



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: 9 February 2009
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Acting Registrar: Mr. John Hocking

Decision of: 9 February 2009

PROSECUTOR

v.

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

PUBLIC WITH CONFIDENTIAL AND *EX PARTE* ANNEX

DECISION ON LAZAREVIĆ MOTION FOR TEMPORARY PROVISIONAL RELEASE

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Government of The Netherlands

Government of the Republic of Serbia

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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 a confidential “Vladimir Lazarevic Motion for Temporary Provisional Release on the Grounds of Compassion,” filed on 29 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 Vladimir Lazarević (“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. The Chamber left open the possibility that the Accused could apply for temporary provisional release on compassionate or humanitarian grounds.³ Following this denial, the Accused applied on 29 May 2007 for temporary provisional release on humanitarian grounds;⁴ and, on 18 June 2007, the Chamber granted this motion.⁵
3. On 7 December 2007, the Chamber denied a motion for temporary provisional release.⁶ The Chamber then denied a motion for reconsideration of this decision,⁷ and the Appeals Chamber affirmed.⁸
4. On 15 April 2008, the Chamber granted a temporary provisional release of the Accused based upon humanitarian and/or compassionate grounds.⁹

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 Lazarević Motion for Provisional Release, 22 May 2007, paras. 13, 15.

⁴ Confidential Vladimir Lazarević’s Motion Requesting Provisional Release on the Grounds of Compassion with Confidential Annex, 29 May 2007.

⁵ Decision on Lazarević Motion for Temporary Provisional Release, 18 June 2007 (public with confidential annex).

⁶ Decision on Lazarević Motion for Temporary Provisional Release, 7 December 2007, para. 11 (public with confidential annex).

⁷ Decision on Lazarević Motion to Reconsider Denial of Motion for Temporary Provisional Release, 13 December 2007 (public with confidential annex).

⁸ Decision on “Lazarević Defence Appeal Pursuant to Rule 116 *bis* Against the Trial Chamber’s Denial of Temporary Provisional Release”, 18 December 2007.

⁹ Decision on Lazarević Motion for Temporary Provisional Release, 15 April 2008 (public with confidential annex).

5. On 9 September 2008, the Chamber dismissed a motion made by the Accused upon humanitarian and/or compassionate grounds, without prejudice to a further application in the light of changed circumstances.¹⁰

6. On 26 September 2008, the Chamber granted the Accused temporary provisional release upon humanitarian/compassionate grounds.¹¹ The Prosecution appealed this decision, which the Appeals Chamber reversed because the Chamber had committed discernable error by misinterpreting a medical report of the Medical Officer of the United Nations Detention Unit: whereas the Medical Officer had reported that a period of convalescence in his home surroundings “could” ameliorate the Accused’s medical condition, the Chamber derived from this information that the recovery period “would” assist the Accused in his recovery.¹² The Appeals Chamber also held that the Chamber failed to properly exercise its discretion by not giving sufficient weight to other information in the medical report.¹³

7. On 10 December 2008, the Chamber denied a motion by the Accused for temporary provisional release because the circumstances did not constitute sufficiently compelling compassionate and/or humanitarian grounds.¹⁴

Applicable law

8. 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.¹⁵ 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.¹⁶

¹⁰ Decision on Lazarević Motion for Temporary Provisional Release, 9 September 2008.

¹¹ Decision on Lazarević Motion for Temporary Provisional Release, 26 September 2008.

¹² Decision on “Prosecution’s Appeal from Decision on Lazarević Motion for Temporary Provisional Release Dated 26 September 2008”, 23 October 2008, paras. 12–13.

¹³ Decision on “Prosecution’s Appeal from Decision on Lazarević Motion for Temporary Provisional Release Dated 26 September 2008”, 23 October 2008, para. 14.

¹⁴ Decision on Lazarević Motion for Temporary Provisional Release, 10 December 2008.

¹⁵ *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.

¹⁶ *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-AR65.1, Decision on Defence Appeal Against Trial Chamber’s Decision on Sredoje Lukić’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.

9. 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.¹⁷ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁸ 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.¹⁹ 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.²⁰

10. 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.²¹

11. 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

¹⁷ *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.

¹⁸ *Ibid.*

¹⁹ *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.

²⁰ *Stanišić Decision*, para. 8.

²¹ 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.

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.²²

12. 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 circumstances²³

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

Discussion

14. 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.²⁴

15. In the Motion, the Accused requests a temporary provisional release for 14 days based upon a medical condition. He states that the purpose of the release will require ten working days.²⁵

16. 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.²⁶ The

²² *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.

²³ *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.

²⁴ Motion, paras. 1–19.

²⁵ Motion, paras. 1–15.

