

**UNITED
NATIONS**



Mechanism for International Criminal Tribunals

Case No: MICT-15-85-ES.4

Date: 29 October 2015

Original: English

IN THE APPEALS CHAMBER

Before: Judge Bakone Justice Moloto, Presiding
Judge Burton Hall
Judge Vagn Joensen

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

DRAGO NIKOLIĆ

PUBLIC

**NOTICE OF FILING OF PUBLIC REDACTED VERSION OF
PROSECUTION APPEAL OF THE DECISION GRANTING
PROVISIONAL RELEASE TO DRAGO NIKOLIĆ**

The Office of the Prosecutor:

Mr. Hassan B. Jallow, Prosecutor
Mr. Mathias Marcussen, Senior Legal Officer

Counsel for Mr. Drago Nikolić:

Mrs. Jelena Nikolić
Mr. Stéphane Bourgon

1. The Prosecution hereby files the public redacted version of its Appeal of the President's Decision granting provisional release to Drago Nikolić. Where necessary, redactions have been made to protect Nikolić's medical privacy (following consultations with the defence) and to protect the contents of confidential documents.

Word Count: 46



Mathias Marcussen
Senior Legal Officer

Dated this 29th day of October, 2015
At The Hague, The Netherlands.

**UNITED
NATIONS**



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Date: 27 July 2015

Original: English

IN THE APPEALS CHAMBER

Before: A Bench of the Appeals Chamber

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

DRAGO NIKOLIĆ

***PUBLIC REDACTED VERSION (OMITTING CONFIDENTIAL
AND EX PARTE ANNEX)***

**PROSECUTION APPEAL OF THE DECISION GRANTING
PROVISIONAL RELEASE TO DRAGO NIKOLIĆ**

The Office of the Prosecutor:

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A. Overview

1. The President's Decision¹ granting Drago Nikolić six months' provisional release suffers from serious, fundamental errors and risks to undermine the trust, particularly among victims, in the MICT.
2. First, the President's Decision is *ultra vires*. The power to grant provisional release under Rule 68 explicitly lies with Trial and Appeals Chambers. The jurisprudence of both the ICTY and ICTR, which is binding on the MICT, makes clear that after conviction the Appeals Chamber retains power to grant provisional release. The President cannot, as he did, appropriate that power for himself on the basis that there are no explicit provisions in the Rules prohibiting him from doing so.
3. Second, it is a fundamental requirement for trust in the judicial process that those who have been convicted by Trial and Appeals Chambers serve their prison sentences imposed on them. They can only be released early if the conditions of Rule 151 are met. In this case, the President found that the conditions for early release were not met. Nikolić must continue to serve his sentence. He has, however, been released from prison to his home with no prospect that he will return to serve any more of his sentence in light of his terminal illness. That clearly circumvents Rule 151.
4. Third, in applying the provisional release regime without hearing the Prosecution, the President violated Rule 68.
5. The Decision thus suffers from serious, fundamental errors and must be overturned.

B. The President's Decision Granting Provisional Release is Subject to Appeal

6. Both ICTY and ICTR jurisprudence demonstrate that the Appeals Chamber has jurisdiction to review decisions by the President.² Moreover, the Appeals Chamber has an inherent jurisdiction to review another organ of the Mechanism's improper attempt to usurp the Appeals Chamber's functions. Likewise, the ICTY Appeals Chamber has held that it has

¹ See 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, paras.43-44 ("Decision").

² See *In re André Ntagerura*, Case No. ICTR-99-46-A28, App.Ch., Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008, para.12; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-05/18-AR15.1, App.Ch., Decision on Appeal from Decision on Motion to Disqualify Judge Picard, 26 June 2009 ("Karadžić Decision").

jurisdiction to review when the President failed to refer a matter to a panel of judges that he was obligated to refer.³

7. As will be set out below, the President *ultra vires* granted Nikolić provisional release rather than refer the issue of provisional release to the Appeals Chamber.⁴

8. The Prosecution has standing to bring this appeal. It was a party to the proceedings that resulted in the President's decision granting Nikolić provisional release, and should have been heard before provisional release was granted.⁵

C. The President's Decision on Provisional Release is *Ultra Vires*

9. The President's decision to grant Nikolić provisional release is *ultra vires*. Rule 68 of the Rules of Procedure and Evidence ("Rules") explicitly grants that authority to Trial Chambers and the Appeals Chamber.

