



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-PT
Date: 14 April 2005
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of: 14 April 2005

PROSECUTOR

v.

DRAGOLJUB OJDANIĆ

**DECISION ON GENERAL OJDANIĆ'S FOURTH
APPLICATION FOR PROVISIONAL RELEASE**

The Office of the Prosecutor

**Mr. Thomas Hannis
Ms. Christina Moeller**

Counsel for Dragoljub Ojdanić

**Mr. Tomislav Višnjić
Mr. Peter Robinson**

Procedural background

1. On 26 June 2002, this Trial Chamber granted provisional release to Dragoljub Ojdanić (“Ojdanić” or “the Accused”) and Nikola Šainović (“Šainović”) finding that both co-accused had satisfied the requirements of Rule 65(B) of the Rules (“First Decision”).¹ Pursuant to leave granted by a Bench of the Appeals Chamber, the Prosecution appealed against the First Decision. On 30 October 2002, by majority, the Appeals Chamber allowed the appeal, quashed and revised the First Decision, and denied provisional release to Ojdanić and Šainović.² The Appeals Chamber held that, in deciding that it was satisfied that, if released, Ojdanić will appear for trial, the Trial Chamber had committed two errors of law, (i) by failing to consider the effect of the senior position of the accused and the consequence thereof upon the weight of governmental guarantees,³ and (ii) by failing to consider the public statements made to the media to the effect that the Accused would not surrender.⁴ Ojdanić further applied for a modification of the Appeals Chamber decision, and sought to introduce additional evidence; both applications were denied by the Appeals Chamber which noted, however, that it was always open to the applicant to submit a fresh application to the Trial Chamber.⁵
2. On 10 February 2003, Ojdanić filed a second application for provisional release, submitting public statements of the Accused that, he submitted, had not been considered by the Appeals Chamber when deciding about the first application. The Trial Chamber denied the second application on the basis that it was not satisfied that any new material had been brought to its attention such as to persuade it not to follow the Appeals Chamber’s finding that the surrender was not voluntary and, therefore, the Trial Chamber was not satisfied that the requirements of Rule 65(B) had been met.⁶
3. On 20 November 2003, the Accused filed a third application for provisional release, arguing that release was necessary to compensate for the lack of resources for the preparation of the

¹ *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-PT, “Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release”, 26 June 2002.

² *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, “Decision on Provisional Release”, IT-99-37-AR65, 30 October 2002 (“Appeals Chamber Decision”).

³ *Ibid*, para. 9.

⁴ *Ibid*, para. 10.

⁵ *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-AR65, “Decision on Motion for Modification of Decision on Provisional Release and Motion to Admit Additional Evidence”, 12 December 2002, p. 4.

defence and the likely delay in the commencement of trial. Again, the Trial Chamber denied the application finding that no new grounds had been advanced to justify a deviation from its previous finding that it was not satisfied that, if released, the Accused will appear for trial and will not pose any danger to any victim, witness or other persons.⁷

4. In December 2004, Ojdanić, together with his co-accused Milan Milutinović (“Milutinović”) and Šainović, again applied for provisional release.⁸ The Prosecution responded,⁹ and the Accused and each of his co-accused replied.¹⁰ The Trial Chamber convened a hearing in this matter on 10 March 2005 at which Mr. Zoran Stojković, Minister of Justice in the Government of the Republic of Serbia, was examined and cross-examined, and Mr. Slavojub Carić, Consul of the Embassy of the State Union of Serbia and Montenegro in The Hague, made a statement, with regard to the guarantees.¹¹
5. The Trial Chamber has considered these applications for provisional release individually, making a separate determination in relation to each accused. The present Decision has been made in light of the particular submissions, written and oral, received relating to Ojdanić’s fourth application for provisional release (“Motion”).¹²

⁶ *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-PT, “Decision on Second Applications for Provisional Release”, 29 May 2003.

