



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: 28 May 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: 28 May 2008

PROSECUTOR

v.

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

PUBLIC REDACTED VERSION

DECISION ON POPOVIĆ'S MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
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 Accused Vujadin Popović’s Motion for Provisional Release, in the Form of a Custodial Visit, Based on Humanitarian Grounds”, filed confidentially on 25 April 2008 (“Motion”), and hereby renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. On 22 June 2005, Popović filed a motion in which he requested to be provisionally released.¹ The motion was rejected by the Trial Chamber.² The Trial Chamber’s decision was upheld by the Appeals Chamber.³

2. On 25 April 2008, Popović filed the current Motion, in which he requests, based on humanitarian grounds, to be granted provisional release, in the form of a custodial visit to his ailing mother.⁴ Annex II of the Motion is a medical assessment of the state of health of Popović’s mother dated 10 March 2008 (“Medical Assessment”). On 2 May 2008, the Prosecution filed confidentially the “Prosecution Response to Accused Popović’s Motion for Provisional Release, With Annex” (“Response”). On 9 May 2008, Popović filed confidentially “Vujadin Popović’s Request for Leave to Reply and Reply to the Prosecution’s Response to Vujadin Popović’s Motion for Provisional Release” (“Reply”).

II. SUBMISSIONS OF THE PARTIES

A. Motion

3. Popović requests a custodial visit to the Municipality of Šekovići, Republika Srpska, Bosnia and Herzegovina, for a period of one week, including travel time, in order to visit his 77 year old mother.⁵ According to the Medical Assessment, the state of health of Popović’s mother has deteriorated, and “her life is in danger.”⁶ Popović submits that due to her illness, his mother has not been able to travel to the Netherlands and visit him during the three years that he has already spent

¹ Vujadin Popović’s Motion for Provisional Release, 22 June 2005.

² Decision on Motion for Provisional Release, 22 July 2005 (“Decision of 22 July 2005”).

³ Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović’s Application for Provisional Release, 28 October 2005 (“Appeals Chamber Decision of 28 October 2005”).

⁴ Motion, p. 1.

⁵ *Ibid.*, para. 11, p. 10. Popović indicates a number of terms and conditions that may be applied to the sought custodial visit. *Ibid.*, pp. 10–11.

⁶ *Ibid.*, Annex II. *See also* para. 12, Annex I.

in custody at the United Nations Detention Unit (“UNDU”). Furthermore, “because of the critical worsening of” her condition, “there may not be many occasions left” for them to meet.⁷

4. Popović submits that the seriously worsened conditions of his mother’s health “constitute a material change in circumstances, which justify the reconsideration of the previous decision denying his request for provisional release.”⁸ Furthermore, together with the fact that he has not seen his mother in a long time, they constitute sufficient reason to grant provisional release on humanitarian grounds.⁹ In this regard, Popović submits that due to the “Motion to Reopen the Prosecution Case, With Two Appendices” filed confidentially on 7 April 2008 (“Motion to Reopen the Prosecution Case”), the proceedings might last “even more” than “a minimum [of] one more year” and therefore, he is concerned he would not be able to see his mother again.¹⁰

5. Popović has provided the Trial Chamber with a Guarantee of the Government of Republika Srpska, as well as a Guarantee of the Republika Srpska Ministry of Interior (“RS MUP”).¹¹ He argues that there is no risk of flight as he will be “escorted at all time during his journey to and from Republika Srpska”, and “will be guarded 24 hours a day by armed police forces of the [RS] MUP” in case he is ordered to stay at his mother’s house or be held at the Public Security Station.¹²

6. Popović argues that his situation is identical to that of other co-Accused, whose requests for custodial visits were granted by the Trial Chamber, and that therefore he should “be treated equally before the Tribunal.”¹³ Furthermore, he adds that his exemplary behaviour during the detention period should be considered positively by the Trial Chamber while deciding upon his request.¹⁴

7. Popović acknowledges that the Decision on the Accused’s submissions made pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence (“Rules”) rendered orally on 3 March 2008 (“Rule 98 *bis* Decision”) “constitutes a significant factor which must be weighed in deciding on an

⁷ *Ibid.*, paras. 10, 12.

⁸ *Ibid.*, para. 14 (referring to the Decision on Borovčanin’s Motion for Leave to Withdraw Application for Provisional Release and to File Application for “Custodial Visit to his Father for a Short Fixed Period Based on Humanitarian Grounds”, 24 July 2007 (“Borovčanin Decision of 24 July 2007”), paras. 16–17; the Decision on Pandurević’s Request for Provisional Release on Compassionate Grounds, 11 December 2007 (“Pandurević Decision of 11 December 2007”), para. 14).

⁹ *Ibid.*, para. 15.

