



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

Case No. IT-03-73-AR65.1
Date: 2 December 2004
Original: English

IN THE APPEALS CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 2 December 2004

PROSECUTOR

v.

**Ivan ČERMAK
and
Mladen MARKAČ**

**DECISION ON INTERLOCUTORY APPEAL AGAINST TRIAL
CHAMBER'S DECISION DENYING 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. 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 (“International Tribunal”) is seised of Mladen Markač’s (“Appellant Markač”)¹ and Ivan Čermak’s (“Appellant Čermak”)² interlocutory appeals against the decision rendered by Trial Chamber II denying their second motions for provisional release, filed respectively on 22 and 26 October 2004. The Prosecution filed a response on 28 October 2004.³

I. Background

2. On 14 September 2004, Trial Chamber II (“Trial Chamber”) denied the motions of Appellants Čermak and Markač for provisional release.⁴ The Appellants sought leave to appeal from that decision pursuant to Rule 65 of the Rules of Procedure and Evidence (“Rules”).⁵ A bench of three judges of the Appeals Chamber granted leave to appeal the Impugned Decision on 13 October 2004.⁶

3. After considering all of the grounds of error alleged by the Appellants, leave to appeal was granted on the basis that they had demonstrated that the Trial Chamber may have erred in exercising its discretion in its assessment of the reliability and effectiveness of the guarantees of the Republic of Croatia, in light of the decision rendered by Trial Chamber I and affirmed by the Appeals Chamber to provisionally release the accused in the *Prlić et al.* case.⁷

II. Submissions

4. Before considering the Appellants’ submissions which are almost identical, the Appeals Chamber notes that several paragraphs from the Dissenting Opinion of Judge David Hunt in the *Nikola Sainović and Dragoljub Ojdanić* case were reproduced in their entirety without any

¹ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-AR65.1, Appellant Mladen Markač’s Interlocutory Appeal Against the Trial Chamber’s Decision Denying Second Motion for Provisional Release, 22 October 2004 (“Markač’s Appeal Brief”).

² *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-AR65.1, Appellant Ivan Čermak’s Interlocutory Appeal Against Trial Chamber’s Decision on Second Motion for the Provisional Release, 26 October 2004 (“Čermak’s Appeal Brief”).

³ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-AR65.1, Prosecution’s Response to the Defence Interlocutory Appeal on Trial Chamber’s Decision on Ivan Čermak’s and Mladen Markač’s Second Motions for Provisional Release, 28 October 2004 (“Prosecution’s Response”).

⁴ *Prosecutor v. Ivan Čermak’s and Mladen Markač*, Case No.: IT-03-73-PT, Decision on Ivan Čermak’s and Mladen Markač’s Second Motions for Provisional Release, 14 September 2004 (“Impugned Decision”).

⁵ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-AR65.1, 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,” 20 September 2004.

⁶ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-AR65.1, Decision on Joint Motion for Leave to Appeal Decision on Provisional Release, 13 October 2004 (“Decision Granting Leave to Appeal”).

⁷ *Prosecutor v. Prlić et al.*, Case No.: IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.3, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004.

reference being provided.⁸ For future reference, the Appeals Chamber reminds the Appellants that clear and precise references to the jurisprudence of the International Tribunal or other legal authorities relied upon, must be provided in all written submissions in appeal proceedings.⁹

5. The Appellants submit that the Trial Chamber: (i) failed to give sufficient weight to the fact that the Prosecution did not oppose the Appellants' provisional release; (ii) failed to recognise that new material had been presented in support of the argument that the Appellants' release would not pose any danger to victims, witnesses or other persons; and (iii) erred in the exercise of its discretion in its assessment of the reliability and effectiveness of the guarantees of the Republic of Croatia, in clear contradiction with another decision on provisional release rendered by Trial Chamber I and affirmed by the Appeals Chamber, whereby the guarantees provided by the Croatian government were accepted.¹⁰

