalf, as guaranteed in Article 21(4)(e) of the Statute, cannot be abridged by the joinder of his case with that of Čermak and Markač.[74] If joinder is affirmed by the Appeals Chamber, he claims that this right will be in conflict with Čermak and Markač's right to their Counsel of choice. Čermak and Markač's Counsel have already represented them for over two years and their discontinuance would be contrary to Articles 21(4)(b) & (d) of the Statute. Gotovina argues that both his right to obtain the attendance and examination of witnesses and Čermak and Markač's right to Counsel of choice are superior to the Prosecution's procedural right to obtain joinder.[75]

26. The Appeals Chamber notes that, in relation to the alleged Gotovina-Čermak conflict, the Trial Chamber observed that no charges arising out of the events alleged in the proposed Joinder Indictment have been brought against Ademi either in the International Tribunal or in the Republic of Croatia, where his case was transferred from the International Tribunal pursuant to Rule 11*bis*.[76] Accordingly, the Trial Chamber concluded that "there is no factual basis on which it is demonstrated that a conflict of interests will arise between the two Accused Čermak and Gotovina."[77] Gotovina argues that the Trial Chamber committed a discernible error in reaching this conclusion because "it failed to recognize the scope of an attorney's legal duty of loyalty to clients and former clients" and "[c]ourts have long recognized that attorneys have duties of loyalty to clients even if those clients are not party to the litigation at hand."[78] Furthermore, Gotovina submits that the Trial Chamber erred by creating a potential conflict for attorneys Prodanović and Sloković where none existed prior to joinder because "[i]t does not appear that any of the parties in the Čermak/Markač case intend to call General Ademi as a witness."[79]

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[72] *Id.*, para. 39.
[73] *Id.*, paras. 40-41.
[74] *Id.*, para. 42; Gotovina Reply, para. 8.
[75] Gotovina Appeal, paras. 31-32, 42.
[76] Impugned Decision, para. 64.
[77] *Ibid.*
[78] Gotovina Appeal, paras. 26, 29.
[79] *Id.*, paras. 30-33.

27. The Appeals Chamber finds that Gotovina fails to demonstrate that the Trial Chamber committed a discernible error in this regard. The Appeals Chamber agrees with Gotovina that a counsel's duty of loyalty to a client extends even to cases where a client is not a party to the litigation. As stated under Article 14(D)(i) and (ii) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal,

> 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 [. . .].

However, it is not certain at this stage in the proceedings that Prodanović's and Slokovic'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 Slokovic 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.

28. Even if a conflict of interests does arise, the Appeals Chamber agrees with the Prosecution that it will most likely exist for Prodanović and Slokovic with regard to their simultaneous representation of Čermak and Ademi regardless of joinder of Čermak's case with Gotovina's.[80] As noted by Gotovina, 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.[81] As such, Prodanović and Slokovic 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.

29. The Appeals Chamber's conclusion in this regard is not changed by Gotovina's allegation that it appears that neither of the parties in the *Čermak and Markač* case intend to call Ademi as a

[80] Prosecution Consolidated Response, para. 15.
[81] Gotovina Appeal, para. 23.

witness.[82] In the first place, the Appeals Chamber considers 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*. Furthermore, the Appeals Chamber notes that Čermak does not affirm or deny Gotovina's representation with regard to whether he intends to call Ademi as a witness in his filings in this appeal. Even assuming that Gotovina's allegation is true, the Appeals Chamber considers that the present stage of the proceedings of the *Čermak and Markač* case is relevant to Gotovina's argument. In the Impugned Decision, the Trial Chamber noted that it is not ready for trial, no date for commencement of trial has been fixed, and there is no reason to anticipate that the setting of a start date is imminent.[83] Under Rule 65*ter*(G) of the Rules, the Defence is not required to submit the list of witnesses it intends to call until after the close of the Prosecution's case and prior the commencement of its case. In light of the fact that the *Čermak and Markač* case is still in the trial preparation phase and the Prosecution has not even commenced its case, let alone the Defence, it is premature to conclude that Čermak does not intend to call Ademi as a witness.

