



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-05-87-T

Date: 5 December 2006

Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Iain Bonomy, Presiding  
Judge Ali Nawaz Chowhan  
Judge Tsvetana Kamenova  
Judge Janet Nosworthy, Reserve Judge

**Registrar:** Mr. Hans Holthuis

**Decision of:** 5 December 2006

**PROSECUTOR**

v.

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

**DECISION ON JOINT DEFENCE MOTION FOR  
PROVISIONAL RELEASE DURING WINTER RECESS**

**Office of the Prosecutor**

Mr. Thomas Hannis  
Mr. Chester Stamp

**Counsel for the Accused**

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović  
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović  
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić  
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković  
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević  
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

**THIS 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 seized of a “Joint Motion for Provisional Release During the Winter Recess,” filed 30 October 2006 (“Motion”), and hereby renders its decision thereon.

### I. Submissions

1. In the Motion, the Accused request to be released from detention from 16 December 2006 until 15 January 2007.<sup>1</sup> The two-page Motion states that the Accused “have always been in full compliance with the terms and conditions of their [prior] provisional release[s],”<sup>2</sup> and asserts that “the Accused pose no risk of flight, nor do they pose a danger to any victim, witness or other person, within the terms of Rule 65[(B)].”<sup>3</sup> The Accused state that “the presumption of innocence is not suspended by virtue of the fact that trial proceedings have commenced,”<sup>4</sup> and ask to be released “on the same terms and conditions under which they have been on provisional release both during the pre-trial phase and during the summer recess.”<sup>5</sup> Although the Motion is not accompanied by any kind of guarantee from the Government of the Republic of Serbia (“Serbia”), the Accused submit that “Serbia has provided standing guarantees to the Accused in support of their provisional release. If required by the Trial Chamber, the Accused shall request that the relevant Government authorities provide the Trial Chamber with documentation confirming the validity of these guarantees.”<sup>6</sup> The Government of the Netherlands states that it “does not have any objections” to the provisional release of Mr. Milutinović.<sup>7</sup> Although the Chamber is not in receipt of any correspondence regarding the five other Accused, the position concerning Mr. Milutinović suggests that the Dutch Government has had “an opportunity to be heard” with respect to the Motion, pursuant to Rule 65(B). For the benefit of the Accused, the Trial Chamber will assume that the Dutch Government would, if asked, express the same position with respect to the other Accused.

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<sup>1</sup> See Motion, para. 2.

<sup>2</sup> *Ibid.*, para. 3.

<sup>3</sup> *Ibid.*, para. 5.

<sup>4</sup> *Ibid.*, para. 6.

<sup>5</sup> *Ibid.*, para. 2 (citations omitted).

<sup>6</sup> *Ibid.*, para. 4.

<sup>7</sup> See Letter from J.H.P.A.M. de Roy, Deputy Director of Protocol for the Ministry of Foreign Affairs, to Jeffrey Apperson, Chief of ICTY CMS, 6 November 2006 (dated 2 November 2006), p. 1 (The “Netherlands, as host country and limiting itself to the practical consequences relating to such a provisional release, does not have any objections. It is the understanding of the Netherlands that, upon his provisional release, Mr. Milutinović will leave Dutch territory.”).

2. The Prosecution opposes the Motion.<sup>8</sup> In its two-page response, the Prosecution states that “there now exists a heightened risk that one or more of the Accused, having now heard a substantial quantum of evidence of the crimes charged against them and knowing the potential penalties if convicted for any of those offences, may now decide not to return for trial.”<sup>9</sup> “At this advanced stage of the proceedings,” the Prosecution submits, “the provisional release of the Accused is not in the interest of justice and the fair determination of the trial.”<sup>10</sup> Cognisant of the Trial Chamber’s previous decisions granting provisional release, the Prosecution asks that, if the Motion at hand is granted, the Accused be required to return to the United Nations Detention Unit (“UNDU”) by 11 January 2007, rather than 15 January 2007.<sup>11</sup>

## II. Discussion

### A. Legal standard

3. Rule 65(B) of the Rules of Procedure and Evidence (“Rules”) requires an accused desirous of provisional release to demonstrate that he or she “will appear for trial and, if released, will not pose a danger to any victim, witness or other person.” The Chamber notes that this provision is in the section of the Rules governing pre-trial proceedings (Part Five), rather than the section of the Rules governing trial proceedings (Part Six),<sup>12</sup> and that the provisions relating to the provisional release of accused before the Tribunal have been applied in the vast majority of cases to accused awaiting trial, rather than accused currently in trial proceedings. However, the placement of a rule under a particular heading does not seem to restrict its application in other stages of the proceedings; for example, Rule 71 *bis* is located not only under the pretrial part of the Rules, but also under the deposition section, and yet is routinely utilised in order to facilitate the testimony of witnesses at trial via video-link conference.

