



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: 7 June 2007

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: 7 June 2007

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

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Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
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 the “Defence Motion Requesting Provisional Release on the Grounds of Compassion with Confidential Annex”, filed confidentially on 23 May 2007 (“Motion”) by the Šainović Defence, and hereby renders its decision thereon.

1. On 4 May 2007, Šainović (“Applicant”) filed a motion for provisional release.¹ In its decision of 22 May 2007, the Trial Chamber denied that motion, reasoning that the Applicant had not satisfied the Trial Chamber that he would return for the continuation of the trial.² The Trial Chamber stated, however, that its decision was without prejudice to the Applicant’s entitlement to move the Chamber for provisional release of a more limited duration on compassionate grounds.³

2. The Applicant now moves the Trial Chamber for temporary provisional release on compassionate grounds for a period not exceeding seven (7) days, starting from the date of this decision, and subject to the same terms and conditions under which he was previously granted provisional release or which the Trial Chamber considers appropriate.⁴ The grounds on which the Applicant bases his motion are the following: (a) the Applicant’s mother and sole surviving parent is 93 years of age in a frail condition, is suffering from serious ill health,⁵ and her prognosis is highly uncertain;⁶ (b) the Applicant’s mother’s serious ill health prevents her from travelling to The Hague to visit him;⁷ and (c) granting temporary provisional release to the Applicant may be his last opportunity to see his mother.⁸

3. The Applicant submits that factors constituting “special circumstances” have previously warranted temporary provisional release for a fixed period in other cases, and that the Applicant’s mother’s serious ill health constitutes such a special circumstance.⁹ The Applicant reiterates his prior full compliance with “every order, condition and decision of this Tribunal during both

¹ Defence Motion Requesting Provisional Release During the Upcoming Court Recess with Confidential Annexes 1 and 3 & Confidential and *Ex Parte* Annex 2, 4 May 2007.

² Decision on Šainović Motion for Provisional Release, 22 May 2007 (“22 May Decision”), para. 12.

³ 22 May Decision, para. 14.

⁴ Motion, paras 3, 12–13.

⁵ Motion, paras 4–5, Annex.

⁶ Motion, para. 7.

⁷ Motion, para. 6.

⁸ Motion, para. 9.

⁹ Motion, para. 10. The Applicant refers to *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Decision on Application for Provisional Release, 12 December 2002 (“*Krnojelac* Decision”), para. 10.

[previous] provisional release and otherwise”, and that the Government of the Republic of Serbia has renewed its guarantees that the Applicant will return from Serbia for trial.¹⁰

4. In a confidential addendum to his Motion, the Applicant specifies the location in Belgrade, Republic of Serbia, to which he would propose to travel, should his Motion be granted, as detailed in the confidential annex to this Decision, and adds that he would not leave the city of Belgrade under any circumstances and that “his presence at the said location would fulfil the purpose of his provisional release.”¹¹

5. The Prosecution filed its response to the Motion on 4 June 2007,¹² in which it stated its “general opposition” to the provisional release of any of the six accused in this case at this stage but recognised the Trial Chamber’s discretion nevertheless to grant provisional release on compassionate grounds.¹³ The Prosecution submits that, should the Applicant be granted provisional release, the Trial Chamber should consider requiring “electronic monitoring and/or 24-hour security details.”¹⁴

6. The Trial Chamber is in receipt of a letter from the Ministry of Foreign Affairs of The Netherlands, in which The Netherlands – in its capacity as host country – represents that it has no objection to the Applicant’s provisional release.¹⁵ The Trial Chamber is also in receipt of the confidential “Conclusion of the Government of the Republic of Serbia”, dated 22 March 2007, confirming that it will respect all orders made by this Trial Chamber in respect of the provisional release of the Applicant.

7. While it is now settled law that Rule 65 governs provisional release generally,¹⁶ motions for provisional release on compassionate grounds are governed by a distinct set of principles. Rule 65(B), which governs provisional release during trial, makes no mention of compassionate grounds, although the jurisprudence of the Tribunal has recognised that Chambers enjoy a measure of discretion when considering motions pursuant to Rule 65. In the *Popović* case, the Appeals

¹⁰ Motion, para. 11.

