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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-04-83-A
Date: 11 May 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision of: 11 May 2009

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**DECISION ON MOTION OF RASIM DELIĆ FOR
PROVISIONAL RELEASE**

The Office of the Prosecutor:

Ms. Michelle Jarvis

Counsel for Rasim Delić:

Ms. Vasvija Vidović
Mr. John Jones

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1. 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 (“Appeals Chamber” and “International Tribunal”, respectively), is seized of a motion requesting provisional release pursuant to Rule 65 (I) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), filed confidentially by Rasim Delić (“Delić”) on 3 April 2009.¹ The Prosecution filed confidentially its response on 14 April 2009, opposing the Motion.² Delić filed his reply on 17 April 2009.³

I. BACKGROUND

2. Delić voluntarily surrendered to the custody of the International Tribunal on 28 February 2005, immediately after being made aware that he had been indicted by the International Tribunal.⁴ On 15 September 2008, Trial Chamber I (“Trial Chamber”) found him guilty, pursuant to Articles 7(3) and 3 of the Statute of the International Tribunal, for the crime of cruel treatment committed by his subordinates against prisoners of the Army of the Republika Srpska detained in Livade/Kamenica Camp in July-August 1995.⁵ The Trial Chamber acquitted Delić on all other counts of the Indictment.⁶ As a result, Delić was sentenced to a term of three years’ imprisonment, subject to credit for the 488 days spent in detention in accordance with Rule 101(C) of the Rules.⁷ The Appeals Chamber is currently seized of two appeals against the Trial Judgement; one filed by Delić against his conviction,⁸ the other filed by the Prosecution against the sentence.⁹

¹ Appellant’s Motion for Provisional Release (Confidential), 3 April 2009 (“Motion”).

² Prosecution Response to Delić’s Motion for Provisional Release (Confidential), 9 April 2009 (“Response”). The Response is dated 9 April 2009 but it was filed on 14 April 2009. However, the Appeals Chamber notes that it was filed on time pursuant to the Rules and Practice Direction.

³ Appellant’s Reply to “Prosecution Response to Delić’s Motion for Provisional Release” (Confidential), 17 April 2009 (“Reply”).

⁴ *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Judgement, 15 September 2008 (“Trial Judgement”), para. 596.

⁵ Trial Judgement, para. 573.

⁶ Trial Judgement, paras 557, 596.

⁷ Trial Judgement, para. 596.

⁸ Trial Judgement, para. 597. The operative indictment in this case is that of 14 July 2006 (“Indictment”). See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on the Prosecution’s Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006; see also Trial Judgement, Annex B, para. 4.

⁹ Defence Notice of Appeal, 14 October 2008; Defence Appellant’s Brief (Confidential), 26 December 2008 (Public Redacted Version filed on 7 January 2009); Prosecution Response Brief (Confidential), 9 February 2009 (Public Redacted Version filed on 17 February 2009); Appellant’s Reply Brief (Confidential), 24 February 2009 (Public Redacted Version filed on 27 February 2009).

⁹ Prosecution’s Notice of Appeal, 15 October 2008; Prosecution’s Appeal Brief, 14 November 2008; Defence Respondent’s Brief, 11 December 2008; Prosecution’s Reply Brief, 22 December 2008.

3. In his Motion, Delić seeks provisional release for the remainder of the appeal proceedings.¹⁰ He submits that he fully meets the requirements of Rule 65(I) of the Rules in that: (i) if released, he will appear at the hearing of the appeal and/or the judgement on appeal as determined by the Appeals Chamber;¹¹ (ii) he will not pose a danger to any victim, witness or other person if granted provisional release on appeal;¹² (iii) “special circumstances” exist warranting such release in that he will have served two-thirds of his sentence as of 14 May 2009.¹³ Delić has submitted a guarantee from the Government of the Federation of Bosnia and Herzegovina (“BiH”) undertaking to ensure that Delić will return to the International Tribunal’s custody at a date set by the Appeals Chamber.¹⁴ In addition, the Appeals Chamber also received a statement from the Dutch Ministry of Foreign Affairs that the Kingdom of the Netherlands does not have any objection to Delić’s provisional release.¹⁵ Finally, Delić requests the Appeals Chamber to relax the condition of reporting once a week to the local police as imposed by the Trial Chamber when granting his previous requests for provisional release during the pre-trial and trial proceedings.¹⁶

