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SCSL – 2003 – 11 – PT
(3344 – 3520)

3344

THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

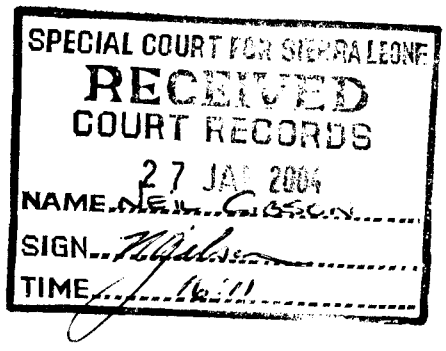
Registrar: Mr. Robin Vincent

Date: 27 January 2004

THE PROSECUTOR

Against

MOININA FOFANA



CASE NO. SCSL-2003-11-PT

APPLICATION FOR BAIL PURSUANT TO RULE 65

Office of the Prosecutor:

Mr. Desmond de Silva, Deputy Prosecutor
Mr. Luc Côté, Chief of Prosecutions
Mr. Walter Marcus-Jones
Mr. Christopher Staker
Mr. Abdul Tejan-Cole

Marieke Van Eik
27 January 2004

Defence Office:

Mr. Sylvain Roy
Mr. Ibrahim Yillah
Ms. Phoebe Knowles

Defence Counsel:

for Mr. Michiel Pestman
for Mr. Victor Koppe
for Mr. Arrow John Bockarie
for Dr. Liesbeth Zegveld
for Prof. Dr. P. André Nollkaemper

Request

1. This is an application presented by the defence on behalf of Mr. Fofana, who requests to be released provisionally to Sierra Leone, as he meets both preconditions prescribed by the second part of Rule 65 (B) of the Rules of Procedure and Evidence (the "Rules").

Detention history

2. Mr. Fofana was arrested on 29 May 2003 in Mattru-Bong in the Bonthe District, pursuant to an "Order for Transfer and Provisional Detention" issued by Judge Pierre Boutet on 28 May 2003. On 26 June 2003, Judge Bankole Thompson approved the indictment, pursuant to Rule 47 of the Rules, and ordered Mr. Fofana's continued detention. The Initial Appearance of Mr. Fofana took place on 1 July 2003, before Judge Pierre Boutet; he pleaded not guilty on all counts. At the moment, Mr. Fofana is detained in the facilities of the Special Court in Freetown, pursuant to Rule 64. No special measures of detention apply.

The law

3. According to Rule 65 (B) the Trial Chamber may order bail, after hearing the State to which the accused seeks to be released, only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

4. Rule 65 (B) was the subject matter of a ruling in the Brima case, issued on 22 July 2003[1]. This ruling would appear to establish that the first duty lies upon the prosecutor to demonstrate to the satisfaction of the Judge or Trial Chamber that there are good reasons to continue the detention of the accused. In particular, the prosecutor has to demonstrate that a reasonable suspicion still exists that the

[1] SCSL, Trial Chamber, Tamba Alex Brima, Ruling on Motion for Bail, SCSL-03-06-PT, 22 July 2003, (*annex 1*).

accused committed the crime or crimes charged. The persistence of this reasonable suspicion that the accused committed the offences is a condition *sine qua non* for the lawfulness of the continued detention. According to internationally agreed standards, however, the reasonable suspicion alone can never be sufficient to justify pre-trial detention beyond a short initial period, even where the accused is charged with a particularly serious crime and the evidence against him is strong.[2] The prosecutor must therefore show that *other* good reasons exist to continue the detention. And the longer the detention lasts, the more evidence there must be to justify it[3].

5. Only after the prosecutor has demonstrated that good reasons exist to continue the detention does the burden shift to the defence to satisfy the Trial Chamber that he will fulfil the conditions mentioned in Rule 65 (B)[4].

6. The burden in relation to proof that an accused will appear for trial and will not pose a danger to victims, witnesses and other persons when seeking bail is identical to that which is required for proof of any other fact in any other application for relief. The standard of persuasion is the balance of probabilities; all the accused has to do is satisfy the Judge or the Trial Chamber that more probably than not he will meet the necessary preconditions[5].

7. As the wording of Rule 65 (B) suggests the power to order bail is a discretionary one. But an accused who succeeds in satisfying the Judge or Trial Chamber that he will appear for trial and not pose a danger to any victim, witness or other person, should be released provisionally[6]. Only in exceptional circumstances, to be demonstrated by the prosecution, can the discretion be exercised to the detriment of the accused. Since the removal from Rule 65 (B) at the ICTY of the requirement

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[2] C. Ovey and R. White, The European Convention on Human Rights, p. 114, (*annex* 2).
[3] See e.g. ECHR, 18 October 1994, Murray, para. 56: "The length of the deprivation of liberty at risk may also be material to the level of suspicion required.", (*annex* 3).
[4] SCSL, Trial Chamber, Tamba Alex Brima, Ruling on Motion for Bail, SCSL-03-06-PT, 22 July 2003, p. 9.
[5] ICTY, Appeals Chamber, Sainovic & Ojdanic, Dissenting Opinion of Judge David Hunt on Provisional Release, 30 October 2002, paras. 26-31, (*annex* 4), *nota bene*: the majority did not disagree on this point, *see* para. 2 of the Opinion.
[6] See e.g. ICTY, Trial Chamber, Brdjanin & Talic, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002, (*annex* 5).

of exceptional circumstances[7], rendering the rule identical to that of the Special Court, the jurisprudence has proceeded upon the basis that, where the accused succeeds in establishing that he will meet the other conditions, he is in principle entitled to provisional release[8].

8. It is a rule of customary international law that pre-trial detention should remain an exception. Article 9 Section 3 of the International Covenant on Civil and Political Rights, for example, states the following:

> "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...".

Other international human rights instruments contain the same principle[9].

9. The gravity of the crimes an accused is charged with and the role the accused allegedly played in those crimes are not relevant to the exercise of the mentioned discretion[10].

10. There are no restrictions to the conditions the Judge or the Trial Chamber may impose upon granting bail. Pursuant to Rule 65(D) of the Rules the Trial Chamber may impose any conditions upon the granting of bail to the accused as it may determine appropriate, including the execution of a bail bond.

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[7] The stipulation that provisional release may only be ordered in "exceptional circumstances" was deleted from Rule 65 (ICTY) at the 21st Plenary Session on 30 November 1999.
[8] See also: ECHR, 25 June 1991, Letellier, para. 46, (*annex* 6).
[9] Article 5, European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 7, American Convention on Human Rights; Articles 6 & 7, African Charter on Human and Peoples' Rights; United Nations General Assembly Resolution 43/17, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 9 December 1998, Principle 39: "Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions, (*annex* 7).
[10] Sainovic & Ojdanic, Dissenting Opinion of Judge Hunt, *see* note 5 above, para. 78, *nota bene*: the majority did not disagree on this point, *see* para. 2 of the Opinion.

Good reasons?

11. As stated above it is up to the prosecutor to prove that good reasons still require the detention of Mr. Fofana. The defence for Mr. Fofana submits that such reasons no longer exist and that Mr. Fofana must therefore released on bail.

12. Were the prosecutor to succeed in establishing the good reasons necessary for the continuation of the pre-trial detention, the defence submits that sufficient proof exists that Mr. Fofana will appear for trial and will not pose a danger to any person if he is released on bail.

Appearance at trial

13. Up until his arrest on 29 May 2003, Mr. Fofana never imagined he was suspected of a crime within the jurisdiction of the Special Court. His arrest came as a complete surprise. He was not informed of the reasons of this arrest and had indeed no idea he was being taken into the custody of the Court until he arrived in the detention facility. As a consequence, Mr. Fofana was not given the opportunity to show his willingness to co-operate with the Special Court. The Trial Chamber must rest assured, however, that Mr. Fofana would have surrendered himself immediately and unhesitatingly to the Court if he had been aware of any indictment against him. Mr. Fofana will return to the Court to face trial, if he is granted bail.

14. Mr. Fofana has pleaded not guilty to all counts in his indictment and he is very conscious of the fact that standing trial is the only way to contest the allegations against him and present his defence.

15. The defence for Mr. Fofana further submits that there are no factors suggesting a risk of flight. There is no evidence whatsoever that Mr. Fofana is planning to flee or that he has special links with other countries that might make his flight easier. On the contrary, his links with Sierra Leone are very strong. As will be

demonstrated below, Mr. Fofana ought to be regarded as a person unlikely to leave, not only because of his special family considerations, but also because of his special status and responsibilities within his Chiefdom.

16. Mr. Fofana has four wives and eighteen children, the majority of whom live in the village of Gbap, Nongoba Bullom Chiefdom, Bonthe District, Southern Province of Sierra Leone. He is the sole supporter of his wives and eighteen children, the youngest being two years old. In addition, he is the sole breadwinner for his mother and he also provides, as best as he can, for the other members of his (extended) family. The future of all family members dependent on Mr. Fofana is now at risk. He is, for example, no longer able to pay for the education of his children.

17. In addition, Mr. Fofana is the Chiefdom Speaker and Deputy Paramount Chief of the Nongoba Bullom Chiefdom and therefore has deep roots in his community. He holds a position of both leadership and responsibility. As Chiefdom Speaker, Mr. Fofana is the principal assistant to the Paramount Chief, responsible *inter alia* for the general maintenance of law and order in the Chiefdom[11]. He is also a member of the Chiefdom's council of elders. Mr. Fofana regards this commitment to remain with the people of his Chiefdom as sacred.

18. Mr. Fofana is involved in several projects in his Chiefdom aimed at the reconstruction of the damage caused during the armed conflict in Sierra Leone. Members of his Chiefdom and a large number of ex-combatants who now reside in the area are dependent upon these projects Mr. Fofana runs for their survival and livelihood. One of these projects, the Gbap Fishing Project, is carried out in close cooperation with international development organisations and supports over five hundred people in the Chiefdom[12].

[11] Declaration, Ibrahim Sorie Yillah, 23 June 2003, paras. 7-8, (*annex* 8).
[12] Declaration, Ibrahim Sorie Yillah, 23 June 2003, paras. 9-14.

19. Mr. Fofana is highly regarded and esteemed by the people in his Chiefdom, who describe him as a very hard-working and dedicated man to whom his community can always turn in times of need[13].

20. Mr. Fofana has never travelled outside Sierra Leone. He has no passport or any other travel document and more generally speaking no realistic avenue of escape. In addition, Mr. Fofana does not have the means to finance such an escape. He has no bank account, neither in Sierra Leone, nor in any other country. His only possessions are two wattle building in the village of Gbap.

No danger to any victim, witness or other person

21. The defence of Mr. Fofana submits that he poses no danger to any victim, witness or any other person upon release.

22. If granted bail, he will return to and stay in the Gbap, the main village in the Nongoba Bullom Chiefdom. The indictment of Mr. Fofana lists a variety of charges, allegedly committed in a wide area covering large parts of the Eastern and Southern Provinces of Sierra Leone. None of the crimes described in the indictment, however, took place in the Nongoba Bullom Chiefdom. It is therefore unlikely that any of the witnesses the prosecutor wishes to rely on at trial is currently living in that Chiefdom. Mr. Fofana, in any case, assumes that none of them are.

23. The defence for Mr. Fofana wishes to point out that the Trial Chamber on 16 October 2003 ordered protective measures for all witnesses and victims in Mr. Fofana's case. All identifying data of these persons were withheld by the prosecutor when he disclosed their statements to the defence pursuant to Rule 66(A) of the Rules. Mr. Fofana has no idea of the identity of the witnesses the prosecutor intends to call to testify against him at trial.

[13] Declaration, Ibrahim Sorie Yillah, 23 June 2003, par. 15.

Guarantees

24. In the event that the Trial Chamber has any concerns about Mr. Fofana's subsequent attendance at trial if granted bail, it is submitted that these can be allayed by the imposition of various conditions.

25. Mr. Fofana is able and willing to abide by the following conditions:

(a) He will not apply for a passport or any other document that would allow him to leave the country.

(b) He will live and remain within the confines of Gbap village.

(c) He will abide by a curfew and remain at home from 10 pm to 7 am and he will consent to unannounced checks by the appropriate authorities at his home address to verify his presence.

(d) He will report twice daily to the local police station and once a day to the Paramount Chief of the Nongoba Bullom Chiefdom.

(e) He will not have any contact with the other accused or with persons who may testify at his trial.

(f) He will not engage in any political activity and will have no contact of any sort with the press and the media. He will refuse any interview or contact with reporters, journalists, photographers or television cameramen.

(g) He will attend trial and respond promptly to all orders, summonses, subpoenas, warrants or requests issued by the Special Court.

26. Attached to this Application is a "Declaration" signed by Mr. Fofana, in which he pledges his word that he will abide by the conditions listed above, if released on bail[14].

Conclusion

27. If granted bail Mr. Fofana will appear for trial and will not pose a danger to witnesses or any other person. Accordingly, the Trial Chamber is urged to grant bail subject to the necessary and proportionate conditions.

28. Finally, an oral hearing on the matter of bail is respectfully requested.

COUNSEL FOR THE ACCUSED

Mr. Michiel Pestman

[14] Declaration, Mr. Moinina Fofana, (*annex* 9).

Defence list of authorities

1. SCSL, Trial Chamber, Tamba Alex Brima, Ruling on Motion for Bail, SCSL-03-06-PT, 22 July 2003.

2. C. Ovey and R. White, The European Convention on Human Rights.

3. ECHR, 18 October 1994, Murray.

4. ICTY, Appeals Chamber, Sainovic & Ojdanic, Dissenting Opinion of Judge David Hunt on Provisional Release, 30 October 2002.

5. ICTY, Trial Chamber, Brdjanin & Talic, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002.

6. ECHR, 25 June 1991, Letellier.

7. United Nations General Assembly Resolution 43/17, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 9 December 1998.

8. Declaration, Ibrahim Sorie Yillah, 23 June 2003.

9. Declaration, Mr. Moinina Fofana.

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SCSL-2003-06-PT-058

(1135-1151)

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IN THE TRIAL CHAMBER

Before: His Lordship, The Rt. Hon. Judge Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 22nd day of July 2003.

The Prosecutor against Tamba Alex Brima

SCSL-03-06-PT

RULING ON A MOTION APPLYING FOR BAIL OR FOR PROVISIONAL RELEASE
FILED BY THE APPLICANT

Office of the Prosecutor:
Mr. James Johnson
Mr. Nicolas Browne-Marke

Applicant Counsel:
Mr Terrence Michael Terry

Attorney General:
Mr. Joseph G Kobba

Registry:
Mrs. Musu Kamara
Ms. Mariana Goetz

HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE:

This is my ruling on this Application.

Mr Tamba Alex Brima, the Applicant in this matter, is in custody and stands indicted before the Special Court of Sierra Leone on a 17 count indictment, preferred against him by the Prosecutor of the Special Court.

The charges include crimes against humanity and International Humanitarian Law allegedly committed by the Applicant in the territory of Sierra Leone, crimes which come within the context of the Provisions of Article 1 of the Agreement dated the 16th of January, 2002, between the United Nations and the Government of Sierra Leone, creating the Special Court for Sierra Leone on the one hand, and also those of Articles 1, 2, 3,4,5, 6 and 7 of the Statute of the said Court annexed to the Agreement, on the other.

The Applicant appeared before me as a designated Pre-trial Judge on the 17th of March, 2003, when he was arraigned on each of the counts of the indictment brought against him. He pleaded not guilty to all of them. He was however, at the end of that process, remanded in custody on the same day pending the commencement of his trial.

On the 28th of May, 2003, the Applicant's Counsel, Mr Terence Michael Terry, filed this motion for bail or for the provisional release of his client and this, pursuant to the provisions of Rule 65 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

The arguments on which the Motion is founded and as are highlighted in Counsel's written submissions are as follows:-

-That the Applicant Tamba Alex Brima is presently suffering from serious medical problems which require daily care namely, diabetes and hypertension:

-That the Applicant is having frequent nightmares at the Bonthe Detention Facility, and that his general health and sight are fast deteriorating because and I quote:

"He has not been able to see any eye specialist".

-That the Applicant is a married man with a son, and the wife is unemployed, and the Accused is the sole breadwinner, so the continued detention of the Accused will cause untold suffering to his wife and child financially and otherwise.

-That the continued detention of the accused is prejudicial to him and continues to impair his access to his counsel regarding his defence for the ensuing trial.

-That his trial will be delayed because the finishing of the construction works of the Special Court in Freetown is going to be delayed beyond early 2004.

-That the Accused will appear for his trial.

-That the Accused will not pose a danger to any victim, witness or other person.

In addition to the aforementioned facts, the Applicant swore to

an affidavit on the 23rd of May, 2003, in the Special Court Detention Facility in Bonthe. The Applicant relies mainly on the facts deposed to in Paragraphs 2 to 34 of this affidavit. In the affidavit, he states that if released on bail, he will appear for his trial and will not pose a danger to victims or witnesses, or to other persons, conditions which are stipulated under Section 65 (B) as a guarantee to secure his release.

Counsel for the Applicant in making his submissions on the law refers to Rule 65(A). He argues that his client in his affidavit deposes to the fact, in fact, makes the engagement that he will appear for trial and if released will not pose a danger to any victim, witness or other person. He argues that under Rule 65(D) the Court has a discretion to impose such conditions as may be determined or may be deemed appropriate upon granting bail. He urges the court to grant conditional or unconditional release to his client.

Furthermore, Counsel for the Applicant argues that the purported warrant of arrest did not order the arrest of his client, Tamba Alex Brima; that the warrant of arrest was not served on him and that Judge Bankole Thompson lacked jurisdiction and acted in excess of his jurisdiction when he granted the Order on the 7th of March, 2003; that the Orders made by the Judge were fundamentally flawed and violated the provisions of Rule 47 of the Rules of Procedure and Evidence. He concludes by urging that the Court releases the Applicant on bail conditionally or unconditionally.

The Respondents on their part argued that the legality of the arrest and the detention of the accused person are not relevant to an application for bail. The Respondents contend that by

applying for bail in this case the Accused has conceded to the legality of his arrest and detention.

That as far as the validity of the Applicant's arrest or the warrant of arrest and the order of transfer and detention are concerned, the Respondents are adopting their arguments advanced in their application for "Habeas Corpus" which is annexed to their reply. That Rule 65 of the Rules of the Special Court is similar to Rule 65 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia (ICTY) as amended on the12th of December, 2002.

That following Rule 65 and the jurisprudence of the ICTY, detention is the rule and a release on bail, the exception, and this, notwithstanding the deletion of the phrase 'in exceptional circumstances' from Rule 65 in relation to granting bail to detainees. The Respondent in so submitting, is urging me to arrive at the same conclusion as did the ICTY, because the now amended wording of their rule 65 is virtually the same with the wording of Rule 65 of the Rules of Procedures and Evidence of the Special Court.

That the Applicant will not appear for trial if released. In so submitting, the Respondents state that the Court has no means to execute its own warrant. That the conflict in this Country put the regular Armed Forces and the Police of Sierra Leone in disarray and that because they are just rebuilding and reconstituting these forces, they will find great difficulty in apprehending the Accused should he seek to evade a recapture and his trial. The cases of Sam Bokarie, and Johnny Paul Koroma, both of whom are still 'wanted persons' by the Prosecutor of the Special Court tend to highlight the risk in

granting bail to the Applicant.

That if the Applicant is released and escapes to embattled Countries like Liberia or Ivory Coast, tracking him down or recapturing him to stand trial would be an up hill if not an impossible task.

Generally, the Respondents argued that the Applicant, on the submissions of his Counsel and even on the facts contained in his own sworn affidavit, does not fulfil the conditions spelt out in Rule 65 (B) of the Rules for bail to be granted to him.

In the course of the hearing on the 15th of July, 2003, Counsel for the Applicant urged me to dismiss the submissions of the Respondents on the grounds that they are said to have been filed on the 5th of June, 2000, a date long before the Special Court was even created. The Respondent in reply pleaded a typographical error as being at the origin of what the Applicant's Counsel was contending. He added that we should be concerned with the date on which the application was filed, that is, on the 5th of June, 2003. The Respondents explanation appears to me convincing. The correction of 2003 instead of 2000 is accordingly granted and is so ordered.

In reply to the submissions of the Respondents, Counsel for the Applicant made further submissions to restate what he raised in his earlier submissions including other arguments in reply to assertions and arguments made by Respondents.

Rule 65 of the Rules of Procedure and Evidence around which this controversy on bail is brewing stipulates as follows, and I would like to reproduce these provisions in extension:

65 (A) 'Once detained, an Accused shall not be granted bail except upon the order of a Judge or Trial Chamber'.

65(B) 'Bail may be ordered by a Judge or a Trial Chamber after hearing the State to which the Accused seeks to be released and on only if it is satisfied that the Accused will appear for his trial and if released will not pose a danger to any victim, witness or other person'.

In applying these provisions and as I earlier indicated, Counsel for the Respondents submits that they must be interpreted to mean that a release on bail or what in other words is referred to as a provisional release, constitutes an exception and continued detention, the rule. This interpretation by the Respondents of Rule 65 is based on case law from the International Criminal Tribunal of Yugoslavia (ICTY) as cited in their submissions.

It would be recalled however, that the original ICTY version of Rule 65 (B) reads as follows: "Provisional release may be ordered by a Trial Chamber only 'in exceptional circumstances' after hearing the host country and only if it is satisfied that the Accused will appear for trial and if released will not pose a danger to any victim, witness or other persons".

This ICTY version of Rule 65 was amended on the 17th of November, 1999, and came into force in ICTY on the 6th of December, 1999, in the following form:

65 (B) 'Release may be ordered by a Trial Chamber only after giving the host country and the state to which the Accused seeks to be released the opportunity to be heard and only if it is

satisfied that the Accused will appear for trial and if released will not pose a danger to any victim, witness or other person'.

The amended version of this Rule, it is observed, no longer contains the very strong component and the element of 'in exceptional circumstances' which appeared to have been the justifying factor for the silently developing legal concept consecrating a 'Release on Bail' as being the exception and 'Continued Detention', the rule.

It would be recalled that the International Criminal Tribunal for Rwanda, (ICTR) moving towards the direction of ICTY and of the Special Court for Sierra Leone whose Rules were adopted on the 8th of March, 2003, but without the phrase 'In exceptional circumstances' also amended this same Rule 65 (B) at their Plenary on the 27th of May, 2003, by striking out, like the ICTY did, and I imagine for the same reasons, the phrase 'in exceptional circumstances'.

What is interesting is that the Trial Chamber of the ICTY, even after effectively deleting the phrase 'in exceptional circumstances', from Rule 65 (B) on the 6th of December, 1999, still rendered a majority judgement on the 8th of October, 2001, in the case of the ***Prosecutor vs Momcilo Krajisnik*** and ***Biljana Plavsic,*** still standing its earlier grounds that granting bail is the exception and detention, the Rule. The Trial Chamber also appeared to have adopted the principal that even where the Accused fulfils the criteria for granting bail, the Court was not bound to grant the bail.

In what however appears to be contrary to the *Krajisnik's* decision and precisely in the case of the ***Prosecutor vs Brdanin*** on

provisional release, the Trial Chamber, still of the ICTY, clearly states that due to the fact that 'exceptional circumstances' were removed from the provisions of Rule 65 (B), the presumption is that release will now be the norm. In the case of ***Ilijkov vs Bulgaria*** *Case No. 33977196 of 26th July, 2001*, the European Court of Human Rights held that the burden of proof to establish the granting of bail may not rest with the Accused person, but on the Prosecution .

This very important and interesting case which was decided on the basis of a majority decision of two of the Honourable Learned Judges with a dissenting opinion by His Lordship the Honourable Judge Patrick Robinson. Honourable Judge Robinson, to highlight his reasoning succinctly, is of the opinion that at no time should detention, as his Colleagues decided, be the rule, and liberty, the exception. In so holding, he is of the opinion that the majority decision seriously compromises the right to liberty and is, to that extent, in contravention of International Customary Law principles and Conventions, particularly and amongst others, those of Article 9 Sub-Section 3 of the International Covenant of Civil and Political Rights, (the ICCPR). This Article provides as follows:-'It shall not be a general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial'.

To properly apply the provisions of Rule 65 (B), they must be interpreted by examining the language used and what the natural meaning is.

Under Rule 65, the following conditions for granting bail can be discerned by just an ordinary reading of the way it is worded.

-It is the Judge's discretion or that of the Trial Chamber to grant bail.

-The Judge or the Trial Chamber will grant bail only after hearing the State to which the Accused seeks to be released.

-The Judge or the Trial Chamber, in the exercise of that discretion in favour of the Accused, only does so if he is satisfied that the Accused will appear for trial.

-The Judge or the Trial Chamber should also be satisfied before ordering his release that the Accused, if released, will not pose a danger to any victim, or witnesses or other persons.

On the submission by the Respondent that continued detention is the rule, and release on bail the exception, it is my opinion that in applications of this nature, the onus is on the Applicant, as the eventual beneficiary of the measure solicited, to satisfy the Judge or the Chamber factually and legally, that he fulfils the conditions necessary for the exercise of this discretion in his favour as pleaded in his application. I am further and also of the opinion, that thereafter, the Prosecution equally bears the burden, to convince and satisfy the Judge or the Trial Chamber legally and factually, that the Accused is not likely to fulfil the conditions required to enable him to enjoy the benefit of the exercise by the Judge or the Trial Chamber, of their inherent discretion to release him on bail or not. In effect, just as the accused canvasses for and justifies his release, the Prosecution bears the traditional burden of equally demonstrating to the satisfaction of the Judge or the Trial Chamber, that there are good reasons for continuing to deprive the detainee of his fundamental human right to

liberty.

This position finds its justification in the provisions of Article 17 (3) of the Statute of the Special Court which is a restatement of a well known, tested and surviving principle of Customary International Law which is that the Accused shall be presumed innocent until he is proven guilty, and that the burden of proving his guilt lies with the Prosecution.

It would indeed be remarkable if the contrary were the case as it would represent a major defection from global trends that hitherto have accorded respect and an attachment to very entrenched, tested, respected and universally accepted principles of Customary International Law, particularly where they touch on and affect the liberty of the individual which is one of the most, if not the most sacred and most frequently abused of all fundamental human rights that exist and are internationally recognised.

Guided by these principles, I will now turn to examine the issue of whether the Applicant, Mr. Tamba Alex Brima, from his sworn affidavit and the submissions of his Counsel, meets the legal criteria for a release on bail.

In his long affidavit, the Applicant pledges amongst other things, that he will appear for trial if released on bail and that he will not pose a danger to any victim, witness or any other person. He says he is married and has one child.

