



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-A
Date: 22 May 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 22 May 2009

PROSECUTOR

v.

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

PUBLIC

**PUBLIC REDACTED VERSION OF THE “DECISION ON
VLADIMIR LAZAREVIĆ’S SECOND MOTION FOR
TEMPORARY PROVISIONAL RELEASE ON THE GROUNDS
OF COMPASSION” ISSUED ON 21 MAY 2009**

The Office of the Prosecutor:

Mr. Paul Rogers

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. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of “Vladimir Lazarevic [sic] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annexes” filed confidentially by Counsel for Vladimir Lazarević (“Lazarević”) on 6 May 2009 (“Second Motion”). The Office of the Prosecutor (“Prosecution”) filed its response on 13 May 2009.¹ Lazarević did not file a reply.

I. BACKGROUND

2. On 26 February 2009, Trial Chamber III (“Trial Chamber”) convicted Lazarević for deportation and forcible transfer as crimes against humanity pursuant to Articles 5(d), 5(i) and 7(1) of the Tribunal’s Statute and sentenced him to 15 years of imprisonment.² While no notices of appeal have yet been filed, the Appeals Chamber understands that all parties, except for Milan Milutinović, intend to appeal the Trial Judgement.³

3. Throughout his trial, Lazarević made a series of requests for provisional release, some of which were granted on humanitarian and/or compassionate grounds.⁴ On 2 April 2009, the Appeals Chamber dismissed Lazarević’s motion for provisional release⁵ “without prejudice to any potential request for provisional release in relation to [his] medical conditions”.⁶

II. APPLICABLE LAW

4. Pursuant to Rule 65(I) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), a convicted person may bring an application seeking provisional release for a fixed period. By virtue of Rule 107 of the Rules, the whole of Rule 65 applies *mutatis mutandis* to applications brought

¹ Prosecution’s Response to Vladimir Lazarević Motion for Temporary Provisional Release on the Grounds of Compassion, 13 May 2009 (confidential) (“Response”).

² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), Volume 3, para. 1211.

³ Joint Motion for an Extension of Time to File Notice of Appeal filed by the Prosecution and the Defence for Nikola Šainović, Dragoljub Ojdanić and Vladimir Lazarević on 9 March 2009; Motion for an Extension of Time to File Notice of Appeal with Annex filed by the Defence for Nebojša Pavković on 9 March 2009; Sreten Lukić’s Joinder in the Motion for Extension of Time to File Notice of Appeal, 9 March 2009. See also, Decision on Motions for Extension of Time to File Notices of Appeal, 23 March 2009, p. 4, ordering the parties wishing to appeal the Trial Judgement to file their notices of appeal no later than 27 May 2009.

⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lazarević Motion for Temporary Provisional Release, 18 June 2007 (public with confidential annex); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lazarević Motion for Temporary Provisional Release, 15 April 2008; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Lazarević Motion for Temporary Provisional Release, 9 February 2009 (public with confidential and *ex parte* annex) (“Decision of 9 February 2009”).

⁵ Vladimir Lazarevic [sic] Motion for Temporary Provisional Release on the Grounds of Compassion, 12 March 2009 (confidential) (“First Motion”).

before the Appeals Chamber under this provision.⁷ Rule 65(I) of the Rules thus provides that the Appeals Chamber may grant provisional release if it is satisfied that (i) the convicted person, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the convicted person, if released, will not pose a danger to any victim, witness or other person, and; (iii) special circumstances exist warranting such release. These requirements must be considered cumulatively.⁸ The Appeals Chamber recalls that “whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities.”⁹ Finally, the discretionary assessments of the requirements under Rule 65 are made on a case-by-case basis.¹⁰

III. DISCUSSION

A. Arguments of the parties

5. Lazarević seeks to be provisionally released from 25 May 2009 until 25 June 2009, “so that he may be able to receive medical treatment in a most adequate manner”.¹¹ [REDACTED]

6. Lazarević [REDACTED] states that the Military Hospital in Niš, Serbia (“Niš Hospital”) “possesses all necessary conditions regarding staff and technical requirements and qualities, for performance of very delicate and demanding surgery”.¹² In addition to the necessary surgeries and laboratory examinations that would be performed in the Niš Hospital, Lazarević submits that the requested release period would include adequate time for “the home care”.¹³

⁶ Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release on the Grounds of Compassion, 2 April 2009 (confidential) (“Decision of 2 April 2009”), para. 11.

