

# Peter Robinson.com: Motion re Provisional Release - ICTY:

THE INTERNATIONAL CRIMINAL TRIBUNAL

FOR THE FORMER YUGOSLAVIA

CASE No. IT-99-37-

AR65

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding

Judge David Hunt

Judge Fausto Pocar

Judge Mehmet Guney

Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Date Filed: 2 August 2002

THE PROSECUTOR

v.

NIKOLA SAINOVIC  
DRAGOLJUB OJDANIC

GENERAL DRAGOLJUB OJDANIC'S  
BRIEF ON APPEAL

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The Office of the Prosecutor:

Ms. Carla Del Ponte

Mr. Geoffrey Nice

Defence Counsel:

Mr. Tomislav Visnjic

Mr. Vojislav Selezan

Mr. Peter Robinson

Counsel for Co-Accused:

Mr. Toma Fila

Mr. Zoran Jovanovic

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## INTRODUCTION

This is an appeal by the Prosecutor from the decision of a Trial Chamber granting provisional release. The Trial Chamber's well-reasoned decision was arrived at after full briefing, and a hearing at which it had the opportunity to observe the accused, and hear the oral argument of the parties and the representative of the Federal Republic of Yugoslavia ("FRY") and the Republic of Serbia.

The Appeals Chamber has never overturned any of the fourteen decisions of Trial Chambers concerning provisional release, save for a decision involving an incorrect assessment of the status of the Republika Srpska as a legal entity.<sup>[1]</sup> This is undoubtedly because decisions on provisional release turn on the particular circumstances of each individual case.<sup>[2]</sup> They present the Trial Chamber with the task to "weigh up and balance the factors presented to it in that case before reaching a decision."<sup>[3]</sup>

As demonstrated below, the Prosecutor has failed to meet her heavy burden on appeal of demonstrating (1) a miscarriage of justice resulting from an error of fact; and (2) that the Trial Chamber acted outside its discretionary framework. The Trial Chamber's decision was in fact a correct one in the particular circumstances of this case.

## PROCEEDINGS IN THE TRIAL CHAMBER

### **The Application**

On 10 June 2002, General Dragoljub Ojdanic filed a Motion for Provisional Release pursuant to Rule 65(B). That Rule provides that:

“Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and if released, will not pose a danger to any victim, witness, or other person.”

In his application, General Ojdanic pointed to the fact that he had voluntarily surrendered to the Tribunal on 25 April 2002, immediately after the passage of the Law on Co-operation. He surrendered directly to the Tribunal, waiving the protections of the extradition procedure contained in the new law.<sup>[4]</sup>

General Ojdanic was the first to surrender under the new law, and his actions were described as “courageous” by the United States State Department.<sup>[5]</sup> General Ojdanic’s actions set a precedent for cooperation which was followed by five others.

General Ojdanic provided his personal guarantee with his application for provisional release.<sup>[6]</sup> In that guarantee, he promised to return for trial and obey all conditions of provisional

release. He also stated that he had resided in Belgrade since his indictment in 1999 and made no effort to conceal his whereabouts.

General Ojdanic provided copies of letters he had sent to FRY authorities indicating his willingness to answer any charges that may be brought against him for his conduct which was the subject of the Tribunal's indictment. He also indicated that he had met with United States Ambassador Pierre-Richard Prosper in Belgrade and reaffirmed his commitment to follow the law of his country with respect to extradition. When that law was changed to require extradition, he promptly made arrangements to come to The Hague voluntarily.

General Ojdanic concluded:

“I am committed to defending myself before this Tribunal, with the assistance of my lawyers, and believe that when the facts are known I will be exonerated. I have every incentive to return to The Hague for my trial to clear my name and restore my honor.”<sup>[7]</sup>

General Ojdanic's personal guarantee was backed by letters from the current Chief of Staff of the Yugoslav Army, the former Chief of Staff of the Army of the Republic of Macedonia, and the former Commander of the Yugoslav Air Force.<sup>[8]</sup> Each of these men, who have known General Ojdanic for more than twenty years, earnestly attested to his honor and their abiding conviction that he would return for trial and obey all of the conditions of his release.

