IT-99-37-AR65
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12 DECEMBER 2002.

654 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-99-37-AR65

Date: 12 December 2002

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge David Hunt
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Decision of: **12 December 2002**

PROSECUTOR

v.

NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ

DECISION ON MOTION FOR MODIFICATION OF DECISION ON PROVISIONAL RELEASE AND MOTION TO ADMIT ADDITIONAL EVIDENCE

Counsel for the Prosecutor
Mrs. Carla Del Ponte
Mr. Geoffrey Nice

Counsel for the Accused
Mr. Toma Fila and Mr. Zoran Jovanović for Nikola Šainović
Mr. Tomislav Višnjić, Mr. Vojislav Seležan and Mr. Peter Robinson for Dragoljub Ojdanić

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"),

SEISED of the "Motion for Modification of Decision on Provisional Release" filed by counsel for Dragoljub OJDANIĆ ("Applicant") on 11 November 2002 ("Motion for Modification") in which he seeks a reconsideration of the Appeals Chamber's "Decision on Provisional Release" issued on 30 October 2002 ("Decision"), and the "Motion to Admit Additional Evidence" also filed by the Applicant on 11 November 2002 (together, "Motions");

NOTING the "Prosecution's Response to Motion for Modification of Decision of Provisional Release and Motion to Admit Additional Evidence" filed on 21 November 2002 ("Prosecution Response"), in which the Prosecution submits that the Motions should be denied;

NOTING the "Reply Brief: Motion for Modification of Decision on Provisional Release" and the "Reply Brief: Motion to Admit Additional Evidence", both filed by the Applicant on 27 November 2002;

NOTING that, according to Rule 115 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), the Appeals Chamber will consider additional evidence in its determination of an appeal if the evidence was not available at first instance, is relevant and credible and if it could have been a decisive factor in reaching the decision at first instance;

NOTING the Applicant's arguments in support of his Motion to Admit Additional Evidence that the material sought to be admitted ("Additional Material") was not available at first instance because its significance only became clear once the Prosecution filed their response to his original motion for provisional release, and because the hearing on his motion for provisional release took place four days (or two working days) after the Applicant received the Prosecution's response to the motion for provisional release, giving him no time to collect the Additional Material;

NOTING the submission in the Prosecution Response that such circumstances do not constitute unavailability within the meaning of Rule 115 of the Rules;

NOTING that the Applicant failed to mention the Additional Material at the hearing on the motion for provisional release, whether or not he had sufficient time to collect it before that hearing;

NOTING FURTHER that no application was made under Rule 115 of the Rules to put the Additional Material before the Appeals Chamber to meet the eventuality that the Appeals Chamber might need to consider the issue itself;

NOTING in this context the submission of the Applicant in the Motion for Modification that, according to precedent, the Appeals Chamber should refer the issue of provisional release back to a Trial Chamber if it finds an error in a Trial Chamber decision on provisional release rather than determining the issue for itself;

CONSIDERING that no such precedent exists in the practice of the Appeals Chamber,[1] and that, on the contrary, in matters of provisional release as in all other matters, where the Appeals Chamber finds an error in a Trial Chamber decision, and where it is sufficiently apprised of the issues in the case, the Appeals Chamber is free to substitute its own decision for that of the Trial Chamber;

CONSIDERING that, whether or not the Additional Material can be considered to have been not available to the Applicant at first instance, there is no excuse for his failure to make an application under Rule 115 of the Rules to admit the material on appeal when the Appeals Chamber first considered this matter;

FINDING therefore that the Applicant has failed to demonstrate that the Additional Material should now be admitted or that it constitutes a basis for reconsideration of the Decision;

NOTING the other arguments put forward by the Applicant in support of his Motion for Modification, namely that the Appeals Chamber erred in its finding that the Applicant's surrender to the Tribunal was not voluntary, as well as in its finding that the Trial Chamber had failed to consider the seniority of his position in granting his original application for provisional release; and that the Applicant was deprived of an opportunity to be heard on these two issues as he could not have known that the Appeals Chamber would make such findings nor that it would rely on them in reaching its Decision;

NOTING the submission in the Prosecution's Response that the Motion for Modification should be denied as it does not set out particular circumstances justifying reconsideration of the Decision;

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[1] See for example, with relation to provisional release, the Appeals Chamber decision in this very case: "Decision in Application by Dragan Jokić for Provisional Release", 28 May 2002, as well other interlocutory appeals such as *Prosecutor v Milošević,* IT-99-37-AR73, IT-01-51-AR73 & IT-01-51-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", 18 April 2002; *Prosecutor v Blaškić*, IT-95-14-AR73, "Decision on Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings", 26 September 2000; *Prosecutor v Tadić,* IT-94-1-AR73, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995; etc.

