



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-A
Date: 9 August 2010
Original: English

BEFORE THE DUTY JUDGE

Before: Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 9 August 2010

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**DECISION ON DRAGOLJUB OJDANIĆ'S MOTION FOR
TEMPORARY PROVISIONAL RELEASE ON
COMPASSIONATE GROUNDS**

The Office of the Prosecutor:

Government of the Republic of Serbia

Mr. Peter Kremer QC

Government of the Kingdom of The Netherlands

Counsel for the Defence:

Mr. Toma Fila and Mr. Vladimir Petrović for Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksander Aleksić for Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Sreten Lukić

1. I, Theodor Meron, acting in my capacity as Duty Judge 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”), am seised of “General Ojdanic’s [*sic*] Motion for Provisional Release” filed publicly by Counsel for Dragoljub Ojdanić (“Ojdanić”) on 20 July 2010.¹ The Office of the Prosecutor (“Prosecution”) filed its confidential response on 21 July 2010.² Ojdanić filed his reply on 23 July 2010.³ A confidential supplement to the Motion was filed by Ojdanić on 3 August 2010.⁴

2. Although the Motion, Response and Reply were all filed before the assigned Appeals Chamber of the Tribunal (“Appeals Chamber”) within the normal Registry hours prior to the commencement of the court recess, the Motion could not be adjudicated until the necessary guarantees had been received from the Government of the Republic of Serbia (“Serbia”).⁵ Considering that Ojdanić requests to attend a memorial service in Serbia on 21 August 2010,⁶ I am satisfied that the Motion is urgent in the sense that it should be dealt with before the return of the assigned Appeals Chamber from court recess in order to facilitate the necessary logistical arrangements for his provisional release. Therefore and pursuant to Rules 28(D)(ii) and 28(F) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) in pertinent parts, the Motion shall be dealt with by me as the Duty Judge.

I. BACKGROUND

3. Throughout the trial proceedings in this case, Ojdanić made a series of requests for provisional release, some of which were granted on humanitarian and/or compassionate grounds.⁷

¹ General Ojdanic’s [*sic*] Motion for Provisional Release, 20 July 2010 (public with public Annex B and confidential Annexes A and C) (“Motion”).

² Prosecution’s Response to General Ojdanić’s Motion for Provisional Release, 21 July 2010 (confidential) (“Response”). Recalling that all submissions filed before the Tribunal shall be public unless there are exceptional reasons for keeping them confidential (see, e.g., Decision on “Defence Request to File a Reply to Confidential ‘Prosecution Response to Šainović’s Second Motion to Admit Additional Evidence’”, 12 July 2010, p. 2), I find that the Prosecution has not demonstrated any such reasons to justify the confidential status of the Response.

³ Reply Brief: General Ojdanic’s [*sic*] Motion for Provisional Release, 23 July 2010 (“Reply”).

⁴ Supplement to General Ojdanic’s [*sic*] Motion for Provisional Release, 3 August 2010 (confidential) (“Supplement”).

⁵ The relevant guarantees were filed on 3 August 2010 as Annex A to Supplement (The Guarantee of the Government of the Republic of Serbia, Confidential No. 00-246/2010, 29 July 2010 (“State Guarantees”).

⁶ Supplement, para. 3.

⁷ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Temporary Provisional Release, 17 December 2008 (public with confidential Annex), paras 1-5; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Temporary Provisional Release, 16 October 2008 (public with confidential Annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Temporary Provisional Release, 10 July 2008 (public with confidential and *ex parte* Annex A and confidential Annex B) (“Decision of 10 July 2008”); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Temporary Provisional Release, 2 May 2008 (public with confidential and *ex parte* Annex A and confidential Annex B); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Temporary Provisional Release, 7 December 2007 (public with confidential Annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Temporary Provisional Release, 4 July 2007 (public with

On 26 February 2009, Trial Chamber III (“Trial Chamber”) convicted Ojdanić of deportation and other inhumane acts (forcible transfer) as crimes against humanity pursuant to Articles 5(d), 5(i) and 7(1) of the Tribunal’s Statute and sentenced him to 15 years of imprisonment.⁸

4. In accordance with Rules 108 and 111 of the Rules, Ojdanić filed his Notice of Appeal and his Appeal Brief on 27 May 2009⁹ and 23 September 2009,¹⁰ respectively. Subsequently, the Appeals Chamber granted Ojdanić’s two requests for amending his grounds of appeal.¹¹ The most recent version of Ojdanić’s amended Appeal Brief was filed on 11 December 2009.¹² He is currently detained in the United Nations Detention Unit (“UNDU”) pending the resolution of the appeals lodged against the Trial Judgement.

