

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: IT-98-29/1-AR 65.1

Date: 17 October 2006

Original: English

4-98-29/1-AR 65.1
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17 October 2006

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BEFORE THE APPEALS CHAMBER

Before:

**Judge Fausto Pocar, President
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz
Judge Wolfgang Schomburg**

Registrar:

Mr. Hans Holthuis

Decision of:

17 October 2006

PROSECUTOR

v.

Dragomir MILOŠEVIĆ

**DECISION ON APPEAL AGAINST DECISION DENYING MOTION FOR PROVISIONAL
RELEASE**

The Office of the Prosecutor:

Mr. Alex Whiting
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Mr. Salvatore Cannata

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Appeals Chamber" and "Tribunal" respectively) is seised with an appeal filed by Dragomir Milošević on 21 August 2006 against the Trial Chamber's Decision on Third Motion for Provisional Release of 16 August 2006 ("Impugned Decision").

2. On 13 July 2005, a Trial Chamber dismissed Dragomir Milošević's ("Milošević") application for provisional release.¹ On 28 December 2005, Milošević filed a second application for provisional release², which was also rejected by the Trial Chamber.³ On 29 June 2006, Milošević filed a third application for provisional release.⁴ This application was refused by the Trial Chamber on 16 August 2006 and on 23 August 2006, Milošević filed an Appeal⁵ against this decision of the Trial Chamber dismissing his third application for provisional release. The Prosecution filed its Response on 1 September 2006.⁶ No reply to that Response was filed by Milošević.

Standard of Review

3. The standard of appellate review is settled in the jurisprudence of the Tribunal. An interlocutory appeal is not a *de novo* review of the decision of the Trial Chamber.⁷ A decision on provisional release by a Trial Chamber is a discretionary decision and the Appeals Chamber will only intervene where the moving party demonstrates a discernible error on the part of the Trial Chamber.⁸ A discernible error may be established by showing that the Trial Chamber misdirected

¹ Decision on Defence Motion for Provisional Release, 13 July 2005 ("First Decision").

² Motion for Provisional Release, 28 December 2005.

³ Decision on Second Motion for Provisional Release, 9 February 2006 ("Second Decision").

⁴ Motion for Provisional Release, 29 June 2006.

⁵ Appeal Against the Decision Dismissing the Motion for Provisional Release and the Grounds of Appeal, 23 August 2006 ("Appeal").

⁶ Prosecution's Response to Appeal Against the Decision Dismissing the Motion for Provisional Release and Grounds of the Appeal, 1 September 2006 ("Response").

⁷ *Prosecutor v. Momčilo Krajišnik*, Case No: IT-00-39-AR73.2, Decision on Krajišnik's Appeal Against the Trial Chamber's Decision Dismissing the Defense Motion for a Ruling that Judge Canivell is Unable to Continue Sitting in this Case, 15 September 2006, para. 9; *Prosecutor v. Vujadin Popović et al.*, Case No: IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006, para. 5-6; *Prosecutor v. Ramush Haradinaj et al.*, Case No: IT-04-84-AR65.2, Decision on Lahi Brahima's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 5; *Prosecutor v. Vinko Pandurević et al.*, Case No: IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006, para. 6; *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.

⁸ *Prosecutor v. Vujadin Popović et al.*, Case No: IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006, para. 5-6; *Prosecutor v. Ramush Haradinaj et al.*, Case No: IT-04-84-AR65.2, Decision on Lahi Brahima's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 5; *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.

itself either as to the principle to be applied or as to the law that 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, or 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.⁹

Grounds of Appeal

4. In his Appeal, Milošević puts forward a number of purported grounds of appeal under the heading "Grounds of Appeal".¹⁰ In its Response, the Prosecution claims that Milošević "has failed to identify any error of law in the Impugned Decision justifying a reversal of that decision and the granting of provisional release to the Accused".¹¹

5. It is well established in the jurisprudence of the Tribunal that a party impugning a decision of a Trial Chamber must demonstrate that the Trial Chamber has committed a discernible error resulting in prejudice to that party.¹² While this is what is required of an appellant, none of the purported grounds of appeal put forward by Milošević actually identifies an alleged error on the part of the Trial Chamber. Rather, each ground of appeal is framed in terms of an assertion, premised by the word "Considering", suggesting that an allegation is being made that, in light of certain alleged factors, the Trial Chamber erred. While the failure of Milošević to precisely identify an alleged error and to make arguments in support thereof is sufficient basis for the Appeals Chamber not to consider this appeal on the merits, in the interests of justice, the Appeals Chamber will attempt to frame Milošević's "considerations", where possible, as allegations of error on the part of the Trial Chamber to determine whether there is any merit in this appeal.

