



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: 3 June 2003
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision: 3 June 2003

PROSECUTOR

v.

MILAN MILUTINOVIĆ

PUBLIC VERSION

DECISION ON 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 confidential “Motion for Provisional Release on Behalf of Milan Milutinović”, filed by the defence of Milan Milutinović (“Milutinović defence”) on 23 January 2003 (“Motion”), in which it seeks that the Accused be granted provisional release pending the start of the trial,

NOTING the “Prosecution’s Response to Milutinović Motion for Provisional Release” filed by the Office of the Prosecutor (“Prosecution”) on 6 February 2003 (“Prosecution Response”), in which it opposes the Motion,

NOTING the “Confidential Reply to Prosecutor’s Response to Milutinović Motion for Provisional Release” filed by the Milutinović defence on 10 February 2003 (“Reply”),

NOTING the “Guarantees of the Federal Republic of Yugoslavia [“Union of Serbia and Montenegro”, “FRY”] and the Resolution of the Government of Serbia for Provisional Release of Mr. Milutinović”, annexed to the Motion, and the Letters from Mr. Goran Svilanović, Minister of Foreign Affairs of Serbia and Montenegro, and Mr. Zoran Živković, Prime Minister of Serbia, confirming the validity of the guarantees issued by the FYR and Serbia,

NOTING the Letter from the Dutch Protocol Department, filed on 12 February 2003, indicating that the Host Country had no objection to the provisional of the Accused, provided that, upon release, he leaves the Netherlands,

NOTING the “Confidential Motion on Behalf of Milan Milutinović for Further Medical Evidence”, filed on 27 February 2003 (“Motion for Medical Evidence”), and the Confidential Report from the Detention Unit’s Medical Officer, Dr. Paulus Flake, filed on 10 March 2003, in accordance with the Trial Chamber Order of 4 March 2003, together with the Letters from Dr. Jap Van der Sloot, cardiologist at Amsterdam’s Academic Medical Centre, filed on 12 March 2003 and 17 April 2003 (“Medical Reports”),

NOTING the “Confidential Urgent Motion Pursuant to Rule 54 on Behalf of Milan Milutinović Re: Evidence to be Called at Provisional Release Hearing”, filed on 17 March 2003,

NOTING the hearing on the Motion held on 1 May 2003, during which a representative of the Serbia and Montenegro appeared and made a statement,

NOTING that in support of this Motion, the Milutinović defence submits, *inter alia*, the following:

- (i) the Accused surrendered voluntarily following the expiry following the expiry of his presidential mandate,¹
- (ii) the circumstances of the Accused are different from that of other fugitives: before October 2000, the Accused could not have surrendered without fear of retribution against him or his family; thereafter, until his mandate expired on 29 December 2002, the Accused’s presence was crucial to ensure the democratic transition and stability as indicated in the Letters of Mr. Đinđić, Mr. Živković and Mr. Svilanović;² and although this is no excuse in law, had he surrendered earlier, the stability of the country would have been endangered,³
- (iii) the Accused has consistently and more recently told the media that he would not resist transfer to the Tribunal or that he would surrender voluntarily, a matter accepted by the Prosecution itself;⁴ however, the Accused has always considered that because he did not commit the crimes alleged, no trial should really be necessary;⁵ regardless of what the Accused may have said, it is the accused’s recent state of mind that matters,⁶
- (iv) the Government guarantees are reliable in this case, as confirmed by the statement of the representative of Serbia and Montenegro at the hearing,⁷ the letters from Mr. Đinđić and Mr. Svilanović, in addition to the Accused’s personal undertaking; the Trial Chamber should make its decision on the present political situation without speculation about the future,
- (v) the Accused has demonstrated his support for the Tribunal, and shown a willingness to cooperate with the Prosecution under certain conditions,⁸

¹ Motion, paras 1, 4(a) and Annexes 1 and 5.

² Motion, paras 1, 4(a)-(b) and Annexes 1 and 5.

³ T. 555-561.

⁴ Reply, para. 9 and T. 562-563, referring to Prosecution Response, para. 9.

⁵ Reply, para. 14.

⁶ T. 562-563.

⁷ T. 594, 599.

⁸ Reply, para. 26.

