

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-01-45-AR73.1

BEFORE THE APPEALS CHAMBER

**Before: Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andresia Vaz
Judge Theodor Meron**

Registrar: Mr. Hans Holthuis

Date filed: 25 August 2005

**THE PROSECUTOR v. ANTE GOTOVINA
(IT-01-45-AR73.1)**

BRIEF OF INTERLOCUTORY APPELLANT ANTE GOTOVINA

Counsel for Ante Gotovina:

**Mr. Gregory W. Kehoe
Mr. Luka S. Misetic**

The Office of the Prosecutor:

**Mr. Alan Tieger
Ms. Laurie Sartorio**

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THE PROSECUTOR

v.

ANTE GOTOVINA

BRIEF OF INTERLOCUTORY APPELLANT ANTE GOTOVINA

I. Introduction and Background

1. Pursuant to Rule 73 (B) & (C) of the Rules of Procedure and Evidence ("RPE") and in accordance with the Practice Direction on the Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal ("Practice Direction"), Appellant General Ante Gotovina hereby respectfully submits this interlocutory appeal from the Trial Chamber II's Decision of 14 July 2006 granting the Prosecution's Consolidated Motion to Amend the Indictment and for Joinder. ("Impugned Decision").
2. The Indictment against General Gotovina was confirmed on 8 June 2001, and on 24 February 2004 the Trial Chamber confirmed an Amended Indictment against General Gotovina (the "Amended Indictment"). General Gotovina was transferred to the Tribunal on 10 December 2005 and he pleaded not guilty to all counts of the Amended Indictment.
3. On 20 February 2006, the Prosecution filed its "Consolidated Motion to Amend the Indictment and for Joinder." (Hereinafter, "Consolidated Motion").
4. On 4 April 2006 General Gotovina opposed the Prosecution's Consolidated Motion.
5. On 12 May 2006 the Prosecution filed its Reply in support of its Consolidated Motion.

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6. On 14 July 2006 the Trial Chamber issued the Impugned Decision, granting the Prosecution's Consolidated Motion and order this case to be joined with the cases of Generals Cermak and Markac.
7. On 17 July 2006 the Registrar assigned a common case number, No. IT-06-90-PT.
8. On 21 July 2006 Appellant filed his application for certification for interlocutory appeal of the Impugned Decision, and on 28 July 2006 the Prosecution filed its consolidated response opposing Appellant's application for certification.
9. On 14 August 2006, Trial Chamber II issued its Decision on Defence Applications for Certification to Appeal the Decision on Prosecution's Motion to Amend the Indictment and for Joinder, granting certification for interlocutory appeal from the Impugned Decision of 14 July 2006.

II. Standard of Review

10. The Appeals Chamber has previously articulated the proper standard of review in cases involving interlocutory appeals of joinder decisions. In Prosecutor v. Slobodan Milosevic,¹ the Appeals Chamber held:

It is for the party challenging the exercise of discretion to identify for the Appeals Chamber a “discernible” error made by the Trial Chamber. It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.

In relation to the Trial Chamber's findings of fact upon which it based its exercise of discretion, the party challenging any such finding must demonstrate that the particular finding was one which no reasonable tribunal of fact could have reached, or that it was invalidated by an error of law. Both in determining whether the Trial Chamber incorrectly exercised its discretion and (in the event that it becomes necessary to do so) in the exercise of its own discretion, the Appeals Chamber is in the same position as was the Trial Chamber to decide the correct principle to be

¹ Prosecutor v. Slobodan Milosevic, Case No. IT-99-37-AR73, *Reasons for Decision on Prosecution Interlocutory Appeal From Refusal To Order Joinder*, (18 April 2002), at para 5-6.

applied or any other issue of law which is relevant to the exercise of the discretion. Even if the precise nature of the error made in the exercise of the discretion may not be apparent on the face of the impugned decision, the result may nevertheless be so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly. Once the Appeals Chamber is satisfied that the error in the exercise of the Trial Chamber's discretion has prejudiced the party which complains of the exercise, it will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber.

III. Legal Standards

A. Legal Standards for Joinder

11. Rule 48 provides that "Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried."
12. Rule 82(B), however, provides that "The 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."

B. Legal Standards for Amendment

13. Rule 50(A)(ii) provides that, "(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."
14. Article 19, paragraph 1, of the Statute states that, "[t]he judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed."

15. Leave to amend an indictment should only be granted if the amendment does not infringe upon the defendant's fundamental right to a fair trial, as guaranteed in Article 21 of the Statute.²
16. In addition to protecting General Gotovina's rights to a fair trial, the Tribunal is obliged to ensure due process of law at all stages of this proceeding. *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-PT, *Decision on Defence Motion Challenging the Exercise of Jurisdiction By The Tribunal*, (9 October 2002), at ¶¶110-111.

