



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-05-88-AR65.1
Date: 24 January 2006
Original: English

IN THE APPEALS CHAMBER

Before: Judge Wolfgang Schomburg, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision: 24 January 2006

THE PROSECUTOR

v.

Vujadin POPOVIĆ
Ljubiša BEARA
Drago NIKOLIĆ
Ljubomir BOROVIČANIN
Zdravko TOLIMIR
Radivoje MILETIĆ
Milan GVERO
Vinko PANDUREVIĆ
Milorad TRBIĆ

**DECISION ON INTERLOCUTORY APPEAL OF TRIAL CHAMBER DECISION
DENYING DRAGO NIKOLIĆ'S MOTION FOR PROVISIONAL RELEASE**

The Office of the Prosecutor:

Peter McCloskey

Counsel for the Accused:

Zoran Živanović for Vujadin Popović
John Ostojić for Ljubiša Beara
Jelena Nikolić and Stéphane Bourgon for Drago Nikolić
Aleksandar Lazarević and Miodrag Stojanović for Ljubomir Borovčanin
Natacha Fauveau Ivanović for Radivoje Miletić
Dragan Krgović for Milan Gvero
Đorđe Sarapa for Vinko Pandurević
Colleen Rohan and Vesna Janjić for Milorad Trbić

THE APPEALS 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 (“Appeals Chamber” and “Tribunal”, respectively);

BEING SEIZED of the “Interlocutory Appeal of the Decision on Drago Nikolić’s Request for Provisional Release and Request for a Variation of the Time Limits” (“Defence Interlocutory Appeal”), filed confidentially by Counsel for Drago Nikolić (“Defence” and “Appellant”, respectively) on 17 November 2005, whereby the Defence appeals Trial Chamber II’s “Decision on Drago Nikolić’s Request for Provisional Release” of 9 November 2005 (“Impugned Decision”), denying the Appellant’s request for provisional release, and requests the Appeals Chamber to quash the Impugned Decision and grant provisional release to the Appellant or, alternatively, to remit the matter to the Trial Chamber for reconsideration;

NOTING the “Prosecution Response to Interlocutory Appeal of the Decision on Drago Nikolić’s Request for Provisional Release” (“Prosecution Response”), filed confidentially by the Office of the Prosecutor (“Prosecution”) on 28 November 2005;

NOTING the “Reply to Prosecution Response to Interlocutory Appeal of Decision on Drago Nikolić’s Request for Provisional Release” (“Defence Reply”), filed by the Defence on 2 December 2005;

ACCEPTING, upon request by the Defence,¹ the Defence Interlocutory Appeal as validly filed pursuant to Rules 65(D), 127(A)(ii) and (B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) since this request was not opposed by the Prosecution² and the Defence has shown good cause for the insignificantly belated filing;

NOTING that the Appellant is charged under Article 7(1) of the Statute of the Tribunal (“Statute”), *inter alia*, with genocide pursuant to Article 4(3)(a) of the Statute, extermination as a crime against humanity pursuant to Article 5(b) of the Statute, murder as a crime against humanity pursuant to Article 5(a) of the Statute, and persecution as a crime against humanity pursuant to Article 5(h) of the Statute including murder, cruel and inhumane treatment, and forcible transfer;⁴

¹ Defence Interlocutory Appeal, paras 15, 16.

² Prosecution Response, fn. 3.

⁴ (*fn3 omitted for technical reasons*) *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Consolidated Amended Indictment, 11 November 2005, paras 26-92.

NOTING that the Appellant was transferred to the custody of the Tribunal on 17 March 2005⁵ and that his case was joined with five other cases on 21 September 2005⁶ and assigned to Trial Chamber II on 26 September 2005;⁷

RECALLING that pursuant to Rule 65(B) of the Rules, a Trial Chamber may grant provisional release only if it is satisfied that the accused will appear for trial and, if released, not pose a danger to any victim, witness or other person, and only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard;

RECALLING that a Trial Chamber's decision on provisional release under Rule 65 of the Rules is a discretionary one and that the Appeals Chamber on review will only determine whether the Trial Chamber correctly exercised its discretion in reaching the decision;⁸

RECALLING that the party challenging a Trial Chamber's decision on provisional release bears the burden of showing that the Trial Chamber committed a discernible error in that it

- (1) misdirected itself as to the principle to be applied;
- (2) misdirected itself as to the law which is relevant to the exercise of discretion;
- (3) gave weight to extraneous or irrelevant considerations;
- (4) failed to give weight or sufficient weight to relevant considerations;
- (5) made an error as to the facts upon which it has exercised its discretion; or
- (6) rendered a decision so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly;⁹

NOTING that the Defence submits that the Trial Chamber failed to adjudicate the Appellant's request for provisional release on the basis of a "thorough understanding of the information available" and raises, in particular, the following grounds of appeal:¹⁰

- (1) The Trial Chamber allegedly erred in law by holding that, under Rules 64 and 65 of the Rules, detention is the rule and provisional release the exception, and this

⁵ *Prosecutor v. Drago Nikolić*, Case No. IT-02-63-I, Order for Detention on Remand, 21 March 2005.