²⁶ Confidential Supplement to Vladimir Lazarevic Motion for Temporary Provisional Release on the Grounds of Compassion with Confidential Annex, 6 January 2009.

Netherlands, in its capacity as host country, has stated that it has no objection to the Accused's provisional release.²⁷

17. The Prosecution opposes the Motion, articulating its general opposition to provisional release of any of the six Accused at this most advanced stage of the proceedings. The Prosecution submits that there is precedent for limited, strictly controlled provisional releases in cases of a compelling showing of unusual or special circumstances on compassionate grounds. However, in the view of the Prosecution, the assertions in the Motion, although showing the existence of medical issues, do not warrant the requested relief without more specific documentation. Moreover, the Prosecution asserts that the Accused's medical needs can be addressed at the United Nations Detention Unit. Should the Motion be granted, the Prosecution requests the Chamber to require 24-hour security of the Accused and to order a stay of the decision.²⁸

18. [See confidential and *ex parte* annex.]

19. [See confidential and *ex parte* annex.]

20. [See confidential and *ex parte* annex.]

21. [See confidential and *ex parte* annex.]

22. [See confidential and *ex parte* annex.]

23. [See confidential and *ex parte* annex.]

24. [See confidential and *ex parte* annex.]

25. [See confidential and *ex parte* annex.]

26. Based upon the serious and sufficiently compelling humanitarian considerations set forth in the Motion, the Chamber considers that it would be appropriate for the Accused to be provisionally released for a limited duration, under strictly controlled conditions, including 24-hour surveillance.

27. Serbia has represented to the Chamber that its implementation of the Chamber's order of 24-hour surveillance includes the following:

- (a) That at all times two police officers are in the presence of the Accused.

²⁷ Letter from Dutch Ministry of Foreign Affairs, 2 January 2009.

²⁸ Confidential Prosecution Response to Vladimir Lazarević Motion for Temporary Provisional Release on the Grounds of Compassion, 5 January 2009, paras. 1, 6–14.

- (b) That the Accused is not allowed to move anywhere without these two police officers.
- (c) That two police officers are placed, at all times, in front of the Accused's dwelling, in order to make sure that he does not leave the premises.
- (d) That the police officers will, at all times, ensure the apprehension of the Accused in the event of escape or failure to meet any of the conditions set out in the Decision.²⁹

The Chamber is satisfied that the above interpretation of the Chamber's order of 24-hour surveillance, as well as the other conditions set forth in the Order below, is sufficient to ensure that the Accused will return for trial and not endanger victims, witnesses, or other persons.

28. For all of the reasons discussed in this Decision and the confidential and *ex parte* annex, the Chamber considers that the criteria of Rule 65(B) are satisfied and is prepared to exercise its discretion to grant a temporary provisional release on the basis of the serious and sufficiently compelling compassionate and/or humanitarian grounds set forth in the Motion.

29. The Chamber also considers that the period of the temporary provisional release is proportional to the health circumstances faced by the Accused. In cases where limited provisional release has been granted on compassionate or humanitarian grounds, the period for which an accused has been provisionally released has varied from three to five days.³⁰ However, based upon the purpose of this temporary provisional release, *i.e.*, a specific medical procedure requiring a fixed amount of time, the Chamber considers that a longer period is both necessary and appropriate for the stated purpose of the temporary provisional release.

30. The Chamber has taken into account the fact that it dismissed the Accused's Rule 98 *bis* motion for a judgement of acquittal, and it finds that this does not outweigh the relevant humanitarian concerns.

²⁹ Republic of Serbia's Submission Related to Trial Chamber's Order of 18 March 2008, 20 March 2008.

³⁰ See, e.g., *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Decision on Application for Provisional Release, 12 December 2002 (15 days requested; five days granted); *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 (five days); *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Urgent Defence Motion on Behalf of Ramush Haradinaj for Provisional Release, 16 April 2005 (three days); *Prosecutor v. Hadžihasanovic et al.*, Case No. IT-01-47-T, Decision Granting Provisional Release to Enver Hadžihasanovic, 18 January 2004 (three days); *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision Pursuant to Rule 65 Granting Mrkšić's Request to Attend His Mother's Funeral, 30 January 2004 (three days); *Prosecutor v. Hadžihasanovic et al.*, Case No. IT-01-47-T, Decision Pursuant to Rule 65 Granting Amir Kubura Authorisation to Attend His Mother's Funeral, 12 March 2004 (three days).

31. The date for the pronouncement of the Judgement in the above-captioned proceeding has been scheduled for 26 February 2009. Due to the involved nature of the medical issues in this matter, it has taken a significant amount of time for all the necessary information to be before the Chamber so that a properly informed decision could be taken, and this has resulted in a short amount of time between the issuance of this decision and the date of the pronouncement of the Judgement. A stay would thus obviate the grant of the Motion and delay the medical treatment needed by the Accused. The Chamber therefore will deny the Prosecution's request for a stay.

