



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-98-32/1-PT

Date: 13 December 2006

Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge Krister Thelin  
Judge Frank Höpfel

**Registrar:** Mr. Hans Holthuis

**Order of:** 13 December 2006

**PROSECUTOR**

v.

**MILAN LUKIĆ  
SREDOJE LUKIĆ**

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**DECISION ON SREDOJE LUKIĆ'S MOTION FOR PROVISIONAL RELEASE**

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**Office of the Prosecutor**

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## I. INTRODUCTION

### A. Procedural history

1. Trial Chamber III 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 of the Accused Sredoje Lukić with Annexes 'A', 'A-1' and 'B'", ("Motion"), filed on 12 October 2006 in which the Accused Sredoje Lukić ("Accused") seeks to be provisionally released and stay in the municipality of Višegrad in the Republika Srpska. The Accused has provided guarantees of the Government of Republika Srpska, Bosnia and Herzegovina, relating to his request for provisional release as well as a personal guarantee that he will abide by any and all conditions of provisional release possibly set by the Trial Chamber. The Kingdom of the Netherlands has provided its guarantees that it would provide assistance if the Trial Chamber were to grant the Motion.
2. The Accused has requested a hearing 'for the purposes of establishing facts and circumstances relevant for the decision on provisional release', if the Trial Chamber should find it necessary.
3. The Office of the Prosecutor ("Prosecution") filed its "Prosecution Response to Sredoje Lukić's Motion for Provisional Release" on 26 October 2006 ("Response"), requesting that the Trial Chamber deny the Accused's application for provisional release. The Prosecution filed a confidential "Supplement to Prosecution's Response to Sredoje Lukić's Motion for provisional release" on 27 October 2006 ("Supplement"). On 2 November 2006, the Accused confidentially filed "Sredoje Lukić's Defence Motion for leave to file Defence Reply to Prosecutor's Response to Sredoje Lukić's Motion for provisional release and Prosecutor's Supplements to its Response" ("Reply"), wherein he challenged the Prosecution's right to file its Supplement as well as parts of its contents.
4. The Accused is charged with persecution, extermination, murder, inhumane acts and cruel treatment in relation to the burning of a house in Pionirski street (in Višegrad, Republika Srpska) causing the death of 70 people and serious injury to the survivors, the burning of a house in Bikavac (near Višegrad, Republika Srpska) causing the death of 70 people and serious permanent injury to the sole survivor, as well as beatings of detainees at Uzamnica detention camp (in Višegrad, Republika Srpska).

5. The initial indictment against the Accused was confirmed in 1998 and was made public in 2000. The Accused surrendered to the Tribunal on 14 September 2005 and made an initial appearance on 20 September 2005, at which time he pleaded not guilty to all the charges against him.

## **B. Arguments of the parties**

### 1. Arguments of the Defence

6. The Accused submits that, although some years passed between the day that the indictment against him was made public and his surrender to the Tribunal, this in itself does not mean his surrender was not voluntary in nature. The Accused argues that “there was a strong resistance of the general public structures in Republika Srpska regarding the cooperation with the Tribunal. In addition, there was a strong ‘war lobby’ which was pressuring the Accused.”<sup>1</sup> The Accused states that he received threats as a consequence of which he was prevented from cooperating with the Tribunal. He submits that under such circumstances, the authorities from the Republika Srpska were unable to guarantee the personal safety of the Accused, or the safety of his family. The Accused submits that as the aforementioned ‘war lobbies’ broke down after 1998, and high ranking Accused from the Republika Srpska voluntarily surrendered, “conditions were created for his voluntary surrender.” The Accused submits that ‘the only reason’ why his surrender did not take place immediately after learning that he was indicted was his fear for the safety of his family.<sup>2</sup>
7. The Accused was aware of the seriousness of the offences with which he is charged when he surrendered to the Tribunal and is well aware that he may serve a long prison term, if convicted.<sup>3</sup>
8. The Republika Srpska has provided guarantees which stipulate that, if provisionally released, the Accused would be placed in the protective custody of government agents of the Republika Srpska. The Accused submits that the presence of these agents monitoring his movements ‘24 hours per day’ strengthens the assurance that he would appear before the Tribunal, if and when requested to do so.<sup>4</sup> The Accused himself has provided his personal assurances that, if provisionally released, he will not communicate or threaten in any way

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<sup>1</sup> Motion, para. 17.

<sup>2</sup> Motion, paras. 17, 18, 20.

<sup>3</sup> Motion, para. 19.