⁷ *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on Motion of Rasim Delić for Provisional Release, 11 May 2009 (“*Delić Decision*”), para. 5; Decision of 2 April 2009, para. 4, referring to *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Provisional Release, 18 December 2008, (confidential) (“*Tarčulovski Decision*”), para. 3; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on the Renewed Defence Request Seeking Provisional Release on Compassionate Grounds, 15 April 2008, (public redacted version) (“*Strugar Decision* of 15 April 2008”), para. 5; and *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008, (public redacted version) (“*Strugar Decision* of 2 April 2008”), para. 3.

⁸ *Delić Decision*, para. 5; Decision of 2 April 2009, para. 4, referring to *Tarčulovski Decision*, para. 3; *Strugar Decision* of 15 April 2008, para. 5; and *Strugar Decision* of 2 April 2008, para. 3.

⁹ *Id.*

¹⁰ *Delić Decision*, para. 5; Decision of 2 April 2009, para. 4, referring to *Strugar Decision* of 2 April 2008, para. 11, referring to *Prosecutor v. Jadranko 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, para. 7.

¹¹ Second Motion, paras 1, 10.

¹² *Ibid.*, para. 4. See also, Annex C to the Second Motion.

¹³ *Ibid.*, para. 4.

7. Lazarević reiterates that the guarantees issued by Government of the Republic of Serbia during the trial proceedings remain valid¹⁴ and submitted, as a supplement to his Second Motion, the confirmation to that extent from the Government of the Republic of Serbia.¹⁵ He furthermore reiterates his personal undertaking made in connection with his previous requests that he would “pose no risk flight, [...] [no] danger to any victim, witness to other person, within the terms of Rule 65 (I)”.¹⁶ Finally, he undertakes, if granted the provisional release, to remain within the territory of Niš.¹⁷

8. The Prosecution opposes the Second Motion claiming that Lazarević failed to show why the required surgeries and examinations cannot occur in The Netherlands.¹⁸ The Prosecution further argues that the psychological factors put forth by Lazarević do not amount to special circumstances warranting provisional release.¹⁹ [REDACTED] It further argues that an unsubstantiated preference to be treated at a hospital near his home could be common to all convicted persons. Yet, the Prosecution emphasizes that provisional release of a convicted person can only be granted as a matter of exception which Lazarević failed to establish.²⁰ Finally, the Prosecution insists that, if the Appeals Chamber were to grant the Second Motion, it should impose the same conditions as the Trial Chamber ordered in its Decision of 9 February 2009, as being “the minimum necessary to ensure [Lazarević’s] return to the [United Nations Detention Unit in The Hague (“UNDU”)].²¹

B. Analysis

1. Special circumstances

9. The Appeals Chamber recalls that the specificity of provisional release at the post-trial stage is reflected by Rule 65(I)(iii) of the Rules, which provides for an additional criterion, *i.e.* that “special circumstances exist warranting such release”.²² For reasons described in paragraph 2 above, the Appeals Chamber will consider that, for the purposes of this decision, the appellate proceedings in this case are pending before it. In such situations, the Appeals Chamber has concluded that special circumstances related to humane and compassionate considerations exist where there is an acute justification, such as the applicant’s medical need or a memorial service for

¹⁴ *Ibid.*, para. 6.

¹⁵ Supplement to Vladimir Lazarevic [*sic*] Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annex, 14 May 2009 (confidential) (“Supplement”).

¹⁶ Second Motion, para. 7.

¹⁷ *Ibid.*, para. 9.

¹⁸ Response, paras 1, 3-5.

¹⁹ *Ibid.*, para. 6.

²⁰ *Ibid.*, para. 10.

²¹ *Ibid.*, para. 12.

