



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-05-87-PT
Date: 28 June 2006
Original: English

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova

Registrar: Mr. Hans Holthuis

Decision of: 28 June 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**DECISION ON ŠAINOVIĆ REQUEST FOR
VARIATION OF CONDITIONS OF PROVISIONAL RELEASE**

Office of the Prosecutor

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Mr. Chester Stamp
Ms. Christina Moeller
Ms. Patricia Fikirini
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Counsel for the Accused

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Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksander Alekšić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 seised of a “Defence Motion: Requesting Variation of Conditions of Temporary Provisional Release”, filed by Nikola Šainović (“Accused”) on 26 June 2006 (“Motion”), and hereby renders its decision thereon.

1. The six accused in the above-captioned matter have been granted temporary provisional release over the summer recess, from 15 July 2006 to 31 July 2006, at 14.00 hours.¹ The Accused therefore will be residing in Belgrade, Republic of Serbia during this period. In the Motion, the Accused requests that the Chamber vary the conditions of his provisional release during the summer recess so that he may visit his mother in Bor on 22 July 2006. The Accused also requests that he be allowed to visit the grave of his father and accompany his mother during the requiem on the same day. The Trial Chamber notes that these requests are similar to others that the Chamber has granted in the past² and considers that it is in the interests of justice to grant the Motion.

2. The Prosecution has indicated that it does not intend to oppose the Motion.

3. Pursuant to Rules 54 and 65(C) of the Rules of Procedure and Evidence, the Trial Chamber hereby GRANTS the Motion and ORDERS as follows:

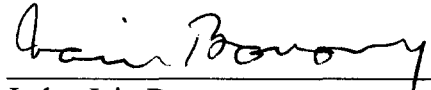
- a. The Accused may travel from Belgrade to Bor for the purposes outlined in the Motion during 22 July 2006 and shall return from Bor to Belgrade by 24.00 hours on the same day.
- b. The Republic of Serbia shall arrange for law-enforcement officials to escort the Accused from Belgrade to Bor and back and shall escort him during the entire day.
- c. The Republic of Serbia shall immediately inform the Trial Chamber of any failure of the Accused to abide by the terms of his temporary provisional release.
- d. Both the Accused and the Republic of Serbia shall continue to adhere to the applicable restrictions and obligations set out in the “Order for Provisional Release of Nikola Šainović”, contained in the Trial Chamber’s “Decision on Third Defence

¹ Decision on Joint Motion for Temporary Provisional Release During Summer Recess, 1 June 2006.

² E.g., confidential Decision on Request by Nikola Šainović for Variation of Conditions of Provisional Release, 12 May 2006; confidential Decision on General Ojdanić’s Urgent Motion for Modification of Conditions of Provisional Release, 19 July 2005; confidential Order Temporarily Modifying the Conditions of Dragoljub Ojdanić’s Provisional Release, 20 April 2006.

Request for Provisional Release”, issued on 14 April 2005, a copy of which is annexed hereto.

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



Judge Iain Bony
Presiding

Dated this twenty-eighth day of June 2006
At The Hague
The Netherlands

[Seal of the Tribunal]

ANNEX

**“Order for Provisional Release of Nikola Šainović”,
contained in the Trial Chamber’s “Decision on Third Defence Request for Provisional
Release”, issued on 14 April 2005**



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-99-37-PT
Date: 14 April 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: 14 April 2005

PROSECUTOR

v.

