

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-05-88-AR65.2

Date: 30 June 2006

Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Theodor Meron

**Registrar:** Mr. Hans Holthuis

**Decision of:** 30 June 2006

**PROSECUTOR**

v.

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

**DECISION ON DEFENCE'S INTERLOCUTORY APPEAL OF  
TRIAL CHAMBER'S DECISION DENYING LJUBOMIR  
BOROVIČANIN PROVISIONAL RELEASE**

**Office of the Prosecutor:**

Mr. Peter McCloskey

**Counsel for the Accused:**

Mr. Zoran Živanović for Vujadin Popović  
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara  
Ms. Jelena Nikolić and Mr. Stephane Bourgon for Drago Nikolić  
Mr. Aleksandar Lazarević and Mr. Miodrag Stojanović for Ljubomir Borovčanin  
Ms. Natacha Fauveau Ivanović for Radivoje Miletić  
Mr. Dragan Krgović for Milan Gvero  
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević  
Mr. Stéphane Piletta-Zanin for Milorad Trbić

1. 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 “International Tribunal”, respectively) is seized of the “Defence Interlocutory Appeal Against the Trial Chamber’s Decision on Defence Application for Provisional Release of the Accused Ljubomir Borovčanin”, filed on 17 May 2006 (“Defence Appeal”).

## I. PROCEDURAL BACKGROUND

2. On 10 May 2006, Trial Chamber II (“Trial Chamber”) denied the motion of Ljubomir Borovčanin (“Appellant”) pursuant to Rule 65 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) for provisional release to the municipality of Bijeljina, Republika Srpska, pending the commencement of his trial (“Impugned Decision”).

3. On 17 May 2006, Counsel for the Appellant (“Defence”) filed the Defence Appeal under Rule 65(D) of the Rules. On 29 May 2006, the Prosecution filed its “Prosecution Response to Motion Seeking Provisional Release of Accused Ljubomir Borovčanin” (“Response”). The Defence replied on 2 June 2006.<sup>1</sup>

4. On 12 June 2006, the Defence filed the “Defence Request for Leave to File a Supplement to the Interlocutory Appeal and Supplement to the Interlocutory Appeal [*sic*] with an Alternative Relief Sought” (“Request for Leave”), seeking alternative and/or additional relief in the Defence Appeal, namely that he be granted provisional release from 15 July 2006 until the commencement of further procedural hearings after the Tribunal’s summer recess, yet to be scheduled by the Trial Chamber.<sup>2</sup> The Prosecution responded on 16 June 2006, opposing the Request for Leave.<sup>3</sup> The Appeals Chamber finds that good cause exists to consider the Defence’s supplemental submissions in the Request for Leave with regard to its request for alternative/additional relief. The Defence was unable to timely make such a request in its Defence Appeal filed on 17 May 2006 due to the fact that the Trial Chamber did not set the date of commencement of trial of 14 July 2006 until 6 June 2006.<sup>4</sup>

<sup>1</sup> Defence Reply to “Prosecution Response to Motion Seeking Provisional Release of Accused Ljubomir Borovčanin”, Dated 29 May 2006, 2 June 2006 (“Reply”).

<sup>2</sup> Request for Leave, paras. 10, 15.

<sup>3</sup> Prosecution Response to Defence Request for Leave to File a Supplement to the Interlocutory Appeal with an Alternative Relief Sought, 16 June 2006 (“Response to Request for Leave”), para. 2.

<sup>4</sup> *Prosecutor v. Popvić et al.*, Case No. IT-05-88-PT, Scheduling Order for a Status Conference and for Start of Trial, 6 June 2006.

## II. STANDARD OF REVIEW

5. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.<sup>5</sup> The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.<sup>6</sup> Accordingly, the Appeals Chamber is not concerned with whether or not it agrees with that discretionary decision. Rather, the relevant inquiry is "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."<sup>7</sup>

6. In order to successfully challenge a discretionary decision on provisional release, a party must show that the Trial Chamber has made a "discernible error".<sup>8</sup> This "discernible error" can be demonstrated by showing that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it exercised its discretion.<sup>9</sup> Finally, the "discernible error" may be established by showing that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.<sup>10</sup>

## III. APPLICABLE LAW

7. Pursuant to Rule 65(A), an accused, once detained, cannot be provisionally released except upon an order of a Chamber. Under Rule 65(B), a Trial Chamber can order release only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard. Further, the Trial Chamber must be satisfied that the accused will appear for trial and that, if released, he or she will not pose a danger to any victim, witness or other person. Where the

<sup>5</sup> *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005 ("*Boškoski Decision*"), para. 5; *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić Decision*"), para. 6; *Prosecutor v. Tolimir, Miletić and Gvero*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005 ("*Gvero Decision*"), para. 4; *Prosecutor v. Rajić*, Case No. IT-95-12-AR65.1, Decision on Appeal of Trial Chamber Decision on Provisional Release, issued confidentially on 16 November 2005 ("*Rajić Decision*"), para. 5; *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006 ("*Brahimaj Decision*"), para. 5.