⁷ *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, “Decision on General Ojdanić’s Third Application for Provisional Release”, 16 December 2003.

⁸ General Ojdanić’s Fourth Application for Provisional Release, 14 December 2004 (“Motion”); Mr. Milan Milutinović’s Second Motion for Provisional Release, 17 December 2004; (Šainović) Third Request for Provisional Release, 23 December 2004.

⁹ Prosecution’s Response to General Ojdanić’s Fourth Application for Provisional Release with Annexes A, B, C and Confidential Annex D, 22 December 2004 (“Prosecution Response”); Prosecution’s Response to Milan Milutinović’s Second Motion for Provisional Release with Annexes A, B, and Confidential Annex C, 22 December 2004; and Prosecution’s Response to Nikola Šainović’s Third Defence Request for Provisional Release with Annexes A and B and the “Prosecution’s Supplemental Response to Nikola Šainović’s Third Defence Request for Provisional Release with Confidential Annex A, filed on 6 January 2005 and 20 January 2005 respectively.

¹⁰ General Ojdanić’s Reply to Prosecutor’s Response to Fourth Application for Provisional Release”, 28 December 2004 (“Reply”); Application to File a Reply and Reply to Prosecution’s Response to Mr. Milan Milutinović’s Second Motion for Provisional Release, 29 December 2004; Defence Reply to Prosecution’s Response to Nikola Šainović’s Third Defence Request for Provisional Release and Defence Second Reply to Prosecution’s Supplemental Response to Šainović’s’s Third Request for Provisional Release, filed on 13 January 2005 and 27 January 2005 respectively.

¹¹ *See, Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, “Order to Defence to Make Arrangements for an Oral Hearing on Provisional Release”, Case No. IT-99-37-PT, 10 February 2005; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, “Scheduling for Hearing on Defence Requests for Provisional Release”, 2 March 2005; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, “Order Rescheduling Hearing on Defence Requests for Provisional Release”, 7 March 2005; *see also*, Joint Defence Request to Re-schedule a Hearing on Defence Requests for Provisional Release”, 4 March 2005.

¹² Motion, *supra* note 8.

Discussion

6. Rule 65(B) (“Provisional Release”) of the Rules requires an applicant for provisional release 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.¹³

If an accused satisfies the Trial Chamber on both points, the Trial Chamber may then proceed to consider whether, in the exercise of its discretion, it should release the accused. However, in this case, it is difficult to see that there could be any basis for refusing the Motion if the accused were to satisfy the Trial Chamber on both points. Since this is not the Accused’s first application, he must also satisfy the Trial Chamber that there has been a material change in circumstances since the last application such as to justify reconsideration of its previous decision. Again, if the Trial Chamber decides on the basis of the material presented to them, including any new circumstances, that the test in Rule 65(B) has been met, it is difficult to see that that could be viewed as other than a material change in circumstances, in light of the grounds on which the Accused’s first application was refused. The first and crucial question, therefore, is whether circumstances have now changed so that it is established that, if released, the Accused will appear for trial. That is the question to which the Trial Chamber now turns.

(a) Is it now established that, if released, Ojdanić will appear for trial?

7. Ojdanić argues that, since his third application for provisional release, he has taken significant steps to cooperate with the Tribunal and the Prosecution, (a) by agreeing to a procedure whereby the testimonies of many of the victims of sexual assaults and other crimes will be presented in writing pursuant to Rule 92 *bis*, (b) readily returning documents inadvertently produced to him as disclosure, and (c) by not opposing the Prosecution’s request that his trial be joined with that of four other Generals in *Prosecutor v Pavković et*

¹³ *Prosecutor v. Šainović & Ojdanić*, Case No. IT-99-37-PT, “Decision on Application of Nikola Šainović and Dragoljub Ojdanić for Provisional Release,” 26 June 2002 (“Šainović Trial Chamber Decision”), para. 11, citing *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-AR65, “Decision on Application by Dragan Jokić for Leave to Appeal,” 18 April 2002, para. 7.

