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**UNITED NATIONS**

Mechanism for International Criminal Tribunals

Case No.: MICT-15-95-ES
Date: 23 February 2016
Original: English

**IN THE APPEALS CHAMBER**

**Before:** **Judge Theodor Meron, Presiding**
**Judge Lee G. Muthoga**
**Judge Burton Hall**
**Judge Aminatta Lois Runeni N'gum**
**Judge José Ricardo de Prada Solaesa**

**Registrar:** **Mr. John Hocking**

**Decision of:** **23 February 2016**

**PROSECUTOR**

**v.**

**ZDRAVKO TOLIMIR**

***PUBLIC REDACTED***

# PUBLIC REDACTED VERSION OF THE "DECISION ON MOTION FOR PROVISIONAL RELEASE" FILED ON 28 JANUARY 2016

**The Office of the Prosecutor:**
Mr. Hassan Bubacar Jallow
Mr. Mathias Marcussen

**Counsel for Mr. Zdravko Tolimir:**
Mr. Aleksandar V. Gajić

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals ("Appeals Chamber" and "Mechanism", respectively) is seised of the "Motion for Provisional Release" filed confidentially and *ex parte* with confidential and *ex parte* Annexes, by Mr. Zdravko Tolimir on 21 October 2015 ("Motion").[1] The Prosecution filed a confidential response on 2 December 2015,[2] and Tolimir filed a confidential reply on 8 December 2015.[3] On 14 December 2015, Tolimir filed a confidential "Submission Containing Medical Report".[4] The Prosecution responded on 21 December 2015,[5] and Tolimir replied on 24 December 2015.[6]

## I. BACKGROUND

2. In its Judgement of 8 April 2015, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") upheld Tolimir's convictions for genocide, conspiracy to commit genocide, extermination, persecutions, and inhumane acts through forcible transfer as crimes against humanity, as well as murder as a violation of the laws or customs of war, in relation to his participation in the events in and around Srebrenica and Žepa in 1995.[7] The ICTY Appeals Chamber reversed Tolimir's convictions related to the killings of six Bosnian Muslim men near Trnovo, the killings of three Bosnian Muslim leaders from Žepa, and the forcible transfer operation in Žepa,[8] and affirmed his sentence of life imprisonment.[9] Tolimir is currently in the custody of the United Nations Detention Unit ("UNDU") awaiting transfer to an enforcement State.

3. In the Motion, Tolimir requests the President of the Mechanism to grant him provisional release.[10] On 18 November 2015, the President assigned the Appeals Chamber to consider the Motion.[11] On 19 November 2015, the Pre-Appeal Judge in this case instructed the Registrar to lift the *ex parte* status of the Motion and the Additional Annex and ordered the Prosecution to file a

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[1] The English translation of the confidential and *ex parte* annexes to the Motion which contains guarantees by the Government of the Republic of Serbia was filed on 26 October 2015. On the same day, Tolimir filed an additional annex to the Motion containing a statement that he will comply with any conditions imposed relating to his request for provisional release. *See* Annex to the Motion for Provisional Release Statement of Mr. Zdravko Tolimir, 26 October 2015 (confidential and *ex parte*) ("Additional Annex").
[2] Prosecution's Response to Zdravko Tolimir's Motion for Provisional Release, 2 December 2015 (confidential) ("Response").
[3] Reply to the Prosecution's Response to Tolimir's Motion for Provisional Release, 8 December 2015 (confidential) ("Reply").
[4] The English translation of this document was filed on 30 December 2015.
[5] Prosecution's Response to Zdravko Tolimir's Submission Containing Medical Report, 21 December 2015 (confidential) ("Response on Medical Report").
[6] Reply to the Prosecution's Response to Zdravko Tolimir's Submission Containing Medical Report, 24 December 2015 (confidential) ("Reply on Medical Report").
[7] *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Judgement, 8 April 2015 ("Appeal Judgement"), paras. 648, 649. *See also* Appeal Judgement, paras. 3-5, 271, 349, 414, 508, 550, 598, 623.
[8] Appeal Judgement, paras. 150, 151, 219, 221, 235, 237, 269, 270, 272, 434, 435, 634, 648, 649.
[9] Appeal Judgement, paras. 648, 649.
[10] Motion, paras. 1, 30, 31.
[11] Order Assigning Judges of the Appeals Chamber to Decide a Motion for Provisional Release, 18 November 2015 (confidential).

