



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: 14 March 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: 14 March 2008

PROSECUTOR

v.

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

PUBLIC WITH CONFIDENTIAL ANNEX

DECISION ON PAVKOVIĆ MOTION FOR TEMPORARY PROVISIONAL RELEASE

Office of the Prosecutor

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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

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 on Compassionate Grounds, with Annexes A, B, C and D,” filed confidentially on 16 January 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 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

2. 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 Additionally, the Chamber held:

There has been no change in circumstances to persuade the Chamber that the Accused is no longer a flight risk. The Accused’s return from a strictly controlled, temporary provisional release on humanitarian grounds does not alter the situation. For the Chamber to agree with the Accused’s point about the purported weakening of the Prosecution case, it would have to weigh the evidence adduced by the Prosecution against that of the Accused, and this is a task reserved for the Chamber’s final assessment of all the evidence at the conclusion of the trial, not at this stage. The fact that the Prosecution and Accused have finished adducing their evidence does not obviate the previous finding of the Chamber that the Accused, if provisionally released, will pose a danger to any victim, witness, or other person.⁷

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, 11.

⁷ Decision on Pavković Motion for Temporary Provisional Release, 7 December 2007, para. 9.

3. On 12 December 2007, the Chamber denied Pavković's motion for temporary provisional release on compassionate or humanitarian grounds, as follows:

Although the Chamber granted the Accused permission to travel to Belgrade in July 2007 for reasons substantially similar to those advanced in the present Motion, it cannot discern a compelling reason to do so again. The Chamber notes that the Accused was on provisional release during the pre-trial phase of the proceedings and was released during the summer recess last year (July 2006). Moreover, the circumstances that have arisen since the Accused's last temporary provisional release do not rise to the level so as to warrant release *at this stage of the proceedings*.⁸

The Appeals Chamber affirmed this decision. The Chamber finds it instructive to recall a portion of the Appeals Chamber's reasoning therein:

CONSIDERING that motions for provisional release are fact-intensive and cases are considered on an individual basis, that the weight attached to humanitarian reasons as justification for provisional release will have to be balanced against the specific temporal and factual circumstances of a particular case and that comparisons with previous provisional release decisions solely on this issue are not helpful;

CONSIDERING FURTHER that a Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person, and that it is in this context that any humanitarian grounds have to be assessed;

FINDING that the Appellant has not shown how the Trial Chamber abused its discretion when it held that it could not discern a compelling reason to provisionally release the Appellant on compassionate grounds again;

FINDING that the Trial Chamber reasonably considered that a provisional release on compassionate grounds was not warranted "at this stage of the proceedings", *i.e.* taking into account the progress of the trial, which includes a temporaneous assessment of flight risk;

RECALLING AGAIN that it is not for the appellate body to lightly overturn the decision by the trier of fact, which is best placed to permanently assess *de novo* whether provisional release is warranted or not⁹

4. It is against this procedural backdrop that the Chamber will now turn to the submissions of Pavković in support of this Motion.

Submissions

5. In the Motion, Pavković moves the Chamber for temporary provisional release on compassionate or humanitarian grounds during the March 2008 recess. In the Motion, Pavković

⁸ Decision on Pavković Motion for Temporary Provisional Release, 12 December 2007, para. 7 (public with confidential annex) (emphasis added).

⁹ *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 (footnotes omitted).

points to the following purported changes in circumstances that warrant his provisional release on humanitarian grounds: (a) the guarantees from the Republic of Serbia; (b) Ojdanić, Pavković, and Lazarević have presented their defence cases, and therefore the Prosecution case is not as strong as it had been immediately upon its completion at the summer recess; and (c) all the victims and witnesses for both the Prosecution and the Accused have already testified.¹⁰

6. [See confidential annex.]

7. The Trial Chamber is in receipt of guarantees from the Republic of Serbia confirming that it will respect all orders made by the Chamber in respect of the provisional release of Pavković.¹¹ The Netherlands, in its capacity as host country, represents that it has no objection to Pavković's provisional release.¹²

8. The Prosecution has indicated that it does not intend to respond to the Motion.

Applicable Law

9. 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.¹³

10. 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.¹⁴ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁵ 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.¹⁶ The Trial

¹⁰ Motion, at paras. 8–9.

¹¹ Pavković Motion for Temporary Provisional Release, 27 November 2007, Annex A.

