



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-95-9-A  
Date: 21 October 2004  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Mehmet Güney, Presiding  
Judge Fausto Pocar  
Judge Mohamed Shahabuddeen  
Judge Wolfgang Schomburg  
Judge Inés Mónica Weinberg de Roca

**Registrar:** Mr. Hans Holthuis

**Decision:** 21 October 2004

**PROSECUTOR**

v.

**BLAGOJE SIMIĆ**

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**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**

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**Counsel for the Prosecutor:**  
Mr. Norman Farrell  
Mr. Mark J. McKeon

**Counsel for the Appellant:**  
Mr. Igor Pantelić  
Mr. Peter Murphy

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## A. Background

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 ("International Tribunal") is seised of the "Motion of Blagoje Simić Pursuant to Rule 65(I) of the Rules of Procedure and Evidence for Provisional Release for a Fixed Period to Attend Memorial Services for his Father" filed by Blagoje Simić ("Appellant") on 29 September 2004 ("Motion"), in which the Appellant seeks provisional release for a short fixed period in order to attend memorial services for his late father in Šamac, Bosnia and Herzegovina. The Prosecution responded confidentially on 5 October 2004.<sup>1</sup> The Appellant replied on 8 October 2004.<sup>2</sup> On 19 October 2004, Mr. Trivun Jovičić, Minister Counsellor and Republika Srpska Liaison Officer, submitted guarantees and authorization from the Republika Srpska Government.

2. On 17 October 2003, the Appellant was sentenced to 17 years imprisonment by Trial Chamber II. The Appeals Chamber is currently seised of the Appellant's appeal against the Trial Chamber's judgement.<sup>3</sup>

## B. Submissions

3. In the Motion, the Appellant requests permission to attend memorial services for his father on the forty-day anniversary of his death, which will be held on 5 November 2004 in Šamac, Bosnia and Herzegovina, and to spend a short period, from 4 to 9 November 2004, with family members after the religious observances.

4. The Appellant submits that the death of his father, "coupled with his own religious beliefs and obligations,"<sup>4</sup> constitute "special circumstances" within the meaning of Rule 65(I) of the Rules of Procedure and Evidence ("Rules"). The Appellant recalls that he surrendered voluntarily to the International Tribunal and has been of good behaviour while detained at the United Nations Detention Unit ("UNDU"). He submits that there is no reason to believe that he would attempt to escape or behave improperly while on provisional release, or that he would pose any danger to any victim, witness or other person. The Appellant points out that Mr. Trivun Jovičić, Liaison Officer of the Presidency of Bosnia and Herzegovina, has agreed to provide guarantees of the Government

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<sup>1</sup> Prosecution's Response to Blagoje Simić's Motion for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, confidential, 5 October 2004 ("Response").

<sup>2</sup> Reply of Blagoje Simić to Response of Prosecution to Motion of [sic] Pursuant to Rule 65(I) of the Rules of Procedure and Evidence for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, 8 October 2004 ("Reply").

<sup>3</sup> Judgement, 17 October 2003.

<sup>4</sup> Motion, paragraph 10.

of Republika Srpska for his safe return and to accompany him at all times during the provisional release. The Appellant further adds that, if the permission sought is granted, he agrees to fully comply with the conditions the Appeals Chamber may impose.

5. The Prosecution opposes the provisional release. It “accepts that the Appellant has established special circumstances warranting the Chamber’s consideration of provisional release”<sup>4</sup> but submits that the Appellant has not shown that, if released, he will surrender into detention at the conclusion of the fixed period.

6. First, the Prosecution submits that, as the presumption of innocence no longer applies since the Appellant has already been convicted, the onus of proof should be higher than proof on the balance of probabilities. It argues that the different considerations that apply to requests for provisional release after a conviction are reflected in the structure of Rule 65 of the Rules which requires an additional requirement pending appeal, namely that the Appeals Chamber be satisfied that “special circumstances exist warranting such release”.<sup>5</sup>

