IT-05-87-AR65.2
A92 - A84
14 DECEMBER 2006

92 AT

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-05-87-AR65.2
		Date:	14 December 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **14 December 2006**

THE PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

DECISION ON INTERLOCUTORY APPEAL OF DENIAL OF PROVISIONAL RELEASE DURING THE WINTER RECESS

The Office of the Prosecutor:

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused:

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 an interlocutory appeal[1] by Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić (collectively "Defendants") against the "Decision on Joint Defence Motion for Provisional Release During Winter Recess" ("Impugned Decision") issued by Trial Chamber III on 5 December 2006.

I. BACKGROUND

2. The Defendants in this case were on provisional release prior to their trial and during the 2006 summer recess, which occurred after one week of their trial had taken place.[2] On 30 October 2006, they brought a "Joint Motion for Provisional Release During the Winter Recess" ("Trial Motion") in which they requested that the Trial Chamber grant them provisional release for the winter recess. The Prosecutor opposed this request.[3] In the Impugned Decision, the Trial Chamber denied the Trial Motion. It reasoned that "circumstances have changed materially since the Accused were last permitted to leave the UNDU"[4] and that it was no longer persuaded either that the Defendants would return from provisional release[5] or that they would pose no danger to victims, witnesses, or others during their provisional release.[6] The Defendants appeal the Impugned Decision pursuant to Rules 65(D) and 116*bis* of the Rules of Procedure and Evidence ("Rules").[7] On 12 December 2006, the Prosecution filed its response,[8] and on 13 December 2006 the Defendants filed their reply.[9]

II. DISCUSSION

3. The Appeals Chamber reviews a Trial Chamber decision regarding provisional release for abuse of discretion. Thus, "the question before the Appeals Chamber is not whether it 'agrees with

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[1] Expedited Appeal Pursuant to Rule 116*bis* Against the Decision on Joint Defence Motion for Provisional Release During Winter Recess, Dated 5 December 2006, 6 December 2006 ("Interlocutory Appeal Defence Brief").
[2] *See* Impugned Decision, paras 1, 9.
[3] Prosecution Response to Defence Joint Motion for Provisional Release During the Winter Recess, 10 November 2006 ("Trial Response").
[4] Impugned Decision, para. 9.
[5] *Ibid.*, para. 10.
[6] *Ibid.*, para. 13.
[7] Interlocutory Appeal Defence Brief, para. 4. Rule 65(D) provides for appeals of right of decisions entered pursuant to Rule 65 by a Trial Chamber, and Rule 116*bis* provides for an expedited appeal procedure for Trial Chamber decisions rendered pursuant to Rule 65.
[8] Prosecution Response to "Expedited Appeal Pursuant to Rule 116*bis* Against the Decision on Joint Defence Motion for Provisional Release During Winter Recess, Dated 5 December 2006", 12 December 2006.

that decision' but 'whether the Trial Chamber has correctly exercised its discretion in reaching that decision.' The party challenging a decision on provisional release must demonstrate that the Trial Chamber has committed a 'discernible error.'"[10] Accordingly, "[t]he Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be '(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.'"[11]

4. The Defendants allege that the Trial Chamber abused its discretion in several respects. First, they claim that the Trial Chamber erred in ruling that Rule 65 applies only to "the provisional release of an accused whose trial has not yet begun and therefore ... that there is no specific rule providing for the provisional release of accused after the trial has commenced and a significant quantum of evidence has been adduced by the Prosecution."[12] Second, they assert that the Trial Chamber erred in its analysis of the relationship between the presumption of innocence and the issue of provisional release.[13] Third, the Defendants claim that the Trial Chamber erred in concluding that, if released, they might not return and further might pose a threat to victims and witnesses.[14] In this regard, they argue that circumstances "have not changed substantially" since their earlier provisional releases and that they "could be released under conditions imposed pursuant to Rule 65(C) which would satisfy any security concerns."[15] Fourth, they suggest that "the Trial Chamber abused its discretion when considering the question of 'disruption of the proceedings.'"[16] The Appeals Chamber will address each of these claims in turn.