In addition to his personal guarantee, General Ojdanic also had the guarantees of the governments of the FRY and Republic of Serbia.<sup>[9]</sup> Those governments guaranteed to “arrest the accused immediately if he tries to escape or violates any other condition of his provisional release,” as well as to supervise his transportation and reporting requirements. The guarantee was signed by the Prime Ministers of the FRY and Republic of Serbia after being enacted by the respective Parliaments.

General Ojdanic’s application also indicated that there was likely to be a lengthy period of time before his trial could commence. In his application, he pointed out that the expected surrender of the co-accused Milutinovic, the judicial economy in awaiting conclusion of the Milosevic trial, and the document-intensive nature of the necessary disclosures would result in a “very lengthy” period of detention if provisional release was not granted.<sup>[10]</sup>

General Ojdanic’s application also addressed other factors, including the potential sentence he faces if found guilty:

“While General Ojdanic occupied the highest position in the Army of the Federal Republic of Yugoslavia during the war in Kosovo, and has reason to expect a lengthy sentence if found guilty, these facts were known to him when he voluntarily surrendered. If they were such as to make him flee, he would have done so before surrendering.”<sup>[11]</sup>

Finally, General Ojdanic indicated that he was prepared to cooperate with both the Prosecutor and Trial Chamber in promoting a fair and efficient trial, and noted that he had already begun doing so.

### **The Response**

The Prosecutor filed a written response objecting to provisional release. She contended that little weight should be given to the guarantees of the FRY and Republic of Serbia because of their failure to arrest the co-accused President Milan Milutinovic of Serbia.<sup>[12]</sup> She also contended that the voluntary surrender of General Ojdanic should be given little weight, coming almost three years after his indictment.<sup>[13]</sup>

The Prosecutor did not dispute the likelihood of a lengthy period before the trial could commence, saying only that:

“The probable length of pretrial detention faced by the accused Ojdanic should not weigh heavily in the Trial Chamber’s decision.”<sup>[14]</sup>

Significantly, the Prosecutor’s response made no mention of the “more onerous” burden of proof for provisional release applications now urged on appeal<sup>[15]</sup>

### **The Hearing**

The Trial Chamber conducted an oral hearing on the motions on 24 June 2002. It heard from counsel for the accused, the Prosecutor, and the representative of the FRY. At the

hearing, Judge Robinson asked counsel for General Ojdanic to estimate the time needed before the trial of the case could commence. Counsel responded:

“Your Honor, I believe that honestly this case will not be ready for trial for about two years. I think that there is probably going to be an amount of documentary evidence similar to the Plavsic and Krajisnik case in terms of volume, in terms of need for translation, and we are dealing with records that are not yet in the possession of the parties in many cases because of the Commission on Cooperation in Yugoslavia just being established and access to archives coming along in a slow process. And so I believe that it’s going to be about two years before we would be ready for the trial in this matter.”

Judge Robinson then remarked:

“Thank you. We will hear more from the Prosecutor on that.”<sup>[16]</sup>

Despite being given the opportunity to address the Trial Chamber on two occasions during the hearing, the Prosecutor never disputed or responded to the issue of the length of time necessary before trial could commence. Instead, the Prosecutor focused on two points: (1) that

she had not yet had the opportunity to interrogate the accused; and (2) that the cooperation of the FRY was unsatisfactory to her.<sup>[17]</sup>

Assistant Federal Minister of Justice Nebojsa Sarkic addressed the Trial Chamber at length concerning his government's cooperation with the Tribunal. He asserted that more than 50% of the requests for documents from the Prosecutor had been complied with and that the remaining requests were being processed. When Judge Robinson asked the Prosecutor about this, indicating "speaking for myself, the question of the degree of cooperation between the government and the Tribunal is important", the Prosecutor acknowledged that she did not have the information.<sup>[18]</sup>

Speaking of the failure to arrest the co-accused Milutinovic, Mr. Sarkic replied:

"As for Mr. Milutinovic, I think that he really should not affect this case in any way because it is known that the attitude of the authorities of the Republic of Serbia is that when his term of office expires this autumn, he will be handed over to the Tribunal."<sup>[19]</sup>

Mr. Sarkic also strongly stated the commitment of the FRY and Republic of Serbia to enforce the conditions of release:

"Our legal system provides for a broad spectrum of measures that can be taken and that will be taken if you meet their request. These measures, as mentioned

in the guarantee, mean a kind of house arrest, obligatory reporting, constant monitoring, and, of course, the obligation of the state that in case they do not report and if there is any indication that they may leave the actual site or any such thing, that the state will arrest them immediately and transfer them to this Court.”<sup>[20]</sup>

The hearing concluded with the Trial Chamber taking the motion under submission. At no time during the hearing did the Prosecutor make any reference to the “more onerous” burden of proof for provisional release, which she now urges on appeal.

