

UNITED
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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-01-42-A
Date: 2 April 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Decision of: 2 April 2008

PROSECUTOR

v.

PAVLE STRUGAR

PUBLIC REDACTED VERSION

**DECISION ON DEFENCE REQUEST SEEKING PROVISIONAL RELEASE ON THE
GROUNDS OF COMPASSION**

Office of the Prosecutor

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Xavier Tracol

Counsel for the Accused

Mr. Goran Rodić
Mr. Vladimir Petrović

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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 “Defence Request Seeking Provisional Release on the Grounds of Compassion with Confidential Annexes” (“Request”), filed confidentially by Pavle Strugar (“Strugar”) on 18 March 2008. The Office of the Prosecutor (“Prosecution”) responded on 20 March 2008, opposing the Request.¹ Strugar replied on 26 March 2008.²

2. On 31 January 2005, Trial Chamber II convicted Strugar pursuant to Article 7(3) of the Tribunal’s Statute (“Statute”) for the crimes of attacks on civilians and of destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science under Article 3 of the Statute.³ It sentenced Strugar to eight years’ imprisonment.⁴ The Appeals Chamber is currently seized of the appeals against the Trial Judgement filed by both parties.⁵

I. APPLICABLE LAW

3. 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 before the Appeals Chamber under this provision.⁶ 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.⁷ The Appeals

¹ Prosecution Response to Defence Urgent Request Seeking Provisional Release on the Grounds of Compassion filed confidentially on 20 March 2008 (“Response”).

² Defence Request Seeking Leave to Reply & Defence Reply to “Prosecution Response to Defence Urgent Request Seeking Provisional Release on the Grounds of Compassion” filed confidentially on 26 March 2008 (“Reply”).

³ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005 (“Trial Judgement”), para. 478.

⁴ *Ibid.*, para. 481.

⁵ Defence Notice of Appeal, 2 March 2005 and Defence Appeal Brief, 8 July 2005; Defence Response Brief, 27 June 2005; Defence Brief in Reply, 1 September 2005; Prosecution’s Notice of Appeal, 2 March 2005 and Prosecution Appellant Brief, 17 May 2005; Prosecution Brief in Response, 17 August 2005; Prosecution Brief in Reply, 12 July 2005; Prosecution’s Addendum on Recent Case-Law Pursuant to Order of 23 August 2007, 1 October 2007 (jointly “Appeals”).

⁶ Cf. *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, para. 4.

⁷ *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-ES, Decision on Motion for Provisional Release, 21 February 2008, para. 3; *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on Radoslav Brdanin’s Motion for Provisional Release, 23 February 2007 (“*Brdanin Decision*”), para. 5; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005 (“*Galić Decision*”),

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.”⁸

II. DISCUSSION

A. Preliminary Matters

4. The Appeals Chamber notes that Strugar seeks the right to reply under Rule 126 *bis* of the Rules.⁹ The Appeals Chamber recalls that the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal¹⁰ does not require the moving party in a motion filed during an appeal from judgement to seek leave prior to filing a reply and that it was therefore unnecessary for Strugar to do so.¹¹ However, the same provision of the Practice Direction specifies that a reply should be filed within four days of the filing of the response, meaning that the Reply should have been filed by 25 March 2008, and that it is therefore untimely. The Appeals Chamber has previously ruled that even though no good cause for a late filing was shown, it could still be found admissible in the interest of justice bearing in mind “the persistent confusion with regards to the applicable rules of procedure in appeals proceedings” despite previous clarifications made by the Appeals Chamber on a number of occasions.¹² In the present case, the Appeals Chamber finds that the Reply meaningfully clarifies Strugar’s position on the matter and will thus accept to consider the arguments contained therein.

B. Arguments of the Parties

5. In his Request, Strugar seeks provisional release for a period of time not exceeding ten days between 20 March 2008 and 20 April 2008 in order to visit his brother and sister in Belgrade, who are respectively 73 and 87 years old and very ill.¹³ He submits that his brother is in “a deplorable state of health” and that [REDACTED].¹⁴ He further submits that his sister is [REDACTED]. She

para. 3; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Mario Čerkez’s Request for Provisional Release, 12 December 2003 (“*Kordić and Čerkez* Decision”), para. 10.

⁸ *Limaj* Decision, para. 5; *Galić* Decision, para. 3; *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 (“*Simić* Decision of 21 October 2004”), para. 14.

⁹ Reply, paras 3-6.

¹⁰ IT/155/Rev.3, 16 September 2005 (“Practice Direction”), para. 14.

¹¹ *Cf. Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, 27 October 2006, para. 5.

