



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-05-88-ES.1

Date: 7 October 2010

Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Christoph Flügge  
Judge Burton Hall

**Registrar:** Mr. John Hocking

**Decision of:** 7 October 2010

**PROSECUTOR**

v.

**LJUBOMIR BOROVCANIN**

**CONFIDENTIAL**

**DECISION ON BOROVCANIN'S REQUEST FOR CUSTODIAL VISIT**

**Office of the Prosecutor**

Mr. Peter Kremer

**Counsel for the Accused**

Mr. Christopher Gosnell and Ms. Tatjana Čmerić

**THIS TRIAL 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 (“Tribunal”) is seised of the “Borovčanin Request for Custodial Visit”, filed on 16 September 2010 (“Motion”), and hereby renders its decision thereon.

## I. PROCEDURAL BACKGROUND

1. On 10 June 2010, Borovčanin (“Applicant”) was convicted of crimes against humanity and a violation of the laws or customs of war pursuant to Articles 7(1) and 7(3) of the Statute of the Tribunal (“Statute”).<sup>1</sup> He was sentenced to 17 years of imprisonment less time served in pre-trial custody.<sup>2</sup>

2. Neither the Applicant nor the Prosecution are appealing the disposition of the Trial Chamber.<sup>3</sup>

3. The Applicant confidentially filed the Motion before the President on 16 September 2010. The President confidentially issued an “Order Assigning Application to Trial Chamber” on 20 September 2010, wherein he assigned Trial Chamber II for the purposes of disposing of the Motion. On 23 September 2010, “Prosecution’s Response to Borovčanin’s Request for Custodial Visit,” (“Response”) was filed confidentially. On 27 September 2010, the Applicant’s “Reply to Prosecution Response to Borovčanin’s Request for Custodial Visit” (“Reply”) was filed confidentially.

## II. SUBMISSIONS

### A. Motion

4. The Applicant submitted that his father’s health, combined with the unlikelihood of being granted provisional release once he is transferred from the United Nations Detention Unit (“UNDU”) to the State where he will serve his sentence, constitute compelling humanitarian reasons for his release prior to discharge from the Tribunal’s custody.<sup>4</sup> He is seeking custodial release for a period of 10 days.<sup>5</sup>

<sup>1</sup> Popović et al Judgement, p. 829.

<sup>2</sup> Popović et al Judgement, p. 829. The Trial Chamber determined that the Applicant had served 1,897 days in pre-trial custody.

<sup>3</sup> Order Assigning Application to Trial Chamber, confidential, 20 September 2010.

<sup>4</sup> Motion, para. 1.

<sup>5</sup> Motion, para. 1.

5. The Applicant submitted that unless a custodial visit is granted, he will likely never see his father again.<sup>6</sup> A medical certificate annexed to the Motion states that the Applicant's father was treated at the Ward for Internal issues of the "Sveti Vračevi" General Hospital in Bijelina on 3 September 2010 and that his health was found to be unsatisfactory.<sup>7</sup> A further examination is planned once his condition allows for more complex diagnostic procedures.<sup>8</sup> The Applicant submitted that his father's overall state of poor health has prevented him from visiting the UNDU since 2005 and that it is likely that it would prevent him from visiting him while he is serving the remainder of his sentence.<sup>9</sup>

6. The Applicant submitted that he has no interest in threatening or interfering with any victim, witness or other person because the judgement against him is final, and because there is no history of any such allegations during his prior two provisional releases.<sup>10</sup>

7. The Applicant further submitted that he is not a flight risk. He argued that since he has been acquitted of having directly committed the crimes with which he was charged, and instead convicted through aiding and abetting and superior responsibility, that there has been a material change insofar as his sentence is far lower than contemplated by the Trial Chamber when it last considered provisional release.<sup>11</sup> Furthermore, the Applicant submitted that assuming he is granted early release, he has just less than six years to serve of his sentence.<sup>12</sup> He asserted that he has no motivation to jeopardize this prospect and, on the contrary, a strong incentive to serve his sentence.<sup>13</sup> The Applicant submitted that his decision not to appeal his conviction or sentence further demonstrates his willingness to serve his sentence and be rehabilitated.<sup>14</sup>

8. The Applicant submitted that strict custodial conditions, as set out in his Guarantee and the Guarantees of the authorities of the Republika Srpska, ensure that he will return to the custody of the Tribunal if he is granted release. He noted that the same guarantees were properly executed during his prior custodial releases, and that he abided by the terms without incident.<sup>15</sup>

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<sup>6</sup> Motion, para. 12.

