



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 MILUTINOVIĆ MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

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 “Milan Milutinović’s Motion for Provisional Release During the Upcoming Court Recess”, filed on 15 March 2007 (“Motion”), and hereby renders its decision thereon.

BACKGROUND

1. On 30 October 2006, Milutinović (“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.¹ The Trial Chamber found that, at that advanced stage in the Prosecution’s case, the risk of the Applicant not returning from provisional release for the remainder of the trial was significantly greater than had been the case when he had previously been granted provisional release in the pre-trial phase of the proceedings.² 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.³

SUBMISSIONS

2. In the Motion, the Applicant requests that he be granted provisional release “for the duration of the recess” on the same terms and conditions on which he has previously been granted provisional release.⁴ In particular, the Applicant raises the following as factors supporting provisional release:

- The presumption of innocence and the right to a fair and expeditious trial;⁵
- The Applicant’s prior conduct,⁶ his personal undertakings,⁷ and his full compliance with conditions when previously on provisional release;⁸

¹ Decision on Joint Defence Motion for Provisional Release During Winter Recess, 5 December 2006 (“Provisional Release Decision”), para. 2. The Applicant had previously been granted provisional release in the Decision on Joint Motion for Provisional Release During Summer Recess, 1 June 2006, and in the Decision on Second Application for Provisional Release, 14 April 2005.

² Provisional Release Decision, para. 10.

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

⁴ Motion, para. 2, p. 7. The Trial Chamber notes that, notwithstanding the Applicant’s use of the term, the upcoming period is not a court recess, but rather an interval between the close of the Prosecution’s case and the opening of the Defence case.

⁵ Motion, paras 5, 10, 11(d)–(f).

⁶ Motion, para. 9.

⁷ Motion, para. 9.

- Standing guarantees from the Government of the Republic of Serbia;⁹
- The Applicant's surrender to the Tribunal on 20 January 2003;¹⁰
- The Applicant's personal circumstances as a retiree, as the former President of the Republic of Serbia subject to constant surveillance,¹¹ and as a 65 year-old suffering from ill-health and exhaustion;¹²
- The relocation of the Applicant's defence team to Belgrade for the duration of the recess in order to prepare his defence, and his preference that he be proximate in order to assist with that preparation;¹³
- The unlikelihood of the Applicant interfering with the Prosecution's witnesses or interests after the closure of the Prosecution's case-in-chief;¹⁴ and
- The Applicant's cooperation with the Office of the Prosecutor, and his behaviour during trial to date.¹⁵

3. The Prosecution filed its response to the Motion on 29 March 2007, opposing the Motion.¹⁶ 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 even further since the Provisional Release Decision.¹⁷ The Prosecution's Response does not address whether the Applicant will 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.¹⁸ 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.

⁸ Motion, para. 7.

⁹ Motion, para. 8.

¹⁰ Motion, para. 11(a).

¹¹ Motion, para. 11(a).

¹² Motion, para. 11(b).

¹³ Motion, para. 11(c).

¹⁴ Motion, para. 11(a).

¹⁵ Motion, para. 11(g).

¹⁶ Prosecution Response to Milan Milutiovic's Motion for Provisional Release During the Upcoming Court Recess, 29 March 2007 ("Response").

¹⁷ Response, paras 4–6.

¹⁸ Provisional Release Appeal Decision, paras 8–10.

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.¹⁹

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.²⁰

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.”²¹

6. In making its determination, the Trial Chamber must provide a reasoned opinion indicating its view on the relevant factors²² which a reasonable Trial Chamber would be expected to consider before making a decision.²³ 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.²⁴ 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.²⁵

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

¹⁹ *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.

²⁰ Rule 65(B); *Popović Decision*, para. 12.

²¹ *Popović Decision*, para. 12.

²² *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.

²³ *Popović Decision*, para. 7.

²⁴ *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.

²⁵ *Popović Decision*, para. 5.

objection to the Applicant's provisional release, should it be granted.²⁶ The Tribunal is furthermore in receipt of the confidential Conclusion of the Government of the Republic of Serbia dated 22 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.²⁷ 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 Chamber notes the standing guarantee furnished by the Government of the Republic of Serbia, along with the Applicant's offer, in his Motion, to request documentation from the relevant governmental authorities confirming the validity of this guarantee.²⁸ 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.²⁹ 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.³⁰ The Trial Chamber now turns to the circumstances of the Applicant's surrender to the Tribunal.

10. The Applicant formerly held several high-level posts in Serbia and the Federal Republic of Yugoslavia, and continued to act in his capacity as President of Serbia while the indictment against him was public.³¹ The initial indictment against the Applicant was issued on 24 May 1999, and was made public on 27 May 1999,³² but his surrender to the Tribunal on 20 January 2003 came nearly three years later and "shortly after his term as President of Serbia expired".³³ The Appeals Chamber has confirmed that an accused's failure to surrender almost three years after being

²⁶ 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.

²⁷ The Trial Chamber notes the Applicant's offer, in his Motion, to request documentation from the relevant governmental authorities confirming the validity of this guarantee. Motion, para. 8.

²⁸ Motion, para. 8.

²⁹ Provisional Release Decision, para. 10.

³⁰ *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.

³¹ An accused's former position and the amount of influence he or she may exert over State authorities has been recognised as impacting on an assessment of government and personal guarantees. See *Lukić and Lukić* Decision, para. 16.