¹² Letter from Deputy Director of Protocol for the Dutch Minister of Foreign Affairs, 6 December 2007.

¹³ *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.

¹⁴ *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.

¹⁵ *Ibid.*

¹⁶ *Prosecutor v. Boškoski 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.

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.¹⁷

11. Rule 65(B), which governs provisional release during trial, makes no mention of compassionate or humanitarian grounds. However, the jurisprudence of the Tribunal has 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.¹⁸

12. Importantly, where an accused applies for provisional release following the denial of a previous application, “it is incumbent on that accused to satisfy the Trial Chamber that there has been a change in circumstances that materially affects the approach taken in earlier provisional release decisions regarding the same accused.”¹⁹

Discussion

13. 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. The Chamber discusses below two recent decisions of the Appeals Chamber that have particular relevance to the present Motion.

14. The Appeals Chamber, in *Prosecutor v. Boškoski & Tarčulovski*, held that it is in the context of the criteria of Rule 65(B) that humanitarian grounds must be assessed. In that case, the Appeals Chamber upheld the Trial Chamber’s denial of provisional release on grounds, *inter alia*, that the accused’s second child had just been born and his wife required assistance in caring for

¹⁷ *Stanišić* Decision, para. 8.

¹⁸ 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.

¹⁹ *Popović* Decision, para. 12.

their children.²⁰ This ruling was made in light of the fact that, despite this humanitarian factor, the Chamber was not satisfied that the accused would appear for trial, if provisionally released, in light of other relevant factors.²¹ This Chamber therefore does not find this holding of the Appeals Chamber to mean that there is a *per se* ban on any provisional release in order to see a newly-born child. As the Appeals Chamber has repeatedly held, motions for provisional release are fact intensive matters, requiring a case-by-case analysis.

15. The Appeals Chamber recently overturned the *Prlić et al.* Chamber's grant of provisional release to five of the accused in that case. The Appeals Chamber stated (in relevant part) as follows:

19. The Appeals Chamber finds that the Trial Chamber committed a discernible error in failing to explicitly discuss the impact of its 98*bis* Ruling when granting provisional release. In deciding to grant the Accused provisional release the Trial Chamber essentially relied on the compliance by the Accused with the terms imposed by the Trial Chamber in prior decisions on provisional release. In this regard, the Impugned Decisions fail to assess the requirements of Rule 65(B) of the Rules in the present context of the proceedings, and particularly in light of the Trial Chamber's imminent 98*bis* Ruling.

20. The Appeals Chamber considers that the 98*bis* Ruling in this case constitutes a significant enough change in circumstance to warrant the renewed and explicit consideration by the Trial Chamber of the risk of flight posed by the accused pursuant to Rule 65(B) of the Rules. Significantly, the Trial Chamber held that ... "a reasonable Trial Chamber could conclude that there was a joint criminal enterprise during the periods covered by the indictment."

21. The Appeals Chamber further finds that the Trial Chamber committed a discernible error in considering that the justifications for release put forth by the Accused might be regarded as humanitarian grounds capable of justifying the granting of a short period of provisional release in the cases of Ćorić, Praljak and Petković. In the cases of Stojić and Prlić the Trial Chamber considered Prlić's request to visit his ailing father and brother and Stojić's request to visit his ailing spouse, brother and parents, to be requests based on humanitarian grounds without offering any indication of how much weight it ascribed thereto. Nonetheless, in all cases, the Appeals Chamber finds that the various justifications for release offered by the Accused are not sufficiently compelling, particularly in light of the 98*bis* Ruling, to warrant the exercise of the Trial Chamber's discretion in favour of granting the Accused provisional release. The Appeals Chamber accordingly finds that the circumstances of this case indicate that a Trial Chamber properly exercising its discretion should have denied provisional release.²²

16. The Appeals Chamber therefore held that the *Prlić* Chamber erred by not offering an indication of how much weight it ascribed to the justifications for temporary provisional release on

²⁰ *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 27 July 2007, paras 13–14.