<sup>4</sup> Motion, para. 24-27; Annex A and A1 to the Defence Motion.

victims or witnesses and that he will abide by any provisional release conditions set by the Trial Chamber.<sup>5</sup>

9. According to the Accused, the fact that his case may be referred to Bosnia and Herzegovina pursuant to Rule 11 *bis* of the Rules and Procedure of the Tribunal (“Rules”) and that as such, the Referral Bench is currently seized of this case, does not hinder the Trial Chamber from deciding a Motion for provisional release.<sup>6</sup>
10. Finally, the Defence argues that no date has yet been set for this trial to commence and that in light of Articles 20 and 21 of the Statute of the Tribunal (“Statute”), Rule 65 (B) of the Rules and the relevant international human rights provisions, his remand in custody can only be maintained, if it is the *only* reasonable measure in the given circumstances; if another less constraining measure is possible, it should thus be adopted.

## 2. Arguments of the Prosecution

11. The Prosecution submits that the Accused bears the burden of establishing that, if released he (i) will appear for trial and (ii) will not pose a danger to any victim, witness or other person. Where a Trial chamber finds that one of the two conditions has not been met, it need not consider the other and must deny provisional release.<sup>7</sup>
12. According to the Prosecution, the Chamber cannot be satisfied that the accused will appear for trial when ordered to do so. The Prosecution argues that his surrender was not truly voluntary. In October 2000 the Indictment against him was made public; the Accused ‘surrendered’ nearly five years later. The Prosecution cites jurisprudence from Trial and Appeals Chambers which rejected similar arguments used by other Accused before this Tribunal. The Prosecution also submits that many other mid-level and low-level Bosnian Serb Accused surrendered to the Tribunal soon after their indictment became public, and that the Accused could have done the same. Besides that, the Prosecution submits that the Accused has not sufficiently shown that the he or his family were subject to ‘real threats’.<sup>8</sup>
13. The Prosecution further argues that the Accused is charged with crimes of the most serious gravity. He is charged with being personally responsible for having participated in the killing

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<sup>5</sup> Motion, para. 28; Annex B and B1 to the Defence Motion.

<sup>6</sup> Motion, paras. 21 and 22.

<sup>7</sup> Prosecution Response, paras. 1 and 2.

of approximately 140 persons and the cruel and inhumane treatment of numerous others. If convicted, the Accused is likely to face a long prison term which considerably affects the Accused's incentive to take flight if provisionally released.<sup>9</sup>

14. The Accused has opposed the currently pending Prosecution Motion for his case to be transferred to Bosnia and Herzegovina. According to the Prosecution, this further shows that the Accused has an incentive to take flight once provisionally released.<sup>10</sup>
15. Lastly, the Prosecution submits that the guarantees neither provide, as submitted by the Accused, a 24 hour surveillance by the authorities of the Republika Srpska, nor does it provide a clear indication of what kind of security measures would be enforced if the Accused were to be provisionally released.<sup>11</sup>

### 3. Prosecution supplement

#### *Admissibility of the Supplement*

16. The Prosecution has sought leave to confidentially file the Supplement.<sup>12</sup> First, the Trial Chamber notes that the Supplement to the Prosecution Response was filed one day after the deadline for its Response or any filings related to its Response. Second, as indicated in the Reply, the Prosecution has not clarified why it had only learned of the materials attached to the Supplement on the day the Supplement was filed; said materials had been compiled already in September 2005. Although Rule 127 allows a Pre-Trial Judge to enlarge the deadlines prescribed by Rule 126 *bis* of the Rules, the Rule conditions that good cause must be shown. Therefore, the Prosecution's late filing of the Supplement must be weighed against the conditions in Rules 126 *bis* and 127. The Prosecution argues it should be permitted to tender the Supplement, because (1) it would be "in the interest of justice" to allow the admission of materials attached to the Supplement and (2) the materials are important for an assessment the flight risk of the Accused.<sup>13</sup>
17. The Trial concludes that, in the interest of having all the relevant material before it, it is in the interest of justice to admit the Supplement which was filed one day after the deadline for the Response. In arriving at this decision, the Chamber notes that the Accused has suffered

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<sup>8</sup> Prosecution Response, paras. 5-15.

<sup>9</sup> Prosecution Response, para. 16-18.

<sup>10</sup> Prosecution Response, para. 19-25.

<sup>11</sup> Prosecution Response, paras. 26-28.

<sup>12</sup> Supplement, para. 3.

no prejudice since he was afforded an opportunity to respond to the Supplement, and did in fact file a Reply.