However, considering the gravity of the offence for which he is charged, no evidence has been adduced nor has any fact been sworn to, as to the availability of enough guarantees at his

disposal in the event of the Court being minded to grant him bail in application of Rule 65 (D) of the Rules of Evidence.

The Respondent has highlighted the fact that the offences for which he is indicted are of particular gravity and that if granted bail, the Applicant would not appear for trial. They further argue that the Sierra Leonean Police force is in a stage of transformation and that if the accused escapes through the very permeable frontiers, it would be difficult to recapture him as is the case up to date, of other indictees like, Sam Bokarie and Johnny Paul Koroma. The Representative of the Honourable and Learned Attorney General, representing the State of Sierra Leone, has, in accordance with the provisions of Rules 65 (B), made both written and oral submissions which are on the same lines as those of the Respondent and like the latter, he is urging the Court to refuse Mr. Tamba Alex Brima's application for bail.

In considering applications for bail under Rule 65 (B), the greatest apprehension that surfaces immediately and at all times is the possibility of the accused, if released, to appear or not to appear for his trial. In this regard, it is important to consider a number of other factors which are not incompatible with the spirit of the elements in Rule 65 (B) and which are linked to the element of a possible flight of the accused, namely, the gravity of the offences for which he is indicted, the character, antecedents and association of the accused, and community ties which he has, and which the accused enjoys in society, including a possible interference with the course of justice like posing a danger to victims or witnesses and other persons. Another factor to be addressed and considered in granting or refusing bail in a case of this nature is the need and imperatives to preserve public order.

In the circumstances and the facts of the case before me, coupled with the flight of indictees, actual and potential, as have already been referred to, I would like to refer to the decision of ***Stogmuller vs Austria*** 1 EHRR 155, where it was decided that 'on the risk that the Accused would fail to appear for trial, bail should be refused where it is certain that the hazards of flight would seem to be a lesser evil than continued imprisonment'. In yet another case of ***Neumeister vs Austria*** 1 EHRR 91, it was observed that in granting bail, it is relevant to consider the character of the person, his morals, his home, his occupation and his assets.

In the present case, the Applicant does not exhibit any assets to show to the satisfaction of the Court, his stakes and attachment in the society to which he is seeking to be released. Besides, there is a lot of scepticism in the engagements he has made in his own personal affidavit. In the case of *Momcilo Krajisnik* the majority judgement of the ICTY had this to say, and I quote;

"As to the undertakings given by the accused himself, the Trial Chamber cannot but note that it is given by a person who faces a substantial sentence if convicted and therefore has a considerable incentive to abscond". These comments indeed hold good for the contents of the Applicant's affidavit.

One other important factor to be considered in adjudicating on applications for bail is the preservation of public peace. In the case of *Letellier vs France* 14 EHRR 83, it was decided that where the nature of the crime alleged and the likely public reaction is such that a release of the Accused may give rise to public disorder, then, a temporary detention or remand may be justified. In the *Letellier* case, Mrs. Letellier, twice a divorcee, was running a

restaurant and living with a third husband. She hired killers who assassinated her ex- husband. Arrested and detained, she applied for bail which was refused on the grounds that the social repulsion and resentment to her crime was such as would disturb the public peace if she were released on bail.

Counsel for the Applicant has, in canvassing for bail, again raised the argument of the illegality of the detention and of the warrant of arrest and of detention, just as he did in his application for Habeas Corpus for this same Applicant. He has also raised the mistaken identity of his client, and the fact that the warrant of arrest did not contain a specific mention ordering the arrest of his client who he says is called ' Tamba Alex Brima' and not ' Alex Tamba Brima' .

After a thorough examination of all the arguments so advanced, I disagree with the contention of the Respondent that the legality of the arrest and detention of an Accused person is not relevant in an application for bail. I do not agree either with the further submission by the Respondent that by applying for bail in this case, the Accused has conceded to the legality of his arrest and of his detention. These submissions are too dangerous and hazardous to be accepted in criminal law and practice particularly in the light of the doctrine and privilege of the presumption of the innocence which a detained person enjoys and the possibility offered him to contest by all available means and at all times, the legality of his detention, which is just what this Applicant has in fact been doing all along. These two submissions by the Respondent are accordingly dismissed as frivolous, baseless, and contrary to the principles on which criminal law and the fundamental principles of Customary International Law are based and administered.

This said, I will now turn to the illegalities and arguments raised by the Applicant in support of the application for bail. The following are the main points amongst others raised in support of the illegalities.

-That the Applicant is called Tamba Alex Brima and not Alex Tamba Brima.

-That he has never served in the Sierra Leonean Army and could therefore not have risen to the rank of a Staff Sergeant as alleged in the indictment.

-That the warrant of arrest was defective in that it did not explicitly order the arrest of his client, thereby rendering his arrest and detention, illegal.

-That Rule 47 was not complied with in signing the indictment, thereby rendering it illegal.

As far as the first and second points are concerned, these, in my considered opinion, are matters to be examined during the trial because the Applicant was charged both as Alex Tamba Brima and as Tamba Alex Brima, the latter which he claims to be his real name.

As to the alleged defect on the warrant of arrest and of detention, it is observed that even though there is no express order ordering the arrest of the Applicant, the said warrant of arrest and of detention were issued against him and in names with which he is now identified. As regards the other allegations related to his identity, the Trial Chamber would be the proper venue to

resolve all the issues so raised.

In concluding I observe that the Applicant is indicted for having allegedly committed very serious crimes against humanity and the People of Sierra Leone, the State to which he seeks to be released.

Having regard to the foregoing analysis of the facts and arguments raised in the examination of his Application and considering;
Firstly, the likely possibility of his escaping or the probable impossibility of locating or recapturing him if released, or
Secondly, the likelihood of a public disorder, and
Thirdly, the possibility of likely recriminations, as was raised in the Letellier Case,
all of which are possible consequences that his release may provoke in this society where very deep wounds caused by the civil war are still healing, it is my considered opinion that this Application, notwithstanding the contents of the written submissions and arguments advanced by Learned Counsel on the Applicant's behalf, lacks any credible merit and therefore fails to satisfy the conditions laid down in Rule 65 of the Rules of Procedure and Evidence, to warrant the exercise in his favour, of the discretion to grant bail or a provisional release.

The Application is accordingly dismissed.

The Applicant will remain in custody pending his trial.

Done at Freetown, this 22nd day of July 2003

HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE:

Seal of the Court

JACOBS AND WHITE,

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

CLARE OVEY AND ROBIN WHITE

Third Edition

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maintaining detention on the basis of the indictment was not founded on any specific legislative provision or case law but stemmed from the absence of clear rules. It did not, therefore, satisfy the test of foreseeability. Furthermore, the fact that without a court order the detention could continue for an unlimited and unpredictable period was contrary to the principle of legal certainty and open to arbitrariness and abuse.

As the *Baranowski* judgment states, even where the national law is clear and has been complied with, the deprivation of liberty will not be 'lawful' if domestic law allows for arbitrary or excessive detention. In the case of *Erkalo* v. *Netherlands*[26] the applicant was detained in a mental hospital pursuant to a court order. When the order expired there was, because of an administrative error, a period of two months during which the applicant continued to be detained before a new order was granted by the court. Although under the Dutch Code of Criminal Procedure the detention was not unlawful in these circumstances, the Court held that the lack of administrative and judicial safeguards—demonstrated by the fact that the absence of any legal basis for the detention came to light only when the applicant himself applied to court—rendered the detention arbitrary and thus unlawful under Article 5(1).

DETENTION ON REMAND

DETENTION PENDING TRIAL: ARTICLE 5(1)(c)

Article 5(1)(c) allows for the arrest and pre-trial detention of a person suspected of having committed a criminal offence. The paragraph can be broken down into a number of separate conditions, all of which must be present in order for the arrest or detention to be acceptable under the Convention. Thus the arrest or detention must be 'lawful'; it must be effected for the purpose of bringing the detainee 'before the competent legal authority'; and the detainee must reasonably be suspected of having committed an offence or of being about to commit an offence or abscond having committed an offence.

The expression 'competent legal authority' has been held to carry the same meaning as 'judge or other officer authorized by law to exercise judicial power' in paragraph 3 of Article 5;[27] this meaning is considered in more detail below in this chapter.

In the *Lawless* case[28] the Irish Government contended that Article 5(1)(c)

[26] *Erkalo* v. *Netherlands* (App. 23807/94), Judgment of 2 September 1998; (1999) 28 EHRR 509.
[27] *Schiesser* v. *Switzerland*, Judgment of 4 December 1979, Series A, No. 34; (1979–80) 2 EHRR 417.
[28] *Lawless* v. *Ireland*, Judgment of 1 July 1961, Series A, No. 3; (1979–80) 1 EHRR 15, paras. 13 and 14 of Judgment.

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[29] *Ječius* v. *Lithuan*
[30] *Labita* v. *Italy* (
[31] See ch. 3 above.
[32] See ch. 8 below.
[33] *Benham* v. *Unit*
[34] *Hood* v. *United*
[35] *Steel and other*
EHRR 603.

should be interpreted in such a way that if the purpose of the arrest or detention was to prevent the commission of an offence, it should not be necessary also to have the intention of bringing the detainee to court. The Court of Human Rights, however, held that the phrase 'effected for the purpose of bringing him before the competent legal authority' qualified all the three alternative bases for arrest and detention at the end of Article 5(1)(c). It followed, therefore, that the internment of the applicant, a member of the Irish Republican Army, under a law allowing for the detention without trial of persons believed by a Minister of State to be 'engaged in activities . . . prejudicial to the preservation of public peace and order or to the security of the State' did not fall within any of the permitted categories in Article 5(1). The Court recently reached a similar conclusion in the *Ječius* case.[29] The applicant had been imprisoned under Article 50 of the Lithuanian Constitution (repealed 30 June 1997), which permitted arrest and preventive detention 'having sufficient reasons to suspect that a person may commit a [specified] dangerous act'. It is not acceptable to detain someone for a crime not yet committed.

As long as, at the time of the arrest or detention, the intention to bring the suspect to court is there, it is immaterial whether or not in the event he is actually brought to court or charged,[30] although too long a period of preliminary detention without judicial control may give rise to an issue under Article 5(3).

The word 'offence' in Article 5(1)(c) carries an autonomous meaning,[31] identical to that of 'criminal offence' in Article 6.[32] Although the classification of the offence under national law is one factor to be taken into account, the nature of the proceedings and the severity of the penalty at stake are also relevant.[33] Thus, for example, detention in close arrest on charges of desertion from the British army,[34] carrying a maximum penalty of two years' imprisonment, falls within Article 5(1)(c), although such military offences lie outside the mainstream English criminal law. The same goes for arrest for breach of the peace,[35] which English law classifies as a quasi-civil matter.

The 'offence' must be specific and concrete: preventive detention of individuals viewed by the State as generally 'undesirable' is not allowed. For this reason also the internment under consideration in the *Lawless* case would not have been covered by Article 5(1)(c). In the *Greek* case the Commission was of the opinion that administrative detention of persons considered by the military

[29] *Ječius* v. *Lithuania* (App. 34578/97), Judgment of 31 July 2000.
[30] *Labita* v *Italy* (App. 26772/95), Judgment of 6 April 2000, para. 155 of the judgment.
[31] See ch. 3 above.
[32] See ch. 8 below.
[33] *Benham* v. *United Kingdom* (App. 19380/92), Judgment of 10 June 1996; (1996) 22 EHRR 293.
[34] *Hood* v. *United Kingdom* (App. 27267/95), Judgment of 18 February 1999; (2000) 29 EHRR 365.
[35] *Steel and others* v. *United Kingdom* (App. 24838/94), Judgment of 23 September 1998; (1998) 28 EHRR 603.

government then in power to be dangerous to public order and security, and the use of house arrest, fell outside any of the categories of deprivation of liberty permitted by Article 5.[36] The *Guzzardi* case[37] also makes clear that preventive detention as part of a campaign to combat organized crime cannot be brought within Article 5(1)(c). This ruling was affirmed in the *Ciulla* case[38] which concerned a residence order imposed on a person suspected of involvement in organized crime through the Mafia.

It can be seen, therefore, that there will be very few cases falling within the second two alternatives in paragraph 1(c). Since the words 'when it is reasonably considered necessary to prevent [the detained person] committing an offence' do not authorize general preventive detention, evidence of intention on the part of the detainee to commit a concrete offence will be necessary. However, in most European countries, acts preparatory to the commission of a crime are themselves categorized as offences. Such evidence would, therefore, usually be sufficient to bring the detainee within the first limb: arrest or detention upon 'reasonable suspicion of having committed an offence'. Similarly any arrest or detention falling within the third limb—'to prevent [the detainee] . . . fleeing after having [committed an offence]'—will also fall within the first.

The requirement that the arrest and detention must be dependent upon the existence of reasonable suspicion that an offence has been committed means that there must be facts or information which would satisfy an objective observer.[39] In the *Fox, Campbell and Hartley* case[40] the applicants argued that the interpretation by the courts of section 11(1) of the Northern Ireland (Emergency Provisions) Act 1978 as requiring only a subjective test of honest belief that the person detained was a terrorist was incompatible with Article 5(1)(c). The Court found that in the context of the special problems presented in combating terrorism a lower standard of 'reasonable suspicion' might be acceptable, but that some objectively realistic grounds would still be needed. Since the United Kingdom had not provided any evidence on which it could be shown that there was any basis for the suspicion that the applicants were terrorists, the Court found a violation of Article 5(1)(c). In the *Labita* case[41] it held that the uncorroborated hearsay evidence of an anonymous informant was not enough to found 'reasonable suspicion' of the applicant's involvement in Mafia-type activities.

[36] *The Greek Case* (1969) 22 II *Yearbook* (special volume), 134–5.
[37] *Guzzardi* v. *Italy* Judgment of 6 November 1980, Series A, No. 39; (1981) 3 EHRR 333.
[38] *Ciulla* v. *Italy*, Judgment of 22 February 1989, Series A, No. 148; (1991) 13 EHRR 346.
[39] *Erdagöz* v. *Turkey* (App. 21890/93), Judgment of 22 October 1997; (2001) 32 EHRR 443.
[40] *Fox, Campbell and Hartley* v. *United Kingdom*, Judgment of 30 August 1990, Series A, No. 182; (1991) 13 EHRR 157; cf. *O'Hara* v. *United Kingdom*, Judgment of 16 October 2001.
[41] *Labita* v. *Italy* (App. 26772/95), Judgment of 6 April 2000.

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[42] *McGoff* v. *Swe*
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PROTECTION WHILE ON REMAND

Article 5(3) guarantees certain rights to persons arrested or detained in accordance with the provisions of Article 5(1)(c). The first part of Article 5(3) is concerned with rights immediately on arrest; the second part deals with detention on remand.

THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE

According to Article 5(3), any person arrested on suspicion of having committed a criminal offence has the right to be brought 'promptly' before 'a judge or other officer authorized by law to exercise judicial power'. In contrast to the right to judicial review of the legality of the detention under Article 5(4), which may be conditional on the application of the detained person, the right under Article 5(3) is to be brought promptly before a judge: it is the duty of the State on its own initiative to see that this is done.[42]

There has been considerable case law on the meaning of 'promptly' in this context, particularly in connection with applicants detained on suspicion of involvement in terrorism. States as diverse as the United Kingdom and Turkey have invoked the need to hold terrorist suspects *incommunicado* for some time following arrest, because of the risk that other members of the terrorist organization could destroy evidence or put the lives of witnesses or even judges in danger. Conversely, it can of course be argued that judicial safeguards are of particular importance in connection with emotive crimes of this nature, when the police and prosecution are likely to be under pressure to secure convictions and may be tempted to use unorthodox means to force confessions.

The Court has never put a finite limit on the acceptable length of preliminary detention, since it considers that this must depend on the circumstances in each case. Some guidance is, however, provided by the *Brogan and others* v. *United Kingdom* judgment.[43] The applicants were detained under special provisions enabling the Secretary of State for Northern Ireland to extend an initial forth-eight-hour period of detention. The shortest length of detention after arrest was four days and six hours and the longest was six days and sixteen hours. All the applicants were released without charge. Even taking account of the particular situation at that time in Northern Ireland, the Court regarded all cases as violations of the requirements of Article 5(3). The United Kingdom's response to the *Brogan* judgment was not to repeal the law allowing for extended periods of pre-charge detention; instead it filed a derogation under Article 15 of the Convention, claiming that, in view of the existence of 'an emergency threatening

[42] *McGoff* v. *Sweden*, Judgment of 26 October 1984, Series A, No. 83: (1986) 8 EHRR 246.

[43] *Brogan and others* v. *United Kingdom*, Judgment of 29 November 1988, Series A, No. 145-B; (1989) 11 EHRR 117.

the life of the nation' this part of Article 5(3) should be disapplied in Northern Ireland. When the same extended detention provisions came before the Court in the *Brannigan and McBride* case[44] the Government conceded that they were not consistent with Article 5(3), but the Court found that the derogation was valid and that there was no violation.[45]

Even where a Government has derogated from its Article 5(3) obligations the Court retains a power of review. The applicant in the case of *Aksoy* v. *Turkey*[46] was arrested on suspicion of involvement with the Kurdish terrorist organization, the PKK, and detained *incommunicado* for fourteen days under emergency provisions in force in South-East Turkey. The Government claimed that there was no violation because it had filed an Article 15 derogation in view of Kurdish separatist violence which had given rise to an 'emergency threatening the life of the nation'. The Court accepted that there was such an emergency, but ruled that, even taking into account the difficulty of investigating terrorist offences, fourteen days was too long to hold a suspect without judicial supervision and without access to a lawyer, doctor or friend.

A number of cases have considered the character of the 'other officer authorized by law to exercise judicial power'. The 'officer' need not be a judge but must display judicial attributes sufficient to protect the rights of the detained person. Most importantly, he or she must be independent of the executive and the parties to the case.[47] Thus a District Attorney who has been involved in indicting and prosecuting the accused cannot fulfil the role of judicial 'officer' under Article 5(3).[48] When assessing independence, the appearance of the situation from the viewpoint of an outside observer is decisive: if it appears that the 'officer' may intervene in subsequent criminal proceedings on behalf of the prosecution, his or her independence and impartiality may be open to doubt. In a case against Bulgaria the Court therefore held that the prosecutor who authorized the applicant's continued detention on remand could not provide sufficient guarantees of independence since he could in theory have taken over the prosecution of the subsequent criminal proceedings.[49] Military disciplinary regimes in several countries have led to violations of Article 5(3), since the Court's autonomous interpretative approach brings many military offences within the scope of Article 5 paragraphs (1)(c) and (3). In the *Hood* case,[50] for

[44] *Brannigan and McBride* v. *United Kingdom*, Judgment of 26 May 1993, Series A, No. 258-B; (1994) 17 EHRR 539.

[45] In February 2001 the UK Government lifted the derogation, in the light of the Northern Irish peace process. A new derogation to Art. 5 (1)(f) was filed on 18 December 2001 following the September 11 attacks.

[46] Aksoy v. *Turkey* (App. 21987/93), Judgment of 18 December 1996; (1997) 23 EHRR 553.

[47] *Schiesser* v. *Switzerland*, Judgment of 4 December 1979, Series A, No. 34; (1979–80) 2 EHRR 417.

[48] *Huber* v. *Switzerland*, Judgment of 23 October 1990, Series A, No. 188.

[49] *Assenov* v. *Bulgaria* (App. 24760/94), Judgment of 28 October 1998; (1998) 28 EHRR 652.

[50] *Hood* v. *United Kingdom* (App. 27267/95), Judgment of 18 February 1999; (2000) 29 EHRR 365.

example, the Court found that the British system whereby the accused soldier's commanding officer remanded him in close arrest was incompatible with Article 5(3) since the same officer was likely to play a central role in the ensuing prosecution and trial by court martial. Similarly, the lack of complete impartiality of the Dutch *auditeur militeur* and the Belgian counterpart took them outside the provision.[51]

The 'officer' must adopt a procedure which meets the normal requirements of due process. This includes hearing representations from the detainee at an oral hearing and deciding, by reference to legal criteria, whether or not the detention is justified.[52] If it is not justified, the 'officer' must have the power to order release.[53]

TRIAL WITHIN A REASONABLE TIME OR RELEASE

Article 5(3) next provides that 'Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this Article . . . shall be entitled to trial within a reasonable time or to release pending trial.'

The drafting of this provision is ambiguous. Read together with Article 5(1) it appears to permit the detention on remand of any person reasonably suspected of having committed an offence—that is, any person likely to stand trial—as long as the trial takes place within a reasonable time, a right in any case guaranteed by Article 5(1). Such an interpretation would, however, be at odds with the purpose of Article 5 which is, broadly, to limit detention to those circumstances where it is strictly necessary in the public interest and to provide guarantees to detainees against arbitrariness. Moreover, it would mean that the Convention allowed for pre-trial detention in many more cases than most national European legal systems, where it is usually necessary to show some ground such as a risk of absconding or tampering with evidence before it is possible to lock up a person who, although accused of an offence, is innocent until proved guilty.

The Court has therefore rejected this reading and, in a clear example of the purposive interpretative approach, has held in a series of judgments that not only the initial arrest, but also the continuing *detention* must be justified, as long as it lasts, by adequate grounds; and that, independently of those grounds, its *duration* must also not exceed a reasonable time.

[51] *De Jong, Baljet and Van den Brink* v. *Netherlands*, Judgment of 22 May 1984, Series A, No. 77; (1986) 8 EHRR 20, *Van der Sluijs, Zuiderfeld and Klappe* v. *Netherlands*, Judgment of 22 May 1984, Series A, No. 78; (1991) 13 EHRR 461; *Duinhoff and Duif* v. *Netherlands*, Judgment of 22 May 1984, Series A, No. 79; (1991) 13 EHRR 478, and *Pauwels* v. *Belgium*, Judgment of 26 May 1988, Series A, No. 135; (1989) 11 EHRR 238. See also *Brincat* v. *Italy*, Judgment of 26 November 1992, Series A, No. 249-A; (1993) 16 EHRR 591, concerning the Italian deputy public prosecutor.

[52] *Assenov* v. *Bulgaria* (App. 24760/94), Judgment of 28 October 1998; (1998) 28 EHRR 652, para. 146; *Caballero* v. *United Kingdom* (App. 32819/96), Judgment of 8 February 2000; *Sabeur ben Ali* v. *Malta* (App. 35892/97), Judgment of 29 June 2000.

[53] See e.g. *Aquilina* v. *Malta* (App. 25642/94), Judgment of 29 April 1999; (1999) 29 EHRR 185.

The standard paragraphs setting out the Court's approach which appear in almost every judgment concerned with this part of Article 5(3) provide:

> [W]hether a period of pre-trial detention can be considered 'reasonable' must be assessed in each case according to its special features. . . .
>
> Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. It falls in the first place to the national judicial authorities to examine all the circumstances arguing for or against the existence of such a requirement and to set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5(3).
>
> The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices: the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were 'relevant' and 'sufficient', the Court must also ascertain whether the competent national authorities displayed 'special diligence' in the conduct of the proceedings. The complexity and special characteristics of the investigation are factors to be considered in this respect.[54]

Thus, as far as the need for pre-trial detention is concerned, it can be seen that the Court understands its role essentially as one of reviewing whether the reasons given by the national courts for refusing release are adequate and sufficient. In each case, the national courts must assess the need for detention with reference to the particular facts. For this reason a British law which automatically denied release on bail to a person charged with a serious violent crime if he had already been convicted of such a crime was incompatible with Article 5(3).[55]

The Court has never elaborated an exhaustive list of grounds which could justify pre-trial detention; each case is to be judged on its own particular merits.

As previously stated, suspicion that the detained person has committed an offence, while a necessary condition, does not suffice to justify detention continuing beyond a short initial period, even where the accused is charged with a particularly serious crime and the evidence against him is strong.[56]

The ground most frequently relied upon by national courts is the risk of

[54] This particular extract was taken from *Scott* v. *Spain* (App. 21335/93), Judgment of 18 December 1996; (1997) 24 EHRR 391, para. 74 of the judgment.

[55] *Caballero* v. *United Kingdom* (App. 32819/96), Judgment of 8 February 2000.

[56] *Tomasi* v. *France*, Judgment of 27 August 1992, Series A, No. 241-A; (1993) 15 EHRR 309; *Ječius* v. *Lithuania* (App. 34578/97), Judgment of 31 July 2000.

absconding. But the risk must be substantiated in each case: it is not sufficient, for example, for the national authorities simply to point to the fact that the accused would receive a long prison sentence if convicted as evidence that he or she would be likely to disappear,[57] although this may be a relevant consideration. The applicant in the case of *Barfuss* v. *Czech Republic*[58] was charged with fraudulently obtaining a number of large bank loans and faced a heavy sentence. The decisions of the Czech courts refusing his applications for bail referred in addition to the fact that he had contacts in Germany, and that if he fled there it would be impossible to continue with the prosecution because there was no extradition agreement between Germany and the Czech Republic. This reasoning was held by the Court of Human Rights to be sufficient for the purposes of Article 5(3).

Where the danger of absconding can be avoided by bail or other guarantees, the accused must be released, and there is an obligation on the national authorities to consider such alternatives to detention.[59] Moreover, in those countries which have the system of bail on financial sureties, the amount of the sureties must not be excessive, and must be fixed by reference to the purpose for which they are imposed, namely to ensure that this particular defendant appears for trial.[60] The sum must never be set exclusively by reference to the seriousness of the charge without considering the accused's financial circumstances.

Another common ground invoked to justify pre-trial detention is the risk of re-offending prior to trial. Again, the domestic court judgments must show that this risk was substantiated: reference to past crimes may not be sufficient.[61] In an early case, *Matznetter* v. *Austria*, the applicant was an accountant charged with committing a number of serious company frauds. The Court held that it was compatible with Article 5(3) for the national court to rely on the risk of reoffending as a ground for refusing bail, since Matznetter had the skill and experience 'such as to make it easy for him to resume his unlawful activities'.[62] Similarly, in the *Assenov* case[63] the Bulgarian authorities were entitled to rely on this ground since the applicant was charged with a long series of thefts, some of which had allegedly been committed subsequent to his initial arrest and questioning by the police.

[57] See e.g. *Muller* v. *France* (App. 21802/93), Judgment of 17 March 1997.

[58] *Barfuss* v. *Czech Republic* (App. 35848/97), Judgment of 31 July 2000; (2002) 34 EHRR 948.

[59] *Wemhoff* v. *Germany*, Judgment of 27 June 1968, Series A. No. 7; (1979–80) 1 EHRR 55, para. 15 of 'The Law'; and see, more recently, *Jablonski* v. *Poland* (App. 33492/96), Judgment of 21 December 2000.

