



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: 4 April 2008
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: 4 April 2008

PROSECUTOR

v.

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

PUBLIC WITH CONFIDENTIAL ANNEX

DECISION ON ŠAINOVIĆ MOTION FOR TEMPORARY PROVISIONAL RELEASE

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Government of Republic of Serbia

Government of The Netherlands

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 seised of an urgent and confidential “Defence Request Seeking Temporary Provisional Release on the Grounds of Compassion,” filed by the Šainović Defence on 3 April 2008 (“Motion”), and hereby renders its decision thereon.¹

1. In the Motion, Nikola Šainović (“Accused”) requests temporary provisional release on the basis of urgent personal reasons. He argues that he has been released previously based upon the guarantees of the Government of the Republic of Serbia (“Serbia”), that he has complied with all previous orders regarding provisional release, and that the practice of the Tribunal in relation to similar requests for relief supports a grant of the Motion.

2. The Trial Chamber is in receipt of guarantees from the Republic of Serbia confirming that it will respect all orders made by the Chamber in respect of the provisional release of the Accused.² The Netherlands, in its capacity as host country, has represented, in the recent past, that it has no objection to the Accused’s provisional release.³

3. In an addendum to the Motion, the Accused submits documentation substantiating the grounds set forth for the temporary provisional release and informs the Chamber that it has submitted a request to Serbia for additional guarantees, but is of the view that the Chamber may base its determination of the Motion upon the existing guarantees that have been reaffirmed on numerous occasions.⁴

4. The Prosecution submits a response to the Motion placing its position upon the record that, as a policy matter, it is not in the interests of justice to allow a provisional release of an accused to disrupt the completion of a trial and that the humanitarian considerations of the Accused must be balanced against the legitimate interest of the international community in the proper administration of justice. Having said that, the Prosecution recognises the Chamber’s discretion to grant temporary provisional release on compassionate and/or humanitarian grounds, which should be exercised in favour of release only upon a documented showing of the most compelling circumstances and in exceptional cases. The Prosecution continues, “The particular circumstances

¹ The Chamber considers it appropriate to file this decision publicly, although the filings were accomplished on a confidential basis. No confidential information is contained herein.

² Confidential Defence Motion Requesting Temporary Provisional Release During the Upcoming Court Recess or Requesting Temporary Provisional Release on the Grounds of Compassion, 26 November 2007, Annex I.

³ Letter from Deputy Director of Protocol for the Dutch Minister of Foreign Affairs, dated 29 November 2007.

⁴ Confidential Addendum to Defence Request Seeking Temporary Provisional Release on the Grounds of Compassion, 3 April 2008.

of this request appear to approach that high standard and if the Trial Chamber is willing to rely on the prior guarantees of the Serbian government, the Prosecution will not contest a favorable ruling to that application.”⁵

5. Pursuant to Rule 65(A), once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B), a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness, or other person, after having given the host country and the state to which the accused seeks to be released the opportunity to be heard.⁶

6. In deciding whether the requirements of Rule 65(B) have been met, a Chamber must consider all of those relevant factors that a reasonable Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.⁷ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.⁸ This is because decisions on motions for provisional release are fact intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.⁹ The Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.¹⁰

7. Rule 65(B), which governs provisional release during trial, makes no mention of compassionate or humanitarian grounds. However, the jurisprudence of the Tribunal has recognised that Chambers enjoy a measure of discretion when considering motions pursuant to Rule 65 where compassionate or humanitarian concerns may permit a more limited provisional release.¹¹

⁵ Confidential Prosecution Response to Nikola Šainović’s Urgent Request Seeking Temporary Provisional Release on the Grounds of Compassion, 3 April 2008.

⁶ *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj’s Interlocutory Appeal Against the Trial Chamber’s Decision Denying his Provisional Release, 9 March 2006, para. 6.

⁷ *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005 (“*Stanišić Decision*”), para. 8.

⁸ *Ibid.*

⁹ *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Decision Denying Johan Tarčulovski’s Motion for Provisional Release, 4 October 2005, para. 7.

¹⁰ *Stanišić Decision*, para. 8.

¹¹ See Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007, paras. 7–11; see also *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, para. 5 (“*Popović Decision*”); *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision Granting Provisional Release to Haradin Bala to Attend His Brother’s Memorial Service and to Observe the Traditional Period of Mourning, 1 September 2006, p. 1; *Prosecutor v. Blagoje*

8. Importantly, where an accused applies for provisional release following the denial of a previous application, “it is incumbent on that accused to satisfy the Trial Chamber that there has been a change in circumstances that materially affects the approach taken in earlier provisional release decisions regarding the same accused.”¹²

9. The Chamber has carefully considered all the submissions in relation to this matter and has taken all relevant factors bearing upon the issue of provisional release into account, including the guarantees from Serbia. Based upon the compelling humanitarian considerations set forth in the Motion, and the conditions under which the Accused’s temporary provisional release will be strictly controlled, the Chamber considers that the criteria of Rule 65(B) are satisfied and is prepared to exercise its discretion to grant a temporary provisional release. The Chamber has taken into account the fact that it dismissed the Accused’s Rule 98 *bis* motion for a judgement of acquittal, and it finds that this does not outweigh the humanitarian concern.