al. (Case No. IT-03-70-PT) indicted for the same crimes.¹⁴ Ojdanić argues that these recent acts of cooperation constitute new circumstances which the Trial Chamber should consider in determining that he is likely to comply with any conditions of his release.¹⁵

8. The Prosecution argues that the Defence position as regards the potential 92 *bis* witnesses or the Motion for Joinder, and the fact that counsel returned to the Prosecution documents to the disclosure of which he was not legally entitled, amounts to no more than Counsel's fulfilment of basic duties towards the Trial Chamber. Moreover, while the Prosecution appreciates the constructive approach of the Ojdanić Defence with regard to the use of Rule 92*bis* testimonies at trial, the Prosecution cannot agree that this constitutes the type of "cooperation" which would, by itself, satisfy the Trial Chamber that the Accused will appear for trial, if released.¹⁶
9. The Trial Chamber considers that, although the factors mentioned at (a) and (b) in paragraph 7 above show a generally cooperative disposition towards the Tribunal, the degree of cooperation with the Tribunal and the Prosecution involved is not such as to merit the Trial Chamber attaching more than modest weight to it in its determination.
10. Of far greater significance is the situation in relation to the guarantees presented in support of the application. Ojdanić submits guarantees from both the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Serbia dated 12 June 2002.¹⁷ The Trial Chamber received confirmation of the same guarantees from the Government of Serbia and the Council of Ministers of Serbia and Montenegro, on 25 February 2005.¹⁸ In the guarantees, Serbia and Montenegro undertake various obligations. These include the obligation of the Federal Ministry of the Interior to ensure through the competent secretariat of the Ministry of the Interior of the Republic of Serbia that the accused reports daily to a police station and to inform the Tribunal immediately should the accused fail to present himself, and the obligation of "Yugoslav organs" to arrest the accused immediately if he tries to escape or violates any other condition of his provisional

¹⁴ Motion, *supra* note 8, paras. 25-26.

¹⁵ *Ibid.*

¹⁶ Prosecution Response, *supra* note 9, paras. 21-22.

¹⁷ Guarantee of the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Serbia no.: 762-1/2002 of 12 June 2002, 21 June 2003.

¹⁸ Guarantees from Government of Republic of Serbia and Council of Ministers of Serbia and Montenegro in Support of Mr. Milutinović Second Motion for Provisional Release filed on 17 December 2004, 25 February 2005, Annexes 1 & 2.

release and to inform the Tribunal of such fact, as well as the undertaking of the Government of the Republic of Serbia to honour all orders of the Trial Chamber so that the he can appear for trial before the Tribunal at any time.

11. While these guarantees are identical to those that were before the Trial Chamber at the time of the earlier applications, Ojdanić submits that there are new circumstances which should reassure the Trial Chamber that they will be complied with, if required, to ensure the Accused's appearance for trial.
12. Ojdanić argues that the decisions of the Trial Chamber and the Appeals Chamber in the *Stanisić & Simatović* case demonstrate that added weight should be attached to the present guarantees of the Government of Serbia and Montenegro.¹⁹ Ojdanić argues that the guarantee of the Government of Serbia and Montenegro submitted on behalf of the accused Stanisić and Simatović is identical to that submitted by Ojdanić; as such, Ojdanić submits, "there is no reason why it should not be sufficient for the Trial Chamber to release [him]".²⁰ This factor coupled with the personal circumstances of the Accused, who surrendered voluntarily and has been in pre-trial detention a year longer than Stanisić and Simatović, demonstrates that the guarantees are sufficient to assure the Trial Chamber that the authorities in Serbia and Montenegro will arrest Ojdanić in the event that he were to violate any conditions of his release.²¹
13. The Prosecution submits that the Defence submissions with regard to government guarantees demonstrate a lack of understanding of the law on guarantees. In essence, the Prosecution submits that, whether and to what extent guarantees of the Government of Serbia and Montenegro were found to be reliable in other cases and for other accused, is entirely irrelevant in the instant case.²²
14. This submission has support in the case-law of the Tribunal.²³ The Trial Chamber is bound to evaluate the guarantees offered in light of the circumstances of this particular case as a whole and the personal circumstances of the Accused.