A. The Applicability of Rule 65

5. Rule 65, entitled "Provisional Release", provides that "[o]nce detained, an accused may not be released except upon an order of a Chamber."[17] Rule 65(B) governs the terms under which Trial Chambers may grant provisional release. It states that such "[r]elease may be ordered by a Trial Chamber 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."

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[9] Joint Reply to Prosecution Response to Expedited Appeal Pursuant to Rule 116*bis* Against the Decision on Joint Defence Motion for Provisional Release During Winter Recess, Dated 5 December 2006, 13 December 2006 ("Interlocutory Appeal Reply").
[10] *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 (footnote omitted).
[11] *Ibid.*
[12] Impugned Decision, para. 4; *see also* Interlocutory Appeal Defence Brief, para. 7; Interlocutory Appeal Reply, para. 12.
[13] Interlocutory Appeal Defence Brief, para. 8.
[14] *Ibid.*, para. 9.
[15] *Ibid.*, paras 9-10.

6. The Trial Chamber found that Rule 65 applies only to pre-trial provisional release decisions. The Trial Chamber noted that 1) this Rule appears in the part of the Rules governing pre-trial proceedings; and 2) Rule 65(B) uses the words "will appear for trial", which the Trial Chamber deemed "ma[de] it clear that the application of the Rule is confined to the provisional release of an accused whose trial has not yet begun".[18] In the Trial Chamber's view, provisional release during trial was therefore "a matter for the discretion of the Trial Chamber in the exercise of its inherent power to control the proceedings in order to ensure that they are conducted in a fair and expeditious manner and with due regard for the protection of victims and witnesses."[19] The Trial Chamber then performed two alternative analyses. First, it assumed (contrary to its preferred view) that Rule 65 did apply, and "analyse[d] the Motion under the legal standards of Rule 65(B)".[20] Taking this approach, it found that the Trial Motion should be denied.[21] Second, the Trial Chamber analyzed the Trial Motion under its own preferred view that Rule 65 did not apply and that instead this was a matter for the discretion of the Trial Chamber exercising its inherent power. Taking this approach, the Trial Chamber also concluded that the Trial Motion should be denied.[22]

7. As the Trial Chamber made clear, its legal discussion of the applicability of Rule 65 was not relevant to its decision to deny provisional release. Accordingly, even if the Trial Chamber erred in claiming that Rule 65 was not applicable, this error cannot serve as the basis for reversal of the Trial Chamber's decision. Nonetheless, the Appeals Chamber will address this legal issue because of its jurisdictional implications: if the Trial Chamber is correct that Rule 65 does not apply to Defendants during a trial, then it is not clear that the parties have a right to appeal decisions regarding provisional release during trial. Rule 65(D) states only that "[a]ny decision rendered under [Rule 65] by a Trial Chamber shall be subject to appeal". Accordingly, if the Trial Chamber's decision was not rendered under Rule 65, then the Appeals Chamber may not have jurisdiction pursuant to Rule 65(D).

8. As the Trial Chamber observed,[23] Rule 65 appears in the part of the Rules entitled "Pre-Trial Proceedings" rather than in the subsequent part of the Rules entitled "Proceedings Before Trial Chambers." Like the Trial Chamber, however, the Appeals Chamber does not give this point much

[16] *Ibid.*, para. 13; *see also ibid.*, para. 14.
[17] Rule 65(A).
[18] Impugned Decision, paras 3-4.
[19] Impugned Decision, para. 15.
[20] *Ibid.*, para. 4.
[21] *See ibid.*, paras 7-14
[22] *See ibid.*, paras 15-20.
[23] *See ibid.*, para. 3.

weight.[24] Rule 65 is not limited to pre-trial proceedings, a fact made evident by the inclusion of Rule 65(I), which on its terms applies to "convicted persons pending an appeal".

