

UNITED
NATIONS

IT-02-60-AR65.4

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17 February 2003

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**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: IT-02-60-AR65.4

Date: 17 February 2003

Original: English

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Presiding
Judge Mehmet Güney
Judge Asoka de Zoysa Gunawardana
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr Hans Holthuis

Decision of: 17 February 2003

PROSECUTOR

v

Vidoje BLAGOJEVIĆ, Dragan OBRENOVIĆ, Dragan JOKIĆ & Momir NIKOLIĆ

DECISION ON PROVISIONAL RELEASE APPLICATION BY BLAGOJEVIĆ

Counsel for the Prosecutor:

Mr Norman Farrell
Mr Peter McCloskey

Counsel for the Appellant:

Mr Michael Karnavas & Ms Suzana Tomanović for Vidoje Blagojević

Procedural Background

1. On 28 March 2002, Trial Chamber II refused an application for provisional release by Dragan Jokić (“Jokić”), a co-accused of the present appellant Vidoje Blagojević (“Blagojević”),¹ upon the basis that it was “not satisfied with the guarantees provided” by the Government of Republika Srpska, as Republika Srpska was only an entity and not a State.² Leave to appeal having been granted,³ the Appeals Chamber considered that a guarantee provided by Republika Srpska is valid although not necessarily sufficient in every case; it upheld the appeal by Jokić and granted provisional release to him.⁴

2. On 22 July 2002, Trial Chamber II refused an application for provisional release by Blagojević,⁵ in which it disagreed with the Appeals Chamber’s ruling in the *Jokić* Appeal Decision, and it asserted that it would be acting *ultra vires* should it base its decision upon such guarantees.⁶ The Trial Chamber stated that it was not satisfied that Blagojević would appear for trial, and accordingly refused provisional release to him.⁷

3. Leave to appeal having been granted upon the basis that the Trial Chamber had excluded relevant evidence from its consideration of that issue,⁸ the Appeals Chamber held that the Trial Chamber was bound to accept and to apply the *Jokić* Appeal Decision that, as a matter of law and for the purposes of the Tribunal, an undertaking given by Republika Srpska qualifies for acceptance by the Trial Chamber, whether or not it is a sovereign State as defined in public international law.⁹ The Appeals Chamber nevertheless recognized that the Trial Chamber may well have reached the same conclusion that Blagojević would not appear for trial even if it *had* taken the Republika Srpska guarantee into consideration.¹⁰ For this reason, it returned the matter to the Trial Chamber for reconsideration, together with a specific direction to the Trial Chamber to take the Republika Srpska guarantee into account when determining that issue.¹¹ That course was taken in the light of the uncertainty created by the

¹ Decision on Request for Provisional Release of Accused Jokić, 28 Mar 2002 (“*Jokić* Decision”).

² *Jokić* Decision, pars 25, 32.

³ Decision on Application for Leave to Appeal, 18 Apr 2002, par 10.

⁴ Decision on Application by Dragan Jokić for Provisional Release, 28 May 2002 (“*Jokić* Appeal Decision”), pp 2-3.

⁵ Decision on Vidoje Blagojević’s Application for Provisional Release, 22 July 2002 (“Original Trial Chamber Decision”).

⁶ Original Trial Chamber Decision, pars 34, 36, 50.

⁷ Original Trial Chamber Decision, pars 54-55.

⁸ Decision on Application for Blagojević for Leave to Appeal, 27 Aug 2002, p 3.

⁹ Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović, 3 Oct 2002 (“Original Blagojević Appeal Decision”), par 6.

¹⁰ Original Blagojević Appeal Decision, par 7.

