

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-05-88-A  
Date: 14 March 2014  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge William H. Sekule  
Judge Fausto Pocar  
Judge Arlette Ramaroson  
Judge Mandiaye Niang

**Registrar:** Mr. John Hocking

**Decision of:** 14 March 2014

**PROSECUTOR**

v.

**VUJADIN POPOVIĆ  
LJUBIŠA BEARA  
DRAGO NIKOLIĆ  
RADIVOJE MILETIĆ  
VINKO PANDUREVIĆ**

***PUBLIC***

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**DECISION ON VINKO PANDUREVIĆ'S MOTION FOR  
PROVISIONAL RELEASE**

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**The Office of the Prosecutor:**

Mr. Peter Kremer QC

**Counsel for the Accused:**

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Mr. Vujadin Popović  
Mr. John Ostojić for Mr. Ljubiša Beara  
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić  
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić  
**Mr. Peter Haynes QC and Mr. Simon Davis for Mr. Vinko Pandurević**

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 “Tribunal”, respectively) is seised of the “Motion on Behalf of Vinko Pandurević for Provisional Release” filed publicly with a confidential annex by Vinko Pandurević (“Pandurević”) on 9 December 2013 (“Motion”).<sup>1</sup> The Office of the Prosecutor (“Prosecution”) responded on 13 December 2013.<sup>2</sup> On the same day, The Netherlands, in its capacity as the Host State indicated that it was not opposed to Pandurević’s provisional release.<sup>3</sup> On 19 December 2013, Pandurević filed a request for leave to reply together with his proposed reply.<sup>4</sup>

## I. BACKGROUND

2. In the pre-trial stage, Pandurević filed two requests for provisional release, both of which were denied by Trial Chamber II of the Tribunal (“Trial Chamber”).<sup>5</sup> During the trial proceedings, Pandurević filed two further requests for provisional release which were granted on compassionate grounds. On the first occasion, in December 2007, the Trial Chamber provisionally released Pandurević to allow him to attend the memorial service for his deceased father.<sup>6</sup> On the second occasion, in July 2008, the Trial Chamber provisionally released Pandurević to allow him to visit his ailing mother.<sup>7</sup>

3. On 10 June 2010, the Trial Chamber convicted Pandurević, pursuant to Articles 3, 5(a), 5(h), 5(i), and 7(1) of the Tribunal’s Statute (“Statute”), of aiding and abetting murder as a violation of the laws or customs of war as well as murder, persecution, and other inhumane acts (forcible transfer) as crimes against humanity. The Trial Chamber also convicted Pandurević, pursuant to

<sup>1</sup> The confidential annex contains a Guarantee of the Government of the Republic of Serbia (“Guarantee”).

<sup>2</sup> Prosecution Response to Pandurević’s Motion for Provisional Release, 13 December 2013 (confidential; public redacted version filed on 16 December 2013) (“Response”).

<sup>3</sup> Correspondence from the Head Host Nation Division, on behalf of the Minister of Foreign Affairs of The Netherlands, “Re: Motion for provisional release of Vinko Pandurevic [sic]”, 13 December 2013 (confidential).

<sup>4</sup> Leave to Reply and Reply of Vinko Pandurevic [sic] to the Prosecution Response to the Motion on Behalf of Vinko Pandurević for Provisional Release, 19 December 2013 (“Reply Request” and “Reply”, respectively).

<sup>5</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-PT, Decision on Pandurević’s Renewed Motion for Provisional Release, 6 June 2006; *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-PT, Decision on Vinko Pandurević’s Application for Provisional Release, 18 July 2005. See also *Prosecutor v. Vinko Pandurević and Milorad 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 (“3 October 2005 Decision”).

<sup>6</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Pandurević’s Request for Provisional Release on Compassionate Grounds, 11 December 2007.

<sup>7</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Pandurević’s Motion for Provisional Release, 21 July 2008 (public redacted version).

