



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-05-88-T
Date: 21 July 2008
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 21 July 2008

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

DECISION ON NIKOLIĆ'S MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor
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Government of Republika Srpska

Government of The Netherlands

Counsel for the Accused

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Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

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 the “Motion on Behalf of Drago Nikolić Seeking Provisional Release Under Custodial Conditions on Compassionate Grounds”, filed confidentially on 9 July 2008 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. The only motion for provisional release previously filed by Nikolić was denied by the Trial Chamber on the ground that it was not satisfied that, if provisionally released, Nikolić would return to the custody of the Tribunal.¹ This decision was upheld on appeal.²

2. In the Motion, Nikolić requests provisional release under custodial conditions for compassionate reasons during the forthcoming recess in the proceedings.³ On 11 July 2008, the Prosecution filed confidentially the “Prosecution’s Consolidated Response to Accused Gvero, Miletić, Nikolić and Pandurević’s Motions for Provisional Release” (“Response”). On 11 July 2008, Nikolić filed an “Addendum to the Motion on Behalf of Drago Nikolić Seeking Provisional Release Under Custodial Conditions on Compassionate Grounds” (“Addendum”), and on 17 July 2008, Nikolić filed confidentially the “Defence Motion Seeking Leave to Reply and Reply to Prosecution’s Consolidated Response to Accused Gvero, Miletić, Nikolić and Pandurević’s Motions for Provisional Release” (“Reply”).

II. SUBMISSIONS OF THE PARTIES

A. Motion

3. Nikolić requests provisional release under custodial conditions during the period 1st to 4th of August 2008 to attend a memorial service for his father, who recently passed away.⁴ The memorial service will be held on 3 August, that is within 40 days of the death of Nikolić’s father, in accordance with Orthodox custom.⁵

¹ Decision on Drago Nikolić’s Request for Provisional Release, 9 November 2005 (“Decision of 9 November 2005”), paras. 17–26.

² *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.1, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolić’s Motion for Provisional Release, 24 January 2006.

³ Motion, para. 1.

⁴ *Ibid.*, paras. 1, 14, 16. See also Confidential Annex A.

⁵ *Ibid.*, para. 1. See also Confidential Annexes A and D.

4. Nikolić argues that the “exceptionally compelling” humanitarian grounds that he be able to pay his last respects to his father and provide support to his ailing mother offset any risk of flight.⁶ Nikolić contends that the humanitarian grounds on which the Motion is based constitute a material change of circumstances since he last applied for (and was denied) provisional release.⁷

5. Nikolić further submits that the duration of the requested provisional release is limited to what is strictly necessary for the purpose of the compassionate grounds.⁸

6. Nikolić proposes “ultra-strict” custodial conditions, guaranteed by the Government of Republika Srpska (“RS”) to address any concerns regarding his risk of flight.⁹ Nikolić has furnished the Trial Chamber with a guarantee from the Government of RS, pursuant to which Nikolić would be guarded at all times by two armed members of the RS Ministry of Internal Affairs (“MUP”), he would spend his nights in the local detention facility which is part of the Bratunac Public Security Centre, and he would remain at all times in the municipality of Bratunac (with the exception of his travel to and from Sarajevo airport).¹⁰ Nikolić has also produced a guarantee from the RS MUP that it is willing to take responsibility for Nikolić’s custody in accordance with any order from the Tribunal,¹¹ and correspondence from The Netherlands, in which it consents to the suggested period of release.¹² In addition, Nikolić offers a personal undertaking that he will return to The Hague after the period of release is over, will not interfere with witnesses, victims and other persons and will and comply with any and all conditions imposed by the Trial Chamber.¹³ It is submitted that the guarantees provided by the RS Government and the Accused are more than sufficient to offset any risk of flight.¹⁴

7. Nikolić acknowledges that the Trial Chamber has previously found Nikolić’s explanation of his time as a fugitive from the Tribunal to be unconvincing.¹⁵ Nikolić argues that notwithstanding this conclusion, there is no information before the Trial Chamber to indicate that Nikolić took any steps to frustrate attempts to capture him.¹⁶

⁶ *Ibid.*, paras. 24–27. *See also* Confidential Annexes A, D and E.

⁷ *Ibid.*, paras. 24, 28–30.

⁸ *Ibid.*, paras. 24, 31–34.

⁹ *Ibid.*, para. 2.

