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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 the Former Yugoslavia Since 1991

Case No.: IT-05-86-AR65.1

Date: 3 October 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **3 October 2005**

THE PROSECUTOR

v.

VINKO PANDUREVIĆ
MILORAD TRBIĆ

DECISION ON INTERLOCUTORY APPEAL FROM TRIAL CHAMBER DECISION DENYING VINKO PANDUREVIĆ'S APPLICATION FOR PROVISIONAL RELEASE

Office of the Prosecutor
Mr. Peter McCloskey

Counsel for the Accused:
Mr. Đorđe Sarapa for Vinko Pandurević
Ms. Colleen Rohan for Milorad Trbić

Introduction

1. On 18 July 2005, Trial Chamber II of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("the Tribunal") denied Vinko Pandurević's application for provisional release on the grounds that it was not satisfied Pandurević would appear for trial.[1] Pandurević ("the Appellant") filed a timely application for leave to appeal the Trial Chamber's decision,[2] submitting at the same time his appeal challenging the denial of provisional release.[3] Following a subsequent amendment to the Rules of Procedure and Evidence, which granted leave as of right to appeal Trial Chamber decisions on applications for provisional release,[4] the President of the Tribunal assigned a bench of 5 judges of the Appeals Chamber to hear the appeal.[5] After the Appellant re-filed the Defense Appeal in response to the Order Assigning Judges,[6] the Prosecution filed its Response[7] and the Appellant filed his Reply.[8] The Appeals Chamber will not consider this Reply, however, for it was untimely – though the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal[9] provides that "an appellant may file a reply within four days of the filing of the response," here the Appellant waited seven days to file his Reply.[10]

2. The Appeals Chamber will reverse a Trial Chamber's denial of provisional release only if the Trial Chamber committed a specific error invalidating the decision or weighed relevant considerations in an unreasonable manner.[11] In this case, asserting that the "requirements [for provisional release] prescribed under Rule 65(B) of the Rules of Procedure and Evidence have been

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[1] Decision on Vinko Pandurević's Application for Provisional Release, 18 July 2005 ("Impugned Decision").
[2] Defence's Application for Leave to Appeal Against the Trial Chamber Decision on Vinko Pandurević's Application for Provisional Release, 25 July 2005.
[3] Defence's Appeal Against the Trial Chamber Decision on Vinko Pandurević's Application for Provisional Release, 25 July 2005 ("Defense Appeal").
[4] Rule 65 of the Rules of Procedure and Evidence of the Tribunal, IT/32/Rev.36, 8 August 2005 ("Rules").
[5] Order Assigning Judges to a Case before the Appeals Chamber, 15 August 2005 ("Order Assigning Judges").
[6] Defence's Appeal Against the Trial Chamber Decision on Vinko Pandurević's Application for Provisional Release, 19 August 2005, ("Defense Appeal"). The Order Assigning Judges "order[ed] that . . . the timing to brief the appeal shall run from the filing of this assignment order." *See* Order Assigning Judges, p. 2.
[7] Prosecution's Response to Vinko Pandurević's Appeal Against the Decision on Provisional Release, 29 August 2005 ("Prosecution Response").
[8] Defence's Reply to the Prosecution's Response to Vinko Pandurević's Appeal Against the Decision on Provisional Release, 5 September 2005 ("the Reply").
[9] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155/Rev.2, 21 February 2005, section II, para. 3.
[10] The Prosecution filed its response on Monday, 29 August 2005, and Pandurević filed his reply on Monday, 5 September 2005.
[11] *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10. A Trial Chamber commits a specific error when it applies an erroneous interpretation of the law, gives weight to irrelevant considerations, fails to give weight to relevant considerations, or bases a decision on an erroneous understanding of the relevant facts. *See ibid.*

satisfied,"[12] the Defense Appeal, at base, merely disputes the amount of weight the Trial Chamber gave to various considerations from which it determined it was not satisfied that the Appellant would appear for trial. The Appeals Chamber, however, not only believes that the Trial Chamber committed no specific error that would invalidate its decision, but also believes that the Trial Chamber reasonably weighted the considerations on which it based its conclusion about whether the Appellant would appear. The Appeals Chamber therefore defers to the Trial Chamber's evaluation of these considerations[13] and dismisses the appeal.