9. Moreover, the Appeals Chamber disagrees with the Trial Chamber's conclusion that the language "will appear for trial" in Rule 65(B) "ma[kes] it clear that the application of the Rule is confined to the provisional release of an accused whose trial has not yet begun".[25] First, the language of the Rule does not read "will appear for the *beginning* of trial" but rather reads "will appear for trial" – language which could refer to any stage of the trial. Second, the purpose behind Rule 65(B) is best fulfilled if its language is read broadly. Its goal of permitting provisional release only if the Trial Chamber is satisfied that the accused will return and will do no harm is not logically limited to the pre-trial stage. Rather, this goal is equally important at other stages of the proceedings, as Rule 65(I) demonstrates in identifying the same criteria for the pre-appeal stage. Finally, the Appeals Chamber notes that the practice of Trial Chambers in the past supports the view that Rule 65(B) is best read as applying to all provisional release applications before the Trial Chamber.[26]

10. Accordingly, the Appeals Chamber holds that Rule 65 applies to provisional release issues arising during the course of trial, just as it applies during pre-trial and pre-appeal proceedings. As noted earlier, however, the Trial Chamber's error has no material effect on the outcome of this appeal in light of the Trial Chamber's decision to analyze the Trial Motion under Rule 65(B) in any event.

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[24] *See ibid.* (noting that "the placement of a rule under a particular heading does not seem to restrict its application in other stages of the proceedings" and giving Rule 71*bis* as an example of a Rule routinely applied outside the pre-trial context).

[25] *Ibid.*, para. 4. The Appeals Chamber assumes for the purposes of this discussion that the Trial Chamber meant to speak of the application of Rule 65(B) in particular rather than of Rule 65 generally. If the Trial Chamber meant the latter, however, then the presence of Rule 65(I) obviously refutes its claim.

[26] *See, e.g., Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motions for Provisional Release of Radivoje Miletić and Milan Gvero, 7 December 2006 ("*Popović* Decision"), p. 4 (relying on Rule 65(B) in granting provisional release request for two accused for part of the winter recess); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Confidential Decision on Motion for Provisional Release of the Accused Prlić, made public on 17 August 2006 (dated 26 June 2006), pp. 3-4 (granting a provisional release request for the summer recess during the course of trial pursuant to Rule 65); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Joint Motion for Temporary Provisional Release During Summer Recess, 1 June 2006, paras 3-4 (applying Rule 65(B) in granting provisional release for the summer recess after one week of trial); *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Request for Provisional Release, 23 February 2006, paras 9-10 (treating Rule 65(B) as the standard for reviewing a provisional release request made during trial); *Prosecutor v. Halilović*, Case No. IT-01-48-T, Confidential Decision on Renewed Motion for Provisional Release, 22 July 2005, p. 4 (applying Rule 65(B) in granting provisional release prior to the entry of judgement); *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Confidential Decision on Motion for Provisional Release of Enver Hadžihasanović, 20 August 2004 (dated 23 July 2004), pp. 2-3 (granting a motion for provisional release during trial pursuant to Rule 65); *Prosecutor v. Halilović*, Case No. IT-01-48-

B. The Relevance of the Presumption of Innocence

11. In the Impugned Decision, the Trial Chamber stated that "the presumption of innocence does not play a determinative role in deciding motions for provisional release."[27] The Defendants read the Trial Chamber as "consider[ing] that the presumption of innocence had little or no relationship to the issue of provisional release" and argue instead that "the jurisprudence of the Tribunal has consistently found that detention of an accused person is to be considered the exception, whereas liberty is to be the rule."[28]