Appellants' view of the Prosecution's position

6. The Appellants assert that the Trial Chamber erred when concluding that the Prosecution took an ambiguous position with respect to the Appellants' second motions for provisional release. According to the Appellants, the relevant fact is that the Prosecution does not oppose the Appellants' provisional release.¹¹ Regarding the fact that the Prosecution joined in the Appellants' application, they further submit that: (i) an agreement by the parties on some procedural or factual question is usually accepted as *communis consensus*;¹² (ii) the Prosecution does not oppose the Appellants' provisional release because they have demonstrated their "full and complete cooperation" *e.g.* giving additional interviews, submitting documentary evidence, fulfilling an agreement on reciprocal disclosure,¹³ and (iii) pursuant to the *in dubio pro reo* principle, the Prosecution's lack of opposition should be considered in favour of the Appellants.¹⁴

⁸ *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No.: IT-99-37-AR65, Decision on Provisional Release, Dissenting Opinion of Judge David Hunt on Provisional Release, 30 October 2002, paras 29, 30, 71, 73, 74.

⁹ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (IT/155 Rev.1) 7 March 2002.

VI. General Requirements for the Written Submissions

14. Where filings of the parties refer to passages in a judgement, decision, transcripts, exhibits or other authorities, they shall indicate precisely the date, exhibit number, page number and paragraph number of the text or exhibit referred to.

¹⁰ Markač's Appeal Brief, at page 6; Čermak's Appeal Brief, at page 6.

¹¹ Markač's Appeal Brief, para. 24; Čermak's Appeal Brief, para. 28.

¹² *Ibid.*

¹³ *Ibid.* See also *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-AR65.1, 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 Markač's Second Motions for Provisional Release, 20 September 2004, para. 17.

¹⁴ Markač's Appeal Brief, para. 31; Čermak's Appeal Brief, para. 29.

Seriousness of the charges

7. The Appellants submit that the Trial Chamber erred in relying on the seriousness of the charges against them. In support they claim that, according to the jurisprudence of the European Court of Human Rights, the severity of the sentence that may be imposed if the accused is convicted is not a ground for refusing provisional release.¹⁵

Whether the Appellants would appear for trial if released

8. Appellant Markač submits that the Trial Chamber erred by not taking into account the fact that he never tried to abscond prior to his surrender in spite of the fact that he knew in advance that he was considered a suspect and was likely to be indicted by the Prosecutor. He further argues that: (i) he never tried to hide; (ii) he gave several interviews to the Prosecution; (iii) he surrendered voluntarily; and (iv) he has always cooperated with the Prosecution “in a way which demonstrated his *bona fide* intention to appear for trial.”¹⁶

9. Appellant Čermak submits that the Trial Chamber erred by not taking into account the fact that he never tried to abscond prior to his surrender in spite of the fact that he was under investigation for six years and thus, knew that he was considered a suspect and was likely to be indicted by the Prosecutor.¹⁷ He further argues that: (i) he surrendered voluntarily as soon as he was indicted; (ii) he agreed to be interviewed in 1998 (when cooperation with the International Tribunal was regarded as a betrayal of national interests), 1999 and 2001; (iii) he provided the Prosecution with more than 150 documents; (iv) he agreed to be interviewed once after his surrender; and (v) he has cooperated with the International Tribunal for more than six years.¹⁸

Whether the Appellants would pose a danger to any victim, witness or other person if released

10. The Appellants argue that no evidence has been adduced in the Impugned Decision in support of the Trial Chamber’s suggestion that if released they may pose a danger to victims, witnesses or other persons.¹⁹ The Appellants assert that there is no indication that they ever posed a danger to any of the victims or witnesses during the 10 years that have elapsed since the alleged commission of the crimes,²⁰ and submit that the Trial Chamber erred when not according due

¹⁵ Markač’s Appeal Brief, para. 25; Čermak’s Appeal Brief, para. 23.

¹⁶ Markač’s Appeal Brief, para. 30.

¹⁷ Čermak’s Appeal Brief, para. 22.

¹⁸ Čermak’s Appeal Brief, para. 21.

¹⁹ Markač’s Appeal Brief, para. 27; Čermak’s Appeal Brief, para. 26.

