

**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-98-32/1-AR65.1  
Date: 16 April 2007  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, President  
Judge Mehmet Güney  
Judge Liu Daqun  
Judge Theodor Meron  
Judge Wolfgang Schomburg

**Registrar:** Mr. Hans Holthuis

**Decision of:** 16 April 2007

**PROSECUTOR**

v.

**Milan LUKIĆ  
Sredoje LUKIĆ**

**DECISION ON DEFENCE APPEAL AGAINST TRIAL CHAMBER'S DECISION ON  
SREDOJE LUKIĆ'S MOTION FOR PROVISIONAL RELEASE**

**The Office of the Prosecutor:**

Mr. Mark B. Harmon  
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**Counsel for Milan Lukić:**

Mr. Alan L. Yatvin

**Counsel for Sredoje Lukić:**

Mr. Đuro J. Čepić  
Mr. Jens Dieckmann

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 “Sredoje Lukić’s Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukić’s Motion for Provisional Release” filed confidentially on 20 December 2006 (“Appeal”) by Sredoje Lukić (“Appellant”).

## I. PROCEDURAL BACKGROUND

2. On 13 December 2006, Trial Chamber III (“Trial Chamber”) rendered the “Decision on Sredoje Lukić’s Motion for Provisional Release” (“Impugned Decision”), denying the Appellant’s motion pursuant to Rule 65 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) for provisional release to the municipality of Višegrad in the Republika Srpska pending the commencement of his trial; admitting the “Supplement to Prosecution’s Response to Sredoje Lukić’s Motion for Provisional Release” filed confidentially by the Prosecution on 27 October 2006 (“Prosecution Supplement”); and allowing “Sredoje Lukić’s Defence Motion for Leave to File Defence Reply to Prosecutor’s Response to Sredoje Lukić’s Motion for Provisional Release and Prosecutor’s Supplements to its Response” filed confidentially by the Appellant on 2 November 2006 (“Reply”).

3. On 20 December 2006, the Appellant filed the Appeal under Rule 65(D) of the Rules requesting that the Appeals Chamber grant the Appeal seeking his provisional release; quash the Impugned Decision; and remit the matter to the Trial Chamber for reconsideration in accordance with the Appeals Chamber decision.<sup>1</sup> On 22 December 2006, the Prosecution confidentially filed the “Prosecution’s Response to Sredoje Lukić’s Appeal Against Decision on Provisional Release” (“Response”) opposing the Appeal. The Defence has not filed a reply.<sup>2</sup>

<sup>1</sup> The Appeals Chamber understands the request that the Appeal be granted and the Impugned Decision quashed to be the principal relief sought, and the remission of the matter for reconsideration as relief sought in the alternative.

<sup>2</sup> The Appeals Chamber finds no basis for the confidential nature of the filings and notes that the Prosecution has no objection to the lifting of the confidentiality of its Response. The confidential status of the Appeal and Response is therefore to be lifted. The Appeals Chamber recalls that under Rules 78 and 107 of the Rules, all proceedings before an Appeals Chamber shall be public unless there are exceptional reasons for keeping them confidential. *See Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Order Withdrawing Confidential Status of Pre-Review Order and Decisions, 5 December 2005, p. 2, citing *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Vinko Martinović’s Withdrawal of Confidential Status of Appeal Brief, 4 May 2005, p. 3.

## II. STANDARD OF REVIEW

4. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.<sup>3</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>4</sup> Accordingly, the relevant inquiry is "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."<sup>5</sup>

5. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".<sup>6</sup> The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."<sup>7</sup>

## III. APPLICABLE LAW

6. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Trial Chamber may 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 Trial Chamber finds that one of these conditions has not been met, it need not consider the other and must deny provisional release.<sup>8</sup>

7. 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

<sup>3</sup> See e.g., *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; *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. Boškoski & Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005 ("*Boškoski Decision of 28 September 2005*"), para. 5.

<sup>4</sup> See e.g., *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 ("*Milutinović Decision*"), para. 3.

