



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**

PARTIALLY CONFIDENTIAL

DECISION ON MILUTINOVIĆ MOTION FOR TEMPORARY PROVISIONAL RELEASE

Office of the Prosecutor

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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 “Mr. Milan Milutinović’s Motion for Temporary Provisional Release on Compassionate Grounds”, filed confidentially on 6 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 Milan Milutinović (“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.³
3. On 4 July 2007, the Chamber denied the Accused’s motion for temporary provisional release on the basis that he had made no showing that he was receiving inadequate health care at the United Nations Detention Unit (“UNDU”) and that it was therefore unnecessary for him to travel to Belgrade in order to undergo medical examination and consultation.⁴
4. On 7 December 2007, the Chamber granted the Accused temporary provisional release in light of all the humanitarian circumstances at the time and under strictly controlled conditions provided by the Republic of Serbia (“Serbia”), *i.e.*, 24-hour surveillance of the Accused.⁵
5. On 5 September 2008, the Chamber granted the Accused temporary provisional release in light of all the humanitarian circumstances at the time and under strictly controlled conditions provided by the Republic of Serbia (“Serbia”), *i.e.*, 24-hour surveillance of the Accused.⁶ The Accused was released for approximately three weeks, from 10 September until 2 October.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 Milutinović Motion for Provisional Release, 22 May 2007, para. 15.

⁴ Decision on Milutinović Motion for Temporary Provisional Release, 4 July 2007, para. 5.

⁵ Decision on Milutinović Motion for Temporary Provisional Release, 7 December 2007, para. 9.

⁶ Decision on Milutinović Motion for Temporary Provisional Release, 5 September 2008, para. 18.

⁷ Decision on Milutinović Motion for Temporary Provisional Release, 5 September 2008, para. 24.

Submissions

6. In the Motion, the Accused requests temporary provisional release in order to attend to medical needs in Belgrade, Serbia, which are described in detail in the Motion and the annexes affixed thereto. The Accused proposes a provisional release lasting between at six weeks and three months.⁸ In addition, the Accused submits that the following factors militate in favour of granting the Motion: his personal undertaking that he will abide by all orders of the Chamber; the fact that he will not pose any danger to victims, witnesses, or other persons; his compliance with all past provisional release orders; his respectful behaviour towards the Chamber; the fact that the Netherlands has never objected to his release; the fact that Serbia has always provided guarantees in relation to his requests for provisional release; and the fact that, while on provisional release, he will be under 24-hour police surveillance.⁹ The Trial Chamber is in receipt of guarantees from Serbia confirming that it will respect all orders made by the Chamber in respect of the provisional release of the Accused.¹⁰ The Netherlands, in its capacity as host country, represents that it has no objection to the Accused's provisional release.¹¹

7. On 13 November 2008, the Prosecution responded to the Motion, expressing its opposition thereto upon several grounds. First, a general objection to the provisional release of any of the six Accused at this advanced stage of the proceedings is lodged. Second, the Prosecution points out that an extended period of release is being requested to attend to the same medical condition upon which the last two releases were at least partially based and that "the time needed for completion of the necessary procedures is ever-expanding". Third, 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, it is argued that the Accused has not made an adequate showing as to the length of time required to complete the proposed course of treatment.¹²

8. Should the Motion be granted, the Prosecution requests the Chamber to consider requiring 24-hour surveillance of the Accused and to stay its order so that the Prosecution may consider whether it will appeal.¹³

⁸ Motion, para. 4.

⁹ Motion, paras. 6–8.

¹⁰ Motion, Annex C.

¹¹ Letter from Dutch Ministry of Foreign Affairs, 11 November 2008.

¹² Confidential Prosecution Response to Milan Milutinović's Motion for Temporary Provisional Release on Compassionate Grounds, 13 November 2008 ("Response"), paras. 3–8.

¹³ Response, paras. 10–11.

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.¹⁴ 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.¹⁵

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.¹⁶ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁷ 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.¹⁸ 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.¹⁹

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.²⁰

¹⁴ *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.

¹⁵ *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.

¹⁶ *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.

¹⁷ *Ibid.*

¹⁸ *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.

¹⁹ *Stanišić* Decision, para. 8.

²⁰ 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.*

12. 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.²¹

13. 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 circumstances²²

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

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.

²¹ *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.

²² *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.

Discussion

15 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.

16 [See confidential annex.]

17 [See confidential annex.]

18. [See confidential annex.]

19. Based upon the considerations set forth in the confidential annex, the Chamber does not consider that it would be appropriate for the Accused to be provisionally released, based upon the present information before the Chamber.

20. 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 paragraphs. The Chamber therefore declines to determine these issues.

Disposition

21. 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-seventh day of November 2008
At The Hague
The Netherlands

[Seal of the Tribunal]