IV. ARGUMENT

I. **The Trial Chamber Erred When It Granted The Prosecution's Motion For Joinder Because Joinder Of The Cases Has Created Conflicts of Interest That Would Not Have Existed Had the Cases Not Been Joined**

17. There are numerous, substantial conflicts of interest that have arisen as a result of the joinder of Gotovina's case with the Cermak and Markac cases. These conflicts have resulted in serious prejudice to Gotovina.

Conflicts between Cermak and Gotovina

18. In his Response in Opposition to the Consolidated Motion, Gotovina argued that although both Cermak and Gotovina were generals, it is likely that Cermak will contend that certain incidents alleged in the Indictments were outside the scope of Cermak's duties, and thus the responsibility of Gotovina. As one example, Cermak may contend that the responsibility for maintaining military discipline within the Knin Garrison belonged to Gotovina as Commander of the Split Military District, a contention that Gotovina will dispute. In his "Response to Prosecution's

² See *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34, *Decisions on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment*, (14 February 2001), in which the Trial Chamber found that "[a]lthough there are no express limits on the exercise of the discretion contained in Rule 50, when viewing the Statute and Rules as a whole, it is obvious that it must be exercised with regard to the right of the accused to a fair trial."

Consolidated Motion to Amend The Indictment and for Joinder,” Cermak confirmed that at trial he may attempt to shift blame to General Gotovina when he wrote:

Moreover, it is obvious that there are significant differences regarding command responsibilities of the accused and their presence in the events charged. The differences between the defences of the accused may cause the conflict of interest [sic] and render common trial opposite to the right on fair trial [sic].³

19. If Cermak’s case were joined with that of General Gotovina, Cermak’s defence strategy as outlined above would result in a potential conflict of interest for Cermak’s defence counsels, Mr. Cedo Prodanovic and Ms. Jadranka Slovic, who also represents Croatian General Rahim Ademi. General Ademi was indicted by the Tribunal on 8 June 2001 for crimes allegedly committed in a September 1993 military operation in the Medak Pocket of Croatia.⁴ During Operation Storm, General Ademi was General Gotovina’s Chief of Staff and second in command as the Commander of the Split Military District. Given General Ademi’s place in the chain of command as General Gotovina’s immediate subordinate, the charges against General Gotovina in the proposed Joinder Indictment could be applied against General Ademi. General Ademi will be a crucial witness in Gotovina’s trial for the defence of General Gotovina, as his testimony will refute many of the accusations contained in the Indictment.
20. Furthermore, during the crucial time period of 9 August through on or about 15 August 1995, the evidence will show that General Gotovina was on leave in order to undertake his honeymoon with his new bride, whom he had wed some two weeks earlier. During Gotovina’s leave of absence, General Ademi was the highest-ranking military officer on duty in the Split Military District. The proposed Amended Indictment alleges that several criminal acts may have taken place during the time that General Ademi was the highest-ranking officer on duty in the Split

³ Ivan Cermak’s Response to Prosecution’s Consolidated Motion to Amend the Indictment and For Joinder, at para. 20.

⁴ See *Prosecutor v. Rahim Ademi*, Case No. IT-01-46-1, later consolidated into the case of *Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78. The case was referred to Croatia for trial pursuant to Rule *bis* pursuant to an order of the Referral Bench dated 14 September 2005.

Military District, including murders alleged to have occurred between 5 and 12 August 1995 in Zagrovic, on 13 August in Orlic, and between 10 and 18 August in Kakanj.⁵

21. Ademi will almost certainly be called as a witness for Gotovina and would in all likelihood testify on all matters alleged in the indictment, including the incidents alleged to have occurred during the time he was in charge during Gotovina's absence. A conflict of interest would consequently arise on the part of Attorney Prodanovic due to his simultaneous representation of the witness Ademi and the Accused Cermak, particularly if Cermak's defence is predicated on the assertion that responsibility for military discipline did not fall upon the Garrison commander, Mr. Cermak, but rather on the Commanders of the Split Military District, Generals Gotovina and Ademi.
22. Under the Tribunal's rules, Attorney Prodanovic's simultaneous representation of Ademi and Cermak would present a conflict of interest: "Counsel or his firm shall not represent 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."⁶
23. Moreover, there is a substantial possibility that Cermak will contend that command responsibility for alleged wrongful acts lies with Ademi and Gotovina as Commanders of the Split Military District.
24. Cermak may very well contend in his defense that responsibility for the prevention and punishment of military crimes lay with Ademi and/or Gotovina as Commanders of the Split Military District. Such a defense would obviously have the effect of implicating Prodanovic's client, Ademi. Substantial prejudice would result to Cermak if his counsel is unable to explore

⁵ Schedule to Proposed Joinder Indictment. The Defence wishes to point out that it is in no way suggesting that General Ademi bears any criminal responsibility whatsoever for these incidents. On the contrary, the Defence submits that General Ademi, like General Gotovina, is not responsible for any alleged crimes described in the Joinder Indictment.

