

Lawyer Dismissed from Operation Storm Trial

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Judges hearing the case of three Croatian army generals have ordered a former justice minister to withdraw due to a conflict of interest.

Hague tribunal judges this week removed former Croatian justice minister Miroslav Separovic from his role as defence lawyer for the indicted Croatian general Mladen Markac.

The judges noted in their March 6 decision that Separovic had a “personal interest” in the case and was likely to be called as a witness.

Markac will go on trial on May 7 with two other Croatian generals, Ante Gotovina and Ivan Cermak. The three men are charged with the murder, persecution and deportation of ethnic Serbs during Operation Storm – a Croatian military operation launched in the summer of 1995 with the objective of retaking the Serb-held Krajina region.

Separovic, a Zagreb attorney, was Croatia’s justice minister during the time period relevant to the indictment

Judges ordered Markac to find a new lawyer, and told Separovic to assist his replacement who will have until March 30 to tell the trial chamber how much time he or she needs to take over the case.

There is no indication whether or not the trial will be put back to give the new defence counsel time to prepare.

In the ruling, judges dismissed Separovic’s protests – made at a hearing on February 28 – in which he denied having any personal interest in the trial and refused to withdraw.

They noted that one possible defence for the three men – who are charged with criminal responsibility for the acts of their subordinates – would be to shift responsibility from the Ministry of Defence to the Ministry of Justice. They noted that Separovic had ruled out using this defence, and found that if he continued to represent Markac it would “foreclose” a potential defence to his client.

Judges added that Separovic’s personal knowledge meant that it was “probable” that he would be called as a witness – a development that would place him “in a situation of having his professional judgment adversely affected by divided loyalties”.

They also dismissed his claim that Markac would suffer “hardship” if Separovic stopped defending him.

Instead, they found that “the harm caused to Markac and to the integrity of proceedings by Separovic’s continued representation would outweigh any hardship suffered by Markac” as a result of his lawyer withdrawing.

The code of conduct for defence lawyers at the tribunal outlaws counsel representing a client where there is a conflict of interest.

Article 14 of the code states that a counsel “shall not represent a client in connection with a matter in which counsel participated personally and substantially as an official or staff member of the tribunal or in any other capacity”. Further, article 26 says, “Counsel shall not act as an advocate in a proceeding in which counsel is likely to be a necessary witness except where... substantial hardship would be caused to the client if that counsel does not so act.”

Any lawyer in breach of the code can face disciplinary procedures.

Michael Karnavas, defence counsel at the tribunal and president of the Association of Defence Counsel Practising Before the International Criminal Tribunal for the Former Yugoslavia, ADC-ICTY, outlined possible scenarios in which a conflict of interest might arise for a defence lawyer.

“In a conflict-of-interest situation, you have to consider – do you have information that might assist your client but may be adverse to you?” he said. “Another clear example is where you have to choose between clients, or if information emerges that you are privy to because of your position,” he added.

In this case, Gotovina’s defence team first pointed out the potential conflicts of interest in April 2006, when opposing the prosecution’s proposal to join their client’s case with that of the other two former generals.

Lawyers indicated that they intended to call Separovic as a witness for Gotovina’s defence and said his testimony could help prove their client had no authority to investigate or punish criminal behaviour by military subordinates.

They flagged up a second potential conflict of interest in the same trial – as Cermak’s lawyers Jadranka Slokovic and Cedo Prodanovic were also representing Croatian general Rahim Ademi in a forthcoming war crimes trial in Croatia.

Gotovina claimed that Ademi was his chief of staff and second in command during Operation Storm and therefore would be a “crucial” witness for his defence.

When the decision to join the cases was confirmed on appeal on October 25, the appeals chamber said that unless Separovic could demonstrate his withdrawal would cause “substantial hardship” to Markac, he should withdraw.

The appeals judges said it wasn’t yet certain whether Prodanovic and Slokovic would face a conflict of loyalties in representing both Cermak and Ademi, but said that the lawyers must inform their clients of the potential conflict of interest relating to their dual representation.

An advisory opinion from the ADC-ICTY’s disciplinary council from January 17 also found that Separovic had a conflict of interest and called for him to withdraw.

Separovic's persistence in defending his client in spite of these warnings to withdraw has led some trial observers to question why his appointment was allowed in the first place.

Court spokesman Refik Hodzic said at a press conference on February 28 that the registry had accepted Separovic on the merits of his qualifications - but added that details emerged during pre-trial proceedings where it "became obvious" that he had personal interest in the case.

It is not possible for the registry to investigate every defence counsel in detail before a case starts, Hodzic added

Karnavas told IWPR that Separovic's representation went against the tribunal's rules and that it was the trial chamber's responsibility to take action against any potential conflict of interest in order to protect the rights of the accused.

He said ADC-ICTY had received no complaints in relation to the case, and would not be taking disciplinary action against Separovic.

"In order for the ADC to start disciplinary proceedings against a defence counsel, a party has to file a complaint. That can be the trial chamber, the prosecution or another lawyer," he explained.

Goran Sluiter, a professor of international criminal law at the University of Amsterdam, is not surprised by judges' decision to throw Separovic off the case.

"This seems to be a very clear case of a conflict of interest," he said.

He points out a further potential conflict of interest which could arise at the tribunal, with some lawyers who start working at the tribunal as prosecutors crossing over to work for the defence.

One example is Gotovina's defence attorney Gregory Kehoe, who previously worked as a prosecutor in the trial of former Bosnian Croat general Tihomir Blaskic, who was sentenced on appeal to nine years in prison.

But Sluiter added that judges allow former prosecutors to act as defence counsel only where they have not previously worked as prosecutors on the same case.

Kehoe told IWPR that as he never worked on the current case during his time with the prosecution, "there's no conflict".

He feels that the decision to take Separovic off the case was "a bit premature" and said he had proposed a different solution to the trial chamber.

"I asked the court to give us time to discuss it with the [prosecution] to see if we could agree on his

testimony. If so, there would have been no need to take him off the case," he said. "But the court refused to explore that resolution."

"The issue hadn't been explored and I don't think it would have prejudiced anything to explore it further."

Caroline Tosh is an IWPR reporter.

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