Analysis

3. A Trial Chamber may grant provisional release only "if it is satisfied that the accused will appear for trial."[14] In deciding whether the accused will appear for trial, the Trial Chamber must consider "all those relevant factors which a reasonable trial chamber would have been expected to take into account before reaching a decision."[15] Following the guidance offered by the Appeals Chamber in *Prosecutor v. Nikola Šainović, Dragoljub Ojdanić*,[16] the Trial Chamber here, in evaluating whether the Appellant would appear for trial, considered the gravity of the charges against him,[17] the likelihood he will face a substantial term of imprisonment,[18] the circumstances surrounding his surrender,[19] guarantees offered by the Government of Serbia and Montenegro,[20] the absence of personal guarantees offered by the Appellant,[21] and the extent of his cooperation with the Prosecution.[22]

4. The Trial Chamber concluded that, as the Appellant has been charged with genocide, conspiracy to commit genocide, crimes against humanity, and violations of the laws or customs of war, all crimes that carry substantial prison sentences, both the gravity of the charges and the likely prison term the Appellant will face if convicted suggest that he may not appear for trial.[23] Conceding the gravity of these charges and the fact that these crimes carry lengthy prison sentences,

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[12] Defense Appeal, para. 22.
[13] *Prosecutor v. Jovica Stanisić*, Case No. IT-03-69-AR65.1, Decision on Prosecution's Appeal Against Decision Granting Provisional Release, 3 December 2004, para. 14 (noting discretion of Trial Chamber in considering a relevant factor); *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005 (noting deference accorded Trial Chambers when they exercise their discretion).
[14] Rule 65(B) of the Rules.
[15] *Prosecutor v. Nikola Šainović, Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 ("*Šainović and Ojdanić*"), para. 6.
[16] *Ibid.*
[17] Impugned Decision, para. 14.
[18] *Ibid.* para. 15.
[19] *Ibid.* paras. 16-18.
[20] *Ibid.* para. 19.
[21] *Ibid.* para. 20.
[22] *Ibid.* para. 21.
[23] *Ibid.* paras. 14-15.

the Appellant argues that, as he surrendered once with knowledge that he had been charged, these considerations provide no indication that he will abscond.[24]

5. In the view of the Appeals Chamber, the Trial Chamber did not abuse its discretion in inferring that these serious charges and severe sentences would tempt the Appellant to flee, notwithstanding his previous surrender. Indeed, the Appeals Chamber has repeatedly recognized that "the more severe the sentence, the greater the incentive to flee."[25]

6. The Trial Chamber found that the circumstances surrounding the Appellant's surrender also militate against provisional release, noting that he remained at large for over three years after learning of the indictment and that his explanation for why he remained at large – that surrender allegedly would have jeopardized the security of his family – was "unsubstantiated and generalized."[26] The Trial Chamber further explained that the Appellant made his surrender conditional on receipt of a government guarantee that would bolster his case for provisional release.[27] On appeal, the Appellant reiterates that he surrendered voluntarily and that he failed to do so earlier because he would have "jeopard[ized] the security of his family."[28] He also asserts that his demand for government guarantees did not make his surrender conditional and contends that the Trial Chamber should have considered the fact that he "did not commit any act that would pose danger to any victim, witness or any other person" while at large.[29] The Prosecution responds that "the Accused's surrender was *explicitly* made conditional on his receipt of a government guarantee for his provisional release,"[30] arguing that such a surrender "is not truly voluntary," and that at the very least "the value of such surrender is undermined by its conditional" nature.[31] "[N]owhere in the original pleadings or in the Appeal," the Prosecution adds, "does the Applicant address the precise details of how the security of his family would have been jeopardized" by his surrender.[32] According to the Prosecution, these facts make it proper for the Trial Chamber to have focused on

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[24] Defense Appeal, paras. 8-9.
[25] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defense Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 6; *see also 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. 25 (making the same point); *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para. 30 (same); *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-AR65.2, Decision on Haradin Bala's Request for Provisional Release, 31 October 2003, para. 25 (same); *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-AR65.3, Decision on Isak Musliu's Request for Provisional Release, 31 October 2003, para. 33 (same).
[26] Impugned Decision, para. 18.
[27] *Ibid.*
[28] Defense Appeal, paras. 10-12, 13.
[29] *Ibid.* paras. 12-13.
[30] Prosecution Response, para. 13 (emphasis in original).
[31] *Ibid.* paras. 15-16.
[32] *Ibid.* paras. 17.