¹² See *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A, Decision on Haradinaj Motion for Access, Balaj Motion for Joinder, and Balaj Motion for Access to Confidential Materials in the *Limaj* Case, 31 October 2006, para. 5 referring to *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motions for Access to Confidential Materials, 16 November 2005, paras 3-4.

¹³ Request, paras 1, 3, 4, 10.

¹⁴ *Ibid.*, para. 3.

suffers from [REDACTED] and other symptoms and diseases making her fully dependant on the care of others.¹⁵ Strugar annexes medical certificates of his brother's and sister's respective conditions.¹⁶ Given these factors, Strugar submits that the state of health and age of his respective siblings does not allow them to travel and visit him at the United Nations Detention Unit in The Hague.¹⁷ He adds that considering the circumstances, a provisional release could be the last and only opportunity for him to see his siblings alive.¹⁸

6. Strugar further submits that provisional release for a fixed period on compassionate grounds has been granted in other cases before the Tribunal upon showing special circumstances pursuant to Rule 65(I)(iii) of the Rules.¹⁹ In his view, the illnesses and age of his siblings constitute a special circumstance in this case because of the "unpredictability of the time both [he] and his siblings have left remaining to live".²⁰

7. Finally, Strugar reiterates his prior full compliance with the conditions imposed on him by the Tribunal during his previous releases and claims that his age and poor state of health "render any prospect of his flight highly unlikely".²¹ In this regard, Strugar provides the address where he would stay in Belgrade, if released²² and affirms having submitted a request to obtain guarantees from the Republic of Serbia, which he would present, upon receipt, in the form of an *addendum* to his Request.²³ To date, the Appeals Chamber has not received such an *addendum*.

8. The Prosecution responds that Strugar fails to demonstrate the existence of special circumstances in the sense of Rule 65(I)(iii) of the Rules.²⁴ According to the Prosecution, such circumstances only exist "when there is acute justification such as a medical need for the Appellant himself or a memorial service for a near family member".²⁵ The Prosecution adds that the decisions

¹⁵ *Ibid.*, para. 4.

¹⁶ *Ibid.*, Annexes 1 and 2.

¹⁷ *Ibid.*, para. 5.

¹⁸ *Ibid.*, paras 5-6.

¹⁹ *Ibid.*, para. 7, referring to *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Decision on Application for Provisional Release, 12 December 2002, para. 10; and also to *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 ("*Limaj et al.* Decision of 1 September 2006"); *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 of his Mother, 5 May 2006 ("*Simić* Decision of 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 ("*Limaj et al.* Decision of 20 April 2006"); *Galić* Decision, para. 15; *Simić* Decision of 21 October 2004, para. 20.

²⁰ Request, para. 7.

²¹ *Ibid.*, para. 8.

²² *Ibid.*, para. 10.

²³ *Ibid.*, para. 9.

²⁴ Response, paras 2, 5.

²⁵ *Ibid.*, para. 2 (footnote omitted) referring to *Prosecutor v. Dragan Zelenović*, Case No. IT-96-23/2-ES, Decision on Motion for Provisional Release, 21 February 2008, para. 13; *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-A,

referred to by Strugar do not support his Request as the circumstances of those cases were considerably different from the ones at hand, as here there is no evidence that the condition of either of Strugar's siblings is fatal.²⁶

9. Strugar replies that nothing in the Rules limits the notion of "special circumstances" "solely to cases where 'there is acute justification such as a medical need for the Appellant himself or a memorial service for a near family member', or where the state of a family member is 'fatal'".²⁷ He accordingly argues that there can be many other situations which the Appeals Chamber may consider, in the exercise of its discretion, as constituting "special circumstances" in the sense of Rule 65(I)(iii) of the Rules.²⁸ He further refers to a number of decisions taken by the Tribunal's Trial Chambers allowing for provisional release on comparable grounds²⁹ and reiterates that the medical conditions of his respective siblings resulting in their inability to visit him in The Hague and the "arguable time" that they have "left in this life" fully amount to "special circumstances" under Rule 65(I)(iii) of the Rules.³⁰

C. Analysis

10. The Appeals Chamber recalls that Strugar has already served more than half of the sentence imposed by the Trial Chamber.³¹ The Appeals are currently scheduled to be heard on 23 April 2008, and the Appeals Judgement will be rendered in due time thereafter.

11. As recalled above, "[t]he specificity of the appeal 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'".³² In this regard, the Appeals Chamber emphasizes that the fact that some accused have been granted provisional release for comparable reasons pending their trial³³ cannot be

Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release, 14 February 2008, para. 10; *Brdanin* Decision, para. 6.