### **The Decision**

The Trial Chamber granted the Motion for Provisional Release in a written decision dated 26 June 2002. The Trial Chamber first set forth the requirements of Rule 65(B), requiring the accused to satisfy the Trial Chamber that he will appear for trial and that, if released, he will not pose a danger to any victim, witness, or other person.<sup>[21]</sup>

The Trial Chamber indicated that it “has looked at the particular circumstances of each case” and “finds that both accused have satisfied the Chamber that they will, if released, appear for trial and, furthermore, will not pose a danger to victims, witnesses, or other persons.”<sup>[22]</sup>

In its analysis of whether the accused would appear for trial, the Trial Chamber held:

“...The Trial Chamber attaches significant weight to the

fact that they have surrendered. This demonstrates a willingness to co-operate with the International Tribunal, and constitutes an indication that they will appear for trial. The Trial Chamber notes that the accused could have surrendered earlier but considers that it is the fact of surrender which is of significance.”<sup>[23]</sup>

With respect to the guarantees of the FRY and Serbian governments, the Trial Chamber held:

“The Trial Chamber also takes into account and attaches importance to the Law on Co-operation passed in April of this year by the Federal Government of the FRY. This recent legislation sets out a procedure for the arrest and surrender of accused persons to the International Tribunal, and obliges the “organs of internal affairs” to arrest such persons. Procedures of this nature did not previously exist, and while it remains to be seen how the procedure will operate in practice, the Trial Chamber accepts that the Government has taken steps to lessen the chance of an accused evading arrest while in the territory of the FRY.

The suggestion was made that the Governments' level of cooperation was generally unsatisfactory. However, it is the particular level of co-operation relating to the issues of provisional release with which this application is concerned. In this connection, the Trial Chamber is satisfied that the proposed level of co-operation is satisfactory."<sup>[24]</sup>

The Trial Chamber went on to consider and reject the Prosecutor's argument concerning the failure to arrest the co-accused Milutinovic, holding that "merely because a co-accused has not yet been arrested does not mean that the general level of co-operation with the International Tribunal is not satisfactory."<sup>[25]</sup>

As to the Prosecutor's argument that the accused faced long sentences if convicted, the Trial Chamber noted that "while it is certainly a factor to take into consideration in assessing whether an accused will appear, by itself it is not a reason for refusing provisional release." The Trial Chamber cited the case of Ilijakov v Bulgaria, where the European Court of Human Rights had held that a law creating a presumption of flight and danger for persons charged with offenses with a potential sentence of 10 years or more contravened Article 5(3) of the European Convention on Human Rights.<sup>[26]</sup>

The Trial Chamber also found that the accused had satisfied it that they would not pose a danger to victims, witnesses, or others if released.<sup>[27]</sup> This finding has not been appealed from.

Finally, having found that the requirements of Rule 65(B) for provisional release had been met, the Trial Chamber considered whether it ought to exercise its discretion to nevertheless deny the motion. The Trial Chamber found that the length of pre-trial detention militated in favor of release as “it may be some considerable time before the trial can commence.”<sup>[28]</sup>

The Trial Chamber further declined to deny release on the grounds urged by the Prosecutor at the hearing—that she had not had the opportunity to interrogate the accused. It did, however, include in the conditions of provisional release, a requirement that the accused “make himself available for interview with the Prosecution when requested.”<sup>[29]</sup> The Prosecutor has not assigned this as error in her appeal.

The Trial Chamber granted a stay of its decision to allow the Prosecutor to appeal.