4. However, the Chamber interprets the words in Rule 65(B)—“will appear for trial”—as making it clear that the application of the Rule is confined to the provisional release of an accused whose trial has not yet begun and therefore considers that there is no specific rule providing for the provisional release of accused after the trial has commenced and a significant quantum of evidence has been adduced by the Prosecution. Having said that, the Chamber notes that other Trial Chambers have provisionally released a number of accused after commencement of their trials and, in doing so, have applied the test of Rule 65(B) to the request, as well as other factors (see

<sup>8</sup> See Prosecution Response to Defence Joint Motion for Provisional Release During the Winter Recess, 10 November 2006 (“Response”).

<sup>9</sup> *Ibid.*, para. 2 (citation omitted).

<sup>10</sup> *Ibid.*, para. 3.

<sup>11</sup> See *ibid.*, para. 5.

<sup>12</sup> See IT/32/Rev. 39, 22 September 2006.

below).<sup>13</sup> In deference to this legal approach, the Chamber will analyse the Motion under the legal standards of Rule 65(B), and then set forth its own view of the basis upon which the Motion should be decided.

5. In cases where accused have been provisionally released during or even after trial, the various Chambers considered a variety of factors in addition to the criteria of Rule 65(B), including whether the accused surrendered to the Tribunal voluntarily,<sup>14</sup> whether the accused had complied with all previous conditions of provisional release,<sup>15</sup> whether the accused had behaved respectfully toward the Chamber,<sup>16</sup> whether the Government of The Netherlands, as host country, had any objections to provisional release,<sup>17</sup> whether the state to which the accused sought to be provisionally released had provided a written guarantee that the accused would return to the Tribunal,<sup>18</sup> and whether any pressing personal circumstances encouraged the provisional release of the accused.<sup>19</sup>

6. As the Appeals Chamber has stated, a “Trial Chamber [deciding a request for provisional release] must consider ‘all those relevant factors which a reasonable trial chamber would have been expected to take into account before reaching a decision.’”<sup>20</sup> Moreover, “the Trial Chamber’s discretion under Rule 65 must be exercised in light of all the circumstances of the case.”<sup>21</sup> Further, such a Trial Chamber “must provide a reasoned opinion that, among other things, indicates its view on all of those relevant factors.”<sup>22</sup> In their Motion, the Accused identify four factors supporting provisional release: (1) the fact that they have complied with previous conditions of provisional release,<sup>23</sup> (2) the “standing guarantees” of Serbia,<sup>24</sup> (3) the assurance that the Accused will pose

<sup>13</sup> See *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Confidential Decision on Motion for Provisional Release of the Accused Prlić, made public on 17 August 2006 (dated 26 June 2006) (“Prlić Decision”) (provisionally releasing accused, whose trial had started, for nine days during Tribunal’s Summer recess); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Joint Motion for Temporary Provisional Release During Summer Recess, 1 June 2006 (“Summer Recess Decision”); *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend his Daughter’s Memorial Service, 21 April 2006 (dated 20 April 2006) (“Limaj Decision”) (provisionally releasing accused, who had been convicted of participating in torture, cruel treatment, and murder and sentenced to 13 years imprisonment, for four days); *Prosecutor v. Halilović*, Case No. IT-01-48-T, Confidential Decision on Renewed Motion for Provisional Release, 22 July 2005 (“Halilović Decision”) (provisionally releasing accused, after close of both Prosecution and Defence cases, for approximately one month); *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Confidential Decision on Motion for Provisional Release of Enver Hadžihasanović, 20 August 2004 (dated 23 July 2004) (“Hadžihasanović Decision”) (provisionally releasing accused, following close of Prosecution case, for period of two weeks prior to commencement of Defence case).

<sup>14</sup> See Prlić Decision, p. 2; Halilović Decision, p. 4.