II. APPLICABLE LAW

5. Pursuant to Rule 65(I) of the Rules, a convicted person may bring an application seeking provisional release for a fixed period. By virtue of Rule 107 of the Rules, the whole of Rule 65 applies *mutatis mutandis* to applications brought before the Appeals Chamber under this provision.¹³ Rule 65(I) of the Rules thus provides that the Appeals Chamber may grant provisional release if it is satisfied that (i) the convicted person, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the convicted person, if released, will not pose a danger to any victim, witness or other person; and (iii) special circumstances exist warranting such release. These requirements must be considered cumulatively.¹⁴ Furthermore, “whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities”.¹⁵

confidential Annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion for Provisional Release, 22 May 2007; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006. See also *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.

⁸ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), Vol. 3, para. 1209.

⁹ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, General Ojdanić’s [sic] Notice of Appeal, 27 May 2009.

¹⁰ General Ojdanić’s Appeal Brief, 23 September 2009 (public with confidential Annex).

¹¹ Decision on Dragoljub Ojdanić’s Motion to Amend Ground 7 of his Notice of Appeal, 2 September 2009; Decision on Dragoljub Ojdanić’s Second Motion to Amend his Notice of Appeal, 4 December 2009. See also General Ojdanić’s [sic] Amended Notice of Appeal, 29 July 2009; General Ojdanić’s [sic] Second Amended Notice of Appeal, 15 October 2009.

¹² General Ojdanić’s Amended Appeal Brief, 11 December 2009 (public with confidential Annex).

¹³ Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release on Compassionate Grounds, 17 May 2010 (public redacted version) (“Lazarević Decision of 17 May 2010”), para. 7 and references cited therein; Public Redacted Version of the Decision on Sreten Lukić’s Second Motion for Provisional Release on Compassionate Grounds, 14 July 2010 (“Lukić Decision of 14 July 2010”), para. 5 and references cited therein.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

Finally, the discretionary assessments of the requirements under Rule 65 are made on a case-by-case basis.¹⁶

III. DISCUSSION

A. Submissions

6. Ojdanić seeks “provisional release from 20-27 August 2010 so that he can attend the memorial service for his sister, Milena Planic [*sic*], who passed away on 15 July 2010 in Serbia”.¹⁷ Ojdanić submits that he was unable to obtain the relevant State guarantees and apply for provisional release in time to attend her funeral held on 17 July 2010, and therefore wishes to attend her memorial service to pay his last respects.¹⁸ He contends that attendance of such memorial services, held 40 days after the death of a close relative, has been found to constitute “compelling humanitarian circumstances and has served as the grounds for provisional release for other accused at this Tribunal.”¹⁹

7. Ojdanić requests to be provisionally released for a period of seven days to enable him to travel to the memorial service in the village of Sirogojno, some 250 kilometres from Belgrade. He further requests permission to visit the graves of his parents in the village of Ravni, near Sirogojno. He states that, if granted provisional release, he will stay at his family residence in Belgrade.²⁰

8. Ojdanić recalls his conduct while previously on provisional release and emphasizes that he will abide by any conditions the Appeals Chamber decides to impose.²¹ Finally, he avers that he is neither a flight risk nor a danger to witnesses and that his provisional release will not interfere with the progress of the appeal.²²

9. The Prosecution does not oppose the Motion, provided the relevant guarantees are obtained from the Government of Serbia and the appropriate conditions are imposed to ensure that Ojdanić will surrender into detention at the conclusion of the period of provisional release and will not pose

¹⁶ *Ibid.*

¹⁷ Motion, para. 1; see also Annex A thereto (confidential).

¹⁸ *Ibid.*, para. 2.