¹¹ *Ibid*, par 8.

decision then under appeal as to whether, despite the Trial Chamber's view that it could not take that guarantee into consideration, it had nevertheless reached its decision that Blagojević would appear for trial even if that guarantee *were* taken into consideration.¹²

4. The Trial Chamber once more refused Blagojević provisional release,¹³ holding that it "remains not satisfied that if released, [Blagojević] would appear for trial".¹⁴ The Trial Chamber formally noted the direction by the Appeals Chamber that it was to take the Republika Srpska guarantees in account when determining whether Blagojević would appear for trial if provisionally released.¹⁵ It then stated, in relation to its original decisions to refuse to grant provisional release to him:¹⁶

CONSIDERING that the decision taken by the Trial Chamber to deny the request for provisional release was independent of the guarantees provided by the authorities which gave them,

CONSIDERING FURTHER that the decision taken by the Trial Chamber to deny the request for provisional release was *de facto* solely based on the fact that the Trial Chamber was "not satisfied that, if released, Mr Blagojević would appear for trial",

The Trial Chamber referred to (a) the absence of any "real new facts [...] put forward by the Defence to cause [it] to reconsider" its original decision to refuse provisional release, (b) the factual material to which it had referred in its original decisions which suggested that Blagojević would not appear for trial if granted provisional release, and (c) the prospect that the trial would commence in May 2003.

5. Leave to appeal from that decision was again granted, upon the basis that, as the Trial Chamber had conceded that it had *not* taken the guarantee into account in its *original* decision refusing provisional release, it was for the full Bench of the Appeals Chamber to determine whether the Trial Chamber had failed to comply with the direction which the Appeals Chamber had given it to take the guarantee into consideration when *reconsidering* the application.¹⁷

¹² *Ibid*, par 7. The ambiguities in the Original Trial Chamber Decision which led to that uncertainty are identified in a subsequent decision of a bench of the Appeals Chamber: Decision on Applications by Blagojević and Obrenović for Leave to Appeal, 16 Jan 2003 ("Leave Decision"), par 5.

¹³ Decision on Vidoje Blagojević's Application for Provisional Release, 19 Nov 2002 ("Impugned Decision").

¹⁴ Impugned Decision, p 3.

¹⁵ *Ibid*, p 2.

¹⁶ *Ibid*, p 3.

¹⁷ Leave Decision, pars 9, 13. Dragan Obrenović, another co-accused, was not granted leave to appeal from the decision of the Trial Chamber refusing him provisional release, because the Trial Chamber had also stated that it would in any event have refused him upon the basis that it was not satisfied that he would not pose a danger to any victim, witness of other person: Leave Decision, par 14.

6. Blagojević then filed his Interlocutory Appeal,¹⁸ the prosecution responded,¹⁹ and Blagojević replied.²⁰ On 7 February 2003, the President assigned the present Bench to hear the appeal.²¹ Blagojević has since filed, as an Appendix to his Interlocutory Appeal, a second guarantee from the government of Republika Srpska which affirms the original guarantee given but which adds nothing to it.²²

The arguments of the parties

7. In his Interlocutory Appeal, Blagojević asserts that the Impugned Decision lacks “findings of fact” and that it also lacks “a discernable legal reasoning from which to conclude that the Trial Chamber had, indeed, taken into account the guarantee of the [Republika Srpska] in determining that Mr. Blagojević poses a flight-risk if provisionally released”.²³ He submits that the Trial Chamber did not make it clear whether it took Republika Srpska guarantees into account²⁴ and that, having failed to do so in the Original Trial Chamber Decision, this guarantee constituted a “new fact” which the Chamber could not ignore.²⁵ The Impugned Decision, Blagojević suggests, indicates a continued reluctance of the Trial Chamber to accept and apply the ruling of the Appeals Chamber in the *Jokić* Appeal Decision.²⁶ Blagojević also asserts that the Trial Chamber erroneously took into account the proximity of the start of the trial as a factor directly relevant to its determination.²⁷

8. In its response, the Prosecution has maintained its objection to Blagojević’s provisional release and simply incorporated the arguments which it had made in earlier

