



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: 26 September 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: 26 September 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 The Netherlands

Government of the Republic of Serbia

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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 a confidential “Defence Renewed Request Seeking Temporary Provisional Release on the Grounds of Compassion,” filed by the Šainović Defence on 11 September 2008 (“Motion”), and hereby renders its decision thereon.

Brief procedural background

1. On 28 June 2006, shortly before the commencement of the trial, the Trial Chamber varied the conditions of the provisional release of the Accused Nikola Šainović (“Accused”) so that he could accompany his mother to his father’s grave during a requiem.¹
2. The Accused was granted provisional release after the commencement of the trial and during the summer recess from 15 to 31 July 2006.²
3. On 5 December 2006, the Chamber denied the six Accused’s joint application for provisional release over the winter recess.³ The Appeals Chamber affirmed this decision.⁴
4. On 22 May 2007, the Chamber denied the application of the Accused for provisional release over the summer recess, holding, *inter alia*, that he had not demonstrated how the circumstances that led to the denial of his application in December 2006 had changed so as to materially affect the approach taken by the Chamber at that time. The Chamber left open the possibility that the Accused could apply for temporary provisional release on compassionate and/or humanitarian grounds.⁵ Following this denial, the Chamber granted on 7 June 2007 the Accused temporary provisional release to deal with urgent personal matters.⁶
5. On 7 December 2007, the Chamber denied the Accused temporary provisional release on compassionate and/or humanitarian grounds based upon the fact that he had been granted an adequate opportunity to attend to these matters during previous provisional releases.⁷

¹ Decision on Šainović’s Request for Variation of Conditions of Provisional Release, 28 June 2006, paras. 1, 3; *see also* confidential Decision on Request of Nikola Šainović for Variation of Conditions of Provisional Release, 12 May 2006.

² Decision on Joint Motion for Temporary Provisional Release During Summer Recess, 1 June 2006.

³ Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006.

⁴ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During Winter Recess, 14 December 2006.

⁵ Decision on Šainović Motion for Provisional Release, 22 May 2007, paras. 12, 14.

⁶ Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007 (public with confidential annex).

⁷ Decision on Šainović Motion for Temporary Provisional Release, 7 December 2007 (public with confidential annex).

6. On 4 April 2008, the Chamber granted the Accused temporary provisional release on compassionate and/or humanitarian grounds for urgent personal reasons.⁸

7. On 5 September 2008, the Chamber denied the Accused's motion for temporary provisional release on humanitarian and/or compassionate grounds because inadequate information as to the costs involved in the requested treatment, as well as the Accused's financial situation, had been provided to the Chamber. Moreover, the Chamber was not satisfied that adequate information had been provided in relation to showing that the treatment was serious and sufficiently compelling enough to warrant a provisional release to Belgrade, Serbia.⁹

Applicable law

8. 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.¹⁰ Where one of the criteria required by Rule 65(B) has not been met, a Chamber must deny provisional release and need not consider the other conditions.¹¹

9. 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.¹² What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹³ 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.¹⁴ The Chamber

⁸ Decision on Šainović Motion for Temporary Provisional Release, 4 April 2008 (public with confidential annex); see also Order Modifying Decision on Šainović Motion for Temporary Provisional Release, 7 April 2008.

⁹ Decision on Šainović Motion for Temporary Provisional Release, 5 September 2008 (public with confidential annex), para. 16.

¹⁰ *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.

¹¹ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber's Decision on Sredoje Lukic's Motion for Provisional Release, 16 April 2007, paras. 6, 23; *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 ("Popović Decision"), para. 6.

¹² *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.

¹³ *Ibid.*

¹⁴ *Prosecutor v. Boškoski 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.

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.¹⁵

10. 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.¹⁶

11. The Appeals Chamber's recently overturned a decision in the *Prlić et al.* case, in which the Trial Chamber granted provisional release to five of the accused in those proceedings. The Appeals Chamber held that the *Prlić et al.* Chamber erred by not offering an indication of how much weight it ascribed to the justifications for temporary provisional release on humanitarian grounds. The Appeals Chamber also held that these various justifications were not sufficiently compelling, particularly in light of the Rule 98 *bis* ruling, to warrant the exercise of the Trial Chamber's discretion in favour of granting the accused provisional release without offering any indication of how much weight it ascribed thereto. This Chamber does not interpret the *Prlić et al.* decision as a *per se* legal ruling that provisional release must always be denied after a Rule 98 *bis* ruling, provided that the Chamber discusses and weighs all the factors relevant to the provisional release motion.¹⁷

12. Even more recently, the Appeals Chamber, again in *Prlić et al.*, has set the test for provisional release at a late stage of trial proceedings as follows:

Concerning the humanitarian reasons sufficient to justify provisional release, the Appeals Chamber notes that the development of the Tribunal's jurisprudence implies that an

¹⁵ *Stanišić* Decision, para. 8.

¹⁶ 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 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.

¹⁷ *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, paras. 19–21.

application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted *when serious and sufficiently compelling humanitarian reasons exist*. . . . Therefore, provisional release should only be granted at a late stage of the proceedings when sufficiently compelling humanitarian reasons exist to justify the release. Furthermore, even when provisional release is found to be justified in light of the nature of the circumstances, the length of the release should nonetheless be proportional to these circumstances¹⁸

13. The Chamber has carefully considered and applied all of the above jurisprudence of the Appeals Chamber when assessing the circumstances of the Accused.

