

IT-03-69-T
D 36524-036517
13 December 2011
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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-03-69-T
Date: 13 December 2011
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 13 December 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON SIMATOVIĆ REQUEST FOR PROVISIONAL
RELEASE**

Office of the Prosecutor

Mr. Dermot Groome

Counsel for Jovica Stanišić

Mr. Wayne Jordash
Mr. Scott Martin

The Government of the Republic of Serbia

Per: The Embassy of the Republic of Serbia
to the Kingdom of the Netherlands

Counsel for Franko Simatović

Mr. Mihajlo Bakrač
Mr. Vladimir Petrović

Government of the Kingdom of the Netherlands

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 16 November 2011, the Simatović Defence (“Defence”) requested provisional release for Mr. Franko Simatović (“Accused”) during the winter court recess from 16 December 2011 until 9 January 2012 (“Request”).¹ The Defence submits that it will file the guarantees of the Republic of Serbia (“Serbia”) confirming that Serbia will act in accordance with any conditions imposed by the Chamber upon the provisional release of the Accused (“Serbian Guarantees”) - as soon as Serbia provides them.² The Defence submits that the Accused poses neither a risk of flight, nor a danger to any victim, witness, or other person and draws attention to the fact that he surrendered to the Tribunal voluntarily and has complied with the conditions of previous provisional releases.³ The Defence further submits that if granted provisional release, the Accused will comply with any orders issued by the Chamber.⁴ Finally, the Defence submits that the Accused’s presence in Belgrade during the court recess would greatly assist the further preparation of the Defence case, which will commence shortly before the winter recess.⁵

2. On 18 November 2011, the Tribunal’s Host State filed a letter, pursuant to Rule 65 (B) of the Rules of Procedure and Evidence (“Rules”), stating that it did not oppose the Request.⁶

3. On 30 November 2011, the Prosecution responded, opposing the Request (“Response”).⁷ The Prosecution submits that Serbia has not yet provided its guarantees and failed to do so when the Accused last requested provisional release.⁸ The Prosecution submits that the Chamber should not grant the Request before receiving and inspecting the Serbian Guarantees.⁹ The Prosecution argues that without such guarantees, there is an increased risk that the Accused would abscond and/or endanger victims, witnesses, and others.¹⁰ According to the Prosecution, the risk of flight is increased by the advanced stage of the case and the damaging evidence from Prosecution and Stanišić Defence witnesses in respect of the Accused.¹¹ The Prosecution further argues that

¹ Request for Provisional Release, 16 November 2011.

² Request, para. 8.

³ Request, paras 6-7; Defence Reply to Prosecution Response to Simatović Request for Provisional Release, 6 December 2011 (“Reply”), para. 2.

⁴ Request, para. 10; Reply, para. 6.

⁵ Request, para. 9; Reply, para. 8.

⁶ Letter of the Ministry of Foreign Affairs of the Kingdom of the Netherlands on Provisional Release for Mr. Franko Simatović, 18 November 2011 (Confidential).

⁷ Prosecution Response to Simatović Request for Provisional Release, 30 November 2011, paras 1, 12, 16.

⁸ Response, paras 5-7.

⁹ Response, para. 7.

¹⁰ Response, paras 7-8.

¹¹ Response, paras 10-11.

provisional release would give the Accused the opportunity to influence witnesses just prior to their testimonies as part of the Defence case.¹²

4. On 2 December 2011, the Defence requested leave to reply to the Response.¹³ On the same day the Chamber granted the Defence leave to reply, instructing it to file the reply by 5 December 2011, and informed the parties accordingly in an informal communication.

5. On 6 December 2011, the Defence filed its reply.¹⁴ The Defence submits that it initially requested Serbia to provide the guarantees on 15 November 2011 and has since contacted Serbia's National Council for Cooperation with the Tribunal multiple times.¹⁵ The Defence requests that the Chamber invite Serbia to submit its position on the requested guarantees and invite a representative of Serbia to provide reasons for its position in a public hearing.¹⁶ The Defence further requests that all correspondence regarding this matter be made public.¹⁷ Finally, the Defence submits that, under Rule 54 of the Rules, even in the absence of Serbian Guarantees the Chamber may issue an order to Serbia to comply with the conditions of provisional release.¹⁸

II. APPLICABLE LAW

6. Rule 65 of the Rules provides the terms upon which provisional release of an Accused before the Tribunal may be granted. Pursuant to paragraph (B) of Rule 65, as amended on 28 October 2011:

Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release.

7. The conditions listed under Rule 65 (B) of the Rules are the minimum requirements necessary for granting provisional release. Trial Chambers at all times retain the discretion not to grant provisional release to an accused, even if it is satisfied that these conditions have been met.¹⁹

¹² Response, paras 12-13.

¹³ Simatović Defence Request to Reply to Prosecution Response to Simatović Request for Provisional Release, 2 December 2011.