NIKOLA ŠAINOVIĆ

DECISION ON THIRD DEFENCE REQUEST FOR PROVISIONAL RELEASE

The Office of the Prosecutor

**Mr. Thomas Hannis
Ms. Christina Moeller**

Counsel for Nikola Šainović

**Mr. Toma Fila
Mr. Vladimir Petrović**

Procedural background

1. On 26 June 2002, this Trial Chamber granted provisional release to Nikola Šainović (“Šainović” or “the Accused”) and Dragoljub Ojdanić (“Ojdanić”) finding that both co-accused had satisfied the requirements of Rule 65(B) of the Rules (“First Decision”).¹ Pursuant to leave granted by a Bench of the Appeals Chamber, the Prosecution appealed against the First Decision. On 30 October 2002, by majority, the Appeals Chamber allowed the appeal, quashed and revised the First Decision, and denied provisional release to Ojdanić and Šainović.² The Appeals Chamber held that, in deciding that it was satisfied that, if released, Ojdanić will appear for trial, the Trial Chamber had committed two errors of law, (i) by failing to consider the effect of the senior position of the accused and the consequence thereof upon the weight of governmental guarantees,³ and (ii) by failing to consider the public statements made to the media to the effect that the Accused would not surrender.⁴ Ojdanić further applied for a modification of the Appeals Chamber decisions, also seeking to introduce additional evidence; both applications were denied by the Appeals Chamber which noted, however, that it was always open to the applicant to submit a fresh application to the Trial Chamber.⁵
2. On 10 February 2003, Šainović filed a second application for provisional release which was denied by the Trial Chamber on the basis that it was not satisfied that the requirements of Rule 65(B) had been met (“Second Decision”).⁶
3. In December 2004, Šainović, together with his co-accused Milan Milutinović (“Milutinović”) and Ojdanić, again applied for provisional release.⁷ The Prosecution

¹ *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-PT, “Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release”, 26 June 2002.

² *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, “Decision on Provisional Release”, IT-99-37-AR65, 30 October 2002 (“Appeals Chamber Decision”).

³ *Ibid*, para. 9.

⁴ *Ibid*, para. 10.

⁵ *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-AR65, “Decision on Motion for Modification of Decision on Provisional Release and Motion to Admit Additional Evidence”, 12 December 2002, p. 4.

⁶ *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-PT, “Decision on Second Applications for Provisional Release”, 29 May 2003 (“Second Decision”).

⁷ (Šainović) Third Request for Provisional Release, 23 December 2004 (“Motion”); General Ojdanić’s Fourth Application for Provisional Release, 14 December 2004; Mr. Milan Milutinović’s Second Motion for Provisional Release, 17 December 2004;

responded,⁸ and the Accused and each of his co-accused replied.⁹ The Trial Chamber convened a hearing in this matter on 10 March 2005 at which Mr. Zoran Stojković, Minister of Justice in the Government of the Republic of Serbia, was examined and cross-examined, and Mr. Slavojub Carić, Consul of the Embassy of the State Union of Serbia and Montenegro in The Hague, made a statement, with regard to the guarantees.¹⁰

4. The Trial Chamber has considered these applications for provisional release individually, making a separate determination in relation to each accused. The present Decision has been made in light of the particular submissions, written and oral, received relating to Šainović's third application for provisional release ("Motion").¹¹

⁸ Prosecution's Response to Nikola Šainović's Third Defence Request for Provisional Release with Annexes A and B, 6 January 2005 ("Prosecution Response"); Prosecution's Response to General Ojdanić's Fourth Application for Provisional Release with Annexes A, B, C and Confidential Annex D, 22 December 2004 ("Prosecution Response"); and Prosecution's Response to Milan Milutinović's Second Motion for Provisional Release with Annexes A, B, and Confidential Annex C, 22 December 2004.

⁹ Defence Reply to Prosecution's Response to Nikola Šainović's Third Defence Request for Provisional Release, 13 January 2005 ("Reply"); Application to File a Reply and Reply to Prosecution's Response to Mr. Milan Milutinović's Second Motion for Provisional Release, 29 December 2004; General Ojdanić's Reply to Prosecutor's Response to Fourth Application for Provisional Release", 28 December 2004.

¹⁰ See, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, "Order to Defence to Make Arrangements for an Oral Hearing on Provisional Release", Case No. IT-99-37-PT, 10 February 2005; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, "Scheduling for Hearing on Defence Requests for Provisional Release", 2 March 2005; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, "Order Rescheduling Hearing on Defence Requests for Provisional Release", 7 March 2005; see also, Joint Defence Request to Re-schedule a Hearing on Defence Requests for Provisional Release", 4 March 2005.

¹¹ Motion, *supra* note 7.

