



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-AR65.6
Date: 23 October 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision: 23 October 2008

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
STRETEN LUKIĆ**

PUBLIC REDACTED

**DECISION ON “PROSECUTION’S APPEAL FROM DECISION
ON LAZAREVIĆ MOTION FOR TEMPORARY
PROVISIONAL RELEASE DATED 26 SEPTEMBER 2008”**

The Office of the Prosecutor:

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused:

Mr. Eugene O’Sullivan and Mr. Slobodan Žečević 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

1. The Appeals 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 (“Appeals Chamber” and “International Tribunal,” respectively) is seized of an appeal by the Office of the Prosecutor (“Prosecution”)¹ against a decision rendered by Trial Chamber III (“Trial Chamber”) on 26 September 2008, granting provisional release to Vladimir Lazarević (“Accused”).²

I. BACKGROUND

2. On 13 August 2008, the Accused filed a motion requesting provisional release for a minimum of 31 days [redacted].³ On 9 September 2008, the Trial Chamber dismissed the motion “without prejudice to a further application in the light of changed circumstances,” on the ground that it had not been provided sufficient information to determine whether provisional release on compassionate and/or humanitarian grounds was appropriate.⁴

3. On 16 September 2008, the Accused filed a renewed motion for provisional release, submitting further details regarding his health condition, which he claimed justified provisional release on compassionate grounds.⁵ On 26 September 2008, the Trial Chamber issued the Impugned Decision, granting provisional release to the Accused and ordering a stay of the Decision, in accordance with Rule 65(F) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), following the Prosecution’s request for an opportunity to appeal should provisional release be granted.⁶ On 29 September 2008, the Prosecution filed this Appeal. The Accused filed a response on 3 October 2008.⁷ The Prosecution did not file a reply.

¹ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.6, *Confidential* Prosecution’s Appeal From Decision on Lazarević Motion for Temporary Provisional Release Dated 26 September 2008, 29 September 2008 (“Appeal”). The Appeals Chamber notes that the Prosecution filed a public, redacted version of its Appeal on 1 October 2008.

² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, *Public With Confidential Annex* Decision on Lazarević Motion for Temporary Provisional Release, 26 September 2008 (“Impugned Decision”).

³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, *Confidential* Vladimir Lazarevic [sic] Motion for Temporary Provisional Release on the Grounds of Compassion, 13 August 2008 (“Motion”), paras 2 and 4-8.

⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, *Confidential* Decision on Lazarević Motion for Temporary Provisional Release, 9 September 2008, paras 3-4.

⁵ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, *Confidential* Vladimir Lazarevic [sic] Renewed Motion for Temporary Provisional Release on the Grounds of Compassion, 16 September 2008 (“Renewed Motion”).

⁶ Impugned Decision, paras 15 and 29.

⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.6, *Confidential* Vladimir Lazarevic [sic] Response to Prosecution’s Appeal from Decision on Lazarevic [sic] Motion for Temporary Provisional Release Dated 26 September 2008, 3 October 2008 (“Response”).

II. STANDARD OF REVIEW

4. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.⁸ The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.⁹ Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision but whether the Trial Chamber has correctly exercised its discretion in reaching that decision.¹⁰

5. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".¹¹ The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹² The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹³

III. APPLICABLE LAW

6. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will

⁸ See e.g., *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006 ("*Brahimaj Decision*"), para. 5; *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić Decision*"), para. 6; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Bošković's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5.

⁹ See e.g., *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006 ("*Borovčanin Decision*"), para. 5; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 ("*Milutinović Decision*"), para. 3.

¹⁰ See e.g., *Borovčanin Decision*, para. 5; *Milutinović Decision*, para. 3.

¹¹ See e.g., *Borovčanin Decision*, para. 6; *Milutinović Decision*, para. 3.

¹² See e.g., *Borovčanin Decision*, para. 6; *Milutinović Decision*, para. 3.

¹³ See e.g., *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10; *Stanišić Decision*, para. 6, fn. 10; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005, para. 4; *Brahimaj Decision*, para. 5; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, para. 6.

not pose a danger to any victim, witness or other person, and after having given the host country and the State to which the accused seeks to be released the opportunity to be heard.¹⁴

7. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.¹⁵ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁶ This is because 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.¹⁷

