



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-03-73-AR65.1

Date: 13 October 2004

Original: English

BEFORE A BENCH OF THREE JUDGES OF THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Florence Mumba
Judge Mehmet Güney

Registrar: Mr. Hans Holthuis

Decision of: 13 October 2004

PROSECUTOR

v.

**Ivan ČERMAK
and
Mladen MARKAČ**

**DECISION ON JOINT MOTION FOR LEAVE TO APPEAL
DECISION ON PROVISIONAL RELEASE**

The Office of the Prosecutor:

Ms. Carla Del Ponte
Mr. Kenneth Scott

Counsel for the Accused:

Mr. Čedo Prodanović and Ms. Jadranka Sloković for Ivan Čermak
Mr. Miroslav Šeparović and Mr. Goran Mikuličić for Mladen Markač

1. This Bench of the Appeals Chamber (“Bench”) 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 (“International Tribunal”) is seised of “Ivan Čermak’s and Mladen Markač’s Joint Motion for Leave to Appeal the Trial Chamber’s Decision on Ivan Čermak’s and Mladen Markač’s Second Motions for Provisional Release” (“Motion”), filed on 20 September 2004.

2. On 14 September 2004, Trial Chamber II (“Trial Chamber”) denied the motions of Ivan Čermak and Mladen Markač (“Accused”) for provisional release (“Impugned Decision”).¹ The Accused now seek leave to appeal from that decision pursuant to Rule 65 of the Rules of Procedure and Evidence (“Rules”).

3. Under Rule 65(A) and (B), once detained, the accused may not be released except upon an order of a Trial Chamber. That order may only be made after hearing the host country and only if the Trial Chamber is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.²

4. Rule 65(D) provides that leave to appeal a Trial Chamber’s decision on provisional release may be granted by a bench of three Judges of the Appeals Chamber “upon good cause being shown”.³ Good cause is shown where the applicant for leave to appeal satisfies the bench that the Trial Chamber “may have erred” in reaching the Impugned Decision.⁴ Good cause may also be satisfied by demonstrating that the Impugned Decision is inconsistent with other decisions of the International Tribunal on the same issues.⁵

5. This Bench of the Appeals Chamber has considered all of the grounds of error alleged by the Accused in their Motion. Without prejudice to any other possibility of error on the part of the Trial Chamber, this Bench is satisfied that the Accused have demonstrated that the Trial Chamber

¹ *Prosecutor v. Čermak’s and Markač*, Case No. IT-03-73-PT, Decision on Ivan Čermak’s and Mladen Markač’s Second Motions for Provisional Release, 14 September 2004.

² *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR65, Decision on Application for Leave to Appeal, 26 August 2002, p. 2.

³ Rule 65(A) and (D) state in relevant part:

Once detained, an accused may not be released except upon an order of a Chamber . . . Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown.

⁴ *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-AR65, Decision on Application for Leave to Appeal, 07 September 2002, p. 2; *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, para. 3; *Prosecutor v. Simatović*, Case No. IT-03-69-AR65.2, Decision on Prosecution’s Application for Leave to Appeal Decision on Provisional Release, 30 September 2004, para. 2.

⁵ *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR65, Decision on Application for Leave to Appeal, 26 August 2002, p. 3.

may have erred in exercising its discretion in its assessment of the reliability and effectiveness of the guarantees of the Republic of Croatia for the Accused's provisional release. The Trial Chamber noted that, although there has been an encouraging improvement in the level of cooperation of the Republic of Croatia with the International Tribunal, this was a quite recent development.⁶ The Trial Chamber was still not satisfied as to the effectiveness with which the Croatian government could fulfil the undertakings it offered to guarantee the appearance of the Accused before the International Tribunal if released, even though the Republic of Croatia renewed its guarantee on behalf of the Accused.⁷ This Bench also notes that the Trial Chamber denied the Accused's motions for provisional release although the Prosecutor submitted in her Response that she does not oppose the Accused's provisional release.⁸

6. This Bench of the Appeals Chamber finds that the decision of the Trial Chamber with regard to the guarantees offered by the Republic of Croatia may be inconsistent with the recent findings of Trial Chamber I on 30 July 2004 in *Prosecutor v. Prlić et al.* In that case, the Prosecution questioned the reliability of the Croatian government's guarantees, with express reference to public statements made by Croatian government and political leaders opposing not only the indictment in the *Prlić* case, but also the indictment of the Accused in the present *Čermak and Markač* case.⁹ The Trial Chamber was nevertheless satisfied as to the reliability of the Croatian government's guarantees and ordered the provisional release of the accused to Croatia.¹⁰ The Appeals Chamber affirmed that decision in its rejection of the Prosecution's application for leave to appeal the decision as follows:

The Appeals Chamber does not accept that the Prosecution has established that the Trial Chamber may have erred in failing properly to consider the reliability and practical effectiveness of the Croatian Government's guarantees . . . [i]n light of . . . the strong assurances given by the Government representatives, coupled with the absence of any indication that those Government representatives would not be able to ensure the fulfilment of those guarantees, including evidence of their compliance with executing the arrest warrants of the Tribunal on the accused and assistance with the expeditious transfer of the accused to the Tribunal, the Prosecution has not established that the Trial Chamber may have erred in its assessment of the reliability and practical effectiveness of the Croatian government guarantees.¹¹

7. This Bench of the Appeals Chamber concludes that in the present case, the Accused have shown that there is a possibility of error by the Trial Chamber in its consideration of the guarantees offered by the Republic of Croatia with regard to the Accused in light of Trial Chamber I's recent

⁶ Impugned Decision, para. 9.

⁷ Cf. Decision on Ivan Čermak's and Mladen Markač's Motions for Provisional Release, 29 April 2004, para. 7, in which the Trial Chamber denied the Accused's first motions for provisional release.

⁸ Prosecution's Response to the Accused's Motions for Provisional Release Filed 23 July 2004, 28 July 2004, para. 11.

⁹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Order on Provisional Release of Jadranko Prlić, 30 July 2004, para. 31.

¹⁰ *Id.*, para. 33.

acceptance of the Croatian government's guarantees in *Prosecutor v. Prlić et al*, as affirmed by the Appeals Chamber. Moreover, this Bench notes that the Prosecutor has joined in the Accused's motion for leave to appeal the Trial Chamber's decision on grounds that it appears to be in direct conflict with the *Prlić* rulings.¹² Therefore, this Bench finds that the Accused have established good cause such that leave to appeal may be granted under Rule 65(D) of the Rules.

Disposition

8. On the basis of the foregoing, this Bench of the Appeals Chamber grants the Accused's Motion for leave to appeal the Impugned Decision. The parties are hereby directed to comply with paragraphs 7-9 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal for the filing of an interlocutory appeal.¹³

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

Done this 13th day of October 2004.
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

¹¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.1, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 42.

¹² Prosecutor's Response to Ivan Čermak's and Mladen Markač's Joint Motion for Leave to Appeal the Trial Chamber's Decision on Ivan Čermak's and Mladen Markač's Second Motions for Provisional Release, 29 September 2004, para. 10.

¹³ 7 March 2002 (IT/155 Rev 1).