



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: 26 September 2008
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: 26 September 2008

PROSECUTOR

v.

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

PUBLIC

DECISION ON PAVKOVIĆ MOTION FOR TEMPORARY PROVISIONAL RELEASE

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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 a “Pavković Motion for Temporary Provisional Release,” filed confidentially on 28 August 2008 (“Motion”), and hereby renders its decision thereon.

Brief procedural background

1. On 5 December 2006, the Trial Chamber denied the six Accused’s joint application for provisional release over the winter recess.¹ The Appeals Chamber affirmed this decision.²

2. On 22 May 2007, the Chamber denied the application of Accused Nebojša Pavković (“Pavković”) for provisional release over the summer recess, holding, *inter alia*, that he had not demonstrated how the circumstances that led to the denial of his application in December 2006 had changed so as to materially affect the approach taken by the Chamber at that time.³ On 18 June 2007, the Chamber granted Pavković’s motion for temporary provisional release upon circumstances related to the ill health of his father.⁴

3. On 27 November 2007, Pavković filed a motion for provisional release.⁵ In its decision of 7 December 2007, the Trial Chamber denied that motion, reasoning that Pavković had not satisfied the Trial Chamber that there had been a change in circumstances that materially affected the approach taken in the decision denying Pavković’s provisional release in December 2006.⁶ On 12 December 2007, the Chamber denied Pavković’s motion for temporary provisional release on compassionate or humanitarian grounds, holding that the circumstances that had arisen since the Accused’s last temporary provisional release did not rise to the level so as to warrant release at that stage of the proceedings.⁷ The Appeals Chamber affirmed this decision.⁸

¹ Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006.

² *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During Winter Recess, 14 December 2006.

³ Decision on Pavković Motion for Provisional Release, 22 May 2007, para. 13.

⁴ Decision on Pavković Motion for Temporary Provisional Release, 18 June 2007, para. 6.

⁵ Pavković Motion for Temporary Provisional Release, 27 November 2007.

⁶ Decision on Pavković Motion for Temporary Provisional Release, 7 December 2007, paras. 8–9, 11.

⁷ Decision on Pavković Motion for Temporary Provisional Release, 12 December 2007, para. 7 (public with confidential annex).

⁸ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.3, Decision on “Pavković Appeal Pursuant to Rule 116 *bis* Against the Decision on Pavković Motion for Temporary Provisional Release, Dated 12 December 2007,” 18 December 2007, p. 5.

4. On 14 March 2008, the Chamber granted a temporary provisional release to the Accused on compassionate and/or humanitarian grounds.⁹

Applicable Law

5. Pursuant to Rule 65(A), once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B), a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness, or other person, after having given the host country and the state to which the accused seeks to be released the opportunity to be heard.¹⁰ Where one of the criteria required by Rule 65(B) has not been met, a Chamber must deny provisional release and need not consider the other conditions.¹¹

6. In deciding whether the requirements of Rule 65(B) have been met, a Chamber must consider all of those relevant factors that a reasonable 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.¹² What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹³ 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.¹⁴ The Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.¹⁵

7. Rule 65(B), which governs provisional release during trial, makes no mention of compassionate or humanitarian grounds. However, the jurisprudence of the Tribunal has

⁹ Decision on Pavković Motion for Temporary Provisional Release, 14 March 2008 (public with confidential annex); *see also* Order Suspending Temporary Provisional Release of Nebojša Pavković, 18 March 2008; Order Reinstating Temporary Provisional Release of Nebojša Pavković, 20 March 2008; Decision on Prosecution Motion for Reconsideration of Order Reinstating Temporary Provisional Release of Nebojša Pavković, 26 March 2008.

¹⁰ *Prosecutor v. Haradinaj, Balaj and Brahimaj*, 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, para. 6.

¹¹ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber's Decision on Sredoje Lukic's Motion for Provisional Release, 16 April 2007, paras. 6, 23; *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 ("*Popović* Decision"), para. 6.

¹² *Prosecutor v. 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. 8.

¹³ *Ibid.*

¹⁴ *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Decision Denying Johan Tarčulovski's Motion for Provisional Release, 4 October 2005, para. 7.

