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-97-25/1-AR65.1

Date: 7 October 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Wolfgang Schomburg
Judge Andrésia Vaz

Registrar: **Mr. Hans Holthuis**

Decision of: **7 October 2005**

THE PROSECUTOR

v.

MITAR RAŠEVIĆ
SAVO TODOVIĆ

DECISION ON INTERLOCUTORY APPEAL FROM TRIAL CHAMBER DECISION DENYING SAVO TODOVIĆ'S APPLICATION FOR PROVISIONAL RELEASE

Office of the Prosecutor
Ms. Hildegard Uertz-Retzlaff
Ms. Christina Moeller

Counsel for the Accused:
Mr. Vladimir Domazet for Mitar Rašević
Mr. Aleksandar Lažarević for Savo Todović

Introduction

1. On 22 July 2005, Trial Chamber II 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 ("the Tribunal") denied Savo Todović's application for provisional release[1] on the grounds that the Chamber was not satisfied that Todović would appear for trial.[2] Todović filed a timely application for leave to appeal the Impugned Decision,[3] and the Prosecution filed a response opposing the application for leave to appeal.[4] Following a subsequent amendment to the Rules of Procedure and Evidence, which granted leave as of right to appeal Trial Chamber decisions on applications for provisional release,[5] the President of the Tribunal assigned a bench of the Appeals Chamber to hear Todović's appeal.[6]

2. According to the Appellant, the Trial Chamber committed numerous errors in the course of determining that it was not satisfied he would appear for trial. In the Appeals Chamber's view, however, nothing he finds fault with in the Impugned Decision amounts to error or an abuse of discretion. The Appeals Chamber therefore defers to the Trial Chamber's consideration of the factors on which it based its decision to deny the Application for Provisional Release.[7]

Analysis

3. A Trial Chamber may grant provisional release only "if it is satisfied that," among other things, "the accused will appear for trial."[8] In deciding whether the accused will appear, the Trial Chamber must consider "all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before reaching a decision."[9] Following the guidance offered by the Appeals Chamber in *Prosecutor v. Nikola Šainović, Dragoljub Ojdanić*,[10] the Trial Chamber here, in evaluating the likelihood the Appellant would appear, considered the gravity of

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[1] Defence Application for Provisional Release of the Accused Savo Todovic with Annexes I to IV, 29 June 2005 ("Defense Application" "Application" or "Application for Provisional Release").
[2] Decision on Savo Todović's Application for Provisional Release, 22 July 2005 ("Impugned Decision").
[3] Defence Application for Leave to Appeal Against the Trial Chamber's Decision on Savo Todović's Application for Provisional Release, 29 July 2005.
[4] Prosecution's Response to "Defence Application for Leave to Appeal Against the Trial Chamber's Decision on Savo Todović's Application for Provisional Release," 4 August 2005.
[5] Rule 65 of the Rules of Procedure and Evidence of the Tribunal, IT/32/Rev.36, 8 August 2005 ("Rules").
[6] Order Assigning Judges to a Case before the Appeals Chamber, 15 August 2005.
[7] *Prosecutor v. Jovica Stanišić*, Case No. IT-03-69-AR65.1, Decision on Prosecution's Appeal Against Decision Granting Provisional Release, 3 December 2004, para. 14 (noting discretion of Trial Chamber in considering a relevant factor); *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 5 (noting deference accorded Trial Chambers when they exercise their discretion).
[8] Rule 65(B) of the Rules.
[9] *Prosecutor v. Nikola Šainović, Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 ("*Šainović & Ojdanić*"), para. 6.
[10] *Ibid.*

the charges against him,[11] circumstances surrounding his surrender,[12] guarantees offered by the Government of Serbia and Montenegro,[13] his own personal guarantees,[14] and the extent of his cooperation with the Prosecution.[15] The Trial Chamber also considered the fact that the Tribunal's Referral Bench had referred the Appellant's case for trial in Bosnia and Herzegovina.[16]

