



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-04-83-T
Date: 19 December 2007
Original: English

Before: Judge Wolfgang Schomburg, Duty Judge

Registrar: Mr. Hans Holthuis

Decision: 19 December 2007

PROSECUTOR

v.

RASIM DELIĆ

Public

**DECISION ON PROSECUTION MOTION TO ARREST THE
ACCUSED RASIM DELIĆ**

The Office of the Prosecutor:

Mr. Daryl A. Mundis

Counsel for the Accused:

Ms. Vasvija Vidović
Mr. Nicolas Robson

The Government of Bosnia and Herzegovina

Per The Embassy of Bosnia and Herzegovina to
The Netherlands, The Hague

The Kingdom of the Netherlands

I, WOLFGANG SCHOMBURG, Judge 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 (“International Tribunal”), acting in my current capacity as Duty Judge,

RECALLING the “Decision on Defence Motion for Provisional Release” issued by Trial Chamber I on 23 November 2007 (“Decision”) in which Rasim Delić was granted provisional release on the condition that he, *inter alia*, not “discuss his case with anyone including the media, other than with his counsel”;¹

NOTING the “Prosecution Motion to Arrest the Accused Rasim Delić with Public Annexes A and B” filed by the Prosecution on 14 December 2007 (“Motion”);

NOTING that the Prosecution requests the Trial Chamber to

- (i) find a breach of the seventh condition of provisional release as imposed in its Decision, and
- (ii) issue an order to the Federation of BiH to immediately arrest, detain and transfer Mr. Delić to the United Nations Detention Centre in The Hague (“UNDU”) in accordance with Rule 65(H) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”);²

NOTING the “Defence Response to Prosecution Motion to Arrest the Accused Rasim Delić with Annexes A and B”, filed by Counsel for Mr. Delić on 17 December 2007 (“Response”);

NOTING that Mr. Delić argues that the Prosecution has failed to show that a breach of the terms and conditions of his provisional release occurred, and alternatively, that if such a breach is found, it would not be sufficiently serious to trigger the need to issue warrant of arrest within the terms of Rule 65(H);³

NOTING the “Prosecution Reply to Defence Response to Prosecution Motion to Arrest the Accused Rasim Delić” filed by the Prosecution on 18 December 2007 (“Reply”) pursuant to the “Order to the Prosecution for the Filing of the Reply” of 18 December 2007;

¹ Decision, Disposition, para. 1(c)(vii) (“seventh condition of provisional release”).

² Motion, para. 1.

³ Response, paras. 8-10.

NOTING that in its Reply, the Prosecution submits that the standard for determining whether a breach of a condition of provisional release has occurred is on a balance of probabilities⁴;

NOTING that Rule 28 (D (ii) provides that where a case has already been assigned to a Trial Chamber and an application is made and the Trial Chamber is unavailable, the application “shall be dealt with by the duty Judge if satisfied as to its urgency”;

CONSIDERING that the Prosecution’s Motion was filed during a period of time when the competent Trial Chamber I was and is unavailable due to the court recess;

CONSIDERING that the Response and Reply were submitted within normal Registry hours but during the court recess;

FINDING that the Motion, along with the Response and Reply, are of an urgent character, and that I am therefore competent to dispose of this matter in my capacity as the Duty Judge;

NOTING that it is undisputed that a meeting took place on 13 December 2007 between Mr. Delić, currently on provisional release in the Federation of Bosnia and Herzegovina (“BiH”) until 11 January 2008,⁵ and Dr. Haris Silajdžić, member of the Presidency of the Federation of BiH;⁶

NOTING FURTHER that it is undisputed that during this meeting the case as such was mentioned among the two aforementioned participants;

NOTING however that according to a press release submitted by the Prosecution,⁷ issued by the Cabinet of Dr. Haris Silajdžić after the meeting, it was Dr. Haris Silajdžić who “inquired into the proceedings against General Delić and the current financial status of his family” and “expressed his hope that the Tribunal will complete the proceedings in the case based upon presented evidence and facts, without any political influence”;⁸

⁴ Reply, paras. 3-6.

⁵ Decision, Disposition, para. 1(d).

