



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-05-87-AR65.1
Date: 1 November 2005
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 1 November 2005

THE PROSECUTOR

v.

**Milan MILUTINOVIĆ
Nikola ŠAINOVIĆ
Dragoljub OJDANIĆ
Nebojša PAVKOVIĆ
Vladimir LAŽAREVIĆ
Vlastimir ĐORĐEVIĆ
Sreten LUKIĆ**

**DECISION ON INTERLOCUTORY APPEAL FROM TRIAL CHAMBER DECISION
GRANTING NEBOJŠA PAVKOVIĆ'S PROVISIONAL RELEASE**

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Mr. John Ackerman and Mr. Aleksander Aleksić for Nebojša Pavković
Mr. Mihaljo Bakrac for Vladimir Lazarević
Mr. Theodore Scudder for Sreten Lukić

I. Procedural Background

1. On 30 September 2005, Trial Chamber III of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“the Tribunal”) granted Nebojša Pavković’s (“Accused”) application for provisional release, and stayed his provisional release pending an appeal by the Prosecution.¹ Pursuant to Rule 65(F), where, as here, “a Trial Chamber grants a stay of its decision to release an accused, the Prosecution shall file his or her appeal not later than one day from the rendering of that decision”.

2. The Prosecution filed its timely appeal of the Impugned Decision on the Tribunal’s next working day, 3 October 2005.² The Defence filed its response on 6 October 2005.³ The Prosecution subsequently filed a motion on 7 October 2005⁴ requesting permission to file its “Prosecution Appeal Brief”, also filed on 7 October 2005.⁵

II. Standard of Review and Applicable Law

3. The Appeals Chamber will reverse a Trial Chamber’s decision on provisional release only if the Trial Chamber committed a specific error invalidating the decision or weighed relevant considerations in an unreasonable manner.⁶ Under Rule 65(B) of the Rules, a Trial Chamber may grant provisional release only after certain conditions are satisfied. First, the Trial Chamber must be satisfied that the accused will return for trial. Second, it must be satisfied that the accused will not pose a danger to any victim, witness or other person. In deciding whether these requirements of Rule 65(B) of the Rules, the Trial Chamber must consider “all those relevant factors which a reasonable trial chamber would have been expected to take into account before reaching a

¹ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Nebojša Pavković’s Provisional Release, 30 September 2005 (“Impugned Decision”).

² *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, Prosecution Appeal of Decision on Nebojša Pavković’s Provisional Release, 3 October 2005 (“Prosecution Appeal”).

³ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, Response to Prosecution Appeal of Decision on Nebojša Pavković’s Provisional Release, 6 October 2005 (“Defence Response”).

⁴ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, Prosecution Motion for Clarification Re Appeal of Pavković Provisional Release, 7 October 2005 (“Prosecution Motion”).

⁵ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, Prosecution Appeal Brief Regarding Decision on Nebojša Pavković’s Provisional Release, 7 October 2005.

⁶ *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10. “In order to challenge a discretionary decision, appellants must demonstrate that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion, or that the Trial Chamber [gave] weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that the Trial Chamber’s decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly”. See *ibid* (internal quotations omitted).

decision.”⁷ A Trial Chamber must provide a reasoned opinion that, among other things, indicates its view on all of those relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision.⁸ Here, the Trial Chamber must at least have demonstrated through a discussion of all relevant factors how the Accused has met 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.⁹ Finally, Rule 65(B) provides that “[r]elease 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”.