1. Seriousness of the Charges Against the Appellant

4. Considering the gravity of the charges faced by the Appellant, the Trial Chamber noted that they included several counts of violations of the laws or customs of war, as well as several counts of crimes against humanity.[17] The Trial Chamber also observed that "[i]f convicted . . . the Accused is likely to face a relatively significant term of imprisonment."[18] The Appellant now argues that "[t]he Trial Chamber erred . . . in relying on the fact that, if convicted of the serious charges against him, the Appellant is likely to face a relatively significant term of imprisonment and that he will, therefore, have a strong incentive to flee if released."[19] He elaborates that, in his opinion, this conclusion contradicts the Trial Chamber's acknowledgment that the gravity of the charges "alone cannot determine the outcome of the Motion."[20] According to the Appellant, the Trial Chamber's decision also "appears to be in direct conflict with the Appeals Chamber Decision in the Prlic *et al.* Case."[21] Putting his arguments a slightly different way, the Appellant adds that "the Trial Chamber gave undue weight to the seriousness of the charges and the possible severity of the sentence."[22] The Prosecution responds that in *Prlić*, a Bench of the Appeals Chamber found it reasonable to grant release, notwithstanding the seriousness of the charges, because other considerations strongly suggested that the applicant would appear for trial.[23] In this case by

[11] Impugned Decision, paras 12-15.
[12] *Ibid.* paras. 16-22.
[13] *Ibid.* paras. 28-33.
[14] *Ibid.* paras. 34-36.
[15] *Ibid.* para. 37.
[16] *Ibid.* paras. 23-27. *See* also Case No. IT-97-25/1-PT, Decision on Referral of Case Under Rule 11*bis* with Confidential Annexes I and II ("Referral Decision"), 8 July 2005, para. 113 (referring the Appellant's case to Bosnia and Herzegovina). The Appellant has appealed this decision. *See Prosecutor v. Mitar Rašević, Savo Todović*, Case No. IT-97-25/1-AR11*bis*.1, Appellant's Brief, 9 August 2005 ("Rule 11*bis* Appeal").
[17] Impugned Decision, para. 14.
[18] *Ibid.* para. 15.
[19] Defence Interlocutory Appeal Against the Trial Chamber's Decision on Savo Todovic's Application for Provisional Release, with Annex Attached, 22 August 2005 ("Defense Appeal"), para. 16.
[20] Defense Appeal, para. 16 (quoting Impugned Decision, para. 15).
[21] *Ibid.* (citing *Prosecutor v. Jadranko Prlić et al.*, Case Nos. IT-04-74-AR65.1, IT-04-74-AR65.2, IT-04-74-AR65.3, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal 8 September 2004 ("*Prlić*"), paras. 30-31).
[22] *Ibid.* para. 22.
[23] Prosecution's Response to "Defence Interlocutory Appeal Against the Trial Chamber's Decision on Savo Todović's Application for Provisional Release, with Annex Attached," 29 August 2005 ("Prosecution Response"), paras. 32-34.

contrast, the Prosecution argues, the serious charges combine with the possibility of Rule 11*bis* referral to create a significant risk that the Appellant will abscond.[24]

5. The Appeals Chamber sees no error in the manner that the Trial Chamber considered the charges faced by the Appellant. Certainly, "the seriousness of the charges faced by an accused cannot be the sole factor determining the outcome of an application for provisional release."[25] Yet contrary to what the Appellant asserts, the Trial Chamber not only acknowledged this point, but went on to evaluate other considerations, explaining why they supported the proposition that the Appellant might not appear, or why they offered little support for the proposition that the Appellant would appear.[26] The Trial Chamber did not conclude that the gravity of the charges faced by the Appellant, on their own, necessarily required denial of provisional release.