- (vi) the Senior position of the Accused is not, in itself, a bar to provisional release as evidenced in the jurisprudence of the International Tribunal; further, his position was more symbolic than one of substance,
- (vii) no evidence has been adduced that the Accused has in the past attempted to interfere with victims, witnesses or ongoing investigations; as a former President of Serbia, he will further be under permanent surveillance,⁹
- (viii) provisional release should be granted on grounds of ill health: [redacted], it is now accepted that an Accused's health is a relevant factor to be taken into account,¹⁰
- (ix) the expected length of the pre-trial detention and the Accused poor health are factors which should weigh in favour of provisional release,¹¹

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

- (i) the surrender of the Accused to the Tribunal on 20 January 2003 cannot be considered voluntary as he is unable to provide any sound justification or excuse for failing to surrender at any time since May 1999, when publicly indicted,¹²
- (ii) the Accused made earlier statements to the media to the effect that he had no intention of surrendering to the Tribunal,¹³ such statements are highly relevant to the Trial Chamber's determination and militate against release,¹⁴
- (iii) 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, constitutes

⁹ Reply, para. 30.

¹⁰ *Prosecution v. Mile Mrkšić*, Decision on Appeal Against Refusal to Grant Provisional Release, Case No. IT-95-13/1-AR 65, 8 Oct. 2002 (Mrkšić Appeals Decision), para. 9.

¹¹ Reply, paras 33-34.

¹² The Prosecution submits that contribution to political stability cannot constitute a legally cognizable justification for an indicted person's ongoing refusal to surrender. Prosecution's Response, paras 6, 8. It is further submitted that in *Mrkšić*, the Appeals Chamber upheld the denial of provisional release by the Trial Chamber which found that surrender after six years of refusal to surrender could have only limited impact in favour of provisional release and that, in those conditions, it was doubtful whether such surrender could be treated as voluntary surrender. Mrkšić Appeals Decision, *supra* n 13, T. 603.

¹³ The Accused is reported to have declared, in an interview with TV *Politika* on 16 January 2001, a Belgrade television station, that his "conscience was clear" and he saw "no reason to surrender [himself] to the Tribunal". He is also reported to have said, referring to the Tribunal, that "these artificial creations for trying an entire people and its leadership is something that [he does] not recognize. "Yugoslavia: I Won't Face War Crimes Court – Serbian President", *Reuters*, 17 January 2001, Confidential Annex to Prosecution's Response.

¹⁴ Prosecution's Response, para. 9, *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Decision on Provisional Release, IT-99-37-AR65, 30 Oct. 2002 ["Šainović & Ojdanić Appeals Decision"], para. 10.

defiance by the FRY and Serbian authorities of orders issued by the Tribunal,¹⁵ nor should the personal Guarantee/Undertaking of the Accused be given weight,¹⁶ the senior position of the Accused during the indictment period, the likelihood of a lengthy sentence if convicted are factors that militate against release, as they affect the weigh to be given to the personal undertaking and the guarantees of the Government,

- (iv) the Law on Cooperation with the International Tribunal contains provisions that are *prima facie* inconsistent with the FRY's international obligations, and various Prosecution's requests for assistance pursuant to Rule 54bis of the Rules of Procedure and Evidence ("Rules") have received unsatisfactory responses,¹⁷ the guarantees in this context are unreliable as it is uncertain whether the authorities will enforce them when requested to do so,¹⁸
- (v) the Accused's surrender cannot constitute cooperation with the Tribunal, and no substantial cooperation with the Prosecution has taken place to be relevant in the determination of this application,¹⁹
- (vi) 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,²⁰
- (vii) 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,²¹ and (b) in the circumstances of this case (serious nature of the crimes charged in this case, the number of victims involved, the high level position of the accused at the time of the alleged crimes), detention is necessary to preserve public confidence in the administration of justice by the Tribunal in its international setting.²²

¹⁵ Prosecution's Response, para. 14.

¹⁶ *Ibid*, para. 16.

¹⁷ *Ibid*, para. 15.

¹⁸ *Ibid*, para. 14.

¹⁹ *Ibid*, para. 17.

²⁰ *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, Case No. IT-9514-T, 25 April 1996, p. 5.

²¹ Prosecution's Response, para. 22.

²² *Ibid*, para. 20.