CONSIDERING that, with regard to his arguments that the Appeals Chamber erred in its Decision, the Applicant seeks merely to reargue his case and does not provide grounds for the Appeals Chamber to reconsider its Decision;

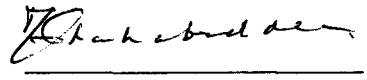
CONSIDERING that there is no merit in the Applicant's argument that he was deprived of the right to be heard as the Applicant should have known from the law and the practice of the Tribunal that the Appeals Chamber was competent to determine the question of his provisional release for itself and was therefore at fault in not addressing the Appeals Chamber on any argument which he thought significant to that point;

FINDING therefore no grounds on which to reconsider the Decision;

NOTING that it is always open to the Applicant, particularly in circumstances such as these where he has new material to support his case, to submit a fresh application for provisional release to the Trial Chamber, which would have to consider such application in light of the guidelines for the granting of provisional release identified in the Decision;

HEREBY DENIES the Motions.

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



Mohamed Shahabuddeen
Presiding

Dated this twelfth day of December 2002
At The Hague,
The Netherlands.

Judge Hunt appends a dissenting opinion on the Motion for Modification and a separate opinion on the Motion to Admit Additional Evidence to this decision.

[Seal of the Tribunal]

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DISSENTING OPINION OF JUDGE DAVID HUNT ON THE APPLICATION FOR RECONSIDERATION AND SEPARATE OPINION ON MOTION FOR ADDITIONAL EVIDENCE

Counsel for the Prosecutor
Mrs Carla Del Ponte
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DISSENTING OPINION OF JUDGE DAVID HUNT ON THE APPLICATION FOR RECONSIDERATION AND SEPARATE OPINION ON MOTION FOR ADDITIONAL EVIDENCE

1. On 30 October 2002, the Appeals Chamber gave its decision on the appeal by the prosecution against the decision of the Trial Chamber to grant provisional release to Nikola Šainović ("Šainović") and Dragoljub Ojdanić ("Ojdanić").[1] The Appeals Chamber, by majority, allowed the appeal, quashed the decision of the Trial Chamber and revised that decision by denying provisional release to Šainović and Ojdanić.[2] I gave a dissenting opinion, stating that, in my opinion, the appeal should be dismissed.[3]

2. Ojdanić subsequently filed two motions – one for "modification" of the Majority Decision,[4] and the other to admit additional evidence.[5] The prosecution responded to those motions,[6] and Ojdanić has now replied.[7] The two motions filed by Ojdanić proceed independently, without apparent reference to each other. However, in order to give them a proper context, the Reconsideration Motion should in my view be interpreted as being based at least in part on the additional evidence tendered pursuant to the Rule 115 Motion. It is therefore necessary to determine both motions together.

3. In my opinion, the Rule 115 Motion should be dismissed. I would accept that, as a practical matter, the additional material sought to be tendered was not available at the hearing before the Trial Chamber. It should, however, have been tendered as additional evidence in opposition to the appeal by the prosecution against the order of the Trial Chamber granting provisional release, to meet the eventuality that the Appeals Chamber may uphold the appeal and then proceed to consider the issues for itself.[8] Ojdanić is correct when he says that a decision can always be reconsidered without showing a change of circumstances.[9] But it is going a very long way to say that, where a party failed to tender additional evidence on appeal, he should be entitled to repair that error on his