6. Precisely because the Trial Chamber considered the charges faced by the Appellant in the context of other circumstances particular to his case, the Impugned Decision is consistent with *Prlić*. That decision upheld the Trial Chamber's conclusion that, while the applicants faced serious charges carrying long prison terms, other evidence – "including evidence of voluntary surrender, assurances by the Croatian government, and undertakings of the accused" – provided sufficient reason to believe the applicants would appear for trial.[27] Consistency with *Prlić* requires, not that the Trial Chamber assign little or no weight to the charges faced by the accused, but only that the Trial Chamber examine other considerations as well. The Trial Chamber retains discretion in deciding how much weight to place on the seriousness of the charges faced by an accused.[28]

7. Contrary to the Appellant's contention, moreover, the Appeals Chamber can see no reason why the weight given by the Trial Chamber to the charges faced by the Appellant would constitute an abuse of discretion. In light of both the Appellant's stated concerns about being incarcerated in Bosnia and Herzegovina[29] – which will be discussed in more detail below – and the absence of considerations suggesting that the Appellant would appear for trial, the weight attached by the Trial Chamber to this factor was reasonable.

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[24] *Ibid.* para. 35-36.
[25] *Prosecutor v. Ivan Čermak and Mladan Markač*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004 ("*Čermak and Markač*"), para. 26.
[26] Impugned Decision, paras. 16-37.
[27] *Prlić*, paras. 30-31.
[28] *See Prosecutor v. Vinko Pandurević*, 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 ("*Pandurević*"), para. 5 (reviewing for abuse of discretion the Trial Chamber's weighting of the seriousness of the charges faces by the accused).
[29] *See* Impugned Decision, para. 26 (citing concerns expressed in Savo Todović's Defense Response to Prosecution's 11*bis* Motion and Defense's Submission of Further Information in Accordance with the Referral Branch's Decision of 14 April 2005 and in the Context of the Prosecutor's Motion Under Rule 11*bis*, 28 April 2005, paras. 94-96).

2. Circumstances of Surrender

8. Considering the Appellant's surrender, the Trial Chamber concluded that the relevant "circumstances indicate that while the Accused surrendered himself to authorities, he did not do so *solely* of his own volition, but was able to be persuaded to do so."[30] The Trial Chamber also observed that, as the Appellant did not surrender for over three years after the indictment against him was made public, he "ha[d] demonstrated an ability to successfully" remain at large for long periods of time.[31] In light of these considerations, the Trial Chamber decided to place "little weight" on the fact that the Appellant surrendered. Here, the Appellant asserts that he "did surrender voluntarily" and as "a result of his own free will."[32] He adds that "the Trial Chamber erred in holding that the . . . circumstances [surrounding his surrender] were of little weight and that the Appellant had demonstrated an ability" to remain at large for long periods of time.[33] The Appellant also argues that his "acknowledgment about the late surrender," as well as "the exhaustive contents of his Personal Guarantee and his preparedness to expand it" show that he experienced an "unequivocal change," and that therefore his time at large should not be taken to negate the probative value of his surrender.[34]

9. According to the Prosecution, "the Accused merely reiterates his position that he 'did surrender voluntarily.'"[35] The Prosecution also asserts that the Appellant fails "to undermine the Trial Chamber's reasoned conclusion" that the accused has proven his ability to remain at large for significant periods of time.[36] The Appeals Chamber agrees. The Appellant's assertion that he "did surrender voluntarily" does nothing to undermine the Trial Chamber's more nuanced conclusion about his surrender – namely, that while the Appellant turned himself in, government authorities persuaded him to do so. The Appeals Chamber recalls, moreover, that where an applicant delays surrender after learning of the indictment against him, it may be reasonable for the Trial Chamber to express doubts about whether that applicant's eventual surrender should be accorded significant weight.[37] Here, the Trial Chamber did not err in concluding that, as the Appellant failed to surrender for over three years and one month, the circumstances surrounding his surrender provide little assurance that he will return for trial. The Trial Chamber also did not err when it failed to

[30] Impugned Decision, para. 17 (emphasis in original).
[31] *Ibid.* para. 22.
[32] Defense Appeal, para. 18.
[33] *Ibid.* para. 23.
[34] *Ibid.* para. 20.
[35] Prosecution Response, para. 19 (quoting Defense Appeal, para. 18).
[36] *Ibid.*

conclude that the Appellant had demonstrated a change in outlook that would permit that Chamber to overlook his previous flight. The Appellant provided the Trial Chamber with no facts it had to take as evidence of a changed outlook – acknowledgement of his past flight certainly need not be treated as evidence that the Appellant's attitude toward flight has changed, and the Trial Chamber could reasonably discount the value of the Appellant's personal guarantee, as will be explained in more detail below. Further, even if the Appellant had offered significant evidence of a change in outlook, the Trial Chamber could reasonably have concluded that the evidence would not lessen concerns raised by a proven ability to remain at large and the fact that he chose to remain at large when actually presented with the opportunity to do so.