¹⁰ *Ibid.*, para. 40. *See also* Confidential Annex B.

¹¹ Addendum, Confidential Enclosure 1.

¹² Correspondence from Host Country Regarding the Provisional Release Request, 11 July 2008.

¹³ Motion, paras. 12, 42. *See also* Confidential Annex C.

¹⁴ *Ibid.*, paras. 35–42.

¹⁵ *Ibid.*, para. 44. *See also* Decision of 9 November 2005, para. 20.

¹⁶ *Ibid.*, para. 45.

8. The Motion also notes that there has been no change in circumstances such that the Trial Chamber should reconsider its previous conclusion that Nikolić does not pose a danger to any victim, witness or other person who may appear before the Tribunal.¹⁷

9. Nikolić therefore submits that the two conditions of Rule 65 (B) are satisfied as well as the additional criteria that there must have been a material change in the circumstances since the last application.¹⁸ For these reasons, it is submitted that the provisional release under custodial conditions should be granted.¹⁹

B. Response

10. In the Response, the Prosecution argues that Nikolić's failure to adequately explain his reasons for not promptly surrendering to the Tribunal indicates a very high risk of flight, and the Motion should be denied.²⁰

11. In the event that the Trial Chamber decides to grant the Motion, the Prosecution emphasises that extremely high levels of security would be necessary in order to negate the perceived flight risk.²¹ The Prosecution seeks a stay in order to file an appeal of this decision only if Nikolić is granted release with conditions less than a custodial visit under high security.²²

C. Reply

12. Nikolić first requests leave to file a reply.²³ In the Reply, Nikolić confirms the conditions under which he seeks provisional release (four days under strict custodial conditions) and notes that the Prosecution has not requested a stay in order to file an appeal if the Trial Chamber grants the Motion under these conditions.²⁴

III. APPLICABLE LAW

13. 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 Trial Chamber may order the provisional release of an accused only if it is satisfied that, if released, the accused will appear for trial and will not

¹⁷ *Ibid.*, paras. 48–50.

¹⁸ *Ibid.*, paras. 51–52.

¹⁹ *Ibid.*, para. 53.

²⁰ Response, para. 12.

²¹ The Prosecution refers expressly to the form of custodial visit, with conditions and restrictions imposed on Borovčanin on 9 April 2008 to be applied in this instance. *Ibid.*, para. 13.

²² Response, paras. 1, 18.

²³ Reply, para. 1–2.

²⁴ *Ibid.*, paras. 4–8.

pose a danger to any victim, witness or other person, and after giving the host country and the state to which the accused seeks to be released the opportunity to be heard.²⁵ Rule 65(C) provides that “[t]he 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”.

14. A decision on a request for provisional release must address all relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision and include a reasoned opinion indicating its view on those relevant factors.²⁶ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case,²⁷ since “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.”²⁸

15. Furthermore the Appeals Chamber held that a Rule 98 *bis* decision declining to enter a judgement of acquittal after the close of the Prosecution case is “a significant enough change in circumstance to warrant the renewed and explicit consideration by the Trial Chamber of the risk of flight by the Accused.”²⁹ It further held that “when considering a provisional release motion at the post-98 *bis* stage of the proceedings, even when a Trial Chamber is satisfied that sufficient guarantees exist to offset the flight risk of an accused, it should not exercise its discretion to grant provisional release unless sufficiently compelling humanitarian reasons tip the balance in favour of allowing provisional release.”³⁰ The humanitarian grounds raised by an accused as a basis for provisional release must be assessed in the context of the two requirements of Rule 65(B),³¹ and the

²⁵ See, *inter alia*, *Prosecutor v. Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5 and IT-05-88-AR65.6, Decision on Consolidated Appeal Against Decision on Borovčanin’s Motion for a Custodial Visit and Decisions on Gvero’s and Miletić’s Motions for Provisional Release During the Break in the Proceedings, 15 May 2008 (“Appeals Chamber Decision of 15 May 2008”), para. 5; Appeals Chamber Decision of 15 May 2008, para. 6; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović’s Interlocutory Appeal against the Decision on Popović’s Motion for Provisional Release, 1 July 2008 (“Appeals Chamber Decision of 1 July 2008”), para. 7.

²⁶ See, *inter alia*, Appeals Chamber Decision of 15 May 2008, para. 6; Appeals Chamber Decision of 1 July 2008, para. 8.