## ARGUMENT

### A. THE TRIAL CHAMBER’S FINDING THAT THE ACCUSED WILL APPEAR FOR TRIAL WAS NOT UNREASONABLE

#### **Standard of Review**

Article 25 of the ICTY statute provides:

“The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor

on the following grounds:

- (A) an error on a question of law invalidating the decision; or
- (B) an error of fact which has occasioned a miscarriage of justice<sup>[30]</sup>

The Prosecutor's first ground of appeal contends that the Trial Chamber made an error of fact when finding that it was satisfied that the accused would appear for trial. The Appeals Chamber does not act as a second Trial Chamber and make an independent assessment of the evidence.<sup>[31]</sup> Rather, as recognized by the Prosecutor, the appellant has the burden of persuading the Appeals Chamber that the conclusion of the Trial Chamber is one which could not reasonably have been made by a reasonable tribunal of fact, so that a miscarriage of justice has occurred.<sup>[32]</sup>

On appeal, the Prosecutor has also argued for a "more onerous" burden of proof than previously applied in any of the fourteen Trial Chamber decisions on provisional release.<sup>[33]</sup> Rule 65(B) requires that the Trial Chamber be "satisfied" that the accused will appear for trial and not pose a danger to any victim, witness, or other person. The Prosecutor never presented its novel interpretation of Rule 65(B) to the Trial Chamber and should not be heard to complain on appeal that the Trial Chamber did not adopt it.<sup>[34]</sup>

## **The Failure to Arrest Milutinovic**

The Prosecutor contends that no reasonable tribunal of fact could have concluded that the accused would be likely to appear for trial because the authorities of the FRY have not arrested the co-accused Milutinovic.

The Prosecutor's contention is belied by the fact that Trial Chambers have granted provisional release in three cases based upon the guarantees of the Republic of Serbia or FRY during the period that Mr. Milutinovic has been under indictment.<sup>[35]</sup> The Prosecutor did not appeal from any of these decisions. How can it be said no reasonable tribunal of fact could come to this conclusion, when three other tribunals have already done so?

The United States government has also certified that the FRY was in compliance with its international obligations, despite its allowing Mr. Milutinovic to complete his term of office before sending him to The Hague.<sup>[36]</sup>

Furthermore, in Prosecutor v. Blagojevic et al, the Appeals Chamber found a guarantee of the Republika Srpska government to be valid.<sup>[37]</sup> That government has failed to arrest the Tribunal's most wanted fugitive, Radovan Karadzic, and at least one co-accused in the Blagojevic case, Vinko Pandurevic. Its level of cooperation has been regarded as less than that of the FRY and certainly the Republic of Serbia.

Finally, the Prosecutor made a similar argument as it makes here to the Trial Chamber in Prosecutor v Ademi, No. IT-01-46-PT (20 February 2002) with respect to the government of Croatia:

“The Prosecution contends that the difficulty with these guarantees relates to lack of cooperation between the Republic of Croatia and the Tribunal. It referred to a failure to expeditiously arrest the accused Ante Gotovina while the sealed indictment was served to the Republic of Croatia, who since relocated to a third country.”<sup>[38]</sup>

The Trial Chamber rejected this argument, concluding that despite the failure to arrest General Gotovina, “as a whole it is satisfied with the assurances that have been put forward by the Government of the Republic of Croatia.”<sup>[39]</sup> It granted provisional release. The Prosecutor did not appeal.

The Prosecutor’s argument in this case has also been internally inconsistent. She claimed to the Trial Chamber that the accused only surrendered when arrest by authorities of the FRY was imminent.<sup>[40]</sup> Now, she claims that the FRY cannot be counted on to arrest the accused. When it suits her, she wanted the Trial Chamber to believe that the FRY authorities would arrest the accused, and, when it suits her, she wants the Appeals Chamber to believe that they will not.

The Prosecutor contends that the governments providing the guarantees will not arrest “high-level” indictees. Yet the Republic of Serbia arrested and delivered President Milosevic to this Tribunal. Like President Milosevic, General Ojdanic no longer holds any position within the government in Yugoslavia.