3. Government Guarantees

10. In support of his Application, the Appellant obtained guarantees from the Government of Serbia and Montenegro, the country to which he seeks to be released. Noting the possibility of Rule 11*bis* referral to Bosnia and Herzegovina, the Trial Chamber discounted the value of the government guarantees, as they spoke only of delivering the Appellant into the custody of the Tribunal, and delivering him for trial before the Tribunal. Viewed in the context of the "current level of cooperation" offered to the Tribunal by the Government of Serbia and Montenegro, the Trial Chamber concluded, these guarantees were not "sufficient to demonstrate that Serbia and Montenegro would be likely to promptly arrest and transfer [the Appellant] to face trial in Bosnia and Herzegovina, or for that purpose."[38]

11. According to the Appellant, "[t]he Trial Chamber erred in holding that the lack of explicit acceptance in the Governmental Guarantees of a preparedness or commitment to transfer the Appellant to a State to which his case may be referred . . . was a significant omission."[39] The Appellant points out that the government guarantee "contain[s] an undertaking to comply with *all* orders of the Trial Chamber, and in particular an order for transfer of the Accused back to the Tribunal."[40] This suffices, the Appellant asserts, in part because, as he interprets the Rules, the Tribunal – not the Government of Serbia and Montenegro – would deliver him to Bosnia and Herzegovina if his case gets referred.[41] The Appellant also argues that, before finding the government guarantees deficient, the Trial Chamber should have accepted his offer – made in the

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[37] *Prosecutor v. Milan Milutinović*, Case No. IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003 ("*Milutinović*"), para. 6.
[38] Impugned Decision, para. 32.
[39] Defense Appeal, para. 34.
[40] *Ibid.* para. 35 (emphasis in original).
[41] *Ibid.* para. 36.

Reply[42] – to request a more comprehensive government guarantee.[43] Putting his arguments in a slightly different manner, the Appellant adds simply that it was also erroneous to "conclud[e] that the Governmental Guarantees are not entitled to any significant weight in the particular circumstances of this case."[44] The Prosecution responds that "the Government Guarantees contain explicit references to the Accused appearing *before the Tribunal*,"[45] and that the Appellant fails to explain why this language should have been interpreted as a commitment to hand him over to another government.[46] According to the Prosecution, it is unclear whether the Government of Serbia and Montenegro has even committed to transferring the Appellant to the Tribunal if he will subsequently be delivered into the custody of Bosnia and Herzegovina.[47]

12. The Trial Chamber did not err in concluding that the wording of the government guarantees greatly diminished their value. As that Chamber noted, in circumstances where the possibility of referral was both significant and evident, the Government of Serbia and Montenegro wrote that it guaranteed the Appellant's "surrender back to the Tribunal," and that it would "respect all Trial Chamber[] orders so that the named could at any time and upon the Tribunal's order, appear before the International Criminal Tribunal."[48] It was not unreasonable to conclude that this language leaves unclear whether the Government would re-arrest the Appellant if he is to be tried in Bosnia and Herzegovina. Given the reasonableness of this conclusion, the Trial Chamber did not abuse its discretion in according little weight to the government guarantees.