<sup>15</sup> See Prlić Decision, p. 2; Halilović Decision, p. 4; Hadžihasanović Decision, p. 2.

<sup>16</sup> See Prlić Decision, p. 3; Halilović Decision, p. 4.

<sup>17</sup> See Prlić Decision, p. 3; Halilović Decision, p. 4; Hadžihasanović Decision, p. 2.

<sup>18</sup> See Prlić Decision, p. 2; Halilović Decision, p. 4; Hadžihasanović Decision, p. 2.

<sup>19</sup> See Prlić Decision, p. 4; Halilović Decision, p. 5; Limaj Decision, p. 2; Hadžihasanović Decision, p. 3.

<sup>20</sup> *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković’s Provisional Release, 1 November 2005 (“Milutinović Appeal Decision”), para. 3 (citation omitted).

<sup>21</sup> Halilović Decision, p.4.

<sup>22</sup> *Ibid.*

<sup>23</sup> See Motion, para. 3.

neither a flight risk nor a danger to anyone,<sup>25</sup> and (4) the fact that the Accused are presumed innocent.<sup>26</sup>

7. The Chamber will consider these factors in the course of its discussion below regarding whether the Accused have carried their burden in respect of the test set forth in Rule 65(B). In addition, the Chamber discusses its own approach to the Motion.

*B. Have the Accused satisfied their burden that, if provisionally released, they will return for trial?*

8. Taking the last factor first, the Chamber considers that, although indispensable to the conduct of trial and rendering of judgement, the presumption of innocence does not play a determinative role in deciding motions for provisional release. If it did, then no accused would ever be detained, as all are presumed innocent.<sup>27</sup> As Rule 64 provides, however, “[u]pon being transferred to the seat of the Tribunal, [an] accused shall be detained.” This is done not because the accused is presumed guilty of the crimes with which he or she is charged, but because the Tribunal, in order to conduct fair trials in the service of its mandate, must ensure that an accused will be present for trial and not seek to obstruct the proceedings by intimidating victims, witnesses, or others.<sup>28</sup> Given that accused are not detained because they are presumed guilty, the presumption of innocence does not alone justify provisional release where the concerns underlying detention have not been dispelled.<sup>29</sup>

9. With respect to the Accused’s contentions that they have complied with previous conditions of provisional release, that Serbia has provided “standing guarantees” that they will be returned for trial, and that they have provided assurances that they will not flee, the Trial Chamber has accepted these representations in the past in deciding to provisionally release the Accused prior to their trial and to temporarily grant provisional release of the Accused during the summer recess, after only one week of trial had ensued.<sup>30</sup> However, circumstances have changed materially since the Accused were last permitted to leave the UNDU. The Chamber ordered the one-week hearing (10–14 July 2006) prior to the summer recess to enable any unforeseen administrative difficulties to be resolved with a view to ensuring that the trial would be conducted in a reasonably fair and

<sup>24</sup> See *ibid.*, para. 4.

<sup>25</sup> See *ibid.*, para. 5.

<sup>26</sup> See *ibid.*, para. 6.

<sup>27</sup> See Statute of the Tribunal, art. 21(3) (“The accused shall be presumed innocent until proved guilty.”).

<sup>28</sup> See *Prosecutor v. Jokić*, Case No. IT-01-42-PT, Order on Miodrag Jokić’s Motion for Provisional Release, 20 February 2002, para. 19 (“Continued detention is [] not prohibited. Nor does it have the nature of a sanction. Its purpose is to ensure the presence of the accused at trial, to preserve the integrity of victims and witnesses and to serve the public interest.”).

<sup>29</sup> See *Milutinović* Appeal Decision, para. 4 (“[A] person not yet tried for the charges against him, and therefore presumed innocent, has a right to be released if he shows that the justifications for pretrial detention do not apply.”).

expeditious manner from 7 August 2006 onwards, and also had suspended the existing order provisionally releasing the Accused for that purpose.<sup>31</sup> However, as of the date of this Decision, 17 weeks of trial have elapsed, and 85 witnesses have given evidence relating to multiple alleged crimes committed throughout Kosovo for which the Accused are said to be responsible.

