

**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-A
Date: 9 November 2011
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. John Hocking

Decision of: 9 November 2011

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**PUBLIC REDACTED VERSION OF 22 JULY 2011 DECISION ON VINKO
PANDUREVIĆ'S MOTION FOR TEMPORARY ALTERATION OF THE
CONDITIONS OF HIS DETENTION**

The Office of the Prosecutor
Mr. Peter Kremer

The Republic of Serbia

The Kingdom of The Netherlands

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Mr. Vujadin Popović
Mr. John Ostojić for Mr. Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Mr. Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Mr. Vinko Pandurević

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal”, respectively);

NOTING the “Judgement” rendered by Trial Chamber II of the Tribunal (“Trial Chamber”) on 10 June 2010;¹

NOTING the respective notices of appeal filed by the parties on 8 September 2010;²

BEING SEISED OF the “Motion on Behalf of Vinko Pandurevic [sic] for a Temporary Alteration in the Conditions of His Detention to Facilitate a Visit to the Serbian Embassy in The Hague”, filed confidentially by Counsel for Vinko Pandurević (“Pandurević”) on 8 December 2010 (“Motion”);

NOTING the “Prosecution’s Response to Pandurević Motion to Alter Conditions of Detention”, filed confidentially by the Office of the Prosecutor (“Prosecution”) on 10 December 2010 (“Response”), in which the Prosecution takes no position on the Motion and defers to the discretion of the Appeals Chamber in this matter;³

NOTING Pandurević submits that: (a) he does not possess a valid Serbian national identity card or passport;⁴ (b) applying for such documents requires an applicant to provide biometric data;⁵ and (c) it is not feasible for the Embassy of the Republic of Serbia (“Serbia”) in The Hague (“Embassy”) to transport the equipment necessary for recording biometric data outside the Embassy, including to the United Nations Detention Unit;⁶

NOTING that Pandurević therefore requests the Appeals Chamber to direct the Registry of the Tribunal (“Registry”) to arrange a brief custodial visit for him to the Embassy “for the purpose of completing the formalities required to obtain a national identity card and/or passport”;⁷

RECALLING that, on 4 February 2011, the Appeals Chamber requested Serbia and The Netherlands to file submissions “regarding the modalities for a temporary alteration of the

¹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version).

² Prosecution’s Notice of Appeal, 8 September 2010; Vujadin Popović’s [sic] Notice of Appeal, 8 September 2010 (confidential; public redacted version filed on 25 February 2011); Appellant, Ljubisa [sic] Beara’s Notice of Appeal, 8 September 2010; Notice of Appeal on Behalf of Drago Nikolić, 8 September 2010 (confidential; public redacted version filed on 7 March 2011); Notice of Appeal on Behalf of Vinko Pandurevic [sic] Against the Judgment of the Trial Chamber Dated 10th June 2010, 8 September 2010 (confidential; public redacted version filed on 9 March 2011); *Acte d’appel de la défense de Radivoje Miletic* [sic], 8 September 2010 (the English translation was filed on 24 September 2010).

³ Response, p. 1.

⁴ Motion, para. 1.

⁵ *Ibid.*, para. 2.

⁶ *Ibid.*, para. 2, Annex 3 (confidential).

conditions of detention of Pandurević to facilitate his completion of the formalities required to obtain a national identity card and/or passport [(“Modalities”)], should a decision be taken to grant the Motion”;⁸

NOTING that Serbia agrees with the temporary alteration of the conditions of Pandurević’s detention proposed in the Motion and that the Ministry of the Interior of Serbia will be responsible for securing Pandurević’s personal safety during his visit to the Embassy and will accompany him from the entrance of the Embassy until his departure from Embassy premises;⁹

NOTING that the authorities of The Netherlands submit that the proposed visit to the Embassy presents it with “very serious challenges to public order and national security”;¹⁰

RECALLING the further order of the Appeals Chamber, issued on 7 March 2011, which directed the Registry to consult with Serbia and The Netherlands concerning the Modalities;¹¹

NOTING the 22 March 2011 Registry Submission filed pursuant to Rule 33(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), appending two memoranda, which reflect the record of the Registry’s consultations with Serbia and The Netherlands regarding the Modalities;¹²

NOTING that Serbia asserts it is not possible to submit a request for the issuance of a Serbian national identity card at the Embassy; and that, with respect to the passport request, Serbia would take custody of Pandurević at the entrance of the Embassy and allow no armed officers of The Netherlands onto the premises of the Embassy;¹³

NOTING that, according to The Netherlands, a visit by Pandurević to the Embassy on the terms proposed by Serbia would create an unwarranted security risk and “an unwanted precedent” in relation to other detainees, including detainees of other international courts and tribunals who are nationals of other countries and detained in The Netherlands;¹⁴

⁷ *Ibid.*, para. 8. See also *ibid.*, p. 2.