Articles 3, 5(a), and 7(3) of the Statute, of murder as a violation of the laws or customs of war and murder as a crime against humanity.<sup>8</sup> He was sentenced to 13 years of imprisonment.<sup>9</sup>

4. On 22 February 2011, the Appeals Chamber granted Pandurević's request for provisional release on compassionate grounds to allow him to visit his ailing mother.<sup>10</sup> On 11 January 2012, the Appeals Chamber granted Pandurević's request for provisional release on compassionate grounds to attend the memorial service and the post-funeral mourning period for his deceased mother.<sup>11</sup> Finally, on 6 June 2012, the Appeals Chamber denied Pandurević's request for provisional release to attend the wedding ceremony of his only daughter in Belgrade, Republic of Serbia, and also to record his biometric data there in order to obtain a personal identification document.<sup>12</sup>

## II. APPLICABLE LAW

5. Rule 65(I) of the Rules provides that the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period, if it is satisfied that: (i) the convicted person, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the convicted person, if released, will not pose a danger to any victim, witness or other person; and (iii) special circumstances exist warranting such release.<sup>13</sup> These requirements must be considered cumulatively.<sup>14</sup> The Appeals Chamber recalls that "whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities".<sup>15</sup> The discretionary assessments of the requirements under Rule 65 of the Rules are made on a case-by-case basis.<sup>16</sup>

## III. PRELIMINARY ISSUES

6. Pandurević requests leave to reply.<sup>17</sup> The Appeals Chamber notes that where a motion is filed during an appeal from judgement the moving party may file a reply within four days of the

<sup>8</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 (public redacted version) ("Trial Judgement"), pp. 831-832. See Trial Judgement, para. 2110.

<sup>9</sup> Trial Judgement, p. 832.

<sup>10</sup> Decision on Vinko Pandurević's Urgent Motion for Provisional Release on Compassionate Grounds, 22 February 2011 (confidential) ("22 February 2011 Decision").

<sup>11</sup> Decision on Vinko Pandurević's Urgent Motion for Provisional Release on Compassionate Grounds, 11 January 2012 ("11 January 2012 Decision").

<sup>12</sup> Decision on Motion on Behalf of Vinko Pandurević for Provisional Release, 6 June 2012 ("6 June 2012 Decision").

<sup>13</sup> Decision on Vujadin Popović's Urgent Motion for Custodial Release on Compassionate Grounds, 30 January 2013 ("30 January 2013 Decision"), p. 3.

<sup>14</sup> 30 January 2013 Decision, p. 3 and reference cited therein.

<sup>15</sup> 11 January 2012 Decision, para. 5 and reference cited therein.

<sup>16</sup> 30 January 2013 Decision, p. 3 and reference cited therein.

<sup>17</sup> Reply Request, para. 2.



filing of the response without first seeking leave to file such a reply.<sup>18</sup> The Appeals Chamber notes that the Reply Request and Reply were filed six days after the Response, and thus two days after the expiration of the deadline for filing a reply. The Appeals Chamber notes that Pandurević made no attempt to justify the late filing of the Reply. The Appeals Chamber recalls that “[p]rocedural time-limits are to be respected, [...] they are indispensable to the proper functioning of the Tribunal and the fulfilment of its mission to do justice. Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated.”<sup>19</sup> Accordingly, the Appeals Chamber denies the Reply Request and declines to consider the Reply as validly filed.

#### IV. SUBMISSIONS

7. Pandurević requests provisional release after the completion of the appeal hearing and for the remainder of the appellate proceedings.<sup>20</sup> He argues that there are special circumstances warranting provisional release: (i) he has spent more than two-thirds of his 13-year sentence in detention; (ii) the proceedings against him have entered into their seventh year; (iii) he has always respected the conditions governing his past periods of provisional release; and (iv) he has shown good behaviour as a detainee.<sup>21</sup> In addition, Pandurević argues that there is little chance of any further proceedings after the appeal hearing and before the appeal judgement is delivered that would necessitate his physical presence in The Netherlands.<sup>22</sup>

8. Pandurević submits that he does not pose a flight risk, for a number of reasons.<sup>23</sup> First, the possibility of an unfavourable appeal judgement does not give him an incentive to flee, as a favourable outcome is equally probable.<sup>24</sup> Second, by surrendering voluntarily to the Tribunal and later exercising his right of appeal, he has shown his intention to complete the judicial process.<sup>25</sup> Third, he points to his good behaviour as a detainee and to his observance of the conditions of his prior provisional releases.<sup>26</sup> Fourth, he has already served two-thirds of his sentence which mitigates any incentive to flee.<sup>27</sup> Finally, he proposes a regime of provisional release specifically

<sup>18</sup> Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev. 4, 4 April 2012, para. 14. See also, *e.g.*, Public Redacted Version of 11 December 2012 Decision on Vujadin Popović’s Application for Custodial Release on Compassionate Grounds, 16 January 2013, fn. 1 and reference cited therein.

