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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-00-39-ES

Date: 17 June 2009

Original: English

IN TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge O-Gon Kwon
Judge Melville Baird

Registrar: **Mr. John Hocking**

Decision of: **17 June 2009**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC

DECISION ON KRAJIŠNIK'S APPLICATION FOR CUSTODIAL VISIT

Office of the Prosecutor
Mr. Peter M. Kremer, QC

The Government of Republika Srpska

Momčilo Krajišnik, *pro se*

Counsel for Momčilo Krajišnik on JCE
Mr. Alan N. Dershowitz
Mr. Nathan Z. Dershowitz

The Kingdom of the Netherlands

Amicus Curiae
Mr. Colin Nicholls, QC

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 "Application for Custodial Visit on Compassionate Grounds", filed confidentially on 13 May 2009, and renders its decision thereon.

I. PROCEDURAL BACKGROUND

1. On 17 March 2009, the Appeals Chamber upheld some of the convictions of Momčilo Krajišnik ("The Applicant") and reduced his sentence to twenty years imprisonment, giving him credit for the time he spent in detention from 3 April 2001.[1] On 24 April 2009, the President confidentially issued the "Order designating state in which Momčilo Krajišnik is to serve his sentence". The Applicant confidentially filed the "Application for Custodial Visit on Compassionate Grounds" ("Motion") before the President on 13 May 2009. In the "Order Assigning Application to Chamber", issued confidentiality on 22 May 2009, the President assigned Trial Chamber II for the purposes of disposing of the Motion.

II. SUBMISSIONS

A. Motion

2. The Applicant submits that there are extraordinary reasons for the Motion.[2] He acknowledges that an Accused can only be granted provisional release at such a late stage when compelling personal circumstances exist, and only for the limited period required for dealing with the compelling personal circumstances.[3]

3. The Applicant submits that the compelling humanitarian reasons in support of his request are that he wishes to visit his elderly and gravely ill mother;[4] that he has not seen his mother for several years and this would most probably be the last opportunity for him to do so;[5] and that after

1 Appeals Judgement, para. 820.
2 Motion, para. 3.
3 *Ibid.*, para. 5.
4 *Ibid.*, para. 6.
5 *Ibid.*, para. 6.

being transferred to serve his sentence of imprisonment, it is unlikely that he will be eligible for release until his sentence is completed.[6]

4. The Applicant submits that since the case against him has ended, he will not pose a danger to any victim, witness or to another person, nor will he have contact with the media.[7]

5. The Applicant contends that he is not a flight risk because he is 64 years old and has already spent nine years in detention.[8] Furthermore, he has never been a fugitive and has behaved well in detention.[9] He submits that he could be subject to the stringent conditions that were imposed on Pandurević and Borovčanin in *Prosecutor v. Popović et al.*[10] The Applicant would be in custody at all times and would spend every night in the local detention facility, which is part of the Pale Public Security Centre, while being allowed to visit his mother during the day-time.[11] The Applicant is ready to comply strictly with any other conditions deemed necessary and appropriate.[12]

6. Annexed to the Motion are the guarantees submitted by the Government of Republika Srpska.[13]

B. Response

7. On 21 May 2009, the Office of the Prosecutor ("The Prosecution") confidentially filed the "Prosecution Response to Momčilo Krajišnik's Application for Custodial Visit on Compassionate Grounds" ("Response"). The Prosecution submits that the reasons that are given in the Motion do not constitute special circumstances under Rule 65(I)(iii) and are insufficient to override the serious flight risk the Applicant poses as a convicted person awaiting transfer for the enforcement of his sentence.[14] In particular, the Prosecution is concerned that the Applicant has not demonstrated that

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6 *Ibid.*, para. 7.

7 *Ibid.*, para. 8.

8 *Ibid.*, para. 8.

9 *Ibid.*, para. 9.

10 *Ibid.*, para. 10; *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Decision on Pandurević's Request for Provisional Release on Compassionate Grounds, 21 July 2008 (Public Redacted) ("*Pandurević* Decision"), para. 25; *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Decision of Borovčanin's Motion for Custodial Visit, 9 April 2008 (Public Redacted) ("*Borovčanin* Decision"), para. 32.

11 Motion, para. 10.

12 *Ibid.*, para. 10.

13 *Ibid.*, para. 10, Annex A.