III. Discussion

4. The Prosecution argues in its motion filed on 7 October 2005 that it should be allowed to file its “Prosecution Appeal Brief” because the one-day time limit allowed by Rule 65(F) should be considered the time limit for filing a notice of appeal.¹⁰ As a preliminary matter, the Appeals Chamber dismisses the Prosecution Motion. Rule 65(F) unequivocally states that the Prosecution must file its appeal within one day after the Trial Chamber granted a stay of its decision to release an accused. This is an exception to the general time limit pursuant to Rule 65(D).¹¹ To be sure, Rule 65(F) merely refers to the filing of an “appeal”, not an “appeal brief”. But neither does it refer to a “notice of appeal”, nor does it suggest that the Prosecutor is entitled to file a separate “appeal brief” at a later time after the deadline for the “appeal” has passed. To read Rule 65(F) to allow such a separate filing would circumvent its purpose—namely, to accelerate the consideration of the appeal so that an accused who has been found to pose neither flight risk nor danger to others will be detained no longer than necessary for appellate review of this determination. It is axiomatic that a person not yet tried for the charges against him, and therefore presumed innocent, has a right to be released if he shows that the justifications for pretrial detention do not apply. If the Prosecution were allowed to file a separate brief at a later time, the accused would require time to respond to it, and the process would be unduly delayed. The Prosecution could, of course, have chosen not to seek a stay of the Trial Chamber’s provisional release order; had it so chosen, its appeal would have been governed by the slower schedule set by Rule 65(D). It chose otherwise. The Appeals Chamber therefore declines to accept the Prosecution Appeal Brief as validly filed, and will consider only the Prosecution’s submissions in its Appeal of 3 October 2005.

⁷ *Prosecutor v. Nikola Šainović, Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 (“*Šainović and Ojdanić*”), para. 6.

⁸ *Prosecutor v. Milutinović*, Case No. IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003, para. 22 (internal citations omitted).

⁹ *Šainović and Ojdanić*, para. 6.

¹⁰ Prosecution Motion, para. 6.

5. The Prosecution Appeal contends that the “Trial Chamber abused its discretion by failing to give *any* weight to [several] relevant considerations submitted by the Prosecution during [an] oral hearing”.¹² According to the Prosecution, the Trial Chamber failed to consider the following:

- (a) the prior failure of the Accused to appear before a court in Belgrade to answer for charges in connection with an attempted killing of Vuk Drašković, currently Serbian Minister of Foreign Affairs;
- (b) the absence of an explanation for the Accused’s failure to surrender for almost 18 months after receiving notice of the Indictment against him;
- (c) numerous public statements by the Accused that he would never go voluntarily to The Hague, including a threat to take “revenge [on] every person who would be potentially responsible for extraditing him and three other generals to The Hague”; and
- (d) the absence of an explanation regarding the circumstances of the Accused’s “voluntary” surrender.¹³

The Prosecution also argues that the Trial Chamber erred by giving undue weight to the guarantees provided by the authorities of Serbia and Montenegro since “no arrests have been made by this entity”.¹⁴ The Prosecution contends that although “there has been significant improvement in the degree of cooperation” between the authorities of Serbia and Montenegro and the Tribunal, government guarantees alone are not sufficient to support provisional release.¹⁵

6. The Defence responds that the Prosecution identified no errors of law in its brief.¹⁶ In response to the Prosecution’s allegation in subparagraph (a) above, the Defence argues that the Trial Chamber appropriately gave no weight to the alleged failure of the Accused to appear before a court in Belgrade. The Defence claims the only submission on this allegation was a media article from B92,¹⁷ there was no evidence that the Accused “was actually ordered to appear on a [specific] date and failed to appear on that date”,¹⁸ and if a date was set for the Accused’s appearance, nothing indicates whether or not it was “a date following his voluntary surrender” and transfer to the

¹¹ Rule 65(D) states: Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal. *Subject to paragraph (F) below*, an appeal shall be filed within seven days of filing the impugned decision. . . . (emphasis added).

¹² Prosecution Appeal, para. 7.

¹³ Prosecution Appeal, para. 7 (citing Transcript, 23 August 2005, pp. 27-30, 38-40).

¹⁴ Prosecution Appeal, para. 8.

¹⁵ Prosecution Appeal, para. 8.

¹⁶ Defence Response, para. 5.

¹⁷ Defence Response, para. 6.

¹⁸ Defence Response, para. 6.