13. The Appeals Chamber notes, moreover, that the Appellant demonstrated no special circumstances that would justify supplementing the government guarantees. Accordingly, the Appeals Chamber finds that the Trial Chamber committed no error in declining to let the Appellant seek a new government guarantee. The Appellant knew before filing his Application that the Referral Bench was considering whether to refer his case to Bosnia and Herzegovina.[49] He therefore should have been aware that the Trial Chamber might find a narrowly worded guarantee

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[42] *See* Savo Todović's Defence Application for Leave to Reply and the Defense Reply to Confidential 'Prosecution's Response to 'Confidential Defense Application for Provisional Release of the Accused Savo Todović with Annexes I to IV' with Annex A and Confidential Annex B,' 15 July 2005 ("Defense Reply" or "the Reply"), para. 25.
[43] Defense Appeal, para.34.
[44] *Ibid.*
[45] Prosecution Response, para. 22 (emphasis in original).
[46] *Ibid.* para. 23.
[47] *Ibid.*
[48] Defense Application, annex III. In Savo Todović's Defence Response to Prosecution's 11*bis* Motion and Defense Submission of Further Information in Accordance with the Referral Bench's Decision of 14 April 2005 and in the Context of the Prosecutor's Motion Under Rule 11*bis*, Case No. IT-97-25/1-PT28 April 2005, the Appellant acknowledges receiving a copy of the Prosecution's Rule 11*bis* Motion on 5 April 2005. *See* para. 6. Though the guarantee in Annex III of the Defense Application is undated, it refers to events occurring on 25 April 2005, and hence must have been written later.

– like the one he submitted – insufficient, and should have sought a stronger guarantee before submitting his Application.

4. Personal Guarantees

14. The Appellant also submitted a personal guarantee in support of his Application for Provisional Release. The Trial Chamber found that this guarantee was "not entitled to significant weight," as it suffered from problems similar to those of the government guarantees – i.e., the Appellant phrased the discussion of his willingness to surrender in a way that indicated he referred only surrender for trial at the International Tribunal.[50] The Trial Chamber noted in particular that the Appellant agreed to be "detained pending my return to the United Nations Detention Unit," to "return to the United Nations Detention Unit," and to comply "with any order of the Trial Chamber varying the terms and conditions of or terminating my provisional release."[51] According to the Trial Chamber, this phrasing was especially problematic given that a decision on referral was imminent when the Appellant made the guarantee, and given "the observations made on behalf of [the Appellant] during the 11*bis* proceedings."[52] Noting that the Appellant had offered in his Application and Reply to make stronger guarantees in the event his original guarantee was deemed insufficient, the Trial Chamber concluded that this offer did "not change [its] assessment" of the Appellant's willingness to comply with a guarantee if compliance would result in his transfer to Bosnia and Herzegovina.[53]

15. The Appellant asserts that "[t]he Trial Chamber erred in finding that [his] Personal Guarantee was not entitled to significant weight, as it did not contain an explicit commitment by the Appellant to return into custody for transfer to the authorities of BiH."[54] He adds that in his submissions to the Trial Chamber, he promised he would "expand his assurances" so that they would commit him to appear for "any other proceedings," adhere to "any other and further terms and conditions" for release, and "comply with any and all terms and conditions" imposed by the Trial Chamber.[55] These statements, he explains, "must be understood to include [his] willingness" to surrender for trial in Bosnia and Herzegovina.[56] He asserts that the Trial Chamber therefore

[49] *Compare* Defense Application, 29 June 2005 (seeking provisional release of the Appellant) *and* Savo Todović's Defense Supplemental Submission in the Context of the Prosecutor's Motion Under Rule 11*bis*, with Annexes I to III, 28 June 2005.
[50] Impugned Decision, paras. 34-36 (discussing Defense Application, Annex I).
[51] *Ibid.* para. 34 (quoting Defense Application, Annex I).
[52] *Ibid.* para. 36.
[53] *Ibid.*
[54] Defense Appeal, para. 38.
[55] *Ibid.* para. 39 (quoting Defense Application, para. 8; Defense Reply, para. 17).
[56] *Ibid.* para. 40.

erred when it concluded that these statements did not change its assessment of his guarantees.[57] Along with his Appeal, the Appellant submitted a new personal guarantee, in which he agreed to surrender for transfer to either the United Nations Detention Unit or Bosnia and Herzegovina.[58] According to the Appellant, the new guarantee "shows that he . . . is prepared to comply with any and all Tribunal[] orders."[59]

