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UNITED NATIONS

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-06-90-AR65.1

Date: 17 January 2008

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **17 January 2008**

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON ANTE GOTOVINA'S APPEAL AGAINST DENIAL OF 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

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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 ("Appeals Chamber" and "Tribunal", respectively) is seized of the "Defendant Ante Gotovina's Interlocutory Appeal of the Trial Chamber's Decision on Provisional Release" ("Appeal") filed partly confidentially on 5 December 2007.

I. PROCEDURAL BACKGROUND

2. On 8 August 2007 Ante Gotovina (also, "Appellant") filed a "Defendant Ante Gotovina's Motion for Provisional Release", including seven annexes ("Motion"). On 22 August 2007 the Office of the Prosecutor ("Prosecution") filed its "Prosecution Response Opposing Ante Gotovina's Request for Provisional Release", which included 19 annexes ("Prosecution Response to the Motion"). The Appellant submitted his "Defendant Ante Gotovina's Motion for Leave to File a Reply in Support of His Request for Provisional Release" ("Motion for Leave to Reply") and the "Reply of Defendant Ante Gotovina in Support of His Request for Provisional Release" on 30 August 2007 ("Reply Brief"), both filed on 31 August 2007.

3. On 28 November 2007 the Trial Chamber issued its "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" ("Impugned Decision"), dismissing the Appellant's request for provisional release.

4. As mentioned above, on 5 December 2007 the Appellant filed the Appeal. The Prosecution responded on 17 December 2007 with its "Prosecution Response to Gotovina's Appeal Against Denial of Provisional Release" ("Response") and, on 21 December 2007, the Appellant filed the "Defendant Ante Gotovina's Reply in Support of His Interlocutory Appeal of the Trial Chamber's Decision on Provisional Release" ("Reply").

II. STANDARD OF REVIEW

5. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.[1] The Appeals Chamber has previously held that a decision on provisional

[1] See, *e.g.*, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 5; *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Decision"), para. 6; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005 ("*Boškoski* Decision of 28 September 2005"), para. 5.

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release by the Trial Chamber under Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rule" or "Rules") is a discretionary one.[2] Accordingly, the relevant inquiry is whether the Trial Chamber has correctly exercised its discretion in reaching that decision, in particular by considering all those relevant factors which a reasonable trial chamber would have been expected to take into account before reaching a decision.[3]

6. For the Appeals Chamber to intervene in a discretionary decision of a Trial Chamber, it must be demonstrated that the Trial Chamber has committed a "discernible error" resulting in prejudice.[4] The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[5]

III. APPLICABLE LAW

7 Pursuant to Rule 65(A), once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B), a Chamber may grant provisional release if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness or other person; and after having given the host country and the State to which the accused seeks to be released the opportunity to be heard.[6]

8. In deciding whether the requirements of Rule 65(B) have been met, a Trial Chamber 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. It must then provide a reasoned opinion indicating its view on those relevant factors.[7] The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as

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[2] See, *e.g.*, *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, para. 3.
[3] See, *e.g.*, *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 6.
[4] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić* Decision on Admission of Transcript"), para. 9.
[5] *Prlić* Decision on Admission of Transcript, para. 8.
[6] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65-4, Decision on the Prosecution Appeal of the Trial Chamber's "*Décision relative à la demande de mise en liberté provisoire de l'accusé Pušić*", 20 July 2007 ("*Pušić* Decision"), para. 8.
[7] *Prosecutor v. Vujadin 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 ("*Borovčanin* Decision of 30 June 2006"), para. 8.

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can be foreseen, at the time the accused is expected to return to the International Tribunal.[8] What these relevant factors are and the weight to be accorded to them depend upon the particular circumstances of each case.[9] This is because decisions on motions for provisional release are fact intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.[10]

IV. DISCUSSION

9. The Appellant raises four grounds of appeal against the Impugned Decision. The Appeals Chamber will deal with them in turn.

A. Change of Appellant's attitude

10. In the Impugned Decision, the Trial Chamber, in addition to the Government of Croatia's guarantees and the Appellant's own assurances, considered the guarantees from the Archbishop of Zadar, Ivan Prenđa, "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'."[11] It went on to consider that the guarantees by the Archbishop of Zadar were essentially based upon the Appellant's own assurances and did not provide support for the claim that Gotovina would return to the Tribunal when ordered and for trial.[12] The Trial Chamber therefore decided that they should not be given any weight.[13]

11. The Appellant argues that the Archbishop stated that he has known the Appellant for fourteen years and that he certified "with his full moral authority" that Gotovina would honour his commitment to return to the Tribunal when so ordered.[14] The Appellant submits that the Trial Chamber abused its discretion in disregarding such assurances because of his prior decision to avoid arrest (his "prior attitude") and therefore making it effectively impossible for him to plead a change in attitude.[15]

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[8] *Stanišić* Decision, para. 8.
[9] *Stanišić* Decision, para. 8.
[10] *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Decision Denying Johan Tarčulovski's Motion for Provisional Release, 4 October 2005, para. 7.
[11] Impugned Decision, p. 3.
[12] Impugned Decision, p. 9.
[13] Impugned Decision, p. 9.
[14] Appeal, paras 9-10; Reply, paras 5 and 7.
[15] Appeal, paras 11-13; Reply, paras 6-8.