30. Finally, the Appeals Chamber notes that, in the event that Prodanović and Sloković do find that their duty of loyalty to Ademi is compromised by their representation of Čermak for these reasons whether in a separate trial with Markač or a joint trial with Markač and Gotovina, it is not clear that this will necessarily lead to Čermak having to forego his right to counsel of choice. Under Article 14(E) of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, Prodanović and Sloković have a duty to inform Čermak and Ademi of the nature and extent of the conflict and to (1) either obtain their full and informed consent to continue representing each of them unless that consent will lead to an irreversible prejudice to the administration of justice; *or* (2) request withdrawal as Counsel for either Ademi or Čermak. Furthermore, if Prodanović and Sloković have to take the latter step, it does not automatically follow that they will choose to represent Ademi over Čermak given that, as of 8 September 2006, no indictment has yet been filed against Ademi in Croatia.[84] Even if Counsel were to decide to continue representing Ademi in Croatia rather than Čermak before the International Tribunal, the Trial Chamber did not commit a discernible error in concluding that this would not cause serious prejudice to Čermak's right to be represented by counsel of his own choosing.[85] The Appeals Chamber recalls that while the right to choose counsel is a fundamental right under Article 21(4)(b)

[82] *Id.*, para. 30.
[83] Impugned Decision, para. 73.
[84] Prosecution Consolidated Response, fn. 29.
[85] Impugned Decision, para. 64.

and (d) of the Statute, this right is not without limits.[86] An accused may choose counsel, but this right does not guarantee that counsel will accept if chosen or always remain counsel for that accused due to a perceived conflict of interests that may arise or for any other reason. As previously stated by the Appeals Chamber, "[o]ne of the limits to the accused's choice is a conflict of interest affecting his counsel."[87] In such a situation, nothing prevents Čermak from choosing other counsel able to represent him. The Appeals Chamber considers that although Prodanović and Sloković have represented Čermak for over two years, as the Trial Chamber noted, his case is not ready for trial, is still in pre-trial proceedings, and there is no reason to anticipate that a start date for the trial is imminent.[88] Thus, any potential prejudice arising from having new counsel at this stage in the proceedings may be mitigated by the Trial Chamber by allowing the new counsel additional time for briefing themselves on the defence case thus far.

31. In relation to the alleged Gotovina-Markač conflict, the Trial Chamber reasoned that the matters to which Šeparović is expected to testify with respect to the military courts in the Republic of Croatia being under the supervision of the Ministry of Justice rather than the Ministry of Defence appear to be of equal importance to Markač's defence.[89] It noted that the proposed Joinder Indictment also charges Markač with participating in the alleged joint criminal enterprise by "failing to establish and maintain law and order among, and discipline of, his subordinates, and neither preventing nor punishing crimes committed by them against the Krajina Serbs."[90] Thus, it concluded that "while a conflict of interests on the part of Mr. Šeparović may arise if the assertions of the Gotovina Defence are true, this conflict would not be resolved" if joinder was denied.[91] Gotovina submits that the Trial Chamber made an error on the facts upon which it exercised its discretion in reaching this conclusion arguing that, as policemen, Markač and his subordinates were never part of the Ministry of Defence, but the Ministry of the Interior, over which the military courts had no jurisdiction. Thus, it is unclear why Šeparović's testimony would also be relevant and necessary to his case.[92] Furthermore, Gotovina contends that defence counsel for Čermak and Markač have not expressed any desire to call Šeparović as a witness.[93]

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[86] *Prosecutor v. Mejakić 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, para. 8.
[87] *Ibid.*
[88] Impugned Decision, para. 73.
[89] *Id.*, para 66.
[90] *Ibid.* (internal citation and quotation marks omitted).
[91] *Ibid.*
[92] Gotovina Appeal, paras. 45-46.
[93] Gotovina Appeal, para. 14; Gotovina Reply, para. 14.

