

IT-04-80-P  
D 2453 - D 2450  
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UNITED  
NATIONS



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-04-80-PT  
Date: 21 July 2005  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Krister Thelin  
Judge Christine Van Den Wyngaert

**Registrar:** Mr. Hans Holthuis

**Order of:** 21 July 2005

**PROSECUTOR**

v.

**Zdravko TOLIMIR  
Radivoje MILETIĆ  
Milan GVERO**

**ORDER ON PROSECUTION'S MOTION TO STAY ORDERS  
ON PROVISIONAL RELEASE CONCERNING THE ACCUSED  
RADIOVOJE MILETIĆ AND MILAN GVERO PURSUANT TO  
RULE 65 AND RULE 127**

**The Office of the Prosecutor:**

Mr. Peter McCloskey

**Counsel for the Accused:**

Ms. Natacha Fauveau-Ivanović for Radivoje Miletic  
Mr. Dragan Krgović for Milan Gvero

**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 a “Prosecution’s Motion To Stay Orders On Provisional Release Concerning The Accused Radivoje Miletić and Milan Gvero Pursuant to Rule 65 and Rule 127”, filed on 20 July 2005 (“Motion”),

**NOTING** the “Decision Concerning Motion For Provisional Release of Radivoje Miletić”, and the “Decision Concerning Motion For Provisional Release of Milan Gvero”, dated 19 July 2005, whereby the Trial Chamber granted the accused Radivoje Miletić and Milan Gvero (“Accused”) provisional release (“Trial Chamber’s Decisions on Provisional Release”);

**NOTING** that in the Motion, the Prosecution, requests that the Trial Chamber’s Decisions on Provisional Release be stayed to allow the Prosecution to file its application for leave to appeal under either Rule 65(D) or Rule 65(F) of the Rules of Procedure and Evidence (“Rules”) and order that the Accused shall not be released pending these matters;<sup>1</sup>

**NOTING** that Rule 65 (E) of the Rules provides “The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application *at the time of filing his or her response* to the initial application for provisional release by the accused” (Emphasis added);

**NOTING**, the interrelationship between Rules 65(E), (F) and (G);

**NOTING** that the Prosecution filed a “Prosecution Response to Request for Provisional Release for Accused Radivoje Miletić”, on 6 May 2005, and a “Prosecution Response to Request For Provisional Release for Accused Milan Gvero”, on 19 April 2005 (“Response”), and that in its Response, it did not apply for a stay of the decision of the Trial Chamber to release the Accused, as is required by Rule 65(E) of the Rules;

**NOTING** that in the Motion, the Prosecution submits, *inter alia*, that it omitted to include a request for stay in its Response opposing the applications for provisional release of the Accused due to an oversight on its side, and that it always intended to seek leave to appeal if the Accused were granted provisional release;<sup>2</sup>

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<sup>1</sup> Motion, paras 2,9.

<sup>2</sup> Motion, para. 4.

**CONSIDERING** that the Motion originates from a failure on the part of the Prosecution to make an application for stay of the Trial Chamber's decision at the time that it filed its Response to the initial application of the Accused for provisional release, as mandated for by Rule 65(E) of the Rules;<sup>3</sup>

**NOTING** that in the Motion, the Prosecution submits that Rule 65(E) of the Rules only provides one way, but not the exclusive way, in which the Prosecutor may seek a stay pending appeal, and that a failure to make an application for stay in conformity with Rule 65(E) of the Rules does not foreclose a separate application for stay if the Trial Chamber finds that there is good cause for dispensing with that requirement pursuant to Rule 127 of the Rules;<sup>4</sup>

**NOTING** the "Joint Defence Response on Prosecution's Motion To Stay Orders On Provisional Release Concerning The Accused Radivoje Miletić and Milan Gvero Pursuant to Rule 65 and Rule 127", dated 20 July 2005, whereby the Accused submit that the Prosecution has not followed the proper procedure to stay a decision for provisional release, and has not shown good cause to justify granting the Motion ("Joint Defence Response");<sup>5</sup>

**CONSIDERING** that the deadline set forth in Rule 65 of the Rules may be varied by a Chamber in accordance to Rule 127 upon good cause been shown;

**CONSIDERING** the Prosecution should not rely upon Rule 127 of the Rules to circumvent the proper procedure to be followed to stay a decision for provisional release;<sup>6</sup>

**CONSIDERING** that the submissions of the Prosecution in support of the Motion suggest that oversight is the explanation for the failure to comply with Rule 65(E) of the Rules, and offers no other cause in explanation of that oversight;

**CONSIDERING** further, that the primary justification now relied on is the suggestion of inconsistency between the Trial Chamber's Decisions on Provisional Release and the decision refusing provisional release in *Prosecutor v. Pandurović*,<sup>7</sup> whereas, as the Defence contends in its Joint Defence Response, there are a number of material distinctions between the circumstances in

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<sup>3</sup> See, *Prosecutor v. Prlić et al.*, Case No.: IT-04-74-AR65.1, Decision on Motions for Reconsideration, Clarification, Request for Release and Applications For Leave to Appeal, 8 September 2004, para. 5.

<sup>4</sup> Motion, paras 4-5.

<sup>5</sup> Joint Defence Response, paras 12-17.

<sup>6</sup> *Prosecutor v. Prlić et al.*, Case No.: IT-04-74-AR65.1, Decision on Motions for Reconsideration, Clarification, Request for Release and Applications For Leave to Appeal, 8 September 2004, para. 5.

*Pandurović* and those in this case, and, in any event, this justification is some what inconsistent with the Prosecution's contention that it was always intended to appeal in this case if the Motion was granted;

**CONSIDERING** that, therefore, the Trial Chamber is not satisfied that good cause has been shown in accordance to Rule 127 of the Rules, which would justify granting the present Motion;

**HEREBY REJECTS** the Motion.

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

Dated this twenty-first day of July 2005,

At The Hague

The Netherlands



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**Judge Kevin Parker**

**Presiding**

**[Seal of the Tribunal]**

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<sup>7</sup> *Prosecutor v. Pandurović and Trbić*, Case No.:IT-05-86-PT, Decision on Vinko Pandurević's Application For Provisional Release, 18 July 2005.