⁶ Code of Professional Conduct for Counsel Appearing Before the International Tribunal, Article 14.

potential defenses that would implicate Ademi, or if the conflict caused Prodanovic to withdraw his representation of Cermak, thus depriving Cermak of his chosen counsel. Moreover, in cross-examining Ademi, Attorney Prodanovic would have access to confidential, attorney-client privileged communications with which he could potentially undermine Ademi's testimony.

25. The Trial Chamber concluded that “no factual basis exists on which it is demonstrated that a conflict of interest will arise.” (Impugned Decision, at para. 64). The Trial Chamber held that this conclusion “follows” from its finding that “no charges” have been filed against Ademi in the Tribunal or in Croatia arising out of the events alleged in the Joinder Indictment. (Id.).
26. Respectfully, the Appellant submits that the Trial Chamber committed “discernable error” when it concluded that defence counsel appearing at the Tribunal can only be found to have a conflict of interest in circumstances where both clients are indicted for crimes arising out of the same event or transaction. Here, the Trial Chamber found that Cermak's attorneys do not have a conflict of interest as a result of joinder, because Ademi is not charged (either before the Tribunal or in Croatia) for events arising out of Operation Storm. The Appellant submits that the Trial Chamber misdirected itself as to the law that is relevant to the exercise of the discretion, because it failed to recognize the scope of an attorney's legal duty of loyalty to clients and former clients.
27. Whether Ademi has been formally charged with crimes arising out of Operation Storm is not determinative in the analysis concerning a potential conflict of interest. Courts have held that “the proscription against adverse representation exists whenever counsel's employment is adverse to the client or former client, and can exist even though a prior client is not a party to the litigation,” and that the fact that the former client is not a party to the new litigation is “inconsequential” in the analysis of the attorney's duties to his former client⁷

⁷ *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1039 (2nd Dist. California, 2002).

28. Here, Gotovina advised the Trial Chamber that the issue of a potential conflict of interest on the part of Cermak's attorneys arises *if the cases are joined*, because Ademi will be called as a witness for Gotovina and Attorneys Prodanovic and Slokovic will be placed in the position of having to cross-examine one client (Ademi) in order to defend another (Cermak). As Gotovina pointed out to the Trial Chamber, Attorneys Prodanovic and Slokovic, in cross-examining Ademi, would be privy to attorney-client privileged information that could be used to undermine the credibility of Ademi, a client of Prodanovic and Slokovic. Alternatively, Prodanovic's and Slokovic's representation of Cermak could potentially be compromised by the attorneys' unwillingness or inability to elicit testimony from Ademi that, while potentially favorable to Cermak, could tend to incriminate Ademi.⁸
29. Courts have long recognized that attorneys have duties of loyalty to clients even if those clients are not party to the litigation at hand, and indeed even to former clients. In this context, the California Court of Appeals explained an attorney's duties as follows:

"It is the duty of an attorney: ... [t]o maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." In this instance, [the attorney] accepted employment which surely at best must have tempted him to reveal or to improperly monopolize the confidences and secrets of his former client. As the Supreme Court recognized in *Anderson v. Eaton*, "Conscience and good morals dictate that an attorney should not so conduct himself as to be open to the temptation of violating his obligation of fidelity and confidence." Clearly, the acceptance of employment which threatens the revelation or improper monopolization of a former client's confidences is adverse to the interests of the former client. . . . It is difficult to believe that a counsel who scrupulously attempts to avoid the revelation of former client confidences -- i.e., who makes every effort to steer clear of the danger zone -- can offer the kind of undivided loyalty that a client has every right to expect and that our legal system demands. Rule 5 operates to preclude any impediment to the fulfillment of an attorney's professional obligation to his client by proscribing any conflict of interest in his representation of past and present clients. "It is better to remain on safe and secure professional ground, to the end that the ancient and honored profession of the law and its representatives may not be brought into disrepute. Courts have consistently held the members of the profession to the strictest account in matters affecting the relation of attorney and client."

⁸ See Gotovina's Response to Consolidated Motion, at para. 60.

