



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: 2 May 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: 2 May 2008

PROSECUTOR

v.

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

**PUBLIC WITH
CONFIDENTIAL AND *EX PARTE* ANNEX A
AND CONFIDENTIAL ANNEX B**

DECISION ON OJDANIĆ MOTION FOR TEMPORARY PROVISIONAL RELEASE

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Government of Republic of Serbia

Government of The Netherlands

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević 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

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 confidential “General Ojdanić Motion for Provisional Release Based on Compassionate Grounds,” filed 29 April 2008 (“Motion”), and hereby renders its decision thereon.¹

Brief procedural background

1. On 5 December 2006, the Chamber denied the six Accused’s joint application for provisional release over the winter recess.² The Appeals Chamber affirmed this decision.³

2. On 22 May 2007, the Chamber denied the application of Accused Dragoljub Ojdanić (“Accused”) 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.⁴ On 4 July 2007, the Chamber granted the Accused’s motion for temporary provisional release on the basis of his familial circumstances.⁵ On 11 July 2007, the Duty Judge of the Tribunal granted a motion by the Accused to vary the address in Belgrade to which he was to be provisionally released.⁶ On 7 December 2007, the Chamber denied a motion for temporary provisional release.⁷

3. It is against this procedural backdrop that the Chamber will now turn to the submissions of the parties.

Submissions

4. In the Motion, the Accused requests temporary provisional release on humanitarian grounds, based upon a recent medical diagnosis. He argues that these new circumstances are so

¹ The Chamber considers it appropriate to file this decision publicly, although the filings were accomplished on a confidential and partially *ex parte* basis. No confidential information is contained herein, and the Chamber appends hereto a confidential annex that is *ex parte* of the other co-Accused.

² Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006.

³ *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.

⁴ Decision on Ojdanić Motion for Provisional Release, 22 May 2007, para. 11.

⁵ Decision on Ojdanić Motion for Temporary Provisional Release, 4 July 2007, para. 8 (public with confidential annex).

⁶ Confidential Order Varying 4 July 2007 Decision on Ojdanić Motion for Temporary Provisional Release, 11 July 2007.

⁷ Decision on Ojdanić Motion for Temporary Provisional Release, 7 December 2007, para. 11 (public with confidential annex).

compelling that a temporary provisional release is in order.⁸ The Accused argues that he has fully complied with all previous provisional release orders and that the guarantees of the Government of the Republic of Serbia (“Serbia”) militate in favour of his release.⁹ The Accused also submits a personal guarantee that he, if provisionally released, will obey all orders of the Chamber and will return for the conclusion of the trial.¹⁰

5. The Trial Chamber is in receipt of guarantees from Serbia, from the earlier provisional release motion of the Accused, confirming that it will respect all orders made by the Chamber in respect of the provisional release of the Accused.¹¹ The Netherlands, in its capacity as host country, has represented in the past that it has no objection to the Accused’s provisional release.¹² The Chamber notes that Counsel for Accused has represented to the Chamber that it will obtain additional, updated guarantees from the Republic of Serbia on the morning of 5 May 2008. Moreover, the Chamber notes that the Republic of Serbia, in respect of the provisional release of Accused Vladimir Lazarević, has submitted renewed guarantees on 15 April 2008,¹³ and The Netherlands, on 14 April 2008, stated that it had no objections.¹⁴ Under these circumstances, the Chamber is of the view that both Serbia and The Netherlands have been given an opportunity to be heard on this matter. The parties are reminded, once again, to obtain renewed guarantees when applying for provisional release.

6. The Prosecution articulates its general opposition to the provisional release of any of the six Accused at this stage of the proceedings. Although the Prosecution recognises that there is precedent for limited and strictly-controlled provisional releases in cases of a compelling showing of unusual or special circumstances on compassionate grounds, which is a matter best left to the discretion of the Chamber, the Prosecution argues that the circumstances in the Motion are not adequate to justify a release of the Accused. As argued by the Prosecution, neither the Accused nor the Medical Officer of the United Nations Detention Unit (“UNDU”) state that the Accused’s medical situation, although serious, requires treatment outside the UNDU.¹⁵

⁸ Motion, para. 6, Annex A.

⁹ Motion, paras. 10–11, 13–14.

¹⁰ General Ojdanic’s Personal Guarantee Related to Motion for Provisional Release Based on Compassionate Grounds, 2 May 2008.

¹¹ Confidential Dragoljub Ojdanić Motion for Temporary Provisional Release During Holiday Recess or Temporary Provisional Release on Compassionate Grounds, 28 November 2007, Annex 1.

¹² Letter from Deputy Director of Protocol for the Dutch Minister of Foreign Affairs, dated 29 November 2007.

¹³ Confidential Addendum to Vladimir Lazarević Motion for Temporary Provisional Release on the Grounds of Compassion, 15 April 2008.

¹⁴ Letter from Dutch Ministry of Foreign Affairs, dated 14 April 2008.

¹⁵ Confidential Prosecution Response to General Ojdanić’s Motion for Provisional Release Based on Compassionate Grounds, 1 May 2008 (“Response”), paras. 4–7.

