

VIEW FROM THE HAGUE

PROVISIONAL RELEASE

All accused before the ICTY are entitled to apply for provisional release. In fact, most of the Tribunal detainees have availed themselves of the entitlement to apply for provisional release and the Trial Chamber has issued orders granting this privilege to 18 of them. Until last week there were no problems with compliance with these orders.

Individuals who are in the Tribunal's custody can apply for provisional release at any time during the proceedings. Only a Trial Chamber can grant such a request. Typically, provisional release is granted between the initial appearance of the accused and the start of trial. This pre-trial period at the Tribunal can be quite a lengthy one due to the number of procedural issues that the accused and prosecution can bring before the Trial Chamber prior to the start of trial. This is why if certain conditions are met, the accused can be allowed to spend this time on provisional release.

The other, slightly less common form of provisional release involves short-term release from custody, under very strict conditions, for personal reasons of the accused (death or serious illness of a close family member, for example).

Among the local media, provisional release that is granted during the pre-trial period is often mistakenly referred to as "odbrana sa slobode" which is a right known in national jurisprudence. However, there is a major difference: "odbrana sa slobode" means that the accused will not be in custody through the entire trial and simply appear in court every day on which he is required to do so. According to the Tribunal's rules, however, this is not possible - once the pre-trial phase is over, the accused must return to the Tribunal's custody.

Before issuing a decision on provisional release, the Trial Chamber carefully considers a number of circumstances. These will include information on whether the accused promptly surrendered voluntarily, guarantees issued by the state in which he will reside during his provisional release, the accused's health, the likelihood that the accused may interfere with witnesses or evidence, etc.

Those who promptly surrender voluntarily have a much better chance of being granted provisional release than those who try to evade justice. The Tribunal does not have a police force of its own, and therefore has to rely on the good intentions of the accused. As in General Pavle Strugar's case, those who surrender voluntarily immediately upon learning of the indictment against them demonstrate respect for the Tribunal's jurisdiction and the Trial Chamber is more likely to believe their undertakings that they will return.

The Tribunal also relies on the guarantees given by the state in which the accused plans to reside during his provisional release. As soon as a trial date is set and a Chamber issues an order requesting the accused to return to the Detention Unit and the custody of the Tribunal, the state in whose territory the accused resides will be required to ensure that he responds promptly to the order. This is exactly what should have happened in the case of Pavle Strugar.

Pavle Strugar was taken into custody on 21 October 2001. He applied for provisional release on 21 November 2001 and, taking into consideration his voluntary surrender and his medical condition, the Trial Chamber, granted his request on 30 November 2003. The order granting the release included a number of conditions set by the Trial Chamber and guarantees by the government of Serbia and Montenegro. Among these conditions, the Trial Chamber ordered Pavle Strugar to return to the Tribunal's custody for the commencement of his trial at a time and date that it will determine in a future order. The Government of Montenegro signed a letter in

which it guaranteed that the competent bodies of the Republic of Montenegro will ensure Strugar's compliance with the Trial Chamber's orders, including his strict compliance with future orders.

Unfortunately, in the case of Mr. Strugar, for the first time, a government failed to honor its guarantees regarding the provisional release of an accused. The Trial Chamber ordered the accused to return to the Tribunal's custody on 2 December 2003 and the trial was scheduled to commence on 9 December. However, even after an exchange of correspondence between the Tribunal, Mr. Strugar's defence attorneys and the government, after which the Trial Chamber concluded that there are no impediments to the accused's return to custody, the government of Serbia and Montenegro still failed to secure Mr. Strugar's return to The Hague until 12 December forcing a delay in the trial. This is very unfortunate because it might call into question the ability of the Trial Chambers to take into consideration guarantees issued by States that have a problem honoring their obligations.

Outreach Programme

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