³² Subsequent amended indictments have been issued.

³³ Motion, para. 11(a).

publicly indicted is an element countering the characterisation of that accused's surrender as voluntary.³⁴

11. On 3 June 2003, the Trial Chamber refused an application by the Applicant for provisional release on the basis *inter alia* that his surrender to the Tribunal could not properly be described as voluntary.³⁵ On 14 April 2005, the Trial Chamber granted the Applicant provisional release, as it was at that time satisfied that the Applicant would appear for trial, notwithstanding its recognition that the Applicant's surrender could not be classified as voluntary.³⁶ In a subsequent decision on 1 June 2006, the Trial Chamber declined to analyse this factor and merely referred to its decision of 14 April 2005 when once again granting a motion from the Applicant for provisional release.³⁷ Throughout its considerations of the Applicant's various motions for provisional release, the conditions of his surrender have not been relied upon as a factor favouring the determination that he will return for trial.

12. The circumstances of the Applicant's surrender to the Tribunal cannot now be considered as a favourable factor when determining whether he has shown that he will return for the continuation of the trial if released provisionally. It is the voluntariness of an accused's surrender that is relevant to the determination of whether that accused will appear for trial if provisionally released.³⁸ The Applicant's surrender has not been classified as voluntary, the Applicant does not submit that it was, and the Trial Chamber does not consider it to be so. At the current stage of the case, the Trial Chamber is not satisfied that the circumstances of his surrender support the determination that the Applicant, if released, will appear for trial.

13. The Trial Chamber notes the Applicant's personal undertakings, and his claim to good prior conduct and full compliance with conditions when previously on provisional release. Combined with his stated cooperation with the Office of the Prosecutor, and his behaviour during trial to date, the Trial Chamber considers that the Applicant's prior conduct and alleged cooperation alone do not justify classifying him as a non-flight risk at this time.

³⁴ Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, 1 November 2005, para. 9.

³⁵ Decision on Provisional Release, 3 June 2003, p. 6.

³⁶ Decision on Second Application for Provisional Release, 14 April 2005.

³⁷ Decision on Joint Motion for Temporary Provisional Release During Summer Recess, 1 June 2006. The Trial Chamber notes that this decision only granted the motion in part, as the Applicant was required to return to the UNDU earlier than he had requested in his motion.

³⁸ *Lukić and Lukić* Decision, para. 16.

14. The Applicant submits that his age, combined with his general condition of ill-health and exhaustion, favour the granting of provisional release in order to allow him to rest and prepare for the recommencement of trial.³⁹ While the Trial Chamber remains concerned about the well-being of all detainees, it is not persuaded that provisional release should be granted on this basis in this case. As discussed above, Rule 65(B) requires the Trial Chamber to determine whether the Applicant has satisfied the burden of showing that if released provisionally he or she will return for the continuation of the trial. The Applicant's age and general health condition may be factors for consideration,⁴⁰ but they can only be considered factors to the extent that the Applicant substantiates the alleged impact of his state of health on the determination the Trial Chamber is required to make.⁴¹ The Applicant has provided no material to suggest that his health condition is incompatible with his continued detention in the UNDU, where he is being provided with medical care, and he has not shown how his state of health suggests that he will return for the continuation of the trial if released provisionally. The Trial Chamber will nevertheless remain informed of the Applicant's physical condition.

15. The Applicant submits that he poses no flight risk.⁴² 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.⁴³ 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.⁴⁴ The 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.⁴⁵

³⁹ Motion, para. 11(b).

⁴⁰ The Tribunal has previously considered the situation where the state of health of an applicant for provisional release is incompatible with detention. See *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-PT, Decision on Motion for Provisional Release Filed by Zoran Kupreškić, Mirjan Kupreškić, Drago Josipović and Dragan Papić (Joined by Marinko Katava and Vladimir Šantić), 15 December 1997, para. 10.

⁴¹ *Prosecutor v. Mrksić*, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, paras 23–24. The Trial Chamber notes that, while Rule 65(B) is the applicable rule in this case and requires the consideration of “relevant factors”, Rule 65(I)(iii) – which applies only to convicted persons pending an appeal – requires the consideration of “special circumstances”. The Appeals Chamber has recognised health/medical issues as pertinent; see *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on ‘Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro’, (16 December 2005).

⁴² Motion, para. 9.

⁴³ *Popović* Decision, para. 12.

⁴⁴ Provisional Release Decision, para. 10.


⁴⁵ Provisional Release Appeal Decision.

16. The remaining factors to which the Applicant refers in his Motion do not impact on an assessment of whether, if released, he will appear for trial. Some of them concern the assessment of whether the Applicant, if released, will not pose a danger to any victim, witness, or other person.⁴⁶ 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.⁴⁷

DISPOSITION

17. 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.



Judge Ali Nawaz Chowhan

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

[Seal of the Tribunal]

⁴⁶ Those factors are the presumption of innocence and the right to a fair and expeditious trial; the relocation of the Applicant's defence team to Belgrade; the likelihood or not of the Applicant interfering with the Prosecution's witnesses or interests after the close of the Prosecution's case-in-chief; the Applicant's status as a retiree; and the applicant's status as the former President of the Republic of Serbia making him subject to constant surveillance.

⁴⁷ *Lukić and Lukić* Decision, paras 6, 23.