¹⁹ Motion, *supra* note 8, paras. 16-18.

²⁰ *Ibid*, para. 21.

²¹ *Ibid*, paras. 21, 23.

²² Prosecution Response, *supra* note 9, para. 25.

²³ The weight to be attributed to guarantees given by a government may depend a great deal upon the personal circumstances of the applicant and must be determined in relation to whole circumstances of the particular case.

15. At the oral hearing of 10 March 2005, the evidence led on behalf of the Accused from Mr. Zoran Stojković confirmed the commitment of the Government of the Republic of Serbia to respect the conditions for the release of each accused as determined by the Trial Chamber and the Tribunal, and to arrest any accused granted provisional release who breaches any condition of his release.²⁴ He mentioned a number of factors which, the defence submitted, indicated the reliability of that commitment.
16. Minister Stojković testified that, since the establishment of the Council for Cooperation with the Tribunal in 2004, six or seven indictees had voluntarily surrendered to the Tribunal and that he expected more individuals to arrive in the near future.²⁵ Minister Stojković explained that, although he was aware of statements made to the press by General Pavković to the effect that he will not surrender voluntarily, such statements were merely his personal views; the Government, he said, was committed to enforce the law in order to ensure his presence at the Tribunal.²⁶ Minister Stojković acknowledged that government officials in Serbia have publicly stated that all indictees were encouraged to surrender voluntarily; however, he said, if they fail to do so, they will be arrested.²⁷ He drew a distinction between accused persons still at large, on the one hand, and those brought before the International Tribunal and provisionally released under the conditions set by the Trial Chamber, on the other. While, in the former case, an intervention of the domestic courts in Serbia is required for an accused to be arrested, in the latter case, he explained, the government has direct authority and obligation to bring the accused to the Tribunal in accordance with the conditions set by the Trial Chamber.²⁸ The Minister said, "...there is no possibility for us not to comply with the conditions we agreed to once you have made your decision for provisional release".²⁹
17. Mr. Slavojub Carić made a statement attesting to the fact that the Council of Ministers of Serbia and Montenegro issued a Decision on 16 February 2005 confirming the Guarantees issued by the Federal Government of the Federal Republic of Yugoslavia of 12 June 2002.

See, Prosecutor v. Šainović & Ojdanić, Case No. IT-99-37-AR65, "Decision on Provisional Release", 30 October 2002 ("Appeals Chamber's Decision on Provisional Release"), para. 7; *Mrksić* Decision, *supra* note 13, para. 9.

²⁴ Transcript, 10 March 2005, pp. 884-888.

²⁵ *Ibid.*, p. 895.

²⁶ *Ibid.*, p. 898.

²⁷ *Ibid.*, pp. 901, 904, 912-913.

²⁸ *Ibid.*, pp. 903, 907-908.