<sup>5</sup> *Ibid.* (internal citations omitted).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Prosecutor v. 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 (*Borovčanin Decision of 30 June 2006*), para. 7.

opinion indicating its view on those relevant factors.<sup>9</sup> Accordingly, 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>10</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>11</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>12</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 accused is expected to return to the International Tribunal.<sup>13</sup>

#### IV. DISCUSSION

##### A. Admissibility of the Prosecution Supplement

8. The Appellant argues that the Trial Chamber erred in law and in fact in founding its examination of whether he would appear for trial on the contents of the Prosecution Supplement.<sup>14</sup> The Appellant claims that the Trial Chamber abused its discretion under Rules 126*bis* and 127 of the Rules by admitting the Prosecution Supplement one day after the deadline for the filing of the “Prosecution Response to Sredoje Lukić’s Motion for Provisional Release” filed on 26 October 2006 (“Prosecution Response of 26 October 2006”). The materials attached to the Prosecution Supplement, which include a letter from the Ministry of Internal Affairs of the Republika Srpska (“RS”) and pages from a false passport allegedly used by the Appellant, were submitted to show that the Appellant evaded arrest and transfer to the International Tribunal between 2001 and 2005 by residing and working under a false passport in various locations outside the RS.<sup>15</sup> The Appellant argues that the Prosecution did not provide any reason to justify why this material, which had been compiled in September 2005, was not filed in time.<sup>16</sup>

<sup>9</sup> *Ibid.*, para. 8.

<sup>10</sup> *Ibid.*; *Milutinović* Decision, para. 3.

<sup>11</sup> *Stanišić* Decision, para. 8.

<sup>12</sup> *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Decision Denying Johan Tarčulovski’s Motion for Provisional Release, 4 October 2005 (“*Tarčulovski* Decision”), para. 7.

<sup>13</sup> *Stanišić* Decision, para. 8.

<sup>14</sup> Appeal, para. 12.

<sup>15</sup> *Ibid.*, para. 13; Impugned Decision, paras. 18-19.

<sup>16</sup> Appeal, para. 14.

9. The Appellant further challenges the admission of the Prosecution Supplement on the basis that the failure to disclose material, intended to undermine the Appellant's credibility, violates the principles of equality of arms and fair trial.<sup>17</sup> The fact that he was given an opportunity to submit a reply does not, in the Appellant's view, suffice to remedy the prejudice caused. The Appellant alternatively maintains that, in case the Prosecution Supplement was correctly admitted, the Trial Chamber erred in law and in fact by giving undue weight to its contents.<sup>18</sup>

10. In the Impugned Decision, the Trial Chamber noted that the Prosecution had failed to clarify why it only learned of the material attached to the Prosecution Supplement on the day it was filed given that the material had been compiled in September 2005.<sup>19</sup> The Trial Chamber then referenced the condition per Rule 127 of the Rules that good cause must be shown if the deadlines prescribed by Rule 126*bis* of the Rules are to be enlarged and concluded that "in the interest of having all the relevant material before it, it is in the interest of justice to admit the Supplement".<sup>20</sup>

11. The Prosecution, on appeal, rather than offering an explanation for the delayed submission, simply responds that no prejudice was caused by the delay because the Appellant was granted leave to reply to both the Prosecution's Response of 26 October 2006 and the Prosecution Supplement.<sup>21</sup> As such, the Appeals Chamber observes that the justification for admitting the Prosecution Supplement appears to be grounded in the relevance of its contents and the Appellant's opportunity to respond, rather than on the circumstances occasioning its delay.

12. The Appeals Chamber recalls that "sufficient reasons constituting good cause" are required to recognize a late filing as validly done.<sup>22</sup> In the *Martić* case, for instance, the Appeals Chamber recognised the late filing of an interlocutory appeal as valid pursuant to Rule 127(A)(ii) and (B) of the Rules, because it was satisfied that the Appellant had demonstrated that the sudden illness of a member of the defence team constituted good cause in those circumstances.<sup>23</sup> Exceptionally, the Appeals Chamber has, in specific circumstances, found good cause to recognize a late filing as

<sup>17</sup> *Ibid.*, paras. 15-23.

<sup>18</sup> *Ibid.*, para. 24.

<sup>19</sup> Impugned Decision, para. 16.

<sup>20</sup> *Ibid.*, para. 17.

<sup>21</sup> Response, para. 17.

<sup>22</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Motions for Extension of Time, 11 January 2007; *Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11*bis*.1, Decision on Savo Todović's Supplemental Submission Concerning the Rule 11*bis* Appellate Proceedings, 23 February 2006, p. 2, citing *Prosecutor v. Želiko Mežakić et al*, Case No. IT-02-65-AR11*bis*.1, Decision on Joint Defence Motion for Enlargement of Time to File Appellant's Brief, 30 August 2005, p. 3.