<sup>6</sup> *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević Decision on Joinder*"), para. 3 (holding that a Trial Chamber exercises its discretion "in determining whether provisional release should be granted [. . .]."); *Stanišić Decision*, para. 6; *Gvero Decision*, para. 4; *Rajić Decision*, para. 5; *Brahimaj Decision*, para. 5.

<sup>7</sup> *Milošević Decision on Joinder*, para. 4; *Stanišić Decision*, para. 6; *Brahimaj Decision*, para. 5.

<sup>8</sup> *Milošević Decision on Joinder*, para. 5.

<sup>9</sup> *Id.*, paras. 5 and 6; *Stanišić Decision*, para. 6; *Brahimaj Decision*, para. 5.

Trial Chamber finds that one of these conditions has not been met, it need not consider the other and must deny provisional release.<sup>11</sup>

8. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.<sup>12</sup> That is, the Trial Chamber must demonstrate, through a discussion of all relevant factors, how the accused has met or failed to meet his burden to satisfy the Trial Chamber that he will appear for trial and will not pose a danger to any victim, witness or other person.<sup>13</sup> What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.<sup>14</sup> This is because decisions on motions for provisional release are fact intensive and cases are considered on an individual basis, in light of the particular circumstances of the individual accused.<sup>15</sup> The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the case is due for trial and the accused is expected to return to the International Tribunal.<sup>16</sup>

#### IV. DISCUSSION

9. The Appeals Chamber notes that, in this case, the Trial Chamber took the following factors into consideration as relevant for reaching the Impugned Decision: the gravity of the crimes against the Appellant and the likely sentence if convicted; the circumstances of the Appellant's surrender and transfer; the extent of the Appellant's cooperation with the Prosecution; the guarantees of the Government of Serbia and Montenegro and Republika Srpska to ensure the presence of the Appellant for trial; the personal guarantee provided by the Appellant; the likelihood that the Appellant will pose a danger to any victim, witness or other person related to his case upon release; and the imminent prospect of trial.<sup>17</sup>

<sup>10</sup> *Milošević* Decision on Joinder, paras. 5 and 6; *Stanišić* Decision, para. 6; *Brahimaj* Decision, para. 5.

<sup>11</sup> *Boškoski* Decision, para. 24.

<sup>12</sup> *Stanišić* Decision, para. 8; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, 1 November 2005 ("*Milutinović* Decision"), para. 3; *Rajić* Decision, para. 7.

<sup>13</sup> *Prosecutor v. Ojdanić and Šainović*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 ("*Ojdanić* Decision"), para. 6; *Milutinović* Decision, para. 3.

<sup>14</sup> *Stanišić* Decision, para. 8; *Rajić* Decision, para. 7.

<sup>15</sup> *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Johan Tarčulovski's Motion for Provisional Release, 4 October 2005 ("*Tarčulovski* Decision"), para. 7; *Stanišić* Decision, para. 8; *Rajić* Decision, para. 7.

<sup>16</sup> *Ojdanić* Decision, para. 7; *Stanišić* Decision, para. 8; *Rajić* Decision, para. 7.

<sup>17</sup> Impugned Decision, paras. 10-43.

10. In the Defence Appeal, the Defence submits that, with the exception of the Trial Chamber's examination of the likelihood that the Appellant will pose a danger to victims and/or witnesses if released, the Trial Chamber erred with respect to each and every factor it took into account. In its Response, the Prosecution argues that the Defence has failed to demonstrate that the Trial Chamber committed any errors in reaching the Impugned Decision. It further contends that, other than restating the assertions contained in its prior pleadings before the Trial Chamber, the Defence describes no errors by the Trial Chamber thereby providing no grounds for this appeal.<sup>18</sup> The Appeals Chamber will consider each error alleged by the Defence in turn.

#### A. The Seriousness of the Crimes Charged

11. The Defence argues that the Trial Chamber erred in considering that the prospect of a substantial term of imprisonment could provide the Appellant, if convicted, with strong incentive not to return to face trial. The Defence points out that the Appellant voluntarily surrendered to the jurisdiction of the International Tribunal and that, at the time of the surrender, the Indictment against him was public so that he was fully aware of the seriousness of the charges against him.<sup>19</sup> The Defence makes comparisons between the case of the Appellant and that of Blagoje Simić. The latter was convicted and sentenced by the Trial Chamber to 17 years' imprisonment and yet was recently granted his second provisional release during his pending appeal despite the fact that it took him six years to surrender.<sup>20</sup>

12. In response, the Prosecution claims that the Trial Chamber correctly found that the prospect of a substantial term of imprisonment could provide the Appellant with a strong incentive not to return for trial and notes that this was not the sole factor considered by the Trial Chamber in reaching its decision. The Prosecution also argues that comparison with Blagoje Simić's case is inapposite because: (1) his two motions were for a very short and fixed period of time so that he could attend memorial services for his parents; (2) the decisions were issued, as an exception, for a convicted person pending appeal; and (3) during these short periods of time, Blagoje Simić was to be accompanied at all times by an accredited liaison to the International Tribunal.<sup>21</sup>

<sup>18</sup> Response, para. 9.

