IT-99-37-AR65.3
A84 - A77
03 July 2003.

84 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-AR65.3

Date: 3 July 2003

Original: English

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney

Registrar: **Mr Hans Holthuis**

Decision of: **3 July 2003**

PROSECUTOR

v.

MILAN MILUTINOVIĆ

DECISION REFUSING MILUTINOVIĆ LEAVE TO APPEAL

Counsel for the Prosecutor
Mr Geoffrey Nice

Counsel for the Accused
Mr John Livingston, Mr Radoje Stefanović and Mr Miladin Papić for Milan Milutinović

Procedural matters

1. On 3 June 2003, Trial Chamber III rendered its "Decision on Provisional Release" ("Impugned Decision" and "Trial Chamber's decision"), whereby it denied a motion by Milan Milutinović ("Milutinović" and "applicant") for provisional release.[1] On 10 June 2003, the Defence filed confidentially an "Application by Milan Milutinović for Leave to Appeal the Trial Chamber's Decision on Provisional Release" ("Motion"), in which Milutinović seeks leave to appeal the Impugned Decision. On 20 June 2003, the Prosecution filed its Response,[2] and on 26 June, the Defence filed its Reply.[3] On 30 June 2003, the Prosecution filed confidentially its "Prosecution's Filing in Relation to Milutinović's Reply Brief" ("Filing"), whereby it submitted that Milutinović's Reply exceeded the authorised number of pages for a reply and that it raised a new issue. On 1 July 2003, the applicant filed confidentially his "Appellant's Response to Prosecution's filing in relation to Milutinović's Reply Brief and Application for leave to exceed page limits", in which he applies *inter alia* for leave to exceed page limits and denies that he raised any new issue in his Reply.[4] He further argues that it "is wholly inappropriate in the interests of finality of filings that the Prosecution be permitted to file any further response to the Appellant's Reply".[5] This Bench of the Appeals Chamber wishes to recall that parties are under a duty to respect the requirements relating to page limits. However, in all the circumstances and in particular having regard to the fact that the Prosecution suffered no prejudice as a result of the excess of pages, this Bench of the Appeals Chamber will not uphold the Prosecution's objection in this respect and recognises the Reply as validly done pursuant to paragraph 16 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal. Furthermore, the suggestion by the Prosecution that a new issue was raised for the first time in the Reply is without merit and accordingly rejected.

2. Milutinović's Motion was filed confidentially, without any reason being given as to what would justify it not being publicly filed. In addition, the issues which his Motion raises are of some

[1] See "Motion for Provisional Release on Behalf of Milan Milutinović", 23 January 2003.
[2] Prosecution's Response to "Application by Milan Milutinović for Leave to Appeal the Trial Chamber's Decision on Provisional Release".
[3] "Reply on Behalf of Milan Milutinović to Prosecution's Response to Accused's Application for Leave to Appeal the Trial Chamber's Decision on Provisional Release". On 24 June 2003 the Defence for Milutinović was granted a two-day extension of time to file its Reply ("Order on Extension of Time")
[4] Paragraphs 3-5.
[5] Paragraph 6.

significance to the Tribunal's procedures generally, and for that reason the present Decision is given publicly notwithstanding the fact that the Motion was filed on a confidential basis.[6]

3. Leave to appeal pursuant to Rule 65 of the Rules of Procedure and Evidence ("Rules") will be granted if the applicant for leave satisfies the Bench that the Trial Chamber "may have erred" in making the Impugned Decision.[7]

Voluntary nature of the surrender

4. The Defence describes the Trial Chamber's finding that the surrender of Milutinović was not voluntary as "irrational", in the sense that no reasonable trier of fact could have reached that conclusion or, in the alternative, that such a finding involved an error of law.[8] From May 1999 until October 2000, the Defence says, Milutinović refrained from surrendering because of the "grave danger of being killed since he would have been viewed by Mr. Milosević as a traitor".[9] After October 2000, after Slobodan Milosević had lost his grip on power, the Defence says that Milutinović refrained from surrendering in order not to endanger the political stability of Serbia.[10]

5. Pursuant to Rule 65 of the Rules, it is for the accused seeking to be provisionally released to establish that, if released, he (i) will appear for trial and (ii) that he will not pose a danger to any victim, witness or other person. The second matter has not been challenged. The fact that an accused may have surrendered voluntarily to the Tribunal is relevant to the first matter, i.e., whether he will appear for trial, to the extent that his voluntary surrender demonstrates his readiness to cooperate with the Tribunal and increases the likelihood that he will appear for trial if released.

6. When determining whether or not his surrender was voluntary, the Trial Chamber could also take into account the fact that, for about three years prior to his eventual surrender, Milutinović had, for one reason or another, declined to surrender to the Tribunal. Putting aside for a moment the merit of the reasons put forward by Milutinović for not surrendering earlier to the Tribunal, it was open to the Trial Chamber to take into account the fact that Milutinović considered that he had to give priority to other factors and surrender only when those factors had ceased to be relevant. The

[6] There is, however, nothing in this decision which reveals material which could justify it remaining confidential.
[7] See, *inter alia*, *Prosecutor v Blagojević et al*, IT-02-60-AR65.3 & IT-02-60-AR65.4, Decision on Application by Blagojević and Obrenović for Leave to Appeal, 16 January 2003, par 8 ("*Blagojević* Leave Decision"); *Prosecutor v Brđanin and Talić*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 September 2000, p 3; and *Prosecutor v Jokić*, IT-02-53-AR65, Decision on Application for Leave to Appeal, 18 April 2002, par 3.
[8] Motion, pp 2-3.
[9] Motion, p 3.
[10] Motion, p 5.