Discussion

5. Rule 65(B) (“Provisional Release”) of the Rules requires an applicant for provisional release to satisfy the Trial Chamber of two matters:

- (i) that he will appear for trial, and
- (ii) that, if released, he will not pose a danger to any victim, witness or other person.¹²

If an accused satisfies the Trial Chamber on both points, the Trial Chamber may then proceed to consider whether, in the exercise of its discretion, it should release the accused. However, in this case, it is difficult to see that there could be any basis for refusing the Motion if the accused were to satisfy the Trial Chamber on both points. Since this is not the Accused’s first application, he must also satisfy the Trial Chamber that there has been a material change in circumstances since the last application such as to justify reconsideration of its previous decision. Again, if the Trial Chamber decides on the basis of the material presented to them, including any new circumstances, that the test in Rule 65(B) has been met, it is difficult to see that that could be viewed as other than a material change in circumstances, in light of the grounds on which the Accused’s first application was refused. The first and crucial question, therefore, is whether circumstances have now changed so that it is established that, if released, the Accused will appear for trial. That is the question to which the Trial Chamber now turns.

(a) Is it now established that, if released, Šainović will appear for trial?

6. Šainović argues that, since his second application for provisional release, he has cooperated with the Tribunal and the Prosecution, (a) by agreeing to be interviewed by the Prosecution in late December 2002 and early January 2003, (b) by holding interviews with an Italian Prosecutor and a Commission of the Italian Parliament which demonstrates his attitude vis-à-vis the administration of justice within different national and international jurisdictions, (c) by holding discussions with the Prosecution on “agreed facts”, and (d) by opposing the Prosecution’s request that his trial be joined with that of four other Generals in *Prosecutor v*

¹² *Prosecutor v. Šainović & Ojdanić*, Case No. IT-99-37-PT, “Decision on Application of Nikola Šainović and Dragoljub Ojdanić for Provisional Release,” 26 June 2002 (“Šainović Trial Chamber Decision”), para. 11,

Pavković et al. (Case No. IT-03-70-PT) indicted for the same crimes, in the interests of a fast and efficient trial, since joinder would postpone the commencement of the trial in this case.¹³ Šainović argues that these recent acts of cooperation constitute new circumstances which the Trial Chamber should consider in determining that he is likely to comply with any conditions of his release.¹⁴

7. The Prosecution argues that the fact that the Accused had agreed to be interviewed by the Prosecution in late December 2002 and early January 2003 is a circumstance which existed and was known to the Trial Chamber at the time of the second application for provisional release. The Prosecution submits that this factor of cooperation of the Accused has already been considered, and need not be revisited in the absence of new material.¹⁵
8. The Prosecution further submits that it fails to see the relevance of the Accused cooperation with a Commission of the Italian parliament in relation to the Telekom Srbija affair for the instant application.¹⁶ Similarly, the Prosecution fails to see how Šainović's opposition to the motion for joinder of this case with Case No. IT-03-70-I should be accepted as "cooperation" of the Accused that demonstrates that, if released, he will appear for trial.¹⁷ Concerning "agreed facts", the Prosecution submits that, pursuant to Rule 65ter, parties are obliged to conduct such negotiations under the supervision of the Senior Legal Officer. The Prosecution disputes that this fact alone constitutes a type of cooperation which would have relevance for a Trial Chamber when deciding whether an accused will appear for trial.¹⁸
9. The Trial Chamber considers that, although the participation of the Accused in an interview with the Prosecution was taken into account at the time of the Second Decision, this indication of his cooperation remains a positive factor which goes to show a generally cooperative disposition towards the Tribunal. While there can be no suggestion that this factor was "not adequately assessed", the Trial Chamber considers that the Accused does not lose the benefit of his cooperation simply because an earlier application for provisional release was denied on the basis of the circumstances of the case at that time.

citing *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-AR65, "Decision on Application by Dragan Jokić for Leave to Appeal," 18 April 2002, para. 7.

¹³ Motion, *supra* note 7, paras. 10-16.

¹⁴ *Ibid.*

¹⁵ Prosecution Response, *supra* note 8, paras. 10-13.

¹⁶ *Ibid.*, para. 14.

¹⁷ *Ibid.*, para. 15.

¹⁸ *Ibid.*, para. 16.