¹⁰ *Ibid.*, para. 13.

¹¹ *Ibid.*, Annex III, Annex IV. He submits that in three recent decisions on provisional release the Trial Chamber was satisfied by identical guarantees. *Ibid.*, para. 17.

¹² *Ibid.*, para. 16. Popović also appends a personal guarantee in which he, *inter alia*, commits “to comply with any order that the Trial Chamber will impose to him, to return unconditionally to the UNDU, not to contact any witnesses and/or victims during his stay in Republika Srpska, and to accept any further restriction that the Trial Chamber shall decide to impose upon him.” *Ibid.*, paras. 20, 26, Annex V.

¹³ *Ibid.*, paras. 18–19 (referring to Borovčanin Decision of 24 July 2007, para. 17; Pandurević Decision of 11 December 2007, para. 14).

¹⁴ *Ibid.*, para. 21.

application for provisional release”, because of its potential impact on the risk of flight of the Accused.¹⁵ Popović, however, submits that “two mitigating factors must be considered in this instance”. First, since he has not made “any submission pursuant to Rule 98 *bis*, the Trial Chamber did not assess the weight or the strength of the evidence specifically against him”,¹⁶ and second, “the limitation of the release to a very short period of time, under strict custodial conditions” can fully address the increased risk of flight caused by the Rule 98 *bis* Decision.¹⁷

8. Furthermore, Popović asserts that he will not pose any danger to any victim, to any prospective witness or to any other person otherwise involved in the proceedings, since he will be under permanent guard of armed police forces of the RS MUP,¹⁸ and that there is no evidence suggesting that he “has ever threatened or posed any danger to any person involved in these proceedings.”¹⁹

B. Response

9. The Prosecution opposes the Motion and requests that it be denied by the Trial Chamber.²⁰ It submits that Popović “has failed to establish material change in the circumstances sufficient to warrant his release since the Trial Chamber’s denial of his previous provisional release application”.²¹ According to the Prosecution, the Medical Assessment submitted by Popović does not provide any detail in support of the conclusion that there is a deterioration of the state of health of Popović’s mother, and that her life is in danger.²²

10. The Prosecution argues that Popović still “presents a significant and ongoing flight risk”.²³ [Redacted²⁴] The Prosecution further points out that Popović did not “contradict the Prosecution’s evidence” in this regard, and unlike his co-Accused Borovčanin, did not provide an account and explanation regarding the time he had spent at large as well as the circumstances of his transfer to

¹⁵ *Ibid.*, para. 22 (referring to the Decision on Gvero’s Motion for Provisional Release during the Break in the Proceedings, 9 April 2008).

¹⁶ *Ibid.*, para. 23.

¹⁷ *Ibid.*, paras. 24, 29 (referring to the Decision on Borovčanin’s Motion for Custodial Visit, 9 April 2008 (Borovčanin Decision of 9 April 2008”), para. 29).

¹⁸ *Ibid.*, para. 25. He also submits that “[t]he witnesses that the Trial Chamber will hear during the presentation of the defence case are not victims, but mainly fact witnesses who will testify to support and supplement Mr. Popović’s theory of the case.” *Ibid.*, para. 26.

¹⁹ *Ibid.*, para. 27.

²⁰ Response, paras. 2, 22.

²¹ *Ibid.*, paras. 2, 18.

²² *Ibid.*, para. 18. Furthermore, the Prosecution argues that since the assessment was issued for the purpose of Popović’s request for provisional release, it “appears to have been specifically solicited in connection with the [...] Motion.” *Ibid.*

²³ *Ibid.*, para. 16.

²⁴ [Redacted]

The Hague.²⁵ It also argues that the particular circumstances of Popović are distinguishable from those of Borovčanin, and that “the fact that a co-Accused successfully abided by the conditions imposed by the Trial Chamber in connection with a custodial visit is no evidence that [Popović] will do the same”.²⁶

11. Moreover, the Prosecution submits that although Popović did not make any submissions pursuant to Rule 98 *bis*, “the evidence adduced by the Prosecution in support of the grave charges against him is ample and compelling” and thus increases his risk of flight.²⁷ The risk of Popović’s flight, the Prosecution argues, is further heightened by the new evidence against him detailed in the Motion to Reopen the Prosecution Case.²⁸

12. Should the Trial Chamber grant the Motion, the Prosecution requests that it will impose upon the provisional release of Popović the same conditions as imposed upon the provisional release of Borovčanin.²⁹ It also requests a stay of the decision in order to file an appeal.³⁰

C. Reply

13. Popović seeks leave to reply to the Response, and addresses the arguments raised by the Prosecution.³¹ He re-emphasizes that the Medical Assessment shows that his mother’s state of health has deteriorated and that her life is in danger.³² However, should the Trial Chamber decide that “the Defence has not met the burden of showing the required material change in circumstances”, he requests that the Trial Chamber consider “the new guarantees [provided by the Republika Srpska], which offer altogether different and more stringent security conditions” as a material change in circumstance, justifying re-consideration of his request to be provisionally released.³³

²⁵ *Ibid.*, paras. 11–12 (referring *inter alia* to the Appeals Chamber Decision of 28 October 2005, paras. 6, 9).