¹⁸ Second Appeal from the Trial Chamber’s Impugned Decision on Vidoje Blagojević’s Application for Provisional Release, 24 Jan 2003 (“Interlocutory Appeal”). The Registrar should note, when considering the fees payable to counsel, that 17 pages of this 23 page document are unnecessarily devoted to the history of the proceedings – a subject which Blagojević had already extensively covered in his application for leave to appeal: Application for Leave to Appeal the Trial Chamber’s Second Decision on Vidoje Blagojević’s Application for Provisional Release due to the Trial Chamber’s Failure or Refusal to Comply with the Directions of the Appeals Chamber or in the Alternative Request for Remand to the Appeals Chamber so as to Consider Whether the Record is Complete for the Purpose of Issuing an Order for the Provisional Release of Vidoje Blagojević, 26 Nov 2002. In that leave application, nine of the 15 pages were devoted to the history of the proceedings..

¹⁹ Prosecution Response to Blagojević’s Second Appeal Regarding Provisional Release, 31 Jan 2003 (“Response”).

²⁰ Accused Blagojević’s Reply to Prosecution’s Response to the Second Appeal Regarding Provisional Release, 3 Feb 2003 (“Reply”).

²¹ Ordonnance du Président Nomination de Juges à un Collège de la Chambre d’Appel, 7 Feb 2003.

²² Appendix to: Second Appeal from the Trial Chamber’s Impugned Decision on Vidoje Blagojević’s Application for Provisional Release (Second Guarantee of the Government of the Republika Srpska in Support of Vido [sic] Blagojević’s Application for Provisional Release), 10 Feb 2003.

²³ Interlocutory Appeal, par 39.

²⁴ Interlocutory Appeal, pars 43 and 47.

²⁵ Interlocutory Appeal, par 47.

²⁶ Interlocutory Appeal, par 50.

²⁷ Interlocutory Appeal, par 51.

filings.²⁸ In summary, the Prosecution refers to the nature of the crimes with which Blagojević is charged (in particular, genocide), the fact that another indicted person (Ljubomir Borovčanin) became a fugitive and remains at large despite an oral agreement reached with the government of Republika Srpska to facilitate his surrender to the Tribunal, the ease with which citizens of Republika Srpska can flee to what was then known as the Federal Republic of Yugoslavia ("FRY"), the acknowledgment by the FRY Foreign Minister of the difficulty in arresting indicted war criminals and the up-coming trial date, as reasons enough to deny Blagojević provisional release.²⁹

9. In his Reply, Blagojević submits, *inter alia*, that the Prosecution's claim in relation to Ljubomir Borovčanin is unsupported by any evidence,³⁰ and that comments made by the FRY Foreign Minister are irrelevant to the present matter.³¹

Discussion

10. The scope of the remittal to the Trial Chamber was limited to a reconsideration of the Original Trial Chamber Decision with the direction that the Trial Chamber was to take into account the guarantee of Republika Srpska when determining whether Blagojević would appear for trial if provisionally released.³² The Appeals Chamber did *not* direct the Trial Chamber to make any further findings of fact in relation to the evidence which had been placed before it by the prosecution in the original application for provisional release.³³ The argument put by Blagojević that the Impugned Decision lacks findings of facts is therefore not open to him in this present appeal. The proximity of the start of the trial clearly may be relevant to the determination of the provisional release application, as it has a bearing upon the weight to be placed upon the applicant's personal undertaking to appear. But it is irrelevant to the weight to be placed upon the Republika Srpska guarantee. The statement by the FRY Foreign Minister was relevant to the case put by the prosecution that it is easy for citizens of Republika Srpska to flee to the FRY, although the Trial Chamber does not appear to have relied upon that statement. It, too, is irrelevant to the weight to be placed upon the

²⁸ Prosecution's Response, par 12.

²⁹ Prosecution's Response, pars 13-16.

³⁰ Reply, pars 1-3.

³¹ Reply, par 4.