[60] *Neumeister* v. *Austria*, Judgment of 27 June 1968, Series A, No. 8; (1979–80) 1 EHRR 91, paras. 13–14 of 'The Law', and see more recently e.g. *Punzelt* v. *Czech Republic* (App. 31315/96), Judgment of 25 April 2000; (2001) 33 EHRR 1159.

[61] *Muller* v. *France* (App. 21802/93), Judgment of 17 March 1997.

[62] *Matznetter* v. *Austria*, Judgment of 10 November 1969, Series A, No. 10; (1979–80) 1 EHRR 198, para. 9 of 'The Law'.

[63] *Assenov* v. *Bulgaria* (App. 24760/94), Judgment of 28 October 1998; (1998) 28 EHRR 652.

Other grounds which have been accepted by the Court as capable of justifying detention are the risk of suppression of evidence[64] and of collusion, that is, contacting other defendants or witnesses to agree on a false version of events.[65]

The right to trial within a reasonable time under Article 5(3) can be invoked only by those detained until trial. If a person is released at any stage before the trial, the situation is governed by Article 6(1) alone. Provided the relevant periods are sufficiently long, there is nothing to prevent a detainee from making claims under both provisions.

The relevant period under Article 5(3) begins with arrest or detention. The question when the Article ceases to apply is more complicated, since some European legal systems regard all detention as provisional until the conviction and sentence are confirmed by the final appeal court. In the *Wemhoff* case the Court held that the relevant period ended with the delivery of the judgment at first instance,[66] and that the protection of Article 5(3) did not, therefore, extend to the date on which German law considered the conviction to have become final, that is, after appeal or upon the expiry of the time-limit for appeal. The Court found it decisive in favour of this interpretation that a person convicted at first instance was in the position provided for by Article 5(1)(a), which authorizes deprivation of liberty 'after conviction'. This last phrase could not be interpreted as being restricted to the case of a final conviction, for this would exclude the detention immediately on conviction of those who appear for trial while still at liberty.

In the *Ringeisen* case the Commission requested the Court to review its *Wemhoff* decision or at least to interpret it in such a way that detention after conviction might be considered as remaining subject to Article 5(3) until the conviction became final. Ringeisen had been detained on two charges and separate proceedings were pending in each. His detention after conviction on the first charge ran concurrently with his remand in custody pending trial on the second charge. In these circumstances the Court did not consider it necessary to pronounce on the issues raised by the Commission; Article 5(3) applied throughout Ringeisen's detention.[67]

The point was finally resolved in the case of *B* v. *Austria*,[68] where the Court confirmed its *Wemhoff* judgment to hold that, despite the rule of Austrian law that sentence becomes final only with the determination of any appeal,

[64] *Wemhoff* v. *Germany*, Judgment of 27 June 1968, Series A, No. 7; (1979–80) 1 EHRR 55, paras. 13–14 of 'The Law'.

[65] *Ringeisen* v. *Austria*, Judgment of 16 July 1971, Series A, No. 13; (1979–80) 1 EHRR 455, para. 107 of Judgment.

[66] *Wemhoff* v. *Germany*, Judgment of 27 June 1968, Series A, No. 7; (1979–80) 1 EHRR 55, paras 6–9 of 'The Law'.

[67] *Ringeisen* v. *Austria*, Judgment of 16 July 1971, Series A, No. 13; (1979–80) 1 EHRR 455, para. 109 of Judgment.

[68] *B* v. *Austria*, Judgment of 28 March 1990, Series A, No. 175; (1991) 13 EHRR 20.

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[70] *Stögmüller* v.
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[71] *Wemhoff* v. G
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[72] *Punzelt* v. *Cze*
[73] *P.B.* v. *France*

the applicant's detention on remand came to an end for the purposes of the Convention with the finding of guilt and sentencing at first instance.

Just as the start and end points of the period to be considered under Article 5(3) are different from those relevant for Article 6(1), so the assessment of what length of time is 'reasonable' differs for the two Articles. In its *Wemhoff* judgment the Court said:

> Article 5, which begins with an affirmation of the right of everyone to liberty and security of person, goes on to specify the situations and conditions in which derogations from this principle may be made, in particular with a view to the maintenance of public order, which requires that offences shall be punished. *It is thus mainly in the light of the fact of the detention* of the person being prosecuted that national courts, possibly followed by the Court [of Human Rights], must determine whether the time that has elapsed, for whatever reason, before judgment is passed on the accused has at some stage exceeded a reasonable limit, that is to say imposed a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed to be innocent.[69]

Consequently Article 5(3) requires that there must be 'special diligence' in bringing the case to trial if the accused is detained.[70] A detained person is entitled to have the case given priority and conducted with particular expedition.[71]

The Court applies a broad two-stage approach. It will first determine whether the grounds relied upon by the national authorities were adequate, until the very end, to justify remanding the accused in custody. If the detention was justified in principle, the Court will then examine the conduct of the prosecution to ensure that the pre-trial detention was not unnecessarily prolonged. Periods of inactivity by the national authorities lasting more than a few months are usually taken by the Court as a sign of lack of diligence, particularly if the overall duration of the detention was long. By way of example, the Court has recently found excessive periods of pre-trial detention lasting from two and a half[72] to nearly five years.[73]

[69] *Wemhoff* v. *Germany*, Judgment of 27 June 1968, Series A, No. 7; (1979–80) 1 EHRR 55, para. 5 of 'The Law' (emphasis added).

[70] *Stögmüller* v. *Germany*, Judgment of 10 November 1969, Series A, No. 9; (1979–80) 1 EHRR 155, para. 5 of 'The Law'.

[71] *Wemhoff* v. *Germany*, Judgment of 27 June 1968, Series A, No. 7; (1979–80) 1 EHRR 55, para. 17 of 'The Law'.

[72] *Punzelt* v. *Czech Republic* (App. 31315/96), Judgment of 25 April 2000; (2001) 33 EHRR 1159.

[73] *P.B.* v. *France* (App. 38781/97), Judgment of 1 August 2000.

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EUROPEAN COURT OF HUMAN RIGHTS

In the case of Murray v. the United Kingdom*,

The European Court of Human Rights, sitting, in pursuance o Rule 51 of Rules of Court A**, as a Grand Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr F. Gölcüklü,
Mr R. Macdonald,
Mr A. Spielmann,
Mr S.K. Martens,
Mr I. Foighel,
Mr R. Pekkanen,
Mr A.N. Loizou,
Mr J.M. Morenilla,
Sir John Freeland,
Mr A.B. Baka,
Mr M.A. Lopes Rocha,
Mr L. Wildhaber,
Mr G. Mifsud Bonnici,
Mr J. Makarczyk,
Mr P. Jambrek,
Mr K. Jungwiert,

and also of Mr H. Petzold, Acting Registrar,

Having deliberated in private on 23 April and 21 September 1994,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

* The case is numbered 13/1993/408/487. The first number is the ca position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creat and on the list of the corresponding originating applications to th Commission.

** Rules A apply to all cases referred to the Court before the entr into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond

the Rules that came into force on 1 January 1983, as amended severa times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commissi of Human Rights ("the Commission") on 7 April 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 14310/88) against the United Kingdom of Great Brit and Northern Ireland lodged with the Commission under Article 25 (art. 25) on 28 September 1988 by Mrs Margaret Murray, Mr Thomas Murray, Mr Mark Murray, Ms Alana Murray, Ms Michaela Murr and Ms Rossina Murray, who are all Irish citizens.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdo recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as t whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 paras. 1, 2 and 5, Article and Article 13 (art. 5-1, art. 5-2, art. 5-5, art. 8, art. 13) of t Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawy who would represent them (Rule 30). The Government of Ireland, hav been reminded by the Registrar of their right to intervene (Article (b) of the Convention and Rule 33 para. 3 (b)) (art. 48-b), did not indicate any intention of so doing.

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Articl of the Convention) (art. 43), and Mr R. Ryssdal, the President of t Court (Rule 21 para. 3 (b)). On 23 April 1993, in the presence of Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr L.-E. Pettiti, Mr N. Valticos, Mr J.M. Morenilla, Mr M.A. Lopes Rocha, Mr L. Wildhaber and Mr G. Mifsud Bonnici (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kin Government ("the Government"), the applicants' lawyers and the Dele of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in conseque the Government's memorial was lodged at the registry on 3 November 1993, the applicants' memorial on 15 November and their claims for just satisfaction under Article 50 (art. 50) of the Convention on 23 December 1993, 18 and 20 January 1994. In a lette received on 14 December 1993 the Secretary to the Commission inform

the Registrar that the Delegate did not wish to comment in writing the memorials filed.

5. In accordance with the President's decision, the hearing to place in public in the Human Rights Building, Strasbourg, on 24 January 1994. The Chamber had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr H. Llewellyn, Assistant Legal Adviser, Foreign and Commonwealth Office, — Agen
Mr R. Weatherup, QC,
Mr J. Eadie, Barrister-at-law, — Counse

(b) for the Commission

Mr M.P. Pellonpää, — Delegat

(c) for the applicants

Mr R. Weir, QC,
Mr S. Treacy, Barrister-at-law, — Counse
Mr P. Madden, — Solicito

The Court heard addresses by Mr Pellonpää, Mr Weir and Mr Weatherup.

6. Following deliberations held on 28 January 1994 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 para. 1).

7. The Grand Chamber to be constituted included ex officio Mr Ryssdal, President of the Court, Mr Bernhardt, Vice-President of Court, and the other members of the Chamber which had relinquished jurisdiction (Rule 51 para. 2 (a) and (b)). On 28 January 1994, in presence of the Registrar, the President drew by lot the names of t ten additional judges called on to complete the Grand Chamber, name Mr R. Macdonald, Mr A. Spielmann, Mr S.K. Martens, Mr I. Foighel, Mr R. Pekkanen, Mr A.N. Loizou, Mr A.B. Baka, Mr J. Makarczyk, Mr P. Jambrek and Mr K. Jungwiert (Rule 51 para. 2 (c)). Mr Pettit a member of the original Chamber, was unable to take part in the Gr Chamber's consideration of the case and was replaced by Mr F. Gölcü in accordance with the drawing of lots effected under Rule 51 para. 2 (c). Mr Valticos, also a member of the original Chamber, w prevented at a later stage from continuing to take part in the Gran Chamber's deliberations.

8. The Grand Chamber held a meeting devoted to procedural matt on 24 March 1994.

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Having taken note of the concurring opinions of the Agent o the Government, the Delegate of the Commission and the applicants, Grand Chamber decided on 23 April 1994 that the consideration of th case should continue without resumption of the oral proceedings (Rule 26).

AS TO THE FACTS

I. Particular circumstances of the case

A. Introduction

9. The six applicants are members of the same family. The fir applicant, Mrs Margaret Murray, and the second applicant, Mr Thomas Murray, are husband and wife. The other four applicants their children, namely their son Mark Murray (born in 1964), their daughters Alana and Michaela Murray (born in 1967) and a younger daughter Rossina Murray (born in 1970). At the relevant time in 19 all six applicants resided together in the same house in Belfast, Northern Ireland.

10. On 22 June 1982 two of the first applicant's brothers were convicted in the United States of America ("USA") of arms offences connected with the purchase of weapons for the Provisional Irish Republican Army ("Provisional IRA"). The Provisional IRA is includ among the organisations proscribed under the special legislation enacted in the United Kingdom to deal with terrorism in Northern Ireland (see paragraph 35 below).

B. First applicant's arrest

11. On 26 July 1982 at approximately 6.30 a.m. Corporal D., a member of the Women's Royal Army Corps, attended an Army briefing a which she was told that the first applicant was suspected of involvement in the collection of money for the purchase of arms for IRA in the USA, this being a criminal offence under section 21 of t Northern Ireland (Emergency Provisions) Act 1978 ("the 1978 Act") a section 10 of the Prevention of Terrorism (Temporary Provisions) Ac 1976. The corporal was instructed to go to the first applicant's house, arrest her under section 14 of the 1978 Act (see paragraphs 36-38 below) and bring her back to the Army screening ce at Springfield Road in Belfast.

12. At 7 a.m. Corporal D., who was unarmed but accompanied by f armed soldiers, arrived by Army vehicle at the applicants' home. T first applicant herself answered the door and three of the male soldiers, together with Corporal D., entered the house. Corporal D established the identity of the first applicant and asked her to ge dressed. Corporal D. went upstairs with the first applicant. The other applicants were roused and asked to assemble in the living ro The soldiers did not carry out any search of the contents of the ho but made written notes as to the interior of the house and recorded personal details concerning the applicants. At about 7.30 a.m. in

hallway of the house Corporal D., with one of the soldiers acting a a witness, said to the first applicant, "As a member of Her Majesty forces, I arrest you." On being asked twice by the first applicant under what section, Corporal D. replied, "Section 14."

C. First applicant's questioning

13. The first applicant was then driven to the Army screening centre at Springfield Road, Belfast. She was escorted into a build and asked to sit for a short time in a small cubicle. At 8.05 a.m. was taken before Sergeant B. who asked her questions with a view to completing part 1 of a standard form to record, inter alia, details the arrest and screening procedure and personal details. The first applicant refused to answer any questions save to give her name and refused to be photographed. The interview ended four minutes later She was then examined by a medical orderly who endeavoured to estab whether she suffered from certain illnesses, but she again refused co-operate and did not answer any of his questions.

14. At 8.20 a.m. she was taken to an interview room and questio by a soldier in civilian clothes in the presence of Corporal D. Sh was asked, inter alia, about her brothers and her contacts with the but she still refused to answer questions. After the interview, wh ended at 9.35 a.m., she was returned to the reception area and then taken back to the medical orderly who asked her if she had any complaints. She did not reply to this query.

At some stage during her stay in the centre she was photographed without her knowledge or consent. This photograph and personal details about her, her family and her home were kept on record.

She was released at 9.45 a.m. without being charged.

15. The standard record form, called the "screening proforma", recorded the first applicant's name, address, nationality, marital tenancy status, the chronological details about her arrest, the nam of the Army personnel involved, the names of the other applicants a their relationship to her, her physique and her attitude to the interview. Under the heading "Additional information ... concernin the arrestee (as reported by the arresting soldier)", it stated: "Subject is the sister of C... M... who was arrested in USA. Questioned on the above subject." Nothing however was recorded und the heading "Suspected offence". It noted that the applicant had refused to answer questions and that no information had been gained from the interview.

D. Proceedings before the High Court

16. Some eighteen months later, on 9 February 1984, the first applicant brought an action against the Ministry of Defence for fal imprisonment and other torts.

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17. In those proceedings one of the principal allegations made the first applicant was that her arrest and detention had been effe unlawfully and for an improper purpose. Her allegations were summarised in the judgment of Murray J. given on 25 October 1985:

> "The plaintiff's counsel launched a series of attacks on th legality of the plaintiff's arrest and detention which vari in thrust between the very broad and the very narrow. In t former class, for example, was an attack in which they alle that the use of section 14 of the [1978 Act] in this case w an example of what they called 'an institutionalised form o unlawful screening' by the military authorities, with the intention of obtaining what counsel termed 'low level intelligence' from the plaintiff, and without (a) any genui suspicion on the part of those authorities that she had committed a criminal offence or (b) any genuine intention o their part of questioning her about a criminal offence alle to have been committed by her."

18. In support of this case the first applicant's counsel not o called and examined the applicant herself but extensively cross-examined the two witnesses called on behalf of the defendants namely Corporal D. and Sergeant B.

19. The evidence given by the first applicant is recorded in a drafted by the trial judge, there being no transcript of the first of the trial as a result of a technical mishap with the recording equipment. The first applicant explained how she had found the conditions of her arrest and detention distressing for her. She ha been angry but had not used strong language. She testified that wh at the Army centre she had refused to be photographed, to be weighe by the medical orderly, to sign any documents and to answer questio whether put by Sergeant B., the medical orderly or the interviewer, apart from giving her name. She had made it clear that she would n be answering any questions. She alleged that Sergeant B. had told in so many words that the Army knew that she had not committed any crime but that her file had been lost and the Army wanted to update She said that she had been questioned about her brothers in the USA their whereabouts and her contacts with them, but not about the purchase of arms for the Provisional IRA or about any offence. She accepted that she had been in contact with her brothers and had bee to the USA, including a visit that year (1985). She believed that Army had wanted to obtain information about her brothers. On leavi the centre, she had told the officials that she would be seeing the in court.

20. As appears from the transcript of her evidence, Corporal D. gave an account of her briefing on the morning of the arrest. She stated that at the briefing she had been told the first applicant's name and address and the grounds on which she was wanted for questioning, namely her suspected involvement in the collection of money for the purchase of weapons from America. She testified that suspicions were aroused by my briefing, and my belief was that

Mrs Murray was suspected of collecting money to purchase arms".

Under cross-examination Corporal D. maintained that the pur of an arrest and detention under section 14 of the 1978 Act was not gather intelligence but to question a suspected person about an offence. She stated that her suspicion of the first applicant had formed on the basis of everything she had been told at the briefing which she had read in a document which had been supplied to her the Corporal D. stated that she would not have effected the arrest unle she had been given the grounds on which she was expected to arrest person. Under repeated questioning, Corporal D. maintained that sh had been informed at the briefing, and that she had formed the suspicion, that the applicant had been involved in the collection o money for the purchase of arms from America.

21. Corporal D. was further examined about the interrogation of first applicant at Springfield Road. She stated that she recalled questions had been asked of the applicant by the interviewer and th the applicant had refused to answer any questions put to her. She recalled that the interviewer had asked a few more questions when h returned to the room after leaving it but that she could not really remember what they were about. Counsel for the defence returned to question of the interview of the applicant towards the end of his examination of Corporal D. in the following exchange:

> Q. "... Now while you were, just going back for a mom to the time when what I might call the interview, that's wh the three of you were in the room, and the two occasions you've said she had to leave, you took her to, she wanted t go to the lavatory. Do you just have no recollection of an of the questions that were asked?"
>
> A. "I don't remember the questions as they were asked. There was a question regards money. A question regards America."

No cross-examination by the first applicant's counsel was directed to this reply of the witness.

22. Sergeant B. was examined and cross-examined about his completion of part 1 of the standard record form when standing at t reception desk. He said that the first applicant had stated her na but refused to give her address or date of birth or any further information. He expressly denied the applicant's allegation that h had said to her that he knew she was not a criminal and that he jus wanted to update her files which had been lost. He gave evidence t information recorded in 1980 on the occasion of a previous arrest o the first applicant had in any event not been lost, since it had be used to complete the details on the first page of the form when she refused to answer any questions.

Under cross-examination Sergeant B. did not accept that the main purpose of questioning a person arrested under section 14 of t

1978 Act was to gather general information about the background, fa and associates of the arrested person. He maintained that persons only arrested and detained if there existed a suspicion against the of involvement in a criminal offence.

23. The issue of the interview of the first applicant was specifically addressed in the final submission of defence counsel, which the following exchange is partially recorded in the transcrip

> "MR. CAMPBELL: My Lord ... your Lordship has the grounds u which the arresting officer carries out (inaudible) she the gives evidence and is present throughout the interview ... I talk about the interview on the very last stage.
>
> JUDGE: At the table?
>
> MR. CAMPBELL: At the table, and said that in the course o that interview money and arms that these matters were raise I can't ... hesitate to use the (inaudible) now that is one point. The other point is this, that this was a lady who o her own admission was not going to answer any questions. S agreed during cross-examination that that was the attitude so one finds that an interview takes place with somebody wh is not prepared to answer any questions but at least the questions are raised with her concerning the matter on whic she was arrested.
>
> JUDGE: Is the substance of that then that because of her fairly firm refusal you would say to answer any questions there was never any probing examination of her collecting money for example?
>
> MR. CAMPBELL: No my Lord because she ... as she said she wasn't going to answer any questions."

24. In his judgment of 25 October 1985 Murray J. gave detailed consideration to the evidence of Corporal D. and Sergeant B. on the hand and the first applicant on the other. Murray J. "could not possibly accept the [first applicant's] evidence" that she had been told by Sergeant B. that she was not suspected of any offence and t he was just updating his records. He similarly rejected the applicant's claim that Corporal D. at no time genuinely suspected h of having committed an offence. In the light of the evidence of Corporal D. herself, who was described as a "transparently honest witness", the judge was

> "quite satisfied that on the basis of her briefing at Musgrave Park she genuinely suspected the [first applicant] having been involved in the offence of collecting money in Northern Ireland for arms".

25. Murray J. also rejected the first applicant's claim that section 14 of the 1978 Act had been used with a view to screening i

order to gain low-level intelligence: he accepted the evidence of Corporal D. and Sergeant B., which had been tested in cross-examination, that the purpose of the applicant's arrest and detention under the section had been to establish facts concerning offence of which she was suspected.

Murray J. also believed the evidence of Corporal D. that th were questions addressed to the matters of which the applicant was suspected. He stated:

> "As regards the interviewer, the plaintiff accepted that he was interested in the activities of her brothers who shortl before the date of the interview had been convicted on arms charges in the USA connected with the Provisional IRA but t [first applicant], who seems to have been well aware of her rights, obviously had decided not to co-operate with the military staff in the centre. In particular she had decide (it seems) not to answer any of their questions and in this situation, and with the short detention period permitted by the section, there was little that the interviewer or any o the other staff in the centre could do to pursue their suspicions."

26. Murray J. likewise rejected the first applicant's argument the photographing of her gave rise to a cause of action. His understanding of the law was that merely taking the photograph of a person, even against their will, without physically interfering wit or defaming the person was not tortious.

27. The first applicant's action before the High Court was therefore dismissed.

E. Proceedings before the Court of Appeal

28. The first applicant thereupon appealed to the Court of Appe She again challenged the legality of her arrest on the grounds, inter alia

> "(1) that the arresting officer did not have, or was not sufficiently proved to have, the requisite suspicion; (2) t she did not have sufficiently detailed knowledge or understanding of what was alleged against the plaintiff to warrant the conclusion that it was an offence which would justify arrest".

In its judgment of 20 February 1987 the Court of Appeal unanimously rejected both these grounds. In delivering judgment, Gibson LJ noted:

> "[The trial judge had] found, and his finding was amply justified by the evidence, that [Corporal D.] genuinely suspected the plaintiff of having been involved in the offe of collecting money in Northern Ireland for arms to be

purchased in America for use by a proscribed organisation."

In particular, as to the second ground Gibson LJ observed:

"Suspicion is something less than proof, and may exist with evidence, though it must be supported by some reason."

29. The Court of Appeal further unanimously rejected the first applicant's complaint that the purpose of her arrest and detention, the whole purport of her questioning, was a fishing expedition unrelated to the matters of which she was suspected and designed to obtain low-grade intelligence about the applicant and others. In rejecting this complaint, the Court of Appeal took account of the evidence which had been adduced on both sides:

"Corporal D. who was present during the interview had very little recollection of the course of the questions. The on other witness as to the conduct of this interview was the [first applicant]. Her account also is sketchy, though in somewhat more detail. What is clear from both witnesses is that the [first applicant] was deliberately unhelpful and refused to answer most of the questions. What is certain i that she was asked about her brothers ... who in the previo month had been convicted of offences connected with the purchase of firearms in the USA for use by the IRA [and for which offences they had been sentenced to terms of two and three years' imprisonment]. It is clear that it was for su a purchase that the [first applicant] was suspected of havi collected money, as she stated the interviewer asked her whether she was in contact with them. There is no doubt, therefore, that the interviewer did attempt to pursue the subject of the suspicion which had been the occasion for he arrest but was unable to make any headway."

30. The first applicant's appeal to the Court of Appeal also concerned certain related matters such as the legality of the searc of the applicants' house, in respect of which the Court of Appeal f that there was a sufficient basis in section 14(3) of the 1978 Act (see paragraphs 36 and 38(d) below). The Court of Appeal held that implied authority granted to the Army under section 14 included a p to interrogate a detained person and, as a practical necessity, a p to record personal particulars and details concerning the arrest an detention. It further found that the standard record form known as "screening proforma" contained no information which might not have relevant to the resolution of the suspicion.

As regards the applicant's complaint that she had been photographed without her knowledge, the Court of Appeal stated as follows:

"The act of taking the photograph involved nothing in the nature of a physical assault. Whether such an act would constitute an invasion of privacy so as to be actionable in

the United States is irrelevant, because the [first applica can only recover damages if it amounts to a tort falling within one of the recognised branches of the law on the top According to the common law there is no remedy if someone takes a photograph of another against his will. Reliance w placed on section 11(4) of the [1978] Act by counsel for th [first applicant] ... This provision gives power to the police to order [in addition to the taking of a photograph] the taking of finger prints without the necessity of chargi the person concerned and applying for an order of the magistrate under article 61 of the Magistrates Courts (Northern Ireland) Order 1981, which contains no comparable provision as to the taking of photographs. The taking of finger prints otherwise than by consent must involve an assault and I am satisfied that section 11(4) was enacted n to legalise the taking of photographs without consent, but legalise the taking of photographs or finger prints in circumstances where there would otherwise have been an ille assault. It does not involve the implication that the taki of a photograph without violence and without consent is actionable."

F. Proceedings before the House of Lords

31. The first applicant was granted leave by the Court of Appea to appeal to the House of Lords. This appeal was rejected on 25 May 1988 (Murray v. Ministry of Defence, [1988] Weekly Law Reports 692).

32. In the House of Lords the applicant did not pursue the allegation that she had not been arrested on the basis of a genuine honest suspicion that she had committed an offence.

She did however pursue the complaint, previously raised bef the Court of Appeal, that since she was only lawfully arrested at 7.30 a.m. she had been unlawfully detained between 7.00 and 7.30 a. The House of Lords found that a person is arrested from the moment is subject to restraint and that the first applicant was therefore under arrest from the moment that Corporal D. identified her on entering the house at 7 a.m.. It made no difference that the forma words of arrest were communicated to the applicant at 7.30 a.m. In this respect Lord Griffiths stated (at pp. 698H-699A):

"If the plaintiff had been told she was under arrest the moment she identified herself, it would not have made the slightest difference to the sequence of events before she l the house. It would have been wholly unreasonable to take her off, half-clad, to the Army centre, and the same half-h would have elapsed while she gathered herself together and completed her toilet and dressing. It would seem a strange result that in these circumstances, whether or not she has action for false imprisonment should depend upon whether th words of arrest are spoken on entering or leaving the house

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when the practical effect of the difference on the plaintif is non-existent."