<sup>7</sup> Motion, Annex IV, p. 2.

<sup>8</sup> Motion, Annex IV, p. 2.

<sup>9</sup> Motion, para. 12.

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

<sup>11</sup> Motion, para. 7.

<sup>12</sup> Motion, para. 5.

<sup>13</sup> Motion, paras. 5-6.

<sup>14</sup> Motion, para 8.

<sup>15</sup> Motion, para. 9, Annexes I-III.

**B. Response**

9. The Prosecution submitted that to justify special circumstances pursuant to Rule 65(I)(iii) of the Rules of Procedure and Evidence (“Rules”), an acute justification is necessary such as the imminent death of a family member<sup>16</sup> and noted that nothing suggests that doctors expect the health of the Applicant’s father to deteriorate immediately.<sup>17</sup> The Prosecution noted that the health of the Applicant’s father appears to be better than it was in March 2008 when the Applicant was last granted provisional release.<sup>18</sup> The Prosecution argued that the Applicant is speculating that he will likely never see his father again, that separation from one’s family is a consequence of a criminal conviction that applies to all convicted persons, and that to permit a convicted person one final visit to family before transfer, is not a special circumstance justifying temporary release.<sup>19</sup>

10. The Prosecution submitted that even if the Applicant has established that special circumstances exist, he failed to establish the additional two requirements of Rule 65(I).<sup>20</sup> The Prosecution argued that because his conviction and sentence are final, the Applicant has an increased incentive to flee<sup>21</sup> and that the time remaining until the completion of his sentence, as opposed to the time remaining until he is eligible for early release, should be measured against the Applicant’s incentive to flee.<sup>22</sup> The Prosecution noted that the Applicant was a fugitive for two and a half years before his arrest, and that this fact has caused the Trial Chamber to conclude in the past that the Applicant poses a serious flight risk.<sup>23</sup>

11. The Prosecution further argued that the Applicant’s temporary release into the custody of the Ministry of the Interior of Republika Srpska has the potential to disrupt ongoing criminal proceedings in the State Court of Bosnia and Herzegovina against the Applicant’s subordinates.<sup>24</sup> The Prosecution submitted that while there is no suggestion that the Applicant would personally interfere with victims, his presence in the region could have negative consequences on the willingness of witnesses to participate in the proceedings given the sensitivity and difficulties faced within the local communities.<sup>25</sup>

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<sup>16</sup> Response, paras. 1, 7.

<sup>17</sup> Response, para. 7.

<sup>18</sup> Response, para. 8.

<sup>19</sup> Response, para. 9.

<sup>20</sup> Response, para. 2.

<sup>21</sup> Response, paras. 2, 14.

<sup>22</sup> Response, para. 12.

<sup>23</sup> Response, para. 13.

<sup>24</sup> Response, para. 2.

<sup>25</sup> Response, paras. 14-15.

12. Finally, the Prosecution submitted that the ten-day period requested is excessive and that any release should be restricted to the absolute minimum necessary.<sup>26</sup>

### C. Reply

13. The Applicant clarified that his father's condition is not critical at this time; rather, his father's state of health is such that there is a substantial likelihood that he will be in custody when his father dies.<sup>27</sup> In response to the Prosecution's argument that his submission that he may never see his father again is speculative, the Applicant submitted that while requests for provisional release by a person in the Tribunal's custody require a showing of likely imminent death, the calculus must be extended over a longer period when the person is about to be transferred out of the Tribunal's custody and will, "for reasons arising from institutional arrangements that are beyond his control, be unable to request provisional release."<sup>28</sup> The Applicant submitted that this approach was adopted in the *Krajišnik* Decision.<sup>29</sup>

14. The Applicant submitted that the Prosecution's claim that his presence in the region could have negative consequences on the participation of witnesses in the State Court proceedings is vague and unsubstantiated.<sup>30</sup>