16. The Prosecution responds that the Appellant knew about the likelihood of referral when he applied for provisional release, yet failed to guarantee he would surrender for trial in Bosnia and Herzegovina. Consequently, the Prosecution asserts, it was reasonable for the Trial Chamber to give little weight to the guarantee.[60]

17. The Trial Chamber did not abuse its discretion in concluding that the Appellant's personal guarantee "is not entitled to significant weight." As the Trial Chamber noted, the Appellant made and submitted his personal guarantee when the decision of the Referral Bench was imminent.[61] It was not unreasonable for the Trial Chamber to infer that, under these circumstances, the Appellant's failure to guarantee his surrender for trial in Bosnia and Herzegovina called into question whether he would surrender if the referral decision was upheld. The Trial Chamber did not err in concluding that the Appellant's offer to expand upon his guarantees did "not change [its] assessment." Given the phrasing of his first guarantee and the context in which it was offered, the Trial Chamber could reasonably conclude that the Appellant might not take any new commitment to surrender seriously in the event he faces trial in Bosnia and Herzegovina. The Appeals Chamber will not consider the new personal guarantee submitted with this Appeal. Such a guarantee constitutes additional evidence which – as Rule 115 applies *mutatis mutandis* to Rule 65 appeals – an appellant may only offer through a Rule 115 motion,[62] and the Appellant here has failed to move for admission of his new guarantee pursuant to Rule 115.

5. Rule 11*bis* Referral Proceedings

18. According to the Trial Chamber, the decision to refer the Appellant's case to Bosnia and Herzegovina – a decision that has been appealed[63] – "significantly increased [the] risk that [he] will not appear for trial."[64] The Trial Chamber explained that even a pending referral motion may

[57] *Ibid.* para. 38.
[58] Defense Appeal, annex.
[59] *Ibid.* para. 41.
[60] Prosecution Response, paras. 27-28.
[61] *See* Defense Application, annex I (guarantee dated 20 June 2005); Defense Application, p.11 (noting that Application was signed on 29 June 2005); Referral Decision (dated 8 July 2005).
[62] *Pandurević*, para. 15.
[63] *See* Rule 11*bis* Appeal.
[64] Impugned Decision, para. 27.

aggravate the risk an accused will abscond.[65] That Chamber also noted that in the Rule 11*bis* referral proceedings, the Appellant expressed "serious concerns" about being incarcerated in Bosnia and Herzegovina.[66]

19. The Appellant asserts that the Trial Chamber committed several errors in examining the effect of the referral proceedings. He points out that "Rule 65 does not contain any provision that would *ipso facto* prevent provisional release in circumstances where an accused's case is pending for referral,"[67] suggesting he is of the view that the Trial Chamber may have improperly presumed the pending referral proceedings necessarily precluded provisional release. The Appellant also argues that "the Trial Chamber erred in considering only the Defence submissions made in the [Application for Provisional Release] and the Rule 11*bis* proceedings and not the ones made in the Reply," which state, in essence, that he will respect the Trial Chamber's orders.[68] Moreover, the Appellant claims "that the fact [that he] exercised his right not to agree with referral . . . cannot and should not be held against him."[69]

20. In response, the Prosecution reiterates the Trial Chamber's assertion that pending referral proceedings may aggravate the risk an accused will flee.[70] The Prosecution also argues that the Trial Chamber never penalized the Appellant for objecting to referral. Instead, the Prosecution asserts, the Trial Chamber simply considered the Appellant's stated fear of incarceration in Bosnia and Herzegovina.[71]

21. The Appeals Chamber sees no error in the Trial Chamber's decision to treat the pending referral proceedings as a factor increasing the risk that the Appellant will flee. In the past, the Appeals Chamber has found it reasonable for a Trial Chamber to determine that a request for referral "might increase the risk that [the accused] would not appear for trial if released."[72] Given that in this case the Appellant has stated he has "rather serious concerns" about incarceration in Bosnia and Herzegovina, the Trial Chamber could reasonably conclude that the Referral Bench's decision increased the risk that he would not appear.