18. The Prosecution argues that new material available undermines the reliability and credibility of the guarantees of Serbia and Montenegro with regard to this Accused and in the context of this specific case. The Prosecution submits that authorities in Serbia and Montenegro have publicly stated that they will not arrest the remaining fugitives of the Kosovo case (co-accused Pavković, Lazarević, Lukić and Đorđjević, “the Generals”) but leave it to them to decide whether they wish to surrender.³⁰ The Prosecutor submits that Ojdanić is more senior in position than any of the Generals still at large in the *Pavković et al.* case and, for this reason, any government guarantees of Serbia and Montenegro with regard to the Accused and his co-accused in this case must be attributed less reliability and credibility.³¹ The Prosecution argues that, in the circumstances of this case, where the individual circumstances of indictees-at-large are nearly identical to the applicant, the expressed unwillingness of the authorities in Serbia and Montenegro to arrest the indictees-at-large indicates that the Government of Serbia and Montenegro will not arrest Ojdanić.³²
19. The Prosecution acknowledged that, in recent months, the number of voluntary surrender of indictees “appears to have been increasing on a weekly basis almost”.³³ However, the Prosecution submits that the reliability and credibility of the guarantees are undermined by the failure by authorities in Serbia and Montenegro to arrest other high profile fugitives, including General Pavković, and General Lukić.³⁴ The Prosecution further submits that, in the assessment of the cooperation of Serbia and Montenegro with the Tribunal recently provided by the Prosecutor to the Security Council, she reported that Serbia and Montenegro remains the country most reluctant to cooperate with the Tribunal.³⁵ The Prosecution argues that this general level of cooperation, in addition to the concrete level of cooperation with regard to specific Accused constitutes new circumstances that strongly militate against the reliability and credibility of the government guarantees in this case.³⁶

²⁹ *Ibid*, p. 904.

³⁰ Prosecution Response, *supra* note 9, para. 28.

³¹ *Ibid*, para. 29.

³² *Ibid*, paras. 28-30.

³³ Transcript, 10 March 2005, p. 895.

³⁴ *Ibid*, pp. 895-896.

³⁵ Prosecution Response, *supra* note 9, Annex B (“Address by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the former Yugoslavia to the Security Council, 23 November 2004”).

³⁶ *Ibid*, paras. 32.

20. The Trial Chamber recalls that the weight to be attributed to government guarantees depends on the personal circumstances of the accused.³⁷ Circumstances arising in a particular case and concerning an individual accused must be assessed at the time when the decision on provisional release is being taken, and also, as far as foreseeable, the time when he will be expected to return for trial.³⁸
21. The Accused is the former Chief of the General Staff of the Army of the Federal Republic of Yugoslavia. Initially indicted on 24 May 1999, he was transferred into the custody of the Tribunal on 25 April 2002. Ojdanić argued that by operation of both Rule 11*bis* (“Referral of the Indictment to Another Court”) and Rule 28 of the Rules (“Reviewing and Duty Judges”), the jurisprudence of the Tribunal on provisional release has changed because “using an accused’s senior position as a reason for pre-trial detention would amount to a practice of blanket detention for all accused at this Tribunal”.³⁹ In the view of the Trial Chamber, there is nothing in these provisions to indicate that an accused’s senior position is no longer relevant to an assessment of the weight to be attributed to governmental guarantees in support of an application for provisional release.
22. The Trial Chamber considers that the senior position held by Ojdanić and the consequence thereof upon the weight of governmental guarantees to be significant factors that inform its assessment in relation to the willingness of the Republic of Serbia and the State Union of Serbia and Montenegro to arrest him should he refuse to appear for trial.
23. The Trial Chamber further observes that, even though the reliability of a guarantee must not be exclusively determined by reference to an assessment of the level of cooperation by the authority providing it, the general level of cooperation by that authority with the International Tribunal is relevant in determining whether it would arrest the accused in question.⁴⁰ What would happen if that authority were obliged under its guarantee to arrest the particular accused is one question that must be answered on the balance of probabilities on the basis of information currently available.

³⁷ Appeals Chamber’s Decision on Provisional Release, *supra* note 23, para. 7.

³⁸ *Ibid.*

³⁹ Prosecution Response, *supra* note 9, para. 32.

⁴⁰ *Prosecutor v. Čermak & Markač*, Case No. IT-03-73-AR65.1, “Decision on Interlocutory Appeal Against Trial Chamber’s Decision Denying Provisional Release”, 2 December 2004, para. 32.

