

AT

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-05-87-T

IN THE TRIAL CHAMBER

Before: Appeals Chamber

Registrar: Mr. Hans Holthuis

Date Filed: 6 December 2006

THE PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**EXPEDITED APPEAL PURSUANT TO RULE 116 *BIS* AGAINST THE
DECISION ON JOINT DEFENCE MOTION FOR PROVISIONAL RELEASE
DURING WINTER RECESS, DATED 5 DECEMBER 2006**

The Office of the Prosecutor

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Mr. Branko Lukić and Dragan Ivetić for Mr. Sreten Lukić**

EXPEDITED APPEAL PURSUANT TO RULE 116 *BIS* AGAINST THE DECISION
ON JOINT DEFENCE MOTION FOR PROVISIONAL RELEASE DURING WINTER
RECESS, DATED 5 DECEMBER 2006

1. On 30 October 2006, the Accused filed a *Joint Motion for Provisional Release During the Winter Recess* (the “Motion”).¹
2. On 10 November 2006, the Prosecution filed the *Prosecution Response to Defence Joint Motion for Provisional Release During the Winter Recess*. (the “Prosecution Response”).²
3. On 5 December 2006, the Trial Chamber handed down its *Decision on Defence Motion for Provisional Release During Winter Recess* (the “Decision”).³
4. Pursuant to Rule 65(D) and Rule 116 *bis*, the Accused jointly appeal against the Decision. Rule 65(D) provides, *inter alia*, that any decision rendered under Rule 65 shall be subject to appeal. An appeal brought pursuant to Rule 65 may be determined in an expedited fashion pursuant to the terms of Rule 116 *bis*.
5. The party challenging a decision on provisional release bears the burden of showing that the Trial Chamber committed a discernible error.⁴ The party must show that the Trial Chamber
 - (1) misdirected itself as to the principle to be applied;
 - (2) misdirected itself as to the law which is relevant to the exercise of discretion;
 - (3) gave weight to extraneous or irrelevant considerations;
 - (4) failed to give weight or sufficient weight to relevant considerations;

¹ *Prosecutor v. Milutinovic, et. al.*, Joint Motion for Provisional Release During the Winter Recess, IT-05-87-T, 30 October 2006.

² *Prosecutor v. Milutinovic, et. al.*, Prosecution Response to Defence Joint Motion for Provisional Release During the Winter Recess, IT-05-87-T, 10 November 2006.

³ *Prosecutor v. Milutinovic, et. al.*, Decision on Joint Defence Motion for Provisional Release During Winter Recess, IT-05-87-T, 5 December 2006.

⁴ *Prosecutor v. Stanasic*, IT-04-79-AR65.1, Decision on Prosecutions Interlocutory Appeal of Mico Stanasic’s Provisional Release, 17 October 2005, para.6.

(5) made an error as to the facts upon which it has exercised its discretion;

or

(6) rendered a decision so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.⁵

6. The Accused submit that the Trial Chamber made the following discernable errors of law and/or abused its discretion in rendering the Decision, which render the Decision unreasonable and plainly unjust. For the reasons set out below, the Accused jointly request the Appeals Chamber to grant their appeal against the Decision and to order that the Accused be provisionally released under the terms and conditions requested in the Motion, namely: that they be granted temporary provisional release 16 December 2006 to 15 January 2007.

7. In paragraphs 3-7 of the Decision, the Trial Chamber erred in law in its interpretation and application of the provisions of Rule 65. In particular, the Trial Chamber erred in paragraph 4 of the Decision in determining that under Rule 65 "*there is no specific rule providing for the provisional release of accused after the trial has commenced and a significant quantum of evidence has been adduced by the Prosecution*". To the contrary, Rule 65(I) expressly provides that the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period. This indicates that the Rule covers the whole of proceedings, from pre-trial to appeal. As a matter of law, the Trial Chamber misdirected itself when considering whether Rule 65 contemplates and permits provisional release during trial proceedings. This error caused the Trial Chamber to misinterpret and to apply incorrectly the jurisprudence of the both the Trial and Appeals Chambers which have granted provisional release during the trial phase,⁶ after a guilty plea, but prior to sentencing, and

⁵ *Prosecutor v. Zeljko Mejakic* "Decision on Dusan Fustar's Request for Interlocutory and Expedited Appeal", 16 December 2005 at para.7. This decision cites *Prosecutor v. Tolimir et al*; "Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release", 19 October 2005, para.4

⁶ See, Confidential, Decision relative à la requete d'Enver Hadzihanovic aux fins de sa mise en liberté provisoire, 23 juillet 2004. This confidential decision is cited at paragraph 8 of the Defence Motion for

pending appeal.⁷ By not properly considering the case law concerning Rule 65, the Trial Chamber caused a miscarriage of justice which the Appeals Chamber should correct.