33. The first applicant had also maintained that the failure to inform her that she was arrested until the soldiers were about to l the house rendered the arrest unlawful. This submission was also rejected by the House of Lords. Lord Griffiths held as follows (at pp. 699H-701A):

> "It is a feature of the very limited power of arrest contai in section 14 that a member of the armed forces does not ha to tell the arrested person the offence of which he is suspected, for it is specifically provided by section 14(2) that it is sufficient if he states that he is effecting the arrest as a member of Her Majesty's forces.
>
> Corporal D. was carrying out this arrest in accordance with the procedures in which she had been instructed to make a house arrest pursuant to section 14. This procedure appear to me to be designed to make the arrest with the least risk injury to those involved including both the soldiers and th occupants of the house. When arrests are made on suspicion involvement with the IRA it would be to close one's eyes to the obvious not to appreciate the risk that the arrest may forcibly resisted.
>
> The drill the Army follow is to enter the house and search every room for occupants. The occupants are all directed t assemble in one room, and when the person the soldiers have come to arrest has been identified and is ready to leave, t formal words of arrest are spoken just before they leave th house. The Army do not carry out a search for property in house and, in my view, they would not be justified in doing so. The power of search is given 'for the purpose arresting a person', not for a search for incriminating evidence. It is however a proper exercise of the power of search for the purpose of effecting the arrest to search ev room for other occupants of the house in case there may be those there who are disposed to resist the arrest. The sea cannot be limited solely to looking for the person to be arrested and must also embrace a search whose object is to secure that the arrest should be peaceable. I also regard as an entirely reasonable precaution that all the occupants the house should be asked to assemble in one room. As Corporal D. explained in evidence, this procedure is follow because the soldiers may be distracted by other occupants i the house rushing from one room to another, perhaps in a st of alarm, perhaps for the purpose of raising the alarm and resist the arrest. In such circumstances a tragic shooting accident might all too easily happen with young, and often relatively inexperienced, armed soldiers operating under conditions of extreme tension. Your Lordships were told th the husband and children either had commenced, or were

contemplating commencing, actions for false imprisonment arising out of the fact that they were asked to assemble in the living-room for a short period before the plaintiff was taken from the house. That very short period of restraint when they were asked to assemble in the living room was a proper and necessary part of the procedure for effecting th peaceable arrest of the plaintiff. It was a temporary restraint of very short duration imposed not only for the benefit of those effecting the arrest, but also for the protection of the occupants of the house and would be wholl insufficient to found an action for unlawful imprisonment.

It was in my opinion entirely reasonable to delay speaking words of arrest until the party was about to leave the hous If words of arrest are spoken as soon as the house is enter before any precautions have been taken to search the house find the other occupants, it seems to me that there is a re risk that the alarm may be raised and an attempt made to resist arrest, not only by those within the house but also summoning assistance from those in the immediate neighbourhood. When soldiers are employed on the difficult and potentially dangerous task of carrying out a house arre of a person suspected of an offence in connection with the IRA, it is I think essential that they should have been trained in the drill they are to follow. It would be impracticable and I think potentially dangerous to leave it the individual discretion of the particular soldier making arrest to devise his own procedures for carrying out this unfamiliar military function. It is in everyone's best interest that the arrest is peaceably effected and I a satisfied that the procedures adopted by the Army are sensible, reasonable and designed to bring about the arrest with the minimum of danger and distress to all concerned. would however add this rider: that if the suspect, for any reason, refuses to accept the fact of restraint in the hous he should be informed forthwith that he is under arrest."

34. Before the House of Lords the first applicant also pursued claim that her period of detention exceeded what was reasonably required to make a decision whether to release her or hand her over the police. In this regard the applicant complained that the stand record form (the "screening proforma") constituted an improper basi for questioning a suspect on the ground that it asked questions not directly relevant to the suspected offence; it was also suggested t the evidence did not show that the questioning of the applicant was directed to the matters of which she was suspected. The allegation unanimously rejected by the House of Lords. Lord Griffiths observe as follows (at pp. 703F-704C):

"The member of the forces who carried out the interrogation between 8.20 and 9.35 a.m. was not called as a witness on behalf of the Ministry of Defence. There may have been sou reasons for this decision associated with preserving the

confidentiality of interrogating techniques and the identit of the interviewer, but be that as it may, the only evidenc of what took place at the interview came from Corporal D. a the [first applicant] and it is submitted that this evidenc is insufficient to establish that the interview was directe towards an attempt to investigate the suspicion upon which [applicant] was arrested. Corporal D. was present at that interview, she was not paying close attention but she gave evidence that she remembered questions about money which we obviously directed towards the offences of which the [applicant] was suspected. The [applicant] also said she w questioned about her brothers.

The judge also had before him a questionnaire that was completed by the interviewer. ... There is nothing in the questionnaire which the Army may not reasonably ask the suspect together with such particular questions as are appropriate to the particular case ..."

The conclusion of the trial judge that the applicant had no been asked unnecessary or unreasonable questions and the conclusion the Court of Appeal that the interviewer had attempted to pursue wi the applicant the suspicion which had been the occasion of the arre but had been unable to make any headway, were held by the House of Lords to be justified on the evidence.

II. Relevant domestic law and practice

A. Introduction

35. For more than twenty years the population of Northern Irela which totals about one and a half million people, has been subjecte to a campaign of terrorism. During that time thousands of persons Northern Ireland have been killed, maimed or injured. The campaign terror has extended to the rest of the United Kingdom and to the mainland of Europe.

The 1978 Act forms part of the special legislation enacted the years in an attempt to enable the security forces to deal effectively with the threat of terrorist violence.

B. Entry and search; arrest and detention

36. The first applicant was arrested under section 14 of the 19 Act, which at the relevant time provided as follows:

"(1) A member of Her Majesty's forces on duty may arrest without warrant, and detain for not more than four hours, a person whom he suspects of committing, having committed or being about to commit any offence.

(2) A person effecting an arrest under this section compli with any rule of law requiring him to state the ground of

arrest if he states that he is effecting the arrest as a member of Her Majesty's forces.

(3) For the purpose of arresting a person under this sectio a member of Her Majesty's forces may enter and search any premises or other place -

(a) where that person is, or

(b) if that person is suspected of being a terroris or of having committed an offence involving the use possession of an explosive, explosive substance or firearm, where that person is suspected of being."

A similar provision had been in force since 1973 and had be considered necessary to deal with terrorist activities in two independent reviews (Report of the Diplock Commission 1972 which recommended such a power and a Committee chaired by Lord Gardiner 1974/1975).

37. In 1983 Sir George Baker, a retired senior member of the judiciary, was invited by the Government to review the operation of 1978 Act in order to determine whether its provisions struck the ri balance between the need, on the one hand, to maintain as fully as possible the liberties of the individual and, on the other, to prov the security forces and the courts with adequate powers to enable t to protect the public from current and foreseeable incidence of terrorist crime. In the resultant report specific consideration wa given to, inter alia, including a requirement in section 14 of the Act that an arrest should be based upon reasonable suspicion. Whil expressly recognising the risk that the facts raising the suspicion might come from a confidential source which could not be disclosed court in a civil action for wrongful arrest, Sir George Baker concl that the inclusion of a requirement of reasonableness would not in make any difference to the actions of the military and recommended amendment to the 1978 Act accordingly. That recommendation was implemented in June 1987.

38. The scope and exercise of the section 14 powers were consid by the domestic courts in the proceedings in the present case. The applicable law, as stated by the judgments in these proceedings, is that when the legality of an arrest or detention under section 14 i challenged (whether by way of habeas corpus or in proceedings for damages for wrongful arrest or false imprisonment), the burden lies the military to justify their acts and, in particular, to establish following elements:

(a) compliance with the formal requirements for arrest;

(b) the genuineness of the suspicion on which the arrest wa based;

(c) that the powers of arrest and detention were not used f

any improper purpose such as intelligence-gathering;

(d) that the power of search was used only to facilitate th arrest and not for the obtaining of incriminating evidence;

(e) that those responsible for the arrest and detention did exceed the time reasonably required to reach a decision whether to release the detainee or hand him over to the police.

C. Photograph

39. Section 11 of the 1978 Act, which concerns police arrest, provides in paragraph 4:

> "Where a person is arrested under this section, an officer the Royal Ulster Constabulary not below the rank of chief inspector may order him to be photographed and to have his finger and palm prints taken by a constable, and a constabl may use such reasonable force as may be necessary for that purpose."

40. In the general law of Northern Ireland, as in English law, is lawful to take a photograph of a person without his or her conse provided no force is used and the photograph is not exploited in su a way as to defame the person concerned (see paragraphs 26 and 30 i fine above).

The common-law rule entitling the Army to take a photograph equally provides the legal basis for its retention.

D. Standard record form

41. As was confirmed in particular by the Court of Appeal and t House of Lords in the present case, the standard record form (known the "screening proforma") was an integral part of the examination o the first applicant following her arrest, and the legal authority f recording certain personal details about her in the form derived fr the lawfulness of her arrest, detention and examination under secti 14 of the 1978 Act (see paragraph 30, first sub-paragraph in fine, paragraph 34 above). The implied lawful authority conferred by section 14 of the 1978 Act to record information about the first applicant equally provided the legal basis for the retention of the information.

PROCEEDINGS BEFORE THE COMMISSION

42. The applicants applied to the Commission on 28 September 19 (application no. 14310/88).

The first applicant complained that her arrest and detentio for two hours for questioning gave rise to a violation of Article 5 paras. 1 and 2 (art. 5-1, art. 5-2), for which she had no enforceable right to compensation as guaranteed by Article 5 para.

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(art. 5-5); and that the taking and keeping of a photograph and personal details about her was in breach of her right to respect fo private life under Article 8 (art. 8).

The other five applicants alleged a violation of Article 5 paras. 1, 2 and 5 (art. 5-1, art. 5-2, art. 5-5) as a res of being required to assemble for half an hour in one room of their house while the first applicant prepared to leave with the Army. T further argued that the recording and retention of certain personal details about them, such as their names and relationship to the fir applicant, violated their right to respect for private life under Article 8 (art. 8).

All six applicants claimed that the entry into and search o their home by the Army were contrary to their right to respect for their private and family life and their home under Article 8 (art. of the Convention; and that, contrary to Article 13 (art. 13), no effective remedies existed under domestic law in respect of their foregoing complaints under the Convention.

The applicants also made complaints under Article 3 and Article 5 para. 3 (art. 3, art. 5-3), which they withdrew subsequen on 11 April 1990.

43. On 10 December 1991 the Commission declared admissible all first applicant's complaints and the other applicants' complaint un Article 8 (art. 8) in connection with the entry into and search of family home. The remainder of the application was declared inadmissible.

44. In its report of 17 February 1993 (Article 31) (art. 31) th Commission expressed the opinion that

(a) in the case of the first applicant, there had been a violation of Article 5 para. 1 (art. 5-1) (eleven votes to three), Article 5 para. 2 (art. 5-2) (ten votes to four) and Article 5 para. 5 (art. 5-5) (eleven votes to three);

(b) there had been no violation of Article 8 (art. 8) (thir votes to one);

(c) it was not necessary to examine further the first applicant's complaint under Article 13 (art. 13) concerning remedie for arrest, detention and the lack of information about the reasons arrest;

(d) in the case of the first applicant, there had been no violation of Article 13 (art. 13) in relation to either the entry i and search of her home (unanimously) or the taking and keeping of a photograph and personal details about her (ten votes to four).

The full text of the Commission's opinion and of the three partly dissenting opinions contained in the report is reproduced as

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annex to this judgment*.

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* Note by the Registrar. For practical reasons this annex will app only with the printed version of the judgment (volume 300-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT

45. At the public hearing on 24 January 1994 the Government maintained in substance the concluding submission set out in their memorial, whereby they invited the Court to hold

> "(1) that there has been no violation of Article 5 paras. 1, 2 or 5 (art. 5-1, art. 5-2, art. 5-5) of Convention in the case of the [first] applicant;
>
> (2) that there has been no violation of Article 8 (art. of the Convention in the case of the [first] applic or in the cases of the other applicants;
>
> (3) that there has been no violation of Article 13 (art. 13) of the Convention in relation to the [fir applicant's complaints concerning entry and search her home and concerning the taking and retention of photograph and personal details;
>
> (4) that there has been no violation of Article 13 (art. 13) of the Convention in relation to the [fir applicant's complaints concerning her arrest; alternatively, if a violation of Article 5 para. 5 (art. 5-5) is found, that no separate issue arises under Article 13 (art. 13) of the Convention".

46. On the same occasion the applicants likewise maintained in substance the conclusions and requests formulated at the close of t memorial, whereby they requested the Court

> "to decide and declare:
>
> (1) that the facts disclose breaches of paragraphs 1, 2 and 5 of Article 5 (art. 5-1, art. 5-2, art. 5-5) o the Convention;
>
> (2) that the facts disclose a breach of Article 8 (art. of the Convention;
>
> (3) that the facts disclose a breach of Article 13 (art. 13) of the Convention".

AS TO THE LAW

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I. GENERAL APPROACH

47. The applicants' complaints concern the first applicant's ar and detention by the Army under special criminal legislation enacte to deal with acts of terrorism connected with the affairs of Northe Ireland. As has been noted in several previous judgments by the Co the campaign of terrorism waged in Northern Ireland over the last quarter of a century has taken a terrible toll, especially in terms human life and suffering (see paragraph 35 above).

The Court sees no reason to depart from the general approac it has adopted in previous cases of a similar nature. Accordingly, the purposes of interpreting and applying the relevant provisions o the Convention, due account will be taken of the special nature of terrorist crime, the threat it poses to democratic society and the exigencies of dealing with it (see, inter alia, the Fox, Campbell a Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, p. 15, para. 28, citing the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 14 p. 27, para. 48).

II. ALLEGED VIOLATION OF ARTICLE 5 PARA. 1 (art. 5-1) OF THE CONVENTION

48. The first applicant, Mrs Margaret Murray, alleged that her arrest and detention by the Army were in breach of Article 5 para. (art. 5-1) of the Convention, which, in so far as relevant, provide

> "Everyone has the right to liberty and security of person. one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected fo the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...
>
> ..."

A. Lawfulness

49. Before the Convention institutions the first applicant did dispute that her arrest and detention were "lawful" under Northern Ireland law and, in particular, "in accordance with a procedure prescribed by law", as required by Article 5 para. 1 (art. 5-1). S submitted that she had not been arrested on "reasonable suspicion" having committed a criminal offence and that the purpose of her arr and subsequent detention had not been to bring her before a compete legal authority within the meaning of paragraph 1 (c) (art. 5-1-c).

B. "Reasonable suspicion"

50. Mrs Murray was arrested and detained by virtue of section 1 of the 1978 Act (see paragraphs 11 and 12 above). This provision, construed by the domestic courts, empowered the Army to arrest and detain persons suspected of the commission of an offence provided, inter alia, that the suspicion of the arresting officer was honestl and genuinely held (see paragraphs 36 and 38(b) above). It is rele but not decisive that the domestic legislation at the time merely imposed this essentially subjective standard: the Court's task is t determine whether the objective standard of "reasonable suspicion" down in Article 5 para. 1 (art. 5-1) was met in the circumstances o the application of the legislation in the particular case.

51. In its judgment in the above-mentioned case of Fox, Campbel and Hartley, which was concerned with arrests carried out by the Northern Ireland police under a similarly worded provision of the 1978 Act, the Court stated as follows (pp. 16-18, paras. 32 and 34)

> "The 'reasonableness' of the suspicion on which an arrest m be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 para. 1 (c) (art. 5-1-c). ... [H]aving a "reasonable suspicion" presupposes the existence of facts o information which would satisfy an objective observer that person concerned may have committed the offence. What may regarded as 'reasonable' will however depend upon all the circumstances.
>
> In this respect, terrorist crime falls into a special category. Because of the attendant risk of loss of life an human suffering, the police are obliged to act with utmost urgency in following up all information, including informat from secret sources. Further, the police may frequently ha to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.
>
> ... [I]n view of the difficulties inherent in the investigation and prosecution of terrorist-type offences in Northern Ireland, the 'reasonableness' of the suspicion justifying such arrests cannot always be judged according t the same standards as are applied in dealing with conventio crime. Nevertheless, the exigencies of dealing with terror crime cannot justify stretching the notion of 'reasonablene to the point where the essence of the safeguard secured by Article 5 para. 1 (c) (art. 5-1-c) is impaired ...
>
> ...
>
> Certainly Article 5 para. 1 (c) (art. 5-1-c) of the Convent should not be applied in such a manner as to put

disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism ... . It follows t the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources supporting information or even facts which would be susceptible of indicating such sources or their identity.

Nevertheless the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 para. 1 (art. 5-1-c) has been secured. Consequently, the responden Government have to furnish at least some facts or informati capable of satisfying the Court that the arrested person wa reasonably suspected of having committed the alleged offenc This is all the more necessary where, as in the present cas the domestic law does not require reasonable suspicion, but sets a lower threshold by merely requiring honest suspicion

On the facts the Court found in that case that, although th arrest and detention of the three applicants, which lasted respecti forty-four hours, forty-four hours and five minutes and thirty hour and fifteen minutes, were based on an honest suspicion, insufficien elements had been furnished by the Government to support the conclu that there had been a "reasonable suspicion" for the purposes of sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) (ibid., p. 18, para. 35).

52. In the present case the Government maintained that there existed strong and specific grounds, founded on information from a reliable but secret source, for the Army to suspect that Mrs Murray involved in the collection of funds for terrorist purposes. Howeve the "primary" information so provided could not be revealed in the interests of protecting lives and personal safety. In the Governme submission, the fact that they had maintained that this was the foundation of the suspicion should be given considerable weight by Court. They also pointed to a number of other facts capable of supporting, albeit indirectly, the reasonableness of the suspicion, including notably the findings made by the domestic courts in the proceedings brought by Mrs Murray, the very recent conviction of he brothers in the USA of offences connected with the purchase of weap for the Provisional IRA, her own visits to the USA and her contacts with her brothers there (see especially paragraphs 10, 19, 24, 25, and 29 above). They submitted that all these matters taken togethe provided sufficient facts and information to satisfy an objective observer that there was a reasonable suspicion in the circumstances the case. Any other conclusion by the Court would, they feared, prohibit arresting authorities from effecting an arrest of a person suspected of being a terrorist based primarily on reliable but secr information and would inhibit the arresting authorities in taking effective measures to counter organised terrorism.

53. The first applicant, on the other hand, considered that the

Government had failed to discharge the onus of disclosing sufficien facts to enable the Convention institutions to conclude that the suspicion grounding her arrest was reasonable or anything more than "honest" suspicion required under Northern Ireland law. As in the of Fox, Campbell and Hartley, the Government's explanation did not the minimum standards set by Article 5 para. 1 (c) (art. 5-1-c) for judging the reasonableness of her arrest and detention. She did no accept that the reason advanced for non-disclosure was a genuine or valid one. She in her turn pointed to circumstances said to cast d on the reasonableness of the suspicion. Thus, had the suspicion re been reasonable, she would not have been arrested under the four-ho power granted by section 14 of the 1978 Act but under more extensiv powers; she would have been questioned by the police, not the Army; time would not have been spent in gathering personal details and in photographing her; she would have been questioned for more than one hour and fifteen minutes; she would have been questioned about her alleged involvement and not just about her brothers in the USA; and would have been cautioned. In reply to the Government the first applicant contended that the issue which the domestic courts inquir into was not the objective reasonableness of any suspicion but the subjective state of mind of the arresting officer, Corporal D.

54. For the Commission, the Government's explanation in the pre case was not materially distinguishable from that provided in the c of Fox, Campbell and Hartley. It took the view that no objective evidence to corroborate the unrevealed information had been adduced support of the suspicion that the first applicant had been involved collecting money for Provisional IRA arms purchases other than her kinship with her convicted brothers. That, the Commission conclude was insufficient to satisfy the minimum standard set by Article 5 para. 1 (c) (art. 5-1-c).

55. With regard to the level of "suspicion", the Court would no firstly that, as was observed in its judgment in the case of Brogan Others, "sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) does n presuppose that the [investigating authorities] should have obtaine sufficient evidence to bring charges, either at the point of arrest while [the arrested person is] in custody. Such evidence may have unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of oth (loc. cit., p. 29, para. 53). The object of questioning during detention under sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, fact which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigat

56. The length of the deprivation of liberty at risk may also b material to the level of suspicion required. The period of detenti permitted under the provision by virtue of which Mrs Murray was arrested, namely section 14 of the 1978 Act, was limited to a maxim of four hours.

57. With particular regard to the "reasonableness" of the suspicion, the principles stated in the Fox, Campbell and Hartley judgment are to be applied in the present case, although as pointed in that judgment, the existence or not of a reasonable suspicion in concrete instance depends ultimately on the particular facts.

58. The Court would firstly reiterate its recognition that the of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives citizens and to democratic society as a whole (see also the Klass a Others v. Germany judgment of 6 September 1978, Series A no. 28, p. para. 48). This does not mean, however, that the investigating authorities have carte blanche under Article 5 (art. 5) to arrest suspects for questioning, free from effective control by the domest courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (ibid., p. 23, para. 49

59. As to the present case, the terrorist campaign in Northern Ireland, the carnage it has caused over the years and the active engagement of the Provisional IRA in that campaign are established beyond doubt. The Court also accepts that the power of arrest gran to the Army by section 14 of the 1978 Act represented a bona fide attempt by a democratically elected parliament to deal with terrori crime under the rule of law. That finding is not altered by the fa that the terms of the applicable legislation were amended in 1987 a a result of the Baker Report so as to include a requirement that th arrest should be based on reasonable, rather than merely honest, suspicion (see paragraph 37 above).

The Court is accordingly prepared to attach some credence t the respondent Government's declaration concerning the existence of reliable but confidential information grounding the suspicion again Mrs Murray.

60. Nevertheless, in the words of the Fox, Campbell and Hartley judgment, the respondent Government must in addition "furnish at le some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence" (see paragraph 51 above). In this connection, unl in the case of Fox, Campbell and Hartley, the Convention institutio have had the benefit of the review that the national courts conduct of the facts and of Mrs Murray's allegations in the civil proceedin brought by her.

61. It cannot be excluded that all or some of the evidence addu before the national courts in relation to the genuineness of the suspicion on the basis of which Mrs Murray was arrested may also be material to the issue whether the suspicion was "reasonable" for th purposes of Article 5 para. 1 (c) (art. 5-1-c) of the Convention. the very least the honesty and bona fides of a suspicion constitute indispensable element of its reasonableness.

In the action brought by Mrs Murray against the Ministry of Defence for false imprisonment and other torts, the High Court judg after having heard the witnesses and assessed their credibility, fo that she had genuinely been suspected of having been involved in th collection of funds for the purchase of arms in the USA for the Provisional IRA (see paragraph 24 above). The judge believed the evidence of the arresting officer, Corporal D, who was described as "transparently honest witness", as to what she had been told at her briefing before the arrest (see paragraphs 11 and 24 above). Likew as found by the judge, although the interview at the Army centre wa later in time than the arrest, the line of questioning pursued by t interviewer also tends to support the conclusion that Mrs Murray herself was suspected of the commission of a specific criminal offe (see paragraphs 14 and 25 above).

62. Some weeks before her arrest two of Mrs Murray's brothers h been convicted in the USA of offences connected with purchase of ar for the Provisional IRA (see paragraph 10 above). As she disclosed her evidence to the High Court, she had visited the USA and had contacts with her brothers there (see paragraph 19 above). The offences of which her brothers were convicted were ones that implie collaboration with "trustworthy" persons residing in Northern Irela

63. Having regard to the level of factual justification require at the stage of suspicion and to the special exigencies of investigating terrorist crime, the Court finds, in the light of all above considerations, that there did exist sufficient facts or information which would provide a plausible and objective basis for suspicion that Mrs Murray may have committed the offence of involve in the collection of funds for the Provisional IRA. On the particu facts of the present case, therefore, the Court is satisfied that, notwithstanding the lower standard of suspicion under domestic law, Mrs Murray can be said to have been arrested and detained on "reasonable suspicion" of the commission of a criminal offence, wit the meaning of sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c).

C. Purpose of the arrest

64. In the first applicant's submission, it was clear from the surrounding circumstances that she was not arrested for the purpose bringing her before a "competent legal authority" but merely for th purpose of interrogating her with a view to gathering general intelligence. She referred to the entries made in her regard on th standard record form completed at the Army centre (see paragraph 15 above), to the failure of the Army to involve the police in her questioning and to the short (one-hour) period of her questioning (see paragraph 14 above).

The Government disputed this contention, pointing to the fa that it was a claim expressly raised by Mrs Murray in the domestic proceedings and rejected by the trial judge on the basis of evidenc which had been tested by cross-examination of witnesses.

The Commission in its report did not find it necessary to examine this complaint in view of its conclusion as to the lack of "reasonable suspicion" for the arrest and detention.

65. Under the applicable law of Northern Ireland the power of arrest and detention granted to the Army under section 14 of the 1978 Act may not be used for any improper purpose such as intelligence-gathering (see paragraph 38(c) above). In the civil action brought by Mrs Murray against the Ministry of Defence the tr court judge found that on the evidence before him the purpose of he arrest and detention under section 14 of the 1978 Act had been to establish facts concerning the offence of which she was suspected (paragraph 25 above). In reaching this conclusion the trial judge h had the benefit of seeing the various witnesses give their evidence of evaluating their credibility. He accepted the evidence of Corporal D. and Sergeant B. as being truthful and rejected the clai of Mrs Murray, in particular her contention that she had been told Sergeant B. that she was not suspected of any offence and had been arrested merely in order to bring her file up to date (see paragraphs 19, 20 to 22, 24 and 25 above). The Court of Appeal, af reviewing the evidence, in turn rejected her argument that the purp of her arrest and detention had been a "fishing expedition" designe to obtain low-grade intelligence (see paragraph 29 above). This argument was not pursued before the House of Lords (see paragraph 3 above).

66. The Court's task is to determine whether the conditions lai down by paragraph (c) of Article 5 para. 1 (art. 5-1-c), including pursuit of the prescribed legitimate purpose, have been fulfilled i the circumstances of the particular case. However, in this context is not normally within the province of the Court to substitute its finding of fact for that of the domestic courts, which are better placed to assess the evidence adduced before them (see, among other authorities, the X v. the United Kingdom judgment of 5 November 198 Series A no. 46, pp. 19-20, para. 43, in relation to Article 5 para. 1 (e) (art. 5-1-e); and the Klaas v. Germany judgment of 22 September 1993, Series A no. 269, p. 17, para. 29, in relation t Article 3 (art. 3)). In the present case no cogent elements have b produced by the first applicant in the proceedings before the Convention institutions which could lead the Court to depart from t findings of fact made by the Northern Ireland courts.

