



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: 22 May 2007  
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:** 22 May 2007

**PROSECUTOR**

v.

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

**PUBLIC**

**DECISION ON OJDANIĆ MOTION FOR PROVISIONAL RELEASE**

**Office of the Prosecutor**

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**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 “General Ojdanić’s Motion for Provisional Release Upon Close of the Prosecution’s Case”, filed on 15 March 2007 (“Motion”), and hereby renders its decision thereon.

## **BACKGROUND**

1. On 30 October 2006, Ojdanić (“Applicant”) and his co-accused filed a “Joint Motion for Provisional Release During the Winter Recess.” In its decision of 5 December 2006, the Trial Chamber denied that motion, reasoning that the circumstances of the case had changed materially since the Applicant and his co-accused had last been granted provisional release.<sup>1</sup> The Trial Chamber found that at that advanced stage in the Prosecution’s case, the risk of the Applicant not returning for the remainder of the trial was significantly greater than had been the case when he had previously been granted provisional release.<sup>2</sup> The Applicant and his co-accused appealed that decision, and in its Decision of 14 December 2006, the Appeals Chamber dismissed the appeal and affirmed the decision of the Trial Chamber.<sup>3</sup>

## **SUBMISSIONS**

2. In the Motion, the Applicant requests that he be granted provisional release in the period following the close of the Prosecution’s case,<sup>4</sup> implicitly until the commencement of the defence cases.<sup>5</sup> He submits that the circumstances have changed substantially since the Provisional Release Decision was issued, and that most of the factors of concern to the Trial Chamber at that time are no longer applicable<sup>6</sup> such that he is not longer a flight risk.<sup>7</sup> The Applicant submits that the balance of equities has shifted in favour of his being granted provisional release,<sup>8</sup> and that the following factors support provisional release:

- The absence of evidence from the Prosecution’s case-in-chief to show that the Applicant knew about or participated in the plan to expel Albanians from

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<sup>1</sup> Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006 (“Provisional Release Decision”), para. 2. The Applicant was granted provisional release in the Decision on Joint Motion for Provisional Release During Summer Recess, 1 June 2006.

<sup>2</sup> Provisional Release Decision, para. 10.

<sup>3</sup> Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 (“Provisional Release Appeal Decision”).

<sup>4</sup> Motion, paras 1, 23.

<sup>5</sup> Motion, para. 2.

<sup>6</sup> Motion, para. 3.

<sup>7</sup> Motion, paras 4–10.

<sup>8</sup> Motion, para. 23.

Kosovo, leading to a decreased risk of flight,<sup>9</sup> and the decreased risk of the Applicant interfering with the Prosecution's witnesses after the closure of the Prosecution's case-in-chief;<sup>10</sup>

- The Applicant's desire to return to trial to "clear his name" and establish his innocence;<sup>11</sup>
- The Applicant's prior conduct while on provisional release,<sup>12</sup> his personal guarantee,<sup>13</sup> and his respect for conditions imposed on him when previously on provisional release;<sup>14</sup> and
- The relocation of the Applicant's defence team to Belgrade for the duration of the period between the Prosecution and Defence cases in order to prepare his defence, and his desire to assist in that preparation and the preparation of his own testimony.<sup>15</sup>

3. The Prosecution filed its response to the Motion on 29 March 2007, opposing the Motion.<sup>16</sup> The Prosecution submits that there is an increased risk of the Applicant not returning for trial should he be granted provisional release, since the quantum of evidence of the crimes for which the Applicant is charged has increased since the Provisional Release Decision.<sup>17</sup> The Prosecution's Response does not address whether the Applicant will not pose a danger to any victim, witness, or other person if granted provisional release.

### **APPLICABILITY OF RULE 65**

4. The Trial Chamber notes that it is now settled law that Rule 65, which governs provisional release, applies during the course of the trial, as well as during pre-trial and pre-appeal proceedings.<sup>18</sup> Rule 65(B) provides as follows:

Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

Where one of the conditions required by Rule 65(B) has not been met, a Trial Chamber must deny provisional release and need not consider the other conditions.<sup>19</sup>

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<sup>9</sup> Motion, paras 5, 6, 8.

<sup>10</sup> Motion, paras 11–13.

<sup>11</sup> Motion, paras 6, 18, 24.

<sup>12</sup> Motion, paras 10, 15.

<sup>13</sup> Motion, para. 19; "Personal Guarantee of Dragoljub Ojdanić", dated 14 March 2007 (annexed to the Motion, pp. 7–9). The Trial Chamber notes the Applicant's express waiver in this document of his right to be present during his trial should he, for any unforeseen reasons, be unable to return to the Tribunal.

<sup>14</sup> Motion, para. 15.

<sup>15</sup> Motion, paras 2, 20–21.

<sup>16</sup> Prosecution Response to General Ojdanić's Motion for Provisional Release Upon Close of the Prosecution's Case, 29 March 2007 ("Response").

<sup>17</sup> Response, paras 4–6.

<sup>18</sup> Provisional Release Appeal Decision, paras 8–10.