24. The Trial Chamber notes that the level of cooperation of the Serbian authorities with the Tribunal has increased in recent months. Indeed, as acknowledged by the Prosecution,⁴¹ an example of this cooperation is seen in the assistance of the authorities in the transfer of some of the indictees to the Tribunal, as illustrated by the recent transfer of General Lazarević, and the cooperation of the Serbian authorities with regard to waivers authorising officials or former officials to be interviewed.⁴² In fact, the Trial Chamber observes that, since October 2004, Serbian authorities have assisted in the transfer of at least 10 indictees, including General Lazarević, Momčilo Perišić, Drago Nikolić, Vinko Pandurević, Ljubomir Borovčanin and, most recently, General Lukić. It appears that the policy of the Government of Serbia to encourage all indictees to surrender voluntarily, failing which they will be arrested and transferred, is working in practice. Furthermore, the evidence, which was not contradicted, and which the Trial Chamber accepts, is that, to date, the guarantees of the Government of the Republic of Serbia and the Federal Government have been respected and upheld in relation to accused who have been provisionally released pending trials.⁴³
25. While the failure to arrest the other fugitives is still a matter of concern, the Trial Chamber is persuaded by the steady influx of indictees from the Republic of Serbia, encouraged by the Government to surrender to the Tribunal voluntarily, coupled with the strong assurances given by Minister Stojković to ensure the fulfilment of the guarantees, and the statement made by Mr. Carić, that the Government of the Republic of Serbia and the Federal Government of Serbia and Montenegro would implement the guarantees provided in support of the application. In arriving at that decision, the Trial Chamber has taken into account the personal circumstances of the Accused, including the senior position previously held by him.
26. The Trial Chamber has considered the findings made in the foregoing paragraphs, particularly paragraphs 9 and 25, against the background of the case as a whole, including the gravity of the charges which will be likely to result in a lengthy term of imprisonment in the event of conviction, and the circumstances surrounding the surrender of the Accused, and is satisfied that the Accused will appear for trial, if released.

⁴¹ Transcript, 10 March 2005, p. 895.

⁴² Prosecution Response, *supra* note 9, Annex B (“Address by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the former Yugoslavia to the Security Council, 23 November 2004”).

⁴³ Transcript, 10 March 2005, p. 886.

(b) Whether, if released, the Accused will not pose a danger to any victim, witness or other person

27. The Trial Chamber observes that, in opposing the Motion, the Prosecution has not argued that, if released, Ojdanić would pose a danger to victims, witnesses or other persons. In the absence of any suggestion that the Accused has interfered with the administration of justice in any way since the date when the indictment was confirmed against him,⁴⁴ the Trial Chamber is satisfied, on the basis of the guarantees of the Federal Government of Serbia and Montenegro and the Government of the Republic Serbia to ensure full compliance with such conditions as the Trial Chamber may impose, that this condition is met.

(c) Determination

28. As mentioned in paragraph 4, it is difficult to see that, where two requirements in Rule 65(B) are met, provisional release should not be granted.

29. However, if further justification for that conclusion were required, it can be found in the period of time that the Accused would otherwise be likely to spend in custody pending trial. The Defence submits that Ojdanić would have been in pre-trial detention for three years before trial, and there is no indication when the instant case will go to trial.⁴⁵ The Prosecution also indicated that it intends to file a motion for joinder which is likely to delay the readiness of the case for trial by several months.

30. At the hearing, the Prosecution confirmed its intention to file a motion to join General Lazarević and his co-accused with the defendants in this case.⁴⁶ The Prosecution acknowledged that this development might considerably impact on the prospect for commencement of trial in this case, and that, in the event of a joinder, “the Court may decide that [it] has to release these defendants if their trial is not going to start until 2006”.⁴⁷

31. The Trial Chamber notes that Ojdanić was transferred to the Tribunal on 25 April 2002 and, as of 10 March 2005, he had been in detention for 2 years, 10 months, and 21 days. In this

⁴⁴ Šainović Trial Chamber Decision, *supra* note 13, para. 16.

⁴⁵ Motion, *supra* note 8, para. 29.

⁴⁶ Transcript, 10 March 2005, p. 915.