32. The Appeals Chamber finds that Gotovina fails to demonstrate that the Trial Chamber made a discernibly incorrect conclusion of fact in this regard. The Trial Chamber reasonably concluded that the conflict of interests caused by the assignment of Šeparović as Counsel to Markač will not be avoided by ordering that the *Gotovina* and *Čermak and Markač* cases be tried separately. In the first place, even if it is established that Markač and his subordinates were under the authority of the Ministry of Interior rather than the Ministry of Defence, Šeparović's testimony as to the military justice system allegedly being under the control of the Ministry of Justice may be important for Markač's case given that the question of whether the Special Police were also subject to the jurisdiction of the military or civilian courts is a matter of fact to be determined at trial. Furthermore, Šeparović's testimony appears to be necessary and relevant for Čermak as well given that he is alleged to be in the same military chain of command as Gotovina.[94] Finally, the Appeals Chamber notes that Gotovina states that Šeparović is the only living witness who will be able to testify as to whether deceased President Tudjman, Šeparović's direct superior, "ever suggested or ordered that the criminal justice system of the Republic of Croatia should conceal or condone criminal activity against Serbian civilians or property."[95] Such testimony is likely to be relevant and necessary with respect to the cases of all three Appellants who are all charged with participating in a joint criminal enterprise by "permitting, denying and/or minimizing the ongoing criminal activity [...]" and by "failing to establish and maintain law and order among, and discipline of, his subordinates, and neither preventing nor punishing crimes committed by them against the Krajina Serbs."[96] Therefore, the Trial Chamber reasonably concluded that any conflict of interests caused to Šeparović is not a basis for deciding against joining the *Gotovina* and *Čermak and Markač* cases given that the conflict would arise whether the cases were tried separately or jointly.

33. Again, as with the alleged Gotovina-Čermak conflict,[97] the Appeals Chamber is not persuaded to alter its conclusion due to Gotovina's allegation that neither Čermak nor Markač have objected to Šeparović's participation in their case nor expressed intent to call him as a witness in their cases-in-chief.[98] Neither Čermak nor Markač affirm or deny Gotovina's representation in their filings in this appeal. Furthermore, even assuming that Gotovina's allegation is true, as stated by Gotovina, neither Čermak nor Markač have in their case "to date" objected to Šeparović or expressed an intention to call him.[99] As already stated above, in the Impugned Decision, the Trial

[94] *See* proposed Joinder Indictment, paras. 3-6.
[95] Gotovina Appeal, para. 39.
[96] Proposed Joinder Indictment, paras. 19(d)-(e), 20(c)-(d), and 21(d)-(e).
[97] *See supra* para. 29.
[98] Gotovina Appeal, para. 14; Gotovina Reply, para. 14.
[99] Gotovina Reply, para. 14.

Chamber noted that it is not ready for trial, no date for commencement of trial has been fixed, and there is no reason to anticipate that the setting of a start date is imminent.[100] Under Rule 65*ter*(G) of the Rules, the Defence is not required to submit the list of witnesses it intends to call until after the close of the Prosecution's case and prior the commencement of its case. In light of the fact that the *Čermak and Markač* case is still in the trial preparation phase, it is premature to conclude that Čermak or Markač will not call Šeparović as a witness to testify in their cases-in-chief. Thus, given the likelihood that on the basis of the allegations by the Prosecution against both Čermak and Markač, Šeparović's testimony will be relevant and necessary for their defence, it was reasonable for the Trial Chamber to conclude that a conflict of interests for Šeparović would arise regardless of whether joinder was granted, even if they have not yet expressed any intention of calling Šeparović as a witness.

34. That being said, the Appeals Chamber considers that under Article 26 of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, this conflict of interests to Šeparović is a basis for requesting withdrawal as Counsel for Markač given that "Counsel shall not act as an advocate in a proceeding in which counsel is expected to be a necessary witness except where (i) the testimony relates to an uncontested issue; (ii) the testimony relates to the nature and value of legal services rendered in the case; or (iii) substantial hardship would be caused to the client if that counsel does not so act." Šeparović is not expected to testify as to an uncontested issue or with regard to his legal services. Thus, unless Šeparović can demonstrate that his withdrawal would cause a substantial hardship to Markač, the Appeals Chamber expects that he will withdraw, whether representing Markač in a joint trial with Gotovina or in a separate trial only with Čermak, in compliance with his ethical and professional obligations.

35. The Appeals Chamber notes that, were he to fail to withdraw, pursuant to Rule 46 of the Rules and Article 38 of the Code of Professional Conduct, the Trial Chamber may find that he is engaging in misconduct in violation of the Code of Professional Conduct. Upon such a finding, the Trial Chamber may, after giving Šeparović a warning, refuse him audience or determine, after giving him the opportunity to be heard, that he is no longer eligible to represent a suspect or accused before the International Tribunal.[101] In addition, with the approval of the President of the International Tribunal, the Trial Chamber may report Šeparović's misconduct to a professional body regulating the conduct of counsel in his State of admission to the bar.[102] Alternatively,

[100] Impugned Decision, para. 73.
[101] *See* Rule 46(A) of the Rules.
[102] *See* Rule 46(B) of the Rules.