⁹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006, paras. 5-6; *Prosecutor v. Ramush Haradinaj et al.*, 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, para. 5; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on the Request of the United States of America for Review, 12 May 2006, para. 6; *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.

¹⁰ Appeal, paras 4-34.

¹¹ Response, para. 8.

¹² *Prosecutor v. Vinko Pandurević & Milorad Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006 ("Pandurević Decision on Joinder") para. 6; *Prosecutor v. Zdravko Tolimir, Radivoje Miletić & Milan Gvero*, Case No. IT-04-80-

Length of Pre-Trial Detention

6. Milošević claims that he has been in detention in the United Nations Detention Unit in The Hague ("UNDU") since 3 December 2004.¹³ Proceedings against him are in the pre-trial phase and the Trial Chamber has not yet set a date for his trial.¹⁴ Milošević recalls his right to be presumed innocent and that any measure depriving him of his liberty must always be made with regard to this presumption in his favour.¹⁵ He argues "that to evaluate the reasonable nature of the length of detention" an issue to be considered is whether the competent authorities have "displayed special diligence in the conduct of proceedings".¹⁶ He claims that special diligence has not been shown in his case as the date for the commencement of his trial has not been set, even though his case is ready for trial. According to Milošević, this constituted a violation of his right to be tried without undue delay. He further submits that the estimation of the Trial Chamber of commencement of trial in early 2007 does not guarantee his right to be tried without undue delay.

7. In Response, the Prosecution says that Milošević merely reiterates arguments made before the Trial Chamber and does not identify any error on the part of the Trial Chamber in its consideration of this factor. It says that the Trial Chamber "properly found that the trial of the Accused is likely to start in early 2007 and that the anticipated period of pre-trial detention will not be excessive".¹⁷ It argues further that there has been no significant delay in the proceedings, which makes the Accused's pre-trial detention unreasonable or excessive.¹⁸ It says that the jurisprudence of the European Court of Human Rights holds that period of up to four years of pre-trial detention may be legitimate.¹⁹

8. In the Impugned Decision, the Trial Chamber considered the length of Milošević's pre-trial detention as "the only novel submission in the Motion".²⁰ It noted that the Defence considered that time to be excessive. It further noted that since the rejection of Milošević's second application for provisional release, he had spent an additional one year and eight months in pre-trial detention.²¹ However, the Trial Chamber held that the "actual or likely excessive length of pre-trial detention"

AR73.1, Decision on Radivoje Miletic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("*Miletic* Decision on Joinder"), para. 6.

¹³ Response, para. 4.

¹⁴ *Ibid.*, para. 5.

¹⁵ *Ibid.*, para. 29.

¹⁶ *Ibid.*, para. 30.

¹⁷ Response, para. 9.

¹⁸ *Ibid.*, para. 11.

¹⁹ *Ibid.*, para. 12.

²⁰ Impugned Decision, p.3.

²¹ Impugned Decision, p. 3.

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was merely a discretionary consideration to be taken into account when deciding on provisional release if the requirements of Rules 65(B) of the Rules of Procedure and Evidence ("Rules") are met.²²

9. The Appeals Chamber is not satisfied that Milošević has identified any discernible error in the reasoning of the Trial Chamber. Milošević's right to be tried without undue delay cannot of itself justify provisional release and the Trial Chamber properly considered that the relevance of the length of pre-trial detention was limited to its exercise of discretion as to whether to grant provisional release once it was satisfied that the conditions of Rule 65(B) had been met.