67. Mrs Murray was neither charged nor brought before a court b was released after an interview lasting a little longer than one ho (see paragraph 14 above). This does not necessarily mean, however, that the purpose of her arrest and detention was not in accordance Article 5 para. 1 (c) (art. 5-1-c) since "the existence of such a purpose must be considered independently of its achievement" (see t above-mentioned Brogan and Others judgment, pp. 29-30, para. 53). the domestic courts pointed out (see paragraphs 25 in fine, 29 in f and 34 in fine above), in view of her persistent refusal to answer questions at the Army centre (see paragraphs 13, 14 and 19 above) i is not surprising that the authorities were not able to make any

headway in pursuing the suspicions against her. It can be assumed that, had these suspicions been confirmed, charges would have been and she would have been brought before the competent legal authorit

68. The first applicant also alleged absence of the required pr purpose by reason of the fact that in practice persons arrested by Army under section 14 were never brought before a competent legal authority by the Army but, if the suspicions were confirmed during questioning, were handed over to the police who preferred charges a took the necessary action to bring the person before a court.

The Court sees little merit in this argument. What counts the purpose of compliance with Convention obligations is the substa rather than the form. Provided that the purpose of the arrest and detention is genuinely to bring the person before the competent leg authority, the mechanics of how this is to be achieved will not be decisive.

69. The arrest and detention of the first applicant must theref be taken to have been effected for the purpose specified in paragraph 1 (c) (art. 5-1-c).

D. Conclusion

70. In conclusion, there has been no violation of Article 5 para. 1 (art. 5-1) in respect of the first applicant.

III. ALLEGED VIOLATION OF ARTICLE 5 PARA. 2 (art. 5-2) OF THE CONVENTION

71. The first applicant also alleged a violation of Article 5 para. 2 (art. 5-2) of the Convention, which provides:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arres and of any charge against him."

72. The relevant principles governing the interpretation and application of Article 5 para. 2 (art. 5-2) in cases such as the present one were explained by the Court in its Fox, Campbell and Hartley judgment as follows (loc. cit., p. 19, para. 40):

> "Paragraph 2 of Article 5 (art. 5-2) contains the elementar safeguard that any person arrested should know why he is be deprived of his liberty. This provision is an integral par of the scheme of protection afforded by Article 5 (art. 5): virtue of paragraph 2 (art. 5-2) any person arrested must b told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a cou to challenge its lawfulness in accordance with paragraph 4 (art. 5-4)... . Whilst this information must be conveyed 'promptly' (in French: 'dans le plus court délai'), it need

not be related in its entirety by the arresting officer at very moment of the arrest. Whether the content and promptn of the information conveyed were sufficient is to be assess in each case according to its special features."

In that case the Court found on the facts that the reasons the applicants' arrest had been brought to their attention during t interrogation within a few hours of their arrest. This being so, t requirements of Article 5 para. 2 (art. 5-2) were held to have been satisfied in the circumstances (ibid., pp. 19-20, paras. 41-43).

73. The first applicant maintained that at no time during her arrest or detention had she been given any or sufficient informatio as to the grounds of her arrest. Although she had realised that th Army was interested in her brothers' activities, she had not, she claimed, understood from the interview at the Army centre that she herself was suspected of involvement in fund-raising for the Provisional IRA. The only direct information she was given was the formal formula of arrest pronounced by Corporal D.

74. The Commission similarly took the view that it was impossib to draw any conclusions from what it described as the vague indicat given by Corporal D. in evidence before the High Court as to whethe the first applicant had been able to understand from the interview she had been arrested. In the Commission's opinion, it had not bee shown that the questions asked of Mrs Murray during her interview w sufficiently precise to constitute the information as to the reason for arrest required by Article 5 para. 2 (art. 5-2).

75. According to the Government, on the other hand, it was appa from the trial evidence that in the interview it was made clear to Mrs Murray that she was suspected of the offence of collecting mone for the Provisional IRA. The Government did not accept the Commission's conclusion on the facts, which was at variance with th findings of the domestic courts. They considered it established th Mrs Murray had been given sufficient information as to the grounds her arrest. In the alternative, even if insufficient information h been given to her to avail herself of her right under Article 5 para. 4 (art. 5-4) of the Convention to take legal proceedings to t the lawfulness of her detention, she had suffered no prejudice ther which would give rise to a breach of Article 5 para. 2 (art. 5-2) s she had been released rapidly, before any determination of the lawfulness of her detention could have taken place.

76. It is common ground that, apart from repeating the formal w of arrest required by law, the arresting officer, Corporal D., also told Mrs Murray the section of the 1978 Act under which the arrest being carried out (see paragraphs 12 and 36 above). This bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 para. 2 (art. 5-2) (see above-mentioned Fox, Campbell and Hartley judgment, p. 19, para. 41

77. During the trial of Mrs Murray's action against the Ministr

of Defence, evidence as to the interview at the Army centre was giv by Mrs Murray and Corporal D., but not by the soldier who had condu the interview (see paragraphs 14, 19 and 21 above). Mrs Murray testified that she had been questioned about her brothers in the US and about her contacts with them but not about the purchase of arms the Provisional IRA or about any offence (see paragraph 19 above). Corporal D. did not have a precise recollection as to the content o the questions put to Mrs Murray. This is not perhaps surprising si the trial took place over three years after the events - Mrs Murray having waited eighteen months before bringing her action - and Corporal D., although present, had not taken an active part in the interview (see paragraphs 14, 16, 17 and 21 above). Corporal D. di however remember that questions had been asked about money and abou America and the trial judge found her to be a "transparently honest witness" (see paragraphs 21 and 24 above). Shortly before the arre two of Mrs Murray's brothers had, presumably to the knowledge of al concerned in the interview, been convicted in the USA of offences connected with the purchase of weapons for the Provisional IRA (see paragraph 10 above).

In the Court's view, it must have been apparent to Mrs Murr that she was being questioned about her possible involvement in the collection of funds for the purchase of arms for the Provisional IR by her brothers in the USA. Admittedly, "there was never any probi examination of her collecting money" - to use the words of the tria judge - but, as the national courts noted, this was because of Mrs Murray's declining to answer any questions at all beyond giving name (see paragraphs 14, 23, 25, 29 and 34 in fine above). The Cou therefore finds that the reasons for her arrest were sufficiently brought to her attention during her interview.

78. Mrs Murray was arrested at her home at 7 a.m. and interview at the Army centre between 8.20 a.m. and 9.35 a.m. on the same day paragraphs 12 and 14 above). In the context of the present case th interval cannot be regarded as falling outside the constraints of t imposed by the notion of promptness in Article 5 para. 2 (art. 5-2)

79. In view of the foregoing findings it is not necessary for t Court to examine the Government's alternative submission.

80. In conclusion, there was no breach of Article 5 para. 2 (art. 5-2) in respect of the first applicant.

IV. ALLEGED VIOLATION OF ARTICLE 5 PARA. 5 (art. 5-5) OF THE CONVENTION

81. The first applicant finally alleged in relation to Article a violation of paragraph 5 (art. 5-5) of the Convention, which read

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have enforceable right to compensation."

This claim was accepted by the Commission but disputed by t Government. The Commission concluded that there was no enforceable right under Northern Ireland law for the breaches of Article 5 paras. 1 and 2 (art. 5-1, art. 5-2) which it considered to have occurred.

82. As the Court has found no violation of Article 5 paras. 1 or 2 (art. 5-1, art. 5-2), no issue arises under Article 5 para. 5 (art. 5-5). There has accordingly been no violation of this latter provision in the present case.

V. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION

83. All six applicants claimed to be the victims of a violation Article 8 (art. 8) of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority wi the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in th interests of national security, public safety or the econom well-being of the country, for the prevention of disorder o crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Arguments before the Court

84. The first applicant complained of the manner in which she w treated both in her home and at the Army centre; in the latter connection she objected to the recording of personal details concer herself and her family, as well as the photograph which was taken o her without her knowledge or consent (see paragraphs 12 to 15 above All six applicants contended that the entry into and search of thei family home by the Army, including the confinement of the second, third, fourth, fifth and sixth applicants for a short while in one room, violated Article 8 (art. 8) (see paragraph 12 above).

85. Both the Government and the Commission considered that the matters complained of were justified under paragraph 2 of Article 8 (art. 8-2) as being lawful measures necessary in a democratic socie for the prevention of crime in the context of the fight against terrorism in Northern Ireland.

B. Interference

86. It was not contested that the impugned measures interfered the applicants' exercise of their right to respect for their privat and family life and their home.

C. "In accordance with the law"

87. On the other hand, the applicants did not concede that the resultant interferences had been "in accordance with the law". The disputed that the impugned measures all formed an integral part of Mrs Murray's arrest and detention or that the domestic courts had affirmed their lawfulness, in particular as concerns the retention the records including the photograph of Mrs Murray.

88. Entry into and search of a home by Army personnel such as occurred in the present case were explicitly permitted by section 14 (3) of the 1978 Act for the purpose of effecting arrests under that section (see paragraphs 36 and 38(d) above). The Court Appeal upheld the legality of the search in the present case (see paragraph 30 above). The short period of restraint endured by the other members of Mrs Murray's family when they were asked to assemb in one room was held by the House of Lords to be a necessary and pr part of the procedure of arrest of Mrs Murray (see paragraph 33 abo The Court of Appeal and the House of Lords also confirmed that the Army's implied lawful authority under section 14 extended to interrogating a detained person and to recording personal details o the kind contained in the standard record form (see paragraph 41 ab and also paragraphs 15, 30 and 34). It is implicit in the judgment of the national courts that the retention of such details was cover by the same lawful authority derived from section 14 (see paragraph in fine above). The taking and, by implication, also the retention a photograph of the first applicant without her consent had no statutory basis but, as explained by the trial court judge and the Court of Appeal, were lawful under the common law (see paragraphs 2 30, 39 and 40 above).

The impugned measures thus had a basis in domestic law. Th Court discerns no reason, on the material before it, for not conclu that each of the various measures was "in accordance with the law", within the meaning of Article 8 para. 2 (art. 8-2).

D. Legitimate aim

89. These measures undoubtedly pursued the legitimate aim of th prevention of crime.

E. Necessity in a democratic society

90. It remains to be determined whether they were necessary in democratic society and, in particular, whether the means employed w proportionate to the legitimate aim pursued. In this connection it not for the Court to substitute for the assessment of the national authorities its own assessment of what might be the best policy in field of investigation of terrorist crime (see the above-mentioned Klass and Others judgment, p. 23, para. 49). A certain margin of appreciation in deciding what measures to take both in general and particular cases should be left to the national authorities.

91. The present judgment has already adverted to the responsibi of an elected government in a democratic society to protect its

citizens and its institutions against the threats posed by organise terrorism and to the special problems involved in the arrest and detention of persons suspected of terrorist-linked offences (see paragraphs 47, 51 and 58 above). These two factors affect the fair balance that is to be struck between the exercise by the individual the right guaranteed to him or her under paragraph 1 of Article 8 (art. 8-1) and the necessity under paragraph 2 (art. 8-2) for the S to take effective measures for the prevention of terrorist crimes (mutatis mutandis, the above-mentioned Klass and Others judgment, p. para. 59).

92. The domestic courts held that Mrs Murray was genuinely and honestly suspected of the commission of a terrorist-linked crime (s paragraphs 24 and 28 above). The European Court, for its part, has found on the evidence before it that this suspicion could be regard as reasonable for the purposes of sub-paragraph (c) Article 5 para. (art. 5-1-c) (see paragraph 63 above). The Court accepts that ther was in principle a need both for powers of the kind granted by sect 14 of the 1978 Act and, in the particular case, to enter and search home of the Murray family in order to arrest Mrs Murray.

Furthermore, the "conditions of extreme tension", as Lord Griffiths put it in his speech in the House of Lords, under wh such arrests in Northern Ireland have to be carried out must be recognised. The Court notes the analysis of Lord Griffiths, when h said (see paragraph 33 above):

> "The search cannot be limited solely to looking for the per to be arrested and must also embrace a search whose object to secure that the arrest should be peaceable. I ... regar it as an entirely reasonable precaution that all the occupa of the house should be asked to assemble in one room. ... It is in everyone's best interest that the arrest is peacea effected and I am satisfied that the procedures adopted by Army are sensible, reasonable and designed to bring about t arrest with the minimum of danger and distress to all concerned."

These are legitimate considerations which go to explain and justify the manner in which the entry into and search of the applicants' home were carried out. The Court does not find that, i relation to any of the applicants, the means employed by the authorities in this regard were disproportionate to the aim pursued

93. Neither can it be regarded as falling outside the legitimat bounds of the process of investigation of terrorist crime for the competent authorities to record and retain basic personal details concerning the arrested person or even other persons present at the time and place of arrest. None of the personal details taken durin the search of the family home or during Mrs Murray's stay at the Ar centre would appear to have been irrelevant to the procedures of ar and interrogation (see paragraphs 12 to 15 above). Similar conclus apply to the taking and retention of a photograph of Mrs Murray at

Army centre (see paragraphs 13 and 14 above). In this connection t the Court does not find that the means employed were disproportiona to the aim pursued.

94. In the light of the particular facts of the case, the Court finds that the various measures complained of can be regarded as ha been necessary in a democratic society for the prevention of crime, within the meaning of Article 8 para. 2 (art. 8-2).

F. Conclusion

95. In conclusion there has been no violation of Article 8 (art. 8) in respect of any of the applicants.

VI. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

96. The first applicant submitted that, contrary to Article 13 (art. 13) of the Convention, she had no effective remedy under dome law in respect of her claims under Articles 5 and 8 (art. 5, art. 8 Article 13 (art. 13) reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy befo a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Claims as to arrest, detention and lack of information abou reasons for arrest (Article 5 paras. 1 and 2) (art. 5-1, art. 5-2)

97. The Commission did not consider it necessary to examine the complaint under this head on the ground that no separate issue aros under Article 13 (art. 13) in view of its conclusion that Article 5 para. 5 (art. 5-5) had been violated.

The Government submitted that, if a breach of Article 5 para. 5 (art. 5-5) were found, the Commission's approach was correc but that, if not, the requirements of Article 13 (art. 13) had been satisfied.

98. Under the Convention scheme of protection of the right to liberty and security of person, the lex specialis as regards entitlement to a remedy is paragraph 4 of Article 5 (art. 5-4) (see Brannigan and McBride v. the United Kingdom judgment of 26 May 1993 Series A no. 258-B, p. 57, para. 76), which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which th lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawfu

The scope of this specific entitlement in relation to arres and detention under the emergency legislation in Northern Ireland h

been considered by the Court, notably in the Brogan and Others and Campbell and Hartley judgments (loc. cit., pp. 34-35, para. 65, and pp. 20-21, para. 45, respectively).

No complaint however was made by the first applicant under Article 5 para. 4 (art. 5-4) at any stage of the proceedings before Convention institutions. The Court sees no cause, either on the fa or in law, to examine whether the less strict requirements of Article 13 (art. 13) were complied with in the present case.

B. Claims as to entry and search (Article 8) (art. 8)

99. The first applicant argued that effective remedies for her claims under Article 8 (art. 8) regarding the Army's actions in entering and searching her house were lacking since such domestic proceedings as might have been taken in relation to entry and searc would have failed because domestic law provided lawful excuse for t actions.

The Commission expressed the opinion that an appropriate re did exist under domestic law, notably in the form of an action for tort of unlawful trespass to property.

The Government accepted and adopted the Commission's reason

100. The Court likewise arrives at the same conclusion as the Commission. Article 13 (art. 13) guarantees the availability of a remedy at national level to enforce the substance of the Convention rights in whatever form they may happen to be secured in the domest legal order. Its effect is thus to require the provision of a dome remedy allowing the competent "national authority" both to deal with the substance of the relevant Convention complaint and to gran appropriate relief in meritorious cases (see, inter alia, the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 39, para. 122, and the authorities cited there). The remedy available to Mrs Murray would have satisfied these conditions. As the Commission pointed out, he feeble prospects of success in the light of the particular circumstances of her case do not detract from the "effectiveness" o the remedy for the purpose of Article 13 (art. 13) (ibid.).

C. Claims as to the taking and retention of a photograph and personal details (Article 8) (art. 8)

101. As to her claims under Article 8 (art. 8) regarding the tak and retention of a photograph and personal details, the first appli agreed with the separate opinion of Sir Basil Hall, who took the vi that since Northern Ireland law offered no protection for an indivi in her position, there being no general right to privacy recognised under that law, Article 13 (art. 13) had been violated.

The Commission, citing the Court's case-law (see the James Others v. the United Kingdom judgment of 21 February 1986, Series A

no. 98, pp. 47-48, paras. 85-86), concluded that in so far as the f applicant's complaint was directed against the content of Northern Ireland law, Article 13 (art. 13) did not confer any entitlement to remedy; and that, if she could be taken to be objecting to the mann in which that law had been applied in her case, she could have brou an action before the Northern Ireland courts.

The Government accepted and adopted the Commission's reason

102. On this point too the Court comes to the same conclusion as Commission.

Whether the relevant domestic law as applied to Mrs Murra ensured her a sufficient level of protection of her right to respec for her private life is a substantive issue under Article 8 (art. 8 The matters complained of by Mrs Murray under Article 8 (art. 8) in this connection have already been found in the present judgment to been compatible with the requirements of Article 8 (art. 8) (see paragraphs 83 to 95 above). Article 13 (art. 13) for its part does go so far as to guarantee Mrs Murray a remedy allowing her to have challenged the content of Northern Ireland law before a national authority (see the James and Others judgment, loc. cit.). For the rest, effective remedies were available to her to raise any claim o non-compliance with the applicable domestic law.

D. Conclusion

103. The facts of the present case do not therefore disclose a violation of Article 13 (art. 13) in respect of the first applicant

FOR THESE REASONS, THE COURT

1. Holds, by fourteen votes to four, that there has been no breach of Article 5 para. 1 (art. 5-1) of the Convention in respect of the first applicant;

2. Holds, by thirteen votes to five, that there has been no breach of Article 5 para. 2 (art. 5-2) of the Convention in respect of the first applicant;

3. Holds, by thirteen votes to five, that there has been no breach of Article 5 para. 5 (art. 5-5-) of the Convention i respect of the first applicant;

4. Holds, by fifteen votes to three, that there has been no breach of Article 8 (art. 8) of the Convention in respect o any of the applicants;

5. Holds, unanimously, that it is not necessary to examine und Article 13 (art. 13) of the Convention the first applicant' complaint concerning remedies for her claims under Article 5 paras. 1 and 2 (art. 5-1, art. 5-2);

6. Holds, unanimously, that, for the rest, there has been no breach of Article 13 (art. 13) of the Convention in respect the first applicant.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 199

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) jcint dissenting opinion of Mr Loizou, Mr Morenilla and Mr Makarczyk;

(b) partly dissenting opinion of Mr Mifsud Bonnici;

(c) partly dissenting opinion of Mr Jambrek.

Initialled: R. R.

Initialled: H. P.

JOINT DISSENTING OPINION OF JUDGES LOIZOU, MORENILLA AND MAKARCZY

1. Although we agree with the majority of the Court that, when interpreting and applying the Convention, due account should be tak of the special nature of terrorist crime, of the exigencies of investigating terrorist activities and of the necessity of not jeopardising the confidentiality of reliable sources of information we cannot concur with its conclusion of no violation of Article 5 paras. 1, 2 and 5 (art. 5-1, art. 5-2, art. 5-5), and Article 8 (art. 8) of the Convention in the present case.

On the contrary, a violation of the applicants' fundamental rights to liberty and security and to respect for private life is disclosed by the circumstances of the case, namely the Army's entry into and search of the applicants' home at 7 a.m. without warrant; assembling of Mrs Murray's husband and four children in a room of t house during half an hour; her arrest and detention during two hour for questioning in a military screening centre on suspicion of her involvement in terrorist activities because her brothers had been convicted in the United States of America of offences connected wit the purchase cf arms for the Provisional IRA; and the failure to in her of the reasons for her arrest (paragraphs 9 to 34 of the judgme

2. Regarding the arrest and detention of Mrs Murray, we regret that we are nct convinced by the majority's arguments, particularly

paragraphs 62 and 63, as to the reasonableness of the suspicion tha she had committed the above-mentioned offence; nor do we find that facts of this case are materially different from those in the Fox, Campbell and Hartley judgment*, where the Court found a violation o Article 5 para. 1 (art. 5-1) because it considered the elements furnished by the Government to be insufficient to support the conclusion that there had been a "reasonable suspicion" that the arrested persons had committed an offence.

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* Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182.

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3. The conviction in the United States of Mrs Murray's two brothers of offences connected with the purchase of weapons for the Provisional IRA, her visit to her brothers there and the reference the collaboration with "trustworthy" persons residing in Northern Ireland implied by such offences are not, in our opinion, sufficien grounds for reasonably suspecting the first applicant of involvemen in the offence of collecting funds in Northern Ireland to buy arms the United States for terrorist purposes. Family ties cannot imply criminal relationship between the author of the offence and his or relatives; nor can the "co-operative" nature of the crime be consid a valid basis for a reasonable suspicion of complicity on the part members of the family or friends of the criminal. These circumstan may give rise only to a bona fide suspicion of such complicity. Th do not give rise to a "reasonable" suspicion such as to justify the serious measures taken against the applicants unless they are conne with other facts in direct relation to the offence. No facts of th kind have however been furnished by the respondent Government, although, in our opinion, they could have been supplied without jeopardising the confidentiality of the source of information which necessary to protect the life and personal safety of that source (paragraph 52 of the judgment).

4. The Court's task, as stated by the majority (paragraph 66 o the judgment), is to determine whether the conditions laid down by sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) have been fulfi in the circumstances of the particular case. With due respect to t review that the national courts have conducted of the facts of the (paragraph 60 of the judgment) and to their findings and conclusion in the proceedings brought by Mrs Murray, it falls to our Court, pursuant to Article 19 (art. 19) of the Convention, to ensure the observance of the engagement undertaken by the States Parties under Article 1 (art. 1) to secure everyone within their jurisdiction, in alia, the right to liberty and the right to respect for private lif In the exercise of this power of review the Court must ascertain whether the essence of the safeguard afforded by this provision of Convention has been secured. "Consequently, the respondent Governm have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspec of having committed the alleged offence" (Fox, Campbell and Hartley

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judgment, p. 18, para. 34).

5. In the instant case the specific circumstances of the entry into and search of the applicants' home by the Army, the limited ro of the Army in the investigation of terrorist crimes under United Kingdom law (paragraphs 36 to 38 of the judgment) and, moreo the personal circumstances of Mrs Murray, a mother of four children with health problems and no criminal record (paragraph 9 of the judgment and document Cour (93) 290, Annexes A-B, pp.100 B-C, 116 B required a higher level of suspicion and the application to the respondent Government of a stricter standard when justifying before this Court the "reasonableness" of the suspicion. Needless to say the domestic courts examined the issue from the standpoint of section 14 of the 1978 Act, which required an honest and genuine, rather than a reasonable, suspicion. The scope of their examinatio was confined to that.

6. Regarding the alleged violation of Article 5 para. 2 (art. of the Convention, in our view the evidence as to Mrs Murray's questioning at the military screening centre (paragraphs 16 to 27 o the judgment), the vague indications and the questions put to her l the necessary precision to justify a conclusion that she was inform of the reasons for her arrest. From the recorded questions about h brothers or "about money and about America", it is not possible for to conclude that it was apparent to her "that she was questioned ab her possible involvement in the collection of funds for the purchas of arms for the Provisional IRA by her brothers in the USA".

7. In the Fox, Campbell and Hartley judgment (paragraph 40) th Court declared that "[p]aragraph 2 of Article 5 (art. 5-2) contains elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part the scheme of protection afforded by Article 5 (art. 5): by virtue paragraph 2 (art. 5-2) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal factual grounds for his arrest, so as to be able, if he sees fit, t apply to a court to challenge its lawfulness in accordance with paragraph 4 (art. 5-4)".

In our opinion, bearing in mind the totality of the circumstances, including the nature of the questions put to Mrs Mur in the course of her interrogation (paragraphs 14 and 21 of the judgment), the information given to Mrs Murray did not meet this ba standard.

8. As to Article 5 para. 5 (art. 5-5) of the Convention, since Mrs Murray's arrest and detention were in breach of paragraphs 1 an 2 of this Article (art. 5-1, art. 5-2), she was entitled to an enforceable right to compensation in accordance with this provision We would recall, as did the Commission (report, paragraph 75), that the similar case of Fox, Campbell and Hartley (paragraph 46) the Co found a violation of Article 5 para. 5 (art. 5-5).

9. The alleged violation of Article 8 (art. 8) of the Conventi is directly linked with the issues under Article 5 para. 1 (art. 5- of the Convention. Consequently, our conclusion is that, a breach this provision having been found to have occurred in the circumstan of the case, the above-mentioned measures taken by the Army interfe in Mrs Murray's private life cannot, in the absence of an objective justification of the suspicions of Mrs Murray's terrorist activity, regarded as necessary in a democratic society for the prevention of crime in accordance with paragraph 2 of Article 8 (art. 8-2). We therefore also find a violation of this provision of the Convention

PARTLY DISSENTING OPINION OF JUDGE MIFSUD BONNICI

1. I am in agreement with the majority on most of the points a issue in this case, starting with the finding that the arrest of th first applicant was carried out on a reasonable suspicion that she committed an offence; thereby holding that Article 5 para. 1 (art. was not violated.

2. I dissent, however, on the second point; that of Article 5 para. 2 (art. 5-2), which guarantees to "everyone who is arrested" right to be "informed promptly, in a language which he understands, the reasons for his arrest and of any charge against him".

The essential and relevant facts, as accepted in the judgme are that:

(a) When Corporal D. proceeded to the first applicant's house, she to her, "As a member of Her Majesty's forces, I arrest you." And o being asked twice by the first applicant under what section, Corpor D. replied, "Section 14" (paragraph 12 of the judgment).

(b) Corporal D. told the domestic court that "the purpose of arrest detention under section 14 was not to gather intelligence but to question a suspected person about an offence" (paragraph 20 of the judgment). This was confirmed by Sergeant B. (paragraph 22).

3. Now there is absolutely nothing in the whole proceedings to indicate that after the first applicant was arrested on the strengt of section 14, she was thereafter promptly given the reasons for he arrest and/or informed of any offence with which she was charged.