### *Content of the Supplement*

18. The attached confidential materials to the Supplement are (1) a letter from the Ministry of Internal Affairs of the Republika Srpska (RS) and (2) pages from a false passport allegedly used by the Accused after the Indictment was made public and before the Accused surrendered to the Tribunal.
19. According to the Prosecution, these materials show that the Accused evaded arrest and transfer to the ICTY between 2001 and 2005 by residing and working under a false passport in various locations outside the Republika Srpska.
20. In its Reply, the Accused submits that his alleged use of a false passport does not affect the voluntariness of his surrender to the Tribunal. Moreover, the Accused submits that the letter from the RS Ministry of Internal Affairs strongly supports his argument why his surrender did not take place immediately after learning that he was indicted, namely that he refrained from surrendering due to his fears for the safety of his family.

## **II. DISCUSSION**

### **A. Applicable law**

21. Rule 65 of the Rules sets out the basis upon which a Trial Chamber may order provisional release of an accused. It provides in relevant part:

(A) Once detained, an accused may not be 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. (Revised 30 Jan 1995, amended 17 Nov 1999, amended 13 Dec 2001)

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others. [...]

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<sup>13</sup> *Ibid.*

22. A provisional release may thus only be ordered by a Chamber if the Chamber is satisfied that the Accused will appear for trial and that he will not pose any danger to victims and witnesses. That discretion must be exercised in light of all the circumstances of the case. It is necessary for an accused to satisfy the Chamber that release is appropriate in a particular case.<sup>14</sup>
23. The Trial Chamber notes that unlike national jurisdictions where there are in existence established means to ensure the enforcement of court orders, the Tribunal does not have its own law enforcement mechanisms and is dependant on the effective cooperation and support of governments and agencies of States.<sup>15</sup> An accused provisionally released by a Chamber will be under the jurisdiction of the State to which he or she is released. Therefore the questions of that State's willingness to ensure the Accused's return to the Tribunal and his non-contact with victims and Prosecution witnesses while released, and the extent to which the Tribunal can confidently rely on the effective support of the State, are of importance in satisfying a Chamber that the requirements of Rule 65 are met.<sup>16</sup>
24. Previous Trial Chambers have, *inter alia* considered the following factors as especially relevant to the provisional release inquiry: (1) the Accused is charged with serious criminal offences; (2) if convicted, he is likely to face a long prison term; (3) circumstances of the Accused's surrender; (4) any suggestion that the Accused has interfered with the administration of justice since the confirmation of the indictment against him and (5) guarantees offered by the authorities of the State to which the Accused seeks to be released, and any personal guarantees offered by the Accused; .<sup>17</sup>

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

### *Risk of flight*

25. The Trial Chamber will first inquire into the question whether the Accused, if released, will appear for trial, and if released, the Accused will not pose a danger to any victim, witness or

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<sup>14</sup> *Prosecutor v. Šešelj*, Case No. IT -03-67-PT, Decision on Defence Motion for provisional release, 23 July 2004, para. 6.

<sup>15</sup> *See also: Prosecutor v. Ademi*, Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002.

<sup>16</sup> *Prosecutor v. Šešelj*, Case No. IT -03-67-PT, Decision on Defence Motion for provisional release, 23 July 2004, para 7.

other person. The burden of proof rests on the accused seeking provisional release, and the standard applied is that of the balance of probabilities.<sup>18</sup>

26. In order to examine whether the Accused will appear for trial if provisionally released, the Trial Chamber will first examine the circumstances of his surrender. In the present case, the Trial Chamber observes that the indictment against the Accused was publicly disclosed in October 2000. Nearly five years later, the Accused surrendered himself to the Tribunal. The Trial Chamber is not convinced by the Accused's arguments that he did not surrender to the Tribunal on account of fear for his safety or that of his family, an argument that is not substantiated by any evidence other than his own statement. Rather, the fact that the Accused apparently lived on a false passport outside the Republika Srpska for a long period of time is a strong indication that the Accused purposefully attempted to evade arrest or that he, at least, has the means and knows how to obtain false documents to facilitate such an attempt.<sup>19</sup>
27. The Trial Chamber now turns to the seriousness of the crimes charged. The Trial Chamber finds that on an assessment of the Second Amended Indictment dated 27 February 2006,<sup>20</sup> the offences alleged are of a very serious nature and that, if convicted, the Accused would likely face a long term of imprisonment. This is a factor of which account may be properly taken by a Trial Chamber in determining whether to grant provisional release.<sup>21</sup> The Trial Chamber also carefully considers, while emphasising the presumption of innocence of the Accused, the fact that former co-accused Mitar Vašiljević was indicted and convicted on both trial and appeal for similar acts as alleged in the Indictment. This, in the eyes of the Accused, raises the spectre that he too will face a lengthy sentence,<sup>22</sup> thereby further enhancing the risk that the Accused would take flight if provisionally released.

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<sup>17</sup> *Prosecutor v. Vladimir Lazarević*, Case No. IT-03-70-PT, Decision on Defence Request for provisional release, 14 April 2005, referring *inter alia* to *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 6.