⁴⁷ *Ibid.*

context, the Trial Chamber must consider the submission that it should take into account the likelihood that Ojdanić might face a longer pre-trial procedure in light of the Prosecution application for joinder (“the Joinder Motion”).⁴⁸ In the Joinder Motion, the Prosecution requests that the accused in the present Case No. IT-99-37-PT, Milutinović, Šainović, and Ojdanić, and the accused in Case No. IT-03-70-PT, Nebojša Pavković, Vladimir Lazarević, Vlastimir Đorđević and Streten Lukić be jointly charged and tried.⁴⁹ The Prosecution has argued in support of that application that the crime-base allegations and the modes of liability for the crimes are the same for all accused.⁵⁰ Furthermore, all accused are charged pursuant to Articles 3 and 5 of the Statute of the Tribunal for the same crimes.⁵¹ A joint trial, it is submitted, will not interfere with the rights of the Accused to an expeditious trial as “a date for trial has not been scheduled [in Case No. IT-99-37-PT] and it appears that a Trial Chamber will not become available to try this case before autumn or winter 2005 or early 2006”. Should the Joinder Motion be granted, the Prosecution estimates that a period of six to eight months would be adequate for the accused in Case No. IT-03-70-PT to prepare their defence.

32. Article 21(3) of the Statute of the Tribunal mandates that “the accused shall be presumed innocent until proved guilty”. The presumption of innocence is enshrined in Article 14(2) of the International Covenant on Civil and Political Rights (“the ICCPR”), the Statute of the International Criminal Court (“ICC”),⁵² and in a number of international human rights treaties.⁵³ It follows from this fundamental principle of criminal justice that “it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...”.⁵⁴

33. While these provisions must be interpreted in light of the specific context in which the Tribunal operates, these norms simply strengthen the Accused’s application in circumstances where, as in this case, he has satisfied the Trial Chamber that he will appear for trial and that he will not pose any danger to victims, witnesses or other persons.

⁴⁸ *Prosecutor v. Milutinović et al.*, Case Nos. IT-99-37-PT, IT-03-70-PT, “Prosecution Motion for Joinder”, 1 April 2005.

⁴⁹ *Ibid.*, para. 3.

⁵⁰ *Ibid.*, para. 24.

⁵¹ *Ibid.*

⁵² ICC Statute, Article 66.

⁵³ See, European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), Article 6(2); the American Convention on Human Rights (“the American Convention”), Article 8; the African Charter on Human and Peoples’ Rights (“the African Charter”), Article 7.

⁵⁴ Article 9(3) of the ICCPR; see also, Article 5(3) of the ECHR.

34. Even though there is no suggestion that the length of the pre-trial detention is excessive in this case, the Trial Chamber considers that a period of three years in pre-trial detention, coupled with the real possibility that an application for joinder might further delay the start of the trial for several months, is a factor to be weighed in favour of the Accused in the exercise of the Trial Chamber's discretion.
35. The Trial Chamber is satisfied that the Accused should be provisionally released pending trial.

Stay

36. The Prosecution has applied for a stay of the Decision of the Trial Chamber to release the Accused pending appeal pursuant to Rule 65(E). The Trial Chamber will grant the request.

DISPOSITION

37. For these reasons, the Trial Chamber **GRANTS** the Motion and **GRANTS** the Prosecution's application for a stay and **ORDERS**:

- (1) the provisional release of Dragoljub Ojdanić subject to the terms and conditions set out in the Order for Provisional Release appended to this Decision; and
- (2) the provisional release of Dragoljub Ojdanić is stayed pending an appeal by the Prosecution pursuant to Rule 65(D), (E), (F) and (G) of the Rules.