In the concrete circumstances of the case, I am prepared to allow that promptness can be waived because of the short duration o the detention, but once the first applicant was arrested (and not merely asked to go voluntarily to a place designated for interrogat she was entitled to be told why she was being arrested - which in effect means "that she was suspected of having committed a given offence". Once that is done, the further information that she was being charged with a given offence can, within a reasonable time, follow. This, however, must be preceded by the first phase, wherei the arrested person must be informed of the reasons for the arrest. This phase cannot be skipped, ignored or disregarded, especially wh

as in this case, the person arrested is not charged with an offence

4. In the view of the majority (paragraph 77 of the judgment) guarantee was satisfied because

> "it must have been apparent to Mrs Murray that she was bein questioned about her possible involvement in the collection funds for the purchase of arms for the Provisional IRA by h brothers in the USA",

which induces the Court to come to the conclusion that

> "the reasons for her arrest were sufficiently brought to he attention during her interview".
>
> And therefore there was no violation.

5. In my opinion this decision reduces the meaning of Article para. 2 (art. 5-2) to such a low level that it is doubtful whether fact it can, if it is adhered to in this form, have any possible concrete application in the future.

In fact what is being held here is that through the content of an interrogation an accused person can, by inference or deductio arrive, on his own, to understand "the reasons for his arrest and . any charge against him". Since the Convention obliges the investigating officer "to inform" the arrested person, I cannot agr that the duty imposed on the investigating officer can be satisfied the obligation of the arrested person to carry out a logical exerci so that he will thereby know of the charge against him - surmising both, from the contents of the interrogation.

6. It is not really possible to sustain this interpretation of Article 5 para. 2 (art. 5-2). If it is sustained, then it would me that the guarantee therein contemplated will only come into play in situations such as that which is described in Franz Kafka's masterp The Trial, where the Inspector, who is supposed to interrogate K (t accused person), tells K ,

> "I can't even confirm that you are charged with an offence, rather I don't know whether you are. You are under arrest certainly, more than that I do not know."*

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* English translation by W. and E. Muir from the German original Der Prozess - Penguin reprint 1953, p. 18.

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7. Therefore, the interpretation arrived at is a substantial limitation of the purpose of Article 5 para. 2 (art. 5-2), to which cannot subscribe, and I find that there was a violation of Article para. 2 (art. 5-2).

8. On all the other points in this judgment, I form part of th majority.

PARTLY DISSENTING OPINION OF JUDGE JAMBREK

I subscribe to the joint dissenting opinion of Judges Loizo Morenilla and Makarczyk as regards the violation of Article 5 paras. 1, 2 and 5 (art. 5-1, art. 5-2, art. 5-5).

I also wish to make some additional points, which reflect m own reasoning related to the case.

1.

In the examination of the matter of "reasonable suspicion", key issue seems to me to be whether "at least some facts or information" were furnished by the Government, which would satisfy objective observer that the person concerned may have committed the offence. In my opinion this condition of reasonableness was not fulfilled. It was suggested by the representative of the Governmen that "primary facts", obtained from a reliable confidential source, which cannot be disclosed must be differentiated from "something ot than the primary facts or information". Elements of the latter kin he claimed, had been provided which should be capable of so satisfy an objective observer. He cited:

(a) the honest belief of the arresting officer,

(b) the briefing by a superior officer, and

(c) circumstances preventing disclosure of information.

In my view all three are capable of satisfying the conditio of an honest or genuine suspicion, but do not constitute "at least facts or information" on which a reasonable suspicion could be base Neither honesty of an arresting officer, nor honesty of superior officer, nor the circumstances of a suspected terrorist crime fall this category.

At the hearing the Government's representative also identif three other kinds of more specific "objective evidence", namely the conviction of the first applicant's brothers, her contacts with the and her visits to America. The problem with these facts, as I see is that none of them per se may be held against the first applicant incriminate her. They rather resemble the incrimination of a perso status, in this case the first applicant's kinship relationship.

I am therefore led to conclude that there has been a violat of Article 5 para. 1 (art. 5-1) in respect of the first applicant, following the reasoning in the Fox, Campbell and Hartley v. the Uni Kingdom judgment (judgment of 30 August 1990, Series A no. 182).

2.

Was it possible for the Court to set some modified standard for "reasonable suspicion" in the context of emergency laws enacted combat terrorist crime?

At this point I wish to explain some of my "philosophic prejudices" related to this issue. Much was made in the Government memorial of the specific features of terrorist crime and the releva emergency provisions, allowing for the tipping of the balance betwe State and individual interests in the direction of the raison d'Eta However, the existence of an emergency may be used to argue in favo of both interests involved, namely that of the Government and that the arrested person. For example, under emergency laws, individual rights may be abused even more easily and on a larger scale than in normal times. They should therefore be given an even more careful protection in view of the intensity of national interests in taking repressive measures against crime. Suspects should thus not be den being provided with at least some evidence and grounds for their arrest, in order to be able to challenge the allegations against th Neither should the competent domestic court be left without persuas evidence supporting the required reasonableness of the arrest.

I also do not dispute that by and large intelligence-gather organisations do indeed obtain "reliable" items of information whic have to be kept confidential, and which should be trusted without closer examination.

But are the items obtained all and always relevant? We may assume that at least some of them are irrelevant or already notorio Information on persons' travel abroad or on their kinship relationships, for example, may be very reliable and also happen to classified as secret, but it may be irrelevant or already notorious Therefore I would hesitate to make life for the intelligence-gather services too easy, at the expense of detainees and especially at th expense of the domestic courts.

3.

My underlying philosophic approach having been identified, more "technical" points about the case may be made.

The search for a balance between the State's interest in fighting crime and the protection of the individual's fundamental rights is the obvious task of the Strasbourg Court. To this end I would propose clarifying the following preliminary issues:

First, what is the relationship between the Article 5 para. 1 (c) (art. 5-1-c) requirement of "reasonable suspicion" and Article 5 para. 2 (art. 5-2) right to be "informed promptly of the reasons for his arrest and of any charge against him"?

Are grounds for reasonable suspicion identical to reasons f arrest?

A usual consequence of the implementation of Article 5 para. 1 (c) (art. 5-1-c) is that the national courts will, if need be called on to decide whether the arresting officer entertained reasonable suspicion of an offence committed by the detainee, while purpose of Article 5 para. 2 (art. 5-2) is to enable the arrested person to assess the lawfulness of the arrest and take steps to challenge it, if need be. This difference may justify differential treatment of evidence supporting such reasons in terms of their confidentiality.

A further point is that the Court referred in the Fox, Camp and Hartley case to "information which ... cannot ... be revealed t the suspect or produced in court to support the charge".

Two questions seem to me relevant in this respect. First, there a difference between revealing information to the suspect and then producing it in court? Probably not. And secondly, is there difference between information made available to the court and information produced in a court, that is revealed to the suspect?

In this connection I see some scope for compromise between wish to preserve the Fox, Campbell and Hartley standard and, at the same time, the need to expand and elaborate its reasoning in order adapt it better to the Murray case and other similar cases.

The "technical" question could also be posed whether otherw confidential information could not be rephrased, reshaped or tailor in order to protect its source and then be revealed. In this respe the domestic court could seek an alternative, independent expert opinion, without relying solely on the assertions of the arresting authority.

4.

I voted for non-violation of Article 8 (art. 8) because I d not see a necessary link between the breach of the requirements of Article 5 para. 1 (art. 5-1) and the interference in the private an family life of Mrs Murray (and her family). I am satisfied with th approach of the Court in regard to Article 8 (art. 8), and, in particular, with its conclusion that the interference was in accord with the law and that the contested measures pursued a legitimate a and were necessary in a democratic society (paragraphs 88 to 94 of judgment).

However, in the light of my views as to the violation of various provisions of Article 5 (art. 5), I cannot subscribe to the Court's reasoning in paragraph 92 of the judgment, namely that Mrs Murray was reasonably suspected of the commission of a terrorist-linked crime and that this fact justified the need to ent and search her home. The finding of non-violation of Article 8 (art. 8) can be sufficiently well grounded regardless of the reason in paragraph 92 of the Court's judgment.

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Case: IT-99-37-AR65

IN THE APPEALS CHAMBER

Before:
Judge Mohamed Shahabuddeen, Presiding
Judge David Hunt
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron

Registrar:
Mr Hans Holthuis

Decision of:
30 October 2002

PROSECUTOR

v

Nikola SAINOVIC & Dragoljub OJDANIC

DISSENTING OPINION OF JUDGE DAVID HUNT ON PROVISIONAL RELEASE

Counsel for the Prosecutor:

Ms Carla Del Ponte
Mr Geoffrey Nice

Counsel for the Defence:

Mr Toma Fila & Mr Zoran Jovanovic for Nikola Sainovic
Mr Tomislav Visnjic, Mr Vojislav Selezan & Mr Peter Robinson for Dragoljub Ojdanic

DISSENTING OPINION OF JUDGE DAVID HUNT

The background to the appeal

1. As a result of a notable increase in the number of indicted persons appearing at the Tribunal voluntarily since the beginning of 2001,[1] there has been a similar increase in the number of applications for provisional release, many of them successful. The present appeal demonstrates how the prosecution is attempting to stem the tide by having the existing jurisprudence of the Tribunal changed in order to make provisional release more difficult to obtain. In my opinion , this attempt should be rejected.

2. Because this Separate and Dissenting Opinion leads to the conclusion that the prosecution's appeal should be dismissed, it must deal with every issue raised by the prosecution by way of

complaint which could have led to the appeal being upheld . The Opinion is structured as follows:

The background to the appeal	pars 1-5
The proceedings before the Trial Chamber	pars 6-17
The Trial Chamber's Decision	par 18
The grounds of appeal	par 19
The approach on appeal	pars 20-25
Discussion and conclusions	
(A) ***Burden of proof on factual issues in provisional release applications***	pars 26-31
(B) ***Nature of prosecution attack upon Trial Chamber's finding of fact***	pars 32-36
(C) ***The reliability of the personal undertakings of the accused to appear for trial***	
Material "did not" establish that they would appear	par 37
The voluntary nature of the surrenders	par 38
The delay in surrendering	par 39
Likely length of the sentences	par 40
Prior statements by accused**	pars 41-48
(D) ***The reliability of the guarantees provided by the FRY/Serbian Governments***	
General considerations	pars 49-52
Failure to arrest co-accused Milutinovic	pars 532-55
The senior position of the two accused**	pars 56-64
(E) ***Other issues relating to the finding that the accused will appear for trial***	
Dependence on guarantee denies right to provisional release	pars 65-66
Erroneous approach	pars 67-69
(F) ***Whether the accused will pose a danger to any victim or witness or others***	
The mere possibility of danger	pars 70-73
(G) ***The exercise of discretion***	
Current jurisprudence	pars 74-78
The issues raised by the prosecution relating to discretion	pars 79-94
Disposition	par 95

Only the two matters marked with the two asterisks (**) constitute the dissent.

3. Nikola Sainovic ("Sainovic") and Dragoljub Ojdanic ("Ojdanic") were until recently co-accused with Slobodan Milosevic ("Milosevic"), Milan Milutinovic ("Milutinovic ") and Vlajko Stojiljkovic ("Stojiljkovic"), in an indictment SIT-99-37C concerning events alleged to have occurred in Kosovo, Serbia, in 1998 and 1999. All five were jointly charged with:
   i. the forced deportation of approximately 800,000 Kosovo Albanian civilians, amounting to (a) deportation as a crime against humanity [Article 5(d) of the Tribunal's Statute; Count 1 of the indictment] and (b) other inhumane acts as a crime against humanity [Article 5(i); Count 2],
   ii. the murder of hundreds of Kosovo Albanian civilians in a number of massed killings, amounting to (a) murder as a crime against humanity [Article 5(a); Count 3] and (b) murder as a violation of the laws or customs of war [recognised by Common Article 3(1)(a) of the Geneva Conventions, and charged under Article 3 of the Tribunal's Statute; Count 4], and
   iii. a campaign of persecution against the Kosovo Albanian civilian population based upon

political, racial or religious grounds, and constituted by:

a. the forced deportation charged in Counts 1 and 2,
b. the murders charged in Counts 3 and 4,
c. sexual assaults by forces of the Federal Republic of Yugoslavia ("FRY") and Serbia of Kosovo Albanians, in particular women, and
d. the wanton destruction or damage of Kosovo Albanian religious sites,

amounting to persecution as a crime against humanity [Article 5(h); Count 5].

4. Milosevic was charged as the President of the FRY at the relevant time, Milutinovic as the President of Serbia, Sainovic as the Deputy Prime Minister of the FRY and as the designated representative of Milosevic for Kosovo, Ojdanic as the Chief of the General Staff of the Armed Forces of the FRY ("VJ"), and Stojiljkovic as the Minister of Internal Affairs of Serbia with the responsibility for ensuring the maintenance of law and order in Serbia. The Trial Chamber recently granted leave to the prosecution to amend the indictment, by deleting from it both the charges against Milosevic (as those charges are now part of a new indictment SIT-02-54C upon which he is presently standing trial) and the charges against Stojiljkovic (who is now deceased).[2] The three accused who remain on the amended indictment are thus Milutinovic (who has not been surrendered or arrested and who will remain the President of Serbia until the end of this year), Sainovic and Ojdanic.

5. Sainovic and Ojdanic applied for provisional release until the commencement of their trial.[3] After an oral hearing , and over the objections of the prosecution, the Trial Chamber granted provisional release to both accused.[4] Leave to appeal was granted upon the basis that there was a need for a full bench of the Appeals Chamber to give an opinion concerning issues relating to provisional release which arise in this particular case.[5] The prosecution has filed its Interlocutory Appeal,[6] the accused have responded,[7] and the prosecution has replied.[8] A further response was filed by Sainovic,[9] seeking *ex post facto* leave to do so, but to which the prosecution has objected.[10] The issue to which the further response has been directed had not been raised by the prosecution in its Reply as a new issue, and no other reason has been put forward as justifying a further response. The further response filed by Sainovic has accordingly been disregarded for the purposes of the appeal.[11]

The proceedings before the Trial Chamber

6. Rule 65(B) ("Provisional Release") of the Rules of Procedure and Evidence ("Rules ") requires an applicant for provisional release to satisfy the Trial Chamber of only two matters:

(i) that he will appear for trial, and
(ii) that, if released, he will not pose a danger to any victim, witness or other person.[12]

The onus of proof of these two matters is placed upon the applicant, notwithstanding the deletion in 1999 of an additional requirement that exceptional circumstances had to be shown.[13] Rule 65 (B) also places upon the Trial Chamber the obligation to give both the host country and the State to which the accused seeks to be released the opportunity to be heard.[14] Rule 65(B) invests a Trial Chamber with a discretion as to whether provisional release should be granted.[15] There has been little consideration given to the circumstances in which it would be appropriate to exercise that discretion.[16] The present appeal requires such a discussion.[17]

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7. In support of his claim that he would appear for trial, Sainovic argued that he had surrendered to the Tribunal only after the Law on Cooperation between the FRY and the Tribunal entered into force on 11 April 2002, because he had not been "in a position to surrender" to it any earlier, as cooperation of Serbs with the Tribunal was "not regulated by the law".[18] But, as soon as the Law on Cooperation entered into force, he said, he responded to "the call Sof the Government of the FRYC to surrender voluntarily to the STribunalC ".[19] He accepted that the Tribunal would reach a decision which is wholly just and lawful,[20] thus (it is said) recognising the authority of the Tribunal.[21] He solemnly promised to make himself available whenever the Trial Chamber so demanded ,[22] which is described as "his own personal undertaking to appear for the trial".[23]

8. Sainovic produced a guarantee from the Governments of the FRY and of Serbia, signed by the Prime Ministers of both, whereby the FRY and Serbia undertake various obligations. These included the obligation of the FRY Ministry of the Interior to ensure (through its Serbian entity) that the accused reports daily to a police station and to inform the Tribunal immediately of the possible absence of the accused , and the obligation of "Yugoslav organs" to arrest the accused immediately if he tries to escape or violates any other condition of his provisional release and to inform the Tribunal of such fact. At the hearing, his counsel added that the Law on Cooperation gives to an accused person access to the archives of Yugoslavia (which, he claimed, only the prosecution had previously enjoyed), and that it was the view of the accused's lawyers that a fair trial would not have been available in the Tribunal until that access had been obtained by the accused.[24] It was not disclosed whether these views were also held by Sainovic. On the issue of discretion, Sainovic points to the unlikelihood of the trial commencing soon, so that the probable length of his pre-trial detention supports his request for provisional release.[25]

9. Ojdanic similarly explained that he surrendered immediately after the Law on Cooperation had been passed, and he asserts that he was the first to do so and that he had set a precedent for cooperation which has since been followed by others.[26] By surrendering, it is said, Ojdanic waived his right to the protections afforded by the "extradition procedure" contained in that Law on Cooperation.[27] Ojdanic produced documents demonstrating that he had previously asked the Chief Military Prosecutor of the FRY to conduct criminal proceedings against him in a military court for the actions upon which he had been indicted before the Tribunal .[28] He said in his personal undertaking to appear for trial that he continued to believe that trials relating to the events in Kosovo should be conducted by the national courts in his country and not by this Tribunal, but he nevertheless recognised that the Tribunal has authority to prosecute him.[29] The Ojdanic Application, but not his personal statement, asserts that, as he had held the highest position in the VJ during the events in Kosovo, he knew at the time of his voluntary surrender that he could expect a lengthy sentence if found guilty.[30] His Application, but not his personal statement, also asserts that he no longer has significant political support in his country.[31]

10. Statements by high ranking army officers and others associated with the VJ testified as to their belief that Ojdanic would appear for trial if granted provisional release .[32] He produced guarantees from the Governments of the FRY and of Serbia to the same effect as those produced by Sainovic . Ojdanic also produced press reports of the position stated to have been taken by the Government of Serbia in relation to the accused Milutinovic – that, in order "not to jeopardize the security and sovereignty of the state", Milutinovic would not be delivered to the Tribunal while he is holding the office of the President of Serbia (which expires at the end of this year).[33] Finally, upon the issue of discretion, he submitted that, because of the time it was expected to take to provide and translate the relevant documents, the length of pre-trial detention in the event that he

were not granted provisional release would be "very lengthy".[34] At the hearing, his counsel estimated that the time required to be ready for trial would be about "about two years".[35] Although invited to address on this issue,[36] the prosecution did not dispute it.

11. 11. In its joint response to the applications,[37] the prosecution pointed out that the indictment had been made public in May 1999 , and that neither applicant had chosen to surrender until he believed that, because of the Law on Cooperation, his Government could no longer avoid its obligations under Article 29 of the Tribunal's Statute and Rule 58 to surrender or transfer him to the Tribunal.[38] The surrender should therefore be seen, the prosecution said, as a carefully calculated course of self-interest, by appearing to cooperate with the Tribunal but in reality attempting to increase the prospects of being granted provisional release.[39] The prosecution suggested that the accused had surrendered only on the instructions of the Government.[40] Both of the accused had stated to the media earlier this year that he would not surrender voluntarily ,[41] Ojdanic explaining that domestic courts should have jurisdiction over him.[42] Each of the accused occupied a position of great responsibility at the time the alleged crimes were committed, and accordingly each had a strong motive for not appearing for trial.[43]

12. The prosecution submitted that little weight should be given to, and no confidence placed upon, the guarantees provided by the Governments of the FRY and Serbia, because of their "clear failure" to arrest the co-accused Milutinovic,[44] and because the only arrest which Serbia had made was of a "medium level perpetrator " and that had been some time ago.[45] The guarantees had been given simply to "retrieve" political advantage.[46] The prosecution also submitted that only limited weight should be afforded to the undertakings given by the accused themselves.[47]

13. The prosecution said that, as it was still continuing to investigate the case against the two accused, it is "possible" that their release would in fact pose a danger to witnesses and victims.[48]

14. On the issue of discretion, the prosecution in its Response took issue with the relevance of the length of pre-trial detention upon which the accused relied , and it submitted that it is only where the length of pre-trial detention would exceed the likely sentence to be imposed that such a factor would be relevant to the exercise of the Trial Chamber's discretion.[49] The prosecution also asserted that no hardship had been demonstrated by the accused as a result of being held in detention. Then, in a response to an argument of Ojdanic that the material he had produced should "tip that balance" in favour of granting provisional release,[50] the prosecution asserted that "SiCt is clear that in order to satisfy the burden placed upon him , the accused must do more than simply tip the balance Sin his favourC".[51]

15. The primary submission of the Prosecutor (who appeared in person on the hearing before the Trial Chamber) was that, in the exercise of its discretion, the Trial Chamber must take into account the policy of the Office of the Prosecutor ("OTP") that provisional release should not be granted until there was no further reason to continue with its inquiry or to maintain the accused in detention, and that provisional release will be opposed until it is possible to interrogate the accused in accordance with Rule 63.[52] It was estimated that several months may be necessary to prepare for and to arrange the interrogation .[53] It was suggested that, because in the course of such an interrogation the prosecution reveals to an accused the evidence which it has against him, the interrogation should not take place whilst an accused is on provisional release because there

would be a danger that the accused would "confront" the sources of the prosecution evidence, there may be collusion and the OTP inquiries may be hindered.[54] If the accused were on provisional release, it was said, he can prepare his answers and would not give spontaneous answers to the interrogation.[55] The issue of provisional release should therefore be discussed only when the two accused agree to be interrogated.[56] Detention must remain the rule, it was said, and despite the amendment to Rule 65 by deleting the requirement of exceptional circumstances.[57]

16. The accused did not file any reply to the Prosecution Response.

17. A representative of the FRY Government (Mr Sarkic) was permitted to address the Trial Chamber at the hearing. Apart from discussing the undertakings which had been given, he informed the Trial Chamber that

(1) It was the intention of the Serbian authorities to hand Milutinovic over to the Tribunal when his term of office expires, either voluntarily on his part or by compulsion.[58]

(2) He had asked the Prosecutor personally not to be "too loud" in her opposition to the applications because a favourable result would encourage his country's national interests and others to surrender or cooperate with the Tribunal,[59] and that other persons who had been indicted had told him that they would be willing to appear before the Trial Chamber "of course pending the outcome of [the present applications]".[60]

The Trial Chamber very correctly made it plain to Mr Sarkic that it was totally independent of any discussions he may have had with the Prosecutor, and that such discussions would not affect its decision in the matter.[61]

The Trial Chamber's Decision

18. These, then, were the issues – and the only issues – which the Trial Chamber was invited to determine. Its findings were as follows:

(a) **Appearance of the accused for trial**

(i) The Trial Chamber attached "significant" weight to the fact that the accused had surrendered.[62]
(ii) It noted that the accused could have surrendered earlier, but considered that it is the fact of surrender which is of significance.[63]
(iii) It referred to the fact that, since the Law on Cooperation had been passed , the Government had taken steps to lessen the chance of the accused evading arrest whilst in FRY territory, although it remained to be seen how the procedures under the recent legislation will operate in practice.[64]
(iv) The proposed level of cooperation of the FRY Government in relation to the two accused with which this application for provisional release was concerned is satisfactory.[65]
(v) The Trial Chamber did not accept the prosecution's argument that the failure of the authorities to arrest Milutinovic suggests that they would not arrest these accused if they failed to appear.[66]
(vi) The fact that an accused who is likely to face a long prison sentence if convicted has a strong reason not to appear is relevant to this issue, and it must be considered ,

but it is not by itself a reason for refusing provisional release.[67]
(vii) The Trial Chamber was satisfied that the particular circumstances of the case of each accused established that, if released, he will appear for trial.[68]

(b) **Danger to any victim, witness or other person**

(i) No suggestion had been made that either accused had interfered with the administration of justice since May 1999 when the indictment was first confirmed against him, and no evidence had been adduced in support of the prosecution suggestion that, if released , the accused may pose a danger to witnesses and victims.[69]
(ii) The Trial Chamber was satisfied that the particular circumstances of the case of each accused established that, if released, he will not pose a danger to victims , witnesses or other persons.[70]

(c) **Discretion**

(i) The absence of any opportunity for the prosecution to interview the accused is irrelevant to the application for provisional release, and arrangements could be made to interview them whilst on provisional release.[71]
(ii) The Trial Chamber accepted that, in this case, it may be some considerable time before the trial can commence.[72]
(iii) This fact, "along with all the other factors discussed above", militated in favour of the grant of provisional release, "subject to terms and conditions to ensure the presence of the accused at trial".[73]

The grounds of appeal

19. In its Interlocutory Appeal, the prosecution initially identified the issues for determination in the present appeal in the following terms:[74]

"(a) the Trial Chamber committed an error of fact in determining that it was satisfied the accused would appear for trial. In particular, the Trial Chamber placed too much reliance on the FRY/Serbia Guarantees,[75] given the failure of the relevant authorities to arrest the co-accused, Milan Milutinovic , to date. The prosecution also submits that the Trial Chamber erred in its treatment of the likelihood of a long prison sentence if the accused are convicted following trial as a factor relevant to provisional release; and

"(b) even if the Trial Chamber was justified in its assessment that the two substantive pre-conditions of Rule 65(B) were satisfied (*i e* 'that the accused will appear for trial and, if released will not pose a danger to any victim, witness or other person') it erred by then exercising its discretion in favour of provisional release . In particular, the Trial Chamber incorrectly analysed the likely length of pre -trial detention as a factor in favour of release and failed to consider several other relevant factors, namely: the senior position of the accused; the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation by the accused to date."

During the course of its Interlocutory Appeal, however, the prosecution sought to enlarge the issues for determination in the appeal. The Appeals Chamber has also been asked to rule upon,

inter alia, the following additional issues:

(c) There should be, or is already, a more onerous burden of proof to be satisfied by an accused seeking provisional release than what is sometimes described as the balance of probabilities (that more probably than not what he asserts is true). The correct standard should be, or already is, that the accused must satisfy the Trial Chamber that there is "no real risk" that he will fail to appear for trial or pose any danger to victims or witnesses.[76]

(d) A Trial Chamber cannot be satisfied that the accused will appear for trial unless it is satisfied that he will do so voluntarily. If there is any question that he will appear only if arrested by the authorities, then the delays involved in his forcible arrest and transfer mean that he will not have appeared for trial . The existence of a guarantee by the relevant authority therefore does not militate in favour of granting provisional release, but is at best a neutral factor,[77] and any doubt which exists as to the performance by a State of its guarantee becomes a negative factor.[78]

(e) The Trial Chamber erred in stating that there was no evidence to negative the "proposition" that the accused would return for trial.[79]

(f) The Trial Chamber failed to consider the matters set out in (b), *supra* , in terms of "whether detention may be necessary in order to maintain confidence in the administration of justice by the Tribunal in its international setting, considering the Tribunal's objectives balanced with the rights of the accused". They are relevant "in evaluating the perception of the integrity of the judicial system". The Trial Chamber failed to give weight "or sufficient weight" to those relevant considerations .[80]

The approach on appeal

20. A decision as to whether provisional release should be granted involves, first , findings of fact as to whether the accused will appear for trial and whether, if released, he will not pose a danger to any victim, witness or other person; and, secondly, whether, even if those findings of fact are made in favour of the accused, the Trial Chamber's discretion should be exercised to refuse provisional release.[81]

21. It is for the party challenging the Trial Chamber's findings of fact to demonstrate that the particular finding challenged was one which no reasonable tribunal of fact could have reached,[82] or that the finding was invalidated by an error of law,[83] or that the evaluation of the evidence was wholly erroneous.[84] These are alternative bases for challenge, not cumulative. So far as the first basis for such a challenge is concerned, it must be accepted that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence .[85] Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable .[86] So far as the second basis for such a challenge is concerned, an error of law invalidating a finding of fact exists where the Trial Chamber has misdirected itself upon an issue of law. Examples would be where, in refusing provisional release, a Trial Chamber took into account the failure of the applicant to prove what it held was a pre-requisite but which was not required by law,[87] or where it excluded relevant evidence from its consideration when making its factual finding .[88] So far as the third basis for a challenge to a Trial Chamber's finding of fact is concerned, the Appeals Chamber has declined to lay down any universal test as to what

constitutes a "wholly erroneous " evaluation of the evidence by a Trial Chamber.[89] As this is not an issue which has been raised by the prosecution in the present appeal, it is unnecessary to explore that question further. It is, however, clear from all of these tests that an appeal from a finding of fact is not a rehearing , and that the Appeals Chamber has no power to substitute its own finding of fact merely because it disagrees with the finding made by the Trial Chamber.