7. In the event that the Chamber grants the release, the Prosecution requests the Chamber to “consider requiring electronic monitoring *and/or* 24-hour security details” of the Accused.¹⁶ [Emphasis added.]

8. Finally the Prosecution requests, pursuant to Rule 65(E), a stay of any decision to grant to the Motion.¹⁷

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.¹⁸

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.¹⁹ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²⁰ 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.²¹ 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.²²

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

¹⁶ Response, para. 7.

¹⁷ Response, para. 8.

¹⁸ *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.

¹⁹ *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.

²⁰ *Ibid.*

²¹ *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.

²² *Stanišić Decision*, para. 8.

Rule 65 where compassionate or humanitarian concerns may permit a more limited provisional release.²³

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.”²⁴

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.

14. The Chamber finds it helpful to briefly discuss below the Appeals Chamber’s recent decision in the *Prlić et al.* case, in which it overturned the Trial 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 *98bis* 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 *98bis* Ruling.

20. The Appeals Chamber considers that the *98bis* 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.”

²³ 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.

²⁴ *Popović* Decision, para. 12.

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.²⁵

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 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. 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.

15. Even more recently, the Appeals Chamber, in *Prlić et al.*, has stated the following:

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 circumstances²⁶

The Chamber has carefully considered and applied this holding of the Appeals Chamber when assessing the following circumstances of the Accused, as advanced in the Motion.

16. [See confidential and *ex parte* annex A.]

²⁵ *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).

²⁶ *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 (footnote omitted); *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.

17. [See confidential and *ex parte* annex A.]

18. [See confidential and *ex parte* annex A.]

19. Based upon the compelling humanitarian considerations set forth in the Motion (as well as the guarantees of Serbia), the Chamber considers that it would be appropriate for the Accused to be provisionally released for a limited duration, under strictly controlled conditions, including 24-hour surveillance. Serbia has recently represented to the Chamber that its implementation of the Chamber's order of 24-hour surveillance includes the following:

- (a) That at all times two police officers are in the presence of the Accused.
- (b) That the Accused is not allowed to move anywhere without these two police officers.
- (c) That two police officers are placed, at all times, in front of the Accused's dwelling, in order to make sure that he does not leave the premises.
- (d) That the police officers will, at all times, ensure the apprehension of the Accused in the event of escape or failure to meet any of the conditions set out in the Decision.²⁷

The Chamber is satisfied that the above interpretation of the Chamber's order of 24-hour surveillance, as well as the other conditions set forth in the Order below, is sufficient to ensure that the Accused will return for trial and not endanger victims, witnesses, or other persons. For the foregoing reasons, 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 humanitarian grounds set forth in the Motion.

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

21. The Chamber will order below that the Accused receive a medical examination prior to his travel to Serbia, to ensure that he is fit to travel to Serbia *and then back again* to The Hague in order to attend the continuation of the trial.

²⁷ Republic of Serbia's Submission Related to Trial Chamber's Order of 18 March 2008, 20 March 2008.

22. The Accused's temporary provisional release has been granted for next week, during which the trial is on a recess; therefore, the Accused will not miss any of the hearings in his trial during his brief provisional release. Having carefully considered the effect that a stay may have upon the timing of the brief provisional release, the Chamber finds it appropriate to grant a stay of its Decision in this matter, in order to preserve the *status quo* and afford the Prosecution an opportunity to challenge it on appeal. Pursuant to Rule 65(F), where a Trial Chamber grants a stay of a decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision. In order not to render moot the Decision, the Chamber would expect the Prosecution to file any appeal forthwith, *i.e.*, tonight or tomorrow, in order to allow it to be handled by the Duty Judge over the weekend.

Disposition

23. For the foregoing reasons and pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby **GRANTS** the Motion, in part, and **ORDERS** as follows:

- (a) On **Tuesday, 6 May 2008**, Dragoljub Ojdanić ("Accused") shall be transported to the appropriate airport in the Netherlands by the Dutch authorities.
- (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(es) detailed in confidential annex B 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(es) detailed in confidential annex B to this Decision;
 - ii. Serbia shall provide 24-hour 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 United Nations Detention Unit in The Hague on **Monday, 12 May 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(es) detailed in confidential annex B to this Decision, and ***notification, as soon as practicable, to the Trial Chamber and the Registrar of the Tribunal of the name of the designated official.***
- (ii) Provision of 24-hour surveillance of the Accused throughout his stay in Serbia.
- (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 Applicant with the terms of this Order.

24. Pursuant to Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby **INSTRUCTS** the Registrar of the Tribunal:

- (a) to 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; and
- (b) to arrange a medical examination of the Accused in order to certify that he is in adequate health to travel to Serbia and then back again to The Hague.
 - i. This report shall be filed with the Registry prior to the Accused's temporary provisional release.

25. Pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, 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.

26. The Trial Chamber, pursuant to Rule 65(E) of the Rules of Procedure and Evidence of the Tribunal, hereby **GRANTS** the Prosecution's request for a stay.

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



Judge Tsvetana Kamenova

Dated this second day of May 2008
At The Hague
The Netherlands

[Seal of the Tribunal]