14 Response, paras. 2-3.

the health situation of his mother is acute;[15] and that the medical report submitted by the Applicant detailing his mother's health is partly illegible.[16]

8. The Prosecution submits that because of the failure of the Applicant to demonstrate special circumstances overriding the flight risk he poses, the Motion should be dismissed,[17] but that, should the Motion be granted, his release should be subject to stringent conditions similar to those imposed on Pandurević and Borovčanin.[18]

C. Reply

9. On 26 May 2009 the Applicant filed confidentially the "Leave to Reply and Reply to Prosecution's Response to Application for Custodial Visit on compassionate grounds" ("Reply"). The Applicant submits that the Response "lacks any semblance of basic humanity."[19] He states that he spent four years at the United Nations Detention Unit awaiting commencement of trial, two and a half years at trial and two and a half years at the appeal phase;[20] he is not a flight risk because he has served a very significant part of the sentence imposed on him, is 64 years of age, has never been a fugitive and has some years to look forward to as a free man;[21] and the requested custodial visit would also give him an opportunity to visit his father's grave.[22] The Applicant agrees to the stringent conditions proposed by the Prosecution in the Response.[23]

D. Correspondence from the Host State

10. On 4 June 2009, J. H. P. A. M. de Roy, Deputy Director of Protocol for the Ministry of Foreign Affairs for the Kingdom of the Netherlands, informed the Tribunal that the Ministry does not object to the provisional release of the Applicant and would cooperate with any order of provisional release without objection, and transfer the Applicant from the United Nations Detention Unit to Schiphol Airport and *vice versa*, in the event of such an order being made.

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15 *Ibid.*, paras. 3-4.
16 *Ibid.*, para. 3.
17 *Ibid.*, para. 6.
18 *Ibid.*, para. 7; *Pandurević* Decision, para. 25; *Borovčanin* Decision, para. 32.
19 Reply, para. 2.
20 *Ibid.*, para. 3.
21 *Ibid.*, para. 5.
22 *Ibid.*, para. 5.
23 *Ibid.*, para. 6.

III. APPLICABLE LAW

11. Rule 104 of the Rules of Procedure and Evidence ("Rules") provides: "All sentences of imprisonment shall be supervised by the Tribunal or a body designated by it." The Trial Chamber considers that a decision as to whether a convicted person, who remains in the custody of the Tribunal pursuant to Rule 103(C), should be granted provisional release falls under the power of supervision for which Rule 104 provides. At the same time the Trial Chamber will be guided in its decision by the jurisprudence of the Appeals Chamber on the provisional release of persons whose cases are at an earlier procedural stage.

12. The Trial Chamber considers the requirement that the Applicant not pose a danger to any victim, witness or other person, must be satisfied for the granting of provisional release, as the safety of individuals would be at risk if this was not satisfied.

13. The Trial Chamber must also consider the flight risk which the Applicant poses, given his status as a convicted person. According to the *Limaj* Decision, 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.[24]

14. The Trial Chamber also considers that special circumstances related to humane and compassionate considerations must be present to justify a custodial release, just as they must be present where appellate proceedings are pending before the Appeals Chamber. The Appeals Chamber has concluded that special circumstances related to humane and compassionate considerations exist where there is an acute justification, such as the applicant's medical need or a memorial service for a close family member.[25] Because "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", justifications such as wanting to spend time with family have explicitly not been recognized as special circumstances under Rule 65(I)(iii).[26]

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[24] *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"), para. 9.

[25] *Prosecutor v. Milutinović et. al.*, Case No. IT-87-05-A, Decision on Vladimir Lazarević's Second Motion for Temporary Provisional Release on the Grounds of Compassion, 21 May 2009 (May 2009 *Lazarević* Decision), para. 9; *Prosecutor v. Milutinović et. al.*, Case No. IT-87-05-A, Decision on Vladimir Lazarević's Motion for Temporary Provisional Release on the Grounds of Compassion, 2 April 2009 (April 2009 *Lazarević* Decision), para. 8.

[26] May 2009 *Lazarević* Decision, para. 9; April 2009 *Lazarević* Decision, para. 8.

