



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-99-37-PT
Date: 29 May 2003
Original: English

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Decision: 29 May 2003

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ**

PUBLIC VERSION

**DECISION ON SECOND APPLICATIONS FOR PROVISIONAL
RELEASE**

The Office of the Prosecutor:

Mr. Geoffrey Nice
Ms. Cristina Romano

Counsel for the Accused:

Mr. John Livingston, Mr. Radoje Stefanović and Mr. Miladin Papić, for Milan Milutinović
Mr. Toma Fila, Mr. Zoran Jovanović and Mr. Goran Petrović, for Nikola Šainović
Mr. Tomislav Višnjić, Mr. Vojislav Selžan and Mr. Peter Robinson, for Dragoljub Ojdanić

THIS TRIAL 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 (“International Tribunal”),

BEING SEISED of a “General Ojdanić Second Application for Provisional Release”, dated 7 February 2003, filed on behalf of the accused Dragoljub Ojdanić (“Ojdanić defence”) on 10 February 2003 (“Ojdanić Second Application”), and a confidential “Second Defence Request for Provisional Release” filed by the defence of Nikola Šainović (“Šainović defence”) on 10 February 2003 (“Šainović Second Application”),

NOTING the “Prosecution’s Response to Ojdanić Second Application for Provisional Release” filed by the Office of the Prosecutor (“Prosecution”) on 24 February 2003 (“Prosecution First Response”), and the confidential “Prosecution’s Response to Šainović’s Second Application for Provisional Release” filed on 24 February 2003 (“Prosecution Second Reponse”),¹

NOTING the “Reply Brief: General Ojdanić Second Application for Provisional Release” filed by the Ojdanić defence on 27 February 2003 (“Ojdanić Reply”), and the confidential and *ex parte* “Defence Reply to Confidential and *Ex Parte* Prosecution’s Response to Šainović’s Second Application for Provisional Release” filed by the Šainović defence on 3 March 2003 (“Šainović Reply”), both with leave of the Trial Chamber,

NOTING the hearing on these applications held on 25 March 2003, during which the representative of the Serbia and Montenegro appeared and made a statement,

NOTING that in support of this new application,² the Ojdanić defence submits, *inter alia*, the following:

¹ On 24 February 2003, in response to Šainović Second Application, the Prosecution filed two pleadings: (1) a confidential “Prosecution’s Response to Šainović’s Second Application for Provisional Release”, and (2) a confidential and *ex parte* “Prosecution’s Response to Šainović’s Second Application for Provisional Release”. The two filings are identical, save for para. 33, disclosed only to the Accused Šainović.

² In June 2002, Nikola Šainović and Dragoljub Ojdanić applied for provisional release until the commencement of their trial [“First Application”]. On 26 June 2002, having considered the oral and written submissions of the parties, this Trial Chamber granted provisional release to both accused. *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Decision on Application of Nikola Šainović & Dragoljub Ojdanić for Provisional Release, IT-99-37-PT, 26 June 2002 [“Trial Chamber’s Decision”]. Pursuant to leave granted by a Bench of the Appeals Chamber, the Prosecution appealed against the Trial Chamber Decision. On 30 October 2002, by majority, Judge Hunt dissenting, the Appeals Chamber allowed the appeal, quashed and revised the Trial Chamber Decision, and denied the provisional release of the co-accused. *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Decision on Provisional Release, IT-99-37-AR65, 30 Oct. 2002 [“Appeals Chamber Decision”].

- (i) that the surrender of the co-accused Milan Milutinović early this year confirms that the guarantees of the FRY or Republic of Serbia are reliable,³ and the fact that the former Presidents of the FRY and Serbia are now in custody, as well as the former Deputy Prime Minister of the FRY, indicates that these guarantees are likely to be fulfilled regardless of the position formerly held by an accused,⁴
- (ii) that a full consideration of the statements of the accused prior to his surrender,⁵ demonstrates that the accused consistently affirmed that he would surrender, if required to do so by Yugoslavian law,⁶ which he did on 25 April 2002,⁷ after the passage of a Law on Cooperation with the International Tribunal ("Law on Cooperation"), and
- (iii) the surrender of the co-accused Milutinović should be considered when assessing the expected length of the pre-trial detention of the accused, the Ojdanić defence "does not believe this case will be ready for trial until sometime in 2004".⁸

