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CHAMBERS
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The Hague, 30 October 2002
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APPEALS CHAMBER DENIES PROVISIONAL RELEASE OF
NIKOLA ŠAINOVIĆ AND DRAGOLJUB OJDANIĆ

On Wednesday 30 October 2002, the Appeals Chamber, consisting of Judge Mohamed Shahabuddeen (presiding), Judge Hunt, Judge Güney, Judge Pocar and Judge Meron, issued its Decision denying the Provisional Release of Nikola Šainović and Dragoljub Ojdanić.

Background:

A hearing on the applications for provisional release took place on 24 June 2002 during which oral arguments were advanced by counsel for the accused and the Prosecution. Representatives of the Federal Government of the Federal Republic of Yugoslavia ("FRY") were also present and were heard by the Chamber.

On Wednesday 26 June 2002, Trial Chamber III granted both the applications for provisional release and the Prosecution's application for a stay and ordered "*the provisional release of Dragoljub Ojdanić and Nikola Šainović subject to the terms and conditions as set out in the Orders for Provisional Release appended to this Decision*". Furthermore, the Trial Chamber ordered that, "*the provisional release of these two accused is stayed pending an appeal by the Prosecution pursuant to Rule 65 (D), (E), (F) and (G) of the Rules of Procedure and Evidence*".

Pursuant to leave granted by a Bench of the Appeals Chamber, the Prosecution appealed against Trial Chamber III's decision. On 2 August 2002, Šainović filed his "Defence Response to the Prosecution's Appeals Against the Trial Chamber's Decision to Grant Provisional Release" and Ojdanić his "Brief on Appeal". On 7 August 2003, the Appellant filed the "Prosecution's Joint Reply".

Decision:

The Appeals Chamber found that:

- The Trial Chamber did not take into account all the factors which were relevant to its taking a fully informed and reasonable decision as to whether the accused will appear for trial if provisionally released. "*In particular, the Trial Chamber failed to consider the effect of the senior position of the two co-accused so far as it relied upon the guarantees. The position of the accused in the hierarchy and the consequence thereof upon the weight of governmental guarantees are indeed significant factors which the Trial Chamber is expected to address as they could have an important bearing on the State's willingness and readiness to arrest that person if he refuses to surrender himself; those factors therefore*

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reduce the likelihood of his appearing at trial. In failing to address these factors, the Trial Chamber committed an error of law.”

- The Trial Chamber failed to refer to the public statements made by the accused to the media to the effect that they would not surrender voluntarily. The Appeals Chamber considered these statements “*highly relevant*” and stated that “*the Trial Chamber committed an error of law in not referring to them*”.
- Although they were publicly indicted in May 1999, both accused ‘surrendered’ in April 2002 “*only after it became clear from the Law on Cooperation that they would no longer find a reliable refuge in the FRY... As a result, the Appeals Chamber disagrees with the finding of the Trial Chamber that the surrenders were voluntary.*”

The Appeals Chamber concluded that “*having taken into account all relevant factors the Appeals Chamber is not satisfied that, if released, the two co-accused would appear for trial as required by Rule 65(B).*”

“Accordingly, the Appeals Chamber (Judge Hunt dissenting)

- (a) Allows the Prosecution’s appeal and quashes the Impugned Decision; and*
- (b) Revises the Impugned Decision by denying the provisional release of Nikola Šainović and Dragoljub Ojdanić.”*

Judge Shahabuddeen submitted a Separate Opinion and Judge Hunt submitted a Dissenting Opinion.
