



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-06-90-PT

Date: 28 November 2007

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Christine Van Den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Decision of: 28 November 2007

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**DECISION ON DEFENDANT ANTE GOTOVINA'S
MOTION FOR PROVISIONAL RELEASE AND ON
DEFENDANT ANTE GOTOVINA'S MOTION TO
STRIKE APPENDICES 11, 12, 13, 14, 15, 16, 17, 18 FROM
THE PROSECUTION'S RESPONSE OPPOSING
GOTOVINA'S MOTION FOR PROVISIONAL RELEASE**

The Office of the Prosecutor

Mr. Alan Tieger
Mr. Stefan Waespi

Counsel for the Accused

Mr. Luka S. Mišetić, Mr. Gregory Kehoe and Mr. Payam Akhavan for Ante Gotovina
Mr. Steven Kay and Mr. Andrew Cayley for Ivan Čermak
Mr. Goran Mikuličić and Mr. Tomislav Z. Kuzmanović for Mladen Markač

TRIAL CHAMBER I (“Trial 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 (“Tribunal”);

BEING SEIZED of “Defendant Ante Gotovina’s motion for provisional release”, filed on 8 August 2007 with seven annexes (“Motion”), wherein the Defence of Ante Gotovina (“Defence”), submitting that “the trial has now been postponed indefinitely”, requests:

- 1) that Ante Gotovina be granted provisional release pursuant to Rule 65 of the Rules of Procedure and Evidence (“Rules”) until the commencement of trial by way of home confinement with round-the-clock electronic surveillance at his home in Pakostane, Republic of Croatia (“Croatia”), arguing that he will return for trial and that he will not pose a threat to any victim, witness or other person, and
- 2) that an evidentiary hearing be held “so that the Trial Chamber may hear evidence from relevant witnesses”;¹

NOTING the “Prosecution response opposing Gotovina’s request for provisional release”, filed on 22 August 2007 with 19 annexes (“Response”), whereby the Prosecution opposes the request for provisional release, arguing that “Gotovina is a flight risk” and that “[a]fter the intense international efforts dedicated to securing Gotovina’s arrest, it would be contrary to the interests of justice to give him another chance to flee”;²

NOTING “Defendant Ante Gotovina’s motion for leave to file a reply in support of his request for provisional release”, filed on 31 August 2007, in which the Defence requests leave pursuant to Rule 126 *bis* for the “Reply of Defendant Ante Gotovina in support of his request for provisional release”, filed on 31 August 2007 with one annex (“Reply”);

CONSIDERING that pursuant to Rule 126 *bis* “[a] reply to the response, if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber”, that the deadline to file a reply expired on 29 August 2007 and that therefore the Reply is untimely;³

CONSIDERING therefore, that the “Prosecution response to Gotovina’s motion seeking leave to reply re: provisional release”, filed on 11 September 2007, need not be considered;

¹ Motion, paras 1, 4, 46, 47.

² Response, paras 1, 24.

³ The Reply and the “Defendant Ante Gotovina’s motion for leave to file a reply in support of his request for provisional release” are dated 30 August 2007 and were received late in the evening that day. The latter filing was re-submitted on 31 August 2007 due to an error. Both submissions were filed on 31 August 2007. The Trial Chamber notes that both filings would have been untimely even had they been filed with the Registry on 30 August 2007.

NOTING that in support of the Motion, the Defence submits guarantees from:

- (i) the Government of Croatia, which states that “it will undertake all necessary measures to ensure that General Gotovina is always available to appear before the Tribunal, including for trial”, that “General Gotovina will not pose a danger to any victim, witness or any other person”, and that it “is prepared to make extraordinary efforts in order to fulfill its obligations to the Trial Chamber and the ICTY pursuant to this Guarantee”;⁴
- (ii) the Archbishop of Zadar, Ivan Prenda, who states that Ante Gotovina “has promised me that he will obey every order of this Tribunal [...] that he will not attempt to flee should he be granted provisional release [...] that he will not pose a threat to any victim, witness or other person [...] and] that he will return to the detention unit of the Tribunal whenever ordered to do so by the Trial Chamber”;⁵
- (iii) Ante Gotovina himself, wherein he states that he “will not under any circumstances leave the confines of [his] property in Pakostane, Croatia”, that he agrees “to submit to all types of monitoring and surveillance ordered by the ICTY or by the Government of the Republic of Croatia”, that he agrees “to comply with every order of the Trial Chamber, including every order to return to the ICTY Detention Unit [...] whenever so ordered by the Trial Chamber”, that he “will not pose a threat to any victims, witnesses or any other person”, that he “will not make any public statements or appearances”, and that he is willing to “tender all of [his] personal and real property as bail, should the Trial Chamber deem that bail is necessary”;⁶