response to the Motion within 14 days and Tolimir to reply within seven days of the filing of the response.[12] In support of his request for provisional release, on 14 December 2015 Tolimir filed a Medical Report prepared by the Reporting Medical Officer of the UNDU, providing information on Tolimir's medical history and health status as of 9 December 2015.[13]

## II. SUBMISSIONS

4. Tolimir requests to be granted provisional release for a period of four months or any other appropriate period, on humanitarian grounds, for the purpose of "rehabilitation and further medical treatment" in the Republic of Serbia.[14] He submits that, even though the Mechanism's Statute and the Rules of Procedure and Evidence ("Rules") do not contain provisions dealing with provisional release after the pronouncement of final judgements, Rule 68 of the Rules pertaining to provisional release during trial and appeal proceedings could be applied in the present case.[15] Tolimir submits that his "critical" health condition and the fact that he is away from his family constitute sufficient compelling reasons for granting his provisional release.[16] He contends that adequate care and medical treatment could be provided by his wife and the medical institution where he was previously treated in Serbia in order to "stabilize and improve" his health condition.[17]

5. The Prosecution responds that the Motion should be dismissed as Tolimir fails to demonstrate the existence of special circumstances justifying provisional release following his final conviction, as required under Rule 68(I) of the Rules.[18] The Prosecution submits that "special circumstances" are assessed more strictly after final judgements[19] and that Tolimir has not demonstrated that his health condition amounts to an "acute justification",[20] or that it has eliminated his flight risk in accordance with Rule 68(I)(i) of the Rules.[21] The Prosecution contends that Tolimir

[12] Order Lifting *ex parte* Status of Motion for Provisional Release and Additional Annex, 19 November 2015 (confidential), p. 2. *See also* Motion, paras. 2-4; Order Designating a Pre-Appeal Judge, 18 November 2015 (confidential).
[13] *See* Submission Containing Medical Report, RP. 43.
[14] Motion, paras. 1, 30, 31. Tolimir notes that if his request is granted, he would not be released to the country where the crimes for which he was convicted of were committed, as they took place in Bosnia and Herzegovina. *See* Motion, paras. 11, 31.
[15] Motion, paras. 8-10, *referring to Prosecutor v. Drago Nikolić*, Case No. MICT-15-85-ES.4, Public Redacted Version of the 20 July 2015 Decision of the President on the Application for Early Release or Other Relief of Drago Nikolić, 13 October 2015 ("*Nikolić* Decision"), paras. 37-39.
[16] Motion, paras. 12-17. *See also* Reply on Medical Report, paras. 4, 6-9, 11.
[17] Motion, paras. 12, 17, 20-27. Tolimir further requests that the Registrar be instructed to obtain a report on his health condition since the UNDU is privy to his medical information. *See* Motion, paras. 18, 19; Reply, paras. 4, 5. Considering that, subsequently, Tolimir filed a medical report prepared by the UNDU reporting medical officer (*see* Submission Containing Medical Report), the Appeals Chamber finds Tolimir's request to be moot.
[18] Response, paras. 1-6; Response on Medical Report, paras. 2-9.
[19] Response, paras. 2, 5; Response on Medical Report, para. 3.
[20] Response, paras. 2, 3; Response on Medical Report, paras. 2, 4.
[21] Response on Medical Report, paras. 2, 7, 8.

fails to show that appropriate medical treatment is not available in the Netherlands,[22] and argues that his desire to receive medical care in Serbia and to spend time with family are insufficient to meet the requirements of Rule 68(I)(iii) of the Rules.[23]

6. Tolimir replies that the Prosecution misunderstands his arguments and incorrectly interprets the information contained in the medical report.[24] He further argues that considering his health condition and the guarantees provided by Serbia, he does not pose a flight risk[25] and it is not necessary to demonstrate that appropriate medical treatment could not be provided in the Netherlands.[26]