The Prosecutor offered no evidence to support her position in the Trial Chamber. She simply argued that if the accused failed to appear for trial, despite having voluntarily

surrendered, the authorities of the FRY might not arrest the accused because they have not arrested Mr. Milutinovic. The Trial Chamber properly declined to base its decision on such speculation.<sup>[41]</sup>

The European Court of Human Rights has held that:

“The existence of concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.”<sup>[42]</sup>

The Prosecutor has failed to prove the existence of any concrete facts that demonstrate that General Ojdanic would not appear for trial.

In the end, a finding whether an accused will appear for trial depends on the Trial Chamber’s assessment of all of the circumstances of a particular case. Primary among these circumstances is the accused’s own trustworthiness. An accused of a mind to fail to appear for his trial can disappear even in countries with the strongest commitment to apprehending fugitives for the Tribunal. On the other hand, an accused who fully intends to appear does not require any action by any government.<sup>[43]</sup>

General Ojdanic has shown by his actions in being the first to voluntarily surrender, that he will appear for his trial if released. His personal guarantee reflects a long commitment to duty and a desire to clear his name. The letters of three Generals who know him well attest to his character as a man of his word and that he will appear for trial. The U.S. State Department called him “courageous” for his decision to voluntarily surrender.

Undoubtedly, the Trial Chamber weighed these facts when deciding that it was satisfied that General Ojdanic would appear for trial, and when deciding that it was satisfied with the level of cooperation of the governments providing the guarantees.

The Trial Chamber had the opportunity to observe General Ojdanic, and to hear, in person, the presentation of the representative of the FRY and Republic of Serbia of their faith in General Ojdanic and their commitment to enforce the conditions of his release. The Trial Chamber's decision, after full briefing, hearing, and deliberation, cannot be said to be so wrong that no reasonable tribunal of fact could come to the same conclusion that a miscarriage of justice has occurred.

### **The Likely Sentence if Convicted**

The Prosecutor contends that the Trial Chamber erred by excluding the factor of the likely length of sentence the accused faces in the event he is convicted.<sup>[44]</sup> The defence has difficulty in following this argument, since the Trial Chamber's decision explicitly took the likely length of sentence into account.

The Trial Chamber acknowledged that the Prosecution argued that "as both accused occupied positions of great responsibility, are charged with serious crimes, and are likely to face long prison sentences if convicted, there are strong reasons for them not to appear for trial." (emphasis added)<sup>[45]</sup>

The Trial Chamber went on to specifically discuss this argument:

"Furthermore, in relation to the argument that there

are strong reasons for the accused not to appear for trial as they are likely to face long prison sentences if convicted, the Trial Chamber considers that, while it is certainly a factor to take into consideration in assessing whether an accused will appear, by itself it is not a reason for refusing provisional release.”<sup>[46]</sup>

There was no error in excluding this factor from consideration. It was considered. The Trial Chamber’s decision not to give it conclusory status was not unreasonable, especially considering that General Ojdanic, at 61 years old, voluntarily surrendered to the Tribunal knowing that he faced a long sentence if convicted, and knowing that, at his age, almost any sentence will be a life sentence.<sup>[47]</sup>

B. THE TRIAL CHAMBER DID NOT  
VENTURE OUTSIDE OF ITS  
DISCRETIONARY FRAMEWORK  
WHEN GRANTING RELEASE

**Standard of Review**

The Prosecutor’s second ground of appeal rests on the argument that the Trial Chamber erred in failing to exercise its discretion to deny provisional release notwithstanding that the accused had satisfied his burden pursuant to Rule 65(B). The Prosecutor does not allege any error of law in the exercise of this discretion, but rather argues that the Trial Chamber gave

undue weight to the time the accused would have to be in detention awaiting trial, and not enough weight to the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted, and the absence of co-operation.

The exercise of this type of discretion is most akin to the sentencing function of a Trial Chamber, when numerous factors are weighed for and against a particular sentence. It is submitted that the standard of review should be the same. The Appeals Chamber should not overturn a Trial Chamber's decision unless it is convinced that the Trial Chamber "has ventured outside its discretionary framework".<sup>[48]</sup>

### **The Time Before Trial Can Commence**

The Prosecutor complains that the Trial Chamber improperly concluded that "it may be some considerable time before the trial can commence."<sup>[49]</sup> However, despite numerous opportunities, she failed to raise this issue in the Trial Chamber and has raised it for the first time on appeal.