<sup>19</sup> *Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5-A, Decision on Admissibility of Notice of Appeal Against Trial Judgement, 4 September 2008, para. 16, quoting *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-A, Judgment (Reasons), 4 December 2001 (original French version pronounced on 1 June 2001 and issued in writing on 19 July 2001), para. 46.

<sup>20</sup> Motion, paras 1, 24.

<sup>21</sup> Motion, paras 21-22.

<sup>22</sup> Motion, para. 23.

<sup>23</sup> Motion, paras 11-18.

<sup>24</sup> Motion, para. 11.

<sup>25</sup> Motion, paras 12-13.

<sup>26</sup> Motion, paras 14-15.

<sup>27</sup> Motion, para. 16.

designed to remove all realistic fears that he might not surrender into detention if deemed necessary, and refers to the Guarantee in this regard.<sup>28</sup>

9. Pandurević further submits that he poses no threat to any victim, witness or other person.<sup>29</sup> He asserts that there has never been any suggestion that he has attempted to interfere with witnesses.<sup>30</sup> He also argues that, at this stage of the proceedings, interference with witnesses could not have any bearing on the Appeals Chamber's verdict.<sup>31</sup> Finally, he submits that the proposed conditions of his provisional release would prevent him from contacting any witnesses.<sup>32</sup>

10. The Prosecution opposes the Motion.<sup>33</sup> It argues that Pandurević poses a flight risk since he faces a real risk of an extended prison term as a result of the Prosecution's appeals against his acquittals and sentence.<sup>34</sup> In addition, the Prosecution argues that Pandurević has a history of absconding from justice, noting that after the indictment against him was made public Pandurević remained at large for more than three years, and that his eventual surrender to the Tribunal was conditional on the Serbian Government guaranteeing his provisional release.<sup>35</sup>

11. Furthermore, the Prosecution submits that there are no special circumstances warranting Pandurević's provisional release.<sup>36</sup> It argues that the Appeals Chamber has never granted provisional release to an appellant who, like Pandurević, served only two-thirds of his sentence and did not voluntarily surrender to the Tribunal immediately following the issuance of a public indictment against him.<sup>37</sup> The Prosecution also argues that the factors taken into consideration by the President of the Tribunal when deciding whether to grant early release are relevant and militate against provisionally releasing Pandurević.<sup>38</sup>

12. In the alternative, should the Appeals Chamber grant the Motion, the Prosecution argues that the Guarantee provided by Pandurević and the Government of the Republic of Serbia is insufficient, as it makes no mention of any surveillance of Pandurević, armed or otherwise.<sup>39</sup>

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<sup>28</sup> Motion, paras 17-18; Guarantee.

<sup>29</sup> Motion, paras 19-20.

<sup>30</sup> Motion, para. 19.

<sup>31</sup> Motion, para. 19.

<sup>32</sup> Motion, para. 20. See Motion, para. 17.

<sup>33</sup> Response, paras 1, 10.

<sup>34</sup> Response, paras 1, 3, 5.

<sup>35</sup> Response, paras 1, 4-5.

<sup>36</sup> Response, paras 1, 6-8.

<sup>37</sup> Response, paras 1, 6.

<sup>38</sup> Response, paras 7-8.

<sup>39</sup> Response, paras 2, 9.

Accordingly, the Prosecution requests that the Appeals Chamber require the Government of the Republic of Serbia to guarantee that it would place Pandurević under 24-hour armed surveillance.<sup>40</sup>

## V. DISCUSSION

### 1. Whether Pandurević poses a flight risk

13. The Appeals Chamber notes Pandurević's delay in surrendering to the custody of the Tribunal.<sup>41</sup> The Appeals Chamber also notes that Pandurević has been convicted of serious crimes and sentenced to 13 years of imprisonment.<sup>42</sup> The pending appeal of the Prosecution against him could provide an incentive to flee, given that it could possibly result in an increased sentence.<sup>43</sup> Nonetheless, the Appeals Chamber considers that two facts militate against finding that Pandurević poses a flight risk. First, Pandurević has already served approximately two-thirds of the sentence imposed by the Trial Chamber. Second, Pandurević has a record of returning to custody after provisional release and compliance with the conditions of that release.<sup>44</sup>

14. In addition, the Appeals Chamber takes into account Pandurević's proposed regime of provisional release<sup>45</sup> and the Government of the Republic of Serbia's written guarantee that it will adhere to all orders of the Appeals Chamber to ensure Pandurević's return to the Tribunal's custody at any time.<sup>46</sup> However, the Appeals Chamber finds that Pandurević's indication that he shall abide by "any order of the Appeals Chamber varying the terms of, or terminating, his provisional release"<sup>47</sup> does not replace the need for sufficient guarantees.<sup>48</sup>

15. The Appeals Chamber finds that these facts, together with the imposition of the same conditions of provisional release as have been imposed previously,<sup>49</sup> suggest that, if granted provisional release, Pandurević will return to the custody of the Tribunal when required to do so by the Appeals Chamber. In light of the foregoing, the Appeals Chamber is satisfied that Pandurević does not pose a flight risk and that the requirement of Rule 65(I)(i) of the Rules is satisfied.