²⁰ Markač’s Appeal Brief, para. 28; Čermak’s Appeal Brief, para. 26.

weight to the written undertakings signed by them to the effect that they would not attempt to contact potential witnesses, victims or other relevant persons.²¹

Government guarantees

11. The Appellants assert that the failure of the Croatian authorities to arrest and bring Ante Gotovina before the International Tribunal does not mean that the general level of cooperation of Croatia is not satisfactory or that the Appellants would not be arrested by the Croatian authorities if they failed to appear before the International Tribunal for trial.²² They further suggest that the purpose of their detention is to force the surrender of Ante Gotovina and submit as follows:

[n]o reasonable tribunal of fact could have reached the same conclusion connecting Ante Gotovina [sic] flight with the detention status of the [Appellants]. By concluding that, the [Appellants] became in fact [...] hostage of the Tribunal.²³

12. After comparing the instant case with the *Prlić et al.* case²⁴ the Appellants stress that the fact that two Trial Chambers have reached opposite conclusions with respect to guarantees provided by the Croatian government might result in a possible loss of confidence of the international community in the International Tribunal's administration of justice.²⁵

13. In both the *Prlić et al.* and *Čermak and Markač* cases, the Prosecution had questioned the reliability of the guarantees provided by the Croatian government, and raised concerns regarding: (i) public statements made by Croatian government and political leaders in support of the Appellants and accused, opposing the indictments against the accused in both cases;²⁶ and (ii) the failure of the Croatian government to arrest Ante Gotovina and bring him before the International Tribunal.²⁷ However, the Prosecution joined in the Appellants' motion for leave to appeal the Impugned Decision.²⁸

14. The Prosecution reiterates that it does not agree with the rulings of the Trial Chamber and the Appeals Chamber in the *Prlić et al.* case which appear to be in direct conflict with the Impugned Decision.²⁹ Nevertheless, it does not oppose the release of the Appellants who "generally have been

²¹ Markač's Appeal Brief, para. 29; Čermak's Appeal Brief, para. 27.

²² Markač's Appeal Brief, para. 26; Čermak's Appeal Brief, para. 24.

²³ *Ibid.*

²⁴ Markač's Appeal Brief, paras. 32, 34; Čermak's Appeal Brief, paras. 25, 30.

²⁵ Markač's Appeal Brief, para. 34; Čermak's Appeal Brief, para. 25.

²⁶ Prosecution's Response, para. 7. See also *Prosecutor v. Prlić et al.*, Case No.: IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.3, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 6.

²⁷ Prosecution's Response, para. 7.

²⁸ Decision Granting Leave to Appeal, para. 7; see also *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-AR65.1, 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.

²⁹ Prosecution's Response, para. 5.

more co-operative” with the International Tribunal,³⁰ and submits that given the rulings in the *Prlić et al.* case, no material circumstances justify detaining the Appellants while releasing the accused in the *Prlić et al.* case.³¹

Appellants’ other arguments

15. Finally, Appellant Markač argues that his medical condition (diabetes and heart disease) should be considered by the Appeals Chamber with greater diligence and seriousness because his health could deteriorate even more if he is not provisionally released.³² Appellant Čermak adds that he has been in the custody of the International Tribunal for more than seven months, and submits that it is unjust to be imprisoned pending the “uncertain start of the trial.”³³

III. Discussion

16. The Impugned Decision notes that most arguments raised by the Appellants had already been advanced in their motions for provisional release filed on 12 March 2004, and recalls that the Trial Chamber found that those arguments did not justify the provisional release sought. The Trial Chamber noted that “only two new matters” were relied upon by the Appellants in support of their second motions for provisional release, namely: (i) the fact that they both gave new interviews to the Prosecution after their initial appearance; and (ii) the fact that the President and the Prosecutor of the International Tribunal had reported to the United Nations Security Council on 29 June 2004, that the cooperation with Croatia had improved significantly.³⁴

Whether the Appellants will appear for trial if released

17. The Trial Chamber had previously concluded that it was not satisfied that the Appellants would appear for trial if released.³⁵ Even though no express finding was made in the Impugned Decision in this respect, it follows from the conclusions reached by the Trial Chamber regarding the seriousness of the charges against the Appellants, and the cooperation of the government of Croatia with the International Tribunal, that the Trial Chamber’s view remained the same. Besides, the Impugned Decision concludes that:

³⁰ Compared to the accused in the *Prlić et al.* case. See Prosecution’s Response, para. 10.