<sup>23</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, fn. 6.

validly done in the interests of justice. For example, in the *Boškoski and Tarčulovski* case,<sup>24</sup> the Appeals Chamber admitted an appeal filed one day after the deadline because it considered it to be in the interests of justice due to the “substantial importance of the Appeal for the rights of the Appellant”.<sup>25</sup> Although the filing in this case concerns the admission of supplementary material to the Prosecution’s Response rather than an appeal itself, the Appeals Chamber considers that, in light of the relevance of the information contained in the Prosecution Supplement to determining the Appellant’s risk of flight and the opportunity afforded to the Appellant to reply to it, it was within the discretion of the Trial Chamber to recognise the filing as validly done in the interests of justice under the good cause requirement.<sup>26</sup> The Appeals Chamber therefore finds that the Trial Chamber did not abuse its discretion in admitting the Prosecution Supplement nor, as is elaborated below, did the Trial Chamber accord its contents too much weight.

### **B. The Appellant’s Appearance for Trial**

13. The Appellant argues that the Trial Chamber erred in law and in fact by stating that it was “not convinced by the [Appellant’s] arguments that he did not surrender to the Tribunal on account of fear for his safety or that of his family” because his statement was not “substantiated by any evidence”.<sup>27</sup> Rather, the Appellant maintains, he provided a detailed illustration of the political climate at the relevant time in the RS to explain his behaviour from the time the indictment against him was made public to his actual surrender.<sup>28</sup> He further argues that these facts are generally known, and that his behaviour and his explanation are consistent with the situation in the RS at the relevant time.<sup>29</sup>

14. The Appellant contends that he could have provided “substantial” evidence justifying his behaviour if his request for an oral hearing had been granted by the Trial Chamber, noting that

<sup>24</sup> *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.3, Decision on Ljube Boškoski’s Interlocutory Appeal on Second Motion for Provisional Release, 28 August 2006 (“*Boškoski Decision*”), para. 9.

<sup>25</sup> *Ibid.* See also, *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR65, Decision on Application for Leave to Appeal, 18 November 2002, p. 2 (wherein the Appeals Chamber found good cause and recognized as validly done, the “Application for Leave to Appeal on Decision on the Motion for Provisional Release” filed by Milan Martić one day out of time “[c]onsidering that the delay in the filing of the Application did not prejudice the Prosecution’s right to respond to it or the proceedings in this appeal and that the Prosecution has made no objection to the late filing”).

<sup>26</sup> *Cf. Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Decision on “Accused Tharcisse Muvunyi’s Motion for Leave to Amend his Grounds for Appeal and Motion to Extend Time to File his Brief on Appeal” and “Prosecutor’s Motion Objecting to ‘Accused Tharcisse Muvunyi’s Amended Grounds for Appeal’”, 19 March 2007, para. 7, fn. 22 (allowing for proposed amendments to a Notice of Appeal within the good cause requirement where the Appeals Chamber finds the amendment to be of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if it is excluded).

<sup>27</sup> *Ibid.*, para. 9, citing Impugned Decision, para. 26.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

such an opportunity is especially important where there is a lack of “material” proof such as in this case.<sup>30</sup> In this context, the Appellant claims that the Trial Chamber violated the principle of fair trial and abused its discretion in denying his application for provisional release without holding an oral hearing.<sup>31</sup>

15. The Appeals Chamber recalls that Rule 65 of the Rules does not provide that the Trial Chamber must hold an oral hearing on an application for provisional release.<sup>32</sup> It is thus within the Trial Chamber’s discretion to conclude, as it did here, that “the arguments made by the parties are sufficient and the Chamber sees no reason for a hearing.”<sup>33</sup> The Appellant’s assertion that he could have provided “substantial” evidence justifying his failure to surrender does not explain what this evidence would have consisted of or how it would have differed from the evidence already before the Trial Chamber.<sup>34</sup> The Appeals Chamber further notes that the Appellant acknowledges that it remains unclear to him “what kind of evidence or proof the Trial Chamber had in mind in respect of the personal motivation of the Appellant.”<sup>35</sup> The Appeals Chamber therefore dismisses the Appellant’s argument that the denial of an oral hearing constituted an abuse of discretion by the Trial Chamber.

16. The Appeals Chamber notes that the Trial Chamber was unsatisfied that the Appellant would appear for trial based in large part on his failure to convincingly demonstrate that pressure from the “war lobby” and threats he purportedly received prevented him from cooperating with the International Tribunal and surrendering himself for nearly five years following the public disclosure of the indictment against him.<sup>36</sup> 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>37</sup> Although the Trial Chamber in this case did not explicitly question the voluntariness of the Appellant’s ultimate decision to surrender, it remained unconvinced that the Appellant’s decision to remain at large for almost five years was involuntary.<sup>38</sup>

17. The Appeals Chamber considers that it was open to the Trial Chamber to conclude that there was an enhanced risk of flight on the basis of the Appellant’s inability to adequately explain his

<sup>30</sup> *Ibid.*, para. 10.