15. A further relevant consideration has emerged from the Appeals Chamber jurisprudence on the provisional release of convicted persons. In *Delić*, the Appeals Chamber held that, at least in the context of where an appeal is pending, "detention for a substantial period of time may, depending on the circumstances of the case, amount to a special circumstance within the meaning of Rule 65(I)(iii) of the Rules."[27]

16. The Appeals Chamber has held that the duration of provisional release granted on humanitarian grounds should be proportional to the period of time necessary to carry out the humanitarian purpose of the release[28] and that "a Trial Chamber must address the proportionality between the nature and weight of the circumstances of a particular case and the duration of the provisional release requested."[29]

IV. DISCUSSION

17. The Applicant has submitted that he will not pose a threat to any witness, victim or other person[30] and the Prosecution has not contested this. Indeed, there is nothing to support the notion that he would pose such a threat. The Trial Chamber thus finds that this traditional requirement for granting release of a convicted person has been satisfied.

18. The Applicant submits that his wish to visit his elderly and gravely ill mother most probably for the last time constitutes "special circumstances" that warrant release.[31] While the Prosecution's contention that the Applicant has not demonstrated that the health situation of his mother is acute is not without foundation,[32] the Trial Chamber nonetheless is satisfied that the "special circumstances" have been established. The medical condition and age of the Applicant's mother in combination demonstrate a sufficient humane and compassionate basis for granting the Motion. Further, detainees at the United Nations Detention Unit are accommodated far away from the former

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27 *Prosecutor v. Delić*, Case No. IT-04-83-A, Decision on the Motion of Rasim Delić for Provisional Release, 11 May 2009 (*Delić* Decision), para. 17.

28 *Prosecutor v. Popović et. al.*, Case No. IT-05-88-AR65.4, Decision on Consolidated Appeal against Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's Motions for Provisional Release during the Break in Proceedings, 15 May 2008 (Consolidated *Popović* Decision), para. 32; *Prosecutor v. Prlić et. al.*, Case No. IT-04-74-AR65.8, Decision on Prosecution's Appeal from "*Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Prlić* Dated 7 April 2008", 25 April 2008 ("*Prlić* Decision"), para. 16; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković* Dated 31 March 2008", 21 April 2008 ("*Petković* Decision"), para. 17.

29 Consolidated *Popović* Decision, para. 18.

30 Motion, para. 8.

31 Motion, para. 6.

32 Response, paras. 3-4.

Yugoslavia and as a consequence have limited opportunities for seeing their families. The Trial Chamber accepts that after his transfer to the state where he is to serve his sentence, the likelihood that the Applicant will be able to see his mother again will be low. It must also be remembered that the Applicant has been detained for a lengthy period of time awaiting trial, during trial and pending appeal.[33] This was of particular significance in determining the existence of special circumstances in *Delić*.[34] The Trial Chamber is thus satisfied that the Applicant has shown "special circumstances" amounting to an "acute justification" which justifies a custodial visit.

19. The Trial Chamber nevertheless notes that, as has been held in *Limaj*, there is an incentive to abscond when proceedings have been completed and the Applicant is a convicted person awaiting transfer to a State in which his sentence will be served.[35] There is thus a risk of flight in the instant case. However, the Applicant submits that he has behaved well in detention[36] and this is not challenged by the Prosecution. The Applicant's submission that he has never been a fugitive[37] is neutral for the reasons given in an earlier Decision in his case, namely that he cannot say he "surrendered" because he was never given the opportunity, but at the same time, there is no evidence that he was evading arrest.[38] Factors that have little significance for the question of flight risk include the fact that he is 64 years old,[39] has served a very significant part of his sentence and has some years to look forward to as a free man.[40] Thus, the Trial Chamber will only grant the Applicant provisional release if stringent conditions are imposed as is suggested in the Motion,[41] the Response[42] and the Reply.[43] Such conditions would include being in custody at all times, i.e. having armed members of the Republika Srpska MUP guarding him for 24 hours per day and spending each night in the local detention facility which is part of the Pale Public Security Centre.[44]

20. Guarantees have been provided by Republika Srpska,[45] but they do not commit it to imposing the stringent conditions envisioned here.[46] The Trial Chamber therefore makes its order

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33 Motion, para. 8; Reply, para. 2.

34 *Delić* Decision, para. 17.

35 *Limaj* Decision, para. 9.

36 Motion, para. 9.

37 Motion, para. 9.

38 *Prosecutor v. Krajišnik and Plavšić*, Case IT-00-39 & 00-40, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, para. 20.

39 Motion, para. 8.

40 Reply, para. 5.

41 Motion, para. 10.

42 Response, para. 7.

43 Reply, para. 6.

44 *Pandurević* Decision, para. 25; *Borovčanin* Decision, para. 32; Motion para. 10.

45 Motion, Annex A.

for Krajišnik's custodial visit conditional on guarantees being provided in relation to such conditions.