Bench of the Appeals Chamber notes furthermore that the reasons given by the Defence for not surrendering at an earlier stage (the danger to him and to his family and the stability of Serbia) ar for the greater part unsubstantiated.

7. It was open to the Trial Chamber in a situation such as this one to give very little weight to the reasons put forward by the Defence in failing to surrender at an earlier stage and to reject the suggestion that the applicant was justified by such circumstances in not surrendering.[11]

8. The Defence also submits that the Trial Chamber's expectation that the Federal Republic of Yugoslavia or Serbia would have invoked the risk to him and his family and the political stability of Serbia as reasons for failing to execute the warrant was unreasonable.[12] In fact, the Trial Chamber was merely pointing out the absence of evidence supporting the Defence's submission as to the reasons for his having refrained to surrender earlier. There is nothing unreasonable in doing so.

9. In addition, the Defence submits that the Trial Chamber should not have relied upon media reports to determine whether or not his surrender had been voluntary, all the more so as he had contested the content of the statements which he is said to have made and which were reported in the press.[13] As suggested by the Defence, media reports have to be handled very carefully as far as their evidential weight is concerned. But they are not to be excluded altogether.[14] In the present case, the Trial Chamber was careful to note that the applicant had indeed disputed the content of those statements attributed to him; it said cautiously that these statements "may" suggest that he did not intend to surrender.[15]

10. The Bench of the Appeals Chamber therefore rejects the Defence's suggestion that the Trial Chamber may have erred on the voluntary nature of the surrender.

Cooperation with the Prosecution

11. The Defence claims that the Trial Chamber improperly adopted the Prosecution's view that Milutinović should not be provisionally released until and unless he cooperates with the Prosecution in such a way that is satisfactory to the Prosecution.[16] Cooperation with the Prosecution is not

[11] Impugned Decision, p 5.
[12] Motion, p 4.
[13] Motion, pp 6-7.
[14] *Prosecutor v Milutinović et al*, IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, par 10 ("*Šainović and Ojdanić* Appeals Decision").
[15] Impugned Decision, p 6.
[16] Motion, pp 7-10.

mentioned in Rule 65 of the Rules, the Defence points out, and should not therefore be a factor relevant to its determination.[17] Nor should an accused be expected to give what the Prosecution regards as "a full and honest" account of the events. In the view of the Defence, the Trial Chamber erred in taking these matters into account.

12. First, there is no indication that the Trial Chamber considered that the account given by an accused must be regarded as "full and honest" by the Prosecution to be relevant to the Chamber's decision to release him provisionally. That view, even if it were the Prosecution's view, was not adopted by the Trial Chamber. Secondly, and contrary to the Defence's submission, if an accused decides to cooperate with the Prosecution, this matter may weigh in his favour when he seeks to be provisionally released, regardless of the fact that it is not explicitly listed in Rule 65, insofar as it shows his general attitude of cooperation towards the Tribunal which is relevant to the issue that he will appear. It is wrong to suggest, however, that an accused should be penalised because he declines to cooperate with the Prosecution.[18] As was pointed out by the Appeals Chamber, an accused person is not, while in the custody of the International Tribunal, at the disposal of the Prosecution.[19]

13. The Bench of the Appeals Chamber therefore rejects the Defence's suggestion that the Trial Chamber may have erred on that point.

Differences between the situation of Milutinović and that of his co-accused

14. The Defence submits that the Trial Chamber failed to have regard to certain factors which distinguished his situation from that of his co-accused, Nikola Šainović and Dragoljub Ojdanić, including the voluntary nature of his surrender and the fact that he will be closely monitored if released.[20]

15. Nothing in the Trial Chamber's decision suggests that the Chamber took into consideration the situation of his co-accused to reach the conclusion that Milutinović should not be provisionally released. As pointed out by the Appeals Chamber, "the circumstances of each accused who applies

[17] Motion, p 9.
[18] *Šainović and Ojdanić* Appeals Decision, par 8: "An accused person may, if he decides to do so, co-operate with the Office of the Prosecutor, *inter alia*, by accepting to be interviewed by the Prosecution, but he does not have to do so and his provisional release is not conditioned, all other conditions being met, upon his giving such an interview while still in custody."
[19] *Šainović and Ojdanić* Appeals Decision, par 8.
[20] Motion, pp 10-11.

for provisional release must be evaluated individually".[21] The Defence has failed to establish that the Trial Chamber may have erred when concluding that, taken as a whole, the circumstances showed that the Accused's surrender was not voluntary.[22] Nor has the Defence established how his being closely monitored if released would render the Trial Chamber's finding an unreasonable one.