³¹ *Ibid.*, paras. 9, 10. The Prosecution submits that the flight risk, as well as the danger posed to victims, witnesses and other persons were more serious with respect to the accused in the *Prlić et al.* case.

³² Markač’s Appeal Brief, para. 29.

³³ Čermak’s Appeal Brief, para. 32.

³⁴ Impugned Decision, para. 8.

³⁵ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-PT, Decision on Ivan Čermak’s and Mladen Markač’s Motions for Provisional Release, 29 April 2004, para. 13.

...the Trial Chamber is not persuaded that there has been a material change of circumstances that would justify a change from its Decision on the Motions for Provisional Release of 29 April 2004.³⁶

Prosecution's position

18. When the Appellants first applied for provisional release the Prosecution opposed relying on, *inter alia*, the seriousness of the alleged crimes, the insufficient cooperation of the Croatian government, the failure to deliver Ante Gotovina, and the Appellants' failure to demonstrate that they would not pose danger to any victim, witness or other person if released. The Trial Chamber emphasized that, in spite of the fact that the arguments advanced by the Appellants were the same, the Prosecution took an ambiguous position with respect to the second motions for provisional release.³⁷ Consequently, it held that:

[i]t has not been demonstrated to the Chamber, on what basis the Prosecution now has rather equivocally expressed itself as not opposed to the provisional release of the two Accused, while not advocating it. Nothing is advanced to indicate that the matters enumerated, on which the Prosecution previously relied, have now changed, apart from the two identified matters.³⁸

19. The Prosecution's submissions were deemed unsatisfactory and unhelpful by the Trial Chamber³⁹ which stressed that it needed to be satisfied that there had been some significant change which justified the Prosecution's change of position. Hence, the Impugned Decision states that:

[t]he matters relied on by each Accused are not of sufficient force to do so, and the Prosecution has not dealt with it.⁴⁰

20. The Appeals Chamber notes that the Appellants' agreement to be interviewed after their arrest appears to have been considered as one important factor by the Prosecution which justified a change of position. Hence, the response to the Appellants' motions for provisional release filed on 23 July 2004, reads as follows:

...pursuant to the Prosecutor's policy in relation to provisional release, namely, that all accused persons should submit themselves to an interview upon arrest before their release is contemplated, *no further purpose is served in that respect by their continued detention.* [Emphasis added].⁴¹

21. In this regard, the Prosecution subsequently submitted before the Appeals Chamber that:

[r]espectfully the Prosecutor does not agree that she has not made her position clear [...] the Prosecutor plainly informed the Trial Chamber of any changes or developments that had occurred since the Chamber's ruling on the accused's first motions for provisional release [...] The Prosecutor did not suggest or argue that this was the only factor for the court to consider, or that it was a determinative factor. The Prosecutor also confirmed that "relations between the Government

³⁶ Impugned Decision, para. 11.

³⁷ *Ibid*, para. 9.

³⁸ *Ibid*.

³⁹ *Ibid*, para. 6.

⁴⁰ *Ibid*, para. 10.

⁴¹ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-PT, Prosecution's Response to the Accused's Motions for Provisional Release filed 23 July 2004, 28 July 2004, para. 8.

of the Republic of Croatia, and the Prosecutor have significant significant [sic] improved in recent months," [...] Beyond this, the Prosecutor simply indicated that, on balance, she did not oppose the second motions for release...⁴²

22. A previous decision rendered by the Appeals Chamber in the *Šainović* and *Ojdanić* case laid down a non-exhaustive list of factors which a Trial Chamber must take into account before granting provisional release.⁴³ The fact that the accused had provisionally accepted to be interviewed by the Office of the Prosecutor was one of those factors.⁴⁴ The Appeals Chamber recalls that an accused person may, if he decides to do so, cooperate with the Office of the Prosecutor, *inter alia*, by accepting to be interviewed by the Prosecution, but he does not have to do so and his provisional release is not conditioned, all other conditions being met, upon his agreement to be interviewed.⁴⁵

23. The Appeals Chamber finds that the Appellants' cooperation with the Prosecution may weigh in their favour insofar as it shows their general attitude of cooperation towards the International Tribunal, which is relevant to the determination as to whether they will appear for trial if released.⁴⁶ The Impugned Decision does not show that the Trial Chamber accorded sufficient weight, if any, to the Appellants' willingness to cooperate with the International Tribunal including the Office of the Prosecutor.