General Ojdanic's Motion for Provisional Release spent five paragraphs detailing why the period of pretrial detention would be very lengthy if release were not granted.<sup>[50]</sup> The Prosecutor did not dispute this.

At the hearing, counsel for General Ojdanic indicated that it was "undisputed" that the period before trial could commence in this case would be lengthy. In response to a question by Judge Robinson, he estimated that period at two years. Judge Robinson said, "Thank you. We will hear more from the Prosecutor on that."<sup>[51]</sup> Despite this invitation, the Prosecutor never disputed or addressed the issue. She cannot now be heard to complain.

Even if this Chamber were to consider the Prosecutor's argument at this late stage, the Prosecutor has failed to show that the Trial Chamber's assessment was incorrect. In fact, as indicated by the defence in its Joint Opposition to Application for Leave to File Interlocutory Appeal, the Prosecutor's own disclosure schedule indicates that she will require 610 days to complete searches of material currently in her possession before she will be able to comply with her obligation to disclose exculpatory evidence pursuant to Rule 68.<sup>[52]</sup>

The prospective length of pre-trial detention is a proper consideration under Rule 65(B).<sup>[53]</sup> Therefore, the Trial Chamber could not have acted outside its discretionary framework by considering it as a factor in this case. Since the Prosecutor failed to provide the Trial Chamber with any facts or argument on this issue, the Trial Chamber could not have erred in failing to consider her submissions.

### **The Consideration of Other Factors**

The Prosecutor contends that the Trial Chamber erred in failing to expressly consider the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted; and the absence of co-operation.

However, the Trial Chamber did consider these matters. In paragraph 10(iv) of the Decision, it expressly listed them as considerations urged by the Prosecutor. In paragraph 14, it found that the length of the potential sentence, while a factor to be considered, was outweighed by other considerations. In paragraph 17, it expressly indicated that it had considered all the factors discussed earlier in the decision.

With respect to the senior position of the accused, it should be noted that persons holding higher positions, such as former President Biljana Plavsic, or positions equal to that of General Ojdanic, such as Generals Halilovic and Hadzihasanovic, have been granted provisional release.

[\[54\]](#)

As to the absence of co-operation, there was no evidence of that before the Trial Chamber. The Trial Chamber expressly considered the Prosecutor's argument that she had not had the opportunity to interrogate the accused, and made it a condition of release.<sup>[55]</sup> The undisputed evidence before the Trial Chamber was that the accused had cooperated by his voluntary surrender, agreement to provide reciprocal discovery, provision to the Prosecutor of a list of items material to his defence, and a pledge to attempt to avoid having witnesses in the Milosevic trial have to come back and testify again.<sup>[56]</sup>

The Trial Chamber considered all of the factors complained of by the Prosecutor. Its evaluation of those factors found them to be outweighed by factors in favor of release, such as the voluntary surrender of the accused, the guarantees of two governments, and the length of time before the trial could commence. Its decision was well within its discretionary framework.

## CONCLUSION

The Prosecutor has failed to meet her burden of establishing that the Trial Chamber's factual finding that the accused will appear for trial was so erroneous that no reasonable tribunal

of fact could come to the same conclusion. The Prosecutor has also failed to meet her burden of establishing that the Trial Chamber ventured outside of its discretionary framework in its decision to grant provisional release. Finally, the Prosecutor has failed to establish that the Trial Chamber's decision has occasioned a miscarriage of justice.

In fact, General Ojdanic has demonstrated by his voluntary surrender, his personal guarantee, the letters vouching for his character by three Generals, and the guarantees of two governments, that he will appear for trial. The decision of the experienced Trial Chamber was a correct one and should not be disturbed on appeal.

The Prosecutor's appeal should be dismissed. General Ojdanic should be ordered released forthwith.

