



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: 9 February 2009  
Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Iain Bonomy, Presiding  
Judge Ali Nawaz Chowhan  
Judge Tsvetana Kamenova  
Judge Janet Nosworthy, Reserve Judge

**Acting Registrar:** Mr. John Hocking

**Decision of:** 9 February 2009

**PROSECUTOR**

v.

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

**PUBLIC WITH CONFIDENTIAL AND *EX PARTE* ANNEX**

**DECISION ON ŠAINOVIĆ MOTION FOR TEMPORARY PROVISIONAL RELEASE**

**Office of the Prosecutor**

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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 Request Seeking Temporary Provisional Release on the Grounds of Compassion,” filed by the Šainović Defence on 31 December 2008 (“Motion”),<sup>1</sup> 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.<sup>2</sup>
2. The Accused was granted provisional release after the commencement of the trial and during the summer recess from 15 to 31 July 2006.<sup>3</sup>
3. On 5 December 2006, the Chamber denied the six Accused’s joint application for provisional release over the winter recess.<sup>4</sup> The Appeals Chamber affirmed this decision.<sup>5</sup>
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.<sup>6</sup> Following this denial, the Chamber granted on 7 June 2007 the Accused temporary provisional release to deal with urgent personal matters.<sup>7</sup>

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<sup>1</sup> See also confidential Defence Request Seeking Medical Examination of the State of Health of the Accused Pursuant to Rule 74 *bis*, 17 December 2008; confidential Addendum Defence Request Seeking Temporary Provisional Release on the Grounds of Compassion, 28 January 2009.

<sup>2</sup> 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.

<sup>3</sup> Decision on Joint Motion for Temporary Provisional Release During Summer Recess, 1 June 2006.

<sup>4</sup> Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006.

<sup>5</sup> *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.

<sup>6</sup> Decision on Šainović Motion for Provisional Release, 22 May 2007, paras. 12, 14.

<sup>7</sup> Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007 (public with confidential annex).

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.<sup>8</sup>

6. On 4 April 2008, the Chamber granted the Accused temporary provisional release on compassionate and/or humanitarian grounds for urgent personal reasons.<sup>9</sup>

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.<sup>10</sup> On 26 September 2008, the Chamber granted a renewed motion based on the same medical grounds, after having been provided with additional information.<sup>11</sup>

### **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.<sup>12</sup> 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.<sup>13</sup>

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

<sup>8</sup> Decision on Šainović Motion for Temporary Provisional Release, 7 December 2007 (public with confidential annex).

<sup>9</sup> 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.

<sup>10</sup> Decision on Šainović Motion for Temporary Provisional Release, 5 September 2008 (public with confidential annex), para. 16.

<sup>11</sup> Decision on Šainović Motion for Temporary Provisional Release, 26 September 2008 (public with confidential annex).

<sup>12</sup> *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.

<sup>13</sup> *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.

into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.<sup>14</sup> What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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,

<sup>14</sup> *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.

<sup>15</sup> *Ibid.*

<sup>16</sup> *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.

<sup>17</sup> *Stanišić* Decision, para. 8.

<sup>18</sup> 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.

provided that the Chamber discusses and weighs all the factors relevant to the provisional release motion.<sup>19</sup>

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 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 circumstances . . . .<sup>20</sup>

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.<sup>21</sup> The Accused also submits that he has adhered to the conditions set by the Chamber during earlier provisional releases, will return for the remainder of the trial, and will not endanger any victim or witness.<sup>22</sup>

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.<sup>23</sup> The

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<sup>19</sup> *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.

<sup>20</sup> *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.

<sup>21</sup> Motion, paras. 4–9, 12.

<sup>22</sup> Motion, para. 10.

<sup>23</sup> Motion, Annex 2.

Netherlands, in its capacity as host country, has stated that it has no objection to the Accused's provisional release.<sup>24</sup>

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.<sup>25</sup>

18. [See confidential and *ex parte* annex.]

19. [See confidential and *ex parte* annex.]

20. [See confidential and *ex parte* annex.]

21. Based upon the foregoing, the Chamber is not satisfied that the circumstances set forth in the Motion are serious and sufficiently compelling enough to warrant a provisional release at this time.

22. In light of the foregoing finding, it is not necessary for the Chamber to address the Accused's submissions relating to the criteria that must be satisfied under Rule 65(B).

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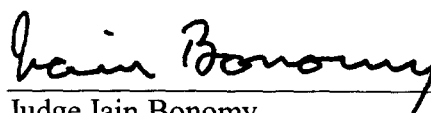
<sup>24</sup> Letter from Dutch Ministry of Foreign Affairs, 7 January 2009.

<sup>25</sup> Confidential Prosecution Response to Šainović's Request Seeking Temporary Provisional Release on the Grounds of Compassion, 6 January 2009, paras. 4–9.

**Disposition**

23. For the foregoing reasons and pursuant to Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby DENIES the Motion.

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

  
Judge Iain Bonomy  
Presiding

Dated this ninth day of February 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**