⁶ The fact that such a meeting took place has been confirmed by Mr. Delić in his Response at paragraph 6, by the Government of the Federation of BiH in a letter of 19 December 2007 sent by Mr. Muhidin Alić, Minister of the Federation Ministry of Internal Affairs, and is by a photo of the meeting included in Annex A to the Motion, and published in several newspapers in the region of the former Yugoslavia, *see* Annex B to the Motion.

⁷ Annex A to the Motion.

⁸ Motion, para. 3; Annex A to the Motion.

NOTING thus that it is solely disputed whether or not Mr. Delić himself responded to these questions and further discussed his case with Dr. Haris Silajdžić;

NOTING the Prosecution's submission that the press release along with the photo taken at the meeting⁹ and related press clippings¹⁰ "clearly indicate that the Accused Rasim Delić has discussed his case with a third party other than his Defence counsel"¹¹ in breach of the condition that Mr. Delić not "discuss his case with anyone including the media, other than with his counsel";¹²

NOTING that an opportunity was granted to the Prosecution to submit further reasons in support of its Motion and in particular to address whether, in light of the events underlying its Motion, there is a significant risk that Mr. Delić will not return from provisional release, and to confirm that Dr. Haris Silajdžić is not on the Prosecution's witness list;¹³

NOTING that the Prosecution submits that it possesses no additional facts beyond those presented in its Motion in support of its claim that a breach of the seventh condition of provisional release has occurred,¹⁴ that there is no significant risk that Mr. Delić will abscond, and that Dr. Haris Silajdžić is not on the Prosecution's witness list;¹⁵

NOTING that Mr. Delić contends that his meeting with Dr. Haris Silajdžić was limited to discussing how his family was coping during the trial and his health condition, and that at the outset of the meeting he informed Dr. Haris Silajdžić that "he could not discuss issues relating to the case while the trial was ongoing";¹⁶

NOTING that a subsequent statement was released by Dr. Haris Silajdžić on 15 December 2007, in which he confirms that Mr. Delić did indeed inform him at the outset of their meeting that he could not discuss issues pertaining to his trial and that the initial press release was issued as a matter of routine by a civil servant who was not present during the meeting;¹⁷

CONSIDERING that the presumption of innocence before the International Tribunal allows for a deprivation of liberty in case of, *inter alia*, flight risk, intimidation of a witness or any other risk of

⁹ Annex A to the Motion.

¹⁰ Annex B to the Motion.

¹¹ Motion, para. 4.

¹² Decision, Disposition, para. 1(c)(vii).

¹³ Internal Memorandum from Judge Wolfgang Schomburg, Duty Judge, 17 December 2007.

¹⁴ Reply, para. 7.

¹⁵ Internal Memorandum from the Prosecutor, Ms. Carla Del Ponte, 17 December 2007. In this context, it has to be noted that the Trial Chamber is currently hearing the Prosecution case.

¹⁶ Response, para. 6.

suppression of evidence, and that this approach is in conformity with Articles 9(3) and 14(2) of the International Covenant on Civil and Political Rights (“ICCPR”);¹⁸

FINDING that based on a free assessment of the evidence before me, on a balance of probabilities¹⁹ the behaviour exhibited by Mr. Delić constitutes a violation of the seventh condition of his provisional release, as he discussed his case with someone other than his counsel;²⁰

NOTING that the Decision orders “that the Accused shall be immediately detained should he breach any of the ... terms and conditions of his provisional release”;²¹

CONSIDERING however that not each and every breach of a term and condition of provisional release can automatically lead to its revocation;

RECALLING that an intrusive measure in public international law, and in particular in criminal law, must be proportional;

CONSIDERING that to be regarded as being proportional such a measure must be suitable, necessary, and its degree and scope must remain in a reasonable relationship to the envisaged target such that, if it is sufficient to use a more lenient measure, the more lenient measure must be applied;²²

CONSIDERING that undisputedly in spite of the aforementioned violation of the seventh condition of his provisional release, there is no indication that Mr. Delić poses an increased risk of flight or that he has contacted any witness on the current witness list of either party;

¹⁷ Annex A to the Response.