³² Original Blagojević Appeal Decision, par 8.

³³ In a Separate Opinion appended to the Original Blagojević Appeal Decision, Judge Hunt stated that another, subsidiary, reason for returning the matter to the Trial Chamber was that the pleadings in that appeal indicated that there were strongly disputed issues of fact involved in the matters upon which the prosecution relied in its opposition to the grant of provisional release in relation to Blagojević, for which there were no clear findings of fact, and it was necessary for the Trial Chamber to determine them. The other members of the Appeals Chamber did not, however, include such a requirement in the Appeals Chamber's decision.

Republika Srpska guarantee in this appeal. The Appeals Chamber does not propose to pay any regard to either of those matters in this appeal.

11. The only issues which arise in this appeal are:

- (a) Did the Trial Chamber comply with the direction by the Appeals Chamber to take the Republika Srpska guarantee into account when determining whether Blagojević would appear for trial if granted provisional release?
- (b) If the Trial Chamber did not do so, what order should now be made by the Appeals Chamber?

(a) Did the Trial Chamber comply with the direction of the Appeals Chamber?

12. The relevant passages from the Impugned Decision have already been reproduced in this decision.³⁴ They demonstrate a clear concession by the Trial Chamber that it had *not* considered the guarantee provided by Republika Srpska when originally determining that it was not satisfied that he would appear for trial if granted provisional release. In order to comply with the direction which was given to it by the Appeals Chamber to take that guarantee into account, therefore, the choice posed for the Trial Chamber in order to overcome the ambiguity in its original decision was a clear one. As stated in the Leave Decision,³⁵ the Trial Chamber could either –

- (a) expressly have held that, notwithstanding the validity of the Republika Srpska guarantee, it was *not* satisfied that Blagojević would appear for trial if provisionally released; or
- (b) have held that, once the validity of that guarantee was taken into account, it *was* satisfied that Blagojević would appear for trial if provisionally released.

However, the Trial Chamber did not expressly acknowledge, or give any clear indication, that it had complied with the direction of the Appeals Chamber.

13. As the Leave Decision stated,³⁶ the Trial Chamber's reference to the absence of any "real new facts [...] put forward by the Defence" which would cause it to "reconsider" its original decision was strictly correct, in that the Republika Srpska guarantees had been put forward by the Defence before those decisions were given, and they could not be described, strictly, as "new" facts. But, as Blagojević has pointed out,³⁷ the existence of those

³⁴ Paragraph 4, *supra*.

³⁵ Leave Decision, par 6.

³⁶ *Ibid*, par 11.

³⁷ Interlocutory Appeal, par 47.

guarantees were facts which had to be considered by the Trial Chamber for the first time, and they were therefore “new” to the Trial Chamber’s consideration. The contrast between the Trial Chamber’s express reference to the absence of “new” facts and its silence concerning the presence of a fact which was “new” to its consideration strongly suggests that indeed it did *not* take those guarantees into consideration as directed.

14. The Trial Chamber was invited to clarify the issue raised *proprio motu*.³⁸ That invitation was intended to give to the Trial Chamber the opportunity to confirm that it *had* taken the guarantee into account, and to explain that the absence of any express reference in the Impugned Decision to having done so was no more than an oversight. The Trial Chamber did not respond to that invitation, which leads to the inference that it was unable to give such a confirmation. The Appeals Chamber is satisfied from this and all the circumstances that the Trial Chamber did *not* comply with the direction to take the Republika Srpska guarantee into account in its reconsideration of Blagojević’s application for provisional release. Notwithstanding the submission made by Blagojević that the Impugned Decision “seems to suggest a reluctance by the Trial Chamber to accept and apply the decision of the Appeals Chamber in *Jokić*”,³⁹ it is unnecessary for the purposes of this appeal to determine why the Trial Chamber failed to comply with that direction. It is sufficient to say that the failure of the Trial Chamber to comply with the direction has led to an unfortunate and wholly unnecessary delay in reaching a proper conclusion in relation to the liberty of Blagojević.