30. Here, the Trial Chamber has created a conflict where none before existed. It does not appear that any of the parties in the Cermak/Markac case intend to call General Ademi as a witness. Accordingly, the issue of Mr. Prodanovic's dual representation of Ademi and Cermak has arisen only because the Trial Chamber joined the Cermak/Markac case with the Gotovina case, where Gotovina intends to call Ademi as a defence witness.
31. In the Impugned Decision, the Trial Chamber notes that "should a conflict arise, its effects can be remedied by a change of counsel and therefore need not cause any serious prejudice." The Appellant submits that the Trial Chamber significantly devalues the fundamental rights of General Cermak under Article 21(4)(b) of the Statute, which provides that the accused shall be entitled, *inter alia*, "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" (emphasis added); and under Article 21(4)(d) of the Statute which provides that the accused shall be entitled, *inter alia*, "... to defend himself in person or through legal assistance of his own choosing."
32. For almost two and one-half years, Cermak has been afforded the right defend himself through counsel of his own choosing, Mr. Prodanovic and Ms. Slokovic. Cermak's fundamental *due process* rights under Article 21 are superior to the Prosecution's *procedural* rights to obtain joinder. The Trial Chamber erred when it ignored Cermak's rights under Article 21, in essence finding that the interest in joinder was superior to Cermak's right to counsel of his choosing.
33. Accordingly, the Trial Chamber erred in joining the cases because in doing so it has created a potential conflict for attorneys Prodanovic and Slokovic, where none existed prior to joinder. Cermak's right to counsel of his choosing is superior to the Prosecution's interest in joinder, and therefore the Trial Chamber erred when it concluded that a "change of counsel" could remedy the potential conflict created by the joinder. Accordingly, the Appeals Chamber should reverse the Trial Chamber's order joining the cases.

Conflicts Between Markac and Gotovina

34. Joinder of Gotovina and Markac's cases has also caused serious conflict of interest issues to arise between Gotovina's right to call witnesses and Markac's right to counsel of his own choosing. Markac is represented in his case by Mr. Miroslav Separovic. Attorney Separovic is the former Minister of Justice of Croatia and served in that capacity from 18 May 1995 until 20 April 1998. Thus, Attorney Separovic was the Minister of Justice of the Republic of Croatia throughout the time period covered by the proposed Joinder Indictment.
35. Attorney Separovic has vital information concerning several of the most serious allegations against General Gotovina. In his capacity as Minister of Defense before, during, and after Operation Storm, Attorney Separovic was the person most responsible in the Republic of Croatia for the proper functioning of the civilian and military criminal justice systems in former U.N. Sector South and throughout Croatia. The Gotovina defence will demonstrate at trial that the military prosecutors and military courts in the Republic of Croatia were actually under the supervision of the Ministry of Justice and the not the Ministry of Defense throughout the time period covered by the proposed Joinder Indictment.
36. Accordingly, Attorney Separovic will be a crucial witness in Gotovina's case because his testimony is expected to be exculpatory for General Gotovina concerning several of the most serious allegations against General Gotovina in the proposed Joinder Indictment. For example, the proposed Joinder Indictment at paragraph 18(e) and (f) contends that General Gotovina participated in and acted in furtherance of the alleged Joint Criminal Enterprise by:
- (e) promoting, instigating, permitting, encouraging and condoning the commission of crimes against Serbs by *failing to report and/or investigate crimes or alleged crimes against them, to follow up on such allegations and/or investigations, and/or to punish or discipline subordinates and others in the Croatian authorities and forces over whom they possessed effective control for crimes committed against Serbs; and*
 - (f) *engaging in, encouraging, facilitating or supporting efforts to deny, conceal and/or minimize crimes committed by the Croatian authorities and forces*

against Serbs, including the provision of false, incomplete or misleading information to international organizations, monitors, investigators and the public.

37. At paragraph 19(e) the proposed Joinder Indictment alleges that General Gotovina participated in the Joint Criminal Enterprise by failing to punish crimes committed against the “Krajina” Serbs. At paragraph 48 of the proposed Joinder Indictment, the Prosecution alleges that, “[p]ursuant to Article 7(3), each accused is charged with and criminally responsible for the criminal acts and/or omissions of his subordinates which he knowingly failed to prevent *or punish.*” All of these allegations concern the functioning of the criminal justice system in Croatia, an area of the Croatian government which fell under the jurisdiction of the Minister of Justice, Attorney Separovic.
38. Attorney Separovic’s testimony will be exculpatory for General Gotovina on these critical points because it is expected that Attorney Separovic will testify 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 Separovic’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.
39. In addition, Attorney Separovic’s testimony is essential because only he can offer testimony concerning whether President Franjo Tudjman was part of a conspiracy to conceal and condone criminal activity in order to advance the alleged Joint Criminal Enterprise. In particular, Attorney Separovic is the only living witness who can testify as to whether President Tudjman, who was Attorney Separovic’s direct superior and is explicitly named as a member of the Joint Criminal Enterprise in the Joinder Indictment at paragraph 5, 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.