¹¹ Addendum to Defence Motion Requesting Provisional Release on Grounds of Compassion with Confidential Annex, filed confidentially on 25 May 2007, paras 4–5.

¹² Confidential Prosecution Response to Nikola Šainović’s Defence Motion Requesting Provisional Release on the Grounds of Compassion, 4 June 2007 (“Response”).

¹³ Response, para. 6.

¹⁴ Response, para. 8.

¹⁵ Letter from Mr. J.H.P.A.M. de Roy, Deputy Director of Protocol for the Minister of Foreign Affairs, to Chief CMSS, dated 9 May 2007.

¹⁶ Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006, paras 8–10.

Chamber stated that “[t]he weight attached to humanitarian reasons as justification for provisional release will differ from one defendant to another depending upon all of the circumstances of a particular case” and that “[i]t was reasonable for the Trial Chamber not to accord much weight to the personal circumstances of the Appellant upon remaining unsatisfied that he did not pose a serious flight risk if released”.¹⁷ The Trial Chamber takes this to mean that, even if an accused has failed to meet the requirements of Rule 65(B), his personal circumstances could nevertheless be so compelling as to merit granting the application for provisional release.

8. In a prior decision, the Trial Chamber varied the conditions of the Applicant’s provisional release at that time so that he could visit his mother, and so that he could accompany his mother to his father’s grave during a requiem.¹⁸ The Trial Chamber noted in that prior decision that these factors were similar to others on which it had based decisions and that it was in the interests of justice to do so.¹⁹ Those circumstances are also similar to those before the Trial Chamber in this Motion.

9. Likewise, the Appeals Chamber has previously granted motions for provisional release based on compassionate grounds, albeit pursuant to Rule 65(I) of the Rules, which expressly provides that “special circumstances” may warrant provisional release.²⁰ Provisional release has been granted to a convicted person pending an appeal to attend memorial services for his daughter and brother and to observe the traditional periods of mourning with family and community members.²¹ In the *Krnojelac* Decision to which the Applicant refers, the Appeals Chamber granted provisional release to an accused so that he could visit his brother, whose terminal illness was recognised as a special circumstance.²²

¹⁷ *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.

¹⁸ Decision on Šainović’s Request for Variation of Conditions of Provisional Release, 28 June 2006, paras 1, 3.

¹⁹ Confidential Decision on Request by Nikola Šainović for Variation of Conditions of Provisional Release, 12 May 2006, para. 1; Confidential Order Temporarily Modifying the Conditions of Dragoljub Ojdanić’s Provisional Release, 20 April 2006, p. 2.

²⁰ See *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. 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.

²¹ *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. 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

²² *Krnojelac* Decision, pp. 2, 3.

10. In the *Kordić and Čerkez* case, an accused on appeal was denied provisional release to visit his mother who was in extremely poor health, and whose death was believed to be imminent.²³ The motion was dismissed for failing to meet the requirements set out in Rule 65(I), as the accused was considered a flight risk.²⁴ However, the Appeals Chamber added that “in case of exceptional circumstances such as e.g. a substantial deterioration of the health conditions of Dario Kordić’s mother, the Defence may submit a detailed request for a temporarily controlled visit to his mother.”²⁵ The Appeals Chamber has therefore recognised that, notwithstanding a finding that an accused does not meet the formal requirements for provisional release pursuant to Rule 65, compassionate concerns may nevertheless permit a more limited provisional release.

11. In this case, the Applicant has been denied provisional release on the grounds that he did not satisfy the Trial Chamber that he would return for the continuation of the trial.²⁶ Notwithstanding that determination, the Trial Chamber considers that it is appropriate that the Applicant be granted provisional release for a limited duration on compassionate grounds, subject to the conditions ordered. In light of the 24-hour surveillance of the Applicant, the Trial Chamber does not consider that monitoring him electronically is necessary.

