



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-95-5/18-R77.2
Date: 21 December 2011
Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Order of: 21 December 2011

IN THE CONTEMPT CASE OF MILAN TUPAJIĆ

Public

DECISION ON MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor in Case IT-95-5/18-T **The Government of Bosnia and Herzegovina**

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via the Embassy of Bosnia and Herzegovina to
The Netherlands, The Hague

Counsel for Mr. Tupajić

Mr. Eugene O'Sullivan (duty counsel)

The Accused in Case IT-95/18-T

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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 seized of “Mr. Tupajić’s Motion for Provisional Release”, filed on 19 December 2011 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 30 November 2011, Milan Tupajić (the “Accused”) was charged with contempt of the Tribunal pursuant to Rule 77(A) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) for knowingly and wilfully interfering with the administration of justice by refusing to comply with two subpoenas issued by the Chamber.¹ The Order for Detention on Remand was issued on 15 December 2011 and the initial appearance of the Accused took place on 16 December 2011 (“Initial Appearance”).² At the Initial Appearance, the Accused maintained that he would not testify in the case of *Prosecutor v. Radovan Karadžić* and pleaded not guilty to the charges against him.³ The Accused was told at the Initial Appearance that he would have ten days to file any preliminary motions pursuant to Rule 77(E) of Rules if he wished to do so.⁴

2. In the Motion, Mr. Eugene O’Sullivan, acting as duty counsel (“Counsel”), requests provisional release for the Accused “until he is required to appear for trial, under such conditions as the Trial Chamber deems fit to impose pursuant to Rule 65(C)”.⁵ In support of his request for provisional release, Counsel submits that the Accused “does not pose a danger to any victim nor is he a flight risk. There are no disclosure issues in this case and no victim or anyone else to whom he could be considered a danger”.⁶ In addition, Counsel assures the Chamber that the Accused “intends to defend himself against the charge of contempt and he will appear for trial” when ordered to do so by the Chamber.⁷

3. Counsel further submits that the Chamber should exercise its discretion pursuant to Rule 65 of the Rules “in a compassionate and reasonable manner to uphold fairness and the interests of justice” and grant the request for provisional release.⁸ Counsel also observes that the winter recess of the Tribunal runs from 19 December 2011 until 6 January 2012 and the

¹ Public Redacted Version of “Order in Lieu of Indictment” Issued on 30 November 2011, 14 December 2011, para. 9.

² Scheduling Order for Initial Appearance, 15 December 2011, p. 2.

³ Hearing, T. 3, 5 (16 December 2011).

⁴ Hearing, T. 8 (16 December 2011).

⁵ Motion, paras. 3, 9.

⁶ Motion, paras. 5, 9.

⁷ Motion, para. 5.

Accused's trial "will not be held during that period".⁹ In addition, Counsel submits that the Accused should be permitted to be with his family for Orthodox Christmas, which falls on 7 January, and for Orthodox New Year, which falls on 14 January.¹⁰

II. Applicable Law

4. Rule 65 of the Rules governs provisional release. It provides, in relevant part that:
- (A) Once detained, an accused may not be released except on order of a Chamber.
 - (B) 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.
 - (C) The 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.
5. The conditions listed under Rule 65(B) of the Rules are the minimum requirements necessary for granting provisional release.¹¹ The defence bears the burden of proof, on the balance of probabilities, that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.¹²

III. Discussion

6. The Chamber is satisfied that the Accused will not, if released, pose a danger to any victim, witness, or other person. While Counsel has submitted that the Accused is not a flight risk and will appear for trial when ordered to so by the Chamber¹³, the Chamber observes that the Motion fails to provide any supporting material from the host country ("Host Country") or the state to which the Accused seeks to be released ("State"). Under the provisions of Rule 65(B), the Chamber may order provisional release "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

⁸ Motion, para. 7.

⁹ Motion, para. 8.

¹⁰ Motion, para. 8.

¹¹ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Decision on Simatović Request for Provisional Release, 13 December 2011 ("Simatović Decision"), para. 7.

¹² *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, Decision on Defence Application for Provisional Release of the Accused Astrit Haraqija, 15 September 2008, para. 6, citing *Prosecutor v. Lazarević*, Case No. IT-03-70-PT, Decision on Defence Request for Provisional Release, 14 April 2005, p.2.

¹³ Motion, paras. 5, 9.

satisfied that the accused will appear for trial”.¹⁴ This would typically require correspondence from the Host Country indicating that it has no objection to the granting of provisional release and a guarantee from the State that it would carry out the orders of the Chamber to ensure the Accused would appear before the Tribunal.¹⁵

7. Despite this practice, the Chamber notes that there is no absolute obligation on the accused person to seek state guarantees as a pre-requisite for provisional release but that it is considered “advisable” to satisfy the Chamber that the accused person will appear for trial.¹⁶ While such guarantees “may carry considerable weight in support of an application for provisional release” the Chamber must still consider whether in the absence of the State’s guarantees, the Accused’s “personal circumstances could satisfy the Trial Chamber that he would appear for trial if released”.¹⁷ Ultimately, while it is within the Chamber’s “discretion to impose the condition of production of guarantees from the... [State] to ensure the presence of the accused at trial pursuant to Rule 65(C) of the Rules, it should not be the threshold consideration”.¹⁸

8. The Chamber considered the nature of the charges against the Accused, the timing of the Accused’s arrest and detention, and the fact that the relevant authorities in Bosnia and Herzegovina had no apparent difficulties in executing his original arrest and transfer to the seat of the Tribunal. In addition the Chamber considered the submissions in the Motion as providing personal assurance by the Accused that he will appear for trial when ordered to do so by the Chamber.¹⁹ The Chamber was also mindful of the Accused’s express intention to challenge the charges against him.²⁰ In these circumstances, the Chamber considers that the Accused has very limited incentive to abscond and does not pose a flight risk. The Chamber is therefore satisfied that the Accused will appear for trial if granted provisional release and will not pose a danger to any victim, witness or other person. It is therefore in the interests of justice that the Motion be granted.