7. Secondly, the Prosecution submits that there is serious risk that the Appellant would abscond from custody because he was convicted of extremely serious offences and was a senior political figure in Bosanski Šamac municipality. In support of its argument, the Prosecution refers to two decisions in the *Kordić and Čerkez* case<sup>6</sup> whereby the Appeals Chamber denied the motions for provisional release partly on the ground that the sentences pronounced against the two appellants created a strong incentive to flee. The Prosecution adds that provisional release should be a rare exception on appeal because “[i]f provisional release were frequently granted to convicted persons pending an appeal, this could affect public confidence in the administration of justice by the Tribunal, by creating an impression that judgements of Trial Chambers must be considered as inherently uncertain until confirmed on appeal”.<sup>7</sup>

8. Thirdly, the Prosecution submits that the guarantee provided by the Government of the Republika Srpska cannot and should not be relied upon insofar as there have been no arrests made

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<sup>4</sup> Response, paragraph 2.

<sup>5</sup> Response, note 4, referring to Rule 65(I) of the Rules.

<sup>6</sup> *The Prosecution v. Kordić and Čerkez*, IT-95-14/2-A, Decision on Mario Čerkez’ Request for Provisional Release, 12 December 2004; *The Prosecution v. Kordić and Čerkez*, IT-95-14/2-A, Decision on Dario Kordić’s Request for Provisional Release, 19 April 2004.

<sup>7</sup> Response, paragraph 8.

on the territory of the Republika Srpska and, should the Appellant abscond, he could find sanctuary in the Republika Srpska.

9. In his Reply, the Appellant concedes that he has the burden of proving to the satisfaction of the Appeals Chamber that he would surrender into detention at the conclusion of the fixed term of provisional release. He submits however that there is no justification for applying a different standard of proof with respect to an appellant since the only difference between trial and appeal lies in the requirement of Rule 65(I)(iii) that "special circumstances" exist. He emphasizes that, as conceded by the Prosecution, special circumstances exist in the present case.

10. The Appellant argues further that the Prosecution provides no fact in support of its argument that the Appellant is likely not to surrender to custody after the period of provisional release. On the contrary, he points out that an accredited liaison to the International Tribunal representing the Presidency of Bosnia and Herzegovina, Mr. Trivun Jovičić, has accepted responsibility for accompanying and supervising him at all times. The Appellant submits that three considerations strongly suggest that he will surrender to detention at the conclusion of the provisional release: first, the Appellant's undisputed record of cooperation with the International Tribunal offers a substantial assurance that the Appeals Chamber can be satisfied that he will return to custody; second, there is no evidence of the likelihood of flight; third, the Appeals Chamber can be satisfied that the stringent conditions suggested in the Motion can be put in place and will have the effect of guaranteeing the Appellant's return to custody.

11. With regard to the Prosecution's argument related to the public confidence in the administration of justice by the International Tribunal, the Appellant replies that it is equally arguable that the appropriate grant of a short period of provisional release in the relatively unusual circumstances of this case will enhance public confidence in the International Tribunal as a judicial body capable of establishing a humane system of justice, in which justice is tempered by measured compassion.

12. Regarding the reliance on guarantees from the Republika Srpska, the Appellant points out that, in the past, the Appeals Chamber has granted *Krnjelac's* motion for provisional release based in part on guarantees from the Republika Srpska.<sup>8</sup>

### C. Discussion

13. Rule 65(I) of the Rules provides that:

- (I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that:
- (i) the appellant, 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 appellant, if released, will not pose a danger to any victim, witness or other person, and
  - (iii) special circumstances exist warranting such release.

The provisions of paragraphs (C) and (H) shall apply *mutatis mutandis*.

The aforementioned Rules 65(C) and (H) provide, respectively, as follows:

- (C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.
- (H) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty. The provisions of Section 2 of Part Five shall apply *mutatis mutandis*.

14. In accordance with the criteria set out in Rule 65(I) of the Rules for granting provisional release, the Appeals Chamber will first determine whether it is satisfied that, if released, the Appellant will surrender into detention at the conclusion of the fixed period. With regard to the applicable standard of proof, the Appeals Chamber recalls that Rule 65 of the Rules provides for provisional release for an accused as well as for a convicted person. The 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.” As to the burden of proof that an applicant must meet in order to satisfy the Appeals Chamber, there is no explicit or implicit provision in the Rules suggesting that a higher standard of proof should be applied on appeal. The Appeals Chamber deems that the inclusion of a provision on provisional release in the Rules was driven by humane and compassionate considerations together with concerns related to the principle of proportionality in international law. These concerns remain even if the applicant has been convicted at trial. The Appeals Chamber considers that the fact that the person has already been sentenced is a matter to take into account when balancing the probabilities.