## DISCUSSION

5. In deciding a request for provisional release, a Trial Chamber must determine whether the applicant has satisfied the burden of showing that, if released provisionally, he or she will (a) return for the continuation of the trial and (b) not pose a danger to any victim, witness, or other person.<sup>20</sup> 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.”<sup>21</sup>

6. In making its determination, the Trial Chamber must provide a reasoned opinion indicating its view on the relevant factors<sup>22</sup> which a reasonable Trial Chamber would be expected to consider before making a decision.<sup>23</sup> This does not mean that the Trial Chamber is obliged to deal with “all possible factors”, but it must at a minimum provide reasons to support its findings.<sup>24</sup> Neither is the satisfaction of these two conditions an automatic trigger for provisional release; they are instead minimum requirements, and the Trial Chamber retains discretion to grant or deny provisional release in light of all the circumstances of the case.<sup>25</sup>

7. In the course of the following discussion in which the relevant requirements of Rule 65(B) are considered, the Chamber will address each of the relevant factors raised by the Applicant in his Motion.

8. The Tribunal is in receipt of a letter from the Ministry of Foreign Affairs of The Netherlands, in which The Netherlands – in its capacity as host country – represents that it has no objection to the Applicant’s provisional release, should it be granted.<sup>26</sup> The Tribunal is furthermore in receipt of the confidential Conclusion of the Government of the Republic of Serbia dated 22

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<sup>19</sup> *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 (“*Lukić and Lukić* Decision”), 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.

<sup>20</sup> Rule 65(B); *Popović* Decision, para. 12.

<sup>21</sup> *Popović* Decision, para. 12.

<sup>22</sup> *Prosecutor v. Halilović*, Case No. IT-01-48-T, Confidential Decision on Renewed Motion for Provisional Release, 22 July 2005; Provisional Release Decision, para. 6.

<sup>23</sup> *Popović* Decision, para. 7.

<sup>24</sup> *Prosecutor v. Haradinaj et al.*, 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.

<sup>25</sup> *Popović* Decision, para. 5.

<sup>26</sup> Letter from Mr. J.H.P.A.M. de Roy, Deputy Director of Protocol for the Minister of Foreign Affairs, to Chief CMSS, dated 20 March 2007.

March 2007, confirming that it will respect all orders made by this Trial Chamber in respect of the provisional release of the Applicant, should it be granted. The host country and the receiving State having been heard, it remains for the Trial Chamber to consider whether it is satisfied that the Applicant, if released, will appear for trial. If it is so satisfied, the Trial Chamber will then consider whether it is satisfied that the Applicant, if released, will not pose a danger to any victim, witness, or other person.

9. The Trial Chamber notes the standing guarantee furnished by the Government of the Republic of Serbia. The Trial Chamber assumes for present purposes that Serbia would do its best to honour this guarantee. However, the Trial Chamber is not satisfied that there has been a change in circumstances that materially affects the approach taken in the decision denying provisional release of 5 December 2006, in which this factor was considered.<sup>27</sup> In any event, a Trial Chamber is not obliged to rely on guarantees provided by a government with the power to arrest the Applicant; it is instead required to evaluate government guarantees in light of the circumstances surrounding each individual applicant.<sup>28</sup>

10. The Trial Chamber notes the Applicant's personal guarantee, and his claim to good prior conduct and full compliance with conditions when previously on provisional release. The Trial Chamber considers that the Applicant's prior conduct and compliance alone do not justify classifying him as a non-flight risk at this time.

11. The Applicant submits that there is a decreased risk of flight in his case.<sup>29</sup> However, the Applicant has not demonstrated to the Trial Chamber how the circumstances which led to the denial of his application for provisional release in December 2006 have changed so as to materially affect the approach taken in the provisional release decision in December 2006, when he was denied provisional release.<sup>30</sup> At that time, the Trial Chamber determined that the Applicant's awareness of the case against him had been deepened, with the consequential finding that the risk that he would not return for the remainder of his trial was significantly greater than it had been previously.<sup>31</sup> The

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<sup>27</sup> Provisional Release Decision, para. 10.

<sup>28</sup> *Popović* Decision, para. 16. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović's Application for Provisional Release, 28 October 2005, para. 10.

<sup>29</sup> Motion, para. 6.

<sup>30</sup> *Popović* Decision, para. 12.

<sup>31</sup> Provisional Release Decision, para. 10.

further evidence that has been led since December 2006 serves only to strengthen the position taken by the Trial Chamber at that time, which was affirmed on appeal.<sup>32</sup>


12. The remaining factors to which the Applicant refers in his Motion do not impact on the Trial Chamber's assessment of whether, if released, he will appear for trial. The Applicant's stated desire to return to trial to "clear his name" and establish his innocence<sup>33</sup> is not pertinent to that determination. Likewise, the Applicant's stated desire to be proximate to his Defence team in Belgrade as they prepare his defence is a logistical issue and not a factor that assists in the assessment of the likelihood that he will return for trial.

13. The remaining factors of the Applicant's conduct when previously on provisional release concern the assessment of whether the Applicant, if released, will not pose a danger to any victim, witness, or other person. Since the foregoing analysis provides an independent basis for the denial of the Applicant's motion for provisional release pursuant to Rule 65(B), the Trial Chamber declines to consider whether the Applicant, if released, will not pose a danger to any victim, witness or other person.<sup>34</sup>

### DISPOSITION

14. For the foregoing reasons, and pursuant to Articles 20 and 21 of the Statute and Rules 54 and 65 of the Rules, the Trial Chamber hereby **DENIES** the Motion without prejudice to any future motion for provisional release of a more limited duration on compassionate grounds.

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

  
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Judge Ali Nawaz Chowhan

Dated this twenty-second day of May 2007  
At The Hague  
The Netherlands

[Seal of the Tribunal]

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<sup>32</sup> Provisional Release Appeal Decision.

<sup>33</sup> Motion, paras. 6, 18, 24.

<sup>34</sup> *Lukić and Lukić* Decision, paras 6, 23.