IV. DISCUSSION

8. The Prosecution alleges that the Trial Chamber committed a discernible error and abused its discretion when it granted provisional release to the Accused for a 25-day period and accordingly requests the Appeals Chamber to reverse the Impugned Decision.¹⁸ Specifically, the Prosecution contends that the Trial Chamber erred: (1) in concluding that the humanitarian grounds asserted by the Accused are sufficiently compelling to justify provisional release; and (2) in concluding that those grounds justify provisional release for a 25-day period.¹⁹ In response, the Accused submits that the Trial Chamber neither discernibly erred nor abused its discretion in the Impugned Decision and requests the Appeals Chamber to dismiss the Appeal.²⁰ The Accused also requests the Appeals Chamber to reaffirm the time frame for provisional release granted by the Trial Chamber in the Impugned Decision, commencing from the date that the present decision is rendered.²¹

A. Humanitarian Grounds for Provisional Release

9. The Prosecution submits that “provisional release should be granted only in cases presenting the most clearly compelling humanitarian grounds.”²² It also asserts that there is a significantly greater flight risk on the part of the Accused at this stage of the proceedings, which requires the Accused to make a greater showing of humanitarian grounds justifying provisional release, and that

¹⁴ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on “Prosecution’s Appeal from *Décision relative à la Demande de mise en liberté provisoire de l’Accusé Petković* Dated 31 March 2008”, 21 April 2008 (“*Petković* Decision”), para. 7.

¹⁵ *Petković* Decision, para. 10.

¹⁶ *Stanišić* Decision, paras 6-8.

¹⁷ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7.

¹⁸ Appeal, para. 2.

¹⁹ Appeal, para. 17.

²⁰ Response, para. 2.

²¹ Response, para. 9.

²² Appeal, para. 26.

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the Accused has failed to do so.²³ The Prosecution also submits that the Trial Chamber's decision to grant the Accused provisional release on humanitarian grounds "is based on a 'patently incorrect conclusion of fact.'"²⁴ In this regard, the Prosecution argues that the Trial Chamber's finding that it "accepts the position of the Medical Officer that the Accused's current medical condition *would* be *significantly ameliorated* by a period of convalescence in his family home surroundings" does not accurately reflect the medical report upon which the Trial Chamber relied.²⁵ The Prosecution explains that the Medical Report of 19 September did not indicate that provisional release *would* ameliorate the Accused's medical condition but rather that "[a] period of recovery spent in his familiar home environment *could* be beneficial."²⁶ The Prosecution also notes that the Medical Report of 19 September does not indicate that provisional release would "significantly" affect the Accused's recovery but rather "simply indicates that provisional release could further assist in the Accused's recovery, which would take place in any event as a result of rest and relaxation."²⁷

10. In response, the Accused submits that medical conclusions can never be completely accurate and that the opinion expressed in the Medical Report that "[a] period of recovery spent in his familiar environment could be beneficial" should be considered in this light.²⁸ The Accused also asserts that the Prosecution misunderstands his health condition, pointing out that [redacted].²⁹

11. The Appeals Chamber observes that in determining whether to grant the Accused provisional release, the Trial Chamber appropriately engaged in an evaluation of whether the requirements of Rule 65(B) of the Rules had been satisfied.³⁰ In making this assessment, the Trial Chamber considered guarantees received from the Serbian government confirming that Serbia will respect all Trial Chamber orders in relation to the provisional release of the Accused.³¹ The Trial Chamber concluded that these guarantees, coupled with the conditions set forth in its provisional release order, were "sufficient to ensure that the Accused will return for trial and not endanger victims, witnesses, or other persons."³² The Appeals Chamber notes that the Prosecution does not dispute this finding in the Appeal.³³

12. Turning to the humanitarian grounds asserted by the Accused in support of the Renewed Motion, the Appeals Chamber recalls that the Trial Chamber considered the Accused's submissions

²³ Appeal, paras 25 and 26.

²⁴ Appeal, para. 4.

²⁵ Appeal, paras 21-22 (emphasis in the original). See also Confidential Annex to Impugned Decision, para. 18.

²⁶ Appeal, para. 21 (emphasis added).

²⁷ Appeal, para. 22.

²⁸ Response, para. 6.

²⁹ Response, paras 6 and 8.

³⁰ Impugned Decision, paras 11-12 and 21-22.

³¹ Impugned Decision, paras 14 and 21.

³² Impugned Decision, para. 21.

that [redacted].³⁴ The Trial Chamber also considered information provided by the United Nations Detention Unit (“UNDU”) Medical Officer in the Medical Report of 19 September.³⁵ The Trial Chamber concluded that:

The Chamber accepts the position of the Medical Officer that the Accused’s current medical condition would be significantly ameliorated by a period of convalescence in his family home surroundings.³⁶

13. The Appeals Chamber observes, however, that contrary to the Trial Chamber’s characterization of the information contained in the Medical Report of 19 September, the Medical Officer did not state that the Accused’s medical condition “would” be ameliorated by a period of recovery in his home environment. Rather, as noted by the Prosecution, the Medical Report of 19 September states that such a recovery period “could” assist in the Accused’s recovery.³⁷ In light of the foregoing, the Appeals Chamber finds that the Trial Chamber committed a discernible error by misinterpreting the evidence upon which it relied in determining that provisional release was appropriate.