NOTING that, in its Response, the Prosecution opposes the Ojdanić Second Application arguing, *inter alia*, as follows:

- (i) the public statements made by the Accused to the media and the circumstances of his surrender make it clear and confirm the Appeals Chamber finding that the Accused's surrender was not voluntary⁹; under the circumstances, provisional release should be denied as the political situation in the FRY (Serbia and Montenegro) may still change, thus affecting the reliability of the Accused's undertaking to appear for trial,¹⁰
- (ii) the guarantees provided by the FRY and Serbia should not be given weight; the surrender of Milutinović, some three years and eight months after being publicly indicted, only

³ Ojdanić Second Application, para. 7.

⁴ *Ibid*, para. 26.

⁵ Ojdanić Second Application, Annexes I & II.

⁶ *Ibid*, para. 12.

⁷ *Ibid*, also Transcripts ("T."), 535; the Ojdanić defence submits that the accused's position has been consistent as reflected in numerous documents and media reports such as his 19 November 2001 Letter to the Chief Military Prosecutor (Ojdanić Second Application, Annex 2) requesting initiation of criminal proceedings by domestic military courts; the 12 February 2002 "Ojdanić: I will not surrender" *Glas Javnosti*; the 3 April 2002 "Ojdanić: I will not surrender to the Hague Tribunal" *Pobjeda* (Beta – AP), quoting the accused as having said that he would not turn himself in to the Tribunal, unless and until the adoption of a Law on co-operation; the 9 April 2002 *Danas* newspaper in which the accused is reported to complain about the passivity of local judicial organs; the 14 April 2002 *AFP* reporting that the accused had agreed to surrender to the Tribunal following the adoption, the previous week, of the Law on co-operation, also in *New York Times*, *Radio Free Europe*, 15 April 2002, and the *Reuters News Service*, 20 April 2002; Ojdanić Second Application, Annex 1.

⁸ Ojdanić Second Application, para. 8.

⁹ Prosecution First Response, para. 5, referring to Appeals Chamber Decision, *supra* n 2, para. 10.

¹⁰ Prosecution First Response, para. 9.

highlights the fact that domestic political considerations have taken precedence over the international obligations of the FRY and Serbia,¹¹

- (iii) the Law on Cooperation with the International Tribunal contains provisions that are *prima facie* inconsistent with the FRY's international obligations,¹² and various Prosecution's requests for assistance pursuant to Rule 54bis of the Rules of Procedure and Evidence ("Rules") have received unsatisfactory responses,¹³ that guarantees in this context must be given a *secondary* consideration, and may be a *negative factor* (against a grant of provisional release) when provided by a State with a history of non-compliance with its legal obligation, although they cannot be regarded as a *positive factor* (in favour of provisional release) when otherwise,¹⁴
- (iv) as the Prosecution is still conducting investigation against individuals in leadership positions for crimes committed in Kosovo in 1999, it is possible that the release of this accused (who held a position of authority) would, in light of the schedule of disclosure set by the pre-trial Judge, increase the risk of any interference with victims and witnesses in the period between the disclosure of evidence and the beginning of trial,¹⁵
- (v) even assuming that the Ojdanić Second Application meets the test of Rule 65(B) of the Rules, the Trial Chamber should exercise its discretion to refuse provisional release because (a) the schedule established by the pre-trial Judge would minimise the likelihood of lengthy pre-trial detention,¹⁶ and (b) in the circumstances of this case (serious nature of the crimes charged in this case, the number of the victims involved, the high level position of the accused at the time of the alleged crimes),¹⁷ detention is necessary to preserve public confidence in the administration of justice by the Tribunal in its international setting.¹⁸

NOTING that, in the Ojdanić Reply, it is submitted that the Prosecution has failed to provide any evidence to oppose provisional release,¹⁹ and, the Ojdanić defence maintains that the Accused's

¹¹ *Ibid*, para. 12.