Šeparović may be subject to the disciplinary regime established under Articles 40-49 of the Code of Professional Conduct, during which Šeparović could be suspended from representing Markač.[103] If Šeparović is found to have engaged in professional misconduct beyond reasonable doubt, this would result in a range of potential sanctions including public admonishment, a fine of up to 50,000 Euros, temporary or permanent suspension from practicing before the International Tribunal and payment of costs.[104]

36. Second, Markač alleges that a conflict of interests will arise if his case is joined with Gotovina's given his intention to call upon Gotovina to testify in support of his defence notwithstanding that, according to him, there is no link between his case and Gotovina's. He claims that the measure of calling a co-accused to testify in a joint trial is not provided for in the Statute or the Rules and thus, the procedural situation is potentially highly prejudicial to his fundamental rights to a fair trial.[105] The Appeals Chamber is not persuaded that these arguments demonstrate commission of a discernible error by the Trial Chamber in the Impugned Decision. There is no basis for the argument that a co-accused may not be called upon to testify on behalf of another accused in a joint trial. As the Trial Chamber correctly noted, the jurisprudence of the International Tribunal envisions the situation where co-accused may testify against one another in a joint trial;[106] there is nothing under the Statute or Rules of the International Tribunal that would prevent them from doing the opposite if they so choose. As provided under Rule 89(C), a Chamber "may admit *any* relevant evidence which it deems to have probative value"[107] and this includes the favourable testimony of a co-accused.

37. In addition to alleged prejudice to the calling of witnesses, the Appellants argue that the Trial Chamber erred in three further respects when considering the possibility of a conflict of interests in the Impugned Decision. First, Čermak and Gotovina allege there is the potential for different defence theories as between themselves if they are tried jointly.[108] In particular, they will likely provide different declarations regarding the existence of certain facts and that "differences can be expected regarding commanding competences and other important facts."[109] The Appeals Chamber agrees with the Trial Chamber that "[a] joint trial does not require a joint defence, and

[103] *See* Article 45 of the Code of Professional Conduct.
[104] *See* Articles 47 and 49 of the Code of Professional Conduct.
[105] Markač Appeal, para. 24.
[106] Impugned Decision, para. 70.
[107] Emphasis added.
[108] Čermak Appeal, para. 24; Čermak Reply, para. 6; Gotovina Appeal, para. 18.
[109] Čermak Appeal, para. 24.

necessarily envisages the case where each accused may seek to blame the other."[110] Likewise, the Appeals Chamber agrees that "the mere possibility of mutually antagonistic defences does not in itself constitute a conflict of interests capable of causing serious prejudice. This is because trials at the Tribunal are conducted by professional judges who are capable of determining the guilt or innocence of each accused."[111] Thus, the Appeals Chamber finds that Gotovina and Čermak fail to establish that the possibility of conflicting defence theories between them will give rise to serious prejudice and that this demonstrates that the Trial Chamber erred.

38. Second, Markač contends that the concurrent presentation of evidence with regard to the charges against the three Appellants would lead to a conflict of interests that might cause serious prejudice to him.[112] In particular, Markač submits that the concurrent presentation of evidence in a joint case against all Appellants "could be unfair as most of the allegations in the proposed Joinder Indictment referring to Gotovina acting as military commander do not relate to the appellant as a Special Police commander."[113] The Appeals Chamber recalls that the presentation of concurrent evidence or evidence that may not relate to an accused in the course of a joint trial does not, in and of itself, constitute serious prejudice to an accused.[114] In determining the guilt or innocence of an accused, it is to be expected that Judges of the International Tribunal will only take into account that evidence adduced to establish guilt with respect to that accused only.[115] If, as Markač alleges, most of the evidence that would be presented in this joint trial would relate to the criminal responsibility of Gotovina and not him, it is to be anticipated that consideration of that evidence will not be used to substantiate charges alleged against Markač. Therefore, the Appeals Chamber finds that because Markač fails to demonstrate how the presentation of concurrent evidence would give rise to a conflict of interests resulting in serious prejudice to him, he has failed to demonstrate that the Trial Chamber committed a discernible error in the Impugned Decision warranting intervention by the Appeals Chamber.