14. The Appeals Chamber also considers the statement of the acting UNDU Medical Officer in a medical report dated 25 August that [redacted].³⁸ Additionally, in the Medical Report of 25 August, the acting Medical Officer stated that [redacted].³⁹ The Appeals Chamber finds that the Trial Chamber failed to give sufficient weight to this evidence, which indicates that the Accused’s recovery is proceeding normally and that he is fit to engage in his regular day-to-day activities and to attend court. Thus, the Trial Chamber has failed to properly exercise its discretion and its conclusion cannot stand.

B. Length of Provisional Release

15. In light of its above findings, the Appeals Chamber need not address the disputed length of provisional release.

V. DISPOSITION

16. On the basis of the foregoing, the Appeals Chamber **GRANTS** the Appeal and **REVERSES** the Impugned Decision.

³³ Appeal, para. 14, fn. 15.

³⁴ Confidential Annex to Impugned Decision, para. 17.

³⁵ Confidential Annex to Impugned Decision, para. 18.

³⁶ Confidential Annex to Impugned Decision, para. 19.

³⁷ Confidential Annex to Impugned Decision, para. 18.

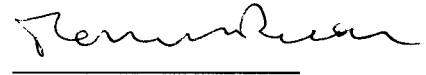
³⁸ [redacted].

³⁹ *Ibid.*

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

Done this 23rd day of October 2008,

At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE SCHOMBURG

1. I agree with the outcome of today's decision of the Appeals Chamber and the reasoning given for it. However, I feel compelled to write separately as the decision fails to provide any guidance on the applicable standard for assessing a request for provisional release which is made at this late stage in trial proceedings, *i.e.* after the case has been heard, judgement pending.

2. The Appeals Chamber has previously clarified that a Trial Chamber must consider the advanced stage of the proceedings when deliberating a provisional release motion. The Appeals Chamber held that a ruling pursuant to 98*bis* of the Rules, dismissing a motion for acquittal of the accused, constituted a significant enough change in circumstance to warrant the renewed and explicit consideration by a Trial Chamber of the risk of flight posed by the accused pursuant to Rule 65(B) of the Rules.¹ I have stated elsewhere that a Trial Chamber must specify in detail whether a specific 98*bis* Ruling has an effect on an individual accused's readiness and willingness to appear again for trial and that a Trial Chamber accordingly must assess any individual change in motivation on the part of the accused.²

3. In this case, the trial proceedings have progressed even further. In fact, closing briefs have been filed and the final arguments have been exchanged before the Trial Chamber which is currently writing its judgement. I note that the Prosecution has asked for a sentence in the range of 20 years of imprisonment to life imprisonment.³ Given this scenario, the Trial Chamber has two obligations. First, it must consider – based on the evidence before it – whether the accused will be acquitted or whether any sentence imposed will be less than the time the accused has already spent in pre-trial detention. If so, the Trial Chamber has an obligation to release the accused immediately.⁴ If not, the Trial Chamber in a second step must assess *de novo* how far the flight risk of the accused has changed *in concreto*. Indeed, from the perspective of an accused the higher the likelihood of a conviction and the higher the sentence to be expected, the higher becomes the incentive to flee.

¹ See *Prosecutor v. Jadranko Prlić et al.*, 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, para. 20.

² *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution's Urgent Appeal Against "Décision relative à la demande de mise en liberté provisoire de l'accusé Pušić" issued on 14 April 2008, Dissenting Opinion of Judge Schomburg, para. 5.

³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Public Redacted Final Trial Brief and Corrigendum, 28 July 2008, paras 1099-1100. See also T. 26947 (20 August 2008).


⁴ See *Prosecutor v. Mario Čerkez*, Case No. IT-95-14/2-A, Order to Release Mario Čerkez, 2 December 2004.

4. Depending on the stage of the proceedings, the threshold for provisional release increases or decreases in tandem with an accused's flight risk. Therefore, the Trial Chamber must dynamically assess the specific flight risk of each individual accused in each particular stage of the proceedings before it is allowed to grant provisional release. This has to be done in reasoned decision. Only a fully reasoned decision allows for a meaningful and fully informed decision of the Appeals Chamber.

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

Dated this 23rd day of October 2008,

At The Hague, The Netherlands.



Judge Wolfgang Schomburg

[Seal of the International Tribunal]