²⁶ Response, paras 3-5.

²⁷ Reply, para. 9.

²⁸ *Ibid.*, paras 8, 10, 14.

²⁹ *Ibid.*, paras 11-12.

³⁰ *Ibid.*, para. 13.

³¹ The fact that Strugar has served approximately 54% of the sentence imposed by the Trial Chamber is not sufficient to be considered as a special circumstance under Rule 65(I)(iii) of the Rules – *cf. Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on the Motion of Veselin Šljivančanin for Provisional Release, 11 December 2007, p. 3 (almost 90% of the sentence served at the moment of application for provisional release on appeal); *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para. 13 (two-thirds of the sentence served); *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A Decision on the Request for Provisional Release of Miroslav Kvočka, 17 December 2003, p. 3 (around 80% of the sentence served).

³² *Brdanin* Decision citing *Simić* Decision of 21 October 2004.

³³ *E.g. Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Šainović Motion for Temporary Provisional Release, 7 June 2007, where the Trial Chamber granted provisional release on compassionate grounds to allow the accused to visit his aged mother suffering from serious ill health while her prognosis was highly uncertain.

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.³⁴ Moreover, the Appeals Chamber has repeatedly reiterated that the discretionary assessments of the requirements under Rule 65 are made on a case-by-case basis.³⁵ Therefore, Strugar's arguments concerning the comparison of his situation with that of the accused pending trial in the *Prosecutor v. Milutinović et al.* case (IT-05-87-T) cannot be seen as determinative.

12. In situations where an application for provisional release is made pending the appellate proceedings, 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.³⁶ 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".³⁷ While the Appeals Chamber agrees with Strugar that there is no finite list of situations which may qualify as special circumstances for the purposes of Rule 65(I)(iii) of the Rules, it considers the notion of acute justification to be inextricably linked to the scope of special circumstances which could justify provisional release on compassionate grounds at the appellate stage of the proceedings before the Tribunal. It is precisely for that reason that justifications such as wanting to spend time with family³⁸ or to visit a close relative in poor health condition³⁹ have explicitly not been recognized as special circumstances under Rule 65(I)(iii) of the Rules.

13. Strugar argues that special circumstances justifying his provisional release at the present stage of the proceedings exist because his siblings are both in very poor health and are of advanced age, which renders the amount of time for him to see them alive highly unpredictable. However, the submitted medical evidence neither demonstrates how the illnesses and age qualify as an acute

³⁴ See *supra*, para. 3, last sentence.

³⁵ E.g., *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, Prajak, Petković and Ćorić, 11 March 2008 para. 7.

³⁶ *Brdanin* Decision, para. 6; *Limaj et al.* Decision of 1 September 2006, p. 1; *Simić* Decision of 5 May 2006, p. 3; *Limaj et al.* Decision of 20 April 2006, p. 2; *Galić* Decision, para. 15; *Simić* Decision of 21 October 2004, para. 20; see also, in the present case, Decision on "Defense Motion: Defense Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro", 16 December 2005, p. 2.

³⁷ *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, para. 12 (terminal illness); *Kordić and Čerkez* Decision, paras 5, 11, 12, where the provisional release was refused for lack of certainty that the applicant would return in the Tribunal's custody, subject however to the fact that in "case of exceptional circumstances such as e.g. a substantial deterioration of the health conditions of Dario Kordić's mother the Defence may submit a detailed request for a temporary controlled visit to his mother".

³⁸ *Simić* Decision of 21 October 2004, para. 21.

³⁹ See *Brdanin* Decision, para. 6, referring to *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Order of the Appeals Chamber on the Motion for Provisional Release by Miroslav Kvočka, 11 September 2002, p. 4.

crisis⁴⁰ nor suggests that Strugar's siblings' respective medical conditions can be described as life-threatening. Therefore, the Appeals Chamber concludes that Strugar has not shown the existence of special circumstances within the meaning of Rule 65(I)(iii) of the Rules.


14. In light of the above and because the requirements under Rule 65(I) of the Rules are cumulative, the Appeals Chamber need not consider whether the requirements of Rules 65(I)(i) or 65(I)(ii) are met in the present case.⁴¹

III. DISPOSITION

15. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Request.

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

Done this 2nd day of April 2008
At The Hague, The Netherlands.



Judge Andrézia Vaz, Presiding

[Seal of the Tribunal]

⁴⁰ Cf. *Brdanin* Decision, para. 6.

⁴¹ Cf. *Kordić and Čerkez* Decision, para. 10.