12. The Appeals Chamber finds no error in the Trial Chamber's reasoning. The Trial Chamber was correct in concluding that the presumption of innocence is not "determinative", since otherwise, as the Trial Chamber observed, "no accused would ever be detained, as all are presumed innocent."[29] Contrary to the suggestion of the Defendants, this Tribunal's consistent jurisprudence does not treat the presumption of innocence as determinative in assessing whether provisional release should be granted. Rather, to the extent that this Tribunal has identified determinative factors, it has pointed to those specified in Rule 65(B).[30]

C. The Trial Chamber's Conclusions about Flight and Risks to Others

13. Analyzing the Trial Motion under Rule 65(B), the Trial Chamber denied it for two independent reasons: first, that the Trial Chamber was not satisfied that the Accused would return after the winter recess; and second, that it was not satisfied that the Accused would pose no danger to victims, witnesses, or others if released.[31]

14. As to the issue of flight risk, the Trial Chamber recognized that it had previously granted the Defendants provisional release without adverse consequences. Nonetheless, it found that "circumstances have changed materially" since the last provisional release – including that "17

T, Decision on Motion for Provisional Release, 21 April 2005, p. 2 (treating Rule 65(B) as the standard when considering a provisional release request made for a break of several weeks in trial proceedings).

[27] Impugned Decision, para. 8; *see also ibid* ("Given that the accused are not detained because they are presumed guilty, the presumption of innocence does not alone justify provisional release where the concerns underlying detention have not been dispelled").

[28] Interlocutory Appeal Defence Brief, para. 8. The Defendants cite one Trial Chamber decision for their conclusion that the Tribunal's jurisprudence consistently treats liberty as the rule rather than the exception. *See ibid.*, fn. 8. In their Interlocutory Appeal Reply, the Defendants further cite to the recent *Popović* Decision as supporting their arguments in this regard, *see* Interlocutory Appeal Reply, para. 14, but that Trial Chamber decision contains no specific discussion of the presumption of innocence.

[29] Impugned Decision, para. 8.

[30] *See, e.g., Stanišić* Decision, para. 7; *Prosecutor v. 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. 6.

weeks of trial have elapsed, and 85 witnesses have given evidence relating to multiple alleged crimes committed throughout Kosovo for which the Accused are said to be responsible."[32] The Trial Chamber found merit in the Prosecution's argument that there was now a "'heightened risk'" that the Defendants would not return.[33] The Prosecution had emphasized that since the Defendants had now heard the serious evidence against them, they had a higher incentive to abscond, particularly considering the potential penalties that might follow a conviction.[34]

15. The Trial Chamber is the body best positioned to assess whether circumstances at trial have materially affected the possibility that accused will not return from provisional release. The Appeals Chamber finds it reasonable for the Trial Chamber to have concluded that the Defendants' incentives to flee increased over the course of a trial as they heard first-hand the evidence against them.[35] This is not to say this is the only reasonable conclusion. In some cases, the incentives to flee might decrease over time;[36] in other cases, these incentives might stay the same; and in still other cases these incentives might not shift enough to affect materially the approach taken in earlier provisional release decisions regarding the same accused. These are matters that are best assessed by the Trial Chamber that is hearing the case, and the Appeals Chamber will not reverse the Trial Chamber's considered judgement or decision absent a discernible error. Here, while the Trial Chamber could have done a more complete job in explaining how the proceedings thus far have increased the Defendants' incentives to flee, it provided enough reasoning to justify its conclusion.

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[31] Impugned Decision, paras 9-14. The Trial Chamber further suggested that, even assuming the Accused posed no flight risk or threat to witnesses, it would have denied the motion under its "residual discretion" under Rule 65(B). *Ibid.*, para. 21. The Appeals Chamber does not address this issue.

[32] *Ibid.*, para. 9.

[33] *Ibid.*, para. 10. The Trial Chamber also noted that it had no new guarantees from Serbia, but "assume[d], for the purposes of this discussion, that Serbia would provide the necessary guarantees." *Ibid.* Serbia has subsequently provided new guarantees. *See* Joint Filing of Guarantees in Support of the Provisional Relase [*sic*] of the Accused During the Winter Recess, 8 December 2006. In light of the Trial Chamber's assumption, however, this provision of guarantees can have no effect on the Appeals Chamber's analysis.