<sup>19</sup> Defence Appeal, paras. 6-7.

<sup>20</sup> *Id.*, paras. 8-9. See *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić for Provisional Release for a Fixed Period to Attend Memorial Services for his Mother, 5 May 2006 ("Second *Simić* Decision").

<sup>21</sup> Response, paras. 10-12.

13. In Reply, the Defence contends that the Appellant here, like Blagoje Simić, seeks to be released for a limited period of time, namely until the commencement of the trial, now relatively close. Furthermore, the Defence asserts that the First *Simić* Decision on provisional release<sup>22</sup> cannot be interpreted to mean that Blagoje Simić was accompanied at all times so that the accredited officer was with him 24 hours a day, seven days a week. The Defence then observes that the Appellant has repeatedly stated that he is ready to abide by any terms and conditions, including 24-hour surveillance.<sup>23</sup>

14. The Appeals Chamber has repeatedly recognised that “the more severe the sentence, the greater the incentive to flee”.<sup>24</sup> The Appeals Chamber has also repeatedly stated, however, that the seriousness of the charges against an accused cannot be the sole factor for determining the outcome of an application for provisional release and must be considered in combination with other relevant factors.<sup>25</sup> The Impugned Decision is consistent with these holdings. The Trial Chamber considered the seriousness of the charges against the Appellant but then went on to consider other relevant factors.<sup>26</sup>

15. Furthermore, as noted previously, provisional release inquiries are highly individualised<sup>27</sup> due to the fact that motions for provisional release are highly fact-based.<sup>28</sup> Consequently, the weight attached to the seriousness of the crimes charged and the prospect of a substantial term of imprisonment will differ from one defendant to another, regardless of how similar their charged crimes may be. Accordingly, the Appeals Chamber is not satisfied that the Defence has established that the Trial Chamber erred by failing to give proper consideration to the two *Simić* Decisions when reaching its decision on his provisional release request.

16. Finally, the Defence has not established that the Trial Chamber erred by failing to assess the seriousness of the crimes charged together with the Appellant’s surrender at a time when he knew that he was charged with serious crimes. In the Impugned Decision, the Trial Chamber did

<sup>22</sup> *Prosecutor v. Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Service for his Father, 21 October 2004 (“First *Simić* Decision”).

<sup>23</sup> Reply, para. 9.

<sup>24</sup> *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 6. See also *Prosecutor v. Pandurević and Trbić*, Case No. IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision denying Vinko Pandurević’s Application for Provisional Release, 3 October 2005 (“*Pandurević* Decision”), para. 5.

<sup>25</sup> *Ojdanić* Decision, para. 6; First *Simić* Decision, para. 15; *Gvero* Decision, para. 25.

<sup>26</sup> Impugned Decision, paras. 12-37, 40-43.

<sup>27</sup> *Prosecutor v. Vujadin 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 (“*Popović* Decision”), para. 7.

consider the voluntary surrender of the Appellant in combination with its consideration of all of the factors listed above<sup>29</sup> and ultimately came to the conclusion that it was not satisfied that the Appellant would appear for trial if provisionally released.

17. In light of the foregoing, the Appeals Chamber is not satisfied that the Defence has shown that the Trial Chamber erred in holding that the seriousness of the charged crimes and the prospect of a substantial term of imprisonment could provide the Appellant, if convicted, with strong incentive not to return to face trial. The Trial Chamber considered the relevant facts and came to a reasonable conclusion based upon those facts.

### **B. The Circumstances of the Appellant's Surrender and Transfer**

18. The Defence further alleges that the Trial Chamber erred in holding that the circumstances of the Appellant's transfer to the International Tribunal were unclear, establishing a significant likelihood that, if provisionally released, the Appellant would attempt to evade justice again. The Defence contends that the Appellant gave a full and exhaustive account on his whereabouts in the period from September 2002, when he was supposed to surrender, to April 2005, when he actually surrendered, revealing that there are no "special hiding places" or any particular aiders who could provide a safe haven for the Appellant.<sup>30</sup>

19. Moreover, the Defence contends that the Trial Chamber completely neglected the Statement of the Appellant's current co-Counsel, Mr. Miodrag Stojanović, who also gave a thorough account of the circumstances surrounding the Appellant's voluntary surrender in April 2005. This Statement shows that it was the Appellant's decision to surrender to the International Tribunal, that he surrendered voluntarily, and that the Prosecution was the first to be informed a week before the actual surrender. These facts, according to the Defence, coupled with the Announcement of the Serbian Government, the Letter from the National Council for Cooperation with the International Tribunal, the guarantees of the Government of Serbia and Montenegro, and the Appellant's statement, all show that the Appellant's surrender was indeed voluntary.<sup>31</sup>

20. In its Response, the Prosecution argues that the Trial Chamber adequately considered all the evidence and materials before it and balanced the multiple factors in considering the motion for

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<sup>28</sup> *Tarčulovski* Decision, para. 7.