Seriousness of the crimes

24. When reaching its first decision denying the provisional release sought, the Trial Chamber relied predominantly on the apparent seriousness of the charges against the Appellants.⁴⁷ Subsequently, the Trial Chamber considered that the circumstances previously relied upon by the Prosecution in support of its opposition to the provisional release of the Appellants had not changed, and concluded that "the charges against the [Appellants] remain[ed] equally serious."⁴⁸

25. It is reasonable for a Trial Chamber to take into account the gravity of the offences charged in order to determine whether facing the possibility of a lengthy sentence would constitute an incentive for an accused to flee.⁴⁹ It is evident that the more severe the possible sentence which an

⁴² *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-AR65.1, 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. 8.

⁴³ *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No.: IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 ("*Šainović and Ojdanić Appeals Chamber Decision*"), para. 6.

⁴⁴ *Ibid*, para. 6.

⁴⁵ *Ibid*, para. 8.

⁴⁶ *Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No.: IT-99-37AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003, para. 12.

⁴⁷ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-PT, Decision on Ivan Čermak's and Mladen Markač's Motions for Provisional Release, 29 April 2004, para. 13.

⁴⁸ Impugned Decision, para. 9.

⁴⁹ *Prosecutor v. Blagoje Simić*, Case No.: IT-95-9-A, Decision on Motion of Blagoje Simić pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Service for his Father, 21 October 2004, para. 15.

accused face is facing, the greater is his incentive to flee.⁵⁰ Thus, the Appeals Chamber is not satisfied that the Trial Chamber erred in relying on the seriousness of the charges against the Appellants.

26. The Appeals Chamber recalls, however, that the seriousness of the charges against an accused cannot be the sole factor determining the outcome of an application for provisional release,⁵¹ and emphasizes that a Trial Chamber must take into account the seriousness of the charges *in addition* to several other factors.⁵²

27. In light of the foregoing, the Appeals Chamber considers that the Trial Chamber regarded the possible severity of the sentence as determinative, thus giving it undue weight for justifying the Appellants' detention.

Government guarantees

28. As noted in the Decision Granting Leave to Appeal, the Trial Chamber was not satisfied that the Croatian government could guarantee that the Appellants would appear before the International Tribunal if released.⁵³ The Trial Chamber acknowledged that there had been an improvement in the level of cooperation of the Republic of Croatia with the International Tribunal, but it concluded as follows:

...that is a very recent development, in which the Tribunal obviously will develop greater confidence within time. At present, notwithstanding the encouraging improvement, the accused General Ante Gotovina has still not been arrested.⁵⁴

29. In light of the decision to provisionally release the accused rendered by Trial Chamber I in the *Prlić et al.* case, and affirmed by the Appeals Chamber, the latter found in its Decision Granting Leave to Appeal that Trial Chamber II may have erred in exercising its discretion in its assessment of the reliability and effectiveness of the guarantees of Croatia in the instant case.⁵⁵

30. Rule 65 of the Rules places no obligation upon an accused applying for provisional release to provide guarantees from a State, as a prerequisite to obtaining provisional release.⁵⁶ Nonetheless,

⁵⁰ *Prosecutor v. Fatmir Limaj et al.*, Case No.: IT-03-66-AR65.2, Decision on Haradin Bala's Request for Provisional Release, 31 October 2003, para. 25.

⁵¹ *Šainović and Ojdanić Appeals Chamber Decision*, para. 6; *Prosecutor v. Blagoje Simić*, Case No.: IT-95-9-A, Decision on Motion of Blagoje Simić pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Service for his Father, 21 October 2004, para. 15.

⁵² See *Šainović and Ojdanić Appeals Chamber Decision*, para. 6.

⁵³ Decision Granting Leave to Appeal, para. 5.

⁵⁴ Impugned Decision, para. 9.

⁵⁵ Decision Granting Leave to Appeal, para. 7. See also *Prosecutor v. Prlić et al.*, Case Nos.: IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.3, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 42.