¹² *Ibid*, para. 13.

¹³ *Ibid*.

¹⁴ *Ibid*, para. 18.

¹⁵ *Ibid*, para. 20; the Prosecution relies upon a decision of the Trial Chamber in the *Blaškić* case in which provisional release was denied on the basis, *inter alia*, of the accused's possession of Prosecution's evidence which, the *Blaškić*'s Chamber said, "would place him in a situation permitting him to exert pressure on victims and witnesses" so that "the investigation of the case might be seriously flawed". *Prosecutor v. Blaškić*, Order Denying a Motion for Provisional Release, IT-9514-T, 25 April 1996, p. 5 [*"Blaškić Decision"*].

¹⁶ Prosecution First Response, para. 20.

¹⁷ *Ibid*, para. 21.

¹⁸ *Ibid*.

¹⁹ Ojdanić Reply, para. 6.

surrender was voluntary,²⁰ in conformity with domestic legislation, that the Ojdanić defence further argues that, given the Tribunal's mission to promote reconciliation in the former Yugoslavia, allowing the Accused Ojdanić to have the same freedom as his counterparts in Bosnia and Croatia (indicted senior army commanders) would be seen as a fair and equitable demonstration of justice in Serbia and Montenegro;²¹ that these factors, along with the estimated remaining length of the pre-trial stage, should weigh in favour of provisional release,²²

NOTING that, in support of its application, the Šainović defence submits, *inter alia*, the following:

- (i) that the accused's surrender was voluntary, that he neither relied on his immunity as a Federal Representative, nor on his mandate in the Chamber of Citizens which would have lasted until 4 February 2003,²³
- (ii) the guarantees of Serbia and Montenegro²⁴ are reliable and the Prosecution has not provided evidence to the contrary,²⁵ that persons who have been provisionally released based on those guarantees have returned to the Tribunal when requested,²⁶
- (iii) that Statements made by his Counsel before receiving the power of attorney on 24 April 2002 should not be ascribed to the accused,²⁷
- (iv) [confidential]
- (v) [confidential]

²⁰ *Ibid*, paras 10-12. Attached to the Ojdanić Reply is a Personal Guarantee Affidavit signed by the Accused, in which the Accused recounts the circumstance of his surrender to the Tribunal and reaffirm his intention to abide by any condition that the Trial Chamber may impose. The Ojdanić defence argues that the voluntary nature of the surrender is also evidenced by the statement of the Deputy Minister of Justice Nebojsa Sarkić, appearing as representative of the FRY at the hearing on the initial application for provisional release; Letters from Lieutenant General Branko P. Krga, Current Chief of Staff of the Yugoslavian Army, and Colonel General Spasoje Smiljanić, former Commander of the Yugoslavian Air Force, both attesting of Ojdanić early intention of voluntary surrender; the statement from the United States State Department applauding his courageous decision and show of leadership, all Annexed to the initial application.

²¹ *Ibid*, para. 28.

²² *Ibid*, para. 29.

²³ Šainović Second Application, paras 19, 21.

²⁴ *Ibid*, para. 30. Representatives of Serbia and Montenegro confirmed the validity of FRY's guarantees at the hearing, T. 510.

²⁵ Šainović Second Application, paras 22-23, stating that the Constitutional Charter does not contain any provision forbidding the extradition of citizens of Serbia and Montenegro, unlike the former constitution.

²⁶ T. 532.

²⁷ T. 501, 530. Šainović Second Application, paras 28-29.