¹⁹ *Ibid.*, para. 7, referring, *inter alia*, to *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 (“*Simić* Decision of 5 May 2006”); *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005 (“*Galić* Decision of 23 March 2005”); *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 Services for his Father, 21 October 2004.

²⁰ Motion, para. 8; see also Annex C thereto (confidential).

²¹ *Ibid.*, paras 3, 8; see also Annex B thereto.

²² *Ibid.*, paras 3-4, 6. According to Ojdanić, he has already served more than half of the time he could be expected to serve of his 15 year sentence and has raised “significant grounds of appeal” which may result in the overturning of his convictions. He asserts that he therefore has every incentive to return to the UNDU (*ibid.*, para. 4; see also Annex B).

any danger to victims or witnesses.²³ The Prosecution further submits that Ojdanić has failed to justify why he should be allowed to stay in his family residence in Belgrade when the memorial service will take place in Sirogojno, 250 kilometres away and his parents' graves are in Ravni.²⁴ Finally, the Prosecution submits that the period granted for provisional release should be limited to the time required to travel, attend the memorial service and visit his parents' graves.²⁵

10. In reply, Ojdanić seeks to clarify the "issue of his stay in Belgrade."²⁶ He submits an itinerary which he claims represents the "most feasible logistical arrangement for his provisional release" wherein he indicates that the first and last nights of provisional release would be spent in Belgrade.²⁷ In the Supplement, Ojdanić relies on a more detailed itinerary and proposes, *inter alia*, that while in the Sirogojno area, he will reside in Zlatibor, approximately 30 kilometres away from the place of the memorial service. Alternatively, he suggests staying with relatives in their small house in Sirogojno for which there is no street address.²⁸

B. Analysis

1. Special circumstances under Rule 65(I) of the Rules

11. The specificity of provisional release at the post-trial stage is reflected by Rule 65(I)(iii) of the Rules, which provides for an additional criterion, *i.e.* that "special circumstances exist warranting such release".²⁹ In such situations, the Appeals Chamber has concluded that special circumstances related to humane and compassionate considerations exist where there is an acute justification, such as the applicant's medical need or a memorial service for a close family member.³⁰ Because "the notion of acute justification [is] inextricably linked to the scope of special circumstances which could justify provisional release on compassionate grounds at the appellate stage", justifications such as wanting to spend time with family have not been recognized as special circumstances under Rule 65(I)(iii) of the Rules.³¹

²³ Response, para. 2.

²⁴ *Ibid.*, para. 3.

²⁵ *Ibid.*, para. 4.

²⁶ Reply, para. 3.

²⁷ *Ibid.*, para. 4.

²⁸ Supplement, para. 4.

²⁹ *Lukić* Decision of 14 July 2010, para. 11 and references cited therein.

³⁰ *Ibid.* I note in particular that such instances include attending the memorial services of a sibling. See *Galić* Decision of 23 March 2005, paras 15, 22.

³¹ *Lukić* Decision of 14 July 2010, para. 11 and references cited therein.

12. In the present case, I am satisfied that the memorial service for Ojdanić's sister constitutes a special circumstance within the meaning of Rule 65(I)(iii) of the Rules.³²

2. Other Rule 65(I) requirements

13. Although the risk of flight associated with granting the request for provisional release is higher at the present stage, after Ojdanić was sentenced by the Trial Chamber to 15 years of imprisonment, than it was when the trial proceedings were ongoing, I find, in light of the discussion below, that the requirement under Rule 65(I)(i) of the Rules is satisfied.

14. In this regard, I take note of the State Guarantees and recall that during his most recent provisional release, Ojdanić was ordered, *inter alia*, to remain under strictly controlled conditions, including 24-hour police surveillance throughout his presence in Serbia.³³ At this stage of proceedings, I consider that the conditions of provisional release should be at least as strict as, or stricter than, those imposed during the trial proceedings, and include, *inter alia*, 24-hour armed surveillance.³⁴ I also note that on previous occasions, Ojdanić has fully complied with all the conditions imposed on him by the Trial Chamber.³⁵

15. In light of the above and considering the circumstances at stake, I am satisfied that, if released, Ojdanić will surrender into detention at the conclusion of the fixed period for which he is provisionally released. Likewise, I am satisfied that Ojdanić will not pose a danger to any victim, witness, or other person, thus satisfying the requirement of Rule 65(I)(ii) of the Rules.