(viii) there is insufficient supporting documentation to justify the Accused's provisional release based on medical condition,²³

CONSIDERING that in determining whether to grant provisional release to an accused, it is 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,

CONSIDERING the list of factors recently set out by the Appeals Chamber of which a Trial Chamber should take account in deciding whether it is satisfied that, if released, an accused will appear for trial,²⁴ and the "the circumstances of each accused who applies for provisional release must be evaluated individually as they weigh upon the likelihood that he will appear for trial",²⁵

CONSIDERING that, in the circumstances of this case, the following factors are specifically relevant in the determination of whether, if released, the Accused will appear for trial: (a) the circumstances in which the Accused surrendered, i.e. whether the surrender was voluntary; (b) the senior position held by the Accused and the weight of governmental guarantees, and (c) the Accused's health condition,

NOTING the submission by the Milutinović defence that the Accused could not have surrendered before October 2000 (during the Milošević regime), because he feared for his family and his personal safety since public figures were singled out for assassination in Serbia at the time;²⁶ and, after October 2000, until his mandate as President of Serbia expired on 29 December 2002, the Accused made a decision to fulfil his mandate in the interests of political continuity, stability and a new democracy, a decision supported by other senior political figures in his country,²⁷

CONSIDERING that, with regard to the first submission above, the Trial Chamber is unable to accept the proposition that an individual publicly indicted by the International Tribunal, for whom a warrant of arrest and transfer was transmitted to the competent authorities, may invoke such circumstances as a justification for his failure to surrender; the Trial Chamber further notes that no such report was submitted by the FRY and Serbia as a reason for failing to execute the warrant,

²³ *Ibid*, para. 21.

²⁴ Šainović & Ojdanić Appeals Decision, *supra* n 14, para. 6.

²⁵ *Ibid*, para. 7.

²⁶ Reply, para. 8, T. 545-549.

²⁷ *Ibid*, para. 11.

CONSIDERING that, as conceded by the Milutinović defence itself,²⁸ the fulfilment of public service by the Accused, however meritorious in the context of the political stability in his country, could not relieve him and the Republic of Serbia of the obligation to comply without undue delay with an order for the arrest, surrender or transfer of the Accused to the Tribunal,

CONSIDERING FURTHER that, although disputed by the Accused,²⁹ some media reports indicate that he had previously made statements that may suggest that he did not intend to surrender as not recognising the authority of the Tribunal,³⁰

CONSIDERING that, when taken as whole, the circumstances of the Accused' surrender do not satisfy the Chamber that his surrender was voluntary,

CONSIDERING that the reliability of the guarantees provided by the FRY and Serbia Government is to be determined in relation to the circumstances which arise in this particular case,³¹ in light of the circumstances prevailing now and, as far as foreseeable, at the time when the accused will be expected to return for trial,³²

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,³³

CONSIDERING that, as a Head of State, the Accused exercised the highest political position in his country, and, for more than three years after being publicly indicted by the International Tribunal, he remained President of Serbia,

CONSIDERING that the Trial Chamber has carefully reviewed the medical reports on the health of the Accused,

[redacted]

²⁸ In the Reply, the Milutinović defence submits that "the Accused's contribution to political stability provides an explanation ... as to why he felt obliged to fulfil his mandate as President and why he did not surrender until after the expiry of that mandate" (emphasis in the original) Reply, paras 7, 20. At the hearing, in answer to Judge Robinson's question as to whether the fulfilment of public service to his country takes precedence over answering the charges against him, counsel submitted: "I don't pretend to say that if one looks at it in a strictly legal way that that explanation provides an answer to him not surrendering". In the final submissions, counsel further stated that: "I accept the strict legal position that's no excuse in law...". T. 560, 586.

²⁹ Reply, para. 14, T. 625.

³⁰ *Supra* n 16.

³¹ Mrkšić Appeals Decision, *supra* n 10, paras 9-13.

³² Šainović & Ojdanić Appeals Decision, *supra* n 14, para. 6.

CONSIDERING that, on the basis of the medical evidence available, the Chamber finds that the Accused can receive adequate treatment while in detention; and, further, the Trial Chamber is not persuaded that the Accused's condition at this moment is of such a nature as to require his release pending trial,³⁴

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

HEREBY DENIES the Motion.

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



Richard May
Presiding

Dated this third day of June 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

³³ *Ibid.*

³⁴ *Prosecutor v. Mrkšić*, Decision on Mile Mrkšić's Application for Provisional Release, IT-95-13/1-PT, 24 July 2002, para. 39.