the Appellant's decision to remain at large after his indictment and not on his subsequent surrender or his explanation for his flight.[33]

7. In the Appeals Chamber's view, it was not unreasonable for the Trial Chamber to discount the probative value of the Appellant's surrender and to give more weight to the fact that he remained at large for three years after learning of his indictment.[34] The mere fact that he failed to surrender earlier shows that he "considered that he had to give priority to other factors and surrender only when those factors had ceased to be relevant."[35] Moreover, the Appellant offered only an "unsubstantiated and generalized" explanation for his decision to remain at large.[36]

8. The Trial Chamber did not err when it took account of the fact that the Appellant made his surrender conditional on the receipt of a government guarantee for his provisional release, and this fact underscores the reasonableness of the decision to discount the probative value of the Appellant's surrender. The Trial Chamber also did not err by failing to consider, when examining whether the Appellant poses a flight risk, the fact that the Appellant never endangered victims or witnesses when he was at large. Though an applicant's treatment of victims and witnesses while at large may be relevant to whether he meets another requirement for provisional release – that the applicant "not pose a danger to any victim, witness or other person"[37] – this conduct sheds no light on whether the accused will appear for trial.

9. The Trial Chamber accorded "very little weight" to the Appellant's 2001 offer to cooperate with the Prosecution, noting that while "the Accused did contact the Prosecution on his own initiative in October 2001 and offered to provide information 'about Srebrenica,' . . . the Accused provided no statement to the Prosecution at this time or at any later date."[38] According to the Appellant "his initiative should be allowed to carry more weight than deemed by the Trial Chamber."[39] The Prosecution responds that the Appellant "refused to surrender after making

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[33] *Ibid.* paras. 19.
[34] *See Prosecutor v. Mile Mrkšić, Miroslav Radić, Veselin Šljivančanin*, Case No. IT-95-13/1-AR65.2, Decision on Application for Leave to Appeal, 19 April 2005, p. 3-4 (noting that Trial Chamber could reasonably express doubts about the probative value of an applicant's surrender when the applicant remained at large for six years after learning of his indictment).
[35] *Prosecutor v. Milan Milutinović*, Case No. IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003 ("*Milutinović*"), para. 6.
[36] *See Ibid.* (noting, in an explanation of why a Trial Chamber did not err by deeming an accused's surrender involuntary, that the accused had failed to substantiate his explanation for declining to surrender).
[37] Rule 65(b) of the Rules; *see also Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, Berislav Pušić*, Case Nos. IT-04-74-AR65.1, IT-04-74-AR65.2, IT-04-74-AR65.3, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, paras. 35-38 (approving of Trial Chamber's decision to consider, when evaluating the risk that applicants would pose a danger to victims or witnesses, the fact the applicants had not tried to obstruct justice during a period in which they were aware they likely had been indicted).
[38] Impugned Decision, para. 21.
[39] Defense Appeal, para. 20.

contact with the Prosecution," reiterates that the Appellant never actually gave the statement that he offered, and adds that, "had [the Appellant] turned himself in when he was first informed of the Indictment against him, then he would have already completed his trial."[40]

10. In according "very little weight" to the Appellant's offer of cooperation, the Trial Chamber acted within its discretion. Though an accused may not "be penalized because he declines to cooperate with the Prosecution," cooperation "may weigh in [the accused's] favour when he seeks to be provisionally released."[41] Here, the Trial Chamber simply reached the reasonable conclusion that, as the Appellant never followed through on his offer of cooperation, the offer itself provides little evidence that he will appear for trial.[42]

11. Considering the value of the guarantees offered by the Government of Serbia and Montenegro, the Trial Chamber noted a "general trend toward increased co-operation given by the authorities of" that government, but also expressed concern with the Prosecution's "allegation . . . that the Government of Serbia and Montenegro is aware of the whereabouts of" one individual, General Tolimir, "who has been indicted by the Tribunal, and is not currently cooperating to effect his arrest and transfer to The Hague."[43] The Trial Chamber also observed that the Appellant had served on the General Staff of the Republika Srpska Army ("VRS"), and had been promoted to Major-General in 1997.[44] In light of this evidence, the Trial Chamber concluded that "there is only some likelihood that . . . authorities [in Serbia and Montenegro] would be willing to re-arrest [the Appellant] if required."[45]

