



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-05-87-PT
Date: 18 November 2005
Original: ENGLISH

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision: 18 November 2005

PROSECUTOR

v.

Milan MILUTINOVIĆ
Nikola ŠAINOVIĆ
Dragoljub OJDANIĆ
Nebojša PAVKOVIĆ
Vladimir LAZAREVIĆ
Vlastimir ĐORĐEVIĆ
SRETEN LUKIĆ

**SECOND DECISION ON NEBOJŠA PAVKOVIĆ'S
PROVISIONAL RELEASE**

The Office of the Prosecutor:

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Mr. Tomislav Višnjić and Mr. Peter Robinson for Dragoljub Ojdanić
Mr. Toma Fila and Mr. Vladimir Petrović for Nikola Šainović
Mr. John Ackerman and Mr. Aleksander Aleksić for Mr. Nebojša Pavković
Mr. Mihaljo Bakrač for Mr. Vladimir Lazarević
Mr. Theodore Scudder for Mr. Sreten Lukić

I. Procedural Background

1. On 30 September 2005 this Trial Chamber granted the motion of Nebojša Pavković (“Accused”) for provisional release but stayed his provisional release pending an appeal by the Prosecution.¹ On 1 November 2005 the Appeals Chamber granted the Prosecution’s appeal, quashed the initial Decision and remitted the matter to this Trial Chamber “for further consideration consistent with this Decision.”²
2. The Appeals Chamber found that the Trial Chamber had erred in its approach to four matters. The first two relate to the question of the likelihood that the Accused will appear for trial. The third relates to the question whether he, if released, will pose a danger to any victim, witness or other person. The fourth is a procedural issue. In giving the Application further consideration the Trial Chamber will deal specifically with each of the four matters.

II. Whether the Accused Will Appear for Trial³

3. The Appeals Chamber found that, in dealing with this question, the Trial Chamber erred by failing to consider two matters: (a) “the public statements, alleged by the Prosecution to have been made by the Accused, that he would not surrender to the Tribunal”;⁴ and (b) “that the Accused ‘held a senior position in the [Yugoslav Army] VJ.’”⁵ The Trial Chamber addresses these two matters together in the course of considering further the question whether the Accused has satisfied the Chamber that he will appear for trial.
4. The Trial Chamber chose to issue its initial Decision on the Accused’s application in the short “Noting and Considering” form of written decision widely used in the Tribunal. In the course of that Decision the Trial Chamber noted the Prosecution’s submission that the Accused had “made a number of strongly worded public statements ... which were quoted in a variety of press articles and these indicate his hostile and aggressive attitude to the International Tribunal.”⁶ The Trial Chamber considered these at length in its

¹ Decision on Nebojša Pavković’s Provisional Release, 30 September 2005 (“Trial Chamber Decision”).

² Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković’s Provisional Release, 1 November 2005 (“Appeals Chamber Decision”), para. 13.

³ See Appeals Chamber Decision, paras. 7-8.

⁴ *Ibid.*, para. 8.

⁵ *Ibid.*

⁶ Trial Chamber Decision, p. 3. See also *Prosecutor v. Pavković et al.*, Case No. IT-03-70-PT, Prosecution’s Response to Nebojša Pavković’s Motion for Provisional Release with Annexes A and B, 24 June 2005 (“Prosecution’s Response”), paras. 12, 14.

initial deliberations. They were one of the factors which prompted the Trial Chamber to appoint a hearing on the question whether the Accused would appear for trial if released. At the hearing these press reports were explored in detail in cross-examination of the Minister of Justice of the Republic of Serbia by Counsel for the Prosecution. Following the hearing the Trial Chamber gave further consideration to the transcript dealing with the Minister's responses to questions on these reports.

5. The senior position of the Accused in the VJ was the subject of a submission by the Prosecution which was noted by the Trial Chamber in its initial Decision.⁷ No weight was attributed by the Trial Chamber to the point which was stated baldly in terms that the Accused held a "senior position in the VJ that may allow him to use particular means that are not available to other accused when trying to abscond."⁸ No additional submission was made by the Prosecution, and it was not clear to what means the Prosecution was referring.