Judicial Bias

10. In his next ground of appeal, Milošević challenges the propriety of Judge Orić being one of the Judges determining his third provisional release application. He says that as Judge Orić was the Presiding Judge in the *Galić* case, and since Milošević was a co-accused to Galić, Judge Orić does not bring an open mind to the assessment of the gravity of the charges against him. He argues that Judge Orić's assignment to his case contravenes Rule 15(A) of the Rules which provides, *inter alia*, that a Judge may not sit on a trial or appeal in any case in which the Judges has had any association which may affect his or her impartiality.²³

11. The Prosecution responds that Milošević's allegation of bias on the part of Judge Orić is a new argument that was not raised before. It opposes this new claim on both procedural and substantive grounds.²⁴ The Prosecution submits that this argument should have been made by Milošević before the Trial Chamber and that, in any event, Rule 15(A) is inapplicable as it only applies to the trial or appeal phases of a case.²⁵ It says that the procedure to be followed when seeking the disqualification of a Judge is set out in Rule 15(B) and it is this procedure that should be followed by Milošević.²⁶

12. As Milošević did not raise this issue before the Trial Chamber and initiate the procedure available to him under the Rules, the Appeals Chamber does not consider it appropriate to address Milošević's allegation of purported bias on the part of Judge Orić in this interlocutory appeal. It suffices to say that if Milošević wants this allegation to be properly considered, he should follow the procedure available to him under the Rules.

²² *Ibid.*

²³ Appeal, para. 13.

²⁴ Response., paras 13-14.

²⁵ *Ibid.*, para. 14.

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Gravity of the Charges

13. Milošević next alleges that the Trial Chamber placed too much weight on the gravity of the charges against him. He argues that “the gravity of the charges against an Accused cannot in and of themselves preclude the provisional release of the Accused without rendering Rule 65 of the Rules completely ineffective”²⁷ and that “this factor must be examined together with others”.²⁸

14. In Response, the Prosecution claims that the Impugned Decision “does not itself make any determinations with regard to the gravity of the offence, finding only that the Accused has failed to present any evidence of a change in material circumstance”.²⁹ The Prosecution says that this ground and those that follow are “merely a repetition of arguments that were considered by the Trial Chamber in the First and Second Decision on provisional release and that the Accused does not claim any change in material circumstances with regard to those factors.”³⁰ It submits that they were properly dealt with in the Impugned Decision and do not constitute a basis for appeal.³¹

15. The Impugned Decision does not specifically address the gravity of the offences of which Milošević is charged. However, this was a factor considered by the Trial Chamber in its First Decision rejecting an earlier application for provisional release.³² This First Decision on provisional release was not appealed by the Appellant pursuant to Rule 65(C) although it could have been. The Impugned Decision, being the third decision on an application by Milošević for provisional release, was limited by the Trial Chamber to a consideration “of new information or circumstances enabling it to reconsider” its two earlier decisions rejecting Milošević’s applications for provisional release.³³ The failure of Milošević to appeal either the First or Second Decision rejecting his provisional release justifies the Appeals Chamber’s refusal to consider a ground of appeal that refers to the reasoning of the Trial Chamber in relation to either. The Impugned Decision, of which appeal the Appeals Chamber is currently seised, is that against the third decision rejecting Milošević’s application for provisional release.

²⁶ *Ibid.*, para. 15.

²⁷ Appeal, para. 14.

²⁸ *Ibid.*, para. 15.

²⁹ Response, para. 17.

³⁰ *Ibid.*, para. 18

³¹ *Ibid.*

³² First Decision, paras 8-12, Second Decision, p.2.

³³ Impugned Decision, p. 2.

16. However, the Appeals Chamber notes that a Trial Chamber must provide a reasoned opinion in rendering a decision on provisional release³⁴ and, in this case, the Trial Chamber approached the third application for provisional release as warranting a reconsideration of its two earlier decisions refusing that release only where Milošević presented “new information or circumstances enabling it to reconsider the First and Second Decision”³⁵. As such, the Trial Chamber’s reasons for refusing the third application for provisional release were for the reasons given in those two earlier decisions. The Trial Chamber was entitled to approach the third application for provisional release in the way it did. Accordingly, to satisfy the interests of justice in the exceptional circumstances of this particular case, the Appeals Chamber finds it appropriate to consider grounds of appeal raised by Milošević, which go to factors examined by the Trial Chamber in the First and Second Decision on his provisional release.