40. Joinder of the cases of Generals Markac and Gotovina thus forces Attorney Separovic into a potential violation of Article 26 of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, which states:

Article 26
Counsel as Witness

Counsel shall not act as an advocate in a proceeding in which counsel is likely 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.

41. Here, Attorney Separovic is clearly a necessary witness given his position and function during the relevant time period. Moreover, Article 26 of the Code of Conduct acts as a complete bar to his ability to represent General Markac if the cases are joined because none of the exceptions to the rule apply: the testimony relates to a contested issue and does not concern the nature and value of legal services. The third exception does not apply because General Markac will not suffer substantial harm if Attorney Separovic does not testify. Rather, this harm will be suffered by General Gotovina. Indeed, because the issue of Attorney Separovic's role as Minister of Justice apparently has not been raised in the Cermak/Markac case, it is clear that Attorney Separovic's testimony was not deemed necessary by the Prosecution or the defences of Generals Markac and Cermak.

42. If the cases were not joined, it would have been indisputable that General Gotovina would have the right to call Attorney Separovic as a defence witness given the relevant evidence that his testimony would offer. General Gotovina's right to call Mr. Separovic is guaranteed under

Article 21(4)(e)⁹ and cannot be abridged simply because his case became joined with a case in which Mr. Separovic was acting as defence counsel. Accordingly, because the cases were joined, then the only option available to the Trial Chamber to address the exclusionary rule contained in Article 26 of the Code of Conduct is to exclude Mr. Separovic as defence counsel for General Markac. Such a result, however, would amount to gross injustice to General Markac. For more than two years he has been represented by counsel of his choice, Mr. Separovic, as is his guaranteed right under Article 21(4)(b) of the Statute, which provides that the accused shall be entitled, *inter alia*, “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.” (emphasis added); and under Article 21(4)(d) of the Statute which provides that the accused shall be entitled, *inter alia*, “. . . to defend himself in person or through legal assistance of his own choosing.”

43. Based on a review of the public records in the Cermak/Markac case, it is evident that none of the parties objected to Mr. Separovic’s participation, or expressed intent to call him as a witness in their cases-in-chief. Therefore, General Markac’s fundamental right to choose his own counsel should not be violated simply to facilitate joinder. Clearly, joinder of these cases will result in serious prejudice either to General Gotovina (who will be unable to call Mr. Separovic as a witness) or General Markac (who will lose his counsel of choice as a result of joinder).
44. Rule 82 of the Rules of Procedure and Evidence grants the Trial Chamber the power to 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 the accused, or to protect the interests of justice.” Implicit in the provisions of Rule 82 is that cases should not be joined in the first place if joinder might cause a conflict of interests that could cause serious prejudice to an accused, or to protect the interests of justice. Here, serious prejudice to the

⁹ Article 21(4)(e) states: “In the determination of any charge against the accused pursuant to the preset Statute, the accused shall be entitled to the following minimum guarantees, in full equality: to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” It should also be noted that this right also guarantees General Gotovina’s ability to call General Ademi as a witness, a right which is threatened by the joinder because General Ademi’s testimony could be challenged on cross-examination by his own attorneys, Mr. Prodanovic and Ms. Slokovic.

competing interests of Markac and Gotovina have resulted from joinder, because either Gotovina's right to call a crucial witness will be violated, or else Markac's right to counsel of his choosing will be abridged.

45. The Trial Chamber erred when it dismissed this argument by General Gotovina and concluded that Mr. Separovic would have to testify in both trials separately even if the cases were not joined, and therefore Mr. Separovic's "conflict would not be resolved if the Motion is denied." (Impugned Decision, at para 66). However, the Trial Chamber's conclusion rests upon the assertion that Mr. Separovic would have to be called in the Markac case because "the issue of whether the military courts in the Republic of Croatia in the relevant time period were under the supervision of the Ministry of Justice or the Ministry of Defence, therefore, appears to be equally relevant to establishing Mladen Markac's responsibility as alleged in paragraphs 21(d) and (e) of the proposed Joinder Indictment." (Impugned Decision, at para 66). Appellant respectfully submits that the Trial Chamber's conclusion is erroneous. Mladen Markac and his subordinates were never part of the Ministry of Defence. Rather, they were part of the Ministry of the Interior. (See Joinder Indictment, at paras 8-11). Accordingly, it is unclear why the Trial Chamber concluded that Mr. Separovic's testimony concerning the military courts of the Republic of Croatia would be relevant to the Markac trial, given that the Croatian military courts had no jurisdiction over Markac or any of his subordinates, who were policemen and not soldiers.
46. Accordingly, Appellant submits that the Trial Chamber misdirected itself as to the law which is relevant to the exercise of the discretion, because it made an error on the facts upon which it exercised its discretion. Specifically, the Trial Chamber erroneously concluded that Attorney Separovic's testimony is also necessary for the defence of General Markac, and therefore, the "conflict would not be resolved if the Motion is denied." As demonstrated above, there was no basis for this conclusion from the Joinder Indictment or from the record. Accordingly, the Trial Chamber's order for Joinder should be reversed on the basis of this error. General Gotovina's