6. The Trial Chamber now has the guidance of the Appeals Chamber by reference to earlier authority that "the effect the former position of an Accused may have on the willingness of a government to comply with its guarantees is a relevant consideration when a Trial Chamber evaluates these guarantees."⁹ The Chamber has itself reflected that point in previous decisions on similar applications.¹⁰ However, the Trial Chamber is also conscious of its responsibility to decide each case on its own individual merits according to a preponderance of the evidence. On the basis of the material before it, the Trial Chamber is satisfied that the former position of this Accused is not likely to have an effect on the willingness of the governments of the Republic of Serbia or Serbia and Montenegro to implement the guarantees they have given,¹¹ to which the Trial Chamber gives significant weight.

7. In addition to the former position of the Accused, the Trial Chamber has had particular regard to the terms of the statements attributed to the Accused, including that

⁷ See Trial Chamber Decision, p. 4.

⁸ *Ibid.*

⁹ *Prosecutor v. Šainović and Ojdanić*, Case No. IT-99-34-AR65, Decision on Provisional Release, 30 October 2002, para. 9.

¹⁰ See, e.g., *Prosecutor v. Stanišić*, Case No. IT-03-69-PT, Decision on Provisional Release, 28 July 24, paras. 25-26.

¹¹ Those guarantees included, among other things, "an undertaking by the Republic of Serbia Ministry of the Interior and the Security Intelligence Agency of the Republic of Serbia to ensure that the accused reports to the nearest police station every day, to keep a record of this and send monthly reports in writing to confirm the accused's compliance with these undertakings," as well as "an undertaking by the Republic of Serbia Ministry of the Interior to arrest the accused

specifically referred to in the next sub-section of this Decision, in evaluating the guarantees along with the likelihood that the Accused will appear for trial. After making his strongly-worded statements, the Accused surrendered to the Tribunal and has undertaken to attend when required and in particular for trial.¹² Having again reviewed the testimony of the Minister of Justice, the Trial Chamber accepts his assurance that the governments' guarantees will be enforced. In light of the terms of the guarantees, the Order originally made by the Trial Chamber included a number of requirements to facilitate the close supervision of the movements and activities of the Accused and to prohibit contact with any co-accused, victim or potential witness. Any order for provisional release made by the Trial Chamber would contain identical provisions. These include requiring the Accused to: "(i) remain within the confines of the municipality of Belgrade; (ii) to surrender his passport to the Ministry of Justice; (iii) to report each day to the police in Belgrade at a local police station to be designated by the Ministry of Justice; (iv) to provide the address at which he will be staying to the Ministry of Justice and the Registrar of the International Tribunal before leaving the United Nations Detention Unit in The Hague; (v) to consent to having the Ministry of Justice check with the local police about his presence and to the making of occasional, unannounced visits upon the Accused by the Ministry of Justice or by a person designated by the Registrar of the International Tribunal; . . . (x) to comply strictly with any requirements of the authorities of Serbia and Montenegro and the Republic of Serbia necessary to enable them to comply with their obligations under this Order and their guarantees."¹³

8. The Trial Chamber has again considered all the circumstances presented to it and has had particular regard to the matters which the Appeals Chamber considered had not been adequately addressed. It has considered the seniority of the Accused's former position in the VJ, the facts that the Accused is charged with extremely serious criminal offences and that he is likely to face a long prison term if convicted, all of the circumstances surrounding his initial refusal to surrender, the absence of any satisfactory explanation as to his failure to surrender prior to April 2005, his surrender, the statements he made, his undertaking to attend for trial, the guarantees now provided, and the assurances received from the Minister of Justice. In light of its very detailed consideration of all material

immediately if he attempts to abscond or violate any of the conditions of his provisional pre-trial release" Guarantee of the Council of Ministers of Serbia and Montenegro, 25 May 2005, p. 2.

¹² See Motion for Provisional Release, 10 June 2005, paras. 9-10, 24.

