



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: 12 May 2010
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 12 May 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC REDACTED VERSION

**PUBLIC REDACTED VERSION
OF THE DECISION ON SIMATOVIĆ DEFENCE MOTION
REQUESTING PROVISIONAL RELEASE DURING
THE ADJOURNMENT**

Office of the Prosecutor

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I. PROCEDURAL HISTORY

1. On 5 March 2010, the Simatović Defence filed a motion seeking provisional release of Franko Simatović (“Accused”).¹ On 8 March 2010, the Simatović Defence filed two addenda to the Motion including the guarantees given by the Government of the Republic of Serbia.²
2. On 9 March 2010, the Chamber ordered the Prosecution to file its response to the Motion, if any, by 11 March 2010 at noon.³ On 11 March 2009, the Prosecution opposed the Motion.⁴
3. On 10 March 2010, the Tribunal’s host state filed a letter stating its position on the relief sought in the Motion.⁵
4. On 12 March 2010, the Simatović Defence requested leave to reply and replied to the Response.⁶ On 17 March 2010, the Chamber informally communicated to the Prosecution that it could file a sur-reply, should it wish to do so. On 18 March 2010, the Prosecution filed its sur-reply.⁷
5. The Chamber notes that on 23 February and again on 8 March 2010, it ordered that the court proceedings in the present case be adjourned until the week of 12 April 2010.⁸

II. SUBMISSIONS

1. Motion

6. In its Motion, the Simatović Defence requests that the Accused be granted provisional release for the period of the present adjournment until 12 April 2010.⁹
7. The Simatović Defence argues that the Accused does not pose a threat to any victim, witness, or other person.¹⁰ It submits that there is not a single piece of evidence that the Accused,

¹ Defence Motion Requesting Provisional Release During the Adjournment, 5 March 2010 (“Motion”).

² Addendum to the Defence Motion Requesting Provisional Release During the Adjournment, 8 March 2010 (“Addendum”) and Second Addendum to the Defence Motion Requesting Provisional Release During the Adjournment (confidential), 8 March 2010 (collectively “Addenda”).

³ Hearing, 9 March 2010, T. 4148.

⁴ Prosecution Response to Simatović’s Request for Provisional Release, Public with Confidential Annexes A to D and *Ex Parte E*, 11 March 2010 (“Response”).

⁵ Letter of the Ministry of Foreign Affairs of the Kingdom of the Netherlands on Provisional Release of Mr. Franko Simatović, 9 March 2010.

⁶ Defence Request to Reply and Defence Reply to ‘Prosecution Response to Simatović’s Request for Provisional Release’ (confidential), 12 March 2010 (“Reply”).

⁷ Prosecution Sur-reply to Simatović’s Request for Provisional Release (confidential), 18 March 2010 (“Sur-reply”).

⁸ Decision on Urgent Simatović Defence Request for Adjournment, 23 February 2010, para. 22; Hearing, 8 March 2010, T. 4079-4081.

during previous periods of provisional release, interfered in any way with the victims and/or witnesses although he was already familiar with their names and whereabouts due to the Prosecution's prior disclosures.¹¹

8. Similarly, the Simatović Defence argues that the Accused poses no risk of flight.¹² It recalls in this respect that the Accused voluntarily surrendered to the Tribunal.¹³ It also submits that in the past, the Accused was granted provisional release on several occasions and that he adhered fully and unconditionally to all the terms and conditions imposed on him.¹⁴ Furthermore, the Republic of Serbia submitted written guarantees in relation to the Motion.¹⁵

9. Finally, the Simatović Defence submits that granting the Motion would be beneficial to the Defence with regard to its further trial preparations and save time and financial resources, by allowing the Defence daily, "intensive" contacts with the Accused without time limitations and logistical difficulties.¹⁶

2. Response

10. In "strongly" opposing the Motion,¹⁷ the Prosecution points out that Witness [redacted] has been subjected to acts of intimidation and that there is a "strong reasonable inference" that such intimidation can be attributed to the Accused.¹⁸ Moreover, it submits that Witness [redacted] has also been the subject of acts of intimidation and that there is a connection between the two events.¹⁹ As a consequence, the Prosecution argues that the Chamber can no longer be satisfied that granting the motion "will not pose a danger to any victim, witness or other person" in the meaning of Rule 65 (B) of the Rules of Procedure and Evidence of the Tribunal ("Rules").²⁰

11. The Prosecution "unreservedly" accepts as fact the statement made by the Defence Counsel that they had not instructed any member of their staff to contact Prosecution witnesses.²¹

⁹ Motion, paras 3, 20.

