



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: 17 September 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: 17 September 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON URGENT MOTION REQUESTING
PROVISIONAL RELEASE OF NEBOJŠA PAVKOVIĆ ON
COMPASSIONATE GROUNDS**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for the Appellants:

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 the “Urgent General Pavković Request for Provisional Release on Compassionate Grounds with Annex A” filed confidentially by Counsel for Nebojša Pavković (“Pavković”) on 17 September 2009 (“Motion”).¹ The Office of the Prosecutor (“Prosecution”) filed its response the same day.² In light of the urgency of the matter and considering the fact that Pavković would not be prejudiced by the outcome of this decision, the Appeals Chamber finds it in the interests of justice to render this decision prior to the expiration of the deadline for filing a reply to the Response.

I. BACKGROUND

2. On 26 February 2009, Trial Chamber III (“Trial Chamber”) convicted Pavković for deportation, forcible transfer, murder and persecution as crimes against humanity and murder as a violation of the laws or customs of war pursuant to Articles 5(d), 5(i), 5(a), 5(h), 3 and 7(1) of the Tribunal’s Statute and sentenced him to 22 years of imprisonment.³

3. Pavković filed his notice of appeal in accordance with Rule 108 of the Rules of Procedure and Evidence (“Rules”) on 27 May 2009⁴ and is currently detained in the United Nations Detention Unit in The Hague (“UNDU”) pending the resolution of the appeals lodged against the Trial Judgement.

4. The Appeals Chamber is also currently seized of “General Pavković Request for Provisional Release on Compassionate Grounds with Annexes A and B” filed confidentially by Pavković on 27 August 2009 (“Motion of 27 August 2009”). A separate decision on the said motion will be rendered in due course.

II. APPLICABLE LAW

5. Pursuant to Rule 65(I) of the 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

¹ The public redacted version of the Motion was filed on the same day. Unless specified otherwise, the references in the present decision are made to the public redacted version of the Motion.

² Prosecution’s Response to General Pavković’s Urgent Request for Provisional Release on Compassionate Grounds, 17 September 2009 (“Response”).

³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), Volume 3, para. 1210.

⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Notice of Appeal from the Judgement of 26 February 2009, 27 May 2009 (see also Decision on Nebojša Pavković Motion to Amend his Notice of Appeal, 9 September 2009). The Prosecution and Counsel for Nikola Šainović, Dragoljub Ojdanić, Vladimir Lazarević and Sreten Lukić filed their notices of appeal on the same date.

applies *mutatis mutandis* to applications brought before the Appeals Chamber under this provision.⁵ 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.⁶ 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.”⁷ Finally, the discretionary assessments of the requirements under Rule 65 are made on a case-by-case basis.⁸

III. DISCUSSION

A. Arguments of the parties

6. Pavković requests to be provisionally released from 18 September 2009 until 22 September 2009 to attend his father’s memorial service in Jagodina, Serbia.⁹ Pavković’s father passed away during the night on 17 September 2009.

7. Referring, on the one hand, to the guarantees from the Government of the Republic of Serbia submitted in support of his Motion of 27 August 2009, and on the other hand, to his conduct during previous occasions when he was provisionally released at trial, Pavković assures to comply with all the requirements of Rule 65(I) of the Rules and “any and all conditions the Appeals Chamber may impose if granted provisional release”.¹⁰

8. The Prosecution “takes no position” on Pavković’s request for provisional release but notes that “the length of the sentence is a factor weighing against release” and suggests that “suitable guarantees should be received first from the Serbian authorities” and that “reasonable conditions” be imposed on Pavković should the Appeals Chamber grant the Motion.¹¹

⁵ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, 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, 22 May 2009 (“*Lazarević* Decision of 21 May 2009”), para. 4 and references cited therein.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Motion, para. 1.

¹⁰ *Id.*, paras 7-8.

¹¹ Response, paras 1-2.

B. Analysis

1. Special circumstances under Rule 65(I)(iii) of the Rules

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”.¹² 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 a close family member.¹³ In the present case, the Appeals Chamber is satisfied that the memorial service for Pavković’s father constitutes special circumstances within the meaning of Rule 65(I)(iii) of the Rules and that the period of the provisional release requested by Pavković is reasonable in this situation.

2. Other Rule 65(I) requirements

10. The Appeals Chamber notes that the risk of flight associated with granting the request for provisional release is higher at the present stage, after Pavković was sentenced by the Trial Chamber to 22 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.

11. The Appeals Chamber takes note of the guarantees reiterated by Serbia issued in connection with Pavković’s Motion of 27 August 2009,¹⁴ and accepts that they are still in effect and applicable to the current Motion. The Appeals Chamber further notes that during the most recent provisional release, Pavković was ordered, *inter alia*, to remain under strictly controlled conditions, including 24-hour electronic surveillance throughout his presence in Serbia.¹⁵ The Appeals Chamber finds

¹² Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release on the Grounds of Compassion, 2 April 2009 (confidential) (“Lazarević Decision of 2 April 2009”), para. 8, referring to *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), para. 10.