⁸ Order on Vinko Pandurević’s Motion for Temporary Alteration of the Conditions of His Detention, 4 February 2011 (confidential), p. 2.

⁹ The Republic of Serbia’s Submission Following the Appeals Chamber’s Order on Vinko Pandurević’s Motion for Temporary Alteration of the Conditions of His Detention, 21 February 2011 (confidential), paras 2-5.

¹⁰ Letter from the Ministry of Foreign Affairs of The Netherlands to the Tribunal, 21 February 2011 (confidential).

¹¹ Further Order on Vinko Pandurević’s Motion for Temporary Alteration of the Conditions of His Detention, 7 March 2011 (confidential), p. 3.

¹² Registry Submission Pursuant to Rule 33(B) Regarding Further Order on Vinko Pandurević’s Motion for Temporary Alteration of the Conditions of His Detention, 22 March 2011 (confidential) (“22 March 2011 Registry Submission”).

¹³ *Ibid.*, Annex I, paras 3, 5.

¹⁴ *Ibid.*, Annex II, paras 2-4.

NOTING FURTHER that: (a) during a visit to an embassy (as opposed to a transfer to national authorities by way of provisional release), a detainee remains under detention and hence a responsibility of the Dutch authorities due to his or her presence on the territory of The Netherlands;¹⁵ (b) Dutch authorities remain responsible not only for the detainees, but for the Embassy itself, and under the terms proposed by Serbia, the Dutch authorities could not sufficiently effect such responsibility during a detainee's stay within the Embassy;¹⁶ (c) the Serbian police officers whom the Embassy proposes to have present during the requested visit cannot lawfully be armed and would not be authorized to use force under Dutch law to secure Pandurević and the Embassy;¹⁷ and (d) for these reasons, the Ministries representing the Dutch authorities would be "extremely reluctant to execute an order granting [such a] visit";¹⁸

NOTING that further consultations by the Registry with Serbia confirmed that the possibility exists for Serbia to issue Pandurević a non-biometric passport, which would remain valid until 31 December 2011;¹⁹

NOTING the subsequent submission of Pandurević that the issuance of a passport valid until 31 December 2011 would provide only a temporary and inadequate solution to the underlying reasons for his request;²⁰

RECALLING that the Motion requested a custodial visit by Pandurević to the Embassy for the express purpose of "completing the required formalities for obtaining a national identity card and/or passport";

CONSIDERING that the Motion is not properly filed under Rule 65 of the Rules, as the requested alteration of the conditions of the detention of Pandurević does not involve provisional release from detention, but rather a custodial visit to an embassy;²¹

¹⁵ *Ibid.*, Annex II, para. 2.

¹⁶ *Ibid.*, Annex II, para. 4.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, Annex II, para. 6.

¹⁹ Internal Memorandum Regarding Pandurević's Motion for Temporary Alteration of the Conditions of Detention, 3 June 2011 (confidential), para. 3.

²⁰ Further Submission on Behalf of Vinko Pandurević Concerning His Motion for a Temporary Alteration in the Conditions of His Detention to Facilitate a Visit to the Serbian Embassy in The Hague, 10 June 2011 (confidential), paras 2-3 ("Further Submission of Pandurević"). Pandurević submits that possession of a government-issued identification document is a condition for the exercise of certain fundamental rights [REDACTED] (see Motion, paras 1, 7; Further Submission of Pandurević, para. 3).

²¹ See Motion, paras 4-7, referring, *inter alia*, to *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Borovčanin's Motion for Custodial Visit, 3 June 2010. The Appeals Chamber notes that Trial Chamber granted Ljubomir Borovčanin's request for a custodial visit to the Embassy under Rule 65 of the Rules. The Appeals Chamber considers that the Trial Chamber erred in so doing as such custodial visits do not fall within the compass of this Rule.

CONSIDERING that the submissions before the Appeals Chamber indicate that it is not possible to submit a request for the issuance of a national identity card at the Embassy;²²

CONSIDERING the opposing views of Serbia and The Netherlands regarding the Modalities;²³

CONSIDERING that Serbia should resolve any difficulties with respect to the issuance of a valid identification document for one of its citizens detained abroad;

CONSIDERING that, while the Appeals Chamber has the authority to issue orders to States pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 107 of the Rules, an order by the Appeals Chamber on the Motion is not necessary for the purposes of an investigation or for the preparation of Pandurević's appeal;²⁴

FOR THE FORGOING REASONS,

HEREBY DENIES the Motion.

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

Dated this ninth day of November 2011
| At The Hague
The Netherlands



Judge Patrick Robinson
Presiding

[Seal of the Tribunal]

²² See 22 March 2011 Registry Submission, Annex I, para. 5.

²³ *Ibid.*, Annexes I, II.

²⁴ The Appeals Chamber recalls that matters relating to the rights of detained persons and conditions of their detention are regulated by the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, IT38/Rev.9, 21 July 2005 and fall primarily under the authority of the Registrar and the President of the Tribunal.