



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

IT-95-13/1-PT  
D2806- D2800  
09 MARCH 2005

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Case No. IT-95-13/1-PT  
Date: 9 March 2005  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge Jean Claude Antonetti  
Judge Kevin Parker

**Registrar:** Mr. Hans Holthuis

**Decision of:** 9 March 2005

**PROSECUTOR**

v.

**MILE MRKŠIĆ  
MIROSLAV RADIĆ  
VESELIN ŠLJIVANČANIN**

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**DECISION ON DEFENCE MOTION FOR PROVISIONAL  
RELEASE**

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**The Office of the Prosecutor:**

Mr. Jan Wubben

**Counsel for the Accused Mile Mrkšić:**

Mr. Miroslav Vasić

**TRIAL CHAMBER II** (“Trial 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 (“Tribunal”) is seised of the “Defence Motion for Provisional Release” filed by Counsel for Mile Mrkšić (“Accused”) on 23 February 2005 (“Motion”) in which Counsel for the Accused (“Defence”) requests the provisional release of the Accused pursuant to Rule 65 (B) of the Rules of Procedure and Evidence (“Rules”). On 2 March 2005, the Office of the Prosecutor (“Prosecution”) filed its “Prosecution’s Response to the Accused Mile Mrkšić’s “Defence Motion for Provisional Release”” (“Response”).

## I. INTRODUCTION

1. The Motion is the third request for provisional release which the Accused has filed since coming within the custody of the Tribunal.
2. On 23 May 2002, the Accused filed a “Defence Motion for Provisional Release” in which he sought to be provisionally released for health reasons to his family home in Belgrade in the Federal Republic of Yugoslavia and which was denied by the Trial Chamber in its “Decision on Mile Mrkšić’s Application for Provisional Release” of 24 July 2002 (“First Decision on Provisional Release”).<sup>1</sup> For purposes of the present decision, it is sufficient to recall that, in the First Decision on Provisional Release, the Trial Chamber had denied the Defence Motion for Provisional Release on the basis that it was not satisfied that, if provisionally released, the Accused would appear for trial.
3. On 29 January 2004, the Accused filed a “Defence Request for Provisional Release for the Purpose of Attending Mother’s Funeral in Lieu of Previously Filed Defence Request for Provisional Release for the Purpose of Visiting his Mother” in which the Accused sought to be allowed to travel to Belgrade to attend the funeral of his mother scheduled to take place on 31 January 2004. On 30 January 2004, in its “Decision Pursuant to Rule 65 Granting Mrkšić’s Request to Attend his Mother’s Funeral” (Second Decision on Provisional Release”), the Trial Chamber allowed that the Accused be provisionally released to attend his mother funeral provided he returned no later than 2 February 2004 and abode by the stringent conditions set out in the disposition.<sup>2</sup>

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<sup>1</sup> See First Decision on Provisional Release, paras 1-10 for a detailed procedural background.

<sup>2</sup> See Second Decision on Provisional Release, pp.3-4.

## II. DISCUSSION

### A. Applicable law

4. Both Articles 20 and 21 of the Statute of the Tribunal (“Statute”) bestow upon the Trial Chamber the responsibility for ensuring that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights for the accused and due regard for the protection of victims and witnesses.

5. Rules 65 of the Rules sets out the basis upon which a Trial Chamber may order provisional release of the Accused and provides in relevant part that:

(A) Once detained, an accused may not released except upon an order of a Chamber.

(B) 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 (...)

6. The Trial Chamber will thus examine, in turn, whether it is satisfied that if provisionally released, the Accused will appear for trial and not pose a danger to any victim, witness or other person.

### B. Application of the law to the facts of the case

#### 1. Whether the Accused will appear for trial

7. The Defence submits that several factors indicate that the Accused, if provisionally released, would appear for trial. Firstly, the Defence alleges that the Accused voluntarily surrendered on 15 May 2002. Secondly, the Defence submits that the Accused was provisionally released between 30 January and 2 February 2004 to attend his mother’s funeral, that he fully complied with the Second Decision on Provisional Release and that he returned to the United Nations Detention Unit (“Detention Unit”) on 2 February 2004. The Defence further submits a personal undertaking of the Accused that he will make himself available whenever the Tribunal so demands and that this undertaking should be read in light of the Accused’s behaviour in the Detention Unit. Finally, the Defence submits that the guarantees from the Government of Serbia and Montenegro and that from the Republic of Serbia have been reiterated in the past, complied with when the Accused was allowed to attend his mother’s funeral on 30 January 2004 pursuant to the Second Decision on Provisional Release and are still valid to support the Motion.