4. The Prosecution does not contest Delić’s assertion that he will pose no danger to any victim, witness or other person. Nevertheless, it opposes the Motion on the grounds that Delić: (i) fails to demonstrate that “special circumstances” exist warranting post-conviction provisional release; and (ii) violated the conditions of his last provisional release two days after arriving in Sarajevo.¹⁷ Should the Appeals Chamber grant provisional release, the Prosecution argues it should impose the same condition of house arrest imposed after Delić breached the conditions of his last provisional release.¹⁸ The Prosecution further asserts that Delić’s submission of duly returning to custody following the hearings held under Rule 4 of the Rules in Sarajevo does not demonstrate his compliance with the International Tribunal’s orders, because he was in custody not on provisional release.¹⁹ Delić replies that his breach of condition has been suitably dealt with and is of no relevance with regard to his present Motion.²⁰

¹⁰ Motion, paras 2, 41.

¹¹ Motion, para. 23.

¹² Motion, para. 29.

¹³ Motion, para. 34. *See also* para. 19.

¹⁴ Motion, para. 27 and Confidential Annex A.

¹⁵ Correspondence from Host Country Re: Provisional release Mr. Rasim Delić, 9 April 2009.

¹⁶ Motion, paras 39-40.

¹⁷ Response, para. 1.

¹⁸ Response, para. 2.

¹⁹ Response, para. 9.

²⁰ Reply, paras 8-9. Delić sought leave to reply which the Appeals Chamber notes it was not necessary, because the issue of the breach of condition was not a new one but rather an argument of the Prosecution made in response to the Motion (*see* Reply, paras 1-2).

II. APPLICABLE LAW

5. Pursuant to Rule 65(I) of the Rules, a convicted person may bring an application seeking provisional release pending an appeal. By virtue of Rule 107 of the Rules, the whole of Rule 65 of the Rules applies *mutatis mutandis* to applications brought before the Appeals Chamber.²¹ Rule 65(I) of the Rules thus provides that the Appeals Chamber may grant provisional release 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. These requirements must be considered cumulatively.²² 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”.²³ Finally, the discretionary assessments of the requirements under Rule 65 of the Rules are made on a case-by-case basis.²⁴ The Appeals Chamber will consider Delić’s submissions in connection with each of these criteria below.

III. PRELIMINARY ISSUE

6. The Appeals Chamber notes that Delić’s Motion and Reply and the Prosecution Response were filed confidentially. However, the parties failed to justify the confidential designation of their filings. Hence, the Appeals Chamber considers that the status of the present decision is public since no information of evidence of a confidential nature is referred to therein.²⁵

²¹ See *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release on the Grounds of Compassion (Confidential), 2 April 2009 (“*Milutinović Decision*”), para. 4; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Provisional Release (Confidential), 18 December 2008 (“*Tarčulovski Decision*”), para. 3; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on the Renewed Defence Request Seeking Provisional Release on Compassionate Grounds (Public Redacted Version), 15 April 2008 (“*Strugar Decision of 15 April 2008*”), para. 5; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion (Public Redacted Version), 2 April 2008 (“*Strugar Decision of 2 April 2008*”), para. 3.

²² *Tarčulovski Decision*, para. 3; *Strugar Decision of 15 April 2008*, para. 5; *Strugar Decision of 2 April 2008*, para. 3. See also *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 (“*Hadžihasanović Decision*”), para. 8; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Radoslav Brđanin’s Motion for Provisional Release, 23 February 2007, para. 5.

²³ *Milutinović Decision*, para. 4; *Tarčulovski Decision*, para. 3; *Strugar Decision of 15 April 2008*, para. 5; *Strugar Decision of 2 April 2008*, para. 3.

²⁴ *Milutinović Decision*, para. 4; *Strugar Decision of 2 April 2008*, para. 11, referring to *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, Praljak, Petković and Čorić, 11 March 2008, para. 7.