10. The Trial Chamber attaches no weight to the fact that the Accused's cooperation with an inquiry of the Italian parliament on matters unrelated to the case at hand. Furthermore, the Trial Chamber considers that the Accused's position as regards the Prosecution motion for joinder has no relevance to the present inquiry.
11. While the other factor mentioned at (c) in paragraph 6 above shows a generally cooperative disposition towards the Tribunal, the degree of cooperation with the Tribunal and the Prosecution involved is not such as to merit the Trial Chamber attaching more than modest weight to it in its determination.
12. Of far greater significance is the situation in relation to the guarantees presented in support of the application. Šainović submits guarantees from both the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Serbia dated 12 June 2002.¹⁹ The Trial Chamber received confirmation of the same guarantees from the Government of Serbia and the Council of Ministers of Serbia and Montenegro, on 25 February 2005.²⁰ In the guarantees, Serbia and Montenegro undertake various obligations. These include the obligation of the Federal Ministry of the Interior to ensure through the competent secretariat of the Ministry of the Interior of the Republic of Serbia that the accused reports daily to a police station and to inform the Tribunal immediately should the accused fail to present himself, and the obligation of "Yugoslav organs" to arrest the accused immediately if he tries to escape or violates any other condition of his provisional release and to inform the Tribunal of such fact, as well as the undertaking of the Government of the Republic of Serbia to honour all orders of the Trial Chamber so that the he can appear for trial before the Tribunal at any time.
13. While these guarantees are identical to those that were before the Trial Chamber at the time of the earlier applications, Šainović submits that there are new circumstances which should reassure the Trial Chamber that they will be complied with, if required, to ensure the Accused's appearance for trial.

¹⁹ Guarantee of the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Serbia no.: 762-1/2002 of 12 June 2002, 21 June 2003.

²⁰ Guarantees from Government of Republic of Serbia and Council of Ministers of Serbia and Montenegro in Support of Mr. Milutinović Second Motion for Provisional Release filed on 17 December 2004, 25 February 2005, Annexes 1 & 2.

14. Šainović argues that the decisions of the Trial Chamber and the Appeals Chamber in the *Stanisić & Simatović* case demonstrate that added weight should be attached to the present guarantees of the Government of Serbia and Montenegro.²¹ Šainović argues that the guarantee of the Government of Serbia and Montenegro submitted on behalf of the accused Stanisić and Simatović is identical to that submitted by Šainović; as such, Šainović submits, “Trial Chambers of the International Tribunal would have to standardize their jurisprudence where the similarities between the facts in the Stanisić, Simatović and Sainović cases is extraordinary [sic] high”.²² Šainović argues that this factor, coupled with the personal guarantees of the Accused as submitted with the first application, demonstrates that the guarantees are sufficient to assure the Trial Chamber that the guarantees of Serbia and Montenegro are reliable.²³
15. The Prosecution submits that the Defence submissions with regard to government guarantees demonstrate a lack of understanding of the law on guarantees.²⁴ The Prosecution argues that, contrary to the Defence submission, the jurisprudence of the Appeals Chamber excludes any form of “standardization” of decisions on provisional release.²⁵
16. This submission has support in the case-law of the Tribunal.²⁶ The Trial Chamber is bound to evaluate the guarantees offered in light of the circumstances of this particular case as a whole and the personal circumstances of the Accused.
17. At the oral hearing of 10 March 2005, the evidence led on behalf of the Accused from Mr. Zoran Stojković confirmed the commitment of the Government of the Republic of Serbia to respect the conditions for the release of each accused as determined by the Trial Chamber and the Tribunal, and to arrest any accused granted provisional release who breaches any condition of his release.²⁷ He mentioned a number of factors which, the defence submitted, indicated the reliability of that commitment.

²¹ Motion, *supra* note 7, para. 28.

²² *Ibid*, para. 29.

²³ *Ibid*, paras. 30-31.

²⁴ Prosecution Response, *supra* note 8, para. 19.

²⁵ *Ibid*.

²⁶ The weight to be attributed to guarantees given by a government may depend a great deal upon the personal circumstances of the applicant and must be determined in relation to whole circumstances of the particular case. See, *Prosecutor v. Šainović & Ojdanić*, Case No. IT-99-37-AR65, “Decision on Provisional Release”, 30 October 2002 (“Appeals Chamber’s Decision on Provisional Release”), para. 7; *Mrksić* Decision, *supra* note 13, para. 9.