<sup>29</sup> *See supra* para. 9.

<sup>30</sup> Defence Appeal, paras. 10-11.

<sup>31</sup> *Id.*, para. 12.

provisional release. The circumstances of the Appellant's transfer were not considered in isolation, but rather, in a comprehensive manner, taking into account the Appellant's avoidance of arrest from September 2002 to April 2005. Furthermore, the Defence's assertion that it provided a full account of the Appellant's whereabouts during that time is irrelevant because the Trial Chamber thoroughly analysed all the submissions and still found that there were unanswered questions in that respect.<sup>32</sup>

21. In its Reply, the Defence claims that it is exactly the Trial Chamber's position, namely that there still remain unanswered questions with respect to the Appellant's surrender, that invalidate the Impugned Decision.<sup>33</sup>

22. The Appeals Chamber recalls that the voluntariness of an accused's surrender is relevant to the Trial Chamber's determination of the likelihood that the accused will appear for trial if provisionally released.<sup>34</sup> The Trial Chamber here considered that the most important fact was the Appellant's failure to surrender to the International Tribunal on 23 September 2002, despite agreeing to do so, and that he remained at large until 1 April 2005.<sup>35</sup> The Trial Chamber discussed the reasons the Appellant gave for this fact and his explanation that, while in hiding, he stayed in his family apartment in Bijeljina or his father's unfinished house in the nearby village of Velika Obarska.<sup>36</sup> The Trial Chamber then held:

While the Accused accepts in his submissions that he should have surrendered earlier than 1 April 2005, that admission fails to reflect an adequate recognition of the fact that, with full knowledge of the warrant of arrest and order for surrender of this Tribunal, he reneged on his agreement to voluntarily surrender and was a fugitive from justice for two and a half years after the Indictment was made public. The Trial Chamber is of the view that the Accused provides only generalised, unsubstantiated and unconvincing reasons for not surrendering in September 2002 and his failure to surrender at any time between September 2002 and April 2005.<sup>37</sup>

23. The Trial Chamber also observed that the Appellant did not provide a satisfactory explanation of the circumstances that led to his change of mind and his decision to come out of hiding. It was therefore not convinced on the basis of the evidence before it that the Appellant acted on his own volition. The Trial Chamber took note of the letter from the National Council for

<sup>32</sup> Response, paras. 14-17.

<sup>33</sup> Reply, para. 11.

<sup>34</sup> *Stanišić* Decision, para. 12.

<sup>35</sup> Impugned Decision, para. 14.

<sup>36</sup> *Id.*, paras. 15-20.

<sup>37</sup> *Id.*, para. 21.



Cooperation with the International Tribunal, dated 1 February 2006, and the Announcement of the Government of Serbia dated 29 March 2006, which state that the Appellant had made a decision to go voluntarily to The Hague, but nevertheless, the Trial Chamber remained unconvinced. It accordingly found that there was a significant likelihood that, if provisionally released, the Appellant would attempt to evade justice again by not returning to face trial.<sup>38</sup>

24. The Appeals Chamber finds that the Defence fails to demonstrate that the Trial Chamber made a discernible error in reaching this conclusion. In certain circumstances, an accused's decision to remain a fugitive and his whereabouts prior to surrender can shed significant light on whether he would appear for trial if granted provisional release.<sup>39</sup> The Trial Chamber was reasonably concerned that the Appellant, who has reneged on a promise to surrender once, would do so again. Furthermore, the Appellant's ability to remain undiscovered for two and a half years, while remaining in contact with family members who were under constant surveillance, was another reasonable consideration. Furthermore, the Defence fails to demonstrate that the Trial Chamber erred when concluding, after reviewing all of the evidence before it including the Statement by the Appellant's co-Counsel, that it remained unclear whether the Appellant's surrender was voluntary.

### C. The Extent of the Appellant's Cooperation with the Prosecution

25. The Defence submits that the Trial Chamber erred in holding that the Appellant's cooperation with the Prosecution in early 2002 has no significant bearing on whether the Appellant will return to the International Tribunal if provisionally released. It claims that, although the Appellant's interviews and the hand-over of significant documentary evidence and video material to the Prosecution date back to 2002, the Appellant thereby showed a high degree of cooperation and there is nothing to suggest that he would not cooperate further.<sup>40</sup> The Defence also disagrees with the Trial Chamber's remark that the Appellant did not voluntarily surrender out of desire to cooperate with the Prosecution or because he felt he had an obligation to hand himself over, submitting that it can hardly be said for any of the accused who voluntarily surrendered that they did so solely because they wanted to cooperate with the Prosecution. In any event, he claims that part of the reason for his voluntary surrender was to respond to the allegations set forth in the Prosecution's Indictment against him and, by coming forward to stand

<sup>38</sup> *Id.*, paras. 22-24.

<sup>39</sup> *Popović* Decision, para. 6.