¹⁴ Reply.

¹⁵ Reply, para. 3.

¹⁶ Reply, para. 4.

¹⁷ Ibid.

¹⁸ Reply, para. 5.

¹⁹ *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević* ("Prosecutor v. Popović et al."), Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, para. 5; Decision on Prosecution Appeal on Decision on Provisional Release and Motions to Present

III. DISCUSSION

8. Under Rule 65 (B) of the Rules, the Chamber cannot order the release of the Accused until it has given Serbia an opportunity to be heard.²⁰ Serbia has not yet submitted its views on the Request. Serbia did not submit its views in relation to the Accused's previous request for provisional release prior to the Chamber's decision of 7 September 2011, in which the Chamber denied provisional release due to the lack of compelling humanitarian grounds.²¹ The Chamber notes however, that Serbia renewed its provisional release guarantees in relation to all earlier requests.²² On this basis, the Chamber anticipates that the submission of the Serbian Guarantees is forthcoming. The Chamber is not inclined to schedule a public hearing with a representative of Serbia in relation to these guarantees. Considering the proximity in time of the requested period of provisional release, the Chamber will, exceptionally, decide on the Request prior to the anticipated filing of the Serbian Guarantees.

9. The Chamber recalls its decision of 7 September 2011 and the discussion therein where it found itself satisfied that the Accused would return for trial and would not pose a danger to any victim, witness, or other person if granted provisional release.²³ The Chamber has received no information indicating a change of circumstances in this regard. In this respect, the Chamber has considered the advanced stage of the proceedings. The Chamber's prior findings on the criteria of Rule 65 of the Rules relied, in part, on the Serbian Guarantees. Thus, while the Chamber may issue binding orders to States, it is not inclined to provisionally release the Accused without Serbia's guarantee that it will act in accordance with any conditions imposed by the Chamber upon the provisional release. On the condition that the Serbian Guarantees are renewed prior to any period of provisional release, the Chamber is satisfied that the Accused would appear for trial and would not pose a danger to any victim, witness, or other person if provisionally released.

10. Prior to the amendment of Rule 65 (B) of the Rules on 28 October 2011, Appeals Chamber case law held that a Trial Chamber should not grant provisional release at the post-Rule 98 *bis* stage of the proceedings unless compelling humanitarian grounds are present that tip the balance in

Additional Evidence Pursuant to Rule 115, 26 June 2008, para. 3; *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, para. 5.

²⁰ See also Decision on the Simatović Request for Provisional Release During the Adjournment in Proceedings, 7 September 2011 ("Decision of 7 September 2011"), para. 5.

²¹ *Ibid.*

²² See, for instance, Decision on Simatović Defence Request for Provisional Release During Summer Recess, 20 July 2011 (Confidential); Decision on Simatović Urgent Request for Provisional Release, 21 April 2011 ("21 April 2011 Decision").

²³ Decision of 7 September 2011, paras 6-7.

favour of allowing provisional release.²⁴ Following the amendment of Rule 65 (B) of the Rules, the Chamber considers that the existence of sufficiently compelling humanitarian grounds is a factor it may consider at its discretion at any stage of the proceedings, and no longer a prerequisite for provisional release.²⁵

11. The Chamber further considers that the Accused's presence in Belgrade during provisional release, as opposed to in The Hague, may assist counsel in the preparation of his Defence case.²⁶ For the foregoing reasons, the Chamber grants provisional release for the winter recess on the condition that the Serbian Guarantees are provided by the Defence prior to the Accused's release. The Chamber stresses that its decision is premised on the timely renewal by Serbia of its prior provisional release guarantees. The Chamber will review the Serbian Guarantees as soon as they are filed by the Defence and will adjust its decision without delay in case of any anomalies.

12. Finally, the Chamber notes that the Defence's filings, the Response, and the present decision are public. Consequently, the Chamber considers that the Defence's request that all correspondence on this matter be public is moot.

IV. DISPOSITION

13. For the foregoing reasons, pursuant to Rules 54 and 65 of the Rules, and on the condition specified above, the Chamber **GRANTS** the Request in part;

14. **DENIES** the request for a public hearing with a representative of Serbia and **DECLARES MOOT** the Defence's request to make all correspondence on this matter public;

15. **INVITES** Serbia to renew its provisional release guarantees prior to 16 December 2011;

16. **ORDERS** as follows:

- (a) that on **Friday 16 December 2011** (or in case of unforeseen events, the first practicable day thereafter), the Accused be transported to Schiphol airport in the Netherlands by the Dutch authorities, or, if the Serbian Guarantees are not renewed prior to 16 December 2011, that on the **first practicable day after the date of the filing of the Serbian Guarantees**, the Accused be transported to Schiphol airport in the Netherlands by the Dutch authorities;

²⁴ See Decision on Urgent Stanišić Motion for Provisional Release, 10 December 2010 (Confidential), para. 5.