Discussion

14. 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.

15. In the Motion, the Accused requests a temporary provisional release for fourteen days based upon a medical condition.¹⁹

16. The Trial Chamber is in receipt of guarantees from Serbia confirming that it will respect all orders made by the Chamber in respect of the provisional release of the Accused.²⁰ The Netherlands, in its capacity as host country, has stated that it has no objection to the Accused's provisional release.²¹

17. The Prosecution opposes the Motion, articulating its general opposition to provisional release of any of the six Accused at this most advanced stage of the proceedings. Although recognising the possibility of temporary provisional releases on compassionate and/or humanitarian grounds, the Prosecution submits that the Accused's situation is not sufficiently compelling enough to warrant a release, despite the medical issues raised in the Motion. Should the Motion be granted, the Prosecution requests the Chamber to require 24-hour security of the Accused and to order a stay of the decision.²²

18. [See confidential annex.]

¹⁸ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković* Dated 31 March 2008", 21 April 2008, para. 17 (footnote omitted) (emphasis added); *but see Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution's Urgent Appeal Against "*Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić*" Issued on 14 April 2008, 23 April 2008, para. 15.

¹⁹ Motion, paras. 6–17.

²⁰ Confidential Supplement to Defence Request Seeking Temporary Provisional Release on the Grounds of Compassion with Confidential Annex, 18 July 2008.

²¹ Letter from Dutch Ministry of Foreign Affairs, 17 September 2008.

²² Confidential Prosecution Response to Šainović's Renewed Request for Temporary Provisional Release on Grounds of Compassion, 23 September 2008, paras. 4–9.

19. [See confidential annex.]

20. [See confidential annex.]

21. [See confidential annex.]

22. Based upon the serious and sufficiently compelling humanitarian considerations set forth in the Motion, the Chamber considers that it would be appropriate for the Accused to be provisionally released for a limited duration, under strictly controlled conditions, including 24-hour surveillance.

23. Serbia has recently represented to the Chamber that its implementation of the Chamber's order of 24-hour surveillance includes the following:

- (a) That at all times two police officers are in the presence of the Accused.
- (b) That the Accused is not allowed to move anywhere without these two police officers.
- (c) That two police officers are placed, at all times, in front of the Accused's dwelling, in order to make sure that he does not leave the premises.
- (d) That the police officers will, at all times, ensure the apprehension of the Accused in the event of escape or failure to meet any of the conditions set out in the Decision.²³

The Chamber is satisfied that the above interpretation of the Chamber's order of 24-hour surveillance, as well as the other conditions set forth in the Order below, is sufficient to ensure that the Accused will return for trial and not endanger victims, witnesses, or other persons.

24. For all of the reasons discussed in this Decision and the confidential annex, 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 on the basis of the serious and sufficiently compelling compassionate and/or humanitarian grounds set forth in the Motion.

25. The Chamber also considers that the period of the temporary provisional release is proportional to the health circumstances faced by the Accused. In cases where limited provisional release has been granted on compassionate or humanitarian grounds, the period for which an

²³ Republic of Serbia's Submission Related to Trial Chamber's Order of 18 March 2008, 20 March 2008.

accused has been provisionally released has varied from three to five days.²⁴ However, based upon the purpose of this temporary provisional release, the Chamber considers that a longer period is both necessary and appropriate for the stated purpose of the temporary provisional release.

26. 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 relevant humanitarian concerns.

27. The Chamber finds it appropriate to grant a stay of its Decision in this matter, in order to preserve the *status quo* and afford the Prosecution an opportunity to challenge it on appeal. Pursuant to Rule 65(F), where a Trial Chamber grants a stay of a decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision.

Disposition

28. 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 **Thursday, 2 October 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.

²⁴ See, e.g., *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Decision on Application for Provisional Release, 12 December 2002 (15 days requested; five days granted); *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 (five days); *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Urgent Defence Motion on Behalf of Ramush Haradinaj for Provisional Release, 16 April 2005 (three days); *Prosecutor v. Hadžihasanovic et al.*, Case No. IT-01-47-T, Decision Granting Provisional Release to Enver Hadžihasanovic, 18 January 2004 (three days); *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision Pursuant to Rule 65 Granting Mrkšić's Request to Attend His Mother's Funeral, 30 January 2004 (three days); *Prosecutor v. Hadžihasanovic et al.*, Case No. IT-01-47-T, Decision Pursuant to Rule 65 Granting Amir Kubura Authorisation to Attend His Mother's Funeral, 12 March 2004 (three days).

- (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, when he is not receiving medical treatment;
 - 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 **Friday, 17 October 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.

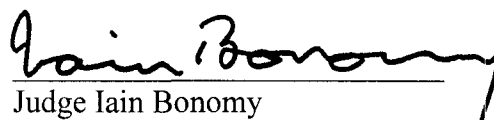
29. Pursuant to Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby **INSTRUCTS** the Registrar of the Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for the provisional release of the Accused, and to continue 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.

30. 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 **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.

31. The Trial Chamber, pursuant to Rule 65(E) of the Rules of Procedure and Evidence of the Tribunal, hereby **GRANTS** the Prosecution's request for a stay.

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


Judge Iain Bony
Presiding

Dated this twenty-sixth day of September 2008
At The Hague
The Netherlands

[Seal of the Tribunal]