



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-05-86-PT
Date: 18 July 2005
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Jean Claude Antonetti
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Decision: 18 July 2005

PROSECUTOR

v.

**VINKO PANDUREVIĆ
MILORAD TRBIĆ**

**DECISION ON VINKO PANDUREVIĆ'S
APPLICATION FOR PROVISIONAL RELEASE**

The Office of the Prosecutor:

Ms. Carla Del Ponte

Counsel for the Accused:

Mr. Đorđe Sarapa, Counsel for Vinko Pandurević
Ms. Colleen Rohan, Counsel for Milorad Trbić

I. INTRODUCTION

1. 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 (“Tribunal”) is seized of the “Application for Provisional Release” (“Motion”) filed on 3 June 2005 by Vinko Pandurević (“Accused”), whereby the Accused requests the Trial Chamber to order his provisional release, pursuant to Rule 65 of the Rules of Procedure and Evidence (“Rules”). The Office of the Prosecutor (“Prosecution”) on 14 June 2005 filed the “Prosecution Response to Request for Provisional Release for Accused Vinko Pandurević” (“Response”), opposing the Motion.

2. On 17 June 2005, the Defence filed the “Defence’s Reply to Prosecution’s Response to Request for Provisional Release for Vinko Pandurević” (“Reply”) without leave. As a preliminary issue, the Trial Chamber notes that under the Rules an accused has no right to file additional arguments to strengthen its original motion after having first filed a motion and then received a response. Further, Rule 126*bis* of the Rules only allows a reply after the Trial Chamber has granted leave to file one. No such request was made in the Reply, or otherwise by the Defence. The Trial Chamber also draws attention to the fact that a reply should be limited to issues raised in the response and not re-argue matters raised in the original motion. In this particular case the Trial Chamber will, however, consider the Reply in rendering its decision. As a further preliminary issue, the Trial Chamber is not inclined to order an oral hearing be held to decide the Motion, as requested by the Defence in the Reply, as it is not necessary in the circumstances of this case, and the Accused has no right to such an audience.

3. The Accused and two co-accused, Radislav Krstić and Vidoje Blagojević were initially included in the same indictment which was confirmed on 2 November 1998 and initially placed under seal.¹ On 27 October 1999, this indictment was amended and remained in effect against the Accused. The amended indictment against the Accused was made public on 7 December 2001.² The cases *Prosecutor v. Radislav Krstić* and *Prosecutor v. Vidoje Blagojević* were tried and resolved separately³ while the Accused remained at large. On 23 March 2005, the Accused was transferred to the United Nations Detention Unit.⁴ The following day, an indictment dated 10 February 2005 was confirmed against the Accused and Milorad Trbić (“Indictment”), and an order

¹ *Prosecutor v. Radislav Krstić, Vidoje Blagojević, Vinko Pandurević*, Case No. IT-98-33-I, Order on Review of Indictment Pursuant to Article 19 of the Statute, 2 November 1998.

² *Prosecutor v. Radislav Krstić, Vidoje Blagojević, Vinko Pandurević*, Case No. IT-98-33-PT, Order to Vacate Portion of Order of 2 November 1998, 7 December 2001.

³ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 and Case No. IT-98-33-A, Judgement, 19 April 2004; *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-T, Judgement, 17 January 2005.

⁴ Scheduling Order for Initial Appearance, 24 March 2005, p. 2.

was made that the indictment of 1999 against the Accused be withdrawn.⁵ At the initial appearance held on 31 March 2005, the Accused chose not to enter a plea for 30 days.⁶ At the further initial appearance held on 3 May 2005, the Accused pleaded not guilty to all charges against him.⁷

II. SUBMISSIONS

4. In support of the Motion, the Defence submits, *inter alia*, that the following factors militate in favour of the provisional release of the Accused: (i) he surrendered voluntarily to the Tribunal on 23 March 2005; (ii) the Government of Republika Srpska issued a guarantee for provisional release of the Accused dated 31 March 2005;⁸ (iii) the Council of Ministers of Serbia and Montenegro issued a guarantee for provisional release of the Accused dated 19 May 2005; (iv) in case of being released, the Accused shall respond to any summons of the Tribunal; and (v) if released, he will not pose a danger to any victim, witness or other person. The Accused seeks pre-trial provisional release to Belgrade in Serbia and Montenegro.