<sup>31</sup> *Ibid.*, para. 11.

<sup>32</sup> See e.g., *Boškoski* Decision, para. 12.

<sup>33</sup> *Impugned Decision*, para. 32.

<sup>34</sup> *Appeal*, para. 10.

<sup>35</sup> *Ibid.*, para. 9.

<sup>36</sup> *Impugned Decision*, paras. 26, 33.

<sup>37</sup> *Borovčanin* Decision of 30 June 2006, para. 22, citing *Stanišić* Decision, para. 22.

failure to surrender himself over an almost five-year period. The Appeals Chamber recalls in this connection that in the *Mrkšić* case, the Trial Chamber, having noted that nothing had prevented the accused from voluntarily surrendering to the International Tribunal for over six years from the public disclosure of his indictment, doubted whether the accused could be treated as having in fact, voluntarily surrendered.<sup>39</sup> The Appeals Chamber upheld the *Mrkšić* Trial Chamber's decision and considered that in such a case, the lack of "voluntariness" of the Appellant's surrender was relevant to the degree of cooperation that could be expected of *Mrkšić* when the time came for him to appear for trial.<sup>40</sup>

18. In this case, the Trial Chamber was further persuaded that there was an enhanced risk the Appellant would take flight if provisionally released because of the seriousness of the crimes charged<sup>41</sup> and the Appellant's opposition to the pending Prosecution motion for a referral under Rule 11bis of the Rules.<sup>42</sup> With regard to the seriousness of the crimes charged, the Appellant maintains that the Trial Chamber erred in law and in fact by according undue weight to this factor in the exercise of its discretion, since at the time of his surrender, the Appellant was well aware of the possibility he could face a lengthy sentence if convicted.<sup>43</sup> The Appellant also challenges the importance given to his opposition to the pending Prosecution motion for a referral under Rule 11bis of the Rules, stating that although the jurisprudence provides that a Trial Chamber may take this into account when assessing the risk that an accused will not appear for trial, "it is obligatory for [the] Trial Chamber to explain in detail, why this factor has importance in its specific decision."<sup>44</sup>

19. With regard to the seriousness of the crimes charged, the Appeals Chamber has repeatedly recognised that "the more severe the sentence, the greater the incentive to flee".<sup>45</sup> Although the seriousness of the crimes charged cannot be the sole factor determining a Trial Chamber's decision on provisional release,<sup>46</sup> the Appeals Chamber finds that the Trial Chamber properly

<sup>38</sup> Impugned Decision, para. 26.

<sup>39</sup> *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-PT, Decision on Mile Mrkšić's Application for Provisional Release, 24 July 2002, para. 43.

<sup>40</sup> *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, paras. 8, 15 – 16 (*Mrkšić* Decision of 8 October 2002).

<sup>41</sup> Impugned Decision, para. 27.

<sup>42</sup> *Ibid.*, para. 28; see *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, Defence Counsel's Response to Request by the Prosecutor under Rule 11bis, 21 November 2005.

<sup>43</sup> Appeal, para. 25.

<sup>44</sup> *Ibid.*, para. 26.

<sup>45</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, para. 5.

<sup>46</sup> *Borovčanin* Decision of 30 June 2006, para. 14 (internal citations omitted).



considered this factor in combination with all the other relevant factors, including the circumstances of the Accused's surrender.<sup>47</sup>

20. With respect to the argument that the Trial Chamber failed to sufficiently explain why the Appellant's opposition to the Prosecution's referral motion militated against the granting of provisional release in his case,<sup>48</sup> the Appeals Chamber finds that there was no need for greater elaboration and, as such, no discernable error committed. It is implicit that the risk of being transferred to a country where the Appellant clearly does not want to be tried can reasonably be considered by the Trial Chamber to constitute an incentive for flight.<sup>49</sup> In light of the fact that the Appellant remained at large for five years, it is not unreasonable to conclude that, should there be a final decision granting the Prosecution's request for referral,<sup>50</sup> the Appellant could decide not to return to the Tribunal to be transferred to the region to stand trial. The Appeals Chamber finds that the Appellant has failed to demonstrate that the Trial Chamber committed a discernible error in the manner in which it treated his opposition to the Rule 11*bis* referral motion.