8. The Trial Chamber erred in law and fact and abused its discretion in finding that the Accused failed to satisfy the two criteria for provisional release contained in Rule 65(B). In paragraphs 8-11 of the Decision, the Trial Chamber examined the issue whether the Accused satisfied the burden that, if provisionally released, they will return for trial. At paragraph 8, the Trial Chamber erred when analysing the guaranteed right of the presumption of innocence under Article 21(3) of the Statute in relation to a request for provisional release. The Trial Chamber considered that the presumption of innocence had little or no relationship to the issue of provisional release and stated that if it did, then no accused would ever be detained, as all are presumed innocent. To the contrary, consistent with instruments of international law/international instruments which guarantee the rights of the accused, the jurisprudence of the Tribunal has consistently found that detention of an accused person is to be considered the exception, whereas liberty is to be the rule.⁸ Not only must there be compelling reasons to deprive an accused of his liberty prior, during or after trial, but continued deprivation of liberty must be both necessary in view of those circumstances and it must be the only reasonable measure in the circumstances. In *The Prosecutor v. Jokic*, the Trial Chamber stated that “Procedural

Provisional Release of Enver Hadžihasanović, IT-01-47-T, 13 July 2005; *Prosecutor v. Halilović*, Decision on Motion for Provisional Release, IT-01-48-T, 21 April 2005; *Prosecutor v. Halilović*, Decision on Motion for Provisional Release, IT-01-48-T, 22 July 2005; *Prosecutor v. Halilović*, Decision on Motion for Provisional Release, IT-01-48-T, 1 September 2005.

⁷ *Prosecution v. Hadžihasanović*, *Decision Granting Provisional Release*, IT-01-47-PT, 19 December 2001. Furthermore, jurisprudence of the Tribunal indicates that provisional release may be granted during the trial – between the close of the Prosecution case and the commencement of the Defence case in the *Hadžihasanović* case – during the post conviction appeal phase – the *Blagoje Simić* case and during the period following the entering of a guilty plea and sentencing – the *Plavšić* case and the *Miodrag Jokić* case and *Prosecutor v. Limaj et. al.*, IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend his Daughter’s Memorial Service, 21 April 2006.

⁸ See, in particular, *Prosecutor v. Hadžihasanovic, et. al.*, Decision Granting Provisional Release to Enver Hadžihasanovic, IT-01-47-PT, 19 December 2001.

¹⁰ *The Prosecutor v. Dragan Jokic*, IT-02-53-PT, “*Decision on Request for Provisional Release of Accused Jokic*”, 28 March 2002, para.18.

measures should never be capricious or excessive. It if is sufficient to use a more lenient measure, it must be applied.”¹⁰

9. The Trial Chamber has previously found that the Accused did not pose any threat to victims and witnesses and there was no risk of flight on their part. The Accused submit that despite 17 weeks of trial having elapsed, the circumstances prevailing when they were previously granted provisional release have not changed substantially. The case against them has been known to the Accused since as early as 2002, in the case of the first three Accused. The vast majority of evidence against the Accused that has been previously disclosed to them, it was known previous to the beginning of the trial that the evidence led would be similar to that led in the *Milosevic* trial.

10. In paragraphs 12-14 of the Decision, the Trial Chamber examined whether the Accused satisfied their burden that, if provisionally released, they will not pose a danger to any victim, witness or person. As noted above, the circumstances have not changed significantly in light of this requirement. Article 20(1) of the Statute makes the rights of the accused the first consideration (requiring “full respect” for those rights), and the need to protect victims and witnesses the secondary one (requiring “due regard” for their need for protection).¹² Furthermore, the conditions of provisional release are such that the Accused would not be in a position or circumstance to interfere with the Prosecution’s interests. Rule 65(C) permits a Chamber to impose conditions upon the release of an accused “to ensure the presence of the accused for trial and the protection of others,” The Accused could be released under conditions imposed pursuant to Rule 65(C) which would satisfy any security concerns.