²⁵ See also *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, IT-08-91-T, Decision Granting Mićo Stanišić's Request for Provisional Release, 18 November 2011, para. 14.

- (b) that, at Schiphol airport, the Accused be provisionally released into the custody of officials of the Government of Serbia to be designated prior to his release in accordance with operative paragraph 17 (a) hereof, who shall accompany the Accused for the remainder of his travel to Serbia and to his place of residence;
- (c) that, on his return, the Accused be accompanied by the same designated officials of the Government of Serbia, who shall deliver the Accused to the custody of the Dutch authorities at Schiphol airport on or before **Thursday 5 January 2012**, and that the Dutch authorities then transport the Accused back to the United Nations Detention Unit (“UNDU”) in The Hague;
- (d) that, during the period of provisional release, the Accused abide by the following conditions, and that the authorities of the Government of Serbia, including the local police, ensure compliance with such conditions:
- (i) to remain within the confines of the municipality of Belgrade;
 - (ii) to surrender his passport and any other valid travel documents to the Serbian Ministry of Justice (“Ministry of Justice”);
 - (iii) to provide the addresses at which he will be staying in Belgrade to the Ministry of Justice and the Registrar of the Tribunal before leaving the UNDU in The Hague;
 - (iv) to report each day before 1 p.m. to the police in Belgrade at a local police station to be designated by the Ministry of Justice in accordance with operative paragraph 17 (b) hereof;
 - (v) to consent to having the Ministry of Justice check with the local police about his presence and to the making of occasional, unannounced visits upon the Accused by the Ministry of Justice or by a person designated by the Registrar of the Tribunal;
 - (vi) not to have any contact whatsoever or in any way interfere with any victim or potential witness or to otherwise interfere in any way with the proceedings or the administration of justice;
 - (vii) not to discuss his case with anyone, including the media, other than his Counsel;
 - (viii) not to seek direct access to documents or archives or to destroy any evidence;

²⁶ 21 April 2011 Decision, para. 12; Decision on Urgent Simatović Motion for Provisional Release, 11 March 2011, paras 16, 19.

- (ix) to comply strictly with any requirements of the authorities of the Government of Serbia necessary to enable them to comply with their obligations under this Order and their guarantees;
- (x) to return to the Tribunal on or before **Thursday 5 January 2012**;
- (xi) to comply strictly with any further Order of the Chamber varying the terms of or terminating provisional release;

17. **REQUIRES** the Government of Serbia to assume responsibility as follows:

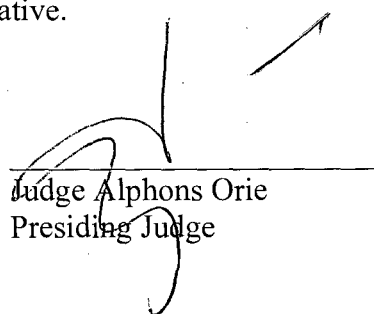
- (a) by designating officials of the Government of Serbia into whose custody the Accused shall be provisionally released and who shall accompany the Accused from Schiphol airport to Serbia and to his place of residence, and notifying, as soon as practicable, the Chamber and the Registrar of the Tribunal of the names of the designated officials;
- (b) by designating a local police station in Belgrade to which the Accused is to report each day during the period of provisional release, and notifying, as soon as practicable, the Chamber and the Registrar of the name and location of this police station;
- (c) by ensuring compliance with the conditions imposed on the accused under the present order;
- (d) for the personal security and safety of the Accused while on provisional release;
- (e) for all expenses concerning transport of the Accused from Schiphol airport to Belgrade and back;
- (f) for all expenses concerning accommodation and security of the Accused while on provisional release;
- (g) by not issuing any new passports or other documents which would enable the Accused to travel;
- (h) by submitting a weekly written report to the Chamber as to the compliance of the Accused with the terms of this Order;
- (i) by arresting and detaining the Accused immediately if he should breach any of the conditions of this Order; and
- (j) by reporting immediately to the Chamber any breach of the conditions set out above;

18. **INSTRUCTS** the Registrar of the Tribunal to:

- (a) consult with the Ministry of Justice of the Netherlands as to the practical arrangements for the provisional release of the Accused;

- (b) continue to detain the Accused at the UNDU in The Hague until such time as the Chamber and the Registrar have been notified of the name of the designated officials of the Government of Serbia into whose custody the Accused is to be provisionally released;
19. **REQUESTS** the authorities of all States through which the Accused will travel to:
- (a) hold the Accused in custody for any time that he will spend in transit at the airport; and
- (b) arrest and detain the Accused pending his return to the UNDU in The Hague, should he attempt to escape.

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



Judge Alphons Orie
Presiding Judge

Dated this thirteenth of December 2011
At The Hague
The Netherlands

[Seal of the Tribunal]