



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-02-65-PT
Date: 12 December 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: 12 December 2005

PROSECUTOR

v.

**ŽELJKO MEJAKIĆ
MOMČILO GRUBAN
DUŠAN FUŠTAR
DUŠKO KNEŽEVIĆ**

DECISION ON DEFENDANT DUŠAN FUŠTAR'S MOTION TO RECONSIDER

Office of the Prosecutor:

Ms. Carla del Ponte
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Jovan Simić and Mr. Zoran Živanović, for Željko Mejačić
Mr. Branko Lukić, for Momčilo Gruban
Mr. Theodore Scudder and Mr. Dragan Ivetić, for Dušan Fuštar
Ms. Slobodanka Nedić, for Duško Knežević

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 (“International Tribunal”),

BEING SEIZED of a “Defendant, Dušan Fuštar’s Motion to Reconsider the Trial Chamber’s 6 December 2005 Decision,” filed by the Defence of Dušan Fuštar (“the Accused”) on 7 December 2005 (“Motion”),

NOTING the “Defendant, Dušan Fuštar’s Petition Seeking a Temporary Provisional Release to Attend the 40 Day Memorial of his Mother-in-Law’s Death,” filed by the Accused on 30 November 2005 (“Petition”), requesting that the Accused be provisionally released from detention from 13 to 20 December 2005, in order to travel to Prijedor, Bosnia and Herzegovina, for the 40-day memorial of the death of his mother-in-law, which will take place on 16 or 17 December 2005,

NOTING also the “Decision on Dušan Fuštar’s Petition Seeking a Temporary Provisional Release,” issued by the Trial Chamber on 6 December 2005, which denied the Petition without prejudice, on the basis that no guarantees had been provided to the Chamber from the relevant government,

CONSIDERING the guarantees provided by the government of the Republika Srpska and filed on 8 December 2005, stating that it would, *inter alia*:

- (1) organise security for the Accused during his temporary stay in Republika Srpska;
- (2) immediately inform the International Tribunal should there be any threats to the safety of the Accused;
- (3) ensure that the Accused is brought in should he breach any of the conditions of his provisional release set forth by the International Tribunal;
- (4) escort the Accused during his journey to the place where he will stay in Republika Srpska;
- (5) hand over the Accused to the Serbian authorities at a location designated for handover, following the expiry of the period of his authorised stay in the Republika Srpska;
- (6) bear all expenses in connection with the transportation of the Accused from the handover location to the place in Republika Srpska where he will stay, and back;
- (7) regularly submit written reports to the Trial Chamber concerning whether the Accused is abiding by the conditions of his provisional release,

CONSIDERING the further guarantees submitted by the government of Repbulika Srpska on 9 December 2005, stating that an official of that government would accompany the Accused on his journey from the Netherlands to Prijedor, and back again,

CONSIDERING also the “Prosecutor’s Response in Opposition to ‘Defendant Dušan Fuštar’s Motion to Reconsider the Trial Chamber’s 6 December 2005 Decision,’” filed on 8 December 2005, in which the Office of the Prosecutor (“Prosecution”) states its opposition to the granting of any temporary period of provisional release for the Accused on the grounds that: (a) the relationship between the Accused and the deceased is not sufficiently close so as to justify the exceptional measure of granting him temporary provisional release; (b) the Accused has not provided a personal guarantee that he will not pose a danger to any victim or witness; (c) there are no government guarantees that the Accused will not pose a danger to any victims or witnesses, or other person, and the government guarantees provided are inadequate to guarantee that he will appear for trial; (d) the case *Prosecutor v. Mejakić et al.*, in which the Accused is indicted, has been referred under Rule 11 *bis* to the courts of Bosnia and Herzegovina and this aggravates the risk that he will not appear for trial; and (e) the Accused’s citizenship of the Republic of Serbia heightens the risk that he will not appear for trial,

CONSIDERING that provisional release may only be granted if the Trial Chamber is satisfied that the Accused will appear for trial, and that he will not, if released, pose a danger to any victim, witness or other person,

CONSIDERING that, in determining whether an accused will appear for trial, should he be provisionally released, a Trial Chamber must consider (1) the gravity of the charges against the accused and if he is likely to serve a long prison sentence if convicted, (2) the circumstances surrounding the accused’s surrender, (3) the degree of co-operation given by the State to which the accused seeks to be released, (4) the guarantees given by that State, and any personal guarantees offered by the accused, (5) the likelihood that, in case of breach of the conditions of provisional release, the relevant State will re-arrest the accused if he declines to surrender, and (6) the accused’s degree of co-operation with the Prosecution,¹ and that these factors have been taken into account by the Trial Chamber in its determination of the Motion,

¹ *Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1-PT, Decision on Savo Todović’s Application for Provisional Release, 22 July 2005, para. 11, quoting from *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 6.

CONSIDERING that that the Accused resisted the referral of his trial to the domestic courts of Bosnia and Herzegovina under Rule 11 *bis* of the Rules, but that such referral was granted by a decision of the Referral Bench, which has been appealed by the Accused and his co-accused,²

CONSIDERING that the Accused has provided no personal assurance that he would return to The Hague following any period of temporary provisional release,

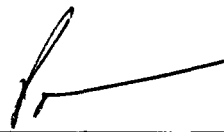
CONSIDERING that the pending appeal of the Rule 11 *bis* referral of this case may aggravate the risk that the Accused would not appear for trial should he be provisionally released,³

CONSIDERING ALSO that the guarantees provided by the Republika Srpska do not sufficiently assure the Trial Chamber that the Accused would be returned to the custody of the International Tribunal, or to the relevant authorities for trial in Bosnia and Herzegovina should his case be referred back to that jurisdiction during the period of his provisional release,

PURSUANT TO Rules 54 and 65 of the Rules of Procedure and Evidence of the International Tribunal,

HEREBY DENIES the **MOTION**.

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



Patrick Robinson
Presiding

Dated this twelfth day of December 2005
At The Hague,
The Netherlands

[Seal of the Tribunal]

² *Prosecutor v. Mejakić et al*, Case No. IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 *bis*, 20 July 2005; *Prosecutor v. Mejakić et al*, Case No. IT-02-65-PT, Joint Defence Notice of Appeal, 4 August 2005.

³ *See, e.g., Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision on Defence Motion for Provisional Release, 9 March 2005, wherein the Trial Chamber noted that a pending request for referral under Rule 11 *bis* may aggravate the risk that an accused would not appear for trial, if released, and denied an application for provisional release.