18. Minister Stojković testified that, since the establishment of the Council for Cooperation with the Tribunal in 2004, six or seven indictees had voluntarily surrendered to the Tribunal and that he expected more individuals to arrive in the near future.²⁸ Minister Stojković explained that, although he was aware of statements made to the press by General Pavković to the effect that he will not surrender voluntarily, such statements were merely his personal views; the Government, he said, was committed to enforce the law in order to ensure his presence at the Tribunal.²⁹ Minister Stojković acknowledged that government officials in Serbia have publicly stated that all indictees were encouraged to surrender voluntarily; however, he said, if they fail to do so, they will be arrested.³⁰ He drew a distinction between accused persons still at large, on the one hand, and those brought before the International Tribunal and provisionally released under the conditions set by the Trial Chamber, on the other. While, in the former case, an intervention of the domestic courts in Serbia is required for an accused to be arrested, in the latter case, he explained, the government has direct authority and obligation to bring the accused to the Tribunal in accordance with the conditions set by the Trial Chamber.³¹ The Minister said, "...there is no possibility for us not to comply with the conditions we agreed to once you have made your decision for provisional release".³²

19. Mr. Slavojub Carić made a statement attesting to the fact that the Council of Ministers of Serbia and Montenegro issued a Decision on 16 February 2005 confirming the Guarantees issued by the Federal Government of the Federal Republic of Yugoslavia of 12 June 2002.

20. The Prosecution argues that new material available undermines the reliability and credibility of the guarantees of Serbia and Montenegro with regard to this Accused and in the context of this specific case. The Prosecution submits that authorities in Serbia and Montenegro have publicly stated that they will not arrest the remaining fugitives of the so-called "Kosovo case".³³ For this reason, any government guarantees of Serbia and Montenegro with regard to the Accused and his co-accused in this case must be attributed less reliability and credibility.³⁴

²⁷ Transcript, 10 March 2005, pp. 884-888.

²⁸ *Ibid*, p. 895.

²⁹ *Ibid*, p. 898.

³⁰ *Ibid*, pp. 901, 904, 912-913.

³¹ *Ibid*, pp. 903, 907-908.

³² *Ibid*, p. 904.

³³ Prosecution Response, *supra* note 8, para. 20.

³⁴ *Ibid*.

21. The Prosecution acknowledged that, in recent months, the number of voluntary surrender of indictees “appears to have been increasing on a weekly basis almost”.³⁵ However, the Prosecution submits that the reliability and credibility of the guarantees are undermined by the failure by authorities in Serbia and Montenegro to arrest other high profile fugitives, including General Pavković, and General Lukić.³⁶ The Prosecution argues that this general level of cooperation, in addition to the concrete level of cooperation with regard to specific Accused constitutes new circumstances that strongly militate against the reliability and credibility of the government guarantees in this case.³⁷
22. The Trial Chamber recalls that the weight to be attributed to government guarantees depends on the personal circumstances of the accused.³⁸ Circumstances arising in a particular case and concerning an individual accused must be assessed at the time when the decision on provisional release is being taken, and also, as far as foreseeable, the time when he will be expected to return for trial.³⁹
23. The Accused is the former Deputy Prime Minister of the Federal Republic of Yugoslavia. Initially indicted on 24 May 1999, he was transferred into the custody of the Tribunal on 2 May 2002. The Trial Chamber considers that the senior position held by Šainović and the consequence thereof upon the weight of governmental guarantees to be significant factors that inform its assessment in relation to the willingness of the Republic of Serbia and the State Union of Serbia and Montenegro to arrest him should he refuse to appear for trial.
24. The Prosecution filed a Letter from Judge Snežana Vujisić, of the District Court of Belgrade, inquiring about the possibility of this Accused being brought to Belgrade to appear in ongoing criminal proceedings against him before the District Court of Belgrade.⁴⁰ The Prosecution submitted that it felt that this was information that ought to be considered in connection with the pending request for provisional release.⁴¹ Šainović argues that this Letter from the District Court of Belgrade demonstrates the willingness of the Serbian

³⁵ Transcript, 10 March 2005, p. 895.

³⁶ *Ibid*, pp. 895-896.

³⁷ *Ibid*, paras. 32.

³⁸ Appeals Chamber’s Decision on Provisional Release, *supra* note 23, para. 7.

³⁹ *Ibid*.

⁴⁰ Prosecution’s Supplemental Response to Nikola Šainović’s Third Defence Request for Provisional Release with confidential Annex A.