⁵⁶ *Prosecutor v. Vidoje Blagojević et al.*, Case No.: IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, para. 8.

the presentation of a guarantee from a governmental body has been regarded as advisable by the Appeals Chamber.⁵⁷ Rule 65(C) permits a Chamber to impose conditions upon the release of an accused “to ensure the presence of the accused for trial and the protection of others,” and frequently the production of a guarantee from the relevant governmental body is imposed as such a condition.⁵⁸

31. In the *Mrkšić* case the Appeals Chamber held that the reliability of a government guarantee must be determined in relation to the circumstances which arise in the particular case.⁵⁹ A distinction can be drawn with the instant case where the Appellants have shown a general attitude of cooperation towards the International Tribunal before and after their surrender, and have already provided the Office of the Prosecutor with relevant information.

32. The Appeals Chamber notes that even though the reliability of a guarantee must not be exclusively determined by reference to any assessment of the level of cooperation by the authority providing it, the general level of cooperation by that authority with the International Tribunal does have some relevance in determining whether it would arrest the accused in question.⁶⁰ In this regard, the President and the Prosecutor of the International Tribunal have, in recent months, made public statements before the United Nations Security Council regarding the substantial improvement in the cooperation of the Croatian authorities.⁶¹ Indeed - as acknowledged by the Trial Chamber - an example of this cooperation were the assurances provided by the Minister of Justice of the Republic of Croatia in her oral submissions, to the effect that the government would comply

⁵⁷ *Prosecutor v. Vidoje Blagojević et al*, Case No.: IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, paras 7, 8; *Prosecutor v. Vidoje Blagojević et al*, Case No.: IT-02-53-AR65, Decision on Application by Dragan Jokić for Provisional Release, 28 May 2002, p. 2.

⁵⁸ *Prosecutor v. Vidoje Blagojević et al*, Case No.: IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, para. 8.

⁵⁹ *Prosecutor v. Mile Mrkšić*, Case No.: IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, para. 9. Where the Appeals Chamber reasoned that it would be reasonable for a Trial Chamber to find that in the case of an accused who occupied a high level position in the government at the time the crimes with which he was charged were committed (regardless of whether he had lost political influence), there could be a “substantial disincentive” for the government authorities to arrest that accused in light of the fact that he still possessed valuable information he could disclose to the Tribunal “if minded to cooperate should he be kept in custody.”

⁶⁰ *Ibid*, para. 11. See also *Prosecutor v. Vidoje Blagojević et al*, Case No.: IT-02-60-AR65.4, Decision on Provisional Release Application by Blagojević, 17 February 2003.

⁶¹ See Address by Judge Theodor Meron, President of the International Tribunal to the United Nations Security Council, 29 June 2004: “...let me emphasize that the overall cooperation of Croatia with the Tribunal has improved significantly. Although the failure to arrest fugitive Ante Gotovina is still a matter of grave concern, I view the progress that has been made in Croatia’s relationship with the Tribunal with great satisfaction.” See Address by Carla del Ponte, Chief Prosecutor of the International Tribunal to the United Nations Security Council, 30 June 2004: “The Croatian authorities are at this point in time fully co-operating with my office. This co-operation must continue, and I expect Croatia to locate and transfer Gotovina to The Hague as soon as possible, hopefully before my next appearance before you.”

with orders of the International Tribunal and cover the costs and expenses related to the appearance of the Appellants before the International Tribunal.⁶²

33. Even though the failure to arrest fugitive Ante Gotovina is still a matter of grave concern,⁶³ this cannot be the decisive factor in the determination as to whether the guarantees offered by the Croatian government are sufficiently reliable to amount to satisfaction that the Appellants will appear for trial. The Appeals Chamber recalls that the circumstances of each accused must be evaluated individually as they weigh upon the likelihood that he will appear for trial. The weight to be attributed to guarantees by a government may depend upon the personal circumstances of the applicant.⁶⁴

34. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in exercising its discretion in its assessment of the reliability and effectiveness of the guarantees of Croatia in the instant case.

35. The Appeals Chamber notes that the fact, that the Appellants never tried to abscond prior to their arrest despite the fact that they knew in advance that they were likely to be indicted and could face a severe sentence if convicted, supports the likelihood that they will indeed appear for trial.