[34] *See* Trial Response, paras 2-3.

[35] *Cf. Prosecutor v. Limaj et al.*, Case No. IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para. 30 (noting that the severity of a sentence faced can impact the extent of the incentive to flee).

[36] The Defendants suggest that their incentives to flee have indeed decreased since the trial began. Interlocutory Appeal Reply, para. 16. They point to an excerpt of a discussion between the Presiding Judge and the Prosecutor on 31 August 2006. *Ibid.* (quoting T. 2674-2675). In that exchange, the Prosecution notes that at the pre-trial stage the Trial Chamber had rejected the Prosecution's proposal to allow a large number of Rule 92*bis* witnesses. The Presiding Judge responds by saying that "one thing that's absolutely clear from the way in which this case has been conducted so far is that there could have been the grossest miscarriage of justice if these witnesses had not been available for cross-examination." *Ibid.* This exchange, however, does not provide enough of a basis for the Appeals Chamber to second-guess the Trial Chamber's conclusion that the incentives for flight have increased rather than decreased for the Defendants in this case. Read most favorably to the Defendants, the Presiding Judge's statement at best suggests that there have been some successful cross-examinations. It does not show that, on balance, the Prosecution's case is weaker objectively than it was before the summer recess. Moreover, several months of trial have passed since this exchange.

16. Accordingly, the Appeals Chamber finds no discernible error in the Trial Chamber's analysis of flight risk. Because this analysis provides an independent basis for the denial of provisional release under the terms of Rule 65(B), the Appeals Chamber declines to consider the Trial Chamber's separate conclusion that it was not satisfied that the Defendants, if released, would pose no threat to victims, witnesses, or others.

D. The Trial Chamber's Consideration of Disruptiveness

17. As noted above, the Trial Chamber provided two alternative analyses that reached the same conclusion – one analysis based on an assumption that Rule 65 applied and the other based on its preferred view that Rule 65 was not applicable. In applying the latter analysis, the Trial Chamber noted that it "must … guard against disruption of the proceedings in order to bring the trial to a fair and expeditious conclusion."[37]

18. The Defendants now claim that the Trial Chamber's reference to disruption constituted discernible error.[38] The Appeals Chamber rejects this argument. Looking at the context in which the Trial Chamber used the phrase, it is plain that the Trial Chamber's reference relates to the Trial Chamber's case-specific concern, discussed earlier, that if granted provisional release "one or more of the Accused might not return for trial".[39] As observed earlier, concerns that the accused might not appear at trial if granted provisional release are entirely appropriate matters for the Trial Chamber to consider – indeed, under Rule 65(B), the Trial Chamber is compelled to consider such concerns. Accordingly, the Appeals Chamber discerns no error in the Trial Chamber's approach.[40]

III. DISPOSITION

19. For the reasons stated above, the Appeals Chamber **DISMISSES** the appeal and **AFFIRMS** the Impugned Decision.

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

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[37] Impugned Decision, para. 16.
[38] Interlocutory Appeal Defence Brief, para. 13; *see also ibid.*, para. 14.
[39] Impugned Decision, para. 16.
[40] The Appeals Chamber also notes that even if there were an error, it would not have materially affected the outcome of this appeal. The Trial Chamber's discussion of "disruption" occurs entirely during its alternative analysis – the one based on its conclusion that Rule 65 does not apply to provisional release requests made during trial. As addressed earlier, the Appeals Chamber disagrees with the Trial Chamber's view that Rule 65 does not apply here and thus relies only on the Trial Chamber's primary analysis (the one applying Rule 65(B)) rather than on this alternative analysis. The Trial Chamber's primary analysis does not mention concerns about disruption.

Dated this 14th day of December 2006,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding Judge

[Seal of the Tribunal]