¹⁵ *Stanišić* Decision, para. 8.

recognised that Chambers enjoy a measure of discretion when considering motions pursuant to Rule 65 where compassionate or humanitarian concerns may permit a more limited provisional release.¹⁶

8. The Appeals Chamber's recently overturned a decision in the *Prlić et al.* case, in which the Trial Chamber granted provisional release to five of the accused in those proceedings. The Appeals Chamber held that the *Prlić et al.* Chamber erred by not offering an indication of how much weight it ascribed to the justifications for temporary provisional release on humanitarian grounds. The Appeals Chamber also held that these various justifications were not sufficiently compelling, particularly in light of the Rule 98 *bis* ruling, to warrant the exercise of the Trial Chamber's discretion in favour of granting the accused provisional release without offering any indication of how much weight it ascribed thereto. This Chamber does not interpret the *Prlić et al.* decision as a *per se* legal ruling that provisional release must always be denied after a Rule 98 *bis* ruling, provided that the Chamber discusses and weighs all the factors relevant to the provisional release motion.¹⁷

9. Even more recently, the Appeals Chamber, again in *Prlić et al.*, has set the test for provisional release at a late stage of trial proceedings as follows:

Concerning the humanitarian reasons sufficient to justify provisional release, the Appeals Chamber notes that the development of the Tribunal's jurisprudence implies that an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted *when serious and sufficiently compelling humanitarian reasons exist*. . . . Therefore, provisional release should only be granted at a late stage of the proceedings when sufficiently compelling humanitarian reasons exist to justify the release. Furthermore, even when provisional release is found to be justified in light of the nature of the circumstances, the length of the release should nonetheless be proportional to these circumstances¹⁸

¹⁶ See Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007, paras. 7–11; see also *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 ("*Popović* Decision"); *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; *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. 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. 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; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, paras. 8–12.

¹⁷ *Prosecutor v. 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, paras. 19–21.

¹⁸ *Prosecutor v. 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, para. 17

10. The Chamber has carefully considered and applied all of the above jurisprudence of the Appeals Chamber when assessing the circumstances of the Accused.

Discussion

11. The Chamber has carefully considered all the submissions in relation to this matter and has taken all relevant factors bearing upon the issue of provisional release into account.

12. In the Motion, the Accused requests provisional release until the Judgement in the above-captioned proceedings is rendered.¹⁹ The Accused avers that he has been on temporary provisional release in the past, during which he fully complied with all conditions set by the Chamber and returned without incident.²⁰ The Accused sets forth in support of the Motion several personal circumstances, including his current health condition, that of members of his family, and other family considerations.²¹ It is submitted that the presumption of innocence militates in favour of the release of the Accused²² and that, the evidence in the case having closed, the Chamber's concern that the Accused will endanger victims, witnesses, or other persons is no longer operative.²³

13. The Accused cites past guarantees from the Republic of Serbia ("Serbia") confirming that it will respect all orders made by the Chamber in respect of the provisional release of the Accused and states that he will obtain updated guarantees, if necessary.²⁴ The Chamber assumes for the purposes of this Motion that Serbia would undertake the necessary guarantees for the Accused. The Netherlands, in its capacity as host country, has stated that it has no objection to the Accused's provisional release.²⁵

14. The Prosecution opposes the Motion, articulating its general opposition to provisional release of any of the six Accused at this most advanced stage of the proceedings. Although recognising the possibility of temporary provisional releases on compassionate and/or humanitarian grounds, the Prosecution submits that the Accused has not made an adequate showing that he will

(footnote omitted) (emphasis added); *but see Prosecutor v. 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, 23 April 2008, para. 15.

¹⁹ Motion, paras. 1, 12.

²⁰ Motion, para. 2.

²¹ Motion, paras. 5-10.

²² Motion, para. 4.

²³ Motion, para. 4.

²⁴ Motion, para. 3.

²⁵ Letter from Dutch Ministry of Foreign Affairs, 9 September 2008.

return if released, despite the medical issues raised in the Motion.²⁶ Should the Motion be granted, the Prosecution requests the Chamber to require 24-hour security of the Accused and to order a stay of the decision.²⁷

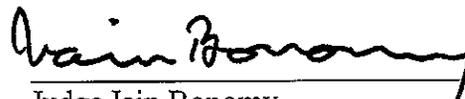
15. The Chamber is of the view that the Accused has not adequately explained why he cannot receive medical treatment at the United Nations Detention Unit; nor does he aver that his family members cannot—or indeed have not been able to—visit him in the Hague. The Chamber therefore is not satisfied that the circumstances set forth in the Motion are serious and sufficiently compelling enough to warrant a provisional release at this time; and, the Chamber is not prepared to exercise its discretion to grant the Motion.

16. In respect of the Accused's arguments going to the criteria that must be satisfied under Rule 65(B), even if the Accused were to satisfy the Chamber that he, if released, would return for the remainder of the proceedings and would not pose a danger to any victim, witness, or other person, the Chamber would not have exercised its discretion, under the present circumstances, to grant the Motion for the reasons set forth in the preceding paragraph. The Chamber therefore declines to determine these issues.

Disposition

17. For the foregoing reasons and pursuant to Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby DENIES the Motion.

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



Judge Iain Bonomy
Presiding

Dated this twenty-sixth day of September 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁶ Confidential Prosecution Response to Pavković's Motion for Temporary Provisional Release, 10 September 2008 ("Response"), paras. 4–7.

²⁷ Response, paras. 8–9.