<sup>40</sup> Defence Appeal, paras. 13-14.

trial before the International Tribunal, he demonstrated that he was in fact cooperating with the Prosecution.<sup>41</sup>

26. The Prosecution responds by arguing that the Trial Chamber correctly found that any cooperation by the Appellant with the Prosecution took place approximately four years ago and was of a brief nature, and that there has been a notable absence of such cooperation since then. Furthermore, the Prosecution notes that the motions for provisional release of the Appellant's fellow Srebrenica accused, Vinko Pandurević, Vujadin Popović and Drago Nikolić, all of whom were publicly indicted fugitives until their transfer to The Hague, have been denied.<sup>42</sup>

27. The Defence, in its Reply, observes that the circumstances of the Appellant's case are different to those of his three co-accused in that, *inter alia*, (1) the Appellant surrendered voluntarily; (2) he provided a detailed and exhaustive account of his whereabouts during the two and a half years at large; (3) he gave two exhaustive interviews to the Prosecution and provided them with highly relevant documents and materials; and (4) he seeks to be provisionally released to Republika Srpska in Bosnia and Herzegovina.<sup>43</sup>

28. The Appeals Chamber recalls that "an accused before this International Tribunal is not obliged to assist the Prosecution in proving its case."<sup>44</sup> Therefore, when considering whether to grant provisional release, a Trial Chamber may not penalize an accused for exercising the right not to incriminate oneself by drawing an adverse inference from an accused's lack of cooperation with the Prosecution or by conditioning provisional release upon such cooperation. However, "when an accused person decides to cooperate with the Prosecution, this matter may weigh in his favour when he seeks to be provisionally released, insofar as it shows his general attitude of cooperation towards the International Tribunal which is relevant to the issue that he will appear for trial."<sup>45</sup>

29. In this case, the Trial Chamber considered the Appellant's submission that he "unequivocally showed his willingness and readiness to cooperate" with the Prosecution and that this should support his application for provisional release.<sup>46</sup> The Appellant noted that on 20 February and 11 March 2002, he gave two voluntary interviews with the Prosecution, and he

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<sup>41</sup> *Id.*, para. 15.

<sup>42</sup> Response, paras. 20-22.

<sup>43</sup> Reply, para. 13.

<sup>44</sup> *Stanišić* Decision, para. 24 (internal citations omitted). See also *Tarčulovski* Decision, para. 15; *Brahimaj* Decision, para. 16.

<sup>45</sup> *Brahimaj* Decision, para. 16.

<sup>46</sup> Impugned Decision, para. 25 (internal citation omitted).

supplied the Prosecution with relevant documents and video material. Upon review of this submission, the Trial Chamber concluded that the Appellant's cooperation with the Prosecution had no significant bearing on whether he would appear for trial if provisionally released. The Trial Chamber reasoned that "while the Accused may have been willing to co-operate in early 2002, it has to be inferred that [he] changed his position [ . . . ] when he decided not to surrender voluntarily on 23 September 2002."<sup>47</sup> The Trial Chamber also noted that the Accused's cooperation was mitigated by the fact that it took place approximately four years ago, was of a brief nature, and that there has been no cooperation with the Prosecution since that time.<sup>48</sup>

30. The Appeals Chamber finds that the Defence has failed to demonstrate that the Trial Chamber erred in concluding that the cooperation by the Appellant in early 2002 has no significant bearing on whether the Appellant will return to the International Tribunal for trial if provisionally released. The Trial Chamber reasonably considered that the Appellant's cooperation at that time could not weigh in his favour now given that it was so long ago and was of a limited nature, and that there has been no evidence of further cooperation since that time.

#### **D. The Government Guarantees**

31. The Defence argues that the Trial Chamber erred in holding that the value of the Republika Srpska's guarantee that the Appellant will return to stand trial is undermined by the Republika Srpska's previous failure to arrest the Appellant when he was a fugitive and was hiding in obvious places such as his family's properties. The Defence reiterates that the Appellant gave a full and exhaustive account of his whereabouts, the circumstances have changed, and the Appellant is now willing and prepared to be under constant surveillance and to abide by any and all terms and conditions of the Trial Chamber. This includes returning to The Hague upon any such order by the Trial Chamber.<sup>49</sup>

32. With regard to the Trial Chamber's doubts regarding the guarantees provided by the authorities of Republika Srpska, the Defence again refers to the case of Blagoje Simić, this time the first provisional release decision, where the Appeals Chamber was willing to accept such guarantees. The Defence also refers to a passage in the First *Simić* Decision in which the Appeals Chamber refers to Blagoje Simić being accompanied by the Liaison Officer of the Government of

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Defence Appeal, paras. 17-18.

