



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: 27 November 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: 27 November 2008

PROSECUTOR

v.

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

PUBLIC

**DECISION ON PAVKOVIĆ RENEWED MOTION FOR
TEMPORARY PROVISIONAL RELEASE**

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Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
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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 partly confidential “Pavković Renewed Motion for Temporary Provisional Release”, filed on 4 November 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

5. On 28 August 2008, Pavković filed a motion for provisional release grounded on his health condition and family circumstances.¹⁰ The Chamber denied that motion, finding that the Accused had not adequately explained why he could not receive medical treatment at the United Nations Detention Unit; nor had he averred that his family members could not visit him in the Hague.¹¹

Applicable Law

6. 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.¹² 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.¹³

7. 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 Chamber is required to assess these circumstances not only as they exist at the time when it reaches its

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 Pavković Motion for Temporary Provisional Release, 28 August 2008, paras. 5–10.

¹¹ Decision on Pavković Motion for Temporary Provisional Release, 26 September 2008, para. 15.

¹² *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.

¹³ *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.

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. 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.

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

8. 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

9. 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.¹⁹

10. 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

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 *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.

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 circumstances²⁰

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

Discussion

12. 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.

13. In the Motion, Pavković requests provisional release of a duration set by the Chamber in its discretion.²¹ Pavković 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.²² In support of the Motion, Pavković raises again the personal circumstances discussed in the Chamber's 26 September 2008 decision, including his current health condition and that of members of his family.²³ He concedes that his condition remains "the same as outlined in his last provisional release motion", and that the condition of one family member also was noted in that motion.²⁴ It is submitted that, the evidence in the case having closed, the Chamber's concern that Pavković will endanger victims, witnesses, or other persons is no longer operative.²⁵ In support of the Motion, Pavković has provided documentation relating to his health and that of his family member.²⁶ The Chamber has considered these documents in reaching its decision.

14. Pavković cites past guarantees from the Republic of Serbia ("Serbia") confirming that it will respect all orders made by the Chamber in respect of his provisional release and states that he will obtain updated guarantees, if necessary.²⁷ The Chamber assumes for the purposes of this

²⁰ *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) (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.

²¹ Motion, para. 8.

²² Motion, para. 5.

²³ Motion, paras. 2–4.

²⁴ Motion, paras. 2–4.

²⁵ Motion, para. 7.

²⁶ Motion, annexes A, B.

²⁷ Motion, para. 6.

Motion that Serbia would undertake the necessary guarantees. The Netherlands, in its capacity as host country, has stated that it has no objection to Pavković's provisional release.²⁸

15. 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 Pavković has not made an adequate showing that he will return if released. While the Prosecution recognises that Pavković has provided the Chamber with information that raises medical issues, it argues that this new information is not significant enough to justify a result different from the decision of 26 September 2008.²⁹ Should the Motion be granted, the Prosecution requests the Chamber to require 24-hour security and to order a stay of the decision.³⁰

16. The Chamber has also received a confidential and *ex parte* "Registry Submission Pursuant to Rule 33 (B) on the State of Health of the Accused, Mr. Nebojša Pavković", filed on 17 November 2008. The Chamber has carefully considered the contents of this submission in reaching its decision.

17. The Chamber is of the view that the Accused has failed to demonstrate how the circumstances that led to the denial of his application in September 2008 have changed so as to materially affect the approach taken by the Chamber at that time. The Accused has still not adequately explained why he cannot receive medical treatment at the United Nations Detention Unit. While it has been demonstrated that Pavković's family member cannot travel to the Hague to visit him, the Chamber does not find this circumstance sufficiently compelling. 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.

18. 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

²⁸ Letter from Dutch Ministry of Foreign Affairs, 13 November 2008.

²⁹ Prosecution Response to Pavković's Renewed Motion for Temporary Provisional Release, 10 November 2008 ("Response"), paras. 5–7.

³⁰ Response, paras. 9–10.

Motion for the reasons set forth in the preceding paragraph. The Chamber therefore declines to determine these issues.

Disposition

19. 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 Bony
Presiding

Dated this twenty-seventh day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]