NOTING the Defence submission that while Ante Gotovina did not surrender voluntarily upon being indicted by the Tribunal on 8 June 2001 and while Ante Gotovina was only arrested on 7 December 2005, “his arrest was the result of the efforts of the Republic of Croatia, which now supports his provisional release”, that “[t]here is no reason to believe that the Croatian Government would be unable to fulfill its obligations under [its guarantee], given Croatia’s history of cooperation”, and, accordingly, that the guarantee of the Government of Croatia “is sufficient to justify provisional release”;⁷

NOTING the Defence submissions that “provisional release is warranted because of the extended length of General Gotovina’s pre-trial detention resulting from the delay in trial”, arguing that

⁴ Motion, paras 14 -15 and Annex 1, paras 3 and 5.

⁵ Motion, para. 21 and Annex 2, para. 4.

⁶ Motion, paras 30-32, Annex 7.

“General Gotovina has been in detention for more than one and a half years thus far”, that “[i]f the trial of this matter does not start until summer 2008, he will have been in detention for two and a half years awaiting trial”, and that “pre-trial release will greatly enhance the ability of General Gotovina to prepare his defence [...as h]is opportunities to consult with his attorneys and his investigative team are limited in the Detention Unit, as is his ability to review the substantial number of documents in this case”;⁸

NOTING the Defence submission that “[t]he Croatian Government has agreed to implement an electronic monitoring system should the Trial Chamber grant provisional release”, as further described in the Motion and annexes, which would require Ante Gotovina “to wear an inconspicuous transmitter [...] which is attached to his ankle or wrist by means of a tamper-detecting strap”, whereby his “presence is tracked constantly” and whereby the police, Trial Chamber, Prosecution, Registry and Defence counsel would be alerted immediately of any violations by Ante Gotovina of the terms of his home confinement;⁹

NOTING the Defence submission that “at this stage of the Tribunal’s existence, all cases pending before the Tribunal involve ‘high-ranking’ individuals because Security Council Resolutions 1503 and 1534 invited the ICTY to focus its cases only on ‘high-ranking’ defendants”, that “while the Tribunal may consider General Gotovina ‘high-ranking,’ this is no longer a relevant consideration given that other ‘high-ranking’ defendants are on provisional release, including Generals Cermak and Markac”;¹⁰

NOTING the Defence submission that “[a]ll charges are ‘serious’ [but that] General Gotovina does not face the most serious charge under the Tribunal’s Statute, which is the crime of genocide [and that] General Gotovina’s co-accused Generals Cermak and Markac, face charges virtually identical to those against General Gotovina and have been granted provisional release”;¹¹

NOTING the Defence’s comparison of the present request with the provisional release granted the Accused Milan Milutinović;¹²

NOTING the Prosecution submission that “Gotovina is a flight risk”, that “Gotovina’s past history demonstrates a determination to avoid standing trial”, that “[w]hen indicted by the ICTY in 2001,

⁷ Motion, paras 2-4, 14-20.

⁸ Motion, paras 5, 11.

⁹ Motion, paras 10, 22-27, Annexes 3-6.

¹⁰ Motion, para. 38.

¹¹ Motion, para. 39.

¹² Motion, paras 41-45.

Gotovina went into hiding and then fled Croatia [evading] apprehension for four and a half years, using false identities and forged documentation”, that “Gotovina has been skilful and resourceful in evading arrest”, and that the Defence has not shown “why, if released, [Ante Gotovina] would not act in the same way again”,¹³

NOTING the Prosecution submission that the burden which rests upon the Defence is a “‘substantial’ one”;¹⁴

NOTING the Prosecution submission that “[w]hen arrested, Gotovina had two Croatian passports bearing his photograph with false names [and that the] stamps in the passports show that Gotovina travelled extensively with them [...including to] Spain, Italy, Brazil, Argentina, Peru, Chile, Singapore, Malaysia, Mauritius, Japan and the Dominican Republic”;¹⁵

NOTING the Prosecution submission that the guarantees submitted by the Defence are insufficient to ensure Ante Gotovina’s attendance at trial for the following reasons:¹⁶