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<sup>8</sup> Reply, paragraph 6, referring to *The Prosecution v. Milorad Krnojelac*, IT-97-25-A, Decision on Application for Provisional Release, 12 December 2002 (“*Krnojelac Decision*”)

15. The Appeals Chamber considers that the seriousness of the offences of which an appellant has been found guilty is one of the factors it has to take into account when assessing whether an appellant, if released, would return to detention. It is evident that the more severe the sentence is, the greater is the incentive to flee. The Appeals Chamber recalls, however, that this cannot be the sole factor that determines the outcome of an application for provisional release.

16. The Appeals Chamber notes that the Appellant was convicted for persecutions as crimes against humanity and sentenced to 17 years. Although the Appellant has already been in detention for more than three years, the remainder of his sentence would still be considerable if the sentence is confirmed in whole or in part. On the other hand, the Appeals Chamber notes that the Appellant surrendered voluntarily to the custody of the International Tribunal and has been of good behaviour while in detention.<sup>9</sup> The fact that the Appellant agrees to condition his provisional release for a short period on all of the requirements the Appeals Chamber will deem necessary supports the Appellant's good faith.

17. The Appeals Chamber also considers that, in previous decisions, it relied successfully on guarantees provided by the Government of Republika Srpska.<sup>10</sup> The fact that no accused has ever been arrested in the territory of the Republika Srpska is not sufficient to rebut the value of the guarantees. Moreover, the guarantee provided by the Presidency of Bosnia Herzegovina through its Liaison Officer that he will accompany and supervise the Appellant at all times to ensure that he returns to the UNDU is an important factor to take into consideration.

18. Weighing all the circumstances of this case together, the Appeals Chamber is satisfied that, if released and subject to specific conditions, the Appellant will surrender into detention at the end of the fixed period.

19. Taking into account that an official of Bosnia and Herzegovina will be accompanying the Appellant at all times until his return to The Hague and the guarantees provided by the Government of Republika Srpska, the Appeals Chamber is also satisfied that if released, the Appellant will not pose a danger to any victim, witness or other person.

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<sup>9</sup> See Judgement, 17 October 2003, paragraph 1091.

<sup>10</sup> See, e.g., *Krnjelac* Decision and, in other circumstances, *The Prosecution v. Kvočka et al.*, IT-98-30/1-A, Decision on the Request for Provisional Release of Miroslav Kvočka, 17 December 2003.

20. Finally, the Appeals Chamber is satisfied that the memorial services organized on the forty-day anniversary of the death of the Appellant's father, which occurred on 26 September 2004, constitute a "special circumstance" within the meaning Rule 65(I)(iii). Therefore, the Appeals Chamber is satisfied that the requirements are met to grant the Appellant's request for provisional release.

21. As to the period of provisional release, the Appeals Chamber considers that the Appellant should be given sufficient time to attend the memorial services for his late father in Šamac. The fact that the Appellant wishes to spend time with his family after the memorial services is, however, not a factor the Appeals Chamber takes into consideration. The Appeals Chamber recalls that only the "special circumstances" which constitute the memorial services for his late father warrant the Appellant's release.

22. The Appeals Chamber wishes to add that the International Tribunal is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and other innocent people. Achieving justice, however, also requires respect for the convicted persons' fundamental rights, in particular their right for private life and family life.<sup>11</sup> By granting provisional release to convicted persons pending an appeal when the special circumstances of a case allow it, the International Tribunal fulfils its obligation to pursue justice for all parties involved.