¹³ Lazarević Decision of 2 April 2009, para. 8, referring to *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), para. 12. See also, *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, referring to *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. 14.

¹⁴ General Pavković Submission of Guarantees in Support of Motion for Provisional Release, 9 September 2009, Annex (“State Guarantees”).

¹⁵ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Pavković Motion for Temporary Provisional Release, 14 March 2008 (public with confidential annex), para. 24(d)(ii). See also Order Suspending Temporary Provisional Release of Nebojša Pavković, 18 March 2008; Order Reinstating Temporary Provisional Release of Nebojša Pavković, 20 March 2008; Decision on Prosecution Motion for Reconsideration of Order Reinstating Temporary Provisional Release of Nebojša Pavković, 26 March 2008.

that the conditions of provisional release at this stage should be at least as strict as those imposed during the trial proceedings.¹⁶ The Appeals Chamber also notes that on previous occasions, Pavković has fully complied with the conditions imposed on him.¹⁷

12. In light of the above and considering the circumstances at stake, 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 Pavković will not pose a danger to any victim, witness, or other person.

13. Finally, the Appeals Chamber notes that The Netherlands, in its capacity as host country, has no objections to Pavković's provisional release as requested by the Motion.¹⁸

IV. DISPOSITION

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

1. Pavković shall be transported to the Schiphol airport in The Netherlands by the Dutch authorities on 18 September 2009, or as soon thereafter as is practicable;
2. At Schiphol airport, Pavković 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, who shall accompany Pavković for the remainder of his travel to and from the address detailed in paragraph 9 of the confidential version of the Motion;
3. The period of the provisional release shall commence when Pavković 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 22 September 2009;
4. On his return flight, Pavković shall be accompanied by the authorised representatives of the Government of the Republic of Serbia who shall deliver Pavković into the custody of the Dutch authorities at Schiphol airport; the Dutch authorities shall then transport Pavković back to the UNDU in The Hague; and

¹⁶ Cf. *Lazarević* Decision of 21 May 2009, para. 14.

¹⁷ E.g., *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Report from the Director of the Office of the National Council for Cooperation with the International Criminal Tribunal for the Former Yugoslavia, No. 1/0-6/18-08, 21 April 2008 (confidential).

¹⁸ Letter from the Deputy Director of Protocol for the Minister of Foreign Affairs titled "Provisional Release General Pavković", 17 September 2009 (confidential).

5. During the period of his provisional release, Pavković 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, Pavković shall provide details of his itinerary to the Ministry of Justice of the Netherlands and to the Registrar of the Tribunal;
- b. Pavković shall be staying at the address indicated in paragraph 9 of the confidential version of the Motion, save for the period of the day travel to Jagodina for attending the memorial service;
- c. the Republic of Serbia shall provide 24-hour electronic surveillance of Pavković throughout his presence in Serbia;
- d. Pavković shall surrender his passport to the Ministry of Justice of Serbia for the entire duration of his provisional release;
- e. Pavković shall not have any contact 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. Pavković shall not discuss his case with anyone, including the media, other than his counsel;
- g. Pavković 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. Pavković shall comply with any order of the Appeals Chamber varying the terms of or terminating his provisional release; and
- i. Pavković shall return to the UNDU no later than 22 September 2009.

15. 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 Pavković shall be provisionally release and who shall accompany Pavković from Schiphol airport in The Netherlands to the address detailed in paragraph 9 of the confidential version of the Motion, and notification, as soon as practicable and prior to Pavković's release, to the Appeals Chamber and the Registrar of the Tribunal of the name of the designated official;
2. Provision of 24-hour electronic surveillance of Pavković throughout his stay in Serbia, and notification, as soon as practicable and prior to Pavković's release, to the Appeals Chamber

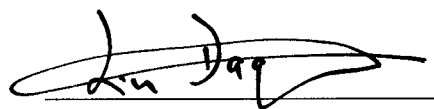
and the Registrar of the Tribunal that arrangements have been put into place for Pavković's 24-hour electronic surveillance;

3. Provision of Pavković's personal security and safety while on provisional release;
 4. All expenses in connection with the transport from Schiphol airport to Pavković's address in Belgrade and back, as well as to the place of the memorial service in Jagodina;
 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 Pavković's security, including full reports of investigations related to such threats;
 7. Detaining Pavković 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 Registrar 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 Pavković; and
 9. Submitting a written report to the Appeals Chamber, upon Pavković's return to the UNDU, as to Pavković's compliance with the terms of the present decision.
16. 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 Pavković's provisional release;
 2. Request the authorities of the State(s) through whose territory Pavković 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 Pavković pending his return to the UNDU should he attempt to escape during travel; and
 - c. continue to detain Pavković at the UNDU in The Hague until such time as the Republic of Serbia has fully complied with the conditions set forth in paragraphs 15.1 and 15.2 above.

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

Done this 17th day of September 2009,

At The Hague, The Netherlands.

A handwritten signature in black ink, appearing to read 'Liu Daqun', written over a horizontal line.

Judge Liu Daqun, Presiding

[Seal of the Tribunal]