⁶ *Prosecutor v. Popović et al.*, Case Nos IT-02-57-PT; IT-02-58-PT; IT-02-63-PT; IT-02-64-PT; IT-04-80-PT; IT-05-86-PT, Decision on Motion for Joinder, 21 September 2005. See also Case No. IT-05-88-PT, Certificate, 22 September 2005.

⁷ *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Order Assigning a Case to a Trial Chamber, 26 September 2005.

⁸ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para. 6.

⁹ See *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-AR65.2, Decision on Dušan Fuštar's Request for Interlocutory and Expedited Appeal, 16 December 2005, para. 7.

¹⁰ The Appeals Chamber notes that the partially confidential Defence "Motion Seeking the Provisional Release of Drago Nikolić until the Beginning of the Trial Phase of the Proceedings" of 7 October 2005 (Motion for Provisional Release) and the "Defence Motion Seeking Leave to Reply to the Prosecution Response to the Defence Motion Seeking Provisional Release of Drago Nikolić" of 26 October 2005 ("Motion Seeking Leave to Reply") are incorporated into the Defence Interlocutory Appeal; see Defence Interlocutory Appeal, fn 4.

understanding may have had an impact on the Trial Chamber's assessment of the Appellant's request for provisional release, in particular the Appellant's personal statement and the guarantees provided by the Government of the Republic of Serbia and the Council of Ministers of Serbia and Montenegro ("Governmental Guarantees");¹¹

- (2) The Trial Chamber allegedly erred in law by failing to observe that Rule 65(B) of the Rules requires an effective opportunity to be heard for the State to which the accused seeks to be released;¹²
- (3) The Trial Chamber failed to give adequate weight to the personal statement provided by the Appellant in support of his request for provisional release including an explanation for his late surrender to the Tribunal and his whereabouts during the time he was at large;¹³
- (4) The Trial Chamber failed to give adequate weight to the Governmental Guarantees when it decided that these were insufficient to establish that the Appellant would appear for trial if provisionally released;¹⁴

NOTING that the Prosecution requests that the Defence Interlocutory Appeal be dismissed on the basis that, *inter alia*, the Appellant failed to demonstrate how any of the alleged errors invalidate the Impugned Decision;¹⁵ Serbia and Montenegro and the Republic of Serbia were given an opportunity to be heard pursuant to Rule 65(B) of the Rules when their guarantees were considered by the Trial Chamber;¹⁶ and, in light of the specific circumstances of the case, the Trial Chamber correctly concluded that neither the Appellant's personal statement nor the Governmental Guarantees could ensure the presence of the Appellant for trial;¹⁷

NOTING that the Defence opposes the validity of the arguments advanced in the Prosecution Response, reinforcing its position set out in the Defence Interlocutory Appeal and submitting, in particular, that the Appellant has shown how the alleged errors invalidate the Impugned Decision;

CONSIDERING that it is irrelevant to the instant case whether, under Rule 65 of the Rules, provisional release is the exception or the rule. The Appellant must show that the Trial Chamber

¹¹ Defence Interlocutory Appeal, paras 17, 21, 22.

¹² Defence Interlocutory Appeal, paras 18, 23-30.

¹³ Defence Interlocutory Appeal, paras 19, 31-38.

¹⁴ Defence Interlocutory Appeal, paras 20, 39-45.

¹⁵ Prosecution Response, para. 33.

¹⁶ Prosecution Response, paras 17-19.

¹⁷ Prosecution Response, paras 20-31.

committed a discernible error in the application of Rule 65 of the Rules which relates to a specific finding;¹⁸

CONSIDERING that under the terms of Rule 65(B) of the Rules, a Trial Chamber only needs to provide the State to which an accused seeks to be released with an opportunity to be heard before the Trial Chamber *grants* provisional release,¹⁹ and that in the Impugned Decision the Trial Chamber *denied* provisional release;

CONSIDERING that a Trial Chamber has considerable discretion when determining what factors will be relevant to its assessment of whether the requirements of Rule 65(B) of the Rules have been met, and that a Trial Chamber also has considerable discretion when determining the weight to accord these factors in light of the specific circumstances of the individual case;²⁰