## III. APPLICABLE LAW

7. Neither the Statute nor the Rules explicitly regulate the provisional release of convicted persons awaiting transfer to an enforcement State.[27] The Appeals Chamber recalls, however, that, in certain limited circumstances, the ICTY has authorized provisional release to convicted persons prior to their transfer to the State where they would serve their sentence.[28] In doing so, the ICTY Appeals Chamber has relied on Rule 65(I) of the ICTY Rules of Procedure and Evidence ("ICTY Rules") which mirrors Rule 68(I) of the Mechanism's Rules.[29] The Appeals Chamber recalls that it is bound to interpret the Statute and the Rules in a manner consistent with the relevant jurisprudence of the ICTY.[30] Bearing this practice in mind, the Appeals Chamber considers that Rule 68 of the Rules applies, *mutatis mutandis*, to convicted persons who are in the custody of the Mechanism pending transfer to an enforcement State.

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[22] Response on Medical Report, paras. 2, 5.
[23] Response, paras. 4, 5, 6.
[24] Reply, paras. 2, 7, 8; Reply on Medical Report, paras. 2, 6, 7-9, 11, 12.
[25] Reply on Medical Report, paras. 12-14.
[26] Reply on Medical Report, para. 5.
[27] Rule 68(I) of the Rules relates to granting provisional release to *appellants* and provides, in relevant part, that "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."
[28] *See, e.g.*, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-ES, Decision on Krajišnik's Application for Custodial Visit, 17 June 2009 ("*Krajišnik* Decision"), paras. 1, 22. *See also Prosecutor v. Ljubomir Borovčanin*, Case No. IT-05-88-AR65.12, Decision on Appeal from Decision on Ljubomir Borovčanin's Request for Provisional Release, 1 March 2011 ("*Borovčanin* Decision"), paras. 2, 3, 9; *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 ("*Limaj et al.* Decision"), paras. 2, 4, 5. The Appeals Chamber notes that, in one case, the President of the Mechanism *proprio motu* provisionally released a convicted person who was in the custody of the Mechanism pending transfer to an enforcement State. *See Nikolić* Decision, paras, 4, 39.
[29] Rule 65(I) of the ICTY Rules provides, in relevant part, that "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." *See also Borovčanin* Decision, para. 9; *Limaj et al.* Decision, paras. 4, 5.
[30] *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, paras. 4-6.

8. Accordingly, provisional release may be granted if the Appeals Chamber is satisfied that: (i) the convicted person, if released, will surrender into detention at the conclusion of the fixed period; (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.[31] These requirements must be considered cumulatively and the discretionary assessment of these requirements is to be made on a case-by-case basis.[32] Furthermore, "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".[33]

## IV. DISCUSSION

9. The Appeals Chamber recalls that special circumstances warranting provisional release related to humane and compassionate considerations have been found to exist where there is an "acute justification", such as a medical need, a memorial service for a close family member, or a visit to a close relative in extremely poor health whose death is believed to be imminent.[34] Requests premised solely on the combination of advanced age and poor health, for example, have not met the threshold of "acute justification" in the absence of demonstration of the existence of an acute crisis or a life threatening medical condition.[35] Tolimir contends that he had suffered several "very serious medical incidents",[36] has difficulties [REDACTED], and is experiencing [REDACTED], [REDACTED], and [REDACTED].[37] Moreover, he submits that, due to "the state of his [REDACTED] and [REDACTED] illnesses", he is [REDACTED].[38] The medical report further indicates that Tolimir has had "several serious ailments" which render his health condition "rather fragile" and that he has "problems with [REDACTED] and [REDACTED]" which causes a substantial reduction in his ability to perform daily activities.[39] The medical report also suggests