²⁵ The Appeals Chamber further notes that both past Trial Chamber provisional release decisions of 6 May 2005 and 23 November 2007, respectively were issued publicly. See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision

IV. DISCUSSION

1. Whether 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

7. Delić contends that he has always shown respect for the International Tribunal and that there are no reasons to suggest otherwise.²⁶ He submits that, as 14 of May 2009, he will have served 730 days out of the complete sentence of 1095 days imposed on him, that the remainder of his sentence is “not considerable”, and thus “should not be considered as a factor creating a strong incentive to flee”.²⁷ Delić “expressly undertakes to comply with any and all conditions which could be imposed by the Appeals Chamber and to be present for the hearing of the appeal and/or when the Appeals Chamber will render its Judgement”.²⁸ The Prosecution responds that the assessment of Delić’s flight risk must take into account both his history and the Prosecution’s appeal against sentence.²⁹ Delić replies that it was never contended that the breach of condition during his previous provisional release created a risk that he would abscond.³⁰

8. The Appeals Chamber recalls that Delić has been convicted of a serious crime and sentenced to three years of imprisonment.³¹ Given that the Prosecution appealed the sentence, this might give Delić an incentive to flee. However, the Appeals Chamber is of the view that three facts militate against that possibility. First, Delić voluntarily surrendered to the custody of the International Tribunal immediately after he was made aware of the Indictment against him,³² and voluntarily cooperated with the Prosecution prior to being indicted.³³ Second, he has a record of returning to custody after provisional release and, with one exception mentioned below, complying with other conditions set out by the Trial Chamber for that release.³⁴ Third, while Delić violated a condition of a previous provisional release (by discussing his case with someone other than his counsel) and as a result was placed under house arrest for the duration of the provisional release

on Defence Request for Provisional Release, 6 May 2005; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Defence Motion for Provisional Release, 23 November 2007 (“*Delić Decision of 23 November 2007*”).

²⁶ Motion, para. 25.

²⁷ Motion, para. 24, referring to *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, para. 16.

²⁸ Motion, para. 26.

²⁹ Response, paras 1, 8, 10.

³⁰ Reply, para. 7.

³¹ Trial Judgement, para. 597.

³² Trial Judgement, para. 573.

³³ *Delić Decision of 23 November 2007*, para. 7.

³⁴ The Appeals Chamber notes that the Trial Chamber granted Delić provisional release, pending the commencement of his trial, from 6 May 2005 to 25 June 2007 (see Trial Judgement, Annex B, para. 8).

period, there was no indication that he posed an increased risk of flight.³⁵ The Appeals Chamber thus finds that these facts suggest that, if granted provisional release, Delić would appear at the hearing of the appeal when required to do so.

9. In addition, the Appeals Chamber takes into account the Government of BiH's written guarantee that it will ensure Delić's return to the International Tribunal's custody at a date determined by the Appeals Chamber.

10. In light of the foregoing, the Appeals Chamber is satisfied that Delić does not pose a flight risk and therefore meets the requirements of Rule 65(I)(i) of the Rules.

2. Whether the appellant, if released, will not pose a danger to any victim, witness or other person

11. Delić submits that he will not pose a danger to any victim, witness or other person if granted provisional release and there is no basis for any such suspicion,³⁶ an assertion not contested by the Prosecution. He further contends that he has been granted provisional release during the pre-trial and trial proceedings and that, on each of those occasions, the Trial Chamber considered that he did not pose any danger to anyone.³⁷

12. In the present case, the Appeals Chamber is satisfied that Delić's past periods of provisional release were indeed without incident with regard to interfering with witnesses. Concerning the fact that he breached a condition of his last provisional release, the Appeals Chamber further notes that there was no indication that he contacted any witness³⁸, nor that he endangered any victim or other person.

13. In light of the foregoing, the Appeals Chamber is satisfied that, if released, Delić will not pose a danger to victims, witnesses or other persons as required by Rule 65(I)(ii) of the Rules.

3. Whether "special circumstances" exist warranting such release

14. Delić argues that, having served two-thirds of his sentence as of 14 May 2009, he would be eligible for early release if an appeal from the Prosecution were not pending.³⁹ He submits that he meets all the requirements for such early release based on his conduct while in detention⁴⁰ and claims that the fact he would have served two-third of his sentence as of this date amounts to

³⁵ *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on Prosecution Motion to Arrest the Accused Rasim Delić, 19 December 2007 ("*Delić Decision of 19 December 2007*"), pp. 5-6.

³⁶ Motion, paras 29-30.

³⁷ Motion, para. 31.

³⁸ See *Delić Decision of 19 December 2007*, p. 5.

³⁹ Motion, paras 32-33.