5. The Prosecution opposes the Motion and argues in the Response that the Accused has not met the requirements for provisional release. In particular, the Prosecution submits that the Accused has not satisfactorily established that he will appear for trial if released, in light of: (i) the fact that the Accused made contact with the Office of the Prosecutor in October 2001 and after being informed that he had been indicted, chose to remain at large; (ii) the indictment against the Accused was made public on 7 December 2001 and the Accused was a fugitive until his arrest and detention; (iii) the circumstances in which the Accused came into custody before being brought to the Tribunal are unknown; and (iv) the Governmental Guarantees should be given little weight given the reluctance of the authorities of Serbia and Montenegro and the Republic of Serbia to fully cooperate with the Tribunal, the serious nature of the charges against the Accused, and the Tribunal's completion strategy.

6. In the Reply, the Defence, *inter alia*: (i) confirmed that the Accused contacted the Prosecution "as far back as in 2001" but that "due to the circumstances and caring about the security of his family, he could not surrender earlier";⁹ and (ii) provided an excerpt from a

⁵ Decision on Review of Indictment and Order for Non-Disclosure, 24 March 2005; see Prosecution's Notice to Withdraw the Original Indictment Against Vinko Pandurević Case No. IT-98-33/2-I, 1 April 2005; see also Decision on Motion of Prosecutor to Vacate the Order for Non-Disclosure Entered 30 March 2005, 8 April 2005.

⁶ Transcript pages (T.) 11-12.

⁷ T. 26-27.

⁸ The Trial Chamber observes that the Motion identifies Belgrade in Serbia and Montenegro as the proposed locale for provisional release: Motion, para. 7. Therefore, it is not necessary for the Trial Chamber to evaluate the guarantee provided by the Government of the Republika Srpska.

⁹ Reply, para. 12.

statement allegedly made to the competent state authority by the Accused on 19 March 2005, which states:

Not wishing to expose either my family to inconveniences or the state to further problems, I declare that on 19 March 2005 at 17.00 hours I voluntarily reported to authorized officials of BIA [Security-Informative Agency] in order to leave for The Hague and thus avoid any doubt about my voluntary surrender. My only condition for voluntary surrender to The Hague Tribunal is, taking into account the attitude of the Government of Serbia, that I will be given all necessary guarantees for my provisional pre-trial release.¹⁰

III. THE LAW

7. Article 21 of the Statute of the Tribunal (“Statute”) is entitled “Rights of the accused” and provides, *inter alia*:

1. All persons shall be equal before the International Tribunal.

[...]

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

[...]

8. Rule 65 of the Rules governs provisional release and reads, in the relevant parts:

(A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

[...]

9. Rule 65 must be interpreted in light of Article 21(3) of the Statute. In order for provisional release to be granted by the Trial Chamber, pursuant to Rule 65(B), it must be satisfied, *inter alia*, of the pre-conditions (1) that the accused will appear for trial, and (2) that if released, he will not pose a danger to any victim, witness or other person. It is the accused that must satisfy the Trial Chamber that these pre-conditions are met.¹¹ These pre-conditions must be established on a balance of probabilities,¹² and this burden has been recognized as “a substantial one in light of the jurisdictional and enforcement limitations of the Tribunal”.¹³ If the Accused fully discharges his burden in relation to these pre-conditions, the decision whether or not to exercise its discretion to

¹⁰ *Ibid.*, para. 7.

¹¹ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 28 (“Prlić”); *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj’s Motion for Provisional Release, 6 June 2005, para. 21.

¹² See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 5.

¹³ *Prlić*, para. 25.

order provisional release is then to be made by the Trial Chamber having regard to all the circumstances of the case. It should be noted that by the terms of Rule 65(B) it is a discretion to order provisional release, not a discretion to refuse to order provisional release. Each accused is entitled to an individualized assessment of the particular circumstances of their request for provisional release.