10. The Prosecution argues that this has created a “heightened risk” that the Accused will not return for the remainder of their trial.<sup>32</sup> The Chamber finds merit in the Prosecution submission and finds that risk to be significantly greater than it was prior to mid-August 2006. The Accused have not explained why the Prosecution might be mistaken. The Chamber notes that the Accused state that “Serbia has provided standing guarantees to the Accused in support of their provisional release. If required by the Trial Chamber, the Accused shall request that the relevant Government authorities provide the Trial Chamber with documentation confirming the validity of these guarantees.”<sup>33</sup> The Chamber has no reason to doubt that this is indeed the case, and assumes for the purposes of this discussion, that Serbia would provide the necessary guarantees. However, the Chamber is not persuaded, upon a balance of the probabilities, by those guarantees, the Accused’s past compliance with provisional release conditions, and their assurances that they will return, that the Accused will in fact return for the continuation of their trial.

11. The Accused have thus failed to satisfy the first part of the test, and the Motion must be refused.

*C. Have the Accused satisfied their burden that, if provisionally released, they will not pose a danger to any victim, witness, or other person?*

12. In the *Halilović* case, the Trial Chamber initially denied the Accused’s request to be provisionally released during a suspension in the proceedings.<sup>34</sup> In doing so, the Chamber considered “that the request for provisional release [had] been made during the course of the trial while the Prosecution [was] still presenting its case” and considered “the advanced stage of the Prosecution case where most of the evidence in support of the Prosecution case [had] been presented and further Prosecution witnesses [were] still to be heard.”<sup>35</sup> Subsequently, the Chamber granted a renewed motion for provisional release, in part, on the basis that the Defence case had

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<sup>30</sup> See *Summer Recess* Decision, para. 3.

<sup>31</sup> See Order Suspending Provisional Release of Each Accused, 26 May 2006.

<sup>32</sup> See Response, para. 2.

<sup>33</sup> See Motion, para. 4.

<sup>34</sup> *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Motion for Provisional Release, 21 April 2005, p. 4.

<sup>35</sup> *Ibid.*

ended, the Prosecution motion to call rebuttal evidence had been denied, and “therefore no further witnesses [would] be heard in the ... case.”<sup>36</sup>

13. The Chamber interprets the *Halilović* Trial Chamber’s concerns to be that the provisional release of an accused was not appropriate where (1) there had been a significant quantum of evidence adduced and (2) there was still more evidence to be adduced that could be hindered by the accused’s provisional release. This Chamber shares those concerns. In this trial, as previously stated, 85 witnesses have given evidence thus far, and dozens more are scheduled to give evidence in the future, 19 of whom have been granted protective measures by the Chamber because they are fearful for their or their families’ security and sensitive to pressure or intimidation. Moreover, the Chamber currently is weighing additional requests for protective measures, and this further heightens the concerns of the Chamber. The Chamber is therefore not convinced, upon a balance of the probabilities, that the Accused, if provisionally released, will not pose a danger to any victim, witness, or other person.

14. The Accused have thus also failed to satisfy the second part of the test, and the Motion must be refused on this ground also.

#### *D. Exercise of Chamber’s discretion*

15. The Trial Chamber now considers the Motion on the basis of the opinion expressed above that Rule 65(B) does not *strictu sensu* apply at this stage of the proceedings. On that view, provisional release during trial is a matter for the discretion of the Trial Chamber in the exercise of its inherent power to control the proceedings in order to ensure that they are conducted in a fair and expeditious manner and with due regard for the protection of victims and witnesses.<sup>37</sup>

16. It is the duty of the Chamber, under Articles 20 and 21 of the Statute to ensure that accused receive a fair and expeditious trial and that due regard is accorded to the protection of victims and witnesses. The Chamber must therefore guard against disruption of the proceedings in order to bring the trial to a fair and expeditious conclusion. To that end, the Chamber finds it important to ensure that the Accused are not subject to the myriad of risks attendant upon being provisionally released to Serbia. There are numerous conceivable reasons that one or more of the Accused might not return for trial, and the Chamber considers that the currently stable and reasonably expeditious progress of the proceedings should not be jeopardised by risking that. That risk would be

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<sup>36</sup> *Prosecutor v. Halilović*, Case No. IT-01-48-T, Confidential Decision on Renewed Motion for Provisional Release, 22 July 2005, p. 5.