8. In its Response, the Prosecution submits that the Accused has not met his burden of proving that he will appear for trial. Indeed, the Prosecution submits that the Accused cannot claim to have voluntarily surrendered when he had been a fugitive for almost seven years. Secondly, the Prosecution submits that the attendance by the Accused at his mother's funeral cannot be compared with what is proposed by the pending Motion. Thirdly, the Prosecution submits that little weight can be attributed to the Accused's personal undertaking to present himself at trial. Finally, the Prosecution submits that the documentation referred to by the Defence in paragraphs 26 to 28 of its Motion does not qualify as evidence of current appropriate guarantees pursuant to Rule 65 (B) of the Rules. The Prosecution additionally submits that the risk of flight of the Accused is enhanced by the possibilities of a transfer of venue, if provisionally released while a Rule 11*bis* request for his case to be transferred is still pending with the Referral Bench. The Prosecution finally raises the fact that the Accused is charged with extremely serious charges, thus facing lengthy prison sentences.

9. The Trial Chamber will consider all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to its decision as to whether the Accused will appear for trial if he is provisionally released.<sup>3</sup>

10. First, regarding the issue of voluntary surrender, the Trial Chamber, in its First Decision on Provisional Release considered that

In light of the circumstantial evidence surrounding his presence before this Tribunal, it seems rather doubtful whether the Accused, having failed to voluntarily surrender during all these years can be treated as if he had in fact, voluntarily surrendered. (...) Accordingly, this factor of surrender can only have limited impact upon the Trial Chamber's determination of this application.<sup>4</sup>

11. The Appeals Chamber held that the Trial Chamber had "evaluated the circumstances which it thought to be relevant and reached a conclusion which was open to it" and had thus not reached a decision which no other reasonable tribunal of fact could have reached.<sup>5</sup>

12. The underlying facts remain the same. Consequently the Trial Chamber, assessing the Motion, sees no reason to depart from the findings of the First Decision on Provisional Release in this respect and thus considers that the factor of surrender of the Accused can only play a limited role in the balancing exercise to be conducted by the Trial Chamber pursuant to Rule 65 (B) of the Rules.

13. Second, the Trial Chamber notes that the Second Decision on Provisional Release allowed the Accused to attend his mother's funeral, that the Second Decision on Provisional Release was based on exceptional grounds of compassion and that it was subject to stringent restrictions, namely being

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<sup>3</sup> *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 ("*Šainović Appeal Decision on Provisional Release*"), para. 6.

<sup>4</sup> First Decision on Provisional Release, para. 43.

escorted at all times either by an official of the Republic of Serbia and Montenegro or of the Kingdom of the Netherlands and returning to the Detention Unit within three days. The Trial Chamber thus considers that the circumstances supporting the Second Decision on Provisional Release cannot be compared to the present.

14. Third, the Trial Chamber notes that the Defence, rather than appending a fresh guarantee either from the Government of Serbia and Montenegro or from the Government of the Republic of Serbia to its Motion, chooses to rely on the guarantees previously submitted on 13 June 2002 and 31 January 2004 and which were for specific periods of time. In examining the Motion, the Trial Chamber cannot consider the guarantees previously submitted with regard to the motions leading to the First and Second Decisions on Provisional Release as valid and current guarantees that the witness will appear for trial, if provisionally released.

15. Fourth, the Trial Chamber does not consider that a request for referral filed by the Prosecution pursuant to Rule 11*bis* is a new factor changing the situation of the Accused to such an extent that the two Rule 65 (B) criteria would be fulfilled. The request for referral in this case is still pending before the Referral Bench and it is not for this Trial Chamber to intervene in any way in that decision.<sup>6</sup> However, its relevance may well be to aggravate the risk that the Accused will not appear for trial.

16. Finally, the Trial Chamber notes the gravity of the crimes with which the Accused is charged in the Second Modified Consolidated Amended Indictment<sup>7</sup>. The Indictment charges the Accused, pursuant to Articles 7 (1) and 7 (3) of the Statute, with various offences allegedly committed subsequent to the Serb takeover of the city of Vukovar (Republic of Croatia), namely with eight counts of persecutions, extermination, inhumane acts (crimes against humanity), cruel treatment (violation of the laws and customs of war), murder (both a crime against humanity and a violation of the laws and customs of war) and torture (both a crime against humanity and a violation of the laws and customs of war). For the crimes charged in the Indictment, the Accused, if convicted, would face extremely lengthy prison sentences.