²² Decision of 2 April 2009, para. 8; *Strugar* Decision of 15 April 2008, para. 10.

a close family member.²³ The Appeals Chamber has also granted provisional release for a visit to a close family member in “extremely poor health and whose death is believed to be imminent”.²⁴ The Appeals Chamber has also emphasized that “the fact that some accused have been granted provisional release for comparable reasons pending their trial cannot be automatically applied by analogy to persons who have already been convicted by a Trial Chamber and who are seeking provisional release pending the appellate proceedings.”²⁵ Finally, because “the notion of acute justification [is] inextricably linked to the scope of special circumstances which could justify provisional release on compassionate grounds at the appellate stage”, justifications such as wanting to spend time with family have explicitly not been recognized as special circumstances under Rule 65(I)(iii) of the Rules.²⁶

10. The Appeals Chamber notes that Lazarević presented medical evidence showing that, among other health-related issues, three matters require urgent medical attention: [REDACTED]. The Appeals Chamber is satisfied that these medical conditions qualify for “acute justification” within the meaning explained above.²⁷

11. Regarding the Prosecution’s objection, the Appeals Chamber notes that, indeed, the medical evidence does not show that the required medical treatment cannot be performed in The Netherlands. While this is not a requirement explicitly provided for in Rule 65(I) of the Rules, the Appeals Chamber agrees with the Prosecution that it is a relevant factor in establishing whether “special circumstances” exist. Nonetheless, the Appeals Chamber emphasizes that the assessment of such circumstances must be made on a case-by-case basis and reflect the totality of relevant considerations. Lazarević’s situation is different from those described in the decisions cited by the Prosecution.²⁸ The Appeals Chamber finds that Lazarević’s past medical history²⁹ together with the

²³ Decision of 2 April 2009, para. 8; *Strugar* Decision of 2 April 2008, para. 12 referring to, *inter alia*, *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on Radoslav Brdanin’s Motion for Provisional Release, 23 February 2007, para. 6; and *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 Services for His Father, 21 October 2004, para. 20.

²⁴ Decision of 2 April 2009, para. 8; *Strugar* Decision of 15 April 2008, para. 10.

²⁵ Decision of 2 April 2009, para. 8; *Strugar* Decision of 2 April 2008, para. 11.

²⁶ Decision of 2 April 2009, para. 8; *Tarčulovski* Decision, para. 8; *Strugar* Decision of 2 April 2008, para. 12.

²⁷ See *supra*, para. 9.

²⁸ First, the Prosecution refers to *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on “Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions”, 8 December 2005, pp. 3-4, in which the Appeals Chamber dismissed Pavle Strugar’s request to be provisionally released on the grounds that, although his need for knee surgery was undisputed, he did not show why the required treatment could not be adduced in The Netherlands. The Prosecution omits to mention, however, that Pavle Strugar’s renewed request was granted some days later in light of his “overall medical situation” and rehabilitation needs (*Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on “Defence Motion: Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro”, 16 December 2005, p. 3).

Second, the Prosecution refers to *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel Request for Provisional Release, 23 February 2006, para. 17, which only mentions the “preferred location” indicated by Slobodan Milošević but not any of the other arguments comparable to those advanced in the Second

undisputed “prolonged uncomfortable recovery” expected after the said surgeries as well as the psychological factors highlighted in the UNDU Medical report³⁰ constitute, in these particular circumstances, sufficient grounds to conclude that the required treatment and subsequent therapy have greater chances to succeed if performed in the Niš Hospital as requested by Lazarević. Consequently, the Appeals Chamber finds that special circumstances exist warranting provisional release of Lazarević.