¹⁰ Motion, para. 11.

¹¹ Ibid.

¹² Motion, para. 12.

¹³ Motion, para. 9.

¹⁴ Motion, paras 8, 11, 13

¹⁵ See Motion, para. 10; Addenda.

¹⁶ Motion, paras 14-19.

¹⁷ Response, paras 1, 12.

¹⁸ Response, paras 1, 9; Annexes A, B. See also Annex C.

¹⁹ Response, Annex B, para. 7.

²⁰ Response, paras 1, 9.

²¹ Response, Annex A, para. 5 (confidential).

12. The Prosecution's conclusion that the acts of intimidation against Witness [redacted] should be attributed to the Accused stems from the following:

- a) [redacted];²²
- b) [redacted];²³
- c) [redacted];²⁴
- d) [redacted].²⁵

13. The Prosecution also submits that Witness [redacted] has also been subject of acts of intimidation. In support of its position it submits that:

- a) [redacted];²⁶
- b) [redacted].²⁷

14. The Prosecution argues that there is a connection between the events pertaining to both Witnesses [redacted] and that there is a comprehensive effort underway to intimidate some prosecution witnesses.²⁸

15. Moreover, the Prosecution submits that since the previous provisional release the trial has made steady progress.²⁹ It argues that the Accused's incentive to flee increases over the course of trial as the evidence against him unfolds.³⁰

16. In the alternative, the Prosecution submits that should the Chamber decide to nevertheless grant the Motion, before it does so, it should conduct a hearing where Witness [redacted] can give

²² Response, Annex A, para. 2; Annex B, paras 4, 8.

²³ Response, Annex A, para. 3; Annex B, paras 4, 8.

²⁴ Response, Annex A, para. 4; Annex B, para. 8.

²⁵ Response, Annex A, para. 6; Annex B, paras 9-11.

²⁶ Response, Annex A, para. 8; Annex C, para. 2..

²⁷ Response, Annex A, para. 9; Annex D. The Chamber also notes that the statement of the Prosecution's investigator reveals that [redacted]. In light of the Prosecution's submissions though, it seems that the Prosecution does not suggest that the Accused can be in any way implicated in these acts of [redacted] - see Response, Annex C, para. 3.

²⁸ Response, Annex A, para. 7.

²⁹ Response, para. 10.

³⁰ Ibid.

sworn evidence about recent acts of intimidation.³¹ The Prosecution also requests a stay of any positive decision on provisional release in order to consider whether to appeal it.³²

3. Reply

17. The Simatović Defence submits that neither the Accused, nor any other member of the Defence team, has ever had any type of contact with any of the Prosecution's witnesses and requests a swift and detailed investigation from the competent state authorities into the allegations of interference with Witness [redacted] and Witness [redacted].³³

18. The Simatović Defence argues that the conclusions drawn by the Prosecution in the Response are entirely unfounded.³⁴ It points out that all the reports of the competent organs pertaining to previous instances of provisional release of the Accused have unequivocally shown that he has fully adhered to all orders and conditions imposed by the Chamber.³⁵

19. In opposing the conclusions advanced by the Prosecution in the Response, the Simatović Defence submits that:

- a) [redacted] whose name is the only one that is being mentioned in the report in relation to the allegations of intimidation is not mentioned in the context of the Accused;³⁶
- b) The mentioning of Simatović's name in the context of the incident involving Witness [redacted] does not represent any evidence that it is connected with the Accused in that anyone can mention Simatović's name;³⁷
- c) The identity of Witness [redacted] has been known to the Accused for [redacted] years, out of which he had been provisionally released for almost two and a half years, and that during this time not a single incident has been recorded;³⁸
- d) There are no indications whatsoever which would connect the events concerning Witnesses [redacted], either in respect of the nature of those events or of Simatović's alleged role in them;³⁹

³¹ Response, paras 1-12.

³² Response, para. 12.

³³ Reply, para. 9; Annex 3.

³⁴ Reply, para. 10.

³⁵ Reply, para. 20.

³⁶ Reply, para. 11.

³⁷ Reply, para. 12.

³⁸ Reply, para. 14.