16. Finally, I note that The Netherlands, in its capacity as host State, has no objections to Ojdanić's provisional release as requested by the Motion.³⁶

3. Ojdanić's residence in Serbia and duration of the provisional release

18. As regards Ojdanić's residence while on provisional release, I find that as a matter of principle, the circumstances of the temporary release do not justify Ojdanić's stay in Belgrade.

³² Cf. *Simić* Decision of 5 May 2006, p. 3; see also *Prosecutor v. Vujadin Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5, IT-05-88-AR65.6, 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 ("*Popović et al.* Decision of 15 May 2008"), paras 31-32.

³³ Decision of 10 July 2008, paras 27, 31(d)(ii).

³⁴ Cf. *Lukić* Decision of 14 July 2010, para. 16; Decision on Urgent Motion Requesting Provisional Release of Nebojša Pavković on Compassionate Grounds, 17 September 2009, para. 11.

³⁵ See *supra*, para. 8; see also *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Report from the First Deputy Prime Minister and Minister of the Interior, Republic of Serbia, No. 3527/08-18, 28 August 2008 (confidential); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Report from the Ministry of Justice, Republic of Serbia, No. 700-00-83/2002-20, 28 May 2008 (confidential); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Report from the Ministry of Justice, Republic of Serbia, No. 700-00-83/2002-08, 8 August 2007 (confidential).

Given that the memorial service is to be held in Sirogojno, there is no need for Ojdanić to be in Belgrade other than during the time strictly necessary to secure his transfer from Belgrade airport to Sirogojno and back. Therefore, the possibility for Ojdanić's overnight stay in Belgrade³⁷ would only be permissible if his immediate travel from Belgrade to Sirogojno and back under the strict conditions imposed below is impracticable for technical and/or logistical reasons. In all other circumstances, Ojdanić must stay at the residential address in Zlatibor mentioned in paragraph 4 of the Supplement for the entire duration of his provisional release under the conditions stipulated below.³⁸

19. As for the requested term of the provisional release, I find that Ojdanić should be released for a period of up to five days, including travel time. Considering the circumstances, I find that this duration is reasonable³⁹ and will not disrupt the appellate proceedings given that the briefing of the appeals is complete and no date for the appeals hearing has yet been set.

20. In addition and subject to the above, I allow Ojdanić to visit his parents' graves in Ravni within the period of his provisional release.⁴⁰ However, given that this visit is not, as such, a "special circumstance" justifying the provisional release,⁴¹ it is not taken into account when determining the reasonableness of the duration thereof.

IV. DISPOSITION

21. For the foregoing reasons, I hereby **GRANT** the Motion and **ORDER** as follows:

1. Ojdanić shall be transported to Schiphol airport in The Netherlands by the Dutch authorities on 19 August 2010, or as soon thereafter as is practicable;
2. At Schiphol airport, Ojdanić shall be provisionally delivered into the custody of a representative of the Government of Serbia, pursuant to paragraphs (a), (b) and (c) of the State Guarantees, who shall accompany Ojdanić for the remainder of his travel to and from the address in Zlatibor detailed in paragraph 4 of the Supplement;
3. The period of the provisional release shall commence when Ojdanić is delivered into the custody of the authorised representative of the Government of Serbia and shall terminate

³⁶ Correspondence from the Deputy Director of Protocol for the Minister of Foreign Affairs "Re Provisional release General Dragoljub Ojdanić", 21 July 2010 (confidential).

³⁷ At the address mentioned in Annex C (confidential) to the Motion.

³⁸ *Infra*, paras 21 *et seq.*

³⁹ *Cf. Popović et al.* Decision of 15 May 2008, paras 31-32.