²⁶ *Ibid.*, paras. 13–15. [Redacted]

²⁷ *Ibid.*, para. 17.

²⁸ *Ibid.*

²⁹ *Ibid.*, paras. 20–21 (referring to Borovčanin Decision of 9 April 2008).

³⁰ *Ibid.*, para. 2.

³¹ Reply, p. 1.

³² *Ibid.*, para. 8. Popović also clarifies that the Medical Assessment “was, indeed, asked for the purpose of the Motion.” However, such assessments “are seldom asked and provided without a reason.” *Ibid.*, para. 9.

³³ *Ibid.*, para. 10.

14. Popović also reiterates that the circumstances of his surrender are similar to those of Borovčanin, whose provisional release has been recently granted by the Trial Chamber, because both Accused had “failed to surrender when they should have.”³⁴

15. He also re-emphasizes that the guarantees provided by the Republika Srpska are identical to those provided for other co-Accused, and that in the case of the other co-Accused, the Trial Chamber considered them as sufficient to eliminate the risk of flight.³⁵ Popović argues that “with the kind of surveillance which he will be subjected to [during his provisional release] it will be impossible for [him] to escape.”³⁶

16. With respect to the new evidence being subject of a reopening of the Prosecution’s case, Popović argues that he “is already accused of the death of more than 7.000 people”, and that the new evidence does not aggravate the nature of the charges against him and therefore does not increase his risk of flight.³⁷

III. APPLICABLE LAW

17. 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 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 following two requirements are met: (1) the accused will appear for trial, and (2) if released, the accused will not pose a danger to any victim, witness or other person. 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”.

18. The Appeals Chamber’s jurisprudence emphasizes that 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 the relevant factors and the weight given to them. What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each

³⁴ *Ibid.*, para. 3.

³⁵ *Ibid.*, para. 4.

³⁶ *Ibid.*, para. 5. He adds that he “has no objection to [...] spending the nights at the nearest police station to his mother’s house”, and that he will agree to any further conditions which the Trial Chamber will impose upon his provisional release. *Ibid.*, para. 11.

³⁷ *Ibid.*, para. 7.

case and individual accused, including the present context of the proceedings of the case,³⁸ 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.”³⁹

19. Furthermore, the Appeals Chamber 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.”⁴⁰ 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),⁴¹ and the 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).

IV. DISCUSSION

20. The Trial Chamber notes that during the pre-trial stage Popović filed a request for provisional release. The request was denied by the Trial Chamber, which noted that Popović did not provide any information regarding the time he was a fugitive, and consequently held that it was not prepared to give any weight to the guarantees provided in support of Popović’s request and was not satisfied that if released Popović will appear for trial.⁴² The Trial Chamber’s decision was upheld by the Appeals Chamber.⁴³

³⁸ *Prosecutor v. Prlić, Stojić, Praljak, Petković, Čorić, and Pušić*, 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* Appeal Decision of 11 March 2008”), paras. 7, 19; *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 (“*Boškoski and Tarčulovski* Appeal Decision of 27 July 2007”), para. 6. In this regard, the Trial Chamber further notes the holding of the Appeals Chamber 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.” *Prlić* Appeal Decision of 11 March 2008, paras. 19–20.

³⁹ 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. 6 (referring to *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal On Provisional Release, 4 October 2005, para. 7).

⁴⁰ *Ibid.*, para. 24.

⁴¹ *Boškoski and Tarčulovski* Appeal Decision of 27 July 2007, para. 14.

⁴² Decision of 22 July 2005, p. 4.

⁴³ The Appeals Chamber held that: “[a] Trial Chamber must evaluate government guarantees in light of the circumstances surrounding each individual applicant, and in some circumstances, it may be reasonable to place little weight on a government guarantee. [...] As the Trial Chamber identified no consideration suggesting that [Popović] will surrender voluntarily, and as [Popović] has successfully remained at large in the past, the Trial Chamber could reasonably conclude that even guarantees issued by governments that have not failed to fulfil past guarantees do not satisfy it that [Popović] will return for trial [...] [G]overnment guarantees must be evaluated in context, and in this case the context made it reasonable to conclude that, notwithstanding the government guarantees that he submitted,

