



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: 17 December 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: 17 December 2008

PROSECUTOR

v.

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

PUBLIC WITH CONFIDENTIAL ANNEX

DECISION ON OJDANIĆ 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 a partially confidential “General Ojdanic Motion for Provisional Release Based on Compassionate Grounds,” filed 3 December 2008 (“Motion”), and hereby renders its decision thereon.

Brief procedural background

1. On 5 December 2006, the 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 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.³ On 4 July 2007, the Chamber granted the Accused’s motion for temporary provisional release on the basis of his familial circumstances.⁴
3. On 7 December 2007, the Chamber denied a motion by the Accused for temporary provisional release.⁵
4. On 29 April 2008, the Ojdanić Defence requested temporary provisional release on humanitarian grounds, based upon a recent medical diagnosis.⁶ On 2 May 2008, the Chamber exercised its discretion and granted the application of Accused for a temporary provisional release, holding that the criteria set forth by Rule 65(B) of the Rules had been satisfied, and that it was

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

⁴ Decision on Ojdanić Motion for Temporary Provisional Release, 4 July 2007, para. 8 (public with confidential annex). 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. Confidential Order Varying 4 July 2007 Decision on Ojdanić Motion for Temporary Provisional Release, 11 July 2007.

⁵ Decision on Ojdanić Motion for Temporary Provisional Release, 7 December 2007, para. 11 (public with confidential annex).

⁶ General Ojdanić Motion for Temporary Provisional Release, 29 April 2008, para. 6, Annex A (public with confidential annex).

appropriate for the Accused to be provisionally released under strictly controlled conditions, including 24-hour surveillance.⁷

5. On 10 July 2008, the Chamber granted a temporary provisional release of the Accused on humanitarian and/or compassionate grounds involving the same medical condition.⁸

6. On 16 October 2008, the Chamber denied a motion for the provisional release of the Accused, which was based on medical grounds.⁹

Submissions

7. In the Motion, the Accused requests temporary provisional release for ten days based upon compassionate and humanitarian considerations.¹⁰ The Accused states that he has fully complied with all previous provisional release orders, that his past conduct illustrates he is not a flight risk or a danger to victims and witnesses, that he has participated in every trial hearing to date despite continuing health problems, and that the guarantees of the Government of the Republic of Serbia ("Serbia") militate in favour of his release. He 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.¹¹

8. 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.¹² The Netherlands, in its capacity as host country and limiting itself to the practical consequences relating to such a provisional release, has represented that it has no objection to the Accused's provisional release.¹³ 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.

9. On 5 December 2008, the Prosecution filed its Response, articulating 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

⁷ Decision on Ojdanić Motion for Temporary Provisional Release, 2 May 2008, para. 19 (public with confidential annex).

⁸ Decision on Ojdanić Motion for Temporary Provisional Release, 10 July 2008 (public with confidential and *ex parte* annex A and confidential annex B).

⁹ Decision on Ojdanić Motion for Temporary Provisional Release, 16 October 2008.

¹⁰ Motion, paras. 1, 8–12, 17, Annexes C–D.

¹¹ Motion, paras. 13–15, Annexes A–B.

¹² Motion, Annex B.

¹³ Letter from Deputy Director of Protocol for the Dutch Minister of Foreign Affairs, filed 9 December 2008.

grounds, it is argued that the circumstances of the Accused are not adequate to justify a release of the Accused at this late stage of the proceedings. In the event that the Chamber grants the release, the Prosecution requests the Chamber to consider requiring 24-hour security details of the Accused and to order a stay of any decision to grant to the Motion.¹⁴

10. On 15 December 2008, the Reporting Medical Officer of the United Nations Detention Unit submitted a medical report on the Accused, in response to a request of the Chamber.¹⁵

Applicable law

11. 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.¹⁶ 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.¹⁷

12. 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.¹⁸ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁹ 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.²⁰ The Chamber is required to assess these circumstances not only as they exist at the time when it reaches its

¹⁴ Prosecution Response to General Ojdanic Motion for Provisional Release on Compassionate Grounds, 5 December 2008, paras. 4–10.

¹⁵ Confidential and *ex parte* Registry Submission Pursuant to Rule 33(B) Regarding the Accused Dragoljub Ojdanić's Health, 15 December 2008; Order Pursuant to Rule 74 *bis*, 10 December 2008.

¹⁶ *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.

¹⁷ *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.

¹⁸ *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.

¹⁹ *Ibid.*

²⁰ *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.

decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.²¹

13. 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.²²

14. 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.²³

15. 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

²¹ *Stanišić* Decision, para. 8.

²² 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.

²³ *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 circumstances²⁴

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

Discussion

17. 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.²⁵

18. [See confidential annex.]

19. [See confidential annex.]

20. [See confidential annex.]

21. [See confidential annex.]

22. In the medical report submitted on 15 December 2008, the Reporting Medical Officer of the United Nations Detention Unit (“UNDU”) answers three questions put to the Registry by the Chamber, regarding matters raised by the Accused in the Motion. The terms of the report make it clear that the Accused is receiving adequate care at the UNDU. 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.

23. In light of the foregoing finding, it is not necessary for the Chamber to address the Accused’s submissions relating to the criteria that must be satisfied under Rule 65(B).

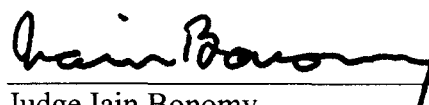
²⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on “Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković* Dated 31 March 2008”, 21 April 2008, para. 17 (footnote omitted) (emphasis added); *but see Prosecutor v. Prlić et al.*, 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.

²⁵ Motion, paras. 1–17, Annexes A–D.

Disposition

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 DENIES the Motion.

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



Judge Iain Bony
Presiding

Dated this seventeenth day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]