⁴⁰ *Cf. ibid.*

⁴¹ *See supra*, para. 12.

upon his return to the Dutch authorities, which shall be no later than five days from the date of his release;

4. On his return flight, Ojdanić shall be accompanied by the authorised representative of the Government of Serbia who shall deliver Ojdanić into the custody of the Dutch authorities at Schiphol airport; the Dutch authorities shall then transport Ojdanić back to the UNDU in The Hague; and
5. During the period of his provisional release, Ojdanić shall abide by the following conditions, and, where applicable, the Government authorities of Serbia shall ensure compliance with such conditions:
 - a. before leaving the UNDU, Ojdanić shall provide details of his itinerary to the Ministry of Justice of The Netherlands and to the Registrar of the Tribunal;
 - b. Ojdanić shall stay at the address in Zlatibor indicated in paragraph 4 of the Supplement;
 - c. in the exceptional event that immediate travel to and/or from Belgrade is impractical for logistical and/or technical reasons,⁴² Ojdanić shall stay overnight at the Belgrade address indicated in Annex C of the Motion;
 - d. Ojdanić shall remain under 24-hour armed surveillance throughout his presence in Serbia;
 - e. Ojdanić shall surrender his passport to the Ministry of Justice of Serbia for the entire duration of his provisional release;
 - f. Ojdanić shall not have any contact whatsoever or in any way interfere with victims or (potential) witnesses or otherwise interfere in any way with the proceedings or the administration of justice;
 - g. Ojdanić shall not discuss his case with anyone, including the media, other than his counsel;
 - h. Ojdanić shall comply strictly with any requirements of the authorities of Serbia necessary to enable them to comply with their obligations under the present decision;
 - i. Ojdanić shall comply with any order of the Appeals Chamber varying the terms of or terminating his provisional release; and
 - j. Ojdanić shall return to the UNDU no later than five days from the date of his provisional release.

22. I further **REQUIRE** the Government of Serbia to assume responsibility for:
1. Designation of an official into whose custody Ojdanić shall be provisionally released and who shall accompany Ojdanić from Schiphol airport in The Netherlands to the address in Zlatibor detailed in paragraph 4 of the Supplement, and notification, as soon as practicable and prior to Ojdanić's release, to the Appeals Chamber and the Registrar of the Tribunal of the name of the designated official;
 2. Provision of 24-hour armed surveillance of Ojdanić throughout his stay in Serbia, including his transfer from Belgrade to Sirogojno, Zlatibor, Ravni, and back;
 3. Provision of Ojdanić's personal security and safety while on provisional release;
 4. All expenses in connection with the transport from Schiphol airport to Ojdanić's address in Zlatibor and back, including the attendance of the memorial service in Sirogojno and the graves in Ravni;
 5. Facilitating, at the request of the Appeals Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;
 6. Reporting immediately to the Registrar of the Tribunal as to the substance of any threats to Ojdanić's security, including full reports of investigations related to such threats;
 7. Detaining Ojdanić immediately should he attempt to escape from the territory of Serbia, or should he in any other way breach the terms and conditions of his provisional release as set out in the present decision and reporting immediately any such breach to the Registrar of the Tribunal and the Appeals Chamber;
 8. Respecting the primacy of the Tribunal in relation to any existing or future proceedings in Serbia concerning Ojdanić; and
 9. Submitting a written report to the Appeals Chamber, upon Ojdanić's return to the UNDU, as to Ojdanić's compliance with the terms of the present decision.
23. I **INSTRUCT** the Registrar of the Tribunal to:
1. Consult with the Dutch authorities and the authorities of Serbia as to the practical arrangements for Ojdanić's provisional release;
 2. Request the authorities of the State(s) through whose territory Ojdanić may travel to:

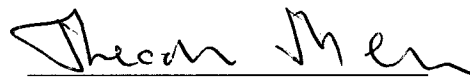
⁴² See *supra*, para. 18.

- a. hold him in custody for any time he will spend in transit at the airport of the State(s) in question; and
 - b. arrest and detain Ojdanić pending his return to the UNDU should he attempt to escape during travel;
3. Continue to detain Ojdanić at the UNDU in The Hague until such time as the Appeals Chamber and the Registrar of the Tribunal have been notified of the name of the designated official of the Government of Serbia into whose custody Ojdanić is to be provisionally released.
24. Finally, I **INSTRUCT** the Registrar of the Tribunal to lift the confidential status of the Response.

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

Dated this ninth day of August 2010,

At The Hague, The Netherlands.



Judge Theodor Meron
Duty Judge