IV. DISCUSSION

A. Opportunity to be heard

10. On 10 June 2005, the Embassy of Serbia and Montenegro filed a decision of the Council of Ministers of Serbia and Montenegro, and the conclusion of the Government of the Republic of Serbia, both concerning guarantees for the provisional release of the Accused (“Governmental Guarantees”). The Trial Chamber therefore considers that the requirement of giving “the State to which the accused seeks to be released” the opportunity to be heard, set forth in Rule 65(B) of the Rules, is satisfied.

11. The Trial Chamber notes that the Government of The Netherlands, the “host country”, has not filed any submissions in this matter, but considering that the Motion was communicated to The Netherlands and that sufficient time has elapsed, the Trial Chamber considers that the requirement that the host country be given the opportunity to be heard, set forth in Rule 65(B) of the Rules, is satisfied.

B. Whether the Accused, if released, will appear for trial

12. The Trial Chamber is required to identify all relevant factors that it has taken into account in reaching its decision as to whether it is satisfied that, if released, an accused will appear for trial. The Appeals Chamber has indicated a non-exhaustive set of factors which a Trial Chamber should take into consideration while assessing whether an accused will appear for trial, in particular:

- a. Whether the accused is charged with serious criminal offences;
- b. Whether the accused is likely to face a long prison term, if convicted;
- c. The circumstances of the accused’s surrender;
- d. The degree of co-operation given by the authorities of the State to which the accused seeks to be released;
- e. The guarantees offered by those authorities, and any personal guarantees offered by the accused; in particular, the weight given to the governmental guarantees must be assessed in light of the position held by the accused prior to his being brought to the Tribunal;

- f. The likelihood that, in case of breach of the conditions of provisional release, the relevant authorities will re-arrest the accused if he declines to surrender; and
- g. The accused's degree of co-operation with the Prosecution.¹⁴

13. The Trial Chamber will now examine the relevant factors pertinent to the request for provisional release of the Accused in this case.

1. The gravity of the crimes charged

14. The Accused is charged with criminal responsibility under Articles 7(1) and 7(3) of the Statute with the most serious of criminal offences, including genocide pursuant to Article 4(3)(a) of the Statute, conspiracy to commit genocide pursuant to Article 4(3)(b) of the Statute, four counts of crimes against humanity (extermination, murder, persecutions, and inhumane acts (forcible transfer)) pursuant to Article 5 of the Statute, and with one count of violations of the laws or customs of war (murder) pursuant to Article 3 of the Statute. The charges relate to the alleged attack on the Srebrenica "safe area" and the subsequent killings and executions of Bosnian Muslim men by units of the Army of Republika Srpska ("VRS") between 11 July 1995 and 11 November 1995, during which time the Accused was allegedly the Commander of the 1st Zvornik Light Infantry Brigade.¹⁵

15. If convicted of these charges the Accused is likely to face a substantial term of imprisonment. The Accused will, therefore, have a very strong incentive to flee if released, but this factor alone cannot determine the outcome of the Motion in light of the rights of the Accused and the jurisprudence of the Tribunal.¹⁶

2. Circumstances of surrender

16. The Trial Chamber considers the voluntary surrender of an accused to be an important factor in determining whether he will appear at trial if provisionally released. First, the Trial Chamber must determine whether, as a matter of fact, the accused voluntarily surrendered. Second, the Trial

¹⁴ See *Prosecutor v. Nikola Šainović, Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 6; see also *Prosecutor v. Vladimir Lazarević*, Case No. IT-03-70-PT, Decision on Defence Request for Provisional Release, 14 April 2005, p. 2 ("Lazarević").

¹⁵ Indictment, 10 February 2005.

¹⁶ *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para. 26. The Trial Chamber observes that although all accused before the Tribunal will by definition face charges which are "serious", it is possible to recognize that certain accused are charged with offences that are *more serious* than others. This requires the Trial Chamber to consider the allegations in the indictment as proven and evaluate, *inter alia*, the nature of each charge, the factual allegations, the alleged form of participation of the Accused, and their alleged degree of responsibility. In cases involving co-accused that have applied for provisional release either jointly or in succession to one another, all other factors being equal, it may be possible for a large disparity between the seriousness of the offences charged against each co-accused to result in one being granted provisional release, and the other being denied it.

