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UNITED NATIONS

	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:	8 December 2005
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **8 December 2005**

PROSECUTOR

v.

PAVLE STRUGAR

DECISION ON "DEFENCE MOTION: REQUEST FOR PROVIDING MEDICAL AID IN THE REPUBLIC OF MONTENEGRO IN DETENTION CONDITIONS"

The Office of the Prosecutor:

Ms. Carla del Ponte
Ms. Helen Brady

Counsel for Pavle Strugar:

Mr. Goran Rodić
Mr. Vladimir Petrović

FH

THE APPEALS CHAMBER of the International Criminal 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" and "Appeals Chamber", respectively);

BEING SEIZED OF the "Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions", filed publicly by Pavle Strugar ("Appellant") on 14 November 2005 ("Defence Motion");

NOTING the "Addendum [to the] Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions", filed publicly by the Appellant on 16 November 2005 ("Addendum to the Defence Motion");

NOTING the "Prosecution Response to Defence Motion for Provisional Release", filed publicly by the Office of the Prosecutor ("Prosecution") on 21 November 2005 ("Prosecution Response");

NOTING the "Defence Reply: Prosecution Response to Defence Motion for Provisional Release", filed publicly by the Appellant on 23 November 2005 ("Defence Reply");

NOTING the "Prosecution Request to File a Further Response, and the Further Response", filed confidentially by the Prosecution on 28 November 2005 ("Prosecution Further Response");[1]

NOTING the "Defence Further Reply: Prosecution Request to File a Further Response & the Further Response", filed publicly by the Appellant on 1 December 2005 ("Defence Further Reply");

CONSIDERING that the Appellant submits that both Dr. Paulus Falke, the medical officer of the United Nations Detention Unit ("UNDU"), and Dr. Zvonko Carević, orthopaedic surgeon at the Clinical Center of Belgrade, determined that the Appellant is in need of surgery for the purpose of a total hip prosthesis implantation;[2]

CONSIDERING that the Appellant argues, *inter alia*, that it is not possible in the UNDU to undertake the procedure which has been indicated by Dr. Carević as being necessary for a successful rehabilitation after the surgery, *i.e.*

(i) two weeks of post-operative rehabilitation in hospitalized conditions,

(ii) four weeks of rehabilitation in a specialized rehabilitation center, and

[1] The public redacted version of this request was filed on 29 November 2005.
[2] Defence Motion, paras 12-13.

(iii) physical rehabilitation of an ambulant type during four months after the surgery;[3]

CONSIDERING that the Appellant submits that it is necessary for his successful surgery and rehabilitation that the surgery be undertaken in the Clinical Center in Podgorica/Montenegro and the rehabilitation in the specialized rehabilitation center "Dr. Simo Milošević" in Igalo/Montenegro;[4]

CONSIDERING that the Appellant suggests that the surgery in Montenegro be done in detention conditions, and that the Government of Montenegro has provided guarantees that it will secure the implementation of detention conditions, assume responsibility for the personal security and well-being of the Appellant, take over the Appellant and later return him to Schiphol airport, bear all costs of transport and security, regularly report to the Appeals Chamber in relation to the prescribed conditions and abide by all other present and future conditions which the Appeals Chamber deems necessary;[5]

CONSIDERING that the Appellant suggests that Ministers of the Government of Montenegro be heard in an oral hearing in relation to the validity of the guarantees given;

CONSIDERING that on the basis of his submissions, the Appellant requests in the Defence Motion that the Appeals Chamber

(i) allows the Appellant to receive surgery placement of a total hip prosthesis in the Clinical Center in Podgorica, Montenegro, in detention conditions,

(ii) allows the transfer and stay of the Appellant in detention in Montenegro [in the aforementioned rehabilitation center "Dr. Simo Milošević"] during four months, for the purpose of receiving the necessary medical aid,

(iii) allows the transfer and stay of the Appellant in detention in Montenegro under the conditions envisaged and prescribed by the Resolution of the Government of Montenegro reached on 3 November 2005,[6] and

(iv) schedules an oral hearing on this matter;

[3] Defence Motion, para. 20.
[4] Defence Motion, para. 22.
[5] Defence Motion, para. 25 (with annexes).
[6] As attached to the Defence Motion.

CONSIDERING ALSO that in the Addendum to the Defence Motion, the Appellant states that he requests in the Defence Motion that he "be *provisionally released* for the purpose of undergoing surgery and post-operative rehabilitation in the territory of the Republic of Montenegro";[7]

CONSIDERING that the Prosecution argues in the Prosecution Response that it does not oppose a request for provisional release of the Appellant to undergo hip-replacement surgery and to receive post-operative treatment in Montenegro for a period of approximately four months, with a view to the guarantees offered by the Republic of Montenegro and with respect to the special humanitarian aspects pertaining to the Appellant's medical condition; but that the Prosecution opposes the request of the Appellant to hold an oral hearing on this issue;[8]

CONSIDERING that the Appellant submits in the Defence Reply that his request for medical treatment implies that time of this treatment is to be credited as time spent in custody, irrespective of the fact where the treatment is performed;[9]

CONSIDERING that the Prosecution argues in the Prosecution Further Response[10] that it is the Prosecution's position that the Appellant is seeking provisional release, that convicted persons are not considered to be serving their sentence while on provisional release, a premise which is not altered by the conditions imposed, and that the Prosecution would not agree that time spent on provisional release receiving medical treatment should be counted towards Strugar's sentence;[11]

CONSIDERING that the Appellant explicitly submits in the Defence Further Reply that he is not asking for provisional release[12] and that therefore it is unnecessary to hear Ministers of the Republic of Montenegro in an oral hearing in relation to the validity of the guarantees given;

CONSIDERING that the fact that the Appellant needs a total hip prosthesis implantation is undisputed;

CONSIDERING that pursuant to the established jurisprudence of the Tribunal, provisional release may be granted to an accused who may remain temporarily outside of the host country for the

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[7] Addendum to the Defence Motion, para. 1 (emphasis added).
[8] Prosecution Response, paras 1-3.
[9] Defence Reply, para. 3.
[10] The Prosecution is seeking leave to file the Prosecution Further Response, as (i) the Appellant raises for the first time in the Defence Reply the argument that any time spent on provisional release receiving medical treatment should be counted towards his sentence, and as (ii) the Appellant fails to accurately represent the Prosecution's position on this issue, Prosecution Further Response, para. 2.
[11] Prosecution Further Response, para. 4.
[12] Defence Further Reply, para. 5.

purpose of receiving medical treatment, provided that the prerequisites of Rule 65 of the Rules are fulfilled;[13]

CONSIDERING that the Appellant did not demonstrate that the preparation for, and the placement of a total hip prosthesis and the ensuing rehabilitation treatment cannot be adequately carried out in health institutions within The Netherlands;

FOR THE FOREGOING REASONS,

DISMISSES the Defence Motion in its entirety.

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

Dated this eighth day of December 2005,
At The Hague,
The Netherlands.

Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

[13] *Cf. Prosecutor v. Ojdanić*, IT-99-37-PT, Confidential Order on General Ojdanić's Urgent Motion for Modification of Conditions of Provisional Release, 30 June 2005; *Prosecutor v. Kovačević*, IT-01-42/2-I, Decision on Provisional Release, 2 June 2004.