



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-AR108bis.2

Date: 17 January 2008

Original: English

**THE APPEALS CHAMBER**

**Before:**

**Judge Fausto Pocar, Presiding  
Judge Liu Daqun  
Judge Andrézia Vaz  
Judge Theodor Meron  
Judge Wolfgang Schomburg**

**Registrar:**

**Mr Hans Holthuis**

**Decision of:**

**17 January 2008**

**PROSECUTOR**

**v.**

**ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ**

**PUBLIC**

**DECISION ON CROATIA'S REQUEST FOR REVIEW OF THE  
TRIAL CHAMBER'S DECISION ON 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

**Government of Croatia**

Ms Jadranka Kosor

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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 Republic of Croatia’s Request for Review Pursuant to Rule 108*bis* of the Trial Chamber’s Decision on Defendant Ante Gotovina’s Motion for Provisional Release”, filed on 5 December 2007 (“Request”).

## I. PROCEDURAL HISTORY

2. On 28 November 2007, Trial Chamber I (“Trial Chamber”) issued the “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” (“Decision”), in which it denied the “Defendant Ante Gotovina’s Motion for Provisional Release”, filed on 8 August 2007.

3. The Trial Chamber in its Decision noted, among other factors relevant for provisional release, that Counsel for Gotovina submitted guarantees from the Government of Croatia, from the Archbishop of Zadar, and from Gotovina himself.<sup>1</sup> It however considered that, in the specific circumstances of the case, the guarantees offered by the Government of Croatia were not sufficient to satisfy the Trial Chamber that Gotovina, if provisionally released, would return to the Tribunal when ordered.<sup>2</sup> In this respect, the Trial Chamber found that, whereas the incentives not to appear for trial remain unchanged, such guarantees “were not sufficiently effective”.<sup>3</sup>

4. Subsequent to the filing of the Request, on 14 December 2007 the Prosecution filed its “Prosecution’s Motion to Strike Croatia’s Request for Review under Rule 108 *bis* of Trial Chamber’s Decision Denying Provisional Release” (“Prosecution Motion”). On 7 January 2008 Gotovina filed the “Motion of Defendant Ante Gotovina to Strike the Prosecution’s Motion to Strike Dated 13 December 2007” (“Gotovina’s Motion to Strike”).

## II. STANDARD OF REVIEW

5. Rule 108 *bis* of the Rules of Procedure and Evidence (“Rules” or “Rule”) provides a mechanism by which a State affected by a decision of a Trial Chamber may request review of that decision by the Appeals Chamber. For such a request to be admissible, the State in question must demonstrate that (i) it is directly affected by the Trial Chamber’s Decision and

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<sup>1</sup> Decision, p. 3.

<sup>2</sup> Decision, p. 8.

<sup>3</sup> Decision, p. 9.

(ii) that the decision concerns issues of general importance relating to the powers of the Tribunal.<sup>4</sup> Only when this two-pronged test is met will the Appeals Chamber consider the merits of the State request for review.<sup>5</sup>

6. In particular, the Appeals Chamber recalls that Rule 108 *bis* was adopted for a State to seek review of a decision that has affected its *legal* rights. This remedy is unavailable to a State which claims that a decision has affected its legitimate *political* interests.<sup>6</sup>

7. Rule 108 *bis* further provides that “[t]he party upon whose motion the Trial Chamber issued the impugned decision shall be heard by the Appeals Chamber. The other party may be heard if the Appeals Chamber considers that the interests of justice so require.”

### III. DISCUSSION

#### A. Parties’ right to be heard

8. In the instant case, Croatia requests review of a decision, which was issued by Trial Chamber I upon motion of Gotovina.<sup>7</sup> Thus, according to the Rules, Gotovina has the right to be heard on this matter, while the Prosecution may be heard only if the Appeals Chamber considers it in the interests of justice.<sup>8</sup> The Appeals Chamber considers that, since Gotovina was arrested upon request of the Prosecution in the first place,<sup>9</sup> the interests of justice require that the Prosecution be heard in relation to this matter. The Prosecution Motion is therefore validly filed.

#### B. Croatia’s request for review

9. The Government of Croatia argues that the Trial Chamber erred for various reasons in concluding that Croatia’s guarantee did not provide sufficient assurance that Gotovina would return for trial. It therefore requests review of the Decision’s “erroneous conclusion” that it was more likely than not that Gotovina would be able to escape the custody of Croatian authorities while on house arrest in that country.<sup>10</sup>

<sup>4</sup> Rule 108 *bis* (A); see *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR108bis.1, Decision on Prosecution’s Motion to Strike Request for Review Under Rule 108bis, 13 December 2006 (“*Gotovina* First Review Decision”), para. 6.