right to call Mr. Separovic should be protected, as should General Markac's right to counsel of his own choosing. The only way that these rights can be protected is if the cases are not joined.

II. The Trial Chamber Erred When, Without Evidentiary Basis, It Concluded That Joinder Would Promote Judicial Economy And Reduce Hardship To Witnesses

47. In considering the Prosecution's Motion for Joinder, the Trial Chamber was obliged to consider a number of factors, including whether judicial economy would be promoted and whether the hardship to witnesses would be minimized.¹⁰ In his Response opposing the Consolidated Motion, Gotovina submitted that the Trial Chamber could not properly evaluate these factors in light of the fact that the Prosecution had not disclosed any list of potential witnesses. The Trial Chamber acknowledged that "no list of witnesses the Prosecution intends to call in support of each of the Amended Indictments and in support of the proposed Joinder Indictment has been submitted to the Chamber. It is, therefore, difficult to assess the precise impact of the proposed joinder on the victims and witnesses who will be called to testify." (Impugned Decision, at para. 78). The Trial Chamber nevertheless permitted joinder on the basis that "some" witnesses may be called to testify in both cases, and therefore the hardship to "these witnesses" will be lessened by joinder.
48. The Trial Chamber erred when it evaluated the factors for joinder without any evidence concerning potential witnesses. Essentially, the Trial Chamber's evaluation is based on the Trial Chamber's own speculation and conjecture. The Trial Chamber was obligated to render a reasoned opinion, and to take into account "all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision."¹¹ Appellant respectfully submits that the Trial Chamber could not have rendered a "reasoned opinion" on factors like hardship to witnesses and judicial economy, where the Trial Chamber

¹⁰ *Prosecutor v. Pandurevic and Trbic*, Decision on Pandurevic's Interlocutory Appeal against the Trial Chamber's Decision of Joinder of Accused, Case No. IT-05-86-AR73.1, 24 January 2006, paragraph 8.

¹¹ *Prosecutor v. Nikola Sainovic*, Case No. IT-99-37-AR65, *Decision on Provisional Release*, (30 October 2002), at para. 6.

had no evidence in its possession from which it could evaluate these factors. Accordingly, the Trial Chamber should have ordered the Prosecution to provide a supplemental disclosure identifying witnesses who are common and those that are specific to each defendant, relief which Gotovina specifically requested from the Trial Chamber. (See Response to Consolidated Motion, at para. 80).

49. Accordingly, the Appeals Chamber should reverse the Trial Chamber's Order for Joinder, and order that the Trial Chamber consider the issues of hardship to witnesses and judicial economy after the Prosecution submits a list of common and specific witnesses.

III. The Trial Chamber Erred When It Concluded That the Proposed Amendments in the Joinder Indictment Did Not Violate General Gotovina's Right To A Fair Trial

50. General Gotovina argued to the Trial Chamber that it should reject the Prosecution's charges against General Gotovina to include the alleged expulsion of the "Krajina" Serbs. In the case of Prosecutor v. Slobodan Milosevic, Case No. IT-02-54, the Prosecution argued a theory inconsistent with the theory that it is advancing in this case. Specifically, in the Milosevic case the Prosecution argued that Milosevic evacuated the "Krajina" Serbs from Croatia as part of an overall joint criminal enterprise ("JCE") in order to resettle areas of eastern Bosnia that had recently been ethnically cleansed, as well as to resettle Kosovo.
51. In the Milosevic case, the Prosecution argued in its opening statement that the "Krajina" Serbs had been abandoned by Milosevic, and that Milosevic wanted to re-settle the "Krajina" Serbs in the freshly cleansed areas of eastern Bosnia (as well as Kosovo) in furtherance of the joint criminal enterprise with which Milosevic was charged. The Prosecution also introduced evidence on direct examination in the Milosevic case in which a Prosecution witness swears under oath that the Croatian Army did not "ethnically cleanse" the Serbs from Croatia.¹²

¹² For further details concerning the Prosecution's arguments in the Milosevic case, please see Gotovina's Response in Opposition to the Consolidated Motion, at paras 28-33).