CONSIDERING that, when assessing whether the Appellant would appear for trial if provisionally released, the Trial Chamber in the Impugned Decision took into account the serious nature of the crimes the Appellant is charged with and the likelihood of a significant prison sentence upon conviction,²¹ the circumstances of the Appellant's surrender,²² the Governmental Guarantees,²³ as well as a personal statement and a guarantee provided by the Appellant;²⁴

CONSIDERING that the Trial Chamber correctly emphasized that the gravity of the crimes an accused is charged with does not suffice to automatically deny provisional release;²⁵

CONSIDERING that it was within the Trial Chamber's discretion to find that the Appellant did not sufficiently explain why he failed to surrender to the Tribunal for a considerable time; and that the Defence Interlocutory Appeal does not point to any significant information or argument, which was not provided to the Trial Chamber and considered by it before rendering the Impugned

¹⁸ See *supra*, p. 3, third "Recalling".

¹⁹ *Prosecutor v. Todović*, Case No. IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, 7 October 2005, para. 29; *Prosecutor v. Popović*, Case No. IT-02-57-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović's Application for Provisional Release, 28 October 2005, para. 11; *Prosecutor v. Nsengimana*, Case No. ICTR-01-69-AR65, Decision on Application by Hormisdas Nsengimana for Leave to Appeal the Trial Chamber's Decision on Provisional Release, 24 August 2005, p. 4, last "Considering".

²⁰ *Cf. Prosecutor v. Rajić*, Case No. IT-95-12-AR65.1, Confidential Decision on Appeal of Trial Chamber Decision on Provisional Release, 16 November 2005, para. 7.

²¹ Impugned Decision, paras 17, 18.

²² Impugned Decision, paras 19, 20.

²³ Impugned Decision, paras 21-23.

²⁴ Impugned Decision, paras 24-26.

²⁵ Impugned Decision, para. 18.

Decision;²⁶ and that the Appellant has not demonstrated that the Trial Chamber erred in attaching little weight to the personal statement and the guarantee provided by the Appellant;

CONSIDERING that it was within the Trial Chamber's discretion to conclude that governmental guarantees could not secure the Appellant's presence at trial; and that the Defence Interlocutory Appeal does not point to any significant information or argument, which was not provided to the Trial Chamber and considered by it before rendering the Impugned Decision²⁷ – this applying, in particular, to the Appellant's relatively low military rank as 2nd Lieutenant and Chief of Security of the 1st Light Infantry Zvornik Brigade during the time relevant to the Indictment;²⁸

CONSIDERING that the Trial Chamber, based on the entirety of the material before it, found that it was not satisfied that the Appellant would appear for trial and was therefore not required to discuss any other requirement under Rule 65(B) of the Rules;²⁹

CONSIDERING that the Trial Chamber in the Impugned Decision also addressed the proportionality³⁰ of the Appellant's pre-trial detention and correctly found it to be proportional to the circumstances of the case;³¹

FINDING that the Trial Chamber in the Impugned Decision indicated and weighed all relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to its decision;

FINDING that, in the context of the specific circumstances of the case – in particular the gravity of the crimes the Appellant is charged with and the likelihood of a significant prison sentence upon conviction – it was reasonable for the Trial Chamber to find that notwithstanding the Governmental Guarantees and the guarantee provided by the Appellant himself it was not satisfied that the Appellant, if released, would appear for trial;

CONCLUDING that the Trial Chamber therefore did not err when denying the Appellant's request for provisional release;

²⁶ See, in particular, Motion for Provisional Release, Confidential Annex A (personal statement provided by the Appellant); Motion Seeking Leave to Reply, paras 16, 19-23, 34-36; Impugned Decision, paras 6, 8, 13, 15, 16, 19, 20, 24, 25; Defence Interlocutory Appeal, paras 31-37; Defence Reply, paras 17-21.

²⁷ See, in particular, Motion for Provisional Release, Confidential Annex B (Governmental Guarantees); Motion Seeking Leave to Reply, paras 24-33; Impugned Decision, paras 21-23; Defence Interlocutory Appeal, paras 23-30, 39-45; Defence Reply, paras 10-15.

²⁸ Impugned Decision, para. 22.

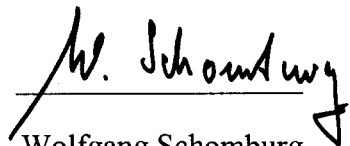
²⁹ Impugned Decision, para. 27.

FOR THE FOREGOING REASONS**REJECTS** all grounds of appeal in their entirety and**DISMISSES** the Defence Interlocutory Appeal.

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

Dated this twenty-fourth day of January 2006,

At The Hague, The Netherlands.


Wolfgang Schomburg

Presiding Judge

[Seal of the Tribunal]

³⁰ As to this requirement under Rule 65 of the Rules, see *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović, 19 December 2001, para. 8.

³¹ Impugned Decision, paras 28, 29.