Whether the Appellants will pose any danger to victims, witnesses and other persons if released

36. The Trial Chamber concluded in this respect that:

...no new material or persuasive arguments have been presented which impact on the assessment of the possible danger that each Accused may pose to victims, witnesses or other persons. This remains a significant issue.⁶⁵

37. The Trial Chamber's first assessment of the arguments initially presented by the Appellants in this regard was influenced by the Prosecution's initial submission, *i.e.*, that the Appellants' positions of authority and Appellant Čermak's wealth "would assist [them] to be in a position to influence victims or witnesses."⁶⁶

38. The Appeals Chamber notes that, the following arguments had been put forward before the Trial Chamber: (i) there was no risk that, if released, the Appellants would pose a danger to any

⁶² See *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-PT, Decision on Ivan Čermak's and Mladen Markač's Motions for Provisional Release, 29 April 2004, para. 6.

⁶³ "[W]hile the Croatian authorities' cooperation has improved considerably, we expect them to exert their utmost efforts until Gotovina is at The Hague." Address by Theodor Meron, President of the International Tribunal to the United Nations General Assembly, 15 November 2004.

⁶⁴ *Šainović and Ojdanić Appeals Chamber Decision*, para. 7.

⁶⁵ Impugned Decision, para. 9.

victims or witnesses since many of them lived outside Croatia at addresses unknown to the Appellants; (ii) those potential witnesses who were living in Croatia were members of the army or the police who had been available to the Appellants since 1995; (iii) the Appellants never tried to contact or influence witnesses despite the fact that they had known for several years that there was a possibility that they could be indicted; (iv) none of the witnesses had suggested that the Appellants either directly or indirectly had attempted to influence their statements.⁶⁷

39. Moreover, in its submissions on appeal the Prosecution further stated that "...the danger posed to witnesses and others was more serious concerning the *Prlić* accused, since several of them lived and worked in immediate proximity to numerous witnesses and victims."⁶⁸

40. The Appeals Chamber considers that there was no evidence before the Trial Chamber to rebut the evidence adduced by the Appellants in satisfaction of the burden placed upon them to establish that, if released, they would not interfere with witnesses and victims.

41. The Appeals Chamber is not satisfied that the Trial Chamber considered cumulatively the various factors which needed to be taken into account in reaching a reasonable determination as to whether the Appellants, if released, would appear for trial, and would not pose any danger to victims, witnesses or other persons.

42. In light of the foregoing, the Appeals Chamber considers that the conditions required for the release of the Appellants pursuant to Rule 65(B) of the Rules have been met.

43. The Appellants have requested the opportunity to make oral submissions before the Appeals Chamber.⁶⁹ However, the Appeals Chamber considers that, the written briefs are sufficient and that there is no need for oral submissions.

IV. Disposition

44. Consequently, the Appeals Chamber grants the appeals against the Impugned Decision and orders that the Appellants be provisionally released under the following terms and conditions:

(a) The Appellants shall:

(i) remain within the confines of their residence in the Republic of Croatia;

⁶⁶ See *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-PT, Decision on Ivan Čermak's and Mladen Markač's Motions for Provisional Release, 29 April 2004, paras. 5,13.

⁶⁷ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-PT, Ivan Čermak's Motion for Provisional Release, 23 July 2004, para.12; Mladen Markač's Motion for Provisional Release, 23 July 2004, para. 12.

⁶⁸ Prosecution's Response, para. 9.

⁶⁹ Markač's Appeal Brief, para. 36; Čermak's Appeal Brief, para. 34.

(ii) surrender their passports to the Ministry of Interior of the Republic of Croatia;

(iii) within three days of their arrival, report the address at which they will be staying, to the Ministry of Interior and the Registrar of the International Tribunal, and notify the Ministry of Interior and the Registrar of the International Tribunal of any change of address within three days of such change;

(iv) report once a week to the local police station;

(v) consent to having their presence checked, including checking by occasional, unannounced visits by the Ministry of Interior, officials of the Government of the Republic of Croatia, the local police, or by a person designated by the Registrar of the International Tribunal;

(vi) not have any contact or in any way interfere with victims or potential witnesses or otherwise interfere with the proceedings or the administration of justice;

(vii) not seek direct access to documents or archives;