²⁷ See, *inter alia*, Appeals Chamber Decision of 15 May 2008, para. 6; Appeals Chamber Decision of 1 July 2008, para. 8.

²⁸ Appeals Chamber Decision of 15 May 2008, para. 6 (referring to *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7).

²⁹ See, *inter alia*, *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008 (“Prlić Appeals Chamber Decision of 11 March 2008”), paras. 19–20.

³⁰ See, for example, Appeals Chamber Decision of 15 May 2008, para. 24.

³¹ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal On Provisional Release, 27 July 2007, para. 14.

Trial Chamber must be satisfied that the conditions of provisional release are sufficient to address any concerns in relation to the requirements of Rule 65(B).³²

16. The Appeals Chamber has also held that where provisional release is found to be justified on humanitarian grounds, the duration of provisional release should be proportional to the period of time necessary to carry out the humanitarian purpose of the release.³³ Accordingly, “a Trial Chamber must address the proportionality between the nature and weight of the circumstances of a particular case and the duration of provisional release requested”.³⁴

IV. DISCUSSION

17. The Trial Chamber notes that the only request filed by Nikolić for provisional release was denied by the Trial Chamber on the grounds that it was not satisfied that Nikolić would reappear before the Tribunal.³⁵ Further, since Nikolić last applied for provisional release, the Trial Chamber has orally rendered its decision on the accused’s submissions pursuant to Rule 98 *bis* (“Rule 98 *bis* Decision”), in which it declined to enter a judgement of acquittal with reference to any of the accused after the conclusion of the Prosecution case.³⁶ The effect of the Rule 98 *bis* Decision must therefore be considered with reference to the particular circumstances of Nikolić as regards risk of flight. The Trial Chamber notes that Nikolić is indicted for genocide, conspiracy to commit genocide, crimes against humanity and war crimes in relation to allegations of murder, extermination, persecution, forcible transfer and deportation.³⁷ In his Rule 98 *bis* submissions, Nikolić requested an acquittal on Count 2 (conspiracy to commit genocide), Count 7 (forcible transfer) and Count 8 (deportation).³⁸ The Trial Chamber rejected these submissions and held that the counts against Nikolić passed the Rule 98 *bis* test.³⁹ However, the standard applied by the Trial Chamber in its Rule 98 *bis* Decision is very different to that under which Nikolić will be ultimately judged, and neither the credibility, nor the weight to be attributed to that evidence was assessed in the Rule 98 *bis* Decision.⁴⁰ As well the Trial Chamber did not make any findings as to the strength of the case against Nikolić in the 98 *bis* Decision. Taking all these factors into account, the Trial Chamber remains of the view, strengthened by the Rule 98 *bis* Decision, that Nikolić poses a flight risk.

³² See, for example, Decision on Borovčanin’s Motion for Custodial Visit, 9 April 2008, para. 24.

³³ Appeals Chamber Decision of 15 May 2008, paras. 18, 32.

³⁴ Appeals Chamber Decision of 15 May 2008, para. 18.

³⁵ See *supra*, fn.1.

³⁶ T. 21460–21473 (3 March 2008).

³⁷ Indictment, counts 1–8.

³⁸ T. 21260 (14 February 2008).

³⁹ T. 21473 (3 March 2008).

⁴⁰ T. 21461 (3 March 2008).

18. However, since the previous decision on provisional release Nikolić's father has died and this request for provisional release is advanced in order that Nikolić may attend a memorial service for him. Clearly, this constitutes a change of circumstance which merits a reconsideration of the question of provisional release. Further the Trial Chamber considers that the opportunity to attend the memorial service of one's father is a humanitarian reason of the highest order. It is sufficiently compelling so as to justify some form of provisional release provided that concerns regarding the risk of flight can be properly addressed.

19. In this regard, Nikolić has proposed that stringent custodial conditions be placed upon him should he be released including being kept under 24 hour guard by armed members of the Republika Srpska MUP, spending every night at the local detention facility and remaining at all times within the confines of the municipality of Bratunac. Further, he has requested release for a limited period of time adequate solely for the humanitarian purpose upon which the Motion is based, that is, to attend his father's memorial service and see his mother.