10. For the foregoing reasons and pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby GRANTS the Motion and ORDERS as follows:

- (a) On **Saturday, 5 April 2008**, Nikola Šainović (“Accused”) shall be transported to the appropriate airport in the Netherlands by the Dutch authorities.
- (b) At the appropriate airport, the Accused shall be provisionally released into the custody of an official of the Government of the Republic of Serbia (“Serbia”) to be designated prior to the Accused’s release in accordance with operative paragraph (m) hereunder, who shall accompany the Accused for the remainder of his travel to and from the address detailed in the confidential annex to this Decision.
- (c) On his return, the Accused shall be accompanied by a designated official of Serbia, who shall deliver the Accused to the custody of the Dutch authorities at the appropriate airport, and the Dutch authorities shall then transport the Accused back to the United Nations Detention Unit in The Hague.

Simić, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić for Provisional Release for a Fixed Period to Attend Memorial Services for His Mother, 5 May 2006, p. 3; *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, 20 April 2006, p. 2; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 15; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Service for His Father, 21 October 2004, para. 20; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić’s Request for Provisional Release, 19 April 2004, paras. 8–12.

¹² *Popović* Decision, para. 12.

- (d) During the period of his provisional release, the Accused shall abide by the following conditions,
- i. the Accused shall remain at the address detailed in the confidential annex to this Decision;
 - ii. Serbia shall provide 24-hour surveillance of the Accused throughout his presence in Serbia; and
 - iii. the Accused shall surrender his passport to the Ministry of Justice of Serbia for the duration of his provisional release.
- (e) Before leaving the United Nations Detention Unit in The Hague, the Accused shall provide details of his itinerary to the Ministry of Justice of the Netherlands and to the Registrar of the Tribunal.
- (f) The Accused shall not have any contact with any co-Accused in the case.
- (g) The Accused shall not have any contact whatsoever, or in any way interfere with, any victim or potential witness or otherwise interfere in any way with proceedings before the Tribunal or with the administration of justice.
- (h) The Accused shall not discuss his case with anyone, including the media, apart from his counsel.
- (i) The Accused shall continue to cooperate with the Tribunal and comply with any further Orders or Decisions of this Trial Chamber regarding his provisional release.
- (j) The Accused shall comply strictly with any requirements of the authorities of Serbia, which are necessary for them to comply with their obligations pursuant to this Order.
- (k) The Accused shall return to the United Nations Detention Unit in The Hague on **Monday, 7 April 2008.**
- (l) The Accused shall comply strictly with any further Order of the Trial Chamber varying the terms of or terminating his provisional release.
- (m) The Government of Serbia shall assume the following responsibilities:
- (i) ***Designation of an official of Serbia***, into whose custody the Accused shall be provisionally released and who shall accompany the Accused from the appropriate airport in The Netherlands to the address detailed in the confidential annex to this Decision, and ***notification, as soon as practicable***,

to the Trial Chamber and the Registrar of the Tribunal of the name of the designated official.

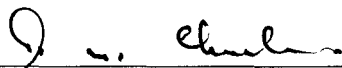
- (ii) Provision of 24-hour surveillance of the Accused throughout his stay in Serbia.
- (iii) Provision of the personal security and safety of the Accused while on provisional release.
- (iv) Responsibility, at the request of the Trial Chamber or the parties, for facilitating all means of cooperation and communication between the parties, and assurance of the confidentiality of any such communication(s).
- (v) Responsibility for informing the Trial Chamber of any failure by the Accused to comply with the terms of this Order.
- (vi) Responsibility for immediately arresting and detaining the Accused, should he breach any of the conditions of this Order.
- (vii) Responsibility, once the Accused has returned to the United Nations Detention Unit in The Hague, *for the submission of a written report to the Trial Chamber* as to the compliance of the Applicant with the terms of this Order.

11. The Trial Chamber hereby **INSTRUCTS** the Registrar of the Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for the provisional release of the Accused, and to continue to detain the Accused at the United Nations Detention Unit in The Hague until such time as the Trial Chamber and the Registrar have been notified of the name of the designated official of the Government of the Republic of Serbia into whose custody the Accused is to be provisionally released.

12. The Trial Chamber hereby **REQUESTS** the authorities of all states through which the Accused will travel:

- (a) to hold the Accused in custody for any time that he will spend in transit at an airport in their territories; and
- (b) to arrest and detain the Accused pending his return to the United Nations Detention Unit in The Hague, should he attempt to escape.

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



Judge Ali Nawaz Chowhan

Dated this fourth day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]