Chamber must evaluate whether the circumstances of the particular case afford more or less weight to this factor.¹⁷

17. The Accused alleges that he voluntarily surrendered on 23 March 2005, and offers some evidence in the Reply to this effect by way of a statement allegedly made by the Accused on 19 March 2005.¹⁸ The Trial Chamber observes that the Reply does not include an actual copy of this statement to the state authorities attesting to the voluntariness of his surrender, nor a certified translation thereof. The Reply simply includes, in the main body of the submissions, a typed version of the alleged statement in English. The Trial Chamber observes that nowhere in the Response has the Prosecution explicitly alleged that the Accused did not, in fact, voluntarily surrender on 23 March 2005. Rather, the Prosecution raises general doubts about the circumstances of his "Serb custody"¹⁹ and draws attention to the fact that several of the "Srebrenica" accused have surrendered to Serb authorities in close proximity to one another and that this brings the voluntariness of their surrenders into doubt.²⁰ The Trial Chamber is not persuaded by the Prosecution's circumstantial allegations in this regard, which are unrelated to the Accused. Furthermore, the Governmental Guarantees have expressly stated that the Accused surrendered voluntarily.²¹ The Trial Chamber, therefore, accepts that the Accused voluntarily surrendered to the Tribunal on 23 March 2005.

18. The Trial Chamber must now consider the circumstances of the voluntary surrender of the Accused, and in particular the manner and timeliness of the surrender, to determine the weight to be given to this factor. The Accused admits that he failed to voluntarily surrender "as far back as in 2001".²² The Accused failed to voluntarily surrender after the indictment against him was made public on 7 December 2001.²³ It is also undisputed that the Accused remained at large until 23 March 2005 when he was transferred to the Tribunal.²⁴ The Trial Chamber observes that the Accused's voluntary surrender was not unconditional, but rather was explicitly made conditional on his receipt of a governmental guarantee for his provisional release.²⁵ The period of over three years and three months during which the Accused was a fugitive from justice, together with the

¹⁷ For example, even where the accused has not voluntarily surrendered, this factor cannot be counted against him if the accused was arrested on a sealed indictment and, therefore, did not have the opportunity to voluntarily surrender: see *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, para. 17.

¹⁸ Reply, para. 7.

¹⁹ Response, para. 6.

²⁰ Response, para. 9, Annex A.

²¹ Governmental Guarantees, p. 3.

²² Reply, para. 12.

²³ *Prosecutor v. Radislav Krstić, Vinko Pandurević, Vidoje Blagojević*, Case No. IT-98-33-PT, Order to Vacate Portion of Order of 2 November 1998, 7 December 2001.

²⁴ *Prosecutor v. Vinko Pandurević*, Case No. IT-98-33/2-I, Scheduling Order for Initial Appearance, 24 March 2005, p. 2; Motion, para. 1; Response, paras. 6, 9.

unsubstantiated and generalized reasons that he provided for his failure to voluntarily surrender earlier, entitles this factor to very little weight in his favour. The Trial Chamber is more concerned that the demonstrated prior ability of the Accused to successfully avoid compliance with his legal obligations for substantial periods of time, until the moment of his choosing, makes his strong incentive to flee all the more potent.

3. Governmental guarantees

19. With respect to the Governmental Guarantees, the Trial Chamber is mindful of the general trend toward increased co-operation given by the authorities of Serbia and Montenegro and the Republic of Serbia to the Tribunal in recent months.²⁶ The Trial Chamber is, however, concerned with the allegation of the Prosecution that the Government of Serbia and Montenegro is aware of the whereabouts of General Tolimir, who has been indicted by the Tribunal, and is not currently cooperating to effect his arrest and transfer to The Hague.²⁷ The Trial Chamber is mindful that Article 36 of the Law on Cooperation of Serbia and Montenegro with the Tribunal “prescribes that the Council of Ministers of Serbia and Montenegro and the government of the republic of which the accused is a citizen, shall give guarantees to the International Criminal [Tribunal] for the provisional release of persons who have surrendered voluntarily.”²⁸ The Trial Chamber has assessed the Governmental Guarantees provided by the State of proposed provisional release in light of the foregoing considerations as well as the senior position of the Accused who was allegedly promoted to Major-General in June 1997 and was a member of the VRS General Staff until he was relieved in April 1998.²⁹ The Trial Chamber, therefore, finds that there is only some likelihood that these State authorities would be willing to re-arrest the Accused if required.