⁴¹ *Ibid*, para. 2.

authorities to enforce criminal procedures against Šainović, including a willingness to act in case of a breach of any of the conditions of his provisional release.⁴²

25. The Trial Chamber considers that the Letter from the District Court in Belgrade addressed to the Registrar of the Tribunal does not have any bearing on the question whether Šainović will appear for trial, if released.
26. The Trial Chamber observes that, even though the reliability of a guarantee must not be exclusively determined by reference to an assessment of the level of cooperation by the authority providing it, the general level of cooperation by that authority with the International Tribunal is relevant in determining whether it would arrest the accused in question.⁴³ What would happen if that authority were obliged under its guarantee to arrest the particular accused is one question that must be answered on the balance of probabilities on the basis of information currently available.
27. The Trial Chamber notes that the level of cooperation of the Serbian authorities with the Tribunal has increased in recent months. Indeed, as acknowledged by the Prosecution,⁴⁴ an example of this cooperation is seen in the assistance of the authorities in the transfer of some of the indictees to the Tribunal, as illustrated by the recent transfer of General Lazarević, and the cooperation of the Serbian authorities with regard to waivers authorising officials or former officials to be interviewed.⁴⁵ In fact, the Trial Chamber observes that, since October 2004, Serbian authorities have assisted in the transfer of at least 10 indictees, including General Lazarević, Momčilo Perišić, Drago Nikolić, Vinko Pandurević, Ljubomir Borovčanin and, most recently, General Lukić. It appears that the policy of the Government of Serbia to encourage all indictees to surrender voluntarily, failing which they will be arrested and transferred, is working in practice. Furthermore, the evidence, which was not contradicted, and which the Trial Chamber accepts, is that, to date, the guarantees of the Government of the Republic of Serbia and the Federal Government have been respected and upheld in relation to accused who have been provisionally released pending trials.⁴⁶

⁴² Defence Second Reply to Prosecution's Supplemental Response to Šainović's Third Request for Provisional Release, 27 January 2005, para. 6.

⁴³ *Prosecutor v. Čermak & Markač*, Case No. IT-03-73-AR65.1, "Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release", 2 December 2004, para. 32.

⁴⁴ Transcript, 10 March 2005, p. 895.

⁴⁵ Prosecution Response, *supra* note 8, Annex B ("Address by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the former Yugoslavia to the Security Council, 23 November 2004").

⁴⁶ Transcript, 10 March 2005, p. 886.

28. While the failure to arrest the other fugitives is still a matter of concern, the Trial Chamber is persuaded by the steady influx of indictees from the Republic of Serbia, encouraged by the Government to surrender to the Tribunal voluntarily, coupled with the strong assurances given by Minister Stojković to ensure the fulfilment of the guarantees, and the statement made by Mr. Carić, that the Government of the Republic of Serbia and the Federal Government of Serbia and Montenegro would implement the guarantees provided in support of the application. In arriving at that decision, the Trial Chamber has taken into account the personal circumstances of the Accused, including the senior position previously held by him.

29. The Trial Chamber has considered the findings made in the foregoing paragraphs, particularly paragraphs 9 and 28, against the background of the circumstances of the case as a whole, including the gravity of the charges which will be likely to result in a lengthy term of imprisonment in the event of conviction, and the circumstances surrounding the surrender of the Accused, and is satisfied that the Accused will appear for trial, if released.

(b) Whether, if released, the Accused will not pose a danger to any victim, witness or other person

30. The Trial Chamber observes that, in opposing the Motion, the Prosecution has not argued that, if released, Sainović would pose a danger to victims, witnesses or other persons. In the absence of any suggestion that the Accused has interfered with the administration of justice in any way since the date when the indictment was confirmed against him,⁴⁷ the Trial Chamber is satisfied, on the basis of the guarantees of the Federal Government of Serbia and Montenegro and the Government of the Republic Serbia to ensure full compliance with such conditions as the Trial Chamber may impose, that this condition is met.

⁴⁷ Šainović Trial Chamber Decision, *supra* note 13, para. 16.