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[110] Impugned Decision, para. 68 *citing Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000 ("*Brđanin and Talić* Separate Trial Decision"), para. 29. *See also Prosecutor v. Brđanin and Talić,* Case No. IT-99-36-AR72.2, Decision on Request to Appeal, 16 May 2000; *Prosecutor v. Popović et al.,* Case Nos. IT-02-57-PT, IT-02-58-PT, IT-02-63-PT, IT-02-64-PT, IT-04-80-PT, IT-05-86-PT, Decision on Motion for Joinder, 21 September 2005, para. 33; *Prosecutor v. Ntahobali,* Case No. ICTR-97-21-T, Joint Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Separate Trial, 2 February 2005, paras. 34-39.

[111] *Prosecutor v. Milan Martić,* Case No. IT-95-11-PT, *Prosecutor v. Jovica Stanišić and Franko Simatović,* Case No. IT-03-69-PT, *Prosecutor v. Šešelj,* Case No. IT-03-67-PT, Decision on Prosecution Motion for Joinder, 10 November 2005; *Brđanin and Talić* Separate Trial Decision, para. 21, *citing Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on Defence Motion to Sever Defendant and Counts, 15 March 1999.

[112] Markač Appeal, para. 24.

[113] *Id.*, para. 25.

[114] *Pandurević* Decision on Joinder, para. 25.

[115] *Ibid.*

39. Finally, Čermak argues that "joinder of cases is unacceptable when there is a possibility that at least one of the co-accused could exculpate himself from the charges on joint participation in the offence".[116] Čermak provides no explanation or support for this statement, and therefore, the Appeals Chamber finds that it fails to demonstrate that the Trial Chamber erred in the Impugned Decision.

### D. Right to Fair and Expeditious Trial without Undue Delay and Judicial Economy

40. Čermak and Markač argue that the Trial Chamber erred in the Impugned Decision by concluding that joinder of their case with Gotovina would not result in undue delay of their trial. They note that their case is at a much more advanced stage than Gotovina's as they have been preparing for their trial for over two years.[117] Markač points out that Gotovina is still in the very early stages of pre-trial proceedings and submits that Gotovina's Counsel "should reach the same procedural level" as that of the *Čermak and Markač* case before the joint trial starts.[118] Consequently, they claim, one could reasonably predict that joinder of these cases would result in a significant delay to the start of the trial of at least one year or more resulting in prejudice to Čermak's and Markač's fundamental right to an expeditious trial.[119]

41. The Appeals Chamber again notes that in the Impugned Decision, the Trial Chamber found that Čermak's and Markač's case is not ready for trial, no date has been fixed for the commencement of their trial, and there is no reason to anticipate that the setting of that date is imminent.[120] As a result, the Trial Chamber concluded that joinder of their trial with Gotovina's would not lead to a delay in the commencement of the trial, or adversely affect Čermak's and Markač's right to a fair trial without undue delay.[121] The Trial Chamber additionally noted that Čermak and Markač are on provisional release pending the commencement of the trial, which further militates against the possibility of infringement of the rights of these Appellants.[122] The Appeals Chamber further notes that the Prosecution, in its Consolidated Response, represents that all of the Appellants are at the same point in terms of disclosure, with the exception of some Rule 70 documents for Gotovina, and there is only one pending preliminary motion pursuant to Rule 72

[116] Čermak Appeal, para. 24.
[117] Čermak Appeal, paras. 22-23; Markač Appeal, paras. 20-21.
[118] Markač Appeal, para. 19, 21.
[119] *Id.*, para. 21.
[120] Impugned Decision, para. 73.
[121] *Ibid.*
[122] *Ibid.*

in the *Gotovina* case.[123] Čermak and Markač do not contest this representation in reply. The Appeals Chamber considers that Čermak and Markač are merely repeating arguments advanced before the Trial Chamber. Thus, it finds that they have failed to demonstrate any discernible error made by the Trial Chamber in finding that joinder will not adversely affect Čermak's and Markač's right to a fair trial without undue delay due to the fact that there is no start date for the trial in the immediate future.