- e) The fact that this information has been in the possession of the Prosecution from [redacted] coupled with the Prosecution's failure to request that the incident be investigated, violates the Accused's rights;⁴⁰
- f) The 2001 report was made after a change of government in Serbia, after the change of high ranking officials in the SDB with whom the Accused had no connection, and at a time when the Accused was not yet indicted and could not have known who the potential witnesses were;⁴¹
- g) The 2001 report has been in the possession of the Prosecution for two years during which the Prosecution responded to the Accused's requests for provisional release four times without arguing that they be denied on the basis of this document.⁴²

20. Finally, the Simatović Defence opposes eventual staying of the positive decision on the Motion pursuant to Rule 65(E) of the Rules as requested by the Prosecution.⁴³

4. Sur-reply

21. In its Sur-reply, the Prosecution submits that the Simatović Defence has failed to sustain its burden of persuading the Chamber that the second and cumulative prong of Rule 65 (B) is met.⁴⁴

22. Moreover, the Prosecution argues *inter alia* that:

- a) The fact that the Accused has previously been provisionally released without incident is not dispositive of the issue of whether he should be provisionally released during the adjournment;⁴⁵
- b) Absent of the two cumulative criteria of Rule 65 (B) being met, the fact that provisional release may facilitate defence preparations is irrelevant;⁴⁶
- c) It did not present evidence of witness intimidation in its possession to the attention of the Chamber beforehand considering its obligation of fairness to the Accused as such matters should only be brought to the attention of a chamber in connection with an application or

³⁹ Reply, para. 15.

⁴⁰ Reply, para. 17.

⁴¹ Reply, para. 18.

⁴² Reply, para. 19.

⁴³ Reply, para. 23.

⁴⁴ Sur-reply, paras 1-4.

⁴⁵ Sur-reply, paras 1, 5-6.

⁴⁶ Sur-reply, paras 1, 7.

another pending. Furthermore, before the [redacted] incident, the Prosecution was not sure of a possible connection of such acts of witness interference to the Accused;⁴⁷ and

- d) Provisional release of the Accused would have a “chilling effect” on Witness [redacted] as it would undermine his confidence in the Tribunal.⁴⁸

III. APPLICABLE LAW

23. The Chamber recalls the law governing the provisional release procedure as set out in previous decisions of this Chamber.⁴⁹

IV. DISCUSSION

24. At the outset, the Chamber notes that the arguments put forward by the Prosecution in the Response include some serious accusations against the Accused. Therefore, the Chamber finds that it is in the interests of justice to allow the Defence to address them in its Reply and therefore grants the request for leave to reply. However, the Chamber also stresses that the proper procedure to be followed by the Simatović Defence should have been to seek leave to reply *before* filing its actual Reply.

25. As regards whether the Accused, if released, will return for trial, the Chamber considers the seriousness of the allegations against him, as well as the current stage of the proceedings. Moreover, the Chamber gives due consideration to the fact that the Accused expressed his wish to voluntarily surrender to the Tribunal⁵⁰ and that in this respect he has always been in full compliance with the terms and conditions set by the Chamber during previous periods of provisional release.⁵¹ Furthermore, the Accused has demonstrated his willingness to cooperate with the Prosecution by

⁴⁷ Sur-reply, paras 1, 10-12.

⁴⁸ Sur-reply, paras 1, 13.

⁴⁹ See Decision on Simatović Defence Motion Requesting Provisional Release During the Winter Court Recess, 15 December 2009 (“15 December 2009 Decision”), paras 11-12; Decision on Simatović Defence Motion Requesting Provisional Release, 15 October 2009 (“15 October 2009 Decision”), paras 10-12.

⁵⁰ See 15 December 2009 Decision, para. 13; 15 October 2009 Decision, para. 13; Decision on Simatović Defence Motion for Provisional Release During the Upcoming Court Recess, 10 July 2009 (“10 July 2009 Decision”), para. 10; Decision on Provisional Release, 26 May 2008 (“26 May 2008 Decision”), para. 51; Decision on Provisional Release, 28 July 2004 (“28 July 2004 Decision”), paras 19-20.

⁵¹ See 15 December 2009 Decision, para. 13; 15 October 2009 Decision, para. 13; 10 July 2009 Decision, para. 10; 26 May 2008 Decision, para. 47.

giving several interviews.⁵² Finally, the Chamber takes into consideration, and gives appropriate weight to, the guarantees given by the Republic of Serbia.⁵³

26. The Chamber notes that the circumstances of the case have changed compared to the previous period of provisional release of the Accused insofar as the presentation of evidence is further underway. The Chamber, however, does not consider that this change is such as to give rise to a reasonable fear that the Accused will attempt to abscond.