16. The Bench of the Appeals Chamber therefore rejects the Defence's suggestion that the Trial Chamber may have erred on that point.

Incorrect factual basis and the position of the applicant

17. The Defence claims that the Trial Chamber proceeded upon an incorrect factual basis when suggesting that the applicant was "a Head of State ... exercis[ing] the highest political position in his country", and that it should instead have considered whether he in fact exercised any form of effective control.[23]

18. It is correct that the Trial Chamber mistakenly suggested that the applicant was a "Head of State", as Serbia was not a State as understood by international law, but one of the republics of the Federal Republic of Yugoslavia.[24] What mattered for the purpose of the Trial Chamber's determination, however, was not the title which he bore at the time, but the nature of the function which he is said to have exercised. And in that the Trial Chamber was correct when it held that he exercised "the highest political position" in Serbia. The Defence's challenge to this finding is somewhat inconsistent with its submission that the very function which he exercised from October 2000 onwards, and the significance of that function to the political stability of Serbia, form the basis relied upon by the Defence to justify his not having surrendered to the Tribunal at an earlier stage.

19. The Defence suggests that his position was essentially *pro forma* and that he did not exercise any "effective control" over the events in the Federal Republic of Yugoslavia and Serbia. The phrase "effective control" appears to have been taken from the law on command responsibility and is of no relevance in relation to the present matter. The issue here is not, as is the case with command responsibility, whether he had "the material ability to prevent offences or punish the principal offenders", a matter to be decided at trial.[25] When referring to his role and position, all the

[21] *Šainović and Ojdanić* Appeals Decision, par 7.
[22] Impugned Decision, p 6.
[23] Motion, pp 11-13.
[24] Impugned Decision, p 6.
[25] See, *inter alia, Prosecutor v. Bagilishema*, ICTR-95-1A-A, Judgement (Reasons), 3 July 2002, pars 49-55; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, pars 196-198.

Trial Chamber was doing was to underline the fact that the position of an accused in the hierarchy may impact upon the weight to be given to governmental guarantees as it may have an important bearing upon a State's willingness and readiness to arrest that person if he refuses to surrender himself or to appear for trial.[26]

20. The Bench of the Appeals Chamber therefore rejects the Defence's suggestion that the Trial Chamber may have erred on that point.

Duty to give reasons and guarantees

21. According to the Defence the Trial Chamber failed to give a reasoned opinion in relation to the guarantees which were put forth in support of his application for provisional release.[27]

22. A Chamber must, as part of the fair trial guarantee, render a reasoned opinion.[28] This requirement obliges the Chamber, *inter alia*, to indicate its view about on all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.[29] There is no indication that the Trial Chamber failed to consider any factor relevant to the weighing of those guarantees. The Trial Chamber said, very properly, 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, 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".[30]

23. The Defence submits that, in addition to mentioning and giving reasons in relation to each and every factor relevant to its conclusion, the Trial Chamber should have given "some explanation as to how it reaches its conclusions with regard to those factors".[31] A Chamber is required to give reasons for its finding on the facts which led to its conclusion but this does not mean that it has a duty to give a detailed analysis of each such factor. In most applications for provisional release, it would be sufficient for a Chamber to state that the matters put forward by the applicant have not satisfied it that he will appear for trial, or that, if released, he will not pose a danger to any victim, witness or other person (as the case may be). In the particular case, one or more of the particular

[26] *Šainović and Ojdanić* Appeals Decision, par 9.
[27] Motion, pp 13-16.
[28] *Prosecutor v Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, par 69
[29] *Šainović and Ojdanić* Appeals Decision, par 6.
[30] Impugned Decision, p 6 (footnotes omitted). See also *Šainović and Ojdanić* Appeals Decision, par 6.
[31] Motion, p14.

matters put forward by the applicant will be of such a nature that, in the discharge of its duty to give reasons, the Chamber will be obliged to explain why it has not accepted one or more of the various matters as being sufficient to establish the relevant fact. It is not possible to state in advance any specific test as when such an obligation will arise. Each case will depend upon its own circumstances. The Bench of the Appeals Chamber is not persuaded by the Defence that the duty to give reasons was not satisfied in the present case.

24. The Bench of the Appeals Chamber therefore rejects the Defence's suggestion that the Trial Chamber may have erred on that point.

Medical condition of the applicant

25. Finally, the Defence submits that the Trial Chamber was in error in its assessment of the available medical evidence and in concluding that the applicant can receive adequate treatment while in detention and that his heart condition is not such as to require his release pending trial.[32]

26. In view of the evidence available to the Trial Chamber on this issue, the Defence has failed to establish that the conclusion reached by the Chamber in relation to those matters was in any way unreasonable or that it may have erred in reaching it.

Disposition

27. In conclusion, the Defence has failed to establish "good cause" pursuant to Rule 65 of the Rules and leave to appeal the Impugned Decision is denied.

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

Judge Pocar
Presiding Judge

Dated 3 July 2003
At The Hague,
The Netherlands.

[Seal of the Tribunal]

[32] Motion, pp 16 *et seq.*