- (i) “Gotovina has ample finances and support networks in Croatia and abroad” and “[h]is skills, resources and ‘financial and practical assistance’ from relatives and supporters have helped him to evade capture in the past”;¹⁷
- (ii) “past experience proves that even when Croatia possessed the ‘political will’ and ‘determination’ to cooperate with the Tribunal, its efforts to locate Gotovina were useless”;¹⁸
- (iii) “Gotovina has also evaded French warrants for his arrest [...and has] failed to appear to stand trial in France or to serve his sentences imposed *in absentia*”;¹⁹
- (iv) “[n]either constant surveillance nor electronic monitoring can ensure that the Accused stays within the reach of the Tribunal, which has limited means to apprehend fugitives” and that an “ankle bracelet does not eliminate the risk of flight; it merely helps to confirm that flight has occurred”;²⁰

¹³ Response, paras 1, 2, 4.

¹⁴ Response, para. 3.

¹⁵ Response, para. 7, referring to Annex 1, “Details of stamps from Gotovina’s false passports, April 2000-December 2004”, and Annex 2, “Copies of Gotovina’s false passports”.

¹⁶ Response, para. 16.

¹⁷ Response, para. 12.

¹⁸ Response, para. 21.

¹⁹ Response, para. 13. See also paras 14-15.

²⁰ Response, paras 18, 20.

- (v) the Defence is “vague as to the practicalities of the proposed home confinement” and “[t]he Government of Croatia has not given any details of the resources it would devote to monitoring Gotovina nor to how it would ensure that he remains within his residence”;²¹
- (vi) “[t]he Archbishop’s guarantee is based on Gotovina’s promise that he will obey the Tribunal and will not attempt to flee or to pose a threat to anyone” and that as “[t]he Archbishop has no means of enforcing this promise, nor would he suffer any consequences if Gotovina were to fail to live up to his promise”, this guarantee “should be given no weight”;²² and
- (vii) Ante Gotovina’s promises “to return and to surrender his personal assets as a bail bond are worthless [...] in light of his personal history of evading justice while his assets were frozen”;²³

NOTING the Prosecution submission that “Gotovina’s 20 months in preventive detention does not exceed the reasonable time period prescribed by international law and is not impermissibly lengthy given the circumstances of the case and the serious crimes charged”, that “the [r]easonable length of pre-trial detention must be evaluated in light of the circumstances of the individual case”, and that the Tribunal’s jurisprudence “recognizes that the reasonableness of the length of pre-trial detention must be interpreted against the circumstances in which the Tribunal operates”;²⁴

NOTING the Prosecution submission that “Gotovina’s application for provisional release must be decided on his facts and not those of his co-defendants [...] which are] materially different from [those] of his co-accused, who voluntarily surrendered to the Tribunal”;²⁵

NOTING the Prosecution submission that the Defence’s comparison with the provisional release of Milan Milutinović is irrelevant, referring to the Appeals Chamber’s holding that the factors justifying provisional release “will differ from one defendant to another depending on all circumstances of the particular case”, and submitting that the weight to be accorded to the government guarantees depends on the personal circumstances of the accused as well as the particular case as a whole, that “Milutinović did eventually surrender to the Tribunal”, and that

²¹ Response, para. 19.

²² Response, para. 22.

²³ Response, para. 23, Annex 8

²⁴ Response, paras 25, 26, referring to the jurisprudence of the European Commission of Human Rights and the European Court of Human Rights and criteria assessed therein, including the length of detention in relation to the nature of the crime, the physical and psychological consequences of the detention on the detainee, and the complexity of the case and investigations, and the conduct of the entire procedure.

²⁵ Response, paras 29, 30.

“Milutinović demonstrated an overtly ‘cooperative disposition’ by assisting the Prosecution, which added weight to his personal guarantee”;²⁶

NOTING the Prosecution submission that pre-trial detention does not affect Ante Gotovina’s ability to prepare his defence, arguing that “[a]n accused’s right to adequate time and facilities for the preparation of his defence may be appropriately safeguarded by means other than provisional release” and that an “accused’s inability to conduct his defence in a more desirable or convenient location is ‘a logistical issue and not a factor that assists in the assessment of the likelihood that he will return for trial’”;²⁷

CONSIDERING that pursuant to Rule 65(B) of the Rules provisional release “may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial, and, if released, will not pose a danger to any victim, witness or other person”;

CONSIDERING that an accused seeking provisional release has the burden of satisfying the Trial Chamber that he will appear for trial;²⁸

CONSIDERING that a Trial Chamber in assessing whether the elements of Rule 65(B) have been met must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision, that it must then indicate its view on those relevant factors, that is, the Trial Chamber must demonstrate how the accused has met or failed to meet his burden to satisfy the Trial Chamber that he will appear for trial and will not pose a danger to any victim, witness or other person;²⁹

CONSIDERING that when one of the conditions required by Rule 65(B) has not been met, a Trial Chamber must deny provisional release and need not consider other conditions;³⁰

²⁶ Response, para. 31 with references.