Bosnia and Herzegovina at all times to ensure his return.<sup>50</sup> The Defence notes that the Liaison Officer who will accompany the Appellant in this case is the same Officer referred to in the First *Simić* Decision, namely, Mr. Trivun Jovičić.<sup>51</sup>

33. Finally, the Defence claims that the Trial Chamber erred in holding that as a Deputy Commander of the MUP SPB and a Commander of a joint force of MUP units, the Appellant held a position of seniority sufficient to potentially affect the willingness of relevant authorities to arrest the Appellant should he fail to comply with the conditions of provisional release. The Defence here notes that previous positions held by the Appellant cannot have any impact on the willingness of relevant authorities to arrest the Appellant if necessary because he held those positions more than a decade ago and the authorities have changed several times since.<sup>52</sup> Moreover, ever since the International Tribunal started granting provisional release to the accused and convicted persons, there has not been a single case in which any of the authorities in question failed to comply with a Chamber's order and/or failed to return an accused to the International Tribunal's custody.<sup>53</sup>

34. The Prosecution argues, relying on the *Jokić* Provisional Release Decision<sup>54</sup> by the Appeals Chamber, that a guarantee by a State is not a sufficient condition for provisional release. Furthermore, the guarantees need to be assessed in light of the specific circumstances of each case and, while two of the Srebrenica co-accused, Radivoje Miletić and Milan Gvero, have been granted provisional release, they are only two of the nine accused in this case to obtain such relief.<sup>55</sup> The specific circumstance that contributed to this outcome was that both men surrendered to the International Tribunal at the time their indictments became public. On the other hand, the other Srebrenica co-accused, namely Vinko Pandurević, Vujadin Popović and Drago Nikolić, all fugitives for years like the Appellant, have been denied provisional release.<sup>56</sup> The Prosecution further contends that, based on the Appellant's past as a fugitive, the ability of the guaranteeing government to bring him back to the International Tribunal remains in doubt, even if the will is there.<sup>57</sup>

<sup>50</sup> First *Simić* Decision, para. 17.

<sup>51</sup> Defence Appeal, paras. 19 and 20.

<sup>52</sup> *Id.*, paras. 21-22.

<sup>53</sup> Defence Appeal, para. 23.

<sup>54</sup> *Prosecutor v. Blagojević, Obrenović and Jokić*, Case No. IT-02-53-AR65, Decision on Application by Dragan Jokić for Provisional Release, 28 May 2002 ("*Jokić* Provisional Release Decision").

<sup>55</sup> The Appeals Chamber notes that the provisional release of these two Srebrenica co-accused has now been suspended and both accused were to be return to the UN Detention Unit by 29 June 2006. See *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Order Suspending Provisional Release, 6 June 2006 ("*Popović* Suspension Order").

<sup>56</sup> Response, paras. 26 and 27.

<sup>57</sup> *Id.*, para. 29.

35. The Defence, in its Reply, states that the circumstances surrounding the two Srebrenica co-accused who were released are not directly relevant because they were released to the Republic of Serbia rather than Republika Srpska. Therefore, the reference by the Prosecution to the inability of Serbian authorities to locate and apprehend high profile indictees is an “absurd assertion as far as Republika Srpska is concerned, since it is a part of BiH with BiH authorities, the EUPM and the NATO forces present and operating”.<sup>58</sup> Finally, the Defence reiterates that, in his statement, the Appellant gives an explanation as to why he decided to depart from the initial decision to voluntarily surrender.<sup>59</sup>

36. The Appeals Chamber recalls that Rule 65 of the Rules places no obligation upon an accused applying for provisional release to provide guarantees from a State as a prerequisite to obtaining provisional release.<sup>60</sup> Nevertheless, such a guarantee, if deemed credible, may carry considerable weight in support of an application.<sup>61</sup> The Appeals Chamber has held that the reliability of a government guarantee must be determined in relation to the circumstances which arise in the particular case.<sup>62</sup> Furthermore, Rule 65(C) permits a Trial Chamber to impose conditions upon the release of an accused so as to ensure his or her presence for trial as well as the protection of others. Frequently, the production of a guarantee from the relevant governmental body is imposed as such a condition.<sup>63</sup>

37. The Appeals Chamber notes that the Trial Chamber considered the guarantee from Republika Srpska in detail. The Trial Chamber observed that while there have been some encouraging signs of cooperation from Republika Srpska, cooperation remains insufficient due to its failure to provide information that could lead to the arrest of Radovan Karadžić and Ratko Mladić. The Trial Chamber further noted the Appellant’s claim that, while at large, he stayed with his family in and around Bijeljina, Republika Srpska, and noted that the Appellant failed to explain how he could stay in such obvious places, under constant surveillance, and yet avoid arrest for two and a half years. It consequently expressed doubts as to the likelihood of the Republika Srpska arresting the Appellant if he failed to appear for trial.<sup>64</sup> Finally, the Trial Chamber noted

<sup>58</sup> Reply, paras. 16 and 17.

<sup>59</sup> *Id.*, para. 18.

<sup>60</sup> *Prosecutor v. Blagojević, Obrenović and Jokić*, Case No. IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002 (“*Jokić Decision*”), para. 7; *Gvero Decision*, para. 9.

<sup>61</sup> *Jokić Decision*, paras. 7 and 8; *Jokić Provisional Release Decision*, p. 2; *Gvero Decision*, para. 9.

<sup>62</sup> *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, para. 9; *Gvero Decision*, para. 10.

<sup>63</sup> *Jokić Decision*, para. 8.