(c) Determination

31. As mentioned in paragraph 5, it is difficult to see that, where two requirements in Rule 65(B) are met, provisional release should not be granted.
32. However, if further justification for that conclusion were required, it can be found in the period of time that the Accused would otherwise be likely to spend in custody pending trial. The Defence submits that Sainović has already spent over 31 months in pre-trial detention, and there is no indication when the instant case will go to trial.⁴⁸ The Prosecution also filed a motion for joinder which is likely to delay the readiness of the case for trial by several months.⁴⁹
33. At the hearing, the Prosecution confirmed its intention to file a motion to join General Lazarević and his co-accused with the defendants in this case.⁵⁰ The Prosecution acknowledged that this development might considerably impact on the prospect for commencement of trial in this case, and that, in the event of a joinder, “the Court may decide that [it] has to release these defendants if their trial is not going to start until 2006”.⁵¹
34. The Trial Chamber notes that Sainović was transferred to the Tribunal on 2 May 2002 and, as of 10 March 2005, he had been in detention for 2 years, 10 months, and 10 days. In this context, the Trial Chamber must consider the submission that it should take into account the likelihood that Sainović might face a longer pre-trial procedure in light of the Prosecution application for joinder (“the Joinder Motion”).⁵² In the Joinder Motion, the Prosecution requests that the accused in the present Case No. IT-99-37-PT, Milutinović, Šainović, and Ojdanić, and the accused in Case No. IT-03-70-PT, Nebojša Pavković, Vladimir Lazarević, Vlastimir Đorđević and Streten Lukić be jointly charged and tried.⁵³ The Prosecution has argued in support of that application that the crime-base allegations and the modes of liability for the crimes are the same for all accused.⁵⁴ Furthermore, all accused are charged

⁴⁸ Motion, *supra* note 7, paras. 25-27.

⁴⁹ *Ibid.*

⁵⁰ Transcript, 10 March 2005, p. 915.

⁵¹ *Ibid.*

⁵² *Prosecutor v. Milutinović et al.*, Case Nos. IT-99-37-PT, IT-03-70-PT, “Prosecution Motion for Joinder”, 1 April 2005.

⁵³ *Ibid.*, para. 3.

⁵⁴ *Ibid.*, para. 24.

pursuant to Articles 3 and 5 of the Statute of the Tribunal for the same crimes.⁵⁵ A joint trial, it is submitted, will not interfere with the rights of the Accused to an expeditious trial as “a date for trial has not been scheduled [in Case No. IT-99-37-PT] and it appears that a Trial Chamber will not become available to try this case before autumn or winter 2005 or early 2006”. Should the Joinder Motion be granted, the Prosecution estimates that a period of six to eight months would be adequate for the accused in Case No. IT-03-70-PT to prepare their defence.

35. Article 21(3) of the Statute of the Tribunal mandates that “the accused shall be presumed innocent until proved guilty”. The presumption of innocence is enshrined in Article 14(2) of the International Covenant on Civil and Political Rights (“the ICCPR”), the Statute of the International Criminal Court (“ICC”),⁵⁶ and in a number of international human rights treaties.⁵⁷ It follows from this fundamental principle of criminal justice that “it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...”.⁵⁸
36. While these provisions must be interpreted in light of the specific context in which the Tribunal operates, these norms simply strengthen the Accused’s application in circumstances where, as in this case, he has satisfied the Trial Chamber that he will appear for trial and that he will not pose any danger to victims, witnesses or other persons.
37. Even though there is no suggestion that the length of the pre-trial detention is excessive in this case, the Trial Chamber considers that a period of three years in pre-trial detention, coupled with the real possibility that an application for joinder might further delay the start of the trial for several months, is a factor to be weighed in favour of the Accused in the exercise of the Trial Chamber’s discretion.
38. The Trial Chamber is satisfied that the Accused should be provisionally released pending trial.

⁵⁵

Ibid.

⁵⁶

ICC Statute, Article 66.

⁵⁷

See, European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), Article 6(2); the American Convention on Human Rights (“the American Convention”), Article 8; the African Charter on Human and Peoples’ Rights (“the African Charter”), Article 7.

⁵⁸

Article 9(3) of the ICCPR; *see also*, Article 5(3) of the ECHR.

Stay

39. The Prosecution has applied for a stay of the Decision of the Trial Chamber to release the Accused pending appeal pursuant to Rule 65(E). The Trial Chamber will grant the request.

DISPOSITION

40. For these reasons, the Trial Chamber **GRANTS** the Motion and **GRANTS** the Prosecution's application for a stay and **ORDERS**:

- (1) the provisional release of Nikola Šainović subject to the terms and conditions set out in the Order for Provisional Release appended to this Decision; and
- (2) the provisional release of Nikola Šainović is stayed pending an appeal by the Prosecution pursuant to Rule 65(D), (E), (F) and (G) of the Rules.