12. The Appeals Chamber is further satisfied that the release period of one month specified in the Second Motion is reasonable and justified considering the nature of the required medical treatment and expected recovery. Additionally, the Appeals Chamber finds that Lazarević’s absence from the UNDU during the said period will not disrupt the appellate proceedings as they are currently only about to commence.³¹

2. Other Rule 65(I) requirements

13. The risk of flight associated with granting the request for provisional release is higher at the present stage, after Lazarević was convicted by the Trial Chamber to 15 years of imprisonment, than it was when the trial proceedings were ongoing. However, the Appeals Chamber finds, in light of the discussion below, that the requirement under Rule 65(I)(i) of the Rules is satisfied.³²

14. The Appeals Chamber takes note of the guarantees reiterated by Serbia.³³ It also notes that the most recent provisional release of Lazarević was authorized by the Trial Chamber only on strictly controlled conditions, including 24-hour surveillance.³⁴ The Appeals Chamber finds that the conditions of provisional release at this stage should be at least as strict as those imposed by the Trial Chamber in its Decision of 9 February 2009. The Appeals Chamber understands that, although the condition of 24-hour surveillance is not mentioned in the documents submitted with the

Motion. The Appeals Chamber further recalls that it did not have the chance to decide on the appeal against the said decision in the *Slobodan Milošević* case due to the termination of the proceedings against him following his death (see *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR65.1, Decision on Assigned Counsel Motion for Expedited Appeal Against the Trial Chamber’s “Decision on Assigned Counsel Request for Provisional Release”, 17 March 2006).

²⁹ [REDACTED] The Appeals Chamber considers that some of these claims are based on Lazarević’s perception of the situation rather than on objective medical evidence. However, the Appeals Chamber acknowledges that the overall negative psychological impact of these circumstances is reflected in the UNDU Medical Report (Annex B to the Second Motion).

³⁰ In particular, the UNDU Medical Report states that the treatment and further medical examination in Serbia should be considered for the following “social and psychological reasons”: [REDACTED] (Annex B to the Second Motion).

³¹ See *supra*, para. 2.

³² Cf. Decision of 9 February 2009, para. 30.

³³ Annex to the Supplement.

³⁴ Decision of 9 February 2009, paras 26-27, with reference to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, The Republic of Serbia’s Submission Related to Trial Chamber’s Order of 18 March 2008, 20 March 2008 (“Serbia 2008 Submissions”).

Supplement, it will also apply to this case³⁵ together with the other conditions set forth below. The Appeals Chamber also notes that Lazarević has complied with the conditions imposed on him by the Decision of 9 February 2009.³⁶

15. In light of the above and considering Lazarević's circumstances, the Appeals Chamber is satisfied that, if released, he will surrender into detention at the conclusion of the fixed period for which he is provisionally released. Likewise, the Appeals Chamber is satisfied that Lazarević will not pose a danger to any victim, witness, or other person.

16. Finally, the Appeals Chamber notes that The Netherlands, in its capacity as host country, has no objections to Lazarević's provisional release as requested by the Second Motion.³⁷

IV. DISPOSITION

17. For the foregoing reasons, the Appeals Chamber hereby **GRANTS** the Second Motion and **ORDERS** as follows:

1. Lazarević shall be transported to Schiphol airport in The Netherlands by the Dutch authorities on 25 May 2009, or as soon thereafter as is practicable;
2. At Schiphol airport, Lazarević shall be provisionally delivered into the custody of a representative of the Government of the Republic of Serbia, pursuant to paragraph (a) of the State Guarantees,³⁸ who shall accompany Lazarević for the remainder of his travel to and from the address detailed in paragraph 9 of the Second Motion;
3. The period of the provisional release shall commence when Lazarević is delivered into the custody of the authorised representative of the Government of the Republic of Serbia and shall terminate upon his return to the Dutch authorities, which shall be no later than 25 June 2009;
4. On his return flight, Lazarević shall be accompanied by the authorised representatives of the Government of the Republic of Serbia who shall deliver Lazarević into the custody of the Dutch authorities at Schiphol airport; the Dutch authorities shall then transport Lazarević back to the UNDU in The Hague; and

³⁵ See Serbia 2008 Submissions, para. 7, stating that such guarantees "are the same in every other provisional release case when the guarantees have been issued by the Republic of Serbia"; Second Motion, para. 6.