22. While the Appellant is right to note that no rule bars provisional release while referral proceedings are pending, the Trial Chamber did not deny his Application just because the Prosecution has sought referral. Instead, the Trial Chamber examined the specific circumstances of

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[65] *Ibid.* para. 25.
[66] *Ibid.* para. 26.
[67] Defense Appeal, para. 32.
[68] *Ibid.* paras. 27-29 (citing Defense Reply, paras. 16-17).
[69] *Ibid.* para. 30.
[70] Prosecution Response, para. 35.
[71] *Ibid.* para. 38.

his case and concluded that, in light of those circumstances, the possibility of referral increased the likelihood that he would flee.[73]

23. Contrary to the Appellant's assertion, moreover, the Trial Chamber did not unreasonably burden his right to oppose referral. As the Prosecution points out, the Trial Chamber did not consider the fact that the Appellant opposed the referral motion. Instead, it considered the fact that, while opposing referral, the Appellant stated that he had "rather serious concerns" about how he would fare in prison in Bosnia and Herzegovina.[74]

24. The Appeals Chamber is likewise unconvinced by the Appellant's submission that the Trial Chamber should have considered, along with the abovementioned statement about incarceration in Bosnia and Herzegovina, the Reply's promises to respect Trial Chamber orders. Though the section of the Impugned Decision examining the import of the Rule 11bis proceedings does not expressly consider the submissions in the Reply, the Trial Chamber considered these submissions when assessing the value of the Appellant's personal guarantees, finding that the statements did not resolve its concerns about the guarantees' failure to contemplate surrender in the event of Rule 11*bis* referral.[75] Thus, the Trial Chamber did in fact examine the issue the Appellant thinks it needed to consider: whether the Reply's expressions of commitment to surrender are strong enough and trustworthy enough to assuage concerns raised by indicia that he might not surrender in the event of referral.

6. Host Country Letter

25. Rule 65(B) provides that "Release may be ordered by a Trial Chamber only after giving the host country" – i.e., The Netherlands – "the opportunity to be heard." The Trial Chamber noted that the Government of The Netherlands had been informed of the Application for Provisional Release, that The Netherlands had adequate time to file a submission, and that it had not done so.[76] Here, the Appellant notes that after the Trial Chamber denied provisional release, The Netherlands submitted a letter stating that it had no objections to his Application.[77]

26. The Trial Chamber did not err in denying provisional release before ascertaining the opinion of the Government of The Netherlands. Rule 65(B) provides that the host country must have the opportunity to be heard before the Trial Chamber *grants* provisional release. Hence, the

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[72] *See Mrkšić, Radić & Šljivančanin*, p. 5.
[73] Impugned Decision, paras. 25-27.
[74] *Ibid.* para. 26.
[75] *Ibid.* para. 36.
[76] *Ibid.* para. 10.
[77] Defense Appeal, para. 15.

Trial Chamber may *deny* provisional release without consulting the Government of The Netherlands. Indeed, if an applicant has not satisfied the Trial Chamber that he would appear for trial, the position of the Government of the Netherlands cannot affect the outcome of his application.[78]

7. Lack of Oral Hearing

27. The Trial Chamber denied the Application for Provisional Release without holding an oral hearing. According to the Appellant, the Trial Chamber abused its discretion in doing so. He elaborates that "the Trial Chamber's position from the Impugned Decision regarding guarantees and the risk of flight" shows "that in this case a need did exist for an oral hearing."[79] Moreover, he asserts that by failing to hold a hearing, the Trial Chamber denied the Government of Serbia and Montenegro its right to be heard.[80] He adds that in his view, the conclusion that the government and personal guarantees suffer from shortcomings contradicts the Trial Chamber's assertion that the parties in this case made "full submissions."[81]