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



Judge Patrick Robinson
Presiding

Dated this fourteenth day of April 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

ORDER FOR PROVISIONAL RELEASE OF NIKOLA ŠAINOVIĆ

1. Nikola Šainović (“the Accused”) shall be transported to Schiphol airport in the Netherlands by the Dutch authorities;
2. At Schiphol airport, the Accused shall be provisionally released into the custody of an official of the government of Serbia and Montenegro to be designated prior to release in accordance with operative paragraph (2)(a) hereof, who shall accompany the Accused for the remainder of his travel to Serbia and Montenegro and to his place of residence;
3. On his return, the Accused shall be accompanied by the same designated official of the government of Serbia and Montenegro, who shall deliver the Accused to the custody of the Dutch authorities at Schiphol airport at a date and time to be determined by Order of the Trial Chamber, and the Dutch authorities shall then transport the Accused back to the United Nations Detention Unit in The Hague;
4. During the period of his provisional release, the Accused shall abide by the following conditions, and the authorities of the governments of Serbia and Montenegro and the Republic of Serbia, including the local police, shall ensure compliance with such conditions:
 - (i) to remain within the confines of the municipality of Belgrade;
 - (ii) to surrender his passport to the Ministry of Justice;
 - (iii) to report each day to the police in Belgrade at a local police station to be designated by the Ministry of Justice;
 - (iv) to provide the address at which he will be staying to the Ministry of Justice and the Registrar of the International Tribunal before leaving the United Nations Detention Unit in The Hague;
 - (v) to consent to having the Ministry of Justice check with the local police about his presence and to the making of occasional, unannounced visits upon the Accused by the Ministry of Justice or by a person designated by the Registrar of the International Tribunal;
 - (vi) not to have any contact with the co-accused in the case;

- (vii) not to have any contact whatsoever or in any way interfere with any victim or potential witness or otherwise interfere in any way with the proceedings or the administration of justice;
- (viii) not to discuss his case with anyone, including the media, other than with his counsel;
- (ix) to continue to cooperate with the International Tribunal;
- (x) to comply strictly with any requirements of the authorities of Serbia and Montenegro and the Republic of Serbia necessary to enable them to comply with their obligations under this Order and their guarantees;
- (xi) to return to the International Tribunal at such time and on such date as the Trial Chamber may order; and
- (xii) to comply strictly with any further Order of the Trial Chamber varying the terms of or terminating his provisional release; and

REQUIRES The Governments of the State Union of Serbia and Montenegro and the Republic of Serbia to assume responsibility as follows:

- a) by designating an official of the government of Serbia and Montenegro into whose custody the Accused shall be provisionally released and who shall accompany the Accused from Schiphol airport to Serbia and Montenegro and to his place of residence, and notifying, as soon as practicable, the Trial Chamber and the Registrar of the International Tribunal of the name of the designated official;
- b) for the personal security and safety of the Accused while on provisional release;
- c) for all expenses concerning transport of the Accused from Schiphol airport to Belgrade and back;
- d) for all expenses concerning accommodation and security of the Accused while on provisional release;
- e) at the request of the Trial Chamber or the parties to facilitate all means of cooperation and communication between the parties and to ensure the confidentiality of any such communication;

- f) to submit a written report to the Trial Chamber every month as to the compliance of the Accused with the terms of this Order;
- g) to arrest and detain the Accused immediately if he should breach any of the conditions of this Order; and
- h) to report immediately to the Trial Chamber any breach of the conditions set out above; and

INSTRUCTS the Registrar of the International Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for his release and to continue to detain the Accused at the United Nations Detention Unit in The Hague until such time as the Trial Chamber and the Registrar have been notified of the name of the designated official of the government of Serbia and Montenegro into whose custody the Accused is to be provisionally released; and

REQUESTS the authorities of all States through which the Accused will travel:

- a) to hold the Accused in custody for any time that he will spend in transit at the airport;
- b) to arrest and detain the Accused pending his return to the United Nations Detention Unit in The Hague, should he attempt to escape.

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



Judge Patrick Robinson
Presiding

Dated this fourteenth day of April 2005
At The Hague
The Netherlands

[Seal of the Tribunal]