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1 Decision on Provisional Release, 30 Oct 2002 ("Majority Decision").
2 *Ibid*, par 13.
3 Dissenting Opinion of Judge David Hunt on Provisional Release, 30 Oct 2002 ("Dissenting Opinion"), par 95.
4 Motion for Modification of Decision on Provisional Release, 11 Nov 2002 ("Reconsideration Motion").
5 Motion to Admit Additional Evidence, 11 Nov 2002 ("Rule 115 Motion").
6 Prosecution's Response to Motion for Modification of Decision of [*sic*] Provisional Release and Motion to Admit Additional Evidence, 21 Nov 2002 ("Prosecution Joint Response").
7 Reply Brief: Motion for Modification of Decision of Provisional Release, 25 Nov 2002 ("Reconsideration Reply"); Reply Brief: Motion to Admit Additional Evidence, 25 Nov 2002 ("Rule 115 Reply"). Both documents were filed on 27 November 2002.
8 The right of a respondent to an appeal to tender additional evidence pursuant to Rule 115 in the event that the appeal is successful has been recognised by the ICTR Appeals Chamber, in *Prosecutor v Bagilishema*, ICTR-95-1A-A, Decision on Motions Raised under Rule 115, 30 May 2002, p 3.

part by the simple expedient of requesting a reconsideration of the appeal and tendering the additional evidence at that point for the first time.[10] The argument by Ojdanić that the Appeals Chamber has departed from precedent by considering the issues for itself is without foundation.[11]

4. In my opinion, the Reconsideration Motion should be allowed. Despite some rather conservative views previously expressed within the Tribunal, I believe that the jurisprudence of the Tribunal now accepts that a Chamber may always reconsider a decision, and not only when there has been a change of circumstances. It may do so when it has realised that its previous decision was erroneous or has caused prejudice.[12] For the reasons which I gave in my Dissenting Opinion,[13] there was a failure by the Appeals Chamber to give Ojdanić the opportunity to be heard on both of the two issues which ultimately found favour with the majority. I do not shrink from stating my firmly held opinion that, by doing so, the Appeals Chamber breached a fundamental principle of natural justice. I am always sceptical of those who hide behind Latin maxims, but there is one which is so well known that it may be stated without the need to translate: *Audi alteram partem, audiatur et altera pars*. This principle has been accepted by the Appeals Chamber as applying to proceedings before a Trial Chamber.[14] There could be no valid justification for holding that such principle does not apply to the Appeals Chamber itself. It is an indispensable requirement of justice that a tribunal must hear both sides, giving each an opportunity of hearing what is argued against him. There was an egregious breach of that requirement in the present case. Another, less well known, Latin maxim needs to be stated: *Qui aliquid statuterit parte inaudita altera, aequum licet dixerit, haud aequum fecerit.*[15] This is translated as: He who shall decide anything without the other

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[9] Reconsideration Motion, pars 2-7.

[10] See, by way of analogy, *Prosecutor v Bagosora et al*, ICTR-98-41-A, Decision – Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction", 2 May 2002, par 10: "An appellant cannot seek to challenge a decision of a Trial Chamber after the time for filling an appeal from that decision has expired by the simple expedient of seeking to have the decision reconsidered."

[11] The Appeals Chamber has frequently determined the issues for itself when upholding an interlocutory appeal: *Prosecutor v Blagojević et al*, IT-02-53-AR65, Decision on Application by Dragan Jokić for Provisional Release, 28 May 2002, p 3; *Prosecutor v Milošević*, Cases IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 Apr 2002, pars 6, 18-19; *Prosecutor v Blaškić*, IT-95-14-AR73, Decision on Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, 26 Sept 2000, p 24; *Prosecutor v Tadić*, IT-94-1-AR73, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, pars 10-15, 57-58; *Prosecutor v Kovačević*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, par 38. See also *Prosecutor v Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, pars 17-20.

[12] *Prosecutor v Galić*, IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal, 14 Dec 2001, par 13; *Prosecutor v Milošević*, IT-01-50-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit, 16 May 2002, par 17.

[13] Paragraphs 47, 64.

[14] *Prosecutor v Jelisić*, IT-95-10-A, Judgment, 5 July 2001, pars 27-28.

[15] 6 Co Rep 52.

side having been heard, although he may have said what is right, will not have done what is right. That says it all.

5. In my opinion, the Appeals Chamber should reconsider its decision, and, for the reasons stated in my Dissenting Opinion, it should dismiss the prosecution's appeal against the decision of the Trial Chamber granting provisional release.

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

David Hunt

Judge David Hunt

Dated 12 December 2002
At The Hague,
The Netherlands.

[Seal of the Tribunal]