<sup>64</sup> *Impugned Decision*, para. 31.

the positions of superiority previously held by the Appellant within Republika Srpska and considered that these were sufficient to potentially affect the willingness of relevant authorities to arrest him should he fail to comply with the conditions of provisional release.<sup>65</sup>

38. The Appeals Chamber is not satisfied that the Trial Chamber made a discernible error in its assessment of the facts relevant to the Republika Srpska guarantee at issue in this case. The Appeals Chamber reiterates that comparisons with the First *Simić* Decision are not apt for the reasons given earlier.<sup>66</sup> As previously held by the Appeals Chamber, it may be justified for a Trial Chamber to accept a government guarantee as reliable in relation to one accused while rejecting the same in relation to another accused.<sup>67</sup> It was thus reasonable for the Trial Chamber to consider the guarantee in the context of the Appellant's circumstances. This particular Appellant said he was hiding in and around his family home in Bijeljina, Republika Srpska, for two and a half years. Furthermore, as pointed out by the Trial Chamber, the positions of power the Appellant held in Republika Srpska, and the connections he most likely made as a result, as well as the fact that circumstances of his surrender remain somewhat unclear, all play a significant role in creating doubt as to Republika Srpska being able and prepared to arrest the Appellant if he fails to return for trial.

#### **E. The Personal Guarantee**

39. The Defence further alleges that the Trial Chamber erred in holding it could not place much weight on the Appellant's personal guarantee. The Defence points to the submissions already raised in the Defence Appeal with regard to the Appellant's surrender and transfer as well as his cooperation with the Prosecution. The Defence adds that the Appellant's personal guarantee, when considered in conjunction with his statements, his voluntary surrender, and his good behaviour at the United Nations Detention Unit in The Hague, clearly presents a genuine and unconditional undertaking by the Appellant to conform with any terms and conditions placed upon his provisional release.<sup>68</sup>

40. The Prosecution responds that the Trial Chamber correctly noted that the Appellant's personal guarantee must be evaluated in the context of the circumstances surrounding his failure to surrender between September 2002 and April 2005, his eventual transfer to the International Tribunal, and the past history of his cooperation with the Prosecution.<sup>69</sup>

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<sup>65</sup> *Id.*, paras. 32-33.

<sup>66</sup> *See supra* para. 15.

<sup>67</sup> *Gvero* Decision, para. 20.

<sup>68</sup> Defence Appeal, para. 26.

<sup>69</sup> Response, para. 34.

41. The Appeals Chamber recalls that an accused is not required to provide a signed personal undertaking to return for trial and to abide by certain conditions if released but that, if an accused does do so, such a guarantee can be taken into account.<sup>70</sup> Here, the Trial Chamber did consider the Appellant's personal guarantee but decided that it could not place much weight on it because of the Appellant's failure to surrender in 2002, despite the promise that he would do so, and the fact that he remained at large for another two and a half years. The Trial Chamber also noted that the instances of the Appellant's cooperation with the Prosecution took place a long time ago and have been totally absent since such that they cannot be used to support the Appellant's personal guarantee.<sup>71</sup> The Appeals Chamber is not convinced that the Defence has demonstrated that the Trial Chamber made a discernible error in its assessment of the Appellant's personal guarantee. The Trial Chamber reasonably considered the Appellant's failure to surrender, after promising that he would do so, as the critical factor. Accordingly, the Trial Chamber did not abuse its discretion in concluding that the Appellant's personal guarantee does not carry much weight.

#### F. The Completion Strategy

42. The Defence submits that the Trial Chamber erred in stating that the Completion Strategy of the International Tribunal may become a matter of relevance for applications for provisional release as the date for completion of trials nears. The Defence submits that the issue of the Completion Strategy is not and cannot be a matter of relevance in relation to provisional release. The Defence notes that the Appellant seeks provisional release pending commencement of his trial before the International Tribunal, so that it is only logical to expect that his case will be tried and completed before the International Tribunal completes its work. Even if this turns out not to be the case, the Appellant's case would be transferred to the State Court of Bosnia and Herzegovina. Furthermore, the Defence claims that there is now a possibility of some extension of completion dates, which further minimises the relevance of the Completion Strategy to the present issue.<sup>72</sup> The Prosecution does not respond to these arguments.

43. The Appeals Chamber considers, as acknowledged by the Defence, that the Trial Chamber did not give weight to the implementation of the Completion Strategy in this particular case. It only observed, *obiter*, that this may become a matter of relevance in future cases as the date of

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<sup>70</sup> *Pandurević* Decision, para. 14.

<sup>71</sup> *Impugned* Decision, para. 37.

<sup>72</sup> *Defence Appeal*, paras. 27-29.

completion nears.<sup>73</sup> Accordingly, this was not a factor taken into account by the Trial Chamber in reaching its decision and the Appeals Chamber will not consider the Defence arguments further in this regard.