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



Judge Patrick Robinson
Presiding

Dated this fourteenth day of April 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

ORDER FOR PROVISIONAL RELEASE OF DRAGOLJUB OJDANIĆ

1. Dragoljub Ojdanić (“the Accused”) shall be transported to Schiphol airport in the Netherlands by the Dutch authorities;
2. At Schiphol airport, the Accused shall be provisionally released into the custody of an official of the government of Serbia and Montenegro to be designated prior to release in accordance with operative paragraph (2)(a) hereof, who shall accompany the Accused for the remainder of his travel to Serbia and Montenegro and to his place of residence;
3. On his return, the Accused shall be accompanied by the same designated official of the government of Serbia and Montenegro, who shall deliver the Accused to the custody of the Dutch authorities at Schiphol airport at a date and time to be determined by Order of the Trial Chamber, and the Dutch authorities shall then transport the Accused back to the United Nations Detention Unit in The Hague;
4. During the period of his provisional release, the Accused shall abide by the following conditions, and the authorities of the governments of Serbia and Montenegro and the Republic of Serbia, including the local police, shall ensure compliance with such conditions:
 - (i) to remain within the confines of the municipality of Belgrade;
 - (ii) to surrender his passport to the Ministry of Justice;
 - (iii) to report each day to the police in Belgrade at a local police station to be designated by the Ministry of Justice;
 - (iv) to provide the address at which he will be staying to the Ministry of Justice and the Registrar of the International Tribunal before leaving the United Nations Detention Unit in The Hague;
 - (v) to consent to having the Ministry of Justice check with the local police about his presence and to the making of occasional, unannounced visits upon the Accused by the Ministry of Justice or by a person designated by the Registrar of the International Tribunal;
 - (vi) not to have any contact with the co-accused in the case;

- (vii) not to have any contact whatsoever or in any way interfere with any victim or potential witness or otherwise interfere in any way with the proceedings or the administration of justice;
- (viii) not to discuss his case with anyone, including the media, other than with his counsel;
- (ix) to continue to cooperate with the International Tribunal;
- (x) to comply strictly with any requirements of the authorities of Serbia and Montenegro and the Republic of Serbia necessary to enable them to comply with their obligations under this Order and their guarantees;
- (xi) to return to the International Tribunal at such time and on such date as the Trial Chamber may order; and
- (xii) to comply strictly with any further Order of the Trial Chamber varying the terms of or terminating his provisional release; and

REQUIRES The Governments of the State Union of Serbia and Montenegro and the Republic of Serbia to assume responsibility as follows:

- a) by designating an official of the government of Serbia and Montenegro into whose custody the Accused shall be provisionally released and who shall accompany the Accused from Schiphol airport to Serbia and Montenegro and to his place of residence, and notifying, as soon as practicable, the Trial Chamber and the Registrar of the International Tribunal of the name of the designated official;
- b) for the personal security and safety of the Accused while on provisional release;
- c) for all expenses concerning transport of the Accused from Schiphol airport to Belgrade and back;
- d) for all expenses concerning accommodation and security of the Accused while on provisional release;
- e) at the request of the Trial Chamber or the parties to facilitate all means of cooperation and communication between the parties and to ensure the confidentiality of any such communication;

- f) to submit a written report to the Trial Chamber every month as to the compliance of the Accused with the terms of this Order;
- g) to arrest and detain the Accused immediately if he should breach any of the conditions of this Order; and
- h) to report immediately to the Trial Chamber any breach of the conditions set out above; and

INSTRUCTS the Registrar of the International Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for his release and to continue to detain the Accused at the United Nations Detention Unit in The Hague until such time as the Trial Chamber and the Registrar have been notified of the name of the designated official of the government of Serbia and Montenegro into whose custody the Accused is to be provisionally released; and

REQUESTS the authorities of all States through which the Accused will travel:

- a) to hold the Accused in custody for any time that he will spend in transit at the airport;
- b) to arrest and detain the Accused pending his return to the United Nations Detention Unit in The Hague, should he attempt to escape.

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



Judge Patrick Robinson
Presiding

Dated this fourteenth day of April 2005
At The Hague
The Netherlands

[Seal of the Tribunal]