4. Personal guarantees

20. While an accused is not required to provide a signed personal undertaking that he will abide by certain conditions if released and comply with the orders of the Tribunal, this is often done in support of a provisional release application and is one of the factors to be taken into consideration as indicated by the Appeals Chamber.³⁰ The Trial Chamber observes that the Accused offers no

²⁵ Reply, para. 7; the Trial Chamber is mindful that the Accused was allegedly in Serb custody from 19 March 2005.

²⁶ Lazarević, p. 3; see also *Prosecutor v. Nikola Šainović*, Case No. IT-99-37-PT, Decision on Third Defence Request for Provisional Release, 14 April 2005, para. 27.

²⁷ Response, Annex A, para. 5.

²⁸ Governmental Guarantees, p. 3; emphasis added.

²⁹ Indictment, 10 February 2005, para. 12.

³⁰ See para. 12 and fn. 14.

such personal guarantee in support of his request for provisional release.³¹ While this factor is not held against the Accused, it does serve to distinguish the circumstances of his case from those of others.

5. Cooperation of the Accused

21. The Trial Chamber observes that while the Accused did contact the Prosecution on his own initiative in October 2001 and offered to provide information “about Srebrenica”, indicating some willingness on his part to cooperate with the Tribunal, this factor is entitled to very little weight given that the Accused provided no statement to the Prosecution at this time or at any later date.³²

22. For the foregoing reasons, considering all of the relevant factors together, the Trial Chamber is not satisfied that the Accused, if released, would appear for trial.

C. Whether the Accused, if released, will pose a danger to victims, witnesses or other persons

23. The Motion states that the Accused would not pose a danger to any victim, witness or other person if granted provisional release.³³ The Prosecution does not dispute this statement. There is also no indication that the Accused has interfered with the administration of justice since the confirmation of the indictment against him, for example by attempting to influence or intimidate victims or potential witnesses or that he will do so, and there is no suggestion that he will pose a danger to others if released. Therefore, the Trial Chamber is satisfied that the Accused would not pose a risk to victims, witnesses or any other person if he were provisionally released.

V. CONCLUSION

24. Given that the Trial Chamber is not satisfied that the Accused, if released, would appear for trial, it is compelled under Rule 65(B) to deny provisional release to the Accused on this ground alone – it has no discretion to grant provisional release where the Accused has failed to satisfy it of either of the pre-conditions of Rule 65(B), i.e. that, if released, he will appear for trial, and will not pose a danger.

³¹ The Trial Chamber has considered statements in the Motion that the Accused shall, *inter alia*, “respond to any summons of the International Tribunal” if released (Motion, para. 6), but notes that the Accused has not personally signed a guarantee attesting to his willingness to abide by certain conditions if granted provisional release.

³² Response, para. 4 and Annex, para. 2.

³³ Motion, para. 8.

VI. DISPOSITION

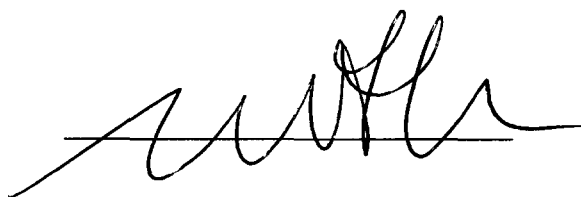
25. For these reasons, pursuant to Rule 65 of the Rules, the Trial Chamber **DENIES** the Motion for provisional release of Vinko Pandurević.

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

Dated this eighteenth day of July 2005,

At The Hague

The Netherlands



Judge Carmel Agius

Presiding Judge

[Seal of the Tribunal]