¹³ Order for Provisional Release of Nebojša Pavković (appended to Trial Chamber Decision), para. 4.

factors the Trial Chamber remains of the view that it has been established by the Accused on a preponderance of the evidence that he will appear for trial.

III. Whether the Accused Will Not Pose a Danger to Victims, Witnesses or Other Persons¹⁴

9. The Appeals Chamber proceeded on the basis that the finding of the Trial Chamber on this matter gave the appearance of having switched the burden to the Prosecution to show that the Accused would pose a danger if released.¹⁵ The Appeals Chamber went on to state that: “If the Trial Chamber found, as it must have done so here, that the Accused upon release will pose no danger to persons, then it must provide the reasons for reaching that finding.”¹⁶ The Appeals Chamber highlighted two matters mentioned in the Prosecution response – and not addressed specifically in the Trial Chamber’s initial Decision – which could be interpreted as indicating that the Accused would pose a danger. These are described by the Appeals Chamber as an allegation “that the Accused was involved in the attempted killing of Vuk Drašković and also had publicly threatened every person who would surrender him to the Tribunal.”¹⁷
10. The Trial Chamber read the Prosecution response to the motion as confined to the question whether the Accused would return for trial. Both of the matters above were presented to the Trial Chamber exclusively in the context of the failure of the Accused to attend court in Belgrade and his delay in surrendering to the Tribunal.¹⁸ They were not presented as material having a bearing on the question of the Accused posing a danger to others.
11. The Trial Chamber accepts that the onus is on the Accused to satisfy the tests of the Rule, and has all along in its consideration of this application proceeded on that basis.¹⁹ It now proceeds to apply that approach to this specific question. In his evidence the Minister of Justice said that he was not even aware of the alleged threat, which would on the face of it have applied to him, and, now that he was, was not at all affected by it.²⁰ The Trial Chamber considered that the threat was made in the context of the Accused’s unwillingness at the time to subject himself to the proceedings of the Tribunal. The

¹⁴ See Appeals Chamber Decision, paras. 10-11.

¹⁵ See *ibid.*, para. 11.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para. 10.

¹⁸ See Provisional Release Hearing, p. 19, 24-25.

¹⁹ *But see* Dissenting Opinion of Judge Patrick Robinson in *Prosecutor v. Krajišnik and Plavšić*, IT-00-39 & 40-PT, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, 8 October 2001.

Accused having since surrendered and appeared before the Tribunal, the Trial Chamber sees no basis for viewing that statement as indicative of an actual intent to take any action. It has not been articulated by the Prosecution as such. So far as the allegation of the attempted killing of Vuk Drašković is concerned, there is before the Trial Chamber absolutely no information whatsoever about the basis for that allegation or the detailed nature of the allegation. The Trial Chamber sees nothing in either point to substantiate a claim that the Accused will, if released at this stage, pose a danger to any victim, witness or other person. On the other hand, the order made by the Trial Chamber included a number of conditions designed to facilitate both the close supervision of the movements and activities of the Accused, and to prevent contact with any co-accused, victim or potential witness. In addition to those enumerated in paragraph seven above, the conditions included the restrictions that the Accused: “. . . (vi) not . . . have any contact with the co-accused in the case; (vii) not . . . have any contact whatsoever or in any way interfere with any victim or potential witness or otherwise interfere in any way with the proceedings or the administration of justice; [and] (viii) not . . . discuss his case with anyone, including the media, other than with his counsel. . . .”²¹ It is a term of the guarantees that any condition imposed by the Trial Chamber will be complied with by both governments.²² In light of the above considerations and the Trial Chamber’s confidence that the guarantees will be enforced if necessary, the Trial Chamber is satisfied on a preponderance of the evidence that the Accused will not pose a danger to any victim, witness or other person.

12. In deciding to consider this issue *ex proprio motu*, the Appeals Chamber may be stating that it is for the Trial Chamber to have regard to any point mentioned in the filings which could have formed the basis for a submission in relation to danger, and to make a finding thereon in arriving at its Decision, even where the Prosecution does not aver that the particular applicant for provisional release presents a danger to any victim, witness or other person. That highlights a practical problem posed by the format of Rule 65, which puts the onus on the Accused to demonstrate that he “will appear for trial and, if

²⁰ See Provisional Release Hearing, p. 20.