10. In the *Radić* case before the ICTY the President specifically held: "Indeed, under the Rules of this Tribunal there is no provision which permits a convicted accused to request such a release from the President, and accordingly I do not have the authority to consider the Request of Radić."⁶ The jurisprudence of the ICTY confirms that the ICTY President has no authority to issue a decision on provisional release.⁷ This view is in line with the plain language of ICTY Rule 65(A): "Once detained, an accused may not be released except upon an order of a *Chamber*".⁸ Thus only a Chamber can issue a decision on provisional release.⁹

11. ICTR jurisprudence is equally clear. Pursuant to ICTR Rules 65(A) and 65(I), only an ICTR chamber can issue a decision on provisional release. Relying on this plain language, the

³ See *Karadžić* Decision.

⁴ Below paras.9-15. As this is not a decision on early release, the Prosecution is not barred from appealing based on the Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism, MICT/3, 5 July 2012 ("Practice Direction") according to which there is no appeal from a decision on early release. Practice Direction, para.12.

⁵ Below paras.20-23.

⁶ *Prosecutor v. Mlado Radić*, Case No.IT-98-30/1-A, Decision on Request for Provisional Release, 13 July 2005, para.3 ("Radić Decision"), referred to in Decision, fn.54.

⁷ *Prosecutor v. Dragan Zelenović*, Case No.IT-96-23/2-ES, Order Assigning Judges to a Case Before the Appeals Chamber, 11 February 2008, p.2 ("*Zelenović* Order"); *Prosecutor v. Fatmir Limaj et al.*, Case No.IT-03-66-A, Order Assigning Judges to a Chamber Before the Appeals Chamber, 7 February 2008, p.2 ("*Bala* Order"). See also confidential decisions cited in confidential and *ex parte* Annex.

The Prosecution generally avoids citing confidential judicial decisions that are unavailable to the defence. However, in the present filing, the Prosecution has only cited confidential decisions as additional authorities for the same point already made by the cited public decisions. These confidential decisions could be made available to the defence as appropriate.

⁸ Emphasis added.

⁹ See *Zelenović* Order; *Bala* Order. See also confidential decisions cited in confidential and *ex parte* Annex. But see *Radić* Decision, para.3 (where the ICTY President relied on the ICTY Rules as a whole, which he interpreted as containing no provision authorizing convicted persons to request provisional release from the President).

ICTR Appeals Chamber in *Rukundo* quashed a single judge's decision on provisional release as *ultra vires*.¹⁰

12. ICTY and ICTR case law is relevant, as the Mechanism is “bound to interpret its [...] Rules in a manner consistent with the jurisprudence of the ICTR and ICTY [...]”¹¹ Moreover, the language of MICT Rule 68(A) is identical to ICTY Rule 65(A) and virtually identical to ICTR Rule 65(A).
13. The President therefore lacks the power to issue a decision on provisional release. Rather, after final judgement has been entered, provisional release can only be granted by the Appeals Chamber.¹²
14. There are no cogent reasons to depart from the settled jurisprudence discussed above, as provisional release could be granted by the Appeals Chamber in appropriate circumstances.
15. While the President purported to provide cogent reasons to depart from the *Radić* Decision, he failed to cite almost all of the relevant ICTY President decisions on the issue, as well as the ICTR *Rukundo* decision.¹³ He thus made no attempt to reconcile his new interpretation of the Rules¹⁴ with the contrary interpretation of the ICTY President and ICTR Appeals Chamber. He further failed to address the plain language of ICTY/ICTR Rule 65(A) (and by implication Rule 68(A)) that limits the power to grant provisional release to the Trial and Appeals Chambers.¹⁵

D. Provisional Release Cannot be Used to Circumvent the Requirements for Early Release

16. Even if the President did have authority to grant provisional release, provisional release cannot be used to grant release which effectively terminates the enforcement of sentence. This would circumvent the requirements for early release.
17. The provisional release under Rule 68 applies to temporary breaks in detention. In this case, however, the Decision effectively terminates Nikolić's imprisonment. He is being released

¹⁰ *Emmanuel Rukundo v. Prosecutor*, Case No. ICTR-2001-70-AR65(D), App.Ch., Decision on Appeal from the Decision of Trial Chamber III of 18 August 2003 Denying Application for Provisional Release, 8 March 2004, p.1.

¹¹ *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, App.Ch., Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, 5 October 2012, para.6.

¹² *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, paras.8-9 (“*Borovčanin* Appeal Decision”); *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, paras.4-5 (“*Bala* Decision”). See also confidential decision cited in confidential and *ex parte* Annex.

¹³ *Above* paras.10-11. The President cited and addressed only the *Radić* Decision. Decision, para.38, fn.54.

¹⁴ Decision, para.38 (nothing in the Rules “explicitly prohibit[s] the President from granting provisional release”).