12. The Appellant argues that the Government of Serbia and Montenegro is "doing [its] utmost" to comply with its obligations to the Tribunal, citing a Report to the Security Council as evidence.[46] He also denies that officials in that government know the whereabouts of General Tolimir,[47] and asserts that "[t]he authorities of Serbia and Montenegro do not draw any difference between the persons accused for reasons of their position and function."[48] Consequently, the Appellant denies there is any "doubt[] that the authorities of Serbia and Montenegro would be willing to re-arrest" him.[49] The Prosecution responds that "cooperation [by the Government of Serbia and Montenegro]

[40] Prosecution Response, paras. 27-28, 30.
[41] *Milutinović*, para. 12.
[42] Impugned Decision, para. 21.
[43] *Ibid.* para. 19.
[44] *Ibid.*
[45] *Ibid.*
[46] Defense Appeal, para. 14.
[47] *Ibid.*
[48] *Ibid.* para. 15.
[49] *Ibid.*

has not been very reliable."[50] As evidence, the Prosecution cites its allegations about General Tolimir, and it asserts that the Trial Chamber properly "assessed [the government guarantees] in the context of" these allegations.[51] The Prosecution adds that the Trial Chamber properly considered the Appellant's 1997 promotion, and that this promotion underscores the reasonableness of the Trial Chamber's doubts about the value of these guarantees.[52]

13. It was not unreasonable for the Trial Chamber to conclude that there is only some likelihood authorities in Serbia and Montenegro will re-arrest the Appellant. Contrary to the Appellant's assertion, the President of the Tribunal's most recent report to the Security Council offers no "proof" that the Government of Serbia and Montenegro has done its "utmost to comply with all" obligations to the Tribunal. The report observes only that "[c]o-operation with Serbia and Montenegro has improved markedly in the last six months."[53] The Trial Chamber acted within its discretion when it took note of this trend yet did not conclude that authorities in Serbia and Montenegro have cooperated with the Tribunal to the "utmost." Though the Trial Chamber should not have relied on a mere "allegation . . . that the Government of Serbia and Montenegro" is aware of one fugitive's whereabouts, yet has failed to arrest him, this did not prejudice the Appellant. Other considerations examined by the Trial Chamber, particularly the fact that the Appellant served on the VRS General Staff and was promoted to Major-General as recently as 1997, offer ample support for the Trial Chamber's conclusion about the value of the government guarantees.

14. In the Impugned Decision, the Trial Chamber noted that the Appellant offered no personal guarantee of his return for trial,[54] observing that some provisional-release applicants do offer such a guarantee, and that if an applicant offers a personal guarantee it can be taken into account.[55] Along with his appeal, the Appellant submitted such a guarantee.[56] The Prosecution objects to the consideration of this statement, observing that the Appellant "had ample opportunity to place [it] before the trial chamber" and that "the Trial Chamber must be entitled to rely on arguments and evidence put forth by the parties."[57]

15. The Appeals Chamber agrees with the Prosecution that the newly presented personal guarantee should not be considered. Rule 115 of the Rules provides that a party must "apply by

[50] Prosecution Response, para. 24.
[51] *Ibid.*
[52] *Ibid.*
[53] Assessments and Report of Judge Theodor Meron, President of the President of the International Criminal Tribunal for the Former Yugoslavia, Provided to the Security Council pursuant to paragraph 6 of Council Resolution 1534 (2004), 25 May 2005, para. 19.
[54] Impugned Decision, para. 20.
[55] *Ibid.*
[56] Defense Appeal, para. 17 & annexes 2, 4.
[57] Prosecution Response, para. 31.

motion" if it wants "to present additional evidence before the Appeals Chamber,"[58] and while that rule speaks in terms of appeals from judgment, it applies equally to appeals from Trial Chamber decisions on provisional release.[59] Here, the Appellant has neglected to present a Rule 115 application. Hence, his personal guarantee is not properly before the Appeals Chamber.

Conclusion

16. On the basis of the foregoing the Appeals Chamber is not satisfied that the Appellant has shown the Trial Chamber erred in denying his application for provisional release. The appeal is dismissed.

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

Done this 3rd day of October 2005,
At The Hague
The Netherlands

Judge Meron
Presiding Judge

[Seal of the Tribunal]

[58] Rule 115(A) of the Rules.
[59] *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case Nos. IT-03-69-AR65.1, IT-03-69-AR65.2, Decision on Prosecution's Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release, 11 November 2004, paras. 2-8; *see also Šainović & Ojdanić*, para. 10.