¹⁴ Simatović Decision, para. 8.

¹⁵ Simatović Decision, paras. 8–9, 15–16.

¹⁶ *Prosecutor v. Blagojević et al.*, Case No. IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, paras. 7–8; *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1, 2 December 2004, Decision on Interlocutory Appeal Against Trial Chamber’s Decision Denying Provisional Release, para. 30; *Prosecutor v. Beqaj*, Case No. IT-03-66-R77, Order for Provisional Release, 4 March 2005, p. 4; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR-65, Decision on Matthieu Ngirumpatse’s Appeal Against Trial Chamber’s Decision Denying Provisional Release, 7 April 2009 (“Ngirumpatse Decision”), para. 13; *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4-A, Decision on Motion of Astrit Haraqija for Provisional Release, 8 April 2009, para. 8.

¹⁷ Ngirumpatse Decision, para. 13.

¹⁸ Ngirumpatse Decision, para. 13.

¹⁹ Motion, para. 5.

²⁰ Hearing, T. 7 (16 December 2011) (private session).

IV. Disposition

9. For the reasons set out above and pursuant to Rules 54 and 65 of the Rules, the Chamber hereby **GRANTS** the Motion and

10. **ORDERS** the provisional release of the Accused on the following terms and conditions:

- (a) as soon as practicable, the Accused shall be transported to Schiphol airport in the Netherlands by the designated authorities of the Government of the Kingdom of the Netherlands (“the Netherlands”);
- (b) at Schiphol airport, the Accused shall be provisionally released into the custody of officials of the Government of Bosnia and Herzegovina, to be designated prior to his release in accordance with paragraph 11(i), who shall accompany the Accused for the remainder of his travel to Bosnia and Herzegovina and to his place of residence;
- (c) on his return, the Accused shall be accompanied by officials of the Government of Bosnia and Herzegovina, who shall hand over the custody of the Accused to the authorities of the Netherlands at Schiphol airport for transport back to the United Nations Detention Unit;
- (d) during the period of provisional release, the Accused shall abide by the following conditions:
 - i) to reside at his usual place of residence;
 - ii) to remain within the confines of the municipality of his place of residence;
 - iii) to surrender his passport and other valid travel documents to the Bosnia and Herzegovina authorities upon his arrival in Bosnia and Herzegovina;
 - iv) to report to the police every Monday at a local police station to be designated by the authorities of Bosnia and Herzegovina;
 - v) to not have or attempt to have by himself, or through any agent, any contact of any nature with any victim, witness or potential witness in respect of the proceedings or otherwise interfere in any way with the conduct of the proceedings or the administration of justice;
 - vi) to not discuss his case with anyone, including the media, other than with his defence;

- vii) to continue to co-operate with the Tribunal;
- viii) to comply strictly with any requirement of the authorities of Bosnia and Herzegovina to enable them to comply with their obligations under this Decision;
- ix) to return to the Tribunal at such time and on such date as the Tribunal may order; and
- x) to comply strictly with any further order of the Tribunal varying the terms of or terminating his provisional release;

11. **REQUIRES** the Government of Bosnia and Herzegovina to assume responsibility as follows:

- (i) to designate officials into whose custody the Accused shall be provisionally released and who shall accompany him from Schiphol airport to his usual place of residence in Bosnia and Herzegovina as well as to designate officials of its government who shall accompany the Accused from his usual place of residence to Schiphol airport, where the Accused shall be delivered into the custody of the Netherlands, who will in turn transport him back to the United Nations Detention Unit;
- (ii) to notify, prior to the release of the Accused from the United Nations Detention Unit, the Chamber and the Registrar of the Tribunal of the name(s) of the official(s) designated pursuant to the previous sub-paragraph;
- (iii) to arrest and detain the Accused immediately should he breach any of the conditions of this Decision; and
- (iv) to report immediately to the Trial Chamber any breach of the conditions set out above;

12. **INSTRUCTS** the Registrar of the Tribunal to consult with the Ministry of Justice of the Netherlands as to the practical arrangements for provisional release of the Accused and to continue to detain him 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(s) of Bosnia and Herzegovina into whose custody the Accused is to be provisionally released; and

13. **REQUESTS** the authorities of the Netherlands to ensure that the Accused is transported, under guard from the United Nations Detention Unit and released into the custody of the designated official(s) of Bosnia and Herzegovina at Schiphol airport and similarly, to take custody of the Accused from the designated official(s), at such time and on such date as the Tribunal may order, to escort him back to the United Nations Detention Unit under guard; and

14. **REQUESTS** the authorities of the States through whose territory the Accused may travel to:

- (i) hold the Accused in custody for any time he will spend in transit at the airport; and
- (ii) arrest the Accused and detain him pending his return to the United Nations Detention Unit, should he attempt to escape.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-first day of December 2011
At The Hague
The Netherlands

[Seal of the Tribunal]