“special circumstances warranting such release” within the meaning of the Rule 65(I)(iii) of the Rules.⁴¹ He further posits that, if he is not granted provisional release, there would be a “serious risk” that he would spend more time in custody than required in the event his appeal is successful or the Prosecution appeal is dismissed.⁴² Finally, he avers that the present case “is in all relevant respects indistinguishable” from the *Hadžihasanović* case.⁴³

15. The Prosecution responds that, unlike *Hadžihasanović*, Delić demonstrated “unwillingness to abide” by the conditions of his last provisional release, which does “give rise to concern” and should disqualify him from the extraordinary circumstance of post-conviction provisional release.⁴⁴ It further asserts that the Appeals Chamber cannot rely on Delić’s promise that he will comply with any other conditions it might impose.⁴⁵

16. Delić replies that he informed Dr. Haris Silajdžić that he was prohibited from discussing the case but that the latter “could not refrain from making polite inquiries relating to the trial generally”.⁴⁶ Delić reiterates that he was punished for this breach but emphasizes that the provisional release was not terminated as requested by the Prosecution.⁴⁷ Finally, Delić contends that this incident has been suitably dealt with and is of no relevance with regard to the examination of the present Motion.⁴⁸

17. The Appeals Chamber notes that a convicted person who has been detained for a period of time amounting to two-thirds of a sentence of imprisonment may be eligible for early release where there is no appeal.⁴⁹ Where there is an appeal pending, the Appeals Chamber recalls that detention for a substantial period of time may, depending on the circumstances of the case, nonetheless amount to a special circumstance within the meaning of Rule 65(I)(iii) of the Rules.⁵⁰ This determination must be made on a case-by-case basis.⁵¹

⁴⁰ Motion, para. 33.

⁴¹ Motion, para. 34, quoting *Prosecutor v. Miroslav Kvočka*, Case No. IT-98-30/1-A, Decision on the Request for Provisional Release, 17 December 2003 (“*Kvočka* Decision”), p. 3 (internal quotations and emphasis omitted).

⁴² Motion, para. 35. See also Reply, para. 8.

⁴³ Motion, para. 37, referring to *Hadžihasanović* Decision, para. 13.

⁴⁴ Response, paras 6-8 (internal quotations omitted).

⁴⁵ Response, para. 8.

⁴⁶ Reply, para. 7.

⁴⁷ Reply, paras 6-7.

⁴⁸ Reply, para. 8.

⁴⁹ *Hadžihasanović* Decision, para. 12, fn. 32.

⁵⁰ *Prosecutor v. Astrit Haraquija and Bajrush Morina*, Case No. IT-04-88-R77.4-A, Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009 (“*Morina* Decision”), para. 10; *Hadžihasanović* Decision, para. 13; *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; *Kvočka* Decision, p. 3.

⁵¹ *Hadžihasanović* Decision, para. 13.

18. In light of the fact that an appeal date has not yet been set, that Delić's past periods of provisional release, with one exception, have not given rise to any concern, and taking into account his good behaviour whilst in detention and the fact that, by 15 May 2009, he will have served two-thirds of his sentence,⁵² the Appeals Chamber finds that special circumstances under Rule 65(I)(iii) of the Rules have been established.

19. In light of the foregoing, the Appeals Chamber finds that Delić has satisfied all the conditions necessary for the granting of provisional release under Rule 65(I) of the Rules.

V. CONDITIONS OF PROVISIONAL RELEASE

20. The Appeals Chamber turns to examine the Parties' submissions concerning the conditions of Delić's provisional release. With regard to the Prosecution's request that the house arrest imposed on Delić after he breached the conditions of his last provisional release be imposed in the present case,⁵³ the Appeals Chamber finds that the breach occurred during a specific context, has been sanctioned accordingly, and that there is therefore no reason to impose house arrest in the present circumstances. However, the Appeals Chamber recalls that any subsequent breach of the conditions of provisional release could justify the termination thereof. With regard to Delić's request that he should only be ordered to report once a month to the local police in Visoko instead of every week as previously imposed on him,⁵⁴ the Appeals Chamber does not consider that the reasons invoked by Delić, namely his eligibility for early release and the likely duration of the period of provisional release, warrant a variation of the conditions previously imposed on him.