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<sup>40</sup> Response, para. 2.

<sup>41</sup> See 3 October 2005 Decision, para. 7.

<sup>42</sup> See *supra*, para. 3.

<sup>43</sup> See Prosecution Appeal Brief, 25 January 2011 (public redacted version), paras 10-224.

<sup>44</sup> See 22 February 2011 Decision, para. 14; 11 January 2012 Decision, para. 13 and references cited therein.

<sup>45</sup> Motion, para. 17.

<sup>46</sup> Guarantee, p. 1. The Appeals Chamber understands that the Government of the Republic of Serbia mistakenly used the expression "Trial Chamber" and that the Guarantee should be understood as addressing the Appeals Chamber.

<sup>47</sup> Motion, para. 17(d)(viii).

<sup>48</sup> Cf. 30 January 2013 Decision, p. 3.

<sup>49</sup> See 11 January 2012 Decision, paras 19-20.



2. Whether Pandurević, if released, will not pose a danger to any victim, witness or other person

16. The Appeals Chamber is not aware of any information suggesting that Pandurević has attempted to interfere with, or endanger, victims or witnesses during his previous periods of provisional release.<sup>50</sup> In this context, the Appeals Chamber again notes Pandurević's proposed regime of provisional release<sup>51</sup> and the Guarantee.

17. In light of the foregoing, the Appeals Chamber is satisfied that Pandurević, if provisionally released under the same conditions of provisional release as have been imposed previously, would not pose a danger to any victim, witness or other person, thus satisfying the requirement of Rule 65(I)(ii) of the Rules.

3. Special circumstances

18. The Appeals Chamber has previously determined that "detention for a substantial period of time may amount to a special circumstance within the meaning of Rule 65(I)(iii) of the Rules and that this determination must be made on a case-by-case basis".<sup>52</sup> In the context of this case, several factors are relevant to this determination. First, proceedings against Pandurević have now entered their ninth year.<sup>53</sup> Second, Pandurević has served approximately two-thirds of his sentence and therefore may be eligible for early release.<sup>54</sup> Third, his past periods of provisional release have not given rise to any concern.<sup>55</sup> These factors could militate in favour of granting the provisional release.

19. However, the Appeals Chamber emphasises that the ultimate decision of whether or not to grant provisional release is subject to the Appeals Chamber's discretion. The Appeals Chamber therefore must make this determination on a balance of probabilities and recalls that the fact that an

<sup>50</sup> 11 January 2012 Decision, para. 14.

<sup>51</sup> Motion, para. 17.

<sup>52</sup> 6 June 2012 Decision, p. 3. See also, e.g., *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Decision on Lahi Brahimaj's Application for Provisional Release, 25 May 2009 ("*Brahimaj* 25 May 2009 Decision"), para. 16; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on Motion of Rasim Delić for Provisional Release, 11 May 2009 ("*Delić* 11 May 2009 Decision"), para. 17; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009, para. 10; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on the Motion of Veselin Šljivančanin for Provisional Release, 11 December 2007, p. 3; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007 ("*Hadžihasanović* 20 June 2007 Decision"), para. 13.

<sup>53</sup> The Appeals Chamber notes that Pandurević's submission that the proceedings have entered into their seventh year is based on a calculation from the commencement of trial proceedings. See Motion, para. 22 & fn. 24. The Appeals Chamber bases its calculation on the date of Pandurević's surrender to the custody of the Tribunal. Cf. *Hadžihasanović* 20 June 2007 Decision, paras 3, 13.

<sup>54</sup> See, e.g., *Brahimaj* 25 May 2009 Decision, para. 15; *Delić* 11 May 2009 Decision, para. 17; *Hadžihasanović* 20 June 2007 Decision, para. 12.