(viii) not destroy evidence;

(ix) not discuss the case with anyone - including the media - other than their counsel, and immediate members of their families;

(x) not have any contact with each other or with any other accused before this International Tribunal;

(xi) comply strictly with any requirements of the Croatian authorities deemed necessary to enable such authorities to comply with their obligations pursuant to the present decision;

(xii) return to the custody of the International Tribunal at such time and on such date as the Trial Chamber may order;

(xiii) comply strictly with any order issued by the Trial Chamber varying the terms of, or terminating, the provisional release;

(xiv) not occupy any official position within the Republic of Croatia;

(xv) report to the Registrar of the International Tribunal, within three days of the start of any employment or occupation, the position occupied, as well as the name and address of the employer;

(b) The Appeals Chamber requires the Government of the Republic of Croatia, to assume

responsibility for:

- (i) the personal security and safety of the Appellants while on provisional release;
- (ii) ensuring compliance with the conditions imposed on the Appellants under the present decision;
- (iii) all expenses concerning the transport of the Appellants from Schiphol airport in the Netherlands (or any other airport in the Netherlands) to their place of residence in the Republic of Croatia, and back to the Netherlands;
- (iv) ensuring that upon release of the Appellants at Schiphol airport (or any other airport in the Netherlands), designated officials of the Government of Croatia (whose names shall be provided in advance to the Trial Chamber and the Registry) take custody of the Appellants from the Dutch authorities and accompany the Appellants for the remainder of their travel to their respective places of temporary residence;
- (v) ensuring that a designated official of the Government of Croatia (or other such designated officials as the Trial Chamber may order or accept) accompanies the Appellants on their return flight to the Netherlands, and delivers the Appellants into the custody of the Dutch authorities at Schiphol airport (or any other airport in the Netherlands) at a date and time to be determined by the Trial Chamber;
- (vi) facilitating at the request of the Trial Chamber or of the parties to the instant case, all means of cooperation and communication between the parties and ensuring the confidentiality of any such communication;
- (vii) not issuing any new passports or documents which would enable the Appellants to travel;
- (viii) monitoring on a regular basis the presence of the Appellants at the addresses given to the Registry of the International Tribunal, and maintaining a log of such reports;
- (ix) submitting a written report⁷⁰ every month to the Trial Chamber and the Registry as to the presence of the Appellants and their compliance with the terms of the present decision;
- (x) reporting immediately to the Registrar of the International Tribunal the substance of any threats to the security of the Appellants, including full reports of investigations related to such threats;

⁷⁰ The report should include *inter alia* the findings of the reports mentioned under (viii).

(xi) immediately detaining the Appellants should they breach any of the terms and conditions of their provisional release and reporting immediately any such breach to the Registry and the Trial Chamber;

(xii) respecting the primacy of the International Tribunal in relation to any existing or future proceedings in the Republic of Croatia concerning the Appellants;

(c) The Appeals Chamber requests the Registrar of the International Tribunal to:

(i) consult with the Ministry of Justice in the Netherlands, the relevant Dutch authorities, and the relevant authorities of the Republic of Croatia, as to the practical arrangements for the Appellants' release;

(ii) keep the Appellants in custody until relevant arrangements are made for their travel;

(iii) transmit the present decision to the competent governments;

(d) The Appeals Chamber requests the Dutch authorities to:

(i) transport the Appellants to Schiphol airport in the Netherlands (or any other airport in the Netherlands) as soon as practicable;

(ii) at Schiphol airport in the Netherlands (or any other airport in the Netherlands), provisionally release the Appellants into the custody of the designated official of the Republic of Croatia;

(iii) on the Appellants' return, take custody of the Appellants at a date and time to be determined by the Trial Chamber and transport the Appellants back to the United Nations Detention Unit;

(e) The Appeals Chamber requests the authorities of the States through whose territory the Appellants may travel to:

(i) hold the Appellants in custody for any time they will spend in transit at the airport;

(ii) arrest the Appellants and detain them pending their return to the United Nations Detention Unit, should they attempt to escape.

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

Done this second day of December 2004.
At The Hague,
The Netherlands.



Judge Florence Ndepele Mwachande Mumba
Presiding Judge