21. The Appeals Chamber has held that the duration of provisional release granted on humanitarian grounds should be proportional to the period of time necessary to carry out the humanitarian purpose of the release.[47] The Applicant has made no submissions in this regard. After the Appeal Chamber held that a period of seven days including travel time to visit an ailing parent was excessively long for Borovčanin,[48] the Trial Chamber in *Prosecutor v. Popovic et. al.* permitted him to make a visit not exceeding four days including travel time.[49] The Trial Chamber finds that in all the circumstances the Applicant should be granted a custodial visit to Republika Srpska for a period of three days excluding travel time.

V. DISPOSITION

22. For these reasons, pursuant to Rule 104, the Trial Chamber hereby

(1) **GRANTS** leave to the Applicant to reply to the Prosecution Response;

(2) **ORDERS** the custodial release of the Applicant in the Republika Srpska for a period not exceeding three days (excluding travel time) to enable him to visit his mother, subject to the following conditions:

(a) the agreement from any affected state to the terms and conditions of custodial release set forth in the present Decision should be submitted to the Registry prior to the transfer of the Applicant, failing which no transfer will occur;

(b) the exact dates of the Applicant's provisional release shall be determined in consultations between the United Nations Detention Unit ("UNDU"), the Registrar of the Tribunal and a representative of the Trial Chamber;

(c) the Applicant shall be transported to Schiphol airport in The Netherlands by the Dutch authorities as soon as practicable;

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46 Motion, Annex A.

47 Consolidated *Popović* Decision, para. 32; *Prlić* Decision, para. 16; *Petković* Decision, para. 17.

48 Consolidated *Popović* Decision, para. 18.

49 *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Further Decision On Borovčanin's Motion For Custodial Visit, 22 May 2008, Annex.

(d) at Schiphol airport, the Applicant shall be transferred into the custody of a designated official of the Republika Srpska, who shall accompany the Applicant on the airplane;

(e) the authorities of all states through whose territory the Applicant may travel will hold the Applicant in custody for any time he will spend in transit at the airport and arrest and detain the Applicant pending his return to the UNDU should he attempt to escape;

(f) during the period of the Applicant's stay in the Republika Srpska, he shall abide by the following conditions, and the authorities of the Republika Srpska shall ensure compliance with such conditions:

(i) the Applicant shall have armed members of the Republika Srpska Ministry of Interior ("RS MUP") guarding him 24 hours per day,

(ii) the Applicant shall remain within the confines of the municipality of Pale, Republika Srpska, Bosnia and Herzegovina, apart from his travel from and to the Airport,

(iii) the Applicant's travel documents shall be given to the European Union Police Mission in Sarajevo or to the Office of the Prosecutor in Sarajevo, or to the Public Security Station in Pale,

(iv) the Applicant shall spend every night in the local detention facility, which is part of the Pale Public Security Centre,

(v) a written report shall be filed with the Tribunal confirming the presence of the Applicant each day,

(vi) the Applicant shall not discuss his case with anyone other than his counsel,

(vii) The Applicant shall not have any contact whatsoever or in any way interfere with any victim or witness or otherwise interfere in any way with the administration of justice,

(viii) The Applicant shall comply strictly with any requirement of the authorities of the Republika Srpska necessary to enable them to comply with their obligations under this decision and their guarantees;

(g) The Applicant shall return to the UNDU in The Hague five days, at the latest, after his departure from the UNDU, unless otherwise ordered by the Trial Chamber;

(h) on his return the Applicant shall be accompanied on the airplane by the designated officials of Republika Srpska, who shall deliver him into the custody of the Dutch authorities at Schiphol airport, the Dutch authorities shall then transport him back to the UNDU;

(3) **REQUIRES** the Republika Srpska to assume responsibility as set out above, to cover all expenses concerning transport of the Applicant from Schiphol airport to Republika Srpska and back as well as concerning accommodation and security of the Applicant while on custodial visit, to arrest the Applicant immediately if he should breach any of the conditions of this decision, and to report immediately to the Trial Chamber any breach of the conditions set out above;

(4) **REQUESTS** the Registry to obtain confirmation of the agreement of any state affected by the transfer, prior to arranging for the transfer of the Applicant to Republika Srpska, and to assist in obtaining the views of any state affected by the transfer, and to distribute this decision to the relevant states and organisations.

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

Kevin Parker
Presiding

Dated this seventeenth day of June 2009
At The Hague
The Netherlands

[Seal of the Tribunal]