[31] *Borovčanin* Decision, para. 9; *Limaj et al.* Decision, para. 5.
[32] *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Third Motion for Provisional Release on Compassionate Grounds, 3 September 2010 ("*Šainović et al.* Decision of 3 September 2010"), para. 5; *Borovčanin* Decision, para. 9. *See also Limaj et al.* Decision, para. 5.
[33] *Borovčanin* Decision, para. 9; *Limaj et al.* Decision, para. 5.
[34] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Public Redacted Version of the "Decision on Valentin Ćorić's Motion Seeking Provisional Release" Issued on 12 March 2015, 14 May 2015 ("*Prlić et al.* Decision"), para. 12; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević's Motion for Temporary Provisional Release, 13 May 2013 ("*Šainović et al.* Decision of 13 May 2013"), p. 2; *Borovčanin* Decision, para. 10.
[35] *See, e.g., Prlić et al.* Decision, para. 12. This standard has also been applied in the context of a convicted person's request to visit a close family member with medical conditions. *See Borovčanin* Decision, para. 10; *Prosecutor v Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Application for Provisional Release pursuant to Rule 65(I), 29 April 2008 (public redacted version), paras. 5, 7; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on Grounds of Compassion, 2 April 2008 (public redacted version) ("*Strugar* Decision"), paras. 5, 13; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Radoslav Brđanin's Motion for Provisional Release, 23 February 2007, para. 6.
[36] Motion, para. 13.
[37] Motion, para. 14.
[38] Motion, paras. 14, 15.
[39] Submission Containing Medical Report, RP. 41.

that, while Tolimir's "physical and mental condition has been stable", further "[REDACTED] and/or [REDACTED] events" could arise in the future which would "require immediate extra medical and nursing care".[40]

10. The Appeals Chamber recalls that an applicant for provisional release on medical grounds bears the burden of establishing that appropriate medical treatment is unavailable or cannot be performed in the Netherlands.[41] An applicant's preference to obtain medical care in a hospital where he had been formerly treated does not satisfy this requirement.[42] Tolimir has not demonstrated that appropriate medical care is not available in the Netherlands or why such treatment can only be administered in Serbia. To the contrary, the medical report suggests that Tolimir has been receiving appropriate treatment in the Netherlands for his current and past medical condition.[43]

11. The Appeals Chamber considers that, while the medical report shows that Tolimir has poor health, his current state does not amount to an acute crisis or life threatening medical condition meeting the stringent threshold of "special circumstances" warranting provisional release. Furthermore, the fact that Tolimir is away from his family in this present situation also does not constitute "special circumstances".[44] In this respect, the Appeals Chamber recalls that, in accordance with the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Rules Governing Detention"),[45] Tolimir is entitled to communicate with his family or other persons and to receive visits from them subject to certain restrictions and conditions.[46] Accordingly, the Appeals Chamber finds that Tolimir has failed to demonstrate the existence of special circumstances under Rule 68(I)(iii) of the Rules.

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[40] Submission Containing Medical Report, RP. 41.
[41] *See Šainović et al.* Decision of 13 May 2013, p. 2; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić's Motion for Provisional Release, 3 April 2013 ("*Šainović et al.* Decision of 3 April 2013"), p. 2; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-88-AR65.8, Decision on Prosecution's Appeal Against Decision on Gvero's Motion for Provisional Release, 20 July 2009 (public redacted version), para. 13.
[42] *See, e.g., Šainović et al.* Decision of 3 April 2013, p. 2.
[43] The Appeals Chamber notes that Tolimir was hospitalized in the Netherlands from 28 to 31 August 2015 and from 28 September to 7 October 2015, and that medical tests and examinations were performed by doctors in the Netherlands, for example, on: 8 September 2015 [REDACTED], 11 September 2015 [REDACTED], 13 October 2015 [REDACTED], and 21 October 2015 [REDACTED]. *See generally* Submission Containing Medical Report.
[44] *Cf. Šainović et al.* Decision of 3 September 2010, para. 11; *Prosecutor v. Milan Milutinović et al.*, 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, para. 9; *Strugar* Decision, para. 12.
[45] IT38/Rev.9, 21 July 2005. The Rules Governing Detention of the ICTY apply *mutatis mutandis* to individuals subject to the jurisdiction of the Mechanism.
[46] Rules 58, 61 of the Rules Governing Detention.

12. In light of the above and considering that the requirements for provisional release are cumulative in nature, there is no need to assess whether the other requirements under Rule 68(I) of the Rules are met in this case.

## V. DISPOSITION

13. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Motion.

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

Done this 23rd day of February 2016,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding Judge

**[Seal of the Mechanism]**