52. In his opening statement in the Milosevic case, Prosecutor Geoffrey Nice made the following argument on behalf of the Prosecution concerning the cause of the departure of the “Krajina” Serbs:

Again, as in the previous indictment, I do not need to relate that which is publicly available in the listing of charges against this accused. As a post script and a further link back to Croatia, this small detail: A witness before you will testify that as a member of the military intelligence, he was aware in 1995 of the accused's intention to stop supporting the Krajina and to allow it to fall back into the control of Croatia. Well, whether his measure of control is exactly as substantial as that, something the Prosecution assert, is, of course, for the Tribunal to establish on all the evidence. But the witness can help us further. He and thousands of other Serb refugees crossed into Serbia. We looked, in 1993, at how this accused was prepared to treat his own people when they did things he didn't like. How was he prepared to treat these people? Did he welcome them back or did he use them for his own purposes? They were prevented from leaving the highway by police officers who funneled the fleeing Serbs down to Croatia [sic], where they could affect the Serb populations in areas in a minority; *all part of an overall plan*. (Emphasis added).¹³

53. The Prosecutor’s argument was clear: the Krajina Serbs were evacuated from Croatia by Milosevic in furtherance of his aims to resettle areas of Eastern Bosnia and Kosovo that had recently been ethnically cleansed.
54. The Prosecution disputes this interpretation of its argument in the Milosevic case. The Prosecution argues, essentially, that the Krajina Serb population was expelled from Croatia by the Tudjman JCE, and then was used by the Milosevic JCE to further its aims in Kosovo. This argument, however, is refuted by the Prosecution’s own actions in the Milosevic case.
55. Specifically, the Prosecution called former United States Ambassador to Croatia, Mr. Peter Galbraith, to the stand to testify as a prosecution witness. The Prosecution on direct examination elicited testimony from Ambassador Galbraith for the purpose of proving that the Croatian Army did not “ethnically cleanse” the “Krajina” Serbs and did not expel the Serbs from Croatia. The Prosecution specifically asked Ambassador Galbraith for his opinion as to whether Croatia

¹³ In the record, Prosecutor Nice later corrected himself and indicated that he meant to say “Kosovo” and

had ethnically cleansed the Serbs from the so-called Krajina, and elicited the following testimony:

MR. NICE:

18 Q. One other detail from this period. You were, as you've indicated,
19 on television from time to time. You once gave an interview, I think
20 where you made a comment about ethnic cleansing which needs
21 interpretation.

22 A. Yes. This was for British television. I think it was the BBC. I
23 said that -- that the -- the Croats had not engaged in ethnic cleansing
24 in the Krajina, although they had engaged in serious human rights
abuses.

25 And my -- my point was that ethnic cleansing was where the forces had
come

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1 into a town, paramilitaries backed by the military, engaged -- terrorised
2 the population, engaged in killings, rapes, and forced the population to
3 leave. **This -- in this case, the population had left before the Croats
4 arrived, probably rightly fearing what the Croats might do but
5 nonetheless they were not there when the Croats actually arrived.**
And

6 so therefore it wasn't ethnic cleansing. The analogy that I would use is
7 that you might enter a room with intent to commit murder but if the
8 individual whom you intended to kill wasn't in the room and had
departed

9 the scene, your bad intent probably isn't a crime.¹⁴

56. It is important to note that this testimony was elicited on *direct* examination by the Prosecution, with the specific question designed to elicit the Ambassador's views on whether Croatian forces had committed ethnic cleansing. The only inference that can be drawn from this questioning is that the Prosecution in the Milosevic case intended to prove not only that Milosevic used the Krajina Serbs to resettle areas of eastern Bosnia and Kosovo, but also that Milosevic's JCE had removed the Krajina Serbs from Croatia before Croatian forces arrived. Accordingly, the Prosecution's actions in the Milosevic case undermine the argument that it is advancing in this case.

not "Croatia." Prosecutor v. Milosevic, IT-02-54, Trial Transcript at p 134.