### G. The Trial Date

44. The Defence finally submits that the Trial Chamber erred in holding that the Appellant's availability in The Hague during preparations for the trial will facilitate those preparations. The Defence disagrees and notes that other accused, such as Blagoje Simić and Sefer Halilović, have previously been on provisional release until a week or even just a few days prior to the commencement of their respective trials and two co-accused in this trial are currently on provisional release.<sup>74</sup> The Defence also takes exception with the Trial Chamber's statement that the trial may begin in July of 2006 and claims ignorance of any change in circumstances that has moved the starting date from 21 August 2006 to July of 2006.<sup>75</sup> The Prosecution did not respond to this issue raised by the Defence.

45. The Appeals Chamber notes that the Trial Chamber considered "one further factor which has some limited relevance to the question of whether, if provisionally released, the Appellant will appear for trial", this being the prospect of an early trial, starting in July 2006.<sup>76</sup> The Trial Chamber held that the imminent prospect of a trial, to a limited degree, heightens the significance for the Appellant of the seriousness of the crimes charged and the likelihood of a substantial term of imprisonment if convicted. Furthermore, the Trial Chamber considered that a number of factors related to the impending start date of the Appellant's trial lessened the justification for the Trial Chamber granting the Appellant provisional release in its discretion. This includes the limited time in custody that the Appellant now faces as well as the fact that the "Accused's ready availability in The Hague during this time will, on balance, facilitate the process of final preparations for trial."<sup>77</sup> Thus, the Trial Chamber concluded that the impending start date of the trial weighed against granting the Appellant provisional release.

46. The Appeals Chamber finds that the Defence has failed to demonstrate that the Trial Chamber erred in taking into consideration the trial start date in reaching its decision on provisional release. As noted in the Defence's Request for Leave, on 6 June 2006, the Pre-Trial Judge in this case issued a scheduling order confirming that the trial will commence on 14 July

<sup>73</sup> See Impugned Decision, para. 39.

<sup>74</sup> Defence Appeal, paras. 30-31.

<sup>75</sup> *Id.*, para. 33.

<sup>76</sup> Impugned Decision, para. 42.

<sup>77</sup> *Id.*, para. 43.



2006.<sup>78</sup> Furthermore, the Appellant is incorrect to state that two of his co-accused are on provisional release as their release was suspended on 6 June in light of the trial start date.<sup>79</sup> In any event, the Appeals Chamber emphasizes again that “[d]ecisions on motions for provisional release are fact-intensive and cases are considered on an individual basis.”<sup>80</sup> Thus, the Trial Chamber was not in error for failing to compare the Appellant’s case with that of his co-accused or with the cases of Blagoje Simić and Sefer Halilović. The Appeals Chamber notes that the Trial Chamber properly considered the impending start date of the trial in light of the particular circumstances of the Appellant’s case.<sup>81</sup> The Defence fails to demonstrate that the Trial Chamber erred in giving weight to this consideration.

## H. The Request for Leave

47. In its Request for Leave, the Defence seeks to supplement the Defence Appeal by requesting alternative or additional relief in light of the Trial Chamber’s scheduling of the Appellant’s trial to start on 14 July 2006. The Defence submits that because there is a limited time period between the filing of this Decision and 14 July 2006 when the Appellant would have to return to the Tribunal, he should be granted provisional release from 15 July 2006 until the commencement of further procedural hearings in his case following the Tribunal’s summer recess either as alternative or additional relief. In support of this request, the Defence incorporates by reference all submissions made in the Defence Appeal. In addition, the Defence offers to obtain further guarantees from Republika Srpska and the Republic of Serbia with regard to this further request. The Defence also argues that provisional release breaks during trial proceedings have already been recognized in other cases before the Tribunal and notes that a pending request for such release is before the Trial Chamber with regard to two of the Appellant’s co-accused. The Defence then incorporates by reference submissions made by the Appellant’s co-accused in that pending request.<sup>82</sup>

48. The Prosecution opposes the additional or alternative relief requested in the Defence’s Request for Leave on the same grounds that it contests the Defence Appeal. It claims that the arguments in its Response “apply in equal measure against granting the alternative relief sought.”<sup>83</sup>

<sup>78</sup> See Request for Leave, para. 6. See also *supra* fn. 4.

<sup>79</sup> See *supra* fn. 55.

<sup>80</sup> *Tarčulovski* Decision, para. 7.

<sup>81</sup> Impugned Decision, para. 42.

<sup>82</sup> Request for Leave, paras. 8-15.

<sup>83</sup> Response to Request for Leave, para. 2.

49. The Appeals Chamber recalls that it is not a court of first instance. The Defence's submissions with regard to the Appellant's alternative or additional request for provisional release during the break in the Trial Chamber's proceedings over the summer recess were not raised before the Trial Chamber and considered by it in the Impugned Decision under the particular circumstances of the Appellant's case thereby allowing for the Appeals Chamber to review the issue on appeal. The Appeals Chamber will not consider the Appellant's request *de novo* in this appeal.

## V. DISPOSITION

50. On the basis of the foregoing, the Defence Appeal and Request for Leave are **DISMISSED**.

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

Done this 30<sup>th</sup> day of June 2006.

At the Hague,  
The Netherlands.



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Judge Fausto Pocar  
Presiding Judge