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12. The Appeals Chamber notes that the "guarantees" offered by the Archbishop of Zadar were essentially based upon the Appellant's own words to him, although the Archbishop did add his own belief that the Appellant would not breach his promises.[16] In such circumstances, a Trial Chamber could legitimately consider these assurances as lacking an independent basis premised on a discernible power of the Archbishop to control the Appellant's actions. A Trial Chamber is indeed required to consider the weight to be accorded to certain guarantees in relation to the particular circumstances of the case.[17] In this case, the Trial Chamber did carefully evaluate these guarantees in light of the circumstances of the Appellant's case,[18] coming to the conclusion that "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".[19] The Appellant has not shown any discernible error in this instance.

B. Incentives not to appear for trial

13. The Trial Chamber also found that the "gravity of the crimes charged and the consequences of a conviction provide a clear disincentive for Ante Gotovina to appear for trial"[20] and that "the incentives not to appear for trial remain unchanged" from the time he was arrested.[21]

14. The Appellant challenges the Trial Chamber's findings essentially on the premise that the Trial Chamber was or should have been aware that, from the time of his initial appearance, the Prosecution has failed to disclose any evidence that he "committed any crime" or demonstrate a *prima facie* basis for his guilt.[22] Conversely, the statements by the Prosecution are read by the Appellant to mean that he took actions to prevent or punish crimes.[23] While the Prosecution refers to the material submitted at the stage of the confirmation of the Indictment,[24] the Appellant argues that this may not be considered "*real* evidence" of his guilt, pointing to several instances of indictments withdrawn or modified after that stage.[25] Moreover, the Appellant alleges that the recent Appeal Judgement in the case *Prosecutor v. Sefer Halilović*, which has clarified some aspects of the doctrine of superior responsibility, provides further incentive for him to appear for

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[16] Motion, Exhibit B.
[17] *Cf.*, for example, *Prosecutor v. Milan Lukić and Sredoje 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 (*Lukić* Decision), para. 21.
[18] See, in particular, Impugned Decision, pp. 8-9.
[19] Impugned Decision, p. 9.
[20] Impugned Decision, p. 8.
[21] Impugned Decision, p. 9.
[22] Appeal, paras 14-16. See also Appeal, paras 18-20 ("Lack of evidence of 'excessive shelling'") and paras 21-23 ("General Gotovina's lack of knowledge of any murders") and Reply, paras 10-11.
[23] Appeal, paras 24-25.
[24] Response, para. 4.
[25] Reply, para. 12-15 (emphasis of the quoted portion in the original).

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trial.[26] On the basis of the foregoing, the Appellant argues that the Trial Chamber erred in not considering this newly available information on the purported weakness of the Prosecution case in considering whether to grant provisional release.[27] The Prosecution contends, *inter alia*, that the "speculation about the potential merits" of the case is an issue first raised only on appeal and therefore the Trial Chamber may not have been said to have committed an error.[28]

15. The Appeals Chamber has held that at the pre-trial stage of the proceedings the accused's "guilt or innocence remains a matter to be adjudicated"[29] and that, in such circumstances, it is not unreasonable for a Trial Chamber to consider the case before the Tribunal as a factor providing incentive to flee.[30] Although the seriousness of the crimes charged cannot be the sole factor determining a Trial Chamber's decision on provisional release,[31] the Appeals Chamber finds that the Trial Chamber properly considered this factor in combination with all the other relevant factors, including the circumstances of the Appellant's arrest. Thus, the Appellant has not shown any discernible error in this respect.

C. Guarantees by the Republic of Croatia

16. The Trial Chamber considered that "the Government of Croatia in the past has demonstrated a willingness to co-operate 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."[32] It further considered 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".[33] It went on to find that "the guarantees [provided] are not sufficiently effective".[34]

17. The Appellant submits that the Trial Chamber abused its discretion in reaching the above conclusions. It notes that the Government of Croatia, whilst aware of the circumstances of his arrest, decided to submit strong guarantees and argues that these circumstances, coupled with Croatia's "full compliance with its international obligations", warrant a *prima facie* case in his

[26] Appeal, paras 26-31.
[27] Appeal, para. 17.
[28] Response, para. 5.
[29] *Boškoski* Decision of 28 September 2005, para. 12.
[30] *Id.*
[31] *Borovčanin* Decision of 30 June 2006, para. 14.
[32] Impugned Decision, p. 8.
[33] Impugned Decision, p. 8.
[34] Impugned Decision, p. 9.