³⁶ Letter from the State Secretary (Ministry of Justice of the Republic of Serbia), 27 March 2009 (confidential); Report by the Ministry of the Interior on Procedure in Accordance with the Decision of a Trial Chamber of the ICTY on the Provisional Release Pending Trial of Indictée Vladimir LAZAREVIĆ in the Period of 11 February 2009 – 23 February 2009, 11 March 2009 (confidential).

³⁷ Letter from the Deputy Director of Protocol for the Minister of Foreign Affairs, 12 May 2009 (confidential).

³⁸ Annex to the Supplement.

5. During the period of his provisional release, Lazarević shall abide by the following conditions, and the government authorities of the Republic of Serbia shall ensure compliance with such conditions:

- a. before leaving the UNDU, Lazarević shall provide details of his itinerary to the Ministry of Justice of the Netherlands and to the Registrar of the Tribunal;
- b. Lazarević shall be staying at the address indicated in paragraph 9 of the Second Motion, save for the period of his hospitalisation in the Niš Hospital;
- c. the Republic of Serbia shall provide 24-hour surveillance of Lazarević throughout his presence in Serbia;
- d. Lazarević shall surrender his passport to the Ministry of Justice of Serbia for the entire duration of his provisional release;
- e. Lazarević shall not have any contacts whatsoever or in any way interfere with victims or (potential) witnesses or otherwise interfere in any way with the proceedings or the administration of justice;
- f. Lazarević shall not discuss his case with anyone, including the media, other than his counsel;
- g. Lazarević shall comply strictly with any requirements of the authorities of the Republic of Serbia necessary to enable them to comply with their obligations under the present decision;
- h. Lazarević shall comply with any order of the Appeals Chamber varying the terms of or terminating his provisional release; and
- i. Lazarević shall return to the UNDU no later than 25 June 2009.

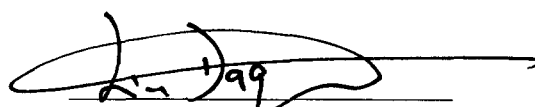
18. The Appeals Chamber further **REQUIRES** the Government of the Republic of Serbia to assume responsibility for:

1. Designation of an official of the republic of Serbia into whose custody Lazarević shall be provisionally release and who shall accompany Lazarević from Schiphol airport in The Netherlands to the address detailed in paragraph 9 of the Second Motion, and notification, as soon as practicable, to the Appeals Chamber and the Registrar of the Tribunal of the name of the designated official;
2. Ensuring Lazarević's personal security and safety while on provisional release;
3. Providing 24-hour surveillance of Lazarević throughout his stay in Serbia;
4. All expenses in connection with the transport from Schiphol airport to Niš and back;

5. Facilitating, at the request of the Appeals Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;
 6. Reporting immediately to the Registrar of the Tribunal as to the substance of any threats to Lazarević's security, including full reports of investigations related to such threats;
 7. Detaining Lazarević immediately should he attempt to escape from the territory of the Republic of Serbia, or should he in any other way breach the terms and conditions of his provisional release as set out in the present decision and reporting immediately any such breach to the Registry of the Tribunal and the Appeals Chamber;
 8. Respecting the primacy of the Tribunal in relation to any existing or future proceedings in the Republic of Serbia concerning Lazarević; and
 9. Submitting a written report to the Appeals Chamber, upon Lazarević's return to the UNDU, as to Lazarević's compliance with the terms of the present decision.
19. Finally, the Appeals Chamber **INSTRUCTS** the Registrar of the Tribunal to:
1. Consult with the Dutch authorities and the authorities of the Republic of Serbia, as to the practical arrangements for Lazarević's provisional release;
 2. Request the authorities of the State(s) through whose territory Lazarević may travel to:
 - a. hold him in custody for any time he will spend in transit at the airport of the State(s) in question; and
 - b. arrest and detain Lazarević pending his return to the UNDU should he attempt to escape during travel; and
 - c. continue to detain Lazarević at the UNDU in The Hague until such time as the Appeals Chamber and the Registrar of the Tribunal have been notified of the name of the designated official of the Government of the Republic of Serbia into whose custody Lazarević is to be provisionally released.

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

Done this 22nd day of May 2009,
At The Hague, The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]