¹⁴ Prosecutor v. Milosevic, IT-02-54, *Trial Transcript* of hearing on 25 June 2003, at p. 21112-13. (Emphasis

57. The use of inconsistent, irreconcilable theories to convict two defendants for the same crime is a due process violation. *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc) (Clark, J., specially concurring). In *Drake*, the prosecution charged two men with murder and armed robbery. The government prosecuted the first defendant, Campbell, on the theory that Campbell alone committed the murder. But in the second defendant's trial, the prosecution asserted that Campbell, due to illness, was physically incapable of killing the decedent. Rather, the prosecution argued, the second man, Drake, must have "actually beat the victim," and, in support of this theory, the prosecution presented Campbell as its star witness. On direct examination, Campbell recited the same testimony that the prosecution had refuted at Campbell's trial. Drake was convicted of murder and robbery.
58. The court in *Drake* reversed the convictions on other grounds, but Judge Clark wrote separately to emphasize that the prosecutor's actions of advancing inconsistent theories constituted a "fundamental and egregious error" that violated the Due Process Clause. The prosecutor's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip-flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice. . . . The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for the truth. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc) (Clark, J., specially concurring).
59. The Supreme Court of California has held that a prosecutor's use of inconsistent and irreconcilable theories is a due process violation. The court noted how this prosecutorial conduct is "inconsistent with the principles of public prosecution." *In re Sakarias*, 35 Cal. 4th 140, 106 P.3d 931, 25 Cal. Rptr. 3d 265 (2005). The *Sakarias* court held that, "fundamental fairness does

added).

not permit the [state], without a good faith justification, to attribute to two defendants, in separate trials, a criminal act only one defendant could have committed. By doing so, the state necessarily urges conviction or an increase in culpability in one of the cases on a false factual basis, a result inconsistent with the goal of the criminal trial as a search for truth.” *Sakarias*, 106 P.3d, at 942.

60. In *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000), two victims were stabbed in the course of a robbery involving two different bands of thugs. During the investigation, a witness, Anthony Lytle, offered conflicting statements about who committed the crime in question. A prosecutor then selectively used the statements at successive trials to present theories just as contradictory as the witness’s own statements. When Lytle told police that one of his associates, James Bowman, stabbed an intended robbery victim, the prosecutor used the statement to argue that because Bowman was, in fact, the killer, the petitioner Jon Keith Smith was guilty of felony murder. The jury in Smith’s trial agreed. When Lytle also attributed the crime to Michael Cunningham, a member of the other band of thugs, the prosecutor used the statement to convict Cunningham of first-degree murder and other offenses. *Smith v. Groose*, 205 F.3d at 1047–49. This led the Eighth Circuit U.S. Court of Appeals to hold that the prosecution violates due process when it uses factually contradictory theories at the core of different cases against different defendants for the same crime because the convictions themselves are unreliable. *Id.*, at 1051–52.

61. The Trial Chamber essentially refused to address this argument raised by General Gotovina in opposition to the amendments in the proposed Joinder Indictment. With respect to Gotovina’s argument that the theories advanced in Milosevic and Gotovina are inconsistent, the Trial Chamber ruled simply that “the factual basis as it is known to the Chamber at this stage does not support such an allegation.” (Impugned Decision, at para 48). The Trial Chamber did not explain what that factual basis is, or why it does not support the Appellant’s arguments. Furthermore, the Trial Chamber refused to address the legal arguments concerning whether the Prosecution’s use of inconsistent theories violates the defendant’s right to a fair trial, finding

that it “remains to be considered and determined whether the proposition has any application in this international legal jurisdiction.” (Id.)

62. The Trial Chamber erred when it failed to give weight or sufficient weight to relevant considerations, and erred as to the facts upon which it has exercised its discretion. In particular, the Trial Chamber should have provided more consideration to the issue of whether the Prosecution’s arguments in Milosevic and Gotovina are indeed inconsistent. As stated above, the Trial Chamber has a duty to provide a reasoned opinion, and here it did not provide any rationale to explain its conclusion that “the factual basis as it is known to the Chamber at this stage does not support such an allegation.”
63. Furthermore, the Trial Chamber committed an error of law by failing to recognize that inconsistent prosecutorial arguments violate a defendant’s right to due process. No explanation is given by the Prosecution or the Trial Chamber to explain when it would be permissible in an international legal jurisdiction for a prosecutor to argue inconsistent and incompatible legal theories against two different defendants in two different cases.
64. Accordingly, Appellant Ante Gotovina respectfully requests that the Appeals Chamber consider whether the Prosecution’s arguments in Gotovina and Milosevic are inconsistent, and to establish a precedent in international law concerning whether a prosecutor’s use of inconsistent legal theories violates a defendant’s right to a fair trial under international law.

CONCLUSION

65. WHEREFORE, Appellant Ante Gotovina respectfully requests that this Honorable Appeals Chamber enter an Order reversing the Trial Chamber’s Order joining this case with the case of Prosecutor v. Ivan Cermak and Mladen Markac; reversing the Trial Chamber’s Order granting the Prosecution leave to file the Joinder Indictment; and for such other relief as this Appeals Chamber deems appropriate.