Tribunal.¹⁹ The Defence similarly challenges the Prosecution's allegations regarding public statements made by the Accused relating to his surrender and threats against public officials.²⁰ The Defence argues that only one source, B92, supports the Prosecution's submission; that a Defence witness contradicted the allegations; and that ultimately the fact that the Accused himself surrendered to the Tribunal contradicts these alleged statements.²¹

7. First, the Appeals Chamber examines the Trial Chamber's finding that it was satisfied that the Accused, if released, would appear for trial. The Appeals Chamber finds that the Trial Chamber erred in failing to consider the public statements, alleged by the Prosecution to have been made by the Accused, that he would not surrender to the Tribunal.²² These statements are highly relevant to an evaluation of the circumstances in which the Accused surrendered,²³ and a reasonable Trial Chamber would have considered them in relation to its evaluation of the personal guarantees offered by the Accused. The Appeals Chamber, therefore, finds that the Trial Chamber's failure to consider whether the Accused in fact had made the alleged statements, and if so, whether this would have cast doubt on his reliability to return for trial if released, merits reversal and remand to the Trial Chamber for consideration of these factors. Consequently, the Appeals Chamber need not itself evaluate the validity and significance of the alleged statements, a task which should be undertaken by the Trial Chamber in the first instance.

8. The Prosecution also argues that the Trial Chamber erred by placing undue weight on the guarantees provided by the authorities of Serbia and Montenegro.²⁴ The Appeals Chamber recalls that the effect the former position of an accused may have on the willingness of a government to comply with its guarantees is a relevant consideration when a Trial Chamber evaluates those guarantees.²⁵ Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to consider that the Accused "held a senior position in the [Yugoslav Army] VJ",²⁶ and the Appeals Chamber reverses and remands the decision to the Trial Chamber for consideration of this factor. Although each applicant for provisional release must be evaluated individually according to his or

¹⁹ Defence Response, para. 6.

²⁰ Defence Response, para. 12.

²¹ Defence Response, para. 12.

²² The Accused allegedly made at least four such statements, which were orally submitted to the Trial Chamber. *See* Transcript, 23 August 2005, p. 17, lines 9-16 (stating on 9 November 2003 "I have no reason to surrender. I am a soldier, and our regulations state that a soldier never surrenders"); *ibid.*, p. 17, lines 19-23 (stating on 13 March 2004, "[t]here can be no talk of me surrendering to The Hague Tribunal. I won't even discuss it"); *ibid.*, p. 18, lines 8-10 (stating on 18 April 2004, "If they extradite the three generals, and I don't include myself out [*sic*] because I will not allow that to happen, this government will be signing its own death warrant"); *ibid.*, p. 18, lines 16-19 ("Pavković said today that he will not turn himself into The Hague").

²³ *Šainović and Ojdanić*, para. 10.

²⁴ Prosecution Appeal, para. 8.

²⁵ *Šainović and Ojdanić*, para. 9.

²⁶ Impugned Decision, p. 5.

her particular circumstances,²⁷ a reasoned opinion should include a discussion of this factor, as it is relevant to the determination.²⁸

9. The Prosecution additionally contends that the Trial Chamber erred by giving no weight to the lack of explanation for the Accused's failure to surrender for a period of almost 18 months after becoming aware of the Indictment against him, and similarly, the Accused's lack of explanation regarding the conditions of his surrender.²⁹ Implicit in the Prosecution Appeal³⁰ is an argument expressly made by the Prosecution in the oral hearing before the Trial Chamber: in the absence of an explanation regarding the conditions of the Accused's surrender, the Accused's surrender should not be considered "truly voluntary".³¹ The Appeals Chamber recalls that the voluntariness of an accused's surrender is relevant to a Trial Chamber's determination that the accused will return to the Tribunal if provisionally released.³² For example, in the *Šainović and Ojdanić* Decision, the Appeals Chamber found an error in the characterization of an accused's surrender as "voluntary" when the accused failed to surrender for almost three years after being publicly indicted, the accused made public statements indicating that he would not voluntarily surrender, and the accused surrendered only after passage of the law on cooperation between the Tribunal and the relevant State government.³³ Here, however, the Trial Chamber expressly considered that there were no explanations for the Accused's failure to surrender for almost 18 months,³⁴ and contrary to the Trial Chamber in *Prosecutor v. Šainović and Ojdanić*, the Trial Chamber here properly did not characterize the Accused's surrender as voluntary, but instead reasonably assigned no credit to the Accused for the conditions of his eventual surrender.³⁵ Consequently, the Appeals Chamber finds the Trial Chamber did not err in this part of the Impugned Decision.