<sup>5</sup> *Id.*

<sup>6</sup> *Prosecutor v. Janko Bobetko*, Case No. IT-02-62-AR54bis & IT-02-62-AR108bis, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, 29 November 2002 (“*Bobetko* Decision”), para. 11; see also *Gotovina* First Review Decision, paras 7-8.

<sup>7</sup> *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-PT, Defendant Ante Gotovina’s Motion for Provisional Release, 7 August 2007.

<sup>8</sup> Rule 108 *bis* (B); Gotovina’s Motion to Strike, paras 2-3.

<sup>9</sup> See, *inter alia*, *Prosecutor v. Ante Gotovina*, Case No. IT-01-45-I, Warrant of Arrest – Order for Surrender, 24 February 2004, p. 2.

<sup>10</sup> Request, para. 2. On this issue, see Prosecution Motion, paras 4-12.

10. Regarding the admissibility test, the Government of Croatia submits that Croatia is *directly affected* by the Decision as its “legal right to sovereign equality under Article 2(1) of the United Nations Charter” has been violated because the Trial Chamber did not treat Croatia’s guarantees on par with those offered by Serbia in similar circumstances or, alternatively, because the Trial Chamber did not provide a reasoned opinion in distinguishing the guarantees offered in this case from those offered by Serbia.<sup>11</sup> In particular, the Government of Croatia cites instances where other accused detained under the Tribunal’s authority were released after comparable guarantees from Serbia, despite the fact that the detainees had been long-time fugitives and had not voluntarily surrendered.<sup>12</sup>

11. The Government of Croatia further maintains that the Decision raises two questions of *general importance to the powers of the Tribunal*, that is, whether (i) the Tribunal is bound by the principle of sovereign equality and therefore must give equal effect to the guarantees of similarly situated States and (ii) the principle of sovereign equality requires the Tribunal to provide a reasoned opinion in writing as to why guarantees of similarly situated States are not given equal effect.<sup>13</sup>

12. The Appeals Chamber finds that Croatia is not affected by the Decision, since the principle of sovereign equality enshrined in Article 2(1) of the United Nations Charter is not actually at stake. The Trial Chamber’s consideration on what effect to be given to a State’s guarantees does not affect a State’s *legal* right, as such guarantees are not dispositive of provisional release determinations. Rather, the Trial Chamber is required to assess all relevant factors relating to individual circumstances of an accused.<sup>14</sup> Here, the Trial Chamber’s decision to reject Gotovina’s request for provisional release was based on Gotovina’s individual circumstances, of which Croatia’s

<sup>11</sup> Request, para. 12.

<sup>12</sup> Request, paras 6-7, 12, 16.

<sup>13</sup> Request, para. 11.

<sup>14</sup> See, 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 (“The Trial Chamber, moreover, did not have to rely on the guarantees just because they had been offered by Governments with power to arrest the Appellant. A Trial Chamber must evaluate government guarantees *in light of the circumstances surrounding each individual applicant*, and in some circumstances, it may be reasonable to place little weight on a government guarantee. Indeed, here *the Trial Chamber did not err by failing to find the government guarantees determinative notwithstanding the issuing authorities’ track record regarding compliance.*”) (citation omitted and emphasis added); *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 (noting that “the reliability of such a guarantee must always be determined *in relation to the circumstances of an individual accused in each case*”) (emphasis added); *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/I-AR65.1, Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release, 16 April 2007, para. 21 (observing that “the Trial Chamber duly considered the weight to be accorded to the guarantees *in relation to the particular circumstances of the Appellant’s case*”) (emphasis added).

guarantees were only a part.<sup>15</sup> Thus, a Trial Chamber's provisional release decision is emphatically not an assessment of the reliability of any particular government or the guarantees that it offers.

13. Furthermore, the Trial Chamber's assessment of the guarantees cannot be said to have affected Croatia's legal rights since Croatia has no legally cognizable interest either in securing Gotovina's provisional release or in ensuring that a Trial Chamber will assess its guarantee in one particular manner.

14. Having reached the above conclusion, the Appeals Chamber need not consider whether the issues raised by the Government of Croatia are "of general importance relating to the powers of the Tribunal" or, on the contrary, merely relate to an established legal principle and its implementation in one specific instance before the Tribunal, as the Prosecution suggests.<sup>16</sup>

#### IV. DISPOSITION

On the basis of the foregoing, the Request is hereby **DENIED**.

Done in English and French, the English version 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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<sup>15</sup> Cf. *Gotovina* First Review Decision, para. 8 and *Bobetko* Decision, para. 11.

<sup>16</sup> Prosecution Motion, para. 13.