²¹ *Ibid.*

²² *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 Ćorić, 11 March 2008 (footnotes omitted).

humanitarian grounds. The Appeals Chamber then went on to hold 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*. As in the *Bošković* decision, this Chamber does not interpret the *Prlić* 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. Pavković also argues in a supplement, dated 12 March 2008, that the Rule 98 *bis* ruling in *Milutinović* was rendered on 18 May 2007, and Pavković was provisionally released on humanitarian grounds on 18 June 2007. This provisional release—after the Rule 98 *bis* decision—was accomplished without incident, and therefore Pavković is not precluded by the *Prlić* decision from being granted provisional release due to flight risk. Pavković also points out that the Prosecution in *Prlić* strongly opposed the provisional release motions, whereas in the instant Motion, Pavković submits that the Prosecution has announced that it does not take a position. On this basis, Pavković argues that the *Prlić* decision has little or no application to his motion for provisional release, and reiterates his request to be temporarily provisionally released on humanitarian grounds over the March 2008 recess.²³

18. At the time of Pavković's last provisional release in June 2007, the Chamber had carefully weighed all the factors present at the time, including the Rule 98 *bis* decision, and found that a temporary and carefully controlled provisional release on humanitarian grounds was warranted. Following that, in December 2007, the Chamber denied a motion for provisional release, reasoning that Pavković had not satisfied the Chamber that there had been a change in circumstances that materially affected the approach taken in the decision denying Pavković provisional release in December 2006. Also in December 2007, the Chamber denied a request for temporary provisional release on humanitarian grounds, noting that Pavković had been on provisional release during the pre-trial phase of the proceedings and was released in July 2006, during which time he had had an opportunity to attend to his personal matters.

19. The Chamber has considered all the factors raised by Pavković, including (a) the guarantees from the Republic of Serbia; (b) the fact that he and the other Accused who were members of the Yugoslav Army have presented their defence cases, and therefore (as argued by Pavković) the Prosecution case is not as strong as it had been immediately upon its completion at the summer recess; and (c) the fact that all the victims and witnesses for both the Prosecution and Pavković's

²³ Pavković Supplement to Motion for Provisional Release, 12 March 2008.

defence case have already testified. First, the Chamber acknowledges the guarantees of Serbia, and has taken them into account in its determination of the Motion. Second, Pavković's return from a strictly controlled, temporary provisional release on humanitarian grounds is not determinative of the Motion, but has been taken into account. Third, for the Chamber to agree with Pavković's point about the purported weakening of the Prosecution case, it would have to weigh the evidence adduced by the Prosecution against that of Pavković, and this is a task reserved for the Chamber's final assessment of all the evidence at the conclusion of the trial, not at this stage. Moreover, the fact that the Prosecution and Pavković have finished adducing their evidence does not necessarily obviate the previous finding of the Chamber that Pavković, if provisionally released, will pose a danger to any victim, witness, or other person.

20. [See confidential annex.]

21. The Chamber has taken into account the fact that it dismissed Pavković's Rule 98 *bis* motion for a judgement of acquittal, and it finds that this does not outweigh the foregoing humanitarian concern.

22. The Chamber considers that it would be appropriate for Pavković to be provisionally released for a limited duration, under strictly controlled conditions—stricter than the previous occasions upon which he was released. In this regard, the release will be conditioned upon the Republic of Serbia providing *24-hour electronic surveillance* of Pavković, as the Prosecution itself has previously recommended.²⁴ Provided that these arrangements can be set in place and in these specific circumstances, the Chamber considers that the criteria of Rule 65(B) are satisfied and is prepared to exercise its discretion to grant provisional release on the basis of the particularly persuasive humanitarian grounds set forth in paragraph 20 above.

23. As a final matter, the Chamber stresses that the Prosecution has chosen not to respond to the Motion, although an opposition would not have necessarily altered the Chamber's decision.

24. 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 GRANTS the Motion and ORDERS as follows:

- (a) On **Tuesday, 25 March 2008**, Accused Nebojša Pavković ("Accused") shall be transported to the appropriate airport in the Netherlands by the Dutch authorities.

²⁴ See, e.g., Confidential Prosecution Response to Pavković's Motion for Compassionate Provisional Release, 11 June 2007, para. 7.