#### **D. Disposition**

23. For the foregoing reasons and pursuant to Rule 65(I) of the Rules, the Appeals Chamber **GRANTS** in part the Motion and **ORDERS** that the Appellant be provisionally released for a fixed period from 4 November 2004 to 7 November 2004 under the following terms and conditions:

1. The Appellant shall be transported to Schiphol airport in The Netherlands by the Dutch authorities on 4 November;
2. At Schiphol airport, the Appellant shall be provisionally delivered into the custody of Mr. Trivun Jovičić, Liaison Officer of the Government of Bosnia Herzegovina, who shall accompany the Appellant for the remainder of his travel to the Republika Srpska and during the course of his stay in the Republika Srpska;

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<sup>11</sup> See, e.g., *Ploski v. Poland*, Judgment, European Court of Human Rights, 12 November 2002 ((26761/95) (202) ECHR 729), paragraph 39 where the Court concluded that, in the particular circumstances of the case, the refusals of leave to attend the funerals of the detainee's parents was a violation of article 8 of the Convention (right to respect for private life and family life). The Court specified however that "article 8 of the Convention does not guarantee a detained person an unconditional right to leave to attend a funeral of his relative." (para. 38).

3. If the circumstances prevent Mr. Trivun Jovičić from fulfilling his duties, the Appellant shall be provisionally delivered into the custody of another official of the Government of Bosnia Herzegovina with the condition that this person is authorised by the Appeals Chamber to take up Mr. Jovičić's duties no later than 29 October 2004;
  4. The period of provisional release shall commence when the Appellant is delivered into the custody of Mr. Trivun Jovičić, Liaison Officer of the Government of Bosnia Herzegovina, or of the other official accredited, and shall terminate upon his return to the Dutch authorities, which shall be no later than 7 November 2004;
  5. On his return flight, the Appellant shall be accompanied by Mr. Trivun Jovičić, Liaison Officer of the Government of Bosnia Herzegovina, or the authorised official, who shall deliver the Appellant into the custody of the Dutch authorities at Schiphol airport; the Dutch authorities shall then transport the Appellant back to the UNDU;
  6. During the period of his provisional release, the Appellant shall abide by the following conditions, and the authorities of the Republika Srpska, including the local police in Šamac, shall ensure compliance with such conditions:
    - a) The Appellant shall remain within the confines of the municipality of Šamac;
    - b) The Appellant shall be under the surveillance of the Šamac police;
    - c) The Appellant shall surrender his passport to the police in Šamac;
    - d) The Appellant shall report once a day to the local police who will maintain a log and file a written report with the International Tribunal confirming his presence each day;
    - e) The Appellant shall not in any way interfere with any persons who testified at his trial;
    - f) The Appellant shall not discuss his case with anyone other than his counsel;
    - g) The Appellant shall comply strictly with any order of the Appeals Chamber varying the terms of or terminating his provisional release;
24. On the basis of the guarantees provided by the Government of Republika Srpska, the Appeals Chamber **REQUIRES** the Government of Republika Srpska to assume responsibility for:
1. All expenses in connection with the transport from Schipol airport to Šamac and back;
  2. Ensuring the personal security and safety of the Appellant while on provisional release;
  3. Reporting immediately to the Registrar of the Tribunal as to the substance of any threats to the security of the Appellant, including full reports of investigations related to such threats;
  4. 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;
  5. detaining the Appellant immediately should he attempt to escape from Šamac, or should he in any other way breach the terms and conditions of his provisional release as set out in this



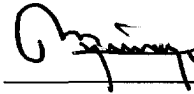
Decision and reporting immediately any such breach to the Registry and the Appeals Chamber; and

6. Respecting the primacy of the International Tribunal in relation to any existing or future proceedings in the Republika Srpska concerning the Appellant;
25. The Appeals Chamber **INSTRUCTS** the Registrar of the International Tribunal to:
1. Consult with the Dutch authorities and the authorities of the Republika Srpska or Bosnia and Herzegovina, as to the practical arrangements for the provisional release of the Appellant;
  2. Request the authorities of States through whose territory the Appellant may travel to:
    - a) Hold him in custody for any time he will spend in transit at the airport; and
    - b) Arrest and detain the Appellant pending his return to the UNDU should he attempt to escape during travel.

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

Dated this 21<sup>st</sup> day of October 2004

At The Hague,  
The Netherlands.



Judge Mehmet Güney  
Presiding Judge

[Seal of the Tribunal]