42. Čermak and Markač also assert that joinder of their case with Gotovina's case adds complexity to their case and will therefore lead to a long and procedurally complicated trial that will violate their right to a fair trial without undue delay. They contest the Trial Chamber's view that joinder will promote judicial economy.[124] Markač submits that the Trial Chamber will most likely have to deal with a greater number of issues and larger volume of evidence in a joint trial, which will lead to the wasting of considerable time and expense. He argues that little, if any, extra court time is likely to be required for running separate trials, and the evidence common to all of the Appellants, which has to be repeated, may not be disputed and may often be simply admitted. "Moreover, an acquittal on one trial may lead to the Prosecution offering no evidence on another trial. A conviction in first may lead to a plea of guilty in a subsequent trial."[125] Furthermore, Čermak argues that there is a real possibility that the *Čermak and Markač* case and the *Gotovina* case will be able to proceed simultaneously before two available Trial Chambers, which "would indeed take less time".[126]

43. In the Impugned Decision, the Trial Chamber noted Markač's argument with regard to increased complexity of the proceedings against him but considered that as a number of factual allegations in the proposed Joinder Indictment are common to all of the Appellants, a joint trial may allow for the presentation of much of the same evidence against all of the Appellants at one time. Furthermore, the Trial Chamber considered that while one separate trial could be expected to be shorter than a joint trial, the joint trial would be more expedient than two or three separate trials. Accordingly, the Trial Chamber found that the benefits of a joint trial outweighed those to be gained from holding separate trials.[127]

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[123] Prosecution Consolidated Response, para. 24.
[124] Čermak Appeal, para. 23. Markač Appeal, paras. 22, 27-28.
[125] Markač Appeal, para. 22.
[126] Čermak Reply, para. 12.
[127] Impugned Decision, paras. 75, 76.

44. The Appeals Chamber considers that Čermak and Markač fail to demonstrate that the Trial Chamber made a discernible error in reaching this conclusion. Two separate trials, whether conducted simultaneously or otherwise, are still likely to require more court hours in total than one joint trial and require more judicial time and resources. Furthermore, two separate trials will likely lead to duplication of efforts. In addition, in light of the significant overlap the Trial Chamber found between the two cases on the basis of the amended indictments, Čermak and Markač fail to demonstrate that a joint trial with Gotovina will lead to a long and procedurally complicated trial. Accordingly, the Appeals Chamber finds that notwithstanding that joinder may add some degree of complexity to each of the proceedings and thus some delay, Čermak and Markač fail to demonstrate that the Trial Chamber erred in prejudicing their right to be tried without undue delay. The Trial Chamber reasonably exercised its discretion in finding that overall, in this case, joinder will promote judicial economy and this weighs in favour of granting joinder.

45. Finally, Markač contends that the Trial Chamber failed to appropriately consider, when determining whether joinder would infringe upon the Appellants' right to an expeditious trial that Gotovina remains in custody while Čermak and Markač are on provisional release.[128] In support of this contention, Markač cites the decision in *Prosecutor v. Dokmanović*. In that decision, the Trial Chamber ordered that an accused be tried separately from his two co-accused, who were not yet in custody, so as to protect his right to be tried without undue delay.[129] The Appeals Chamber considers that the *Dokmanović* case is distinguishable from the circumstance of the Appellants. At the time of the decision in *Dokmanović,* the co-accused had never been in the custody of the International Tribunal, and it was uncertain as to when they might be apprehended. Indeed, the Trial Chamber in *Dokmanović* reserved the possibility of reconsidering its decision to separate the trials, should the fugitive co-accused come into the custody of the International Tribunal before commencement of the trial.[130] In contrast, Čermak and Markač have been taken into the International Tribunal's custody and are on provisional release only until the commencement of trial. Čermak and Markač were granted provisional release on the Trial Chamber being satisfied that they would return for trial when required. Consequently, there is no indication of any infringement of Gotovina's right to be tried without undue delay by their provisional release. Furthermore, as noted by the Prosecution, it is more likely that Gotovina's continued detention will

[128] Markač Appeal, para. 27.
[129] *Prosecutor v. Dokmanović*, Case No. IT-95-13a, Decision of Trial Chamber II Concerning Separation of Trials, 28 November 1997.
[130] *Id.*, p. 2.

lead to an expedited start of the joint trial against him, Čermak and Markač.[131] Accordingly, the Appeals Chamber rejects this argument as unfounded.