¹⁸ Article 9(3) reads in relevant part that: “It shall not be the general rule that persons awaiting trial shall be detained in custody”; Article 14 (2) provides that: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty.” ICCPR, 999 U.N.T.S., 171, *entered into force* 23 March 1976. The International Tribunal’s obligation to respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings is spelled out at paragraph 106 of the *Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808(1993)*, wherein the Secretary-General specifically notes that “such internationally recognized standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights.” U.N. Doc. S/25704 (3 May 1993).

¹⁹ With respect to the applicable standard in the analogous situation of determining a breach of bail conditions *see e.g.* *Title 18, United States Code*, Chapter 207 §3148(b)(1)(A) (United States of America); *Bail Act 1976*, Chapter 63 § 7(3)(b) (United Kingdom); *Criminal Procedure (Scotland) Act 1995*, Part III §28(1) (Scotland); As for the free assessment of evidence, although in a different context, *see* Bundesgerichtshof [BGH] [Federal Supreme Court of Justice] 28 June 1961, *Entscheidungen des Bundesgerichtshofs in Strafsachen* [BGHSt] 16, 164 (166) (Germany).

²⁰ Decision, Disposition, para. 1(c)(vii).

²¹ *Ibid.*, para. 5.

²² *See e.g., Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović, 19 December 2001, para. 7.

FINDING that the revocation of Mr. Delić's provisional release would be a suitable measure;

FINDING however, that on a balance of probabilities, a revocation is not necessary as a more lenient measure, *i.e.* detention under police supervised house arrest suffices in this case;

NOTING that the Government of the Federation of BiH, in a letter sent today, 19 December 2007, expressed its willingness to ensure the implementation of further guarantees beyond those contained in the original Decision, namely:

- (i) to enforce any order by the International Tribunal to place Mr. Delić under house arrest at the address(es) designated by the International Tribunal in both Visoko and Sarajevo, with release being granted only for medical treatment, if needed; and
- (ii) to ensure the appropriate surveillance by the competent authorities of the designated residence in which Mr. Delić is placed under house arrest;²³

FOR THE FOREGOING REASONS, and pursuant to Rules 28, 54 and 65 of the Rules,

I HEREBY

(I) ISSUE a stern warning to Mr. Delić that any further infringement of the conditions of provisional release imposed by the Trial Chamber or by this decision – however, slight – will be taken together with this violation such that any reconsideration of Mr. Delić's provisional release, should it become necessary, will take into account the cumulative effect of all violations;

(II) GRANT the Prosecution Motion in part; and

(III) ORDER as follows and with immediate effect:

- (i) that Mr. Delić be placed under house arrest at his residence in Visoko;
- (ii) that Mr. Delić only be released for the purposes of medical treatment if need be, during which time he will reside under house arrest at his residence in Sarajevo, as appropriate;
- (iii) that the Registrar take the necessary measures to ensure compliance with subparagraphs (i) and (ii);

²³ Letter from Prime Minister, Dr. Nedžad Branković, dated 19 December 2007.

(IV) **REAFFIRM** all other conditions imposed by Trial Chamber I in its Decision of 23 November 2007;

(V) **REQUEST** the Government of the Federation of BiH to:

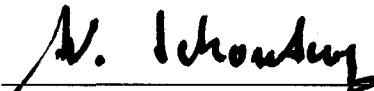
- (i) place Mr. Delić under house arrest at his residence in Visoko, with release being granted only for the purposes of medical treatment is needed, during which time Mr. Delić may be alternatively placed under house arrest at his residence in Sarajevo, if appropriate;
- (ii) ensure the appropriate surveillance by the competent authorities of the residence in which Mr. Delić is placed under house arrest, or during any transfer, in particular, for the purposes of medical treatment, if need be;

(VI) **REAFFIRM** all other responsibilities undertaken by the Government of the Federation of BiH pursuant to the Decision of 23 November 2007; and

(VII) **REJECTS** the remainder of the Prosecution's Motion.

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

Done this 19th day of December 2007,
At The Hague
The Netherlands


Judge Wolfgang Schomburg
Duty Judge

[Seal of the International Tribunal]