22. It is for the party challenging the exercise of a discretion based upon those findings of fact to identify for the Appeals Chamber a "discernible" error made by the Trial Chamber.[90] It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion , or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion .[91]

23. Both in determining whether the Trial Chamber incorrectly exercised its discretion and (in the event that it becomes necessary to do so) in the exercise of its own discretion, the Appeals Chamber is in the same position as was the Trial Chamber to decide the correct principle to be applied or any other issue of law which is relevant to the exercise of the discretion. Even if the precise nature of the error made in the exercise of the discretion may not be apparent on the face of the decision under appeal, the result may nevertheless be so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[92] Once the Appeals Chamber is satisfied that the error in the exercise of the Trial Chamber's discretion has prejudiced the party which complains of the exercise, it will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber.[93]

24. In some cases where errors of fact or in the exercise of discretion have been established, it may not be possible, or convenient, for the Appeals Chamber to substitute its own findings or its own exercise of discretion for that of the Trial Chamber . This could be, for instance, because the Trial Chamber decision has depended upon that Chamber's own views of the credibility of a particular witness, or where the decision depends upon many other issues in the case which are not sufficiently placed before the Appeals Chamber. In such cases, it is appropriate to quash the decision of the Trial Chamber and to return the issue to the Trial Chamber for its reconsideration in the light of the decision of the Appeals Chamber.

25. In other cases, the Appeals Chamber may be unable with any certainty to determine whether or not a particular piece of evidence or a particular consideration has been taken into account. This could arise in many different situations. It is clear in the jurisprudence of the Tribunal that a Trial Chamber is not expected to refer in its decision to *every* fact and *every* consideration which has been placed before it,[94] but it is nevertheless expected to refer in its decision to certain relevant matters which have been strongly disputed or which are vital to the issues which it has to determine .[95] In some circumstances, the absence of any reference to a matter which it might have been expected would be referred to if it had in fact been considered may lead to the inference that it was not in fact considered.[96] That, however, is not a proposition of universal application. Where it remains unclear as to whether a particular issue was considered by the Trial Chamber, it is open to the Appeals Chamber to quash the decision and return the case to the Trial Chamber for clarification as to whether a particular matter had been considered by it, and for reconsideration if it had not.[97] If the Trial Chamber responds that it had in fact considered the particular issue, it need only say so and confirm its decision.

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Discussion and conclusions

(A) *Burden of proof on factual issues in provisional release applications*

26. The logical starting point in this appeal by the prosecution is with the burden of proof, an issue which is applicable to both factual issues upon which the accused bears the onus, that he will appear for trial and that, if released, he will not pose a danger to any victim, witness or other person. If the Trial Chamber accepted the case put forward by the accused after applying a lower burden of proof than that which it should have applied, then the decision would have to be quashed.

27. The prosecution argues that a Trial Chamber should not grant provisional release unless it is satisfied that there is "no real risk" that the accused will fail to appear for trial or pose any danger to victims or witnesses or other persons.[98] That is not what the Rule says. Rule 65(B) requires only a satisfaction that the accused will appear for trial, not that there is no real risk that he will not appear . The difference is substantial. Nor did the prosecution make any such submission to the Trial Chamber. The rather opaque comment in its original Response to the Ojdanic Application – that, in order to satisfy the burden placed upon him, Sainovic must do more than simply tip the balance in his favour[99] – hardly suffices to make the point which is now sought to be made on appeal.

28. That the prosecution did not make this point before the Trial Chamber is conceded by it, but it says that this is irrelevant, because it was the duty of the Trial Chamber to ensure that it applies the correct standard of proof regardless of the submissions of the parties, yet it "did not adhere to the standard that every Trial Chamber is under an obligation to apply".[100] The prosecution does concede that the standard which it has now identified to the Appeals Chamber is "more *specific* than anything referred to in the jurisprudence so far", but nevertheless, the prosecution argues, the test it now proposes –

> [...] clearly falls within the general framework of, and is consistent with, all of the Tribunal's decisions emphasising the very substantial burden of proof upon an applicant for provisional release, given the particular context in which this Tribunal operates.[101]

The prosecution refers to three Trial Chamber decisions to support this argument . In the order in which the prosecution referred to them, they are:

Prosecutor v Brdjanin & Talic,[102] in which the Trial Chamber said:

> The absence of any power in the Tribunal to execute its own arrest warrant upon an applicant in the former Yugoslavia in the event that he does not appear for trial , and the Tribunal's need to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf, place a substantial burden upon any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released. That is not a re-introduction of the previous requirement that the applicant establish exceptional circumstances to justify the grant of provisional release. It is simply an acceptance of the reality of the situation in which both the Tribunal and applicants for provisional release find themselves.

Prosecutor v Ademi,[103] in which the Trial Chamber said:

> In considering the two pre-conditions expressly laid down in Rule 65(B), it must be remembered that, there are factors that are specific to the functioning of the Tribunal which may influence the

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> assessment of the probability of the risk of absconding or interfering with these witnesses. [...] First, the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. It must also rely on the cooperation of States for the surveillance of accused who have been released. This calls for a more cautious approach in assessing the risk that an accused may abscond.

Prosecutor v Blaskic,[104] in which the Trial Chamber said:

> **CONSIDERING** that the guarantees offered by General Blaskic, including the payment of a bail bond, are in no way sufficient to ensure that, if released, he would appear before this International Tribunal; that the gravity of the crimes allegedly committed and the sentences which might be handed down justify fears as to the appearance of the accused;
>
> **CONSIDERING**, furthermore, that it is not certain that, if released, the accused would not pose a danger to any victim, witness or other person; that the knowledge which, as an accused person, he has of the evidence produced by the Prosecutor would place him in a situation permitting him to exert pressure on victims and witnesses and that the investigation of the case might be seriously flawed;

29. None of these statements (except perhaps the second paragraph quoted from the *Blaskic* Decision) supports the prosecution argument that there exists a heavier burden in relation to proof that an accused person will appear for trial and will not pose a danger to victims, witnesses and other persons when seeking provisional release than that which is required for proof of any other fact in any other application for relief. Contrary to the prosecution's submission, there does not exist any standard of persuasion fixed at an intermediate point between the satisfaction beyond reasonable doubt required to establish guilt of a criminal charge and satisfaction that more probably than not what any applicant for relief asserts is true (sometimes referred to as the balance of probabilities). Satisfaction that what such an applicant asserts is more probably true than not depends upon the nature and consequences of the matter to be proved. The more serious the matter asserted, or the more serious the consequences flowing from a particular finding, the greater the difficulty there will be in satisfying the relevant tribunal that what is asserted is more probably true than not. That is only common sense.[105] The nature of the issue necessarily affects the process by which such satisfaction is attained, but the burden of proof is the same: that more probably than not what is asserted by the applicant is true.

30. In the *Brdjanin* Decision, the reference to the "substantial burden" placed upon an applicant in establishing that he will indeed appear for trial if released is a reference only to the substantial difficulty he will have, by reason of the context within which the Tribunal is forced to operate, in satisfying a Trial Chamber that more probably than not he will appear.[106] The reference in the *Ademi* Decision to a "more cautious approach" in assessing the risk that an accused may abscond is a reference to the same thing. The reference in the *Blaskic* Decision to the absence of certainty that the accused would not pose a danger to victims, witnesses and others (which, depending how it is interpreted , may assist the prosecution's argument) does not sit well with the somewhat lesser standard adopted in that decision for determining whether the accused will appear for trial, but the difference may be the result of a poor translation from the French original (the original French could just as readily be translated in this context as "it does not find it evident that" as "it is not certain that"). However, certainty can never be required except (in a limited sense) in proof of guilt of a criminal charge, and the difference between the burden of persuasion for guilt and the lesser burden of persuasion for other issues should not be confused. The difference between them is no mere matter of words; it is a matter of critical substance.

31. The prosecution's argument that there is, or should be, a burden of proof placed upon an applicant for provisional release to satisfy the Trial Chamber that there is no real risk that the accused will

fail to appear for trial or pose any danger to victims or witnesses or other persons is rejected. The Trial Chamber made no error in relation to the burden of proof.

Appearance for trial

(B) *Nature of prosecution attack upon the Trial Chamber's findings of fact*

32. A preliminary issue to be considered is the nature of the attack which the prosecution has made upon the Trial Chamber's findings of fact. In its Interlocutory Appeal , the prosecution has asserted that the Trial Chamber "committed an error of fact in determining that it was satisfied that the accused would appear for trial".[107] Although the prosecution acknowledges the limitations upon the right of a party to have the Appeals Chamber reconsider a Trial Chamber's finding of fact,[108] which the prosecution has expressed in terms similar to those stated in the jurisprudence of the Appeals Chamber,[109] its submissions have failed to remain within those limitations. Considering those limitations in the order in which they have been stated in par 21, *supra*, the prosecution has taken the following positions:

> (1) It has not alleged anywhere in its Interlocutory Appeal that the finding of fact by the Trial Chamber that the accused would appear for trial was one which no reasonable tribunal of fact could have reached.[110]
>
> (2) It has alleged that the Trial Chamber's finding was invalidated by a number of errors of law. One of these has already been dealt with (the burden of proof , which applies to both factual issues which the accused must establish), and the remaining errors of law alleged will be dealt with later.[111]
>
> (3) It has not stated that the Trial Chamber's evaluation of the evidence was *wholly* erroneous so as to enable its finding to be quashed, although it has alleged that the Trial Chamber made a number of errors, which are also dealt with later.

33. What the prosecution has also done, and this is where it appears to have departed from those limitations already recognised in the Tribunal's jurisprudence, is to approach its challenge to the factual finding made that the accused would appear upon the basis that the grant of provisional release is a discretionary matter, and therefore that it is sufficient to demonstrate that the Trial Chamber's factual finding resulted from a wrong exercise of its discretion.[112] Such an approach conflates the two issues which arise on appeal in an entirely impermissible way.

34. To repeat what was said earlier,[113] a decision as to whether provisional release should be granted involves, first, findings of fact as to whether the accused will appear for trial and whether, if released, he will not pose a danger to any victim, witness of other person; and , secondly, whether, even if those findings of fact are made in favour of the accused , the Trial Chamber's discretion should be exercised to refuse provisional release . It is true that, as the prosecution states in a different context,[114] both issues identified in Rule 65(B) involve an assessment of future, rather than past, conduct and thus a degree of prediction in the determination to be made. But the determination of future conduct does not become an exercise of discretion . Such a determination does differ in some respects from the determination of past events, but the difference is one of degree and not of substance. Even in relation to the determination of past events, there is a difference in degree between the determination of a specific issue as to whether A killed B and the determination of a less specific issue such as whether an attack directed against a civilian

population was widespread or systematic. A Trial Chamber is allowed a greater degree of latitude in making a determination of whether the attack was widespread or systematic than in its determination of whether A killed B, and similarly it is allowed a greater degree of latitude in making a determination of future conduct. But they are all findings of fact, not the exercises of discretion, and they are insulated against appeal as such.

35. The difference between a finding of fact and the exercise of a discretion is fundamental. The exercise of a discretion will usually be based upon facts which have been found by the trial court, and is permitted usually where there is a need for the application of the law, based upon the findings of fact which have been made, to be flexible and adaptable to the circumstances of the particular case. It would be quite wrong to approach the determination of the future conduct of the accused – upon the basis of which that discretion is to be exercised – in some such flexible and adaptable way. The two situations are wholly different. An appellate court may upset the exercise of such a discretion only where that exercise has miscarried . If the prosecution's appeal fails in relation to its challenge to the findings of fact upon which it was based, then the exercise of discretion must be examined on appeal in the light of the findings which were made and which must be accepted as correct for that purpose.

36. Arguments which are relevant only to a challenge to an exercise of discretion , such as a failure to give sufficient weight to relevant considerations, do not suffice in a challenge to a finding of fact unless the qualitative weight placed by the Trial Chamber upon any particular matter renders the factual finding one which no reasonable tribunal of fact could have reached. That is because it is for the Trial Chamber to assess and to weigh the evidence before it,[115] and the question as to whether the Trial Chamber gave due weight to any particular piece of evidence is itself a question of fact, not of law.[116] To interfere with a factual finding upon the basis that the Appeals Chamber merely disagreed with the Trial Chamber's assessment of the weight to be placed upon relevant evidence would amount to an unauthorised substitution of the Appeals Chamber's own views for that of the Trial Chamber on that question of fact.

(C) ***The reliability of the personal undertakings of the accused to appear for trial***

37. **Material "did not" establish that they would appear** The prosecution has submitted that "the Trial Chamber has granted the accused provisional release when the material before it *did not* establish that they would return for trial", a result which is characterised as a "grossly unfair outcome in these judicial proceedings".[117] The submission is directed to the prosecution's challenge to the finding of fact made by the Trial Chamber that the accused would appear for trial. That manifestly is *not* the correct issue in an appeal which involves a challenge involving a finding of fact. Article 25 of the Tribunal's Statute ("Appellate proceedings") is concerned with "an error of fact which has occasioned a miscarriage of justice", but there must first be shown that there is an error of fact which can be upset on appeal.[118] Once again, it is necessary to emphasise that appeals in this Tribunal are *not* rehearings. The prosecution does not submit that the material before the Trial Chamber *could not* support the finding which it made. The challenge that the evidence "did not" establish that the accused will appear for trial is rejected . The prosecution has put forward other arguments that error has been established , although without always identifying the character of the error alleged to have been made. Attention will now be given to those other arguments.

38. **The voluntary nature of the surrenders** The accused did not give evidence in support of their applications. Ojdanic, but not Sainovic, produced some testimonials from former colleagues asserting their belief that he would appear for trial. Otherwise , the case of the two accused rested

upon their written undertakings and the fact that they had voluntarily surrendered. The prosecution has challenged the voluntary nature of the surrender by the accused, which it says occurred in response to the Government's instructions to do so.[119] Sainovic did say that he had responded to the "invitation" or the "call" of the FRY Government to surrender.[120] The prosecution has not identified any such statement by Ojdanic. There is, however , nothing in the evidence which would have obliged the Trial Chamber as a matter of law to accept that the accused surrendered *only* because of instructions from the Government, and nothing has been shown which would justify the Appeals Chamber interfering with the Trial Chamber's findings on this basis.

39. **The delay in surrendering** The prosecution also challenged the weight to be given to the surrenders because of the delay of almost three years which occurred after the accused must have known that the indictment had been issued and before the surrenders took place. The explanation offered by both accused, that they were unable to surrender until the Law on Cooperation had been passed,[121] is unacceptable in law, but the issue is their state of mind, not the legality of their views. The prosecution's challenge to the honesty of that explanation is that the accused had chosen to surrender only when they believed that, because of the Law on Cooperation, their Government could no longer avoid its obligations to surrender or transfer them to the Tribunal.[122] Other Trial Chambers may perhaps have rejected the explanation put forward by the accused as inadequate, but this Trial Chamber was not obliged in law to do so, and it has not been said, nor could it be said, that the decision to grant provisional release was rendered, by its failure to accept the prosecution's argument upon this issue, one which no reasonable tribunal of fact could have reached.[123]

40. **Likely length of the sentences** The prosecution complains of the Trial Chamber's statement that, whilst the likely length of the sentence which may be imposed if an applicant for provisional release is convicted is "certainly" a factor to be considered in assessing whether that applicant will appear for trial, the likely length of sentence "by itself [...] is not a reason for refusing provisional release".[124] The prosecution submits that, to the extent that the Trial Chamber "excluded this factor from consideration altogether", it fell into error.[125] Any conclusion that the Trial Chamber "excluded this factor from consideration altogether " would necessarily fly in the face of the Trial Chamber's statement that such a factor is "certainly" one to be considered. What the Trial Chamber was responding to was the attitude so often expressed by the prosecution in these cases, which appears to assume that the likely length of the sentence which an accused would receive if convicted has some life of its own in relation to Rule 65. It does not . So far as the issues which the accused must establish in order to obtain provisional release are concerned, such a factor is relevant because it is a matter of common experience that the more serious the charge, and the greater the likely sentence if convicted, the greater the reasons for not appearing for trial.[126] It is therefore a matter to be considered when deciding whether the accused will appear for trial, notwithstanding any personal guarantee which he may have given and no matter what supporting evidence he has in relation to that issue.[127] But, if the undoubted existence of such common experience does not lead the Trial Chamber to reject the accused's case that he will appear for trial, that factor is manifestly not by itself a sufficient reason for refusing provisional release . That is all that the Trial Chamber was saying, and what the Trial Chamber said was correct. Such a factor is not relevant to any other issue which the accused must establish. The prosecution has argued that it is also relevant to the exercise of discretion, but the statement of the Trial Chamber to which its complaint is directed was made in relation to the issue as to whether the accused would appear for trial, and not in relation to the exercise of discretion, an issue to which reference will be made later.

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41. **Prior statements by accused** The present decision of the Appeals Chamber , to which this Separate and Dissenting Opinion is appended,[128] concludes that the Trial Chamber erred in law by not referring to statements made by the two accused earlier this year that they did not intend to surrender voluntarily .[129]

42. The prosecution has included in the "Book of Authorities" which it filed in support of its appeal the text of statements alleged to have been made by the accused to the media. This material was not before the Trial Chamber, and any complaint concerning the Trial Chamber's treatment of those statements can only be based upon the material which the prosecution had chosen to place before the Trial Chamber. The procedure adopted by the prosecution on appeal was quite improper. In no sense can such a document validly be part of a book of authorities.[130] If the prosecution wished to place this material before the Appeals Chamber as additional evidence, it should have applied for its admission pursuant to Rule 115, an impossible task in the circumstances.[131] It has not made such an application, and I agree with the Majority Decision that the additional evidence must be disregarded on the appeal.

43. There was little attention paid to these statements at the hearing before the Trial Chamber. In dealing with the delay by the two accused until the Law on Cooperation was passed before they surrendered, the prosecution stated in relation to Sainovic :[132]

> The Prosecution notes also that the accused told the media earlier this year that he would not surrender voluntarily.

In relation to Ojdanic, the prosecution stated:[133]

> As with the accused SAINOVIC, the accused OJDANIC stated to the media earlier this year that he would not surrender voluntarily, explaining that domestic courts should have jurisdiction over him.[134]

At the hearing, the Prosecutor said to the Trial Chamber, at the very end of the submissions made:[135]

> [...] Mr Ojdanic had indicated sometime fairly recently, as indicated in our pleadings , that he believed he would best be tried by domestic courts, in particular military courts. The prosecution would just point out that in the *Talic* decision on provisional release, it was also found important in the context of that hearing that Talic had declared prior to the provisional release argument that he felt justice could only be done in the case – in his case before a military court, not allowing for – but, however – sorry, however, allowing for the possibility of an international military court trying him. The prosecution merely notes here that Mr Ojdanic does not even allow for the possibility of international justice.

It is unclear as to whether these earlier statements had been made in a context in which the accused were saying that they would *never* surrender themselves , even in the event that the Law on Cooperation were to be passed. The Interlocutory Appeal asserts that such statements were made "just prior to their transfer",[136] but that assertion depends upon the material illegitimately placed before the Appeals Chamber. The only material before the Trial Chamber identifies the statement by Ojdanic as having been made on 13 February this year, and the surrender by him as having taken place on 25 April. The assertion during argument that the statement was made "sometime fairly recently" must be read in the light of that material.

44. The Trial Chamber makes no reference in its Decision to the material concerning the earlier statements which *was* placed before it. As stated earlier, a Trial Chamber is expected to refer in its

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decision to certain relevant matters which have been strongly disputed or which are vital to the issues which it had to determine ,[137] and in some circumstances the absence of any reference to such a matter if it had in fact been considered may lead to the inference that it was not considered.[138] It is difficult to see how these prior statements fell within such a proposition , bearing in mind the little attention paid to them by the prosecution when before the Trial Chamber. They must be viewed in the light of the fact that the two accused subsequently *did* surrender, and they appear to have little weight in resolving the issue as to whether, if they were now granted provisional release, they would appear for trial.

45. The significance to be given to the absence of any reference to those statements in the Decision can be judged by the absence of any complaint by the prosecution in this appeal that the Trial Chamber failed to consider those earlier statements . It certainly does say in its Interlocutory Appeal that the safety net of a "water -tight" guarantee from a cooperative State was of great importance because these statements had been made by the two accused. But the prosecution does *not* suggest that the inference to be drawn from the absence of any reference to those two statements in the Trial Chamber Decision is that it had failed to consider them . Indeed, admittedly in a different context, the prosecution accepts that a Trial Chamber does not have to refer to every argument which has been presented to it.[139]

46. The Majority Decision says that it gives no weight to the absence of any complaint by the prosecution concerning the absence of any reference in the Trial Chamber Decision to these statements, because the prosecution continues to rely upon those statements, and thus that the Trial Chamber erred in law by not *referring* to them. With all due respect to the Majority Decision, that is not the issue. The issue here can only be whether the Trial Chamber *considered* those statements . If the failure to *consider* that material is to be established by the failure to *refer* to it in its decision, then the first issue to be determined is whether it would be expected that the Trial Chamber would refer to that material if it had indeed been considered by it. That is the only relevance of the absence of any *reference* by the Trial Chamber. Where the prosecution does not complain of the absence of any reference to this material, it is quite impossible to see how the Appeals Chamber could safely draw the inference that the Trial Chamber did not consider it when determining whether the two accused would appear for trial. It would certainly not be appropriate for the Appeals Chamber to substitute its own finding of fact unless it were clear that the Trial Chamber had failed consider these statements.

47. In my opinion, it is neither safe nor appropriate for the Appeals Chamber to do so, particularly as the accused have not been given the opportunity to respond to the point taken by the Appeals Chamber itself. If a complaint *had* been made by the prosecution that the Trial Chamber had failed to consider the earlier statements when determining that they would appear for trial, and if it remained unclear as to whether it had done so, the appropriate course (as previously discussed) [140] would be to quash the decision and return the case to the Trial Chamber for clarification as to whether a particular matter had been considered by it, and for reconsideration if it had not.

48. I therefore disagree with the Majority Decision when it concludes that the Trial Chamber committed an error of law by not referring to statements made by the two accused that they did not intend to surrender voluntarily.

(D) *The reliability of the guarantees provided by the FRY/Serbia Governments*

49. **General considerations** The prosecution states that the importance of a guarantee provided by a relevant authority that the accused will be arrested if he does not comply with the conditions of his

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provisional release (including his appearance for trial), and the degree of scrutiny to be accorded to its reliability , must be determined on a case by basis,[141] and not on the basis of an assessment of that authority's level of cooperation with the Tribunal generally.[142] The prosecution is correct that the reliability of such a guarantee must be determined in relation to the circumstances which arise in the particular case. This issue has been discussed recently by the Appeals Chamber.[143]

50. A Trial Chamber may accept a relevant authority's guarantee as reliable in relation to Accused A, whereas the same or another Trial Chamber may decline to accept that the same authority's guarantee as reliable in relation to Accused B, without there being any inconsistency involved between those two decisions. Accused A may have surrendered voluntarily as soon as he learnt that he had been indicted and have cooperated with the OTP in a way which demonstrated his *bona fide* intention to appear for trial. The reliability of the guarantee provided by the relevant authority is of less importance in such a case, and may more easily be accepted as sufficiently reliable in relation to this particular accused person. On the other hand, Accused B may have been a high level government official at the time he is alleged to have committed the crimes charged, and he may have since then lost political influence but yet possess very valuable information which he could disclose to the Tribunal if minded to cooperate should he be kept in custody. There would be a substantial disincentive for that authority to enforce its guarantee to arrest that particular accused if he were not to comply with the conditions of his provisional release. A finding that the guarantee is not sufficiently reliable in the case of Accused B would be completely reasonable, despite the finding that it was reliable in relation to Accused A. Academic and opinion writers and the interested public may, of course, nevertheless wrongly perceive an inconsistency in those two cases in relation to the same authority, and criticise the Tribunal for what has been wrongly perceived. Trial Chambers should take care to explain their decisions in a way to avoid such criticisms, but they cannot be expected to change their view of the facts in a particular case in order to avoid unfounded criticism. Nor should the Appeals Chamber interfere with either such case simply because of the possibility of such criticism.

51. There are many factors which are relevant to a Trial Chamber's determination of the reliability of the guarantee provided by the authority in question. Such reliability must be determined not by reference to any assessment of the level of cooperation by that authority with the Tribunal generally, but in relation to what would happen if that authority were obliged under its guarantee to arrest the particular accused in question. What would happen in the circumstances of *that* particular accused in question is a fact in issue to be decided when determining whether that accused will appear for trial. The general level of cooperation by the authority with the Tribunal does have some relevance in determining whether it would arrest the particular accused in question, but it is not itself a fact in issue. It is therefore both unnecessary and unwise to include in the Trial Chamber's decision a separate finding concerning that general level of cooperation – unnecessary because any such finding can only be applicable to a particular point in time, and unwise because it could easily be misunderstood by the parties in relation to subsequent applications for provisional release.