²¹ Order for Provisional Release of Nebojša Pavković (appended to Trial Chamber Decision), para. 4.

²² See Guarantee of the Council of Ministers of Serbia and Montenegro, 25 May 2005, p. 2 (“[T]he Council of Ministers of Serbia and Montenegro hereby . . . undertakes to adhere to all orders of the Trial Chamber if the Trial Chamber renders a decision to allow the accused Nebojša PAVKOVIĆ provisional pre-trial release”); p. 4 (“The Government of the Republic of Serbia hereby gives a guarantee . . . that, if the Trial Chamber of the International Criminal Tribunal issues a decision to grant Nebojša PAVKOVIĆ provisional pre-trial release . . . , it will comply with all orders of the Trial Chamber . . .”).

released, will not pose a danger to any victim, witness or other person.”²³ In the absence of any submission from the Prosecution setting out a basis indicative of the potential of such danger, it is difficult to see that a Trial Chamber could do other than conclude that the Accused will not pose such a danger. Since the Trial Chamber is not in a position to conduct an investigation but must rely upon the material presented by the parties in view of the general adversarial nature of provisional release hearings, it would be much more satisfactory if the onus were upon the Prosecution to show that the Accused would not appear for trial and would pose a danger. There seems no reason, consistent with the presumption of innocence, why that should not be the order of things.²⁴

IV. Giving the Host Country the Opportunity to be Heard²⁵

13. The Appeals Chamber also held that the Trial Chamber erred in law by not stating specifically in its Decision that it gave the Netherlands the opportunity to be heard as Rule 65(B) requires. This appears to be more a matter of form than substance. The Trial Chamber notes that this issue was taken *proprio motu* by the Appeals Chamber.
14. It is Tribunal Registry practice that, as a matter of course, and automatically whenever a motion for provisional release is submitted, the motion is intimated to the Government of the Host Country, the Netherlands. The Trial Chamber therefore applied the procedural principle *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. It accordingly assumed, in the absence of any challenge, that the basic procedural requirement had been observed.
15. The Trial Chamber has now specifically checked whether that practice was followed in this case and has been assured that it was.²⁶ The procedural requirements of Rule 65(B) were accordingly observed. For the purpose of complying with Rule 65(B), the Trial Chamber considers that reliance in the future should be placed on the procedural principle above.

²³ Rule 65(B).

²⁴ See Dissenting Opinion of Judge Robinson, *supra* note 19.

²⁵ See Appeals Chamber Decision, para. 12.

²⁶ The Registry advised the Trial Chamber that Pavković’s motion for provisional release was served on the Dutch Ministries of Foreign Affairs and Justice on 13 June 2005. Neither ministry commented on the motion. The Registry advised the Trial Chamber that, in cases where the Netherlands expresses no opinion on a motion for provisional release, “the Tribunal will proceed with its decision under the presumption that the Kingdom of the Netherlands holds the opinion stated in a letter addressed to the Registrar of the Tribunal, dated the 18th of July 1996.” That letter expresses the Netherlands’s position that “it is for the Tribunal to determine whether a request for provisional release should be honoured and, if so, under what conditions. The Netherlands Government therefore limits itself to the practical consequences relating to such a provisional release.”

V. Disposition

16. The Accused having satisfied the Trial Chamber on both prerequisites for provisional release, and no other reason why the motion should be refused having been identified, the Trial Chamber **GRANTS** the provisional release of Nebojša Pavković subject to the terms and conditions set out in the Order for Provisional Release appended to this Chamber's 30 September 2005 Decision on Nebojša Pavković's Provisional Release. The Accused's provisional release is stayed pending an appeal by the Prosecution pursuant to Rules 65 (D), (E), (F) and (G) of the Rules.²⁷

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



Judge Patrick Robinson
Presiding

Dated this eighteenth day of November 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁷ See Prosecution Response, para. 20.