VI. DISPOSITION

21. For the foregoing reasons and pursuant to Rule 65(I) of the Rules, the Appeals Chamber **GRANTS** the Motion in part, and

ORDERS that Delić be provisionally released pending the hearing of his appeal under the following terms and conditions:

- a. As soon as practicable, Delić shall be transported to Schiphol airport in the Netherlands by the Dutch authorities;

⁵² The Office of Legal Aid and Detention Matters confirmed that Delić would have had served two-thirds of his sentence by 15 May 2009.

⁵³ Response, para. 2.

⁵⁴ Motion, paras 39-40.

- b. At Schiphol airport, Delić shall be provisionally released into the custody of a designated official of the Government of BiH, who shall accompany Delić for the remainder of his travel to BiH and his place of residence therein;
- c. On his return flight, Delić shall be accompanied from his place of residence in BiH by a designated official of the BiH Government, who shall deliver Delić to the custody of the Dutch authorities at Schiphol airport; the Dutch authorities shall then transport Delić back to the United Nations Detention Unit ("UNDU") in The Hague; and
- d. During the period of his provisional release, Delić shall abide by the following conditions, and the authorities of BiH, including the local police, shall ensure compliance with such conditions. Delić shall
 - i. provide (a) the address at which he will be staying in Sarajevo and (b) the address at which he will be residing in Visoko, to the BiH Ministry of Justice ("Ministry of Justice") and the Registry of the International Tribunal before leaving the UNDU in The Hague;
 - ii. remain within the confines of the municipalities of Sarajevo and Visoko;
 - iii. surrender his passport to the Ministry of Justice;
 - iv. report weekly to the police in Visoko at the local police station to be designated by the Ministry of Justice;
 - v. consent to having the Ministry of Justice check with the local police about his presence and to the making of occasional, unannounced visits upon Delić by the Ministry of Justice or by a person designated by the Registry of the International Tribunal;
 - vi. not have any contact whatsoever or in any way interfere with any victim or witness or otherwise interfere in any way with the proceedings or the administration of justice;
 - vii. not discuss his case with anyone, including the media, other than with his counsel;

- viii. continue to cooperate with the International Tribunal;
- ix. comply strictly with any requirements of the authorities of the BiH necessary to enable them to comply with their obligations under this Decision and their guarantees; and
- x. comply strictly with any further order of the Appeals Chamber varying the terms of or terminating his provisional release.

REQUIRES the Government of BiH to assume responsibility as follows:

- a. by designating an official of the BiH Government into whose custody Delić shall be provisionally released and who shall accompany Delić from Schiphol airport to his place of residence in Visoko, and notifying, as soon as practicable, the Appeals Chamber and the Registry of the International Tribunal of the name of the designated official;
- b. for the personal security and safety of Delić while on provisional release;
- c. for all expenses concerning transport of Delić from Schiphol airport to his residence in Visoko and back;
- d. for all expenses concerning accommodation and security of Delić while on provisional release;
- e. at the request of the Appeals Chamber or the Parties, to facilitate all means of cooperation and communication between and among the Appeals Chamber and the Parties and to ensure the confidentiality of any such communication;
- f. to submit a written report to the Appeals Chamber every week as to the compliance of Delić with the terms of this Decision;
- g. to arrest and detain Delić immediately should he breach any of the conditions of this Decision; and
- h. to report immediately to the Appeals Chamber any breach of the conditions set out above.

INSTRUCTS the Registry of the International Tribunal to consult with the Dutch Ministry of Justice as to the practicable arrangements for the release of Delić and to continue to detain him at the UNDU in The Hague until such time as the Appeals Chamber and the Registry have been notified of the name of the designated official of the BiH Government into whose custody Delić is to be provisionally released.

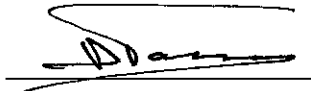
REQUESTS the authorities of all States through whose territory Delić will travel,

- a. to hold Delić in custody for any time that he will spend in transit at the airport; and
- b. to arrest and detain Delić pending his return to the UNDU in The Hague, should he attempt to escape.

ORDERS that Delić shall be immediately detained should he breach any of the foregoing terms and conditions of his provisional release; and

DIRECTS the Registry to lift the confidentiality of the Motion, Response and Reply.

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



Judge Andrézia Vaz
Presiding Judge

Dated this 11th day of May 2009
At The Hague
The Netherlands

[Seal of the International Tribunal]