### E. Minimising Hardship to Witnesses

46. Gotovina and Čermak argue that the Trial Chamber erred when it evaluated the factor of minimising hardship to witnesses as weighing in favour of granting joinder without any evidence concerning potential witnesses.[132] In the Impugned Decision, the Trial Chamber acknowledged that without the Prosecution providing a list of potential witnesses it intended to call in support of each of the amended indictments and the proposed Joinder Indictment, it was difficult to assess the precise impact of the proposed joinder on the victims and witnesses to be called to testify.[133] Nevertheless, it determined that some witnesses were likely to testify in both cases and that the hardship to those witnesses would be lessened.[134] Gotovina and Čermak argue that the Trial Chamber erred because there was no factual basis upon which it could make this determination without a witness list from the Prosecution.[135] For example, Gotovina points out that if the number of witnesses common to all three Appellants is significantly lower than the number of witnesses specific to each of them, the specific witnesses will face hardship in a joint trial because their statements will be disclosed to three defendants instead of just one and they will face three cross-examinations resulting in overall hardship caused to witnesses by a joint trial.[136] Accordingly, the Trial Chamber should have ordered the Prosecution to provide a list of common and specific witnesses before making such a determination in the Impugned Decision.[137]

47. The Appeals Chamber notes that in reaching the conclusion that hardship to witnesses would be minimised by joinder, the Trial Chamber considered the arguments raised here by Gotovina and Čermak as well as the Prosecution's position that "most [of its] witnesses for the two cases are identical and likely need to be called for both trials".[138] In these circumstances, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to generally conclude, in light of the Prosecution's representation and based on its assessment of all of the common allegations and supporting materials against all of the Appellants in the proposed Joinder Indictment, that there will

[131] Prosecution Consolidated Response, para. 25.
[132] Gotovina Appeal, para. 48; Čermak Reply, paras. 14-17.
[133] Impugned Decision, para. 78.
[134] *Ibid.*
[135] Gotovina Appeal, para. 48; Čermak Reply, para. 16.
[136] Gotovina Reply, para. 18.
[137] Gotovina Appeal, para. 48.
[138] Impugned Decision, para. 77.

be lesser hardship for some witnesses if only one trial is held and that this should weigh in favour of joinder. Furthermore, as pointed out by the Prosecution, the same Judges assigned to preside over the Prosecution's consolidated motion for joinder are those previously assigned to the *Gotovina* case.[139] These Judges, and especially the two common to both cases, were in a good position to understand the significant overlap between the two cases. Additionally, as the Prosecution notes, disclosure in the two cases has been identical.[140] In light of the foregoing, the Appeals Chamber rejects Gotovina's argument that, without a witness list from the Prosecution, the Trial Chamber was unable to determine that a joint trial would result in the minimization of hardship for some witnesses.

48. Furthermore, with regard to Gotovina's argument as to potential hardship for some specific witnesses if there is a joint trial, the Appeals Chamber is not persuaded that this demonstrates that the Trial Chamber erred. It is unclear whether specific witnesses will find it a hardship to testify in front of all of the Appellants. Moreover, as these witnesses are specific for charges alleged with regard to just one of the Appellants, it is unlikely that they will suffer hardship by being cross-examined by each Appellant for a total of three times. In any event, were such hardship to arise for some specific witnesses, it is open to the Trial Chamber to take steps to mitigate that hardship by applying certain protective measures consistent with the rights of the accused as provided for witnesses under the Rules of the International Tribunal.[141] Furthermore, as previously noted by the Appeals Chamber, under Rule 90(F) of the Rules, the Trial Chamber can mitigate any potential burden to a witness caused by consecutive cross-examination because it "has discretion to regulate the examination of witnesses so as to avoid repetitive questioning during cross-examination" subject to the obligation to respect the rights of the accused.[142]

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[139] Prosecution Consolidated Response, para. 23.
[140] *Ibid.*
[141] *See e.g.*, Rules 75 and 79 of the Rules.
[142] *Miletić* Decision on Joinder, para. 29. Rule 90 (F) provides that "[t]he Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time."

## V. DISPOSITION

49. On the basis of the foregoing, the Appeals are hereby **DISMISSED**.

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

Dated this 25th day of October 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

**[Seal of the International Tribunal]**