<sup>18</sup> See e.g. *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on assigned counsel request for provisional release, 23 February 2006, para. 10.

<sup>19</sup> See also Decision on the Defence Motion for the Provisional Release of the Accused, *Pros. v. Páško Ljubičić*, Case No. IT-00-41-PT, 2 August 2002, p. 6; *Prosecutor v. Martić*, Case No. IT-95-11-PT, Decision on Motion for provisional release, 10 October 2002; The Trial Chamber has carefully examined the materials attached to the Supplement and sees no reason to question their authenticity.

<sup>20</sup> The Second Amended Indictment of 27 February 2006 is the operative Indictment against both Accused, see Decision on the form of the Indictment, 11 May 2006, para. 10.

<sup>21</sup> *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 6

<sup>22</sup> The Trial Chamber sentenced Mitar Vašiljević to a single sentence of imprisonment for 20 years. The Appeals Chamber reversed certain convictions of the Trial Chamber and reduced his sentence to imprisonment for 15 years.



28. The Trial Chamber notes that the Prosecution Motion for a referral under Rule 11 *bis* has not yet been decided by the Referral Bench. The Accused has opposed that Motion.<sup>23</sup> Again, this is a factor which, on the basis of the jurisprudence of the Tribunal, a Trial Chamber may properly take into account in determining whether there is a risk that the Accused will not appear for Trial. It is the finding of the Chamber that this militates against the grant of provisional release.<sup>24</sup>
29. Mindful that the Republika Srpska has provided guarantees should provisional release be granted and regardless of whether, as alleged by the Prosecution, these guarantees provide sufficient specificity regarding the surveillance of the Accused, in light of the seriousness of the alleged crimes and the factors indicating the Accused's risk of flight, neither the guarantees provided by the Republika Srpska nor the personal guarantees of the Accused can outweigh the very strong indications weighing against the Accused's provisional release.

*Danger to victims and witnesses*

30. The Accused has requested to be provisionally released to the municipality of Višegrad. This Trial Chamber notes that all of the alleged crimes listed in paragraph 4 of this Decision were allegedly personally perpetrated by the Accused in Višegrad. On this basis alone the Trial Chamber would be inclined to reject the Motion. It would find it unacceptable to provisionally release an Accused to the same municipality where he allegedly committed each of the alleged crimes charged and where, possibly, a large number of the alleged victims and witnesses in this case may still reside.<sup>25</sup>

*Length of pre-trial detention*

31. Finally, the Trial Chamber, in answer to the Accused's submission on this point, finds that the length of the Accused's pre-trial detention, even in light of the fact that no trial date is yet set, is not such as to in any way change the reasons stated for continued detention of the Accused.<sup>26</sup>

<sup>23</sup> Defence Counsel's Response to Request by the Prosecutor under Rule 11 *bis*, 21 November 2005.

<sup>24</sup> *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision on Defence Motion for Provisional Release, 9 March 2005, para. 15; *Prosecution v. Mile Mrkšić et al.*, Case No. IT-95-13/1-AR65.2, Decision on Application for Leave to Appeal, 19 April 2005, p. 5; *Prosecutor v. Savo Todović et al.*, Case No. IT-97-25/1-PT, Decision on Savo Todović's Application for provisional release, 22 July 2005, paras. 25-27.

<sup>25</sup> On the proximity of Accused to victims and witnesses, *see also* *Prosecutor v. Ljube Bošković et al.*, Case No. IT-04-82-PT, Decision on Defence Motion of Ljube Bošković for provisional release, 18 July 2005, para. 43.

<sup>26</sup> For a more detailed discussion on the length of pre-trial detention in light of the International Covenant on Civil and Political Rights of 19 December 1966 and the Convention for the Protection of Human Rights and Fundamental

*Oral hearing*

32. The Accused has requested a hearing for the purposes of establishing facts and circumstances relevant for the decision on provisional release in case the Trial Chamber should find it necessary. In the current case, the arguments made by the parties are sufficient and the Chamber sees no reason for a hearing.

*Conclusion*

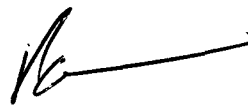
33. The Accused has not satisfied the Trial Chamber that, if released, the Accused will appear for trial and that he will not pose any danger to victims and witnesses.

**III. DISPOSITION**

34. For the foregoing reasons and pursuant to Rules 65, 126 and 127 *bis* of the Rules, the Trial Chamber:

- (1) admits the Supplement,
- (2) allows the Reply but
- (3) **denies** the Motion.

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



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Judge Patrick Robinson

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

**[Seal of the Tribunal]**