¹² *Prosecutor v. Nikola Šainovic and Dragoljub Ojdanic*, Case No.: IT-99-37-AR65, Decision on Provisional Release, Separate Opinion of Judge David Hunt, 30 October 2002, at para. 74; *Prosecutor v. Brdjanin and Talic*, IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, at para. 20.

11. In paragraphs 15-21 of the Decision, the Trial Chamber found that in the exercise of its discretion under Rule 65, it would have refused the request for provisional release, even if the Accused had satisfied the two parts of the test under Rule 65(B). In paragraph 15 of the Decision, the Trial Chamber erred in considering Rule 65 not to apply during the trial phase of proceedings.¹³ It is therefore an error of law to find that the issue of provisional release is a matter of discretion of the Trial Chamber in the exercise of its inherent power to control proceedings when this issue is governed by the express terms of the two prong test under Rule 65(B).

12. Assuming however that the issues were a matter of the discretion of the Trial Chamber, the Trial Chamber erred in law by abusing its discretion when it refused the request for provisional release. Paragraph 16 of the Decision states that the Trial Chamber must guard against disruption of the proceedings, there are myriad of risks attendant upon being provisionally released to Serbia, and there are numerous conceivable reasons that one or more of the Accused might not return for trial. The Prosecution Response merely observes in general terms that the provisional release of the Accused should be balanced against the proper administration of justice and the completion of the trial, without offering any particulars or specific reasons which raise a legitimate concern that the Accused would appear for trial following the winter recess. Furthermore, the Trial Chamber fails to identify any basis or examples to support its observations that the Accused might not return for trial.

13. In paragraph 16-18 of the Decision, the Trial Chamber abused its discretion when considering the question of "disruption of the proceedings". The Accused are entitled to a fair and expeditious trial. It is submitted that given the age, health, amount of time spent in pre-trial detention by the Accused and intensity of the trial to date, and the extended trial days scheduled for January and February, it is appropriate that they be permitted a relatively short period of time away from the UNDU to rest and recuperate. The fact that this trial is proceeding at a much faster rate than the other multi-accused cases at the tribunal requires that the Trial Chamber must use their discretion in a

¹³ See, *supra*, paragraph 7.

compassionate and reasonable manner to provide the accused an opportunity for a break. It is submitted that the nature of the UNDU means that is not a place where any proper respite or recuperation can occur. The accused have a right to receive a fair and expeditious trial, however without the opportunity for the Accused to rest there is the danger that their physical *or* mental health may deteriorate. This is a real and considerable risk in trials of this nature.

14. In paragraph 16-18 of the Decision, the Trial Chamber abused its discretion when considering the question of “disruption of the proceedings”. The Trial Chamber fails to identify any specific factors which warrant the conclusion that provisional release should be denied. This amounts to an abuse of process because the Trial Chamber “*must focus on the concrete situation of the individual applicant, and consequently the provision must not be applied in abstracto, but with regard to the factual basis of the particular case.*”¹⁴

15. Decisions on motions for provisional release are fact intensive and cases must be considered on an individual basis in light of the particular circumstances of the individual accused.”¹⁵

REQUESTED RELIEF

Based on the foregoing, pursuant to Rule 65(D) and Rule 116 bis, the Accused jointly request that the Appeal Chamber grant their appeal against the Decision and order that the Accused be provisionally released under the terms and conditions requested in the Motion, namely: that they be granted temporary provisional release 16 December 2006 to 15 January 2007.

Word count: 1,720

¹⁴ The Prosecutor v. Hadzihasanovic et al., Case No. IT-01-47-PT, “Decision Granting Provisional Release to Amir Kubura”, 19 December 2001, para. 7.

¹⁵ Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Johan Tarculovski’s Motion for Provisional Release, 4 October 2005, para. 7; *see also* Sainovic & Odjanic Decision, para. 7; Prosecutor v. Mrksic, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, para. 9.

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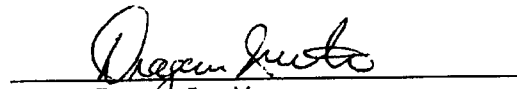
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