<sup>37</sup> *Prosecutor v. Jokić*, Case No. IT-01-42-PT, Order on Miodrag Jokić’s Motion for Provisional Release, 20 February 2002, para. 19 (“Continued detention is [] not prohibited. Nor does it have the nature of a sanction. Its purpose is to ensure the presence of the accused at trial, to preserve the integrity of victims and witnesses and to serve the public interest.”).

substantially reduced if the Accused were to remain in the controlled environment of the United Nations Detention Unit throughout the trial.

17. Where the Accused (1) are charged with serious criminal offences; (2) are likely, if convicted, to face long prison terms; and (3) have held positions of power and influence, and where a substantial body of evidence has been led in the trial, any change in the *status quo* of the Accused would carry with it the risk, identified in the *Halilović* case, that the attendance of witnesses and the presentation of evidence may be hindered. The Chamber considers that this risk would be substantially reduced by continuing the detention of the Accused until the conclusion of the trial.<sup>38</sup>

18. The Accused have not identified any pressing personal circumstances comparable to those that have featured in other Chambers' decisions to release accused during trial.<sup>39</sup>

19. The Chamber recalls that its "discretion under Rule 65 must be exercised in light of all the circumstances of the case"<sup>40</sup> and finds that the concerns it has identified in this section are not outweighed by the factors that the Accused identify in the Motion, namely their compliance with previous conditions of provisional release, Serbia's "standing guarantees," their assertions that they will pose neither a flight risk nor a danger to anyone, and the fact that they are presumed innocent.<sup>41</sup> Finally, although some of the Accused surrendered voluntarily to the Tribunal<sup>42</sup> and all have behaved respectfully toward the Trial Chamber, the Chamber does not consider that these factors outweigh the reasons already identified that make continued detention appropriate. Therefore, the Chamber does not find it appropriate, in light of the circumstances of the present case, to grant provisional release of the Accused at the current stage of the proceedings.

20. It follows that the Chamber would have come to the same decision under this approach to the Motion.

<sup>38</sup> *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Motion for Provisional Release, 21 April 2005, p. 4.

<sup>39</sup> See *Prlić* Decision, p. 4 ("[T]he Accused Prlić [has] submitted medical certificates to the effect that the father and brother of the Accused Prlić are ill."); *Halilović* Decision, p. 5 (citing "the need of the Accused to solve with the competent authorities the matter of the apartment where his family lives, and the impossibility for his family to pay for a visit to The Hague"); *Limaj* Decision, p. 2 ("[T]he Motion requests that the Appellant be allowed to attend a memorial service in Kosovo on 26 April 2006 in honour of his daughter."); *Hadžihasanović* Decision, p. 3 ("[I]n order to prevent the expulsion of his wife and children from their apartment, the accused wishes to take more active participation in the ongoing judicial proceedings in Sarajevo relating to the ownership of the apartment.").

<sup>40</sup> *Halilović* Decision, p.4.

<sup>41</sup> See *ibid.*, para. 6.

<sup>42</sup> Mr. Šainović, Mr. Ojdanić, and Mr. Pavković are not entitled to credit for their surrenders because of the long periods of time that elapsed between their knowledge of the indictments against them and the dates on which they surrendered to the Tribunal. See *Milutinović* Appeal Decision, para. 9 ("[T]he Trial Chamber [] properly did not characterize [Mr. Pavković's] surrender as voluntary, but instead reasonably assigned no credit to the Accused for the conditions of his eventual surrender.") (citation omitted); *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT,

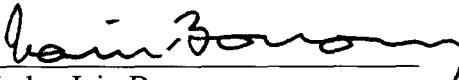


21. In addition, even if the Accused had satisfied the two parts of the test under Rule 65(B), for the reasons discussed in this section, the Chamber would have refused the Motion in the exercise of its residual discretion under that Rule.

### III. Disposition

22. For all of the forgoing reasons and pursuant to Articles 20 and 21 of the Statute and Rules 54 and 65, the Chamber hereby DENIES the Motion.

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

  
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Judge Iain Bonomy  
Presiding

Dated this fifth day of December 2006  
At The Hague  
The Netherlands

[Seal of the Tribunal]

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Decision on Second Applications for Provisional Release, 29 May 2003, p. 6 (noting that “the Appeals Chamber found that the surrenders of [Mr. Šainović and Mr. Ojdanić] were not voluntary”).