<sup>55</sup> 11 January 2012 Decision, para. 13; 22 February 2011 Decision, para. 14 and references cited therein.

individual has already been sentenced is relevant.<sup>56</sup> Furthermore, the basis of Pandurević's application is the fact that he has served a substantial period of his sentence but the question of whether this amounts to a special circumstance in his case is left to the discretion of the Appeals Chamber – *i.e.* detention for a substantial period of time *may* amount to a special circumstance. Additionally, the Appeals Chamber notes that although Pandurević may have been *eligible* for early release had there been no appeal, he would not have been *entitled* to such release.<sup>57</sup> Other relevant factors are: (i) the pending appeal of the Prosecution against Pandurević which could possibly result in an increased sentence;<sup>58</sup> (ii) the fact that Pandurević did not surrender promptly upon learning of the indictment against him;<sup>59</sup> and (iii) the fact that the hearing of the appeal in the case of *Popović et al.* has been concluded.<sup>60</sup> In weighing these factors, the Appeals Chamber, Judge Niang dissenting, is not satisfied that Pandurević's time in detention, considering the specific facts of his case, amounts to a special circumstance warranting his provisional release at this time.<sup>61</sup>

## VI. DISPOSITION

20. In light of the foregoing, the Appeals Chamber hereby **DENIES** the Reply Request and, Judge Niang dissenting, **DENIES** the Motion.

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




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Judge Patrick Robinson  
Presiding

Dated this fourteenth day of March 2014,  
At The Hague,  
The Netherlands.

[Seal of the Tribunal]

Judge Mandiaye Niang appends a dissenting opinion.

<sup>56</sup> See *supra*, para. 5.

<sup>57</sup> *Brahimaj* 25 May 2009 Decision, para. 15; *Hadžihasanović* 20 June 2007 Decision, para. 12.

<sup>58</sup> See *supra*, para. 13.

<sup>59</sup> See Trial Judgement, para. 2224; *supra*, para. 13.

<sup>60</sup> Cf. *Brahimaj* 25 May 2009 Decision, para. 16; *Delić* 11 May 2009 Decision, para. 18.

<sup>61</sup> See *Hadžihasanović* 20 June 2007 Decision, para. 13: "The issue in this case is whether a lower percentage of a sentence of imprisonment served in detention – approximately two-thirds – considered together with other specific facts of the case, may likewise amount to a 'special circumstance'. This determination has to be made on a case-by-case basis."



## DISSENTING OPINION OF JUDGE NIANG

1. Vinko Pandurević is convicted for aiding and abetting murder as a violation of the laws or customs of war as well as murder, persecution and other inhumane acts as crimes against humanity; and, as a superior, for murder as a violation of the laws or customs of war and as a crime against humanity. He is sentenced to 13 years of imprisonment, and is in custody since 23 March 2005, when he voluntarily surrendered to the Tribunal.<sup>1</sup>

2. While awaiting the delivery of the Appeal Judgement, Pandurević has filed a motion for provisional release (“Motion”).

3. The Majority finds, and I agree with them, that the Motion meets the first two criteria set out in Rule 65(I) of the Rules, namely that Pandurević, subject to some conditions, does not pose a flight risk,<sup>2</sup> nor does he constitute a danger to any victim, witness or other person.<sup>3</sup> The Majority proceeds however, to deny the Motion on the ground that it fails to meet the third test, to wit, the existence of special circumstances.<sup>4</sup>

4. The standard of “special circumstances” mirrors the “exceptional circumstances” previously referred to in Rule 65(B) of the Rules, which have given rise to controversy. The legitimacy of this requirement has been questioned,<sup>5</sup> and its content remains inherently hazy. It is nevertheless settled law at the appellate stage. I will not reopen a belated debate thereon despite my lingering discomfort surrounding the notion.

5. Focussing on the case, and the test, at hand, I agree once more with the Majority that: “detention for a substantial period of time may amount to a special circumstance within the meaning of Rule 65(I)(iii) of the Rules”.<sup>6</sup> In particular, it has been held that having been in custody for two-thirds of the sentence pronounced at the first instance, thereby being eligible for early

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<sup>1</sup> See *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-PT, Decision on Vinko Pandurević’s Application for Provisional Release, 18 July 2005, para. 17.

<sup>2</sup> Decision, para. 15.

<sup>3</sup> Decision, para. 17.

<sup>4</sup> Decision, paras 19-20.

<sup>5</sup> Including when it appeared under the new trappings of “compelling humanitarian grounds”. See, e.g., *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.7, Decision on Franko Simatović’s Appeal Against the Decision Denying His Urgent Request for Provisional Release, 23 May 2011, p. 1; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.26, Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlić, 15 December 2011, para. 12.