21. In his submissions in the current Motion, again Popović chose not to explain his whereabouts during the time he was a fugitive, and thus not to rebut the information provided by the Prosecution on this matter.⁴⁴ Rather Popović based his request for provisional release on the deteriorating health of his mother, the provisional release granted by the Trial Chamber to a co-Accused in what Popović categorizes as similar circumstances⁴⁵ and the guarantees provided by the Republika Srpska, found by the Trial Chamber to be satisfactory in other instances.⁴⁶

22. The Trial Chamber recalls that in the jurisprudence of this Tribunal requests for provisional release are considered on an individual basis in light of the particular circumstances of the accused seeking release.⁴⁷ Decisions whether to grant or deny such requests are the result of a careful assessment of the particular circumstances of each case. Consequently, the factors considered by the Trial Chamber, as well as the weight attributed to each one of them, can vary from one case to the other.

23. In this case, the Trial Chamber acknowledges that Popović's has advanced a humanitarian ground in support of his request for provisional release: his wish to visit his ailing mother whose state of health has deteriorated. The Trial Chamber also acknowledges that Republika Srpska provided guarantees in support of Popović's request. It further notes the receipt of a letter from the Ministry of Foreign Affairs of the Kingdom of the Netherlands, which in its capacity as the host country, affirms that it has no objection to the provisional release of Popović.⁴⁸

24. The Trial Chamber, however, also considers the particular circumstances of Popović, namely the nature of the case against him and his behaviour to date. The Trial Chamber finds that the information provided by the Prosecution regarding Popović's whereabouts during the time he was at large and the circumstances surrounding his transfer to this Tribunal, which Popović failed to rebut, indicate that Popović poses a particularly high risk of flight.

[Popović] had not adequately proven that he would appear for trial." Appeals Chamber Decision of 28 October 2005, para. 10.

⁴⁴ See para. 10 above.

⁴⁵ In Borovčanin Decision of 24 July 2007 and Borovčanin Decision of 9 April 2008, the Trial Chamber granted Borovčanin's request to visit his ailing father. In Pandurević Decision of 11 December 2007, the Trial Chamber granted Pandurević's request for provisional release to attend the memorial service of his father. In those decisions, the Trial Chamber imposed stringent conditions upon the provisional release of the Accused. Borovčanin Decision of 9 April 2008, paras. 29, 31–32; Pandurević Decision of 11 December 2007, paras. 17–18; Borovčanin Decision of 24 July 2007, para. 17, pp. 5–7.

⁴⁶ Borovčanin Decision of 9 April 2008, para. 27; Pandurević Decision of 11 December 2007, para. 15; Borovčanin Decision of 24 July 2007, para. 17.

⁴⁷ See para. 18 above.

⁴⁸ Correspondence from Host Country Regarding the Provisional Release of Vujadin Popović, 28 April 2008.

25. The jurisprudence of this Tribunal recognizes that when a Trial Chamber “cannot exclude the existence of a flight risk or danger [...] ‘sufficiently compelling’ humanitarian reasons, coupled with necessary and sufficient measures to alleviate any flight risk or danger, can constitute a basis for resolving uncertainty and doubt in favour of provisional release”.⁴⁹ The Trial Chamber is of the view that a decision whether to grant a provisional release in such circumstances is based on the exercise of a delicate balance between the risk of flight posed by the Accused and the humanitarian reasons advanced in support of his request to be provisionally released. Thus, when the risk of flight posed by the Accused is extremely high, only humanitarian circumstances which are exceptionally compelling may militate in favour of granting some form of provisional release.

26. In the current case, the Trial Chamber acknowledges that Popović’s mother is ill, but also finds that the risk of flight imposed by Popović is extremely high. After assessing the relevant factors, the Trial Chamber is not convinced that the humanitarian reason advanced by Popović, as it stands presently, is sufficiently compelling to justify the provisional release of an Accused who poses such a high risk of flight.

27. In light of this conclusion, the Trial Chamber does not find it necessary to address the second requirement of Rule 65(B).

V. DISPOSITION

28. For these reasons, pursuant to Article 21 of the Statute of the Tribunal and Rules 54 and 65 of the Rules, the Trial Chamber hereby

- (a) **GRANTS** leave to Popović to reply to the Prosecution Response;

⁴⁹ *Prosecutor v. Prlić, Stojić, Praljak, Petković, Čorić, and Pušić*, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal Against “Decision to Provisionally Release the Accused Pušić issued on 14 April 2008”, 23 April 2008, para. 15. The humanitarian grounds must be assessed in the context of the two requirements of Rule 65(B). *Bošković and Tarčulovski* Appeal Decision of 27 July 2007, para. 14.

(b) **DENIES** the Motion.

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



O-Gon Kwon
Judge

Dated this twenty-eighth day of May 2008
At The Hague
The Netherlands

[Seal of the Tribunal]