10. Next, the Appeals Chamber examines the Trial Chamber's finding that it was satisfied that the Accused, if released, will not pose a danger to victims, witnesses or other persons. The Prosecution alleged that the Accused was involved in the attempted killing of Vuk Drašković and also had publicly threatened every person who would surrender him to the Tribunal.³⁶ In light of these allegations it was not reasonable for the Trial Chamber to conclude that nothing suggested

²⁷ *Šainović and Ojdanić*, para. 7.

²⁸ See e.g., *Šainović and Ojdanić*, para. 9; *Prosecutor v. Bošković & Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Bošković's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 18.

²⁹ Prosecution Appeal, para. 7.

³⁰ Prosecution Appeal, para. 7 (citing Transcript, 23 August 2005, pp. 27-30, 38-40)

³¹ Transcript, 23 August 2005, p. 39, lines 6-9.

³² *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para. 21.

³³ *Šainović and Ojdanić*, para. 10.

³⁴ Impugned Decision, p. 4.

³⁵ Impugned Decision, p. 5 (The Trial Chamber states that it reached the Impugned Decision "notwithstanding the absence of any satisfactory explanation as to the Accused's failure to surrender prior to April 2005").

³⁶ See supra paragraph 5, subparagraphs (a) and (c).

that the Accused will pose a danger if released without giving a reason for such conclusion. The Defence Response essentially highlights that the material offered to support the Prosecution's allegation is open to different interpretations.³⁷ The Appeals Chamber does not address the validity of the Prosecution's allegations, but finds that the Trial Chamber must have at least provided reasons for concluding that the Accused will not pose a danger if released. The Appeals Chamber finds that this error merits reversal and remands the decision for consideration of the Prosecution's submissions.

11. The Trial Chamber "consider[ed] that there is nothing to suggest that, if released, the Accused will pose" such a danger, and "that the Trial Chamber thereby previously [only] identified the [question of whether the Accused would appear for trial] as being in issue".³⁸ The Trial Chamber is not obliged to deal with all possible factors when deciding whether it is satisfied the requirements of Rule 65(B) are fulfilled, but at a minimum, the Trial Chamber must provide reasoning to support its findings regarding the substantive considerations relevant to its decision.³⁹ Here, the Trial Chamber appears, in effect, to have switched the burden to the Prosecution to show that the Accused would pose a danger if released. In the putative absence of such information, the Trial Chamber appears to have assumed the lack of a danger posed by the Accused's release. If the Trial Chamber found, as it must have done so here, that the Accused upon release will pose no danger to persons, then it must provide the reasons for reaching that finding.

12. Finally, the Impugned Decision does not indicate whether the Trial Chamber gave The Netherlands the opportunity to be heard, as Rule 65(B) requires, before the Trial Chamber grants provisional release.⁴⁰ This failure constitutes an error of law.

IV. Disposition

13. For the foregoing reasons, the Appeals Chamber **GRANTS** the Prosecution Appeal and **QUASHES** the Impugned Decision; and **REMITTS** the matter to the Trial Chamber for further consideration consistent with this Decision.

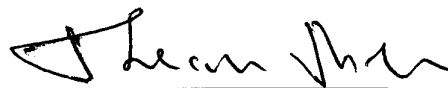
³⁷ See Defence Response, paras. 6-8.

³⁸ Impugned Decision, p. 2.

³⁹ *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004 (The Appeals Chamber examined whether the Trial Chamber considered appropriate factors in sufficient measure, and determined that the Trial Chamber had an obligation to provide reasons for its decision, although the Trial Chamber need not have provided its reasoning in detail); *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber, Judgement, 12 June 2002, para. 42 (a Chamber has an obligation to give reasoned opinions for its decisions but this obligation does not require it to spell out every step in its reasoning).

⁴⁰ Rule 65(B) states "[r]elease may be ordered by a Trial Chamber only after giving the host country" – i.e., The Netherlands – "the opportunity to be heard"; *Prosecutor v. Rašević & Todović*, Case No. IT-97-25/1-AR65.1, Decision

Done this 1st day of November 2005,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Tribunal]

on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, 7 October 2005, paras. 25-26.