17. In its First Decision, it is clear that the Trial Chamber considered that the seriousness of crimes is but one of the factors that a Trial Chamber is required to take into account in assessing whether an accused will appear for trial if released. The Trial Chamber unequivocally stated that “the seriousness of the charges cannot be the sole factor in denying provisional release – it must be considered in addition to the other factors”.³⁶ After considering the seriousness of the crimes alleged against Milošević, the Trial Chamber concluded that they may result in a substantial term of imprisonment if he is convicted but that “this factor alone is insufficient to deny his request for provisional release, so it must be considered along with other relevant factors”.³⁷ The Trial Chamber then went on to consider other relevant factors as circumstances surrounding the surrender of Milošević,³⁸ the provision of governmental guarantees,³⁹ the personal guarantees of Milošević,⁴⁰ and the co-operation of Milošević.⁴¹ No further consideration was given to the seriousness of the crimes in the Second Decision.

18. The Appeals Chamber finds that the Trial Chamber did not commit any error in consideration of the seriousness of the crimes alleged against him. The Trial Chamber clearly treated the seriousness of the crimes alleged as just one factor, among others, to be taken into account when considering whether, if released, he would appear for trial.

³⁴ *Prosecutor v Mico Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005.

³⁵ Impugned Decision, p. 2.

³⁶ First Decision, para. 8.

³⁷ *Ibid.*, para. 12.

³⁸ *Ibid.*, paras 13-19.

³⁹ *Ibid.*, paras 20-21.

⁴⁰ *Ibid.*, para. 22.

⁴¹ *Ibid.*, para. 24.

Voluntary Surrender

19. In his next ground of appeal, Milošević alleges that the Trial Chamber erred in the weight it attached to his voluntary surrender.⁴² He concedes that he cannot deny that a period of time passed between the date of the publication of the indictment against him and his surrender. However, he says that he could have been located at his apartment as he was present there as of 23 May 2001.⁴³ He claims that the report produced by the Prosecution to the Trial Chamber from the Ministry of Interior for the Republic of Serbia of 15 September 2003, showed that the authorities were attempting to locate and apprehend him at an address different to the one he had declared to them “in accordance with the Serbian and Montenegrin laws governing the control of citizens”.⁴⁴ He argues that because the report shows that the authorities were looking for him at a different address from the one he declared to them, and as he was always at the address he had given them and made no attempt to flee after publication of the indictment against him, the Trial Chamber should have placed greater weight on the fact of his voluntary surrender.⁴⁵

20. The Impugned Decision does not re-examine the issue of Milošević’s surrender to the Tribunal, but for the reasons already given, the Appeals Chamber will examine the Trial Chamber’s consideration of this issue in the First and Second Decision to determine whether there is any merit to Milošević’s complaint.

21. In the First Decision, the Trial Chamber considered the claim of Milošević that he had surrendered voluntarily against the implied claim of the Prosecution that he had not. Having examined the evidence, it concluded that Milošević had surrendered voluntarily.⁴⁶ Following this determination, the Trial Chamber went on to consider how much weight should be attributed to the fact of voluntary surrender.⁴⁷ On the evidence before it, the Trial Chamber found that three years had elapsed since the publication of the indictment and the transfer of Milošević to the UNDU. It properly determined that this lapse of time was significant “because the weight to be given to the voluntary surrender of an accused person diminishes with the passage of time during which he or she has failed to do so”.⁴⁸ The Trial Chamber also examined the report adduced by the Prosecution dated 15 September 2003 referred to above, which claimed that operations had been intensified to

⁴² Appeal, para. 16.

⁴³ *Ibid.*, para. 17.

⁴⁴ *Ibid.*, paras 18-19.

⁴⁵ *Ibid.*, para. 20.

⁴⁶ First Decision, paras 13-16.

⁴⁷ *Ibid.*, para. 17.

⁴⁸ *Ibid.*, para. 17.

trace Milošević or any person in contact with him. However, despite these attempts to apprehend him, he remained at large until his voluntary surrender fourteen months later.⁴⁹ The Trial Chamber concluded that while it was satisfied that Milošević had surrendered voluntarily, it was not satisfied with his explanation for the three-year delay and thus, while it was a factor to suggest that he would appear for trial, “it is entitled to little weight in this particular case”.⁵⁰

22. In its Second Decision, the Trial Chamber gave consideration to “a collation of the Accused’s passport with the report of the Ministry of Internal Affairs, Anti-Organised Crime Unit” submitted by Milošević to show that the authorities of the Republic of Serbia were trying to locate him at the wrong address.⁵¹ The Trial Chamber found that the collation of documents submitted by Milošević did not suffice to establish that the Serbian authorities had failed to locate him for three years because of a change of address, but that, “even if it is assumed the authorities did not use the right address to locate the Accused”, this did not account for the fact that the Accused failed to surrender voluntarily for three years after the Indictment was made public”.⁵²

23. In light of the above, the Appeals Chamber is not satisfied that the Trial Chamber placed insufficient weight on the voluntary surrender of Milošević. The simple fact of the matter is that he waited three years to do so and this was so whether or not the Serbian authorities were trying to locate him at the wrong address. Consequently, it was correct for the Trial Chamber to give the fact of voluntary surrender little weight.