20. The Trial Chamber is satisfied with the Guarantees provided by the Government of Republika Srpska⁴¹ and the Republika Srpska MUP.⁴² The Trial Chamber also acknowledges Nikolić's personal undertaking.⁴³ It further notes the correspondence from The Netherlands, affirming that it has no objection to the sought provisional release.⁴⁴

21. In all these circumstances, the Trial Chamber is of the opinion that the compelling humanitarian reason advanced by Nikolić, when combined with the strict custodial conditions and limited time of release, as detailed below, outweigh any risk of flight. It is further satisfied that Nikolić will not pose a threat to witnesses, victims or any other person in this case.

V. DISPOSITION

22. For these reasons, pursuant to Article 29 of the Statute and Rules 54 and 65 of the Rules, the Trial Chamber hereby:

- (a) **GRANTS** leave to Nikolić to file the Reply;
- (b) **GRANTS** Nikolić's request for provisional release, on the condition that any affected state has provided its agreement to the Registry, and decides as follows:

⁴¹ Motion paras. 35–41. *See also* Confidential Annex B.

⁴² Addendum, Confidential Enclosure 1.

⁴³ Motion para. 42. *See also* Confidential Annex C.

⁴⁴ Correspondence from Host Country Regarding the Provisional Release Request, 11 July 2008.

- (i) the agreement from any affected state should be submitted to the Registry prior to the transfer of Nikolić failing which no transfer will occur;
- (ii) Nikolić shall be provisionally released for a period of four days (including travel time), being from 1 until 4 August 2008;
- (iii) Nikolić shall be transported to Schiphol airport in The Netherlands by the Dutch authorities;
- (iv) at Schiphol airport, Nikolić shall be transferred into the custody of a designated official of the Republika Srpska, who shall accompany Nikolić on the airplane;
- (v) the authorities of all states through whose territory Nikolić may travel will hold Nikolić in custody for any time he will spend in transit at the airport and arrest and detain Nikolić pending his return to the United Nations Detention Unit (“UNDU”), should he attempt to escape;
- (vi) during the period of Nikolić’s stay in Republika Srpska, he shall abide by the following conditions, and the authorities of the Republika Srpska shall ensure compliance with such conditions:
 1. Nikolić shall be in custody at all times, *i.e.* have armed members of the Republika Srpska MUP guarding him 24 hours per day, while being allowed to attend the memorial service for his father and see his mother, as requested in his Motion,
 2. Nikolić shall remain within the confines of the municipality of Bratunac, Republika Srpska, Bosnia and Herzegovina, apart from his travel to and from the Airport,
 3. Nikolić’s travel documents shall be given to the European Union Police Mission (“EUPM”) in Sarajevo or to the Office of the Prosecutor in Sarajevo, or to the Public Security Station in Bratunac,
 4. Nikolić shall spend every night in the local detention facility, which is part of the Bratunac Public Security Centre,
 5. a written report shall be filed with the Tribunal confirming the presence of Nikolić each day,
 6. Nikolić shall not discuss his case with anyone other than his counsel,

7. Nikolić shall not have any contact with the co-accused in the case,
 8. Nikolić shall not have any contact whatsoever or in any way interfere with any victim or potential witness or otherwise interfere in any way with the proceedings or the administration of justice,
 9. Nikolić shall comply strictly with any requirement of the authorities of the Republika Srpska necessary to enable them to comply with their obligations under this decision and their guarantees;
 10. Nikolić shall return to the UNDU in The Hague four days, at the latest, after his departure from the UNDU;
 11. on his return Nikolić shall be accompanied on the airplane by the designated officials of Republika Srpska, who shall deliver him into the custody of the Dutch authorities at Schiphol airport, the Dutch authorities shall then transport him back to the UNDU;
- (c) **REQUIRES** the Republika Srpska to assume responsibility as set out above, to cover all expenses concerning transport of Nikolić from Schiphol airport to Republika Srpska and back as well as concerning accommodation and security of Nikolić while on custodial visit, to arrest Nikolić immediately if he should breach any of the conditions of this decision, and to report immediately to the Trial Chamber any breach of the conditions set out above; and
- (d) **REQUESTS** the Registry to obtain confirmation of the agreement of any state affected by the transfer, prior to arranging for the transfer of Nikolić to Republika Srpska, and to assist in obtaining the views of any state affected by the transfer, and to distribute this decision to the relevant states and organisations.

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



Carmel Agius
Presiding

Dated this twenty-first day of July 2008
At The Hague
The Netherlands

[Seal of the Tribunal]