27. For these reasons, the Chamber is satisfied that the Accused, if provisionally released, will return for trial.

28. As regards whether the Accused, if released, will not pose a danger to any victim, witness, or other person, the Chamber notes the Prosecution's submissions regarding alleged acts of intimidation against Witnesses **[redacted]**. The Chamber considers that any instance of interference with Tribunal's witnesses, especially those that could be seen as acts of intimidation, are reprehensible, and will be treated by the Chamber most seriously.

29. The Chamber wishes to stress that information supplied by Witness **[redacted]** to the Prosecution's investigator is sufficiently detailed and has been given full weight by the Chamber. The Chamber also notes in this respect that the Simatović Defence does not challenge the facts pertaining to the events involving **[redacted]** but rather the inference that is drawn from such facts by the Prosecution. Therefore, the Chamber does not find it necessary to conduct a hearing with Witness **[redacted]** during which he could provide evidence under solemn declaration.

30. At the outset, the Chamber notes the statement of Simatović's Defence Counsel that neither the Accused, nor any other member of the Defence team, has ever had any type of contact with any of the Prosecution's witnesses. The Chamber also notes that except for the information submitted in the Response, there has been no indication that the Accused did not respect any court order governing his previous periods of provisional release.

31. The Chamber notes that the circumstances of the events mentioned in the Response suggest that indeed Witness **[redacted]** *prima facie* appears to have been subject to interference by an unidentified third party. The Chamber considers that the analysis of the various facts pertaining to Witness **[redacted]** as presented by the Prosecution is not conclusive as to whether the Accused was in fact involved in such interference but nevertheless allows for such possibility. In this respect,

⁵² See 15 December 2009 Decision, para. 13; 15 October 2009 Decision, para. 13; 10 July 2009 Decision, para. 10; 26 May 2008 Decision, para. 49; 28 July 2004 Decision, paras 16-18.

the Chamber takes into consideration not only the fact that specific reference to [redacted] was made to Witness [redacted] on [redacted] but also, especially in light of the reportedly suspicious chain of events before and following the assault on Witness [redacted], the possible affiliation of [redacted] with the State Security Service.

32. The Chamber acknowledges that in 2001, when the Accused was still a senior member of the State Security Service, this institution seemed to be aware of one of the witnesses' contacts with the Prosecution. However, the Chamber does not accept the connection of this knowledge to the event taking place eight years later as implicating the Accused. At the same time, the Chamber notes that the fact that the State Security Service was privy to confidential information in relation to Prosecution's contacts with potential witnesses, regardless of the fact that this information dates back to 2001, coupled with the possible affiliation of one of the individuals involved in the [redacted] incident with the State Security Service, does allow for the possibility that instances of interference with Witnesses [redacted] could somehow be connected.

33. The Chamber would like to stress that the limited information presented by the Prosecution and the lack of a thorough investigation into events submitted in the Response means that the Chamber faces a dilemma. On the one hand, if a further investigation establishes facts that would contradict the inference drawn by the Prosecution, denying the provisional release request would be unwarranted. The Accused would have been deprived of the possibility which is opened to him under the Rules of being provisionally released. On the other hand, if such an investigation reveals facts that would support the allegations, granting the provisional release request would equate to imprudently putting at risk the welfare of the witnesses and the integrity of the proceedings.

34. The Chamber finds that a substantial uncertainty, as set out before, presently remains, which negatively affects the satisfaction required from the Chamber under Rule 65 (B). The Chamber is therefore not satisfied, that the Accused, if released, will not pose a danger to any victim, witness or other person.

35. The Chamber also draws the Prosecution's attention to the necessity that the instances of witness interference it identifies in the Response be investigated further.

V. DISPOSITION

36. For the foregoing reasons, pursuant to Rules 54, 65 and 126 *bis* of the Rules, the Chamber

⁵³ Addenda.

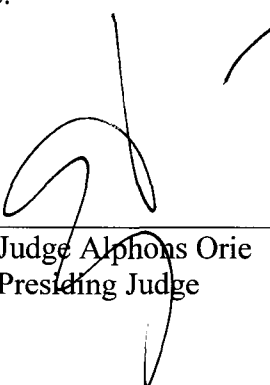
GRANTS leave to file the Reply;

DENIES the Motion;

INSTRUCTS the Prosecution to inform the Chamber of the results of any further investigation into the instances of alleged witness interference; and

INSTRUCTS the Prosecution to review whether the status of any existing public Prosecution filings pertaining to witnesses should be amended.

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



Judge Alphons Orie
Presiding Judge

Dated this twelfth day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]