21. Lastly, the Appellant contends that the Trial Chamber erred in law and in fact in finding that the guarantees provided by the government of the RS and by the Appellant himself, were not entitled to significant weight.<sup>51</sup> The Appeals Chamber notes that the Trial Chamber found that neither guarantee, "in light of the seriousness of the alleged crimes and the factors indicating the Accused's risk of flight [...] can outweigh the very strong indications weighing against the Accused's provisional release."<sup>52</sup> In this sense, the Appeals Chamber observes that the Trial Chamber duly considered the weight to be accorded to the guarantees in relation to the particular circumstances of the Appellant's case.

22. The Appeals Chamber finds that such a conclusion was open to the Trial Chamber in the exercise of its discretion. The Trial Chamber appropriately considered the reliability of the government and personal guarantees in the context of the Appellant's particular circumstances.<sup>53</sup> While the Appeals Chamber has found that these circumstances may involve a consideration of an

<sup>47</sup> Impugned Decision, paras. 25-31.

<sup>48</sup> Appeal, para. 26.

<sup>49</sup> See e.g., *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-AR65.2, Decision on Dušan Fuštar's Request for Interlocutory and Expedited Appeal, 16 December 2005, para. 9.

<sup>50</sup> The Appeals Chamber notes that the Referral Bench ordered the referral of the Appellant's case to the authorities of Bosnia and Herzegovina on 5 April 2007. However, it remains to be seen whether an appeal will be filed against that decision. See *Prosecutor v. Lukić et al.*, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis* with Confidential Annex A and Annex B, 5 April 2007.

<sup>51</sup> Appeal, para. 27.

<sup>52</sup> Impugned Decision, para. 29.

accused's former position and the amount of influence he or she may still retain over state authorities,<sup>54</sup> the seriousness of the crimes charged and the circumstances of the Appellant's surrender are also relevant considerations.<sup>55</sup> It was therefore reasonable for the Trial Chamber to find that under the specific circumstances of the Appellant's case, the guarantees provided by the RS and the Appellant were insufficient for demonstrating that the Appellant would appear for trial if released.

### C. Danger to Victims and Witnesses

23. Having upheld the Trial Chamber's denial of provisional release on the basis of the Appellant's risk of flight, the Appeals Chamber declines to consider the arguments raised as to whether the Trial Chamber erred in rejecting the Appellant's application for provisional release on the basis that the Appellant failed to sufficiently demonstrate that he would not pose a danger to any victim, witness or other person if released to the same municipality where it is alleged by the Prosecution that crimes have been committed. Upon finding that it was not satisfied that the Appellant would appear for trial if provisionally released under Rule 65(B) of the Rules, the Trial Chamber was required to deny provisional release and was not obliged to make any determination under the second prong of that Rule.<sup>56</sup>

### D. Other Considerations

24. As a final matter, the Appellant's cursory argument that the Trial Chamber failed to give sufficient weight to the length of his pre-trial detention is dismissed. The Trial Chamber's finding that the length of the Appellant's pre-trial detention, even in light of the fact that no trial date is yet set, is not such as to warrant any change in its reasons for denying provisional release<sup>57</sup> is reasonable, and the Appellant has not demonstrated otherwise. The Appeals Chamber considers that although no trial date has been set, ongoing proceedings before the Referral Bench adequately justify, in the circumstances, the time spent by the Appellant in pre-trial detention since he was transferred to the seat of the International Tribunal on 16 September 2005.

<sup>53</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, para. 16.

<sup>54</sup> See e.g., *Borovčanin* Decision of 30 June 2006, paras. 37-38; *Stanišić* Decision, paras. 17, 19-22; *Boškoski* Decision of 28 September 2005, paras. 16-18.

<sup>55</sup> See e.g. *Mrkšić* Decision of 8 October 2002, para. 8; *Stanišić* Decision, para. 12 (on the relevance of the circumstances of surrender); and *Borovčanin* Decision of 30 June 2006, para. 14 (on the relevance of considering the seriousness of the charges).

<sup>56</sup> See *supra* para. 6.

<sup>57</sup> *Impugned* Decision, para. 31.

**V. DISPOSITION**

25. On the basis of the foregoing, the Appeals Chamber **DISMISSES** the Appeal and **ORDERS** the Registry to lift the confidentiality of the Appeal and the Response.

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

Done this 16<sup>th</sup> day of April 2007  
At The Hague,  
The Netherlands.



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Judge Fausto Pocar  
Presiding Judge

**[Seal of the International Tribunal]**