15. The Applicant submitted that while it is not a legal certainty, since most detainees have been released upon serving two-thirds of their sentences, he can hope for the same treatment, and therefore the duration of his sentence until the time he is eligible for early release should be considered in a flight risk analysis.<sup>31</sup>

16. The Applicant submitted that the reduced flight risk combined with the purpose of the visit justifies a custodial release of ten days.<sup>32</sup>

### D. Correspondence from the Host State

17. On 30 September 2010, Koen Sizoo, Head of the Host Nation Division of the Minister of Foreign Affairs for the Kingdom of the Netherlands, informed the Tribunal that the Netherlands has

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<sup>26</sup> Response, para. 10.

<sup>27</sup> Reply, para. 2. See: *The Prosecutor v Momčilo Krajišnik*, IT-00-39-ES, Decision on Krajišnik's Application for Custodial Visit, 17 June 2009 ("*Krajišnik* Decision").

<sup>28</sup> Reply, para. 3.

<sup>29</sup> Reply, para. 3.

<sup>30</sup> Reply, paras. 5-6.

<sup>31</sup> Reply, paras. 7-9.

<sup>32</sup> Reply, para. 10.

no objections to the provisional release of the Applicant and would provide transport from the UNDU to Schiphol Airport and vice versa.<sup>33</sup>

### III. APPLICABLE LAW

18. Rule 104 of the Rules of Procedure and Evidence (“Rules”) provides that: “All sentences of imprisonment shall be supervised by the Tribunal or a body designated by it.”

19. Accordingly, where a convicted person seeks provisional release while he is in the custody of the Tribunal awaiting transfer to the State where his sentence will be served pursuant to Rule 103(C), the authority to grant provisional release lies within the power of supervision provided for by Rule 104.<sup>34</sup>

20. In disposing of the Motion, the Chamber will follow the Trial Chamber that issued the *Krajišnik* Decision in being guided by the jurisprudence of the Appeals Chamber on the provisional release of persons at an earlier stage in the proceedings.<sup>35</sup>

21. The criteria set out in Rule 65(I), although not binding, may also serve to guide the Chamber in disposing of the Motion. Rule 65(I) permits the Appeals Chamber to grant provisional release to convicted persons in custody pending an appeal and is therefore not applicable to requests for provisional release by convicted persons whose judgements are final. Nonetheless, the criteria set out in Rule 65(I) have been of assistance to Chambers in determining requests for provisional release by convicted persons whose judgements are final.<sup>36</sup> The Chamber will be guided by the Rule 65(I) criteria, specifically, there must be no flight risk, no risk to victims, witnesses or other persons, and special circumstances must exist warranting release.

22. As regards the flight risk posed by a convicted person, the Appeals Chamber held in the *Limaj* Decision that there is an increased incentive to abscond once proceedings have been completed and the convicted person is awaiting transfer to a State in which his sentence will be served.<sup>37</sup>

23. The Appeals Chamber has found that special circumstances related to humane and compassionate considerations exist where there is an acute justification, such as the applicant’s

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<sup>33</sup> Guarantee of Host State, 4 October 2010.

<sup>34</sup> *Krajišnik* Decision, para 11.

<sup>35</sup> *Krajišnik* Decision, para. 11.

<sup>36</sup> See: *Prosecutor v 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* Decision”), paras 4-5, and *Krajišnik* Decision, paras. 12-14.

<sup>37</sup> *Limaj* Decision, para. 9.

medical need or a memorial service for a close family member.<sup>38</sup> The notion of acute justification is inextricably linked to the scope of special circumstances which could justify provisional release on compassionate grounds at the appellate stage.<sup>39</sup> Accordingly, justifications such as wanting to spend time with family have explicitly not been recognized as special circumstances under Rule 65(I)(iii).<sup>40</sup> However, in the *Krajišnik* Decision, the Chamber found that the medical condition and age of the Applicant's mother, in combination with other factors, established special circumstances warranting Rule 104 custodial release.