12. In cases similar to the instant case where limited provisional release has been granted on compassionate grounds, the period for which an accused has been provisionally released has varied from three to five days.²⁷ The Trial Chamber therefore considers that granting the Applicant provisional release on compassionate grounds for a period of five (5) days is consistent with the practice of the Tribunal.

²³ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić’s Request for Provisional Release, 19 April 2004 (“*Kordić Decision*”), paras 5, 11.

²⁴ *Kordić Decision*, paras 9–10.

²⁵ *Kordić Decision*, para. 12.

²⁶ 22 May Decision, para. 12.

²⁷ In the *Krnjelac* decision on which the applicant relies, the accused was granted only five days despite requesting 15 days. In *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, the accused was granted five days; in *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, the accused was granted three days; in *Prosecutor v. Hadžihasanovic et al.*, Case No. IT-01-47-T, Decision Granting Provisional Release to Enver Hadžihasanovic, 18 January 2004, the accused was granted three days; in *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, the accused was granted three days; and, in *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, the accused was granted three days.

13. For the foregoing reasons, and pursuant to Articles 20 and 21 of the Statute and Rules 54 and 65 of the Rules, the Trial Chamber hereby **GRANTS** the Motion in part and **ORDERS** as follows:

- (a) On Tuesday 12 June 2007, Nikola Šainović (“Applicant”) shall be transported to the appropriate airport in the Netherlands by the Dutch authorities.
- (b) At the appropriate airport, the Applicant 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 Applicant’s release in accordance with operative paragraph (m) hereunder, who shall accompany the Applicant for the remainder of his travel to and from the address detailed in the confidential annex to this Decision.
- (c) On his return, the Applicant shall be accompanied by a designated official of Serbia, who shall deliver the Applicant to the custody of the Dutch authorities at the appropriate airport, and the Dutch authorities shall then transport the Applicant back to the United Nations Detention Unit in The Hague.
- (d) During the period of his provisional release, the Applicant shall abide by the following conditions,
 - i. the Applicant shall remain at the address detailed in the confidential annex to this Decision;
 - ii. Serbia shall provide 24-hour surveillance of the Applicant throughout his presence in Serbia; and
 - iii. the Applicant 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 Applicant shall provide details of his itinerary to the Ministry of Justice of the Netherlands and to the Registrar of the Tribunal.
- (f) The Applicant shall not have any contact with any co-accused in the case.
- (g) The Applicant 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 Applicant shall not discuss his case with anyone, including the media, apart from his counsel.

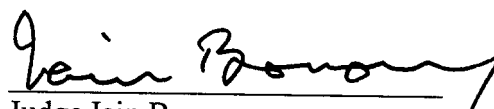
- (i) The Applicant shall continue to cooperate with the Tribunal and comply with any further Orders or Decisions of this Trial Chamber regarding his provisional release.
- (j) The Applicant shall comply strictly with any requirements of the authorities of Serbia, which are necessary for them to comply with their obligations pursuant to this Order.
- (k) The Applicant shall return to the Tribunal on Monday 18 June 2007.
- (l) The Applicant 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 Applicant shall be provisionally released and who shall accompany the Applicant from the appropriate airport in The Netherlands to the address detailed in the confidential annex to this Decision and notify, as soon as practicable, the Trial Chamber and the Registrar of the Tribunal of the name of the designated official.
 - (ii) Provision of 24-hour surveillance of the Applicant throughout his stay in Serbia.
 - (iii) Provision of the personal security and safety of the Applicant 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 ensuring the confidentiality of any such communication(s).
 - (v) Responsibility for informing the Trial Chamber of any failure by the Applicant to comply with the terms of this Order.
 - (vi) Responsibility for arresting and detaining the Applicant immediately should he breach any of the conditions of this Order.
 - (vii) Responsibility, once the Applicant 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.

14. 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 Applicant, and to continue to detain the Applicant 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.

15. The Trial Chamber hereby **REQUESTS** the authorities of all States through which the Accused will travel:

- (a) to hold the Applicant 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.

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



Judge Iain Bonomy
Presiding

Dated this seventh day of June 2007
At The Hague
The Netherlands

[Seal of the Tribunal]