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favour.[35] The Appellant further avers that no reasonable Trial Chamber could have rejected the guarantees of a member-elect of the United Nations Security Council without at least holding an evidentiary hearing on the matter.[36] The Appellant finally suggests that the Impugned Decision is further premised on an error of fact, since the effect of the Government of Croatia's commitment prior to his arrest may not be used to evaluate guarantees related to the conditions of provisional release.[37]

18. The Appeals Chamber finds that the Trial Chamber duly considered the Government of Croatia's guarantees not in isolation, but in light of the specific circumstances of the case.[38] The Appellant appears to be under the misapprehension that a Trial Chamber is called to evaluate the guarantees offered by a government *in abstracto* and to assign to them a specific weight or significance depending on their source. The Impugned Decision, instead, appropriately deals with the guarantees in connection with the circumstances of the Appellant in particular, specifically his previous history and his proven ability to abscond from justice and evade law-enforcement authorities not just in Croatia, but in other countries, too.[39] Thus, in view of the margin of deference in discretionary matters such as provisional release, the Appeals Chamber finds that the Trial Chamber did not commit a discernible error in taking into account the Appellant's prior behaviour in order to ascertain the likely effectiveness of the guarantees in question.

D. Consideration of the Reply Brief

19. Rule 126 *bis* provides that a reply to a response, "if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber." The Trial Chamber noted the Motion for Leave to Reply, filed on 31 August 2007, in which the Appellant requested leave (pursuant to Rule 126 *bis*) for the Reply Brief, which was also filed on that same day. The Trial Chamber further noted that the two filings were originally received by the Registrar late in the evening on 30 August 2007 but only filed the day after, adding that both filings would have been untimely even if they had been filed on 30 August 2007.[40]

20. The Appellant submits that the Trial Chamber abused its discretion in refusing to consider the Reply Brief in this case, since the Head of Court Management "advised counsel for Gotovina

[35] Appeal, paras 32-33.
[36] Appeal, para. 34.
[37] Appeal, paras 35-36; Reply, paras 24-25.
[38] *Cf., e.g., Prosecutor v. Vujadin Popović*, Case No. IT-02-57-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović's Application for Provisional Release, 28 October 2005, para. 10; *Prosecutor v. Vujadin 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. 16; *Lukić* Decision, para. 21.
[39] Impugned Decision, pp. 6, 8-9.
[40] Impugned Decision, p. 2 and fn. 3.

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that the time for filing a … reply to the opposing party's after-hours filing was to be counted from the date of *distribution* of the filing, not from the date of filing itself."[41] Moreover, the Appellant argues, the Trial Chamber did not enquire about the timing of the filing or the discrepancy in the filing dates.[42] According to the Appellant these conclusions and the denial of leave to file the Reply Brief therefore constitute abuse of discretion.[43]

21. The Prosecution responds that the Appellant has no right to file a reply and that the Trial Chamber therefore committed no discernible error in deciding to disregard the Reply Brief,[44] in particular in light of the fact that his filings before the Trial Chamber never mentioned the delays in service of the response as a reason to extend the deadlines.[45] The Prosecution further argues that the additional documents related to the communications between the Appellant and the Court Management and Support Section are not part of the record and, in any event, indicate that an extension of time may be granted by the Trial Chamber if the delay in service is raised before the Trial Chamber – which the Appellant failed to do.[46] Finally, the Prosecution avers that the decision to exclude the Reply Brief had no effect on the outcome of the Impugned Decision.[47]

22. The Appeals Chamber finds that the Trial Chamber could not have considered the issue of the delay of service because the matter was properly first raised by the Appellant only on appeal. Thus, the Trial Chamber did not commit a discernible error in this respect. In any event, the arguments of the Appellant would also fail on the merits. Although the Tribunal has granted extensions of time in certain instances, and in particular when a party mentions the issue of delay of service explicitly in its own filings, the Rules are clear that time limits start running from the date of *filing*. Moreover, even if the Trial Chamber had considered 23 August 2007, the date of circulation of the Prosecution Response to the Motion, as the filing date (instead of 22 August, the date appearing on the official filing), the Motion for Leave to Reply and the Reply Brief would still have been filed late, since the deadline would have expired on 30 August. While these two documents are indeed dated 30 August 2007, they were filed only when they were re-submitted on 31 August 2007 due to an error.[48] In light of the foregoing, the Trial Chamber therefore did not commit a discernible error in disregarding the Reply Brief.

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[41] Appeal, para. 38 (emphasis in original). See also Reply, paras 26-31.
[42] Appeal, paras 39 and 41.
[43] Appeal, para. 40.
[44] Response, para. 10.
[45] Response, para. 11.
[46] Response, para. 12.
[47] Response, para. 13.
[48] Impugned Decision, fn. 3.

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V. DISPOSITION

23. On the basis of the foregoing, the Appeals Chamber **DISMISSES** the Appeal.

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

Done this 17th day of January 2008
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

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