



**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-03-69-AR65.2
Date: 30 September 2004
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mehmet Güney

Registrar: Mr. Hans Holthuis

Decision of: 30 September 2004

PROSECUTOR
v.
FRANKO SIMATOVIĆ

**DECISION ON PROSECUTION'S APPLICATION FOR LEAVE TO APPEAL DECISION
ON PROVISIONAL RELEASE**

Counsel for the Prosecution

Mr. Dermot Groome
Mr. David Re

Counsel for the Accused:

Mr. Zoran Jovanović for Franko Simatović
Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić

1. The Prosecution has filed an application for leave to appeal¹ the decision of Trial Chamber III issued on 28 July 2004, granting the accused Franko Simatović's ("Simatović") application for provisional release ("Impugned Decision").²

2. The Prosecution seeks leave to appeal the Impugned Decision pursuant to Rules 65(D) and 65 (F) of the Rules of Procedure and Evidence ("Rules"). For leave to appeal to be granted by the Appeals Chamber the Prosecution is required to demonstrate good cause. For the purposes of Rule 65, the jurisprudence of the Tribunal establishes that good cause will be shown if the applicant satisfies the Appeal Chamber that the Trial Chamber may have erred in the Impugned Decision.³ While the Prosecution is required only to show the possibility of error on the part of the Trial Chamber for good cause to be established, the prior jurisprudence of the Tribunal shows that the Appeals Chamber will only grant leave where that possibility of error is clearly established.⁴

3. Before turning to consider the merits of the Prosecution's Application the Appeals Chamber will determine the Prosecution's request that its reply in this matter be held validly filed pursuant to Rule 127 A(ii) and (B) of the Rules.⁵

4. The Reply of the Prosecution was filed on 4 August 2004, one day later than the time prescribed for the filing of replies under the relevant Practice Direction.⁶ To establish good cause for its Reply to be recognised as validly filed pursuant to Rule 127 A (ii) of the Rules the Prosecution submits that (1) due to resignations and staff being on leave, it has only one lawyer working on this case during the court recess; (2) the Response of Simatović did not come to the attention of this lawyer until after hours on 3 August, the day that the Reply was due; and (3) on this date it filed its reply to the response of Simatović's co-accused and due to the overlap of issues in relation to both of these accused the Appeals Chamber should have the benefit of its reply in

¹ Application for Leave to Appeal "Decision on Provisional Release", 29 July 2004 ("Application").

² *Prosecutor v. Stanišić and Simatović*, Case No.: IT-03-69-PT, Defence Motion for Provisional Release, Confidential and *ex parte*, 30 January 2004.

³ *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-AR65, Decision on Application for Leave to Appeal, 19 April 2000, page 3.

⁴ *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37 AR 65.2, Decision Refusing Leave to Appeal, 26 June 2003; *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-AR65, Decision on Application for Leave to Appeal, 19 April 2000; *Prosecutor v. Fatmir Limaj, et al.*, Case No. IT-03-66-AR65.3, Decision on Isak Musliu's Request for Provisional Release, 31 October 2003; Decision on Haradin Bala's Request for Provisional Release, 31 October 2003; Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003; *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, Case No. IT-00-39 & 40-AR65, Decision on Application for Leave to Appeal, 14 December 2001; *Prosecutor v. Enver Hadžihasanović*, Case No. IT-01-47-AR65 & IT-0147-AR65.2, Decision on Application for Leave to Appeal, 5 September 2002; *Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR65.3 & IT-02-60-AR65.4, Decision on Applications by Blagojević and Obrenović for Leave to Appeal, 16 January 2003.

⁵ Prosecution's Reply to "Defence's Response to Prosecution Application for Leave to Appeal Decision on Provisional Release", 4 August 2004 ("Reply").

⁶ Practice Direction on Procedure for Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155/Rev 1, 7 March 2002.

relation to both. The Prosecution adds that the accused will suffer no prejudice by the delay of one day in the filing of the Reply.

5. The Prosecution provides no explanation as to why Simatović's Response did not come to the attention of its lawyer assigned to the case until after the expiration of the deadline for the filing of the reply. If the Prosecution wants the Appeals Chamber to consider this factor as showing good cause it should provide such an explanation. The mere fact that the responsible lawyer was not aware of a response being filed is not, on its own, sufficient, to establish good cause, neither the fact that Simatović's Response was submitted during the official court recess. However, given that the Reply was filed only one day out of time and that, in the circumstances of the case, the opposing party is not prejudiced by the late filing, the Appeals Chamber considers that there is good cause to recognise the Reply as validly filed.

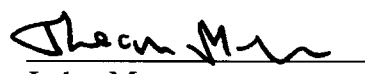
6. The Appeals Chamber has considered all of the grounds of error alleged by the Prosecution in its Application, Simatović's Response⁷ and the Prosecution's Reply thereto. Without prejudice to any other possibility of error on the part of the Trial Chamber, the Appeals Chamber is satisfied that the Prosecution has demonstrated that the Trial Chamber may have erred in the weight it placed upon the Government guarantees given by the authorities of Serbia and Montenegro in finding itself satisfied that, if released, Simatović would appear for trial. While Government guarantees are not a necessary condition for the grant of provisional release,⁸ the Appeals Chamber is satisfied that the possibility of error by the Trial Chamber in considering the guarantees does establish good cause for leave to appeal to be granted to the Prosecution pursuant to Rule 65(D) of the Rules.

Disposition

7. Leave to appeal the Impugned Decision is granted.

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

Done this 30th day of September 2004,
At The Hague,
The Netherlands.


Judge Meron
Presiding Judge

Seal of the Tribunal

⁷ Defence Response to Prosecutor's Motion for Leave to Appeal "Decision on Provisional Release", 30 July 2004 ("Response").

⁸ *Prosecutor v Dragan Jokić*, Case No. IT-02-53-AR65, "Decision on Application for Provisional Release", 28 May 2002, p. 2.