Government and Personal Guarantees

24. In the next ground of appeal, Milošević argues that the Trial Chamber placed insufficient weight on the fact that the Republic of Serbia had given guarantees to the Chamber that it would ensure Milošević’s appearance for trial if he was released,⁵³ and the fact that he signed a declaration on his honour to comply with any conditions imposed by the Trial Chamber should he be granted provisional release.⁵⁴

25. Again, the Impugned Decision does not address this issue, but as the reasoning of the First and Second Decision form part of the reasoning of the Impugned Decision, the Appeals Chamber will examine the Trial Chamber’s consideration of this factor in the First and Second Decision.

⁴⁹ *Ibid.*, para. 18.

⁵⁰ *Ibid.*, para. 19.

⁵¹ Second Decision, p. 3.

⁵² *Ibid.*

⁵³ Appeal., paras 21-24.

⁵⁴ *Ibid.*, para. 25.

26. In the First Decision, the Trial Chamber, following rulings of the Appeals Chamber, took into account the reliability of the guarantees in relation to the circumstances then obtaining, including the position the Accused held prior to his arrest and “as far as foreseeable, circumstances as at the time when the case is due for trial and when he will be expected to return”.⁵⁵ It noted that at the time of the period in the Indictment, Milošević was “allegedly an Assistant Commander of the Main Staff of the Bosnian Serb Army and held no position in the Federal Government”.⁵⁶ It considered that as he retired nine years ago, it was “unlikely that he might possess any information of such importance as to make the Government concerned reluctant to hand him over to the Tribunal, in case of his failure to comply with the conditions of his provisional release”.⁵⁷ With respect to the circumstances at the time of the expected return of Milošević for trial, the Trial Chamber found that it was not in a position to foresee whether the level of co-operation of the Federal Government would have changed, particularly as the trial was not expected to commence in the imminent future. It concluded, therefore, that it was “satisfied that personal circumstances concerning the Accused, as well as both current and future indicators of the co-operation offered by the Federal Government, provide sufficient guarantees that the authorities in charge will ensure the return of the Accused to the Tribunal, if released.”⁵⁸ Following its consideration of the Government guarantees, the Trial Chamber noted Milošević’s personal guarantee.⁵⁹

27. The Appeals Chamber is not satisfied that Milošević has shown any error on the part of the Trial Chamber in its consideration of the Government guarantees, which it accepted, or his personal guarantee, which it took into account by noting that it had been given.

Threat to Victims and Witnesses

28. In his final ground of appeal, Milošević alleges that the Trial Chamber placed insufficient weight on the fact that he wishes to be released to Belgrade, whereas all the alleged victims and witnesses reside outside of Belgrade, and that he “has signed a declaration on his honour in which he promises that, if he is granted provisional release, he will refrain from contacting the victims, the witnesses, the media and will ask directly that he be permitted to consult the documents and the archives”, so that should the Chamber “decide to grant him provisional release, there can be no risk that the Accused will cause a danger to victims, witnesses or any other persons”.⁶⁰

⁵⁵ Impugned Decision, para. 20.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, para. 21.

⁵⁹ *Ibid.*, para. 22.

⁶⁰ Appeal, p. 7.

29. In the First Decision, the Trial Chamber accepted the “uncontested evidence of the Accused” and held that it was “satisfied that he would not pose a risk to victims, witnesses or any other person if he were provisionally released”.⁶¹ Accordingly, the Appeals Chamber is satisfied that the Trial Chamber gave sufficient consideration to this issue. Milošević has not demonstrated how the Trial Chamber failed to weigh it properly.

Disposition

30. In light of the foregoing, the appeal of Milošević against the Impugned Decision is **DISMISSED**.

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

Dated this 17th day of October 2006,
At The Hague,
The Netherlands.



Judge Fausto Pocar
President

[Seal of the Tribunal]

⁶¹ First Decision, para. 25.