<sup>6</sup> Decision, para. 18, fn. 51 and references cited therein.

release in the absence of any appeal pending, constitutes a “special circumstance” warranting provisional release.<sup>7</sup> This stand is sensible.

6. The Majority has listed other relevant factors, albeit in a somewhat haphazard fashion, with no clarity as to the value or weight ascribed to those factors in the instant case.<sup>8</sup> Odd enough, among the factors listed are those the Majority had already discounted as susceptible to be held against the Applicant, when examining whether he would present a flight risk.<sup>9</sup> A vague reference to the discretionary power of the Chamber is similarly unhelpful.<sup>10</sup>

7. In fact, upon review of the reasoning leading to the denial of the Motion, one is still left to wonder what the rationale of the decision is. Sifting through all the so-called relevant factors listed, and bearing in mind that the Appeal Chamber is at liberty to subject the provisional release to any measures it deems adequate, one may attempt to pin down the justification of the decision in the following remark: the Prosecution’s appeal is still pending and could result in an increased sentence.

8. This remark discounts the other equally possible alternatives that the sentence may not increase or might even decrease or be voided altogether. More worrying, this factor, which carries the whole weight of the Majority’s decision, would set a precedent of barring any provisional release when a Prosecution appeal would be pending. This would not be in line with previous balanced decisions in which a pending Prosecution’s appeal has not precluded the Judges from considering the time spent in detention as a special circumstance warranting provisional release.<sup>11</sup>

9. What is relevant is not whether the sentence could be increased on appeal. Granting provisional release would avoid the situation where Pandurević would remain in prison with reference to a sentence that could have warranted early release, had the appeals procedure been

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<sup>7</sup> *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Decision on Lahi Brahimaj’s Application for Provisional Release, 25 May 2009 (“*Brahimaj Decision*”), paras 15-16; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on Motion of Rasim Delić for Provisional Release, 11 May 2009 (“*Delić Decision*”), paras 17-18; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, paras 12-13, fn. 35.

<sup>8</sup> See Decision, para. 19. I note, among the factors that the Majority lists, “the fact that the hearing of the appeal in th[is] case has been concluded”. I fail to see how this factor can play against the request. The Majority does not explain. I rather see this factor as favourable to the provisional release – as it means that Pandurević’s physical presence before the Tribunal will not be required until the delivery of the Appeal Judgement.

<sup>9</sup> See Decision, para. 13. The Majority recalls among others “that Pandurević did not surrender promptly upon learning of the indictment against him”. I fail to see the pertinence of this remark when the Majority already concluded that Pandurević does not pose a flight risk.

<sup>10</sup> See Decision, para. 19.

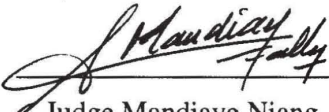
<sup>11</sup> See *Brahimaj Decision*, paras 10, 15-16; *Delić Decision*, paras 8, 17-19; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009, paras 5, 10; *Prosecutor v. Jelena Rašić*, Case No. IT-98-32:1-R77.2-A, Decision on Jelena Rašić’s Urgent Motion for Provisional Release Pursuant to Rule 65(I), 4 April 2012, paras 8, 12.

completed earlier.<sup>12</sup> Given the projected timeline for the delivery of the Appeal Judgement, from eight months to a year of potentially unnecessary and avoidable detention could be at stake.

10. Should the current sentence be increased as a result of the Prosecution's appeal, there would be no harm to justice. Provisional release is not early release. Pandurević, if released, would still be brought back to detention for the delivery of the Appeal Judgement. The sentence, whether confirmed or increased, would run again. If required, Pandurević would serve the increased sentence meted out by the Appeals Chamber.

11. Between two alternatives, where one could cause prejudice and the other would cause none, I prefer the latter. I would have granted the Motion.

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



Judge Mandiaye Niang

Done this fourteenth day of March 2014;  
At The Hague,  
The Netherlands.

**[Seal of the Tribunal]**

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<sup>12</sup> While a detainee who has served two thirds of his sentence is not *entitled* to early release, one cannot discount the "Tribunal's consistent past practice [whereby] the completion of two-thirds of a convicted person's sentence weighs heavily in favour of early release". See *Prosecutor v. Haradin Bala*, Case No. IT-03-66-ES, Public Redacted Version of the 28 June 2012 Decision of the President on Early Release of Haradin Bala, 9 January 2013, para. 39.