(b) What order should now be made?

15. The original finding by the Trial Chamber that, without reference to the guarantee, it was not satisfied that Blagojević would appear for trial was not intended to be in issue in the reconsideration which was ordered. It is thus not in issue in this appeal. The only issue which remains to be determined in the application for provisional release is that which the Trial Chamber has failed twice to consider: whether Blagojević has established that, when the valid guarantee from Republika Srpska is taken into account, he will appear for trial. No purpose would be served by returning that issue to the Trial Chamber yet again to determine. There is no other factor which would require the matter to be returned to the Trial Chamber, as the Appeals Chamber is now in the same position as the Trial Chamber to determine that one remaining issue.

³⁸ Leave Decision, par 16.

³⁹ Interlocutory Appeal, par 50.

16. The guarantee given by Republika Srpska is relevant to the issue of whether Blagojević will appear for trial because Republika Srpska has the power to arrest an accused who fails to return into custody in accordance with a personal undertaking to do so. Whether its guarantee is sufficiently reliable to produce a satisfaction that a particular accused will appear for trial must be determined in relation to the circumstances which arise in that particular case.⁴⁰ In the present case, with a finding that Blagojević's own personal undertaking is not sufficient to produce that satisfaction,⁴¹ the reliability of the guarantee must be substantial indeed before provisional release could be granted. What, then, is the likely attitude of Republika Srpska to arresting this particular accused if he fails to comply with his personal undertaking? The Appeals Chamber disregards the unsupported claims of the prosecution in relation to Ljubomir Borovčanin, and observes that, even if the incident were to be established, the circumstances alleged constitute only some evidence of an uncooperative attitude, and they have little bearing upon the reliability of a *guarantee* given by Republika Srpska.

17. Blagojević is charged, *inter alia*, with genocide arising out of the events at the Srebrenica "safe area" in Bosnia which are well known. Blagojević is alleged by the indictment to have been at the relevant time the Commander of the 1st Bratunac Light Infantry Brigade, which (the indictment alleges) was responsible for the security of part of the Srebrenica "safe area".⁴² Blagojević is alleged to have been responsible for planning, directing and monitoring the activities of all subordinate formations within his Brigade.⁴³ The Brigade is alleged to have been responsible for all prisoners captured, detained or killed within its zone of responsibility,⁴⁴ and Blagojević is charged both with command responsibility for the activities of those under his command and with individual responsibility (including participation in a joint criminal enterprise to kill Muslim men and to transfer forcibly women and children from the Srebrenica enclave).⁴⁵

18. Blagojević is thus alleged to be at a high level in the hierarchy of responsibility for the crimes charged. Republika Srpska has so far failed to arrest any persons indicted by the Tribunal, and there is a substantial disincentive for it to arrest this particular accused, who

⁴⁰ *Prosecutor v Mrkšić*, IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 Oct 2002, pars 9, 11.

⁴¹ See par 4, *supra*.

⁴² Indictment, par 1.

⁴³ *Ibid*, par 2.

⁴⁴ *Ibid*, par 36. The wording of the indictment upon this issue is unclear as to the nature of the responsibility alleged.

⁴⁵ *Ibid*, pars 27-34.

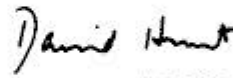
must have substantially valuable information which he could disclose to the Tribunal if minded to cooperate should he be returned to custody. In the light of the finding already made that Blagojević's own personal undertaking is not sufficient to demonstrate that he will appear for trial, the Appeals Chamber is not satisfied that he will do so even when the valid guarantee from Republika Srpska is taken into account.

Disposition

19. The appeal is dismissed.

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

Dated this 17th day of February 2003,
At The Hague,
The Netherlands.



Judge David Hunt
Presiding Judge

[Seal of the Tribunal]