Respectfully submitted,

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VOJISLAV SELEZAN

PETER ROBINSON

Counsel for General Ojdanic

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<sup>[1]</sup> Prosecutor v Blagojevic et al, No. IT-02-60-AR65 (28 May 2002)

<sup>[2]</sup> Prosecutor v Blagojevic et al, No. IT-02-60-PT (22 July 2002) at para. 35 (Obrenovic decision); at para. 27 (Blagojevic decision); at para.17 (Jokic decision of 28 March 2002); Prosecutor v Gruban, No. IT-95-4-PT (17 July 2002) at page 3, para. 6; Prosecutor v Ademi, No. IT-01-46-PT (20 February 2002) at para. 18; Prosecutor v Jokic, No.IT-01-42-PT (20 February 2002) at para. 17; Prosecutor v Hadzihasanovic, No. IT-01-47-PT (19 December 2001) at para. 7; Prosecutor v Halilovic, No. IT-01-48-PT (13 December 2001) at page 2, para. 6); Prosecutor v Plavsic, No. IT-00-39&40-PT (5 September 2001) at page 3, para. 3; Prosecutor v Simic et al, No. IT 95-9-PT (4 April 2000) at page 6, para. 3.

<sup>[3]</sup> Prosecutor v Jokic, No. IT-01-42-PT (20 February 2002) at para. 17

<sup>[4]</sup> The fact that the accused waived his right to the surrender procedure in his home country was cited as a factor in favor of provisional release in Prosecutor v Hadzihasanovic, No. IT-01-47-PT (19 December 2001) at para. 14.

<sup>[5]</sup> The Report of the State Department briefing of 25 April 2002 was attached to the Application, and is provided as Annex 1 to this brief for the convenience of the Chamber.

<sup>[6]</sup> General Ojdanic's personal guarantee is reproduced as Annex 2 to this brief.

<sup>[7]</sup> Personal Guarantee of General Dragoljub Ojdanic at para. 8.

<sup>[8]</sup> These letters are reproduced as Annex 3 to this brief.

<sup>[9]</sup> The guarantees are reproduced as Annex 4 to this brief.

<sup>[10]</sup> Motion for Provisional Release at para. 18-22.

<sup>[11]</sup> Motion for Provisional Release at para. 26

<sup>[12]</sup> Prosecution's Response to Applications for Provisional Release, at para. 11,21.

<sup>[13]</sup> Response, at para. 24.

<sup>[14]</sup> Response, at para. 25

<sup>[15]</sup> See Prosecutor's Appeal at paras. 9-14.

<sup>[16]</sup> Transcript of hearing at page 415

<sup>[17]</sup> Transcript at pages 424-30, 433-35

<sup>[18]</sup> Transcript at page 434.

<sup>[19]</sup> Transcript at page 431. News articles reflecting this position were attached to the Motion for Provisional Release and are reproduced here as Annex 5.

<sup>[20]</sup> Transcript at page 422.

<sup>[21]</sup> Decision, at para. 11

<sup>[22]</sup> Decision, at para. 17

<sup>[23]</sup> Decision, at para. 12

<sup>[24]</sup> Decision, at para. 12

<sup>[25]</sup> Decision, at para. 14

<sup>[26]</sup> Decision, at para. 14

<sup>[27]</sup> Decision, at para. 16

<sup>[28]</sup> Decision, at para. 17

<sup>[29]</sup> Order of Provisional Release for Dragoljub Ojdanic, para. 4 (f)

<sup>[30]</sup> The appeal of this case is governed procedurally by Rule 65(D). When granting leave to appeal, the three judges of the Appeals Chamber did not make a finding that the Trial Chamber “may have erred” as it had required in the other cases under Rule 65. Prosecutor v Blagojevic et al, No. IT-02-53-AR65 (18 April 2002) at para. 3; Prosecutor v Brdjanin & Talic, No. IT-99-36-AR65 (7 September 2000); and Prosecutor v Simic et al, No. IT 95-9-AR65 (19 April 2000). Rather, it granted leave to appeal because “it is felt that there is a need for the full bench of the Appeals Chamber to give an opinion as to issues of provisional release which arise in this particular case.”

<sup>[31]</sup> Prosecutor v Delalic, No. IT-96-21-A (20 February 2001) at para. 203; Prosecutor v Furundija, No. IT-95-17/1-T (10 December 1998) at para. 174

<sup>[32]</sup> Prosecutor v Delalic, No. IT-96-21-A (20 February 2001) at para. 434; Prosecution’s Appeal at para. 8.