- (vi) the length of the pre-trial stage,²⁸ and the positive effect of a release on public opinion, especially in Serbia and Montenegro, for the mandate the Tribunal as an institution dedicated to justice, truth and reconciliation.²⁹

NOTING that the Prosecution objects to the Šainović Second Application, *inter alia*, on the following grounds:

- (i) the surrender of the Accused was not voluntary as he could have surrendered earlier, domestic legislation cannot take precedence over international obligations,³⁰
- (ii) given the ongoing investigations and Nikola Šainović's previous high rank, his release could pose a danger to victims and witnesses,³¹
- (iii) the pre-trial Judge has set a trial preparation schedule which minimises lengthy pre-trial detention,³²
- (iv) [confidential]
- (v) [confidential]
- (vi) the argument that granting the Šainović Request reinforces the Serbia and Montenegro public opinion in favour of the Tribunal is irrelevant, public interest considerations weigh heavily against granting provisional release in this case.³³

CONSIDERING that in determining whether to grant provisional release to an accused, it is for the Trial Chamber to consider the particular circumstances of each case, and for an accused to satisfy the Trial Chamber of two matters: (i) that he will appear for trial, and (ii) that, if released, he will not pose a danger to any victim, witness or other person,

NOTING that, when considering the First Application, the Appeals Chamber held that that the Trial Chamber had committed two errors of law in that it failed (i) to take into account all the factors which were relevant, in particular, to consider the effect of the senior position of the accused

²⁸ Šainović Second Application, para. 64.

²⁹ *Ibid*, paras 65-66.

³⁰ Prosecution's Second Response, para. 12.

³¹ *Ibid*, para. 30, referring to the *Blaškić* Decision, *supra* n 15.

³² Prosecution Second Response, para. 29.

³³ *Ibid*, paras 32, 34.

and the consequence thereof upon the weight of governmental guarantees,³⁴ and (ii) to refer to the public statements of the accused,³⁵

NOTING ALSO that the Appeals Chamber found that the surrenders of the Accused were not voluntary,³⁶

NOTING that the Application by the Accused Ojdanić for a modification by the Appeals Chamber of its Decision on provisional release and a Motion to admit additional evidence were denied by the Appeals Chambers,³⁷

NOTING that, in that Decision, the Appeals Chamber said 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”³⁸

CONSIDERING the guidelines set out by the Appeals Chamber when considering the First Application, of which the Trial Chamber should take account in deciding whether it is satisfied that, if released, an accused will appear for trial,³⁹

CONSIDERING that the senior position of the Accused is a factor that the Trial Chamber must take into account in considering the weight of the guarantees,

CONSIDERING that as Deputy Prime Minister of the FRY and Chief of General Staff of the VJ – and then FRY Minister of Defence– both Nikola Šainović and Dragoljub Ojdanić were among the highest ranking officials in the FRY,

CONSIDERING that the public statements of the accused are factors which must be taken into account in assessing whether the surrenders were voluntary,

³⁴ Appeals Chamber Decision, *supra* n 2, para. 9.

³⁵ The Appeals Chamber noted that, as argued by the Prosecution before the Trial Chamber, both Šainović and Ojdanić made public statements to the media to the effect that they would not surrender voluntarily: “Ojdanić: I will not surrender”) *Glas Javnosti*, 12 February 2002; “Ojdanić: I will not surrender to the Hague Tribunal” *Pobjeda* (Beta – AP), 3 April 2002. *Ibid*, para. 10.

³⁶ *Ibid*.

³⁷ *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Decision on Motion for Modification of Decision on Provisional Release and Motion to Admit Additional Evidence, IT-99-37-AR65, 12 Dec. 2002.

³⁸ *Ibid*, p. 4.

³⁹ Appeals Chamber Decision, para. 6.

CONSIDERING that the Trial Chamber rejects the argument that the surrender of the co-accused Milutinović, coming as it did more than three years after he had been publicly indicted, is evidence that the guarantees given are reliable,

[*confidential*]

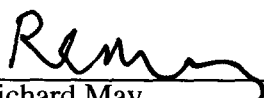
CONSIDERING that the Trial Chamber is not satisfied that any new material has been brought to its attention such as to persuade it not follow the Appeals Chamber Decision that the surrenders were not voluntary,

CONSIDERING therefore, that the Trial Chamber is not satisfied that, if released, the Accused will appear for trial, and will not pose a danger to any victim, witness or other person,

PURSUANT TO Rule 65 of the Rules of Procedure and Evidence of the International Tribunal,

HEREBY DENIES the Applications.

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


Richard May
Presiding

Dated this twenty-ninth day of May 2003
At The Hague
The Netherlands

[Seal of the Tribunal]