24. Finally, a Trial Chamber must also consider the proportionality of the duration of provisional release granted on humanitarian grounds with the period of time necessary to carry out the humanitarian purpose of the release.<sup>41</sup>

#### IV. DISCUSSION

25. The Chamber notes that the Applicant's sentence began to run on the day that it was pronounced pursuant to Rule 102(A) and that under Rule 103(C) he remains in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served. Under these circumstances, the Applicant's criminal responsibility and punishment have been finally determined and he is serving his sentence for the crimes he committed. It is in this context that the motion will be determined.

26. The Chamber finds the Prosecution's submission that the Applicant's presence in the region could have negative consequences on the participation of witnesses in the State Court proceedings is unsubstantiated by any evidence and largely speculative. There is no evidence that he has endangered victims, witnesses, or others during previous periods of provisional release. Moreover, the Trial Judgement in his case is final. Therefore, the Chamber finds that the Applicant does not pose a threat to victims, witnesses, or other persons.

27. Turning to the issue of special circumstances, the Chamber notes that the Applicant implies that the *Krajišnik* Decision stands for the principle that where it is possible that a convicted person

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<sup>38</sup> *Krajišnik* Decision, para 14; *Prosecutor v Pavle Strugar*, IT-01-42-A, Decision on the Defence Request Seeking Provisional Release on the Grounds of Compassion, confidential, 2 April 2008, para. 12. See also: *Prosecutor v Milutinović et al*, IT-05-87-A, Decision on Vladimir Lazarević's Second Motion for Temporary Provisional Release on the Grounds of Compassion, 21 May 2009, para 9; *Prosecutor v Šainović et al*, IT-05-87-A, Decision on Dragoljub Ojdanić's Motion for Temporary Provisional Release on Compassionate Grounds, 9 August 2010, para. 11.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Krajišnik* Decision, para. 16.

may never see a loved one again due to his transfer to a State to serve his sentence, although that loved one's death is not imminent, special circumstances exist warranting custodial release.<sup>42</sup>

28. The Chamber finds that due to the exceptional nature of requests for custodial release subsequent to a final conviction, each request must be determined on a case-by-case basis in relation to its specific facts. The very nature of such requests requires such an approach. It is not the case that every convicted person who can demonstrate a likelihood that he will never see a loved one again will be granted custodial release after a final conviction irrespective of other factors.

29. The Applicant further submitted that the circumstances giving rise to the Motion are akin to the circumstances in the *Krajišnik* Decision, and that accordingly, he has demonstrated special circumstances warranting custodial release. In the *Krajišnik* Decision, it was noted that Krajišnik submitted that his elderly mother was gravely ill and that he had not seen her for several years.<sup>43</sup> The Chamber considered the medical condition and age of the mother; that detainees are accommodated far away from the former Yugoslavia making it difficult for detainees to see their families; the low likelihood that the Applicant will be able to see his mother again upon transfer to an enforcement State; and, that Krajišnik had been in custody for a lengthy period of time awaiting trial, during trial, and pending appeal.<sup>44</sup> The *Krajišnik* Chamber acknowledged that the Prosecution's contention that the health situation of the mother was not acute was not entirely baseless. The Chamber accepts that the circumstances giving rise to that decision are similar to those proffered by the Applicant. However, each case must be assessed on its own specific facts.

30. Turning to the specific circumstances of the Applicant's request, the Chamber notes that the Applicant was granted two custodial visits in July 2007 and May 2008, respectively, on the basis of the critical medical status of his father.<sup>45</sup> In December 2008, a further request was denied in light of the fact that the father's health had improved.<sup>46</sup> The Chamber finds that there is nothing in the medical information provided to indicate that the Applicant's father's health is critical at this time.

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<sup>42</sup> Reply, para. 3.

<sup>43</sup> *Krajišnik* Decision, para. 3.

<sup>44</sup> *Krajišnik* Decision, para. 18.

<sup>45</sup> *Prosecutor v Popović et al*, IT-05-88-T, Decision on Borovčanin Motion for leave to withdraw Application for Provisional Release and to file Application for 'Custodial Visit to his Father for a Short Fixed Period based on Humanitarian Grounds,' confidential, 24 July 2007; *Prosecutor v Popović et al*, IT-05-88-T, Decision on Borovčanin's Motion for Custodial Visit, confidential, 9 April 2008; *Prosecutor v Popović et al*, IT-05-88-AR65.4, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's Motions for Provisional Release during the Break in the Proceedings, 15 May 2008; and, *Prosecutor v Popović et al*, IT-05-88-T, Further Decision on Borovčanin's Motion for Custodial Visit, 22 May 2008. The Applicant was granted custodial release on humanitarian grounds with strict custodial conditions due to the critical state of his father's health.