52. The reliability of guarantees by any particular authority necessarily depends to some extent, as the prosecution correctly points out,[144] upon the vagaries of politics and of personal power alliances within the relevant authority as well as upon the impact of any international pressure (including financial pressure) upon the authority at any time. The prosecution says that such political considerations can never be accommodated in criminal proceedings before this Tribunal , and therefore that (in the circumstances of the present case) "only a guarantee from a state who *SsicC* is cooperating unconditionally" would be sufficient to establish that the accused will appear for trial.[145] A distaste for political issues is not, however, a sufficient reason for avoiding the

obligation of a Trial Chamber to determine an issue of fact posed for its determination and for adopting an alternative approach which would almost necessarily preclude success for any applicant for provisional release. For example, the likelihood in the future of a change in government in any particular case is something which is relevant to the reliability of a State guarantee. A difference in cooperation as a result of a change in government is a fact of life (even though a political one) which *must* be taken into account in determining whether a guarantee will be enforced by an authority in relation to the accused person in question.

53. **Failure to arrest co-accused Milutinovic** As previously stated, Milutinovic (the co-accused of Sainovic and Ojdanic) presently remains in Serbia as its President,[146] the explanations given being that he will be handed over to the Tribunal when his office expires at the end of this year, either voluntarily on his part or by compulsion,[147] and that to arrest him before his office expires would jeopardise the security and sovereignty of the State.[148] Such explanations would appear to be unacceptable in law,[149] but they indicate that, whatever may be the legal position, FRY/Serbia appears to regard its obligations under Article 29 of the Tribunal's Statute as dependent upon its current political situation, and that the guarantees given by FRY/Serbia may selectively be complied with – only if it were thought to be appropriate in the political situation which exists at the time. That was a matter which was put to the Trial Chamber, and the Trial Chamber stated:[150]

> As to the Prosecutor's argument that the failure of the authorities to arrest the co□accused Milan Milutinovic suggests that these accused would not appear at the International Tribunal, the Trial Chamber does not accept that argument. Merely because a co-accused has not yet been arrested does not mean that the general level of co-operation with the International Tribunal is not satisfactory.

Once again, other Trial Chambers may perhaps have thought that, even in relation to *these* two particular accused, the prosecution argument had considerable weight, but this Trial Chamber was not obliged in law to do so. It has not been suggested that the Trial Chamber's refusal to accept the argument based upon the failure to arrest Milutinovic as demonstrating that these two accused would not appear for trial was a conclusion which no reasonable tribunal of fact could have reached. It is the Trial Chamber, not the Appeals Chamber, which has the primary responsibility for making that decision, and the Appeals Chamber cannot substitute its own view merely because it may disagree with the finding which the Trial Chamber made. If it were otherwise, then the Appeals Chamber would be converted into a court of rehearing. The Security Council did not make any such provision in the Tribunal's Statute, and the Appeals Chamber should not allow itself to become a court of rehearing by accepting arguments such as have been put forward by the prosecution in this appeal. No other basis has been suggested in the Interlocutory Appeal for interfering with the Trial Chamber's refusal to accept that argument.

54. But the prosecution nevertheless takes issue with the relevance of the Trial Chamber's reference in that passage to the "general level of cooperation" of the FRY/Serbia authorities with the Tribunal. It says that the degree of reliance to be placed upon any guarantee must be determined in relation to the particular case , and not upon the basis of a general assessment of the general level of cooperation which may be based upon factors extraneous to the present case.[151] This issue has already been discussed,[152] and the prosecution is correct to an extent. As previously stated, the general level of cooperation does have some relevance in determining whether the authority which gave the guarantee would arrest the particular accused in question, but it is both unnecessary and unwise for a Trial Chamber to make pronouncements in its decision as to that general degree of cooperation.[153] But the passage to which the prosecution takes exception has been wrenched from its proper context.

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55. The Trial Chamber had previously defined the sense in which it was using the term "level of cooperation", which makes it clear that, in the passage to which the prosecution has taken exception, it was concerned with the level of cooperation *so far as it concerned the present applications*. The particular passage was in fact a reference to a submission which had been made by the prosecution itself . The Trial Chamber had earlier said:[154]

> The suggestion was made that the Government's level of cooperation was generally unsatisfactory.[155] However, it is the particular level of cooperation relating to the issues of provisional release with which this application is concerned. In this connection, the Trial Chamber is satisfied that the proposed level of cooperation is satisfactory.

That clearly enough was the sense in which the Trial Chamber was using the term in the passage to which the prosecution now takes exception. It is true that the word "general" was used in the impugned passage, whereas the Trial Chamber had earlier, correctly, referred to the "particular" level of cooperation, but the prosecution can hardly take advantage of what is obviously an unfortunate slip when it had itself been raising the issue of the general level of cooperation. This is, however, a good illustration as to why Trial Chambers should avoid saying anything which can be misunderstood as an assessment of a particular State's general level of cooperation. That is primarily for the President of the Tribunal to state in the annual report made on behalf of the Tribunal to the United Nations, or in a separate report. This complaint is rejected.

56. **The senior position of the two accused** The Majority Decision concludes :

> (a) that, in determining whether the accused would appear for trial, the Trial Chamber failed to consider the effect of the senior position of the two accused so far as it relied upon the guarantees,
>
> (b) that the position of an accused in the hierarchy could have an important bearing upon a State's willingness and readiness to arrest that person if he refuses to surrender himself, and
>
> (c) that those factors reduce the likelihood of his appearing at trial.[156]

(As the Majority Decision allows the appeal upon this issue, it was unnecessary for it to deal with the further issue of the relevance, if any, of the senior position of the accused to the exercise by the Trial Chamber of its discretion under Rule 65(B).)[157]

57. In failing to address these factors, the Majority Decision says, the Trial Chamber committed an error of law.[158] The reliability of guarantees provided by a State are, of course, relevant to the issue of whether the accused will appear for trial. It must be kept in mind that such an issue does not have a life of its own, as the prosecution sometimes suggests; indeed, the Appeals Chamber has made it clear that, although the production of a guarantee from the relevant governmental body is advisable, it is not a prerequisite for provisional release.[159]

58. In reaching its conclusion that the Trial Chamber failed to consider this issue , the Majority Decision itself fails to mention that the prosecution has expressly conceded in this appeal that, in relation to the issue of whether the accused will appear for trial, the Trial Chamber *did* consider the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation on the part of the States giving guarantees .[160] That concession was made in a context which was clearly intended to refer to the

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reliability of both the undertakings of the accused that they will appear for trial and – insofar as the issue was raised before the Trial Chamber – the reliability of the guarantees provided to these two accused.[161]

59. That concession made by the prosecution was well based. The relationship between the senior position of the two accused and the reliability of the guarantees played a very minor role indeed in the arguments of the prosecution before the Trial Chamber . The only possible reference by the prosecution in its Response to such a relationship has to be read into this statement concerning the application by Sainovic:[162]

> [...] the Prosecution submits that little weight should be given to such guarantees . It is noteworthy that the co-accused Milan MILUTINOVIC remains at large to this date. There has been a clear failure to arrest MILUTINOVIC on the part of the very same authorities upon whom the accused seeks to rely.

That statement – which can be interpreted (with the benefit of what was said during the hearing) as suggesting that the failure of the State to arrest a co-accused of Sainovic resulted from the senior position of that co-accused – is not repeated in relation to Ojdanic. The other references in the Response to the senior position of the two accused with which this appeal is concerned are limited to two, and neither has any relevance at all to the relationship between their senior position and the reliability of the guarantees. In the first, the prosecution suggested that, "in the light of the positions of authority held by the accused and the ongoing nature of the investigations", it was "possible" that the release of the two accused would pose a danger to witnesses and victims.[163] In the second, the prosecution said, in relation to Sainovic:[164]

> In determining the issue of whether the accused will appear for trial, it is relevant to take into account that the accused is a person who occupied a position of great responsibility at the time the alleged crimes were committed. The crimes alleged against him are gravely serious crimes. If the accused is convicted, he will face a long sentence of imprisonment.

The prosecution then quoted from the *Brdjanin* Decision:[165]

> It is a matter of common experience that the more serious the charge, and the greater the likely sentence if convicted, the greater the reasons for not appearing for trial.

A similar statement is made in relation to Ojdanic.[166] This is solely referable to the reliability of the personal undertakings of the accused to appear for trial.

60. At the hearing, the Prosecutor said:[167]

> [...] what it is absolutely unacceptable, we have had – we have received six voluntary surrenders, people who surrendered on the instructions of the government, pushed to surrender, but we never had one arrest except one which was a medium level perpetrator who we have had for a long time. But the military, the high responsible military who are here, Pandurevic and other names,[168] and we've got Vladic *[sic]*.[169] We know exactly, and everyone knows here, and I said so to the representative of Yugoslavia that he also – that Mladic is in Serbia, and everyone knows. So these arrests don't take place.

And, later:[170]

> [...] we have a cooperation for certain suspects, for certain ethnic groups, and there is no cooperation when you have Serbian suspects, and that has to be apprised *[sic]*. [...] But here one sees very clear, in

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> particular in the case of the military of Serbia, that there is no cooperation at all. There again, one can't give a meaningful statistic even if you can confirm it. You have to see what sort of cooperation is at stake. If not, that's just a confirmation of this ethnical difference according to whether the suspects are Serbian, Albanian, or – one has to see that the question of the government of Yugoslavia will cooperate with us on all our requests.

61. When dealing with the arguments put forward by the prosecution, the Trial Chamber said:[171]

> As to the Prosecutor's argument that the failure of the authorities to arrest the co-accused Milan Milutinovic suggests that these accused would not appear at the International Tribunal, the Trial Chamber does not accept that argument. [...] Furthermore , in relation to the argument that there are strong reasons for the accused not to appear for trial as they are likely to face long prison sentences if convicted , the Trial Chamber considers that, while it certainly is a factor to take into consideration in assessing whether an accused will appear, by itself is not a reason for refusing provisional release.

The first of those two sentences refers directly to the argument put forward by the prosecution in its Response to the motions filed by the two accused, and repeated at the hearing, that the guarantees provided were not reliable where the accused held a senior position.[172] The second sentence refers to the argument, based upon the proposition put forward in the *Brdjanin* Decision and quoted in that Response (which was concerned with the reliability of the personal undertaking given by the accused), that the greater the likely sentence if convicted, the greater the reasons for not appearing for trial. In the circumstances of these two accused, as the prosecution was suggesting, such sentences are likely to be greater in the case of conviction because of the senior position of the two accused. The reference to the "long prison sentences" is thus necessarily a reference to their "position of great responsibility at the time the alleged crimes were committed " referred to by the prosecution in its Response upon that issue.

62. The prosecution complains on appeal that the Trial Chamber was wrong to have rejected the argument which had been put forward based upon the failure of the relevant authorities to arrest Milan Milutinovic, because that failure demonstrated the selective basis upon which those authorities were prepared to carry out their obligations to assist the Tribunal,[173] and that the political vagaries and personal power alliances within FRY/Serbia can never be accommodated in the criminal proceedings conducted before the Tribunal,[174] but it did not in any way suggest that the Trial Chamber had failed to *consider* the relevance of the senior position of these two accused to the reliability of the guarantees issued. The prosecution's only complaint is that, having considered the issue, the Trial Chamber reached the wrong conclusion.

63. In all these circumstances, it is, with all due respect to the Majority Decision , quite impossible for any appellate court safely to assert that the Trial Chamber failed to address the senior position of the accused in the hierarchy in relation to whether the accused will appear for trial, even though it may disagree with the conclusion which the Trial Chamber reached. It is true that, when repeating the argument of the prosecution, the Trial Chamber did not expressly include a reference to the specific phrase to which the Majority Decision refers, the "senior position " of the accused, but the reference which the Trial Chamber made to the arguments which had been put forward by the prosecution unmistakably refers to the senior position of the two accused as being relevant to that issue. Trial Chambers are not expected to write text books when giving their decisions on interlocutory matters of this type, even when dealing with issues which the prosecution put forward as important in the present case. It is easy to understand the pressures upon Trial Chambers – and this is a very busy Trial Chamber – to determine the issues which have been put forward by the parties as soon as reasonably possible, without the elaboration of specific phrases which were not used by the prosecution when appearing before it. The requirement that a Trial

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Chamber give a reasoned opinion[175] requires it only to deal with the matters which are vital to the issues which it has to determine, and (so far as it is necessary in order to answer them) any other matters which the parties have raised before it as being vital. A Trial Chamber is not required to deal with matters which the parties do not appear to regard as important, and even less is it required to deal with matters which the parties have not raised before it (other than, again, those which are vital to the issues which it has to decide).

64. I therefore disagree with the Majority Decision when it concludes that the Trial Chamber "failed to consider the effect of the senior position of the two accused so far as it relied upon the guarantees" and thereby committed an error of law. The Appeals Chamber should usually respect concessions made by parties which are directly against their interests. There may be a case where it is appropriate to disregard such concessions but, where such a case arises, it is imperative that the other party be given the opportunity to respond to the ground of appeal which the Appeals Chamber has itself taken contrary to that concession. An Appeals Chamber should never be seen to be interfering with the determination of an issue of fact by a Trial Chamber with which the Appeals Chamber may disagree but which withstands appellate interference if the proper judicial processes are followed.

(E) ***Other issues relating to the finding that the accused will appear for trial***

65. **Dependence on guarantee denies right to provisional release** The prosecution has argued that, if there is any question in the collective mind of the Trial Chamber that the accused will appear for trial only if he is arrested by the authorities , then it *cannot* be satisfied that he will appear for trial, as the delays involved in his forcible arrest and transfer mean that he will not have appeared for trial.[176] That is certainly not how Trial Chambers have considered the issue in the past, as the passages quoted from the *Brdjanin* and *Ademi* Decisions make clear.[177] That is no doubt because, when an accused person has been granted provisional release , the Trial Chamber has usually been wise enough to call him up for the trial in sufficient time in advance of the trial date (for pre-trial conferences and the like) so that any need to take action to enforce a State guarantee does not arise for the first time on the day the trial is to commence. In any event, the prosecution's reasoning does not accord with the manner in which the issue should be approached.

66. The issue as to whether the accused will appear for trial cannot be considered in isolation. It must be considered in the light of all of the evidence in the application,[178] which necessarily includes the deterrent effect upon the mind of the accused of the existence of the State guarantee and the likelihood that it will be enforced against him. It would be an overly subtle analysis of fine distinctions, and it would be productive of error, to consider, first, whether the accused's assertion that he will appear should be accepted without reference to the State guarantee, secondly, taking into account the deterrent effect of the State guarantee, and, finally, whether he will appear only if forcibly arrested and transferred. No such argument was put before the Trial Chamber and, if it had, the Trial Chamber would have been correct to dismiss it. The only issue is whether the accused will appear for trial, taking into account his assertion that he will do so, the existence of any State guarantee, the likelihood that such State guarantee will be enforced against the particular accused in question and any other specific evidence which is relevant to that issue. The Trial Chamber made no error of law upon this issue.

67. **Erroneous approach** The prosecution submits that the Trial Chamber made an error of law when making the statement:[179]

> The Trial Chamber is thus satisfied that there is no evidence to negative the assertion that the accused

will appear for trial.

The prosecution says that this was erroneous because "there was clearly evidence , namely the failure to arrest Milutinovic [...] that presented a real risk that the FRY/Serbia guarantees are insufficient to ensure the return of the accused for trial ", and that the Trial Chamber, by starting with an assumption that the accused *would* return for trial and then looking to see what evidence exists to the contrary , failed to meet "the very high burden of proof that Rule 65(B) imposes".[180]

68. The context in which the Trial Chamber made this statement is important to understanding what was intended by it. In determining whether the accused would appear for trial , the Trial Chamber had to determine whether it would accept the personal undertakings to appear which the two accused had given. Before the Trial Chamber accepted those undertakings, it was obliged to consider all of the arguments put by the prosecution as to why they should not be accepted. If, despite all of those matters put by the prosecution, the Trial Chamber accepted those personal undertakings of the two accused, then that was a sufficient basis for finding that they would appear for trial. The Trial Chamber accordingly dealt with the various matters put forward by both parties which were relevant to the acceptance or otherwise of those undertakings – the surrender (and the delays involved), the Law on Cooperation passed by the FRY Government, the guarantees given by the FRY/Serbia Governments (and the level of cooperation which could be expected in relation to these two accused concerning the execution of those guarantees, considering, *inter alia*, their failure to arrest Milutinovic), and the length of sentences which the two accused might expect to receive if convicted.

69. In dealing with these issues, the Trial Chamber expressly referred to, and thus must have had regard to, the evidence concerning all those matters as to why the undertakings should not be accepted. The reference to "no evidence" obviously could not have been intended literally to be true. What the Trial Chamber clearly intended to say in the impugned passage was that, despite all of the matters which had been put by the prosecution, nothing had been demonstrated to show that the undertakings should not be accepted. Necessarily implicit in such a statement is an acceptance of the undertakings which were given. It must be conceded that the impugned passage could have been better expressed. It is unfortunate that, despite the need for applications for provisional release to be dealt with expeditiously (particularly when the application is to be granted), loose terminology such as this was permitted to remain. It has given the unsuccessful party something more to exploit on appeal , even though the meaning intended is reasonably apparent when the offending words are seen in their proper context. The Appeals Chamber is not entitled to reverse a decision of a Trial Chamber merely because the particular phrase chosen by a Trial Chamber was not the best which could have been chosen, provided that the phrase chosen does not demonstrate an error of law. No error in the approach taken by the Trial Chamber in this case has been established.

(F) *Whether the accused will pose a danger to any victim or witness or others*

70. The Trial Chamber expressed its satisfaction that neither of the accused will pose such a danger, noting that there was no suggestion that either of them had interfered in any way whatsoever with the administration of justice since the indictment became public (some four days after it was confirmed) in May 1999.[181] The prosecution has not directed any ground of appeal specifically to that finding beyond its complaint that the burden of proof applied was erroneous, and that the correct burden of proof should have been that there is no real risk that the accused will pose any danger to victims or witnesses or other persons.[182] This ground of appeal has already been rejected.[183] The prosecution has, however, made some general submissions concerning the issue

to which some reference should be made.

71. The prosecution submitted to the Trial Chamber that, as it was still continuing to investigate the case against the two accused, it was "possible" that their release would in fact pose a danger to witnesses and victims.[184] At no stage did the prosecution provide any evidence to support the existence of such a possibility, nor did it raise any issue that there was more than such a possibility . This is not to suggest that the prosecution bears any legal onus upon this issue . However, where a party (here, the applicant for provisional release) bears the onus of establishing a negative proposition (here, that he will not pose a danger to any victim, witness or other person if released), there is little that he can do but give the appropriate undertaking and point to such things as the absence on his part of any significant political support through which such interference could be directed. If there are matters which could affect the reliability of the undertaking given, the other party has the obligation, in fairness, to put them forward before the Trial Chamber to enable the party seeking to prove the negative proposition to deal with them, and not to reserve such points until an appeal.

72. In its Interlocutory Appeal, the prosecution has nevertheless sought to rely upon a statement in the *Blaskic* Decision, quoted earlier, when the Trial Chamber in that case refused provisional release upon the basis, *inter alia* , of the knowledge which an accused has of the evidence produced to him by the prosecution , which (it was said) "would place him in a situation permitting him to exert pressure on victims and witnesses" so that "the investigation of the case might be seriously flawed".[185] This issue was reinforced during the oral hearing when the prosecution submitted that provisional release should not be discussed until the accused had agreed to be interviewed, and that , once interviewed, there would be a danger that the accused would "confront" the sources of the prosecution evidence, and the OTP inquiries may be hindered.[186]

73. It is a strange logic that, once the prosecution has complied with its obligations under Rule 66 to disclose to the accused the supporting material which accompanied the indictment and the statements of the witnesses it intends to call, the accused thereafter should not be granted provisional release merely because, once released , he would be in a position to exert pressure upon them. Such logic has since been correctly rejected by another Trial Chamber,[187] and this part of the *Blaskic* Decision was not accepted as correct in another decision by the same Trial Chamber.[188] Careful consideration as to where the balance should lie in resolving the tension between the protection of victims and witnesses and the rights of the accused, given since the *Blaskic* Decision, has accepted that Article 20.1 of the Tribunal's Statute makes the rights of the accused the first consideration (requiring "full respect" for those rights), and the need to protect victims and witnesses the secondary one (requiring "due regard" to their need for protection).[189] Those rights include the right of an accused person to be released from custody pending trial where – to repeat the words of Rule 65(B) – he has satisfied the Trial Chamber that, *inter alia*, he "will not pose a danger to any victim, witness or other person". The mere possibility upon which the prosecution relies in the present case cannot by itself deny provisional release.

(G) *The exercise of discretion*

74. **Current jurisprudence** As already stated, little consideration has been given to the circumstances in which it would be appropriate to exercise that discretion .[190] It has been exercised (in exceptional circumstances) to *grant* provisional release notwithstanding that the accused had failed to satisfy the Trial Chamber that he will appear for trial.[191] However, it has been said that, in general, the discretion is unlikely be exercised in favour of an accused who had failed to

establish that he would appear for trial .[192] Rather, the discretion would in general be exercised in the appropriate case only to *refuse* provisional release notwithstanding that the accused had established both factual requirements of Rule 65(B).[193] Such a discretion has been exercised in what may be called obvious cases.[194] Some suggestions have also been made that it could be exercised in other, perhaps less obvious, cases. For example, one Trial Chamber has suggested that obstructive behaviour other than absconding or interfering with witnesses may be relevant to the exercise of the discretion to refuse provisional release – where there has been the destruction of documentary evidence, the effacement of crime traces or the potential that the accused would form a conspiracy with co-accused who remain at large.[195] Bearing in mind the presumption of innocence, some care would have to be exercised to ensure that there was at least a real prospect that such a conspiracy *would* occur, rather than a mere suspicion that it *may* occur, but this issue may be left for future determination in a case in which it does arise.

75. A more recent development has been the introduction into provisional release cases of a concept adopted from the jurisprudence of the European Court of Human Rights ("ECHR"), that of "proportionality". It is a concept of protean application in that jurisprudence, requiring that:

> [...] there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[196]

That was said in a case concerning the compulsory expropriation of property. It has also been applied by the name of "proportionality", for instance, in cases concerning the rights to life,[197] to privacy and family life,[198] to freedom of expression,[199] and to freedom of assembly.[200] A similar concept (although not always given the name of "proportionality") has been applied in ECHR jurisprudence in provisional release cases, requiring the existence of:

> [...] a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.[201]

The individual ingredients of that formula, in general terms, may be relevant considerations in the exercise of the Tribunal's discretion, in that a Trial Chamber must always keep in mind the somewhat general considerations of the public interest, including the presumption of innocence and the right to individual liberty, but statements that they "must" be proportional in the sense adopted in the ECHR jurisprudence could produce problems.[202] Similarly , statements that Rule 65(B) "must" be read in the light of certain human rights treaties could also produce problems.[203] This Tribunal is not a European Court, and it is not bound by the jurisprudence of the ECHR, although it will always have due regard to it, and to the European Convention and all other relevant human rights treaties – the jurisprudence as persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law, and the treaties as authoritative evidence of customary international law in relation to some of their provisions.[204]

76. It is unwise to introduce such a concept of "proportionality" as an additional matter, beyond the express requirements of Rule 65(B), which "must" be taken into account under Rule 65(B). The Tribunal has substantially departed from some of the ECHR jurisprudence in relation to provisional release. For example, that jurisprudence denies the propriety of the accused bearing the burden of proof that he will appear for trial,[205] but the Tribunal has placed that onus upon the accused in Rule 65(B). It has done so because it has recognised that the context in which it operates is in some respects very different to that in which the European domestic courts operate.[206] In particular, unlike European domestic courts, the Tribunal has no power to execute

arrest warrants.[207] So far as this Tribunal is concerned, therefore, the terms of Rule 65(B) already provide the required balance between the public interest on the one hand and the respect which must be paid to the presumption of innocence and individual liberty on the other hand. It is to the terms of the Rule, and not to the ECHR jurisprudence concerning the principle of proportionality, that the Trial Chamber must turn when considering the matters which an accused must establish in support of an application for provisional release. As said earlier, of course, the somewhat general considerations of the public interest, including the presumption of innocence and the right to individual liberty, may all be relevant to the exercise of discretion in the particular case .

77. At the time when an applicant for provisional release had to establish exceptional circumstances,[208] the likely length of pre-trial detention, the need for the accused to assist in the preparation of the case and similar issues were routinely (but unsuccessfully) put forward by him as matters which made the circumstances exceptional. Insofar as they were relevant to that issue, the onus of persuasion was clearly upon the accused to establish that such matters operated in his favour upon that issue. In response, the prosecution just as routinely (but somewhat more successfully) put forward as matters which prevented the circumstances from being exceptional such issues as the extreme gravity of the crimes charged and the role alleged to have been played in those crimes by the applicant.[209] The prosecution carried no onus of persuasion in relation to exceptional circumstances.

78. Following the removal from Rule 65(B) of the requirement of exceptional circumstances , and despite at least one expression of some doubt as to the precise nature of their relevance other than generally in the exercise of discretion,[210] the same issues have continued to be put forward by accused when applying for provisional release. In particular, references have been made by Trial Chambers, in the context of an exercise of discretion, to the likely length of pre-trial detention in the event that provisional release is not granted, but there has been little explanation as to just *how* these issues are relevant to the exercise of that discretion .[211] No doubt because these issues could only operate somehow in their favour, the accused have continued to attempt to discharge an onus of persuasion in relation to them. There has been no decision produced by the prosecution which suggests that any Trial Chamber has accepted the extreme gravity of the crimes charged and the role alleged to have been played in those crimes by the applicant (previously relevant to exceptional circumstances) as now being relevant also to the exercise of discretion. Those matters have, however , been accepted as relevant to the sentence which the accused may expect if convicted , and thus to whether he will appear for trial.[212]

79. **The issues raised by the prosecution relating to discretion** The prosecution has raised issues relating to the exercise of discretion in its Interlocutory Appeal which it had not raised before the Trial Chamber. A party who seeks to have a discretion exercised in its favour is obliged to draw to the attention of the Trial Chamber exercising that discretion the matters upon which it relies. A Trial Chamber is not required to have the ability to read that party's mind and, if the party is unsuccessful before the Trial Chamber, it cannot raise those matters before the Appeals Chamber for the first time in the guise of a complaint that the Trial Chamber failed to take them into account when exercising its discretion.

80. The prosecution has attempted to avoid the rejection of its new arguments by the simple expedient of reversing the onus of persuasion in relation to the exercise of discretion. In Ground (b),[213] the prosecution says:

> (b) even if the Trial Chamber was justified in its assessment that the two substantive pre-conditions of

> Rule 65(B) were satisfied (*i e* 'that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person') it erred by then exercising its discretion