<sup>[33]</sup> Prosecution’s Appeal at para. 9-14.

<sup>[34]</sup> The Prosecutor’s attempt to rewrite the Rule to read “really satisfied” or “satisfied that there is no real risk” should be addressed to the judges at a Plenary Session. The Trial Chamber applied the Rule as written.

<sup>[35]</sup> Prosecutor v Plavsic, No. IT-00-39&40-PT (5 September 2001); Prosecutor v Jokic, No. IT-01-42-PT (20 February 2002); Prosecutor v Gruban, No. 95-4-PT (17 July 2002).

<sup>[36]</sup> Transcript of hearing at page 414

<sup>[37]</sup> Prosecutor v Blagojevic et al, No. IT-02-53-AR65 (28 May 2002)

<sup>[38]</sup> Decision at para. 35.

<sup>[39]</sup> Decision at para. 38.

<sup>[40]</sup> Response to Motions for Provisional Release at para. 15

<sup>[41]</sup> It should also be noted that the FRY and Republic of Serbia have fully complied with its undertakings to supervise the provisional release of Biljana Plavsic and Miodrag Jokic—the two accused who have been released in its territory.

<sup>[42]</sup> Iljkov v Bulgaria, App. No. 33977/96 (European Court of Human Rights, 26 July 2001) quoted in Prosecutor v Jokic, No. IT-01-42-PT (20 February 2002) at para. 19

<sup>[43]</sup> This explains why a guarantee of a particular government might be accepted as sufficient in one case, and insufficient in another. Compare Prosecutor v Blagojevic, No. IT-02-53-AR65 (28 May 2002) with Prosecutor v Krajisnik, No. IT-00-39&40 (8 October 2002) concerning the guarantee of the Republika Srpska; and Prosecutor v Plavsic, No. IT-00-39&40 (5 September 2001) and Prosecutor v Jokic, No. IT-01-42-PT (20 February 2002) with Prosecutor v Mrksic, No. IT-95-13a-PT (24 July 2002) concerning the guarantees of the FRY and Republic of Serbia.

<sup>[44]</sup> Prosecution Appeal at para 26.

<sup>[45]</sup> Decision at para. 10(iv)

<sup>[46]</sup> Decision at para 14.

<sup>[47]</sup> Since the Tribunal only prosecutes serious crimes, and high and mid level officials who are likely to have at least reached middle age, and since every offence under the Tribunal’s statute carries a potential sentence of life imprisonment, attaching conclusory status to the length of the potential sentence would abrogate Rule 65(B) entirely.

<sup>[48]</sup> Prosecutor v Delalic, No. IT-96-21-A (20 February 2001) at para. 725.

<sup>[49]</sup> Decision at para. 17.

<sup>[50]</sup> Motion for Provisional Release, paras. 18-22

<sup>[51]</sup> Transcript of hearing at page 415

<sup>[52]</sup> The disclosure schedule, which was submitted with the Joint Opposition, is reproduced here as Annex 6. (see circled figure)

<sup>[53]</sup> Prosecutor v Simic et al, No. IT 95-9-PT (4 April 2000) last paragraph before Order; Prosecutor v Brdjanin & Talic, IT 99-36-PT (25 July 2000) at para. 24; Prosecutor v Krajisnik, No. IT-00-39-PT (8 October 2001) at para. 22; Prosecutor v Ademi, No. IT-001-46-PT (20 February 2002) at para. 26; Prosecutor v Jokic, No. IT-01-42-PT (20 February 2002) at para. 25.

<sup>[54]</sup> The Prosecutor also appears to be arguing that General Ojdanic should be detained because he held a high-level position and his detention “may be necessary in order to maintain confidence in the administration of justice by the Tribunal...” (Appeal at para 39) There is no precedential support for making an example of someone by keeping him in pretrial detention and it is inimical to common notions of justice. The Trial Chamber in Prosecutor v Hadzihasanovic, No. IT-01-47-PT (19 December 2001) rejected a similar argument, stating: “This Trial Chamber does not accept this submission. It applies the law and is not mandated to “sending signals”. (para. 13)

<sup>[55]</sup> Decision at para. 17; Order at para. 4(f).

<sup>[56]</sup> Transcript of hearing at page 441