²⁷ Response, para. 32, referring to *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović motion for provisional release, 22 May 2007, para. 13.

²⁸ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.1, Decision on interlocutory appeal from Trial Chamber decision granting Nebojša Pavković’s provisional release, 1 November 2005, para. 11.

²⁹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence’s interlocutory appeal of Trial Chamber’s decision denying Ljubomir Borovčanin provisional release, 30 June 2006, para. 8.

³⁰ See, *inter alia*, *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence’s interlocutory appeal of Trial Chamber’s decision denying Ljubomir Borovčanin provisional release, 30 June 2006, para. 7; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović motion for provisional release, 22 May 2007, para. 4; *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence appeal against Trial Chamber’s decision on Sredoje Lukić’s motion for provisional release, 16 April 2007, paras 6, 23; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.3, Decision on interlocutory appeal of Trial Chamber’s decision denying Ljubomir Borovčanin provisional release, 1 March 2007, para. 6.

CONSIDERING that the relevant factors, as well as the weight to be accorded to them, depends upon the particular circumstances of each case;³¹

CONSIDERING that Ante Gotovina not only did not surrender voluntarily to the Tribunal, but also actively evaded arrest for a significant period of time and that while evading arrest Ante Gotovina travelled extensively across international borders by using forged personal documents and false identities;

CONSIDERING that Ante Gotovina's lack of a voluntarily surrender to the Tribunal, coupled with his proven ability and determination to avoid arrest, raises significant doubt as to the Defence's submission that he will return for trial if provisionally released;

CONSIDERING that Ante Gotovina faces serious charges of crimes against humanity and violations against the laws or customs of war, which carry the possibility of a significant prison sentence if convicted;

CONSIDERING that while evading arrest Ante Gotovina was aware of the indictment and the charges against him, including the gravity thereof and the consequences for him should he be convicted by the Tribunal;

CONSIDERING therefore, that the gravity of the crimes charged and the consequences of a conviction provide a clear disincentive for Ante Gotovina to appear for trial and, therefore, weigh significantly against granting him provisional release;

CONSIDERING that the Government of Croatia in the past has demonstrated a willingness to cooperate with the Tribunal in the apprehension of Ante Gotovina, but that the commitment of the Government has been shown to be of limited effect where Ante Gotovina has demonstrated his ability and determination to thwart, for a significant amount of time, all efforts to apprehend him, including efforts of the international community;

CONSIDERING therefore, that the guarantee offered by the Government of Croatia, seen in the context of Ante Gotovina's proven ability and determination to avoid arrest, is not sufficient to satisfy this Trial Chamber that Ante Gotovina, if provisionally released, will return to the Tribunal when ordered and for trial;

³¹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.3, Decision on interlocutory appeal of Trial Chamber's decision denying Ljubomir Borovčanin provisional release, 1 March 2007, para. 7.

CONSIDERING in this respect, that the guarantee by the Archbishop of Zadar, and the guarantee by Ante Gotovina himself upon which the Archbishop's guarantee is based, do not provide support in this respect and therefore will not be given weight by the Trial Chamber;

CONSIDERING that provisional release by way of home confinement combined with electronic surveillance is of limited effect to *prevent* an escape, making it an insufficient remedy and, therefore, does not satisfy the Trial Chamber that provisional release conditions will not be violated;

CONSIDERING that the length of Ante Gotovina's pre-trial detention at present and at trial start during the summer of 2008, as projected by the Defence, does not amount to an unreasonably long pre-trial detention before this Tribunal, especially in view of the gravity of the crimes with which Ante Gotovina is charged and his history of evading arrest for a significant amount of time;

CONSIDERING that the Defence's argument that provisional release will "greatly enhance the ability of General Gotovina to prepare his defence" by affording better opportunities to consult with his attorneys and investigative team and to review documents does not assist in the assessment under Rule 65(B) whether Ante Gotovina will appear for trial if provisionally released, and will therefore not be considered by the Trial Chamber;

FINDING that, whereas the incentives not to appear for trial remain unchanged, the guarantees are not sufficiently effective, and the Defence has provided no convincing arguments to support that Ante Gotovina has changed his attitude rather than having simply adapted to the situation he finds himself at present, the Trial Chamber is not satisfied that Ante Gotovina will appear for trial if provisionally released;