17. Considering all the above, the Trial Chamber is therefore not satisfied that, if provisionally released, the Accused would appear for trial.

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<sup>5</sup> Appeal Decision on Provisional Release, paras 14-15.

<sup>6</sup> Motion by the Prosecution under Rule 11*bis* for referral of the Indictment, 8 February 2005; Order by the President appointing a Trial Chamber for the purpose of determining whether an indictment should be referred to another court under Rule 11*bis*, 10 February 2005.

<sup>7</sup> The "Preliminary Motion in Respect to the Third Modified Consolidated Amended Indictment" filed by Co-Accused Veselin Šljivančanin on 13 December 2004 is still pending and the Trial Chamber will therefore refer to the Second Modified Consolidated Amended Indictment of 26 August 2004 ("Indictment") as the operative indictment against the Accused.

2. Whether the Accused will pose a danger to any victim, witness or any person

18. The Defence submits that the current financial situation of the Accused, the fact that he complied with the Second Decision on Provisional Release and the fact that victims from the Republic of Croatia have been giving evidence before the Belgrade District Court in the “Ovčara Farm” proceedings without any problems indicate that the Accused would be in no position to exert influence on the victims and witnesses if he were provisionally released.

19. The Prosecution submits that the Accused has not met his burden of proving that he will not pose a danger to any victim, witness and their family.

20. The Trial Chamber agrees with the Prosecution that the burden is on the Accused to prove that he will not pose a danger to any victim, witness and their family. The Trial Chamber does not consider that invoking the current financial status of the Accused and his compliance with the Second Decision on Provisional Release is sufficient for the Trial Chamber to be satisfied that the second cumulative criterion provided for in Rule 65 (B) is fulfilled.<sup>8</sup>

21. The Trial Chamber is thus not satisfied that, if provisionally released, the Accused would not pose a danger to any victim, witness or other person.

3. The proportionality of the pre-trial detention of the Accused

22. The Defence submits that the Trial Chamber is required to assess the length of the pre-trial detention in light of the fact that the Accused has spent almost three years in pre-trial detention.

23. The Prosecution submits further that the decisions of the European Court of Human Rights do not purport to impose a set time-limit for pre-trial detention and that the reasonableness of the pre-trial detention should be assessed on a case-by-case basis.

24. The Trial Chamber recalls the reasoning of its First Decision on Provisional Release where it acknowledged the relevance of Rule 65 to the application of the International Covenant on Civil and Political Rights of 19 December 1996 (“ICCPR”) and of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (“ECHR”), and that “the Trial Chamber must interpret Rule 65 not *in abstracto* but with regard to the factual basis of the particular case and with respect to the concrete situation of the individual applicant.”<sup>9</sup>

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<sup>8</sup> The Trial Chamber notes that the “Prosecution Motion for Protective Measures of Sensitive Witnesses” filed confidentially on 17 December 2004 and the “Prosecution Motion for Order of Protective Measures” filed confidentially on 31 January 2005 are still pending before the Trial Chamber.

<sup>9</sup> First Decision on Provisional Release, paras 28-35.

25. While the Accused has been in detention since 15 May 2002, the length of the period of pre-trial detention must be assessed in light of the specific circumstances of this case. The Indictment charges the Accused along with two co-accused, Miroslav Radić and Veselin Šljivančanin (“Co-Accused”), who were transferred to the Tribunal respectively on 17 May 2003 and 13 June 2003, for the crimes aforementioned. The Accused is charged with the murder and extermination of at least two hundred and sixty four Croat and other non-Serbs. In the two years and ten months of pre-trial detention of the Accused, the investigation into the crimes has been ongoing and conducted in a reasonable manner. The Trial Chamber thus considers that the length of pre-trial detention of the Accused is proportional to the circumstances of the case brought against him in the Indictment.

### III. DISPOSITION

For the foregoing reasons,

**PURSUANT** to Articles 20 and 21 of the Statute of the Tribunal and Rule 65 of the Rules

**TRIAL CHAMBER II HEREBY DENIES** the Motion.

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

Dated this ninth day of March 2005,

At The Hague

The Netherlands



**Carmel Agius**

**Presiding Judge**

**[Seal of the Tribunal]**