- (b) At the appropriate airport, the Accused shall be provisionally released into the custody of an official of the Government of the Republic of Serbia ("Serbia") to be designated prior to the Accused's release in accordance with operative paragraph (m) hereunder, who shall accompany the Accused for the remainder of his travel to and from the address detailed in the confidential annex to this Decision.
- (c) On his return, the Accused shall be accompanied by a designated official of Serbia, who shall deliver the Accused to the custody of the Dutch authorities at the appropriate airport, and the Dutch authorities shall then transport the Accused back to the United Nations Detention Unit in The Hague.
- (d) During the period of his provisional release, the Accused shall abide by the following conditions,
- i. the Accused shall remain at the address detailed in the confidential annex to this Decision;
 - ii. ***Serbia shall provide 24-hour electronic surveillance of the Accused throughout his presence in Serbia;*** and
 - iii. the Accused shall surrender his passport to the Ministry of Justice of Serbia for the duration of his provisional release.
- (e) Before leaving the United Nations Detention Unit in The Hague, the Accused shall provide details of his itinerary to the Ministry of Justice of The Netherlands and to the Registrar of the Tribunal.
- (f) The Accused shall not have any contact with any co-Accused in the case.
- (g) The Accused shall not have any contact whatsoever, or in any way interfere with, any victim or potential witness or otherwise interfere in any way with proceedings before the Tribunal or with the administration of justice.
- (h) The Accused shall not discuss his case with anyone, including the media, apart from his counsel.
- (i) The Accused shall continue to cooperate with the Tribunal and comply with any further Orders or Decisions of this Trial Chamber regarding his provisional release.
- (j) The Accused shall comply strictly with any requirements of the authorities of Serbia, which are necessary for them to comply with their obligations pursuant to this Order.

- (k) The Accused shall return to the Tribunal on **Wednesday, 2 April 2008**.
- (l) The Accused shall comply strictly with any further Order of the Trial Chamber varying the terms of or terminating his provisional release.
- (m) The Government of Serbia shall assume the following responsibilities:
 - (i) *Designation of an official of Serbia, into whose custody the Accused shall be provisionally released and who shall accompany the Accused from the appropriate airport in The Netherlands to the address detailed in the confidential annex to this Decision, and notification, as soon as practicable and prior to the release of the Accused, to the Trial Chamber and the Registrar of the Tribunal of the name of the designated official.*
 - (ii) *Provision of 24-hour electronic surveillance of the Accused throughout his stay in Serbia, and notification, as soon as practicable and prior to the release of the Accused, to the Trial Chamber and the Registrar of the Tribunal that arrangements have been put into place for the 24-hour electronic surveillance of the Accused.*
 - (iii) Provision of the personal security and safety of the Accused while on provisional release.
 - (iv) Responsibility, at the request of the Trial Chamber or the parties, for facilitating all means of cooperation and communication between the parties, and assurance of the confidentiality of any such communication(s).
 - (v) Responsibility for informing the Trial Chamber of any failure by the Accused to comply with the terms of this Order.
 - (vi) Responsibility for immediately arresting and detaining the Accused, should he breach any of the conditions of this Order.
 - (vii) Responsibility, once the Accused has returned to the United Nations Detention Unit in The Hague, *for the submission of a written report to the Trial Chamber* as to the compliance of the Accused with the terms of this Order.

25. The Trial Chamber hereby **INSTRUCTS** the Registrar of the Tribunal as follows:

- (a) The Registrar of the Tribunal shall consult with the Ministry of Justice in The Netherlands as to the practical arrangements for the provisional release of the

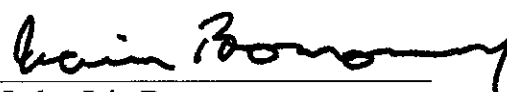
Accused, and to continue to detain the Accused at the United Nations Detention Unit in The Hague until such time as the Trial Chamber and the Registrar have been notified of the name of the designated official of the Government of the Republic of Serbia into whose custody the Accused is to be provisionally released.

(b) The Registrar of the Tribunal shall not release the Accused into the custody of the Government of the Republic of Serbia until Serbia has fully complied with paragraph 24(m)(i)–(ii) above.

26. The Trial Chamber hereby **REQUESTS** the authorities of all states through which the Accused will travel:

- (a) to hold the Accused in custody for any time that he will spend in transit at an airport in their territories; and
- (b) to arrest and detain the Accused pending his return to the United Nations Detention Unit in The Hague, should he attempt to escape.

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



Judge Iain Bonomy
Presiding

Dated this fourteenth day of March 2008
At The Hague
The Netherlands

[Seal of the Tribunal]