FINDING therefore, that the Trial Chamber need not consider other conditions under Rule 65(B) and that it is not necessary to hold an evidentiary hearing;

BEING ALSO SEIZED of "Defendant Ante Gotovina's motion to strike appendices 11, 12, 13, 14, 15, 16, 17, and 18 from the Prosecution's response opposing Gotovina's motion for provisional release," filed on 29 August 2007 with 21 annexes ("Motion to Strike"),³² whereby the Defence requests the Trial Chamber to strike annexes 11 through 18 of the Response, submitting that the Prosecutor "offers no admissible evidence to support her allegations that Gotovina 'twice failed to stand trial in France or to serve his sentence imposed *in absentia*,' or that 'Gotovina received

³² On 29 August 2007, the Defence filed the "Defendant Ante Gotovina's motion for leave to exceed the word limitation" in respect of the Motion to Strike.

protection and assistance from 100 to 200 armed former military personnel in Croatia as well as from acquaintances and friends in South America and from members of the Italian mafia”;³³

NOTING the “Prosecution response opposing Gotovina’s motion to strike annexes”, filed on 11 September 2007 with one annex (“Second Response”), wherein the Prosecution submits that:

- 1) “[o]f the eight appendixes [*sic*] challenged by the Defence, seven consist of copies of public official court and law enforcement records from France” and that one annex “is a translation of a letter from the Croatian Ministry of the Interior to the Council for Cooperation with the International Court of Justice and the International Criminal Tribunal [which] was faxed to the Prosecutor by Croatian authorities to explain the steps the Croatian Government was taking to attempt, unsuccessfully, to locate and arrest Gotovina”,
- 2) “Gotovina has failed to raise any concerns about the authenticity of these documents” but instead offers “an elaborate background conspiracy story to explain how these documents fit in to a larger plot against him”, and
- 3) the annexes “are properly filed pursuant to Rule 89 (C)”;³⁴

NOTING the “Defendant Ante Gotovina’s motion for leave to file a reply in support of his motion to strike appendices”, filed on 18 September 2007, in which the Defence requests leave pursuant to Rule 126 *bis* for the “Reply of Defendant Ante Gotovina in support of his motion to strike annexes”, filed on 18 September 2007 (“Gotovina Reply”), wherein the Defence argues that:

- 1) “Rule 89(D) enables the Trial Chamber to strike evidence from the record if its probative value is outweighed by the need to ensure a fair trial”,³⁵
- 2) the documents in the annexes “have no probative value because the Prosecution is unable to authenticate the documents [...having failed] to identify the source of the documents, and in particular, which service of the French and Croatian governments allegedly tendered the documents [...having failed] to demonstrate the chain of custody of the documents [...and having failed] to submit a witness to testify as to the truth of the matters asserted in the documents”,³⁶

³³ Motion to Strike, para. 1.

³⁴ Second Response, paras 2, 3, 5.

³⁵ Gotovina Reply, para. 2. The Trial Chamber notes that Rule 89(D) reads: “A chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”.

³⁶ Gotovina Reply, para. 2.

- 3) “[t]he burden is on the Prosecution to demonstrate that these documents are authentic and not subject to Rule 70”,³⁷ and
- 4) “General Gotovina disputes both the authenticity as well as the substance of the documents, including that he was convicted *in absentia* [...] or that warrants for his arrest were issued,”³⁸

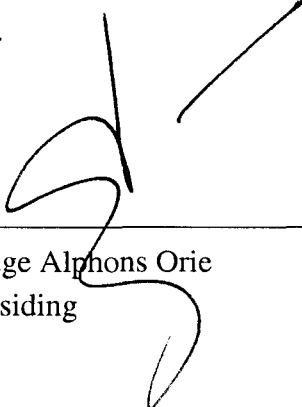
CONSIDERING that as the Defence has not satisfied the Trial Chamber that Ante Gotovina will appear for trial if provisionally released, any new factual elements which have been introduced by the Prosecution, such as his alleged behaviour towards French authorities, need no further consideration by the Trial Chamber;

PURSUANT to Rule 65 of the Rules;

DENIES the Motion in its entirety;

DISMISSES the Motion to Strike.

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



Judge Alphons Orié
Presiding

Dated this twenty-eighth day of November 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

³⁷ Gotovina Reply, para. 6.

³⁸ Gotovina Reply, para. 7.