Disposition

32. For the foregoing reasons and pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby **GRANTS** the Motion, in part, and **ORDERS** as follows:

- (a) On **Wednesday, 11 February 2009**, Vladimir Lazarević ("Accused") shall be transported to the appropriate airport in the Netherlands by the Dutch authorities.
- (b) At the appropriate airport, the Accused shall be provisionally released into the custody of an official of the Government of the Republic of Serbia ("Serbia") to be designated prior to the Accused's release in accordance with operative paragraph (m) hereunder, who shall accompany the Accused for the remainder of his travel to and from the address detailed in the confidential and *ex parte* annex to this Decision.
- (c) On his return, the Accused shall be accompanied by a designated official of Serbia, who shall deliver the Accused to the custody of the Dutch authorities at the appropriate airport, and the Dutch authorities shall then transport the Accused back to the United Nations Detention Unit in The Hague.
- (d) During the period of his provisional release, the Accused shall abide by the following conditions,
 - i. the Accused shall remain at the address detailed in the confidential and *ex parte* annex to this Decision, when he is not receiving medical treatment;
 - ii. Serbia shall provide 24-hour surveillance of the Accused throughout his presence in Serbia; and
 - iii. the Accused shall surrender his passport to the Ministry of Justice of Serbia for the duration of his provisional release.

- (e) Before leaving the United Nations Detention Unit in The Hague, the Accused shall provide details of his itinerary to the Ministry of Justice of the Netherlands and to the Registrar of the Tribunal.
- (f) The Accused shall not have any contact with any co-Accused in the case.
- (g) The Accused shall not have any contact whatsoever, or in any way interfere with, any victim or potential witness or otherwise interfere in any way with proceedings before the Tribunal or with the administration of justice.
- (h) The Accused shall not discuss his case with anyone, including the media, apart from his counsel.
- (i) The Accused shall continue to cooperate with the Tribunal and comply with any further Orders or Decisions of this Trial Chamber regarding his provisional release.
- (j) The Accused shall comply strictly with any requirements of the authorities of Serbia, which are necessary for them to comply with their obligations pursuant to this Order.
- (k) The Accused shall return to the United Nations Detention Unit in The Hague on **Monday, 23 February 2009**.
- (l) The Accused shall comply strictly with any further Order of the Trial Chamber varying the terms of or terminating his provisional release.
- (m) The Government of Serbia shall assume the following responsibilities:
 - (i) ***Designation of an official of Serbia***, into whose custody the Accused shall be provisionally released and who shall accompany the Accused from the appropriate airport in The Netherlands to the address detailed in the confidential and *ex parte* annex to this Decision, and ***notification, as soon as practicable, to the Trial Chamber and the Registrar of the Tribunal of the name of the designated official.***
 - (ii) Provision of 24-hour surveillance of the Accused throughout his stay in Serbia.
 - (iii) Provision of the personal security and safety of the Accused while on provisional release.

- (iv) Responsibility, at the request of the Trial Chamber or the parties, for facilitating all means of cooperation and communication between the parties, and assurance of the confidentiality of any such communication(s).
- (v) Responsibility for informing the Trial Chamber of any failure by the Accused to comply with the terms of this Order.
- (vi) Responsibility for immediately arresting and detaining the Accused, should he breach any of the conditions of this Order.
- (vii) Responsibility, once the Accused has returned to the United Nations Detention Unit in The Hague, *for the submission of a written report to the Trial Chamber* as to the compliance of the Applicant with the terms of this Order.

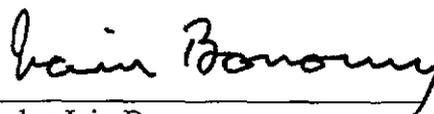
33. Pursuant to Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby **INSTRUCTS** the Registrar of the Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for the provisional release of the Accused, and to continue to detain the Accused at the United Nations Detention Unit in The Hague until such time as the Trial Chamber and the Registrar have been notified of the name of the designated official of the Government of the Republic of Serbia into whose custody the Accused is to be provisionally released.

34. Pursuant to Article 29 of the Statute of the Tribunal and Rules 54 and 65 of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby **REQUESTS** the authorities of all states through which the Accused will travel:

- (a) to hold the Accused in custody for any time that he will spend in transit at an airport in their territories; and
- (b) to arrest and detain the Accused pending his return to the United Nations Detention Unit in The Hague, should he attempt to escape.

35. The Trial Chamber, pursuant to Rule 65(E) of the Rules of Procedure and Evidence of the Tribunal, hereby **DENIES** the Prosecution's request for a stay.

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



Judge Iain Bonomy
Presiding

Dated this ninth day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]