¹⁵ *Above* para.13.

from prison and it is not foreseen that he will return to serve any of the remainder of his sentence, because the period of release exceeds his current life expectancy.¹⁶ His situation therefore falls squarely within Rule 151, which governs early release.

18. The President, after consulting the Judges of the Sentencing Chamber that are Judges of the MICT, determined that the conditions for early release under Rule 151 have not been met. In particular, the President did not find that Nikolić's situation amounted to a "humanitarian emergency", which might have allowed for early release prior to two-thirds of the sentence having been served.¹⁷ Granting Nikolić provisional release in this situation thus circumvents the rules for early release.
19. Had the President not applied the erroneous provisional release regime, Nikolić would have remained in detention.

E. The Decision on Provisional Release Violated the Prosecution's Right to Be Heard

20. Even if Rule 68 applies, the Decision contains a procedural error, as the Prosecution should have been heard prior to a convicted person's provisional release.¹⁸
21. The Prosecution's right to make submissions on provisional release is enshrined in the Rules. Three separate provisions of Rule 68 mandate that the Prosecution must be afforded an opportunity to be heard on an accused's release.¹⁹ Indeed, the Prosecution's right to be heard on provisional release is so fundamental that the ICTY Appeals Chamber overturned a Trial Chamber decision whereby the Prosecution would have been excluded from making submissions on the continuation of conditions relating to an accused's provisional release.²⁰
22. The *sua sponte* nature of the President's decision on provisional release²¹ made the exercise of the Prosecution's right to be heard even more important. While a judicial authority may have the right to act *proprio motu*, it also has the duty to first hear from the party whose right

¹⁶ [REDACTED].

¹⁷ Decision, paras.21, 35.

¹⁸ See Decision, fn.56.

¹⁹ Rule 68(E)-(G).

²⁰ *Prosecutor v. Ramush Haradinaj et al.*, Case No.IT-04-84-AR65.1, App.Ch., Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, paras.98-99, 102-103. See also *Bala* Decision, para.3; *Prosecutor v. Ljubomir Borovčanin*, Case No.IT-88-ES-1, T.Ch., Decision on Borovčanin's Request for Custodial Visit, 7 October 2010, paras.9-12; *Borovčanin* Appeal Decision, para.6; *Prosecutor v. Momčilo Krajišnik*, Case No.IT-00-39-ES, T.Ch., Decision on Krajišnik's Application for Custodial Visit, 17 June 2009, paras.7-8; *Prosecutor v. Dragan Zelenović*, Case No.IT-96-23/2-ES, App.Ch., Decision on Motion for Provisional Release, 21 February 2008, paras.7-10 (all providing the Prosecution an opportunity to make submissions on requests for provisional release after a final judgement was entered). See also confidential decision cited in confidential and *ex parte* Annex.

²¹ Decision, para.38.

will be affected by the decision to be made.²² Failure to do so renders the proceedings unfair.²³

23. [REDACTED].²⁴ It should have been afforded the same chance before the MICT. In particular, the Prosecution should have been given an opportunity to review and make submissions on the medical documentation underlying the President's decision.²⁵


F. The Decision and Relevant Filings Should be Made Public

24. Given the importance of the issues it raises, the Decision and related filings should be made publicly available, with redactions as appropriate to protect Nikolić's medical privacy.²⁶ This would accord with the MICT principle that proceedings should be public unless there are exceptional reasons to keep them confidential.²⁷

G. Conclusion

25. The Appeals Chamber should quash the President's decision on provisional release, revoke Nikolić's provisional release, and order him to be returned to the United Nations Detention Unit.

Word Count: 2,280 (including confidential and *ex parte* Annex)


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Dated this 27th day of July, 2015
At The Hague, The Netherlands.

²² *Prosecutor v. Goran Jelisić*, Case No.IT-95-10-A, App.Ch., Judgement, 5 July 2001, para.27 (“*Jelisić AJ*”).

²³ *Jelisić AJ*, para.27.

²⁴ [REDACTED].

²⁵ See Decision, paras.5, 7, 8 (noting various medical reports regarding Nikolić that are unavailable to the Prosecution).

²⁶ In the ICTY *Hadžić* case, the Trial Chamber and the Appeals Chamber have issued several public decisions on provisional release related to the accused's terminal illness. See, e.g. *Prosecutor v. Goran Hadžić*, Case No.IT-04-75-AR65.1, App.Ch., Decision on Urgent Interlocutory Appeal from Decision Denying Provisional Release, 13 April 2015, paras.2 and following.

²⁷ See *Prosecutor v. Paul Bisengimana*, Case No.MICT-12-07, Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012 (public redacted version), para.6.