28. The Prosecution responds that there is no "indication in Rule 65(B) that the 'opportunity to be heard' necessarily means an opportunity to be heard *orally*."[82] According to the Prosecution, the Government of Serbia and Montenegro had ample opportunity to submit guarantees in writing, and need not have been afforded an opportunity to elaborate orally upon the meaning of those guarantees.[83] Similarly, the Prosecution contends that, as the Appellant had the opportunity to submit a personal guarantee, and was fully aware of the pending Rule 11*bis* proceedings when he made out that guarantee, the Trial Chamber had no obligation to let him expand his guarantee through comments at an oral hearing.[84]

29. The Appeals Chamber agrees that the Trial Chamber did not abuse its discretion by denying the Application without holding an oral hearing. Rule 65(B) provides that the State to which an accused seeks to be released must have an opportunity to be heard before the Trial Chamber *grants* his application.[85] This rule does not provide that this State must have the opportunity to be heard before the Trial Chamber *denies* provisional release. Hence here, where the Trial Chamber denied provisional release, the Government of Serbia and Montenegro had no

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[78] *See* Rule 65(B) of the Rules (noting that a Trial Chamber may order release "only if it is satisfied that the accused will appear for trial").
[79] Defense Appeal, para. 12.
[80] *Ibid.* para. 13.
[81] *Ibid.* para. 10 (quoting Impugned Decision, para. 3).
[82] Prosecution Response, para. 9 (emphasis in original).
[83] *Ibid.* para. 10.
[84] *Ibid.* para. 12-13.
[85] *See* Rule 65(B) of the Rules of Procedure and Evidence of the Tribunal, IT/32/Rev.36, 8 August 2005.

right to be heard at all, let alone a right to be heard *orally*. Similarly, nothing in Rule 65 – or in any other rule – requires a Trial Chamber to hear oral argument from an applicant before denying provisional release,[86] and indeed, no rule requires the Trial Chamber to hold a hearing before deciding that government or personal guarantees offered by the applicant merit little weight, even if the applicant has requested a hearing and seeks to supplement these guarantees with oral assurances. Instead, the Appeals Chamber has explained, "[t]he granting of an oral hearing is a matter for the discretion of a Chamber, and it may legitimately be regarded as unnecessary when . . . the information before the Trial Chamber is sufficient to enable the Chamber to reach an informed decision."[87] In this case, where the Appellant submitted two briefs, personal guarantees, and government guarantees with full knowledge of the pending Rule 11*bis* proceedings, and where the Trial Chamber explicitly considered his offer to make more expansive personal assurances at an oral hearing, the Trial Chamber did not abuse its discretion by deciding the Application on the parties' written submissions, notwithstanding the Appellant's request for a hearing.

30. Unlike the Appellant, the Appeals Chamber sees no inconsistency between the Trial Chamber's conclusion that the government and personal guarantees suffer from shortcomings and its assertion "that the parties in this case made full submissions." In this assertion, the Trial Chamber indicated only that the parties filed those submissions permitted by the Rules. The assertion expresses no opinion on the merits of the arguments contained in those submissions or on the value of the guarantees submitted with them – guarantees the Trial Chamber examined and found lacking elsewhere in its decision.

Disposition

31. On the basis of the foregoing the Appeals Chamber is not satisfied that the Appellant has shown the Trial Chamber erred in denying his Application for Provisional Release. The Appeal is **DISMISSED**.

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

Done this 7th day of October 2005,
At The Hague
The Netherlands

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[86] *See Prosecutor v. Nikola Šainović, Dragoljub Ojdanić*, Case No. IT-99-37-AR65.2, Decision Refusing Ojdanić Leave to Appeal, 27 June 2003, p. 4 (noting that "the right of an accused to be heard is not similar to what the accused regards as the right to be heard personally").

[87] *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para. 17; *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-AR65.2, Decision on Haradin Bala's Request for Provisional Release, 31 October 2003, para. 33; *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-AR65.3, Decision on Isak Musliu's Request for Provisional Release, 31 October 2003, para. 17.

Judge Meron
Presiding Judge

[Seal of the Tribunal]