<sup>46</sup> *Prosecutor v Popović et al*, IT-05-88-T, Decision on Borovčanin's Motion for Custodial Visit, 17 December 2008, ("Borovčanin Decision December 2008"), para. 32. The Applicant's request for custodial release was denied on the



and notes the Applicant's submission to that effect.<sup>47</sup> The Chamber disagrees with the Applicant's submission that in applications for custodial release by convicted persons whose judgements are final, the calculus for measuring the imminence of death should be extended. Rather, the Chamber finds that the assessment of special circumstances in an application for custodial release while a convicted person is awaiting transfer to an enforcement State must be conducted more strictly in light of the fact that a convicted person is serving his sentence and is no longer presumed innocent.

31. The Chamber notes, as did the *Krajišnik* Chamber, that detainees at the UNDU are accommodated far away from the former Yugoslavia and as a consequence have limited opportunities for seeing their families. This scenario would not necessarily arise in a domestic jurisdiction. However, the Chamber is not satisfied that the combination of the Applicant's father's age and health condition constitute special circumstances warranting custodial release.

32. Regarding the Applicant's risk of flight, the Chamber acknowledges that the Applicant proposes to be released on very strict conditions and that the Applicant has complied with similar conditions during his prior custodial releases.

33. The Applicant and the Prosecution disagree as to the length of time that should be considered in a flight risk analysis, the total sentence or the time until the Applicant will be eligible for early release. The Chamber notes that early release is not a certainty. While the length of the sentence to be considered in a flight risk analysis is the entire sentence, the Chamber acknowledges that the Applicant has an incentive not to jeopardize his chances of being granted early release and takes that into account when analyzing the risk that he will abscond.

34. The Applicant submitted that his conviction and sentence constitute a change in circumstances which reduce his risk of flight since the last time it was considered by the Trial Chamber in December 2008.<sup>48</sup> In the *Borovčanin* December 2008 Decision on custodial release, the Trial Chamber found that the risk of flight outweighed the humanitarian circumstances put forward in part due to the seriousness of the crimes with which he was charged. The Chamber finds that despite being acquitted of the most serious crimes with which he was charged, the Applicant has been convicted of very serious crimes and sentenced to a significant period of incarceration. As the

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basis that the Trial Chamber was not persuaded that the humanitarian grounds advanced were compelling enough to outweigh his risk of flight due to the improvement in his father's health.

<sup>47</sup> *Infra*, paras. 4, 13.

<sup>48</sup> Motion, para. 7; *Borovčanin* Decision December 2008, para 28. The Trial Chamber noted that Borovčanin was detained and transferred to the Tribunal after two and a half years as a fugitive, that the charges were serious and included genocide, conspiracy to commit genocide, crimes against humanity and war crimes.

Appeals Chamber held in the *Limaj* Decision, there is an increased incentive to abscond once proceedings have been completed and a convict is awaiting transfer to an enforcement State.<sup>49</sup>

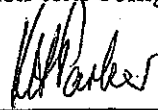
35. The Chamber further notes that the Applicant was at large for approximately two and a half years prior to his arrest. When balancing these circumstances, the Chamber is not satisfied that the Applicant, if released, will surrender to detention. It is not necessary to determine whether strict custodial conditions would be sufficient to alleviate such risk in light of the Chamber's finding that the Applicant has not established that special circumstances exist for his request.

## V. DISPOSITION

For these reasons, pursuant to Rule 104 of the Rules, the Trial Chamber hereby

- (1) **GRANTS** leave to the Applicant to reply to the Prosecution Response; and
- (2) **DENIES** the Motion;

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



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Judge Kevin Parker

Presiding Judge

Dated this 7<sup>th</sup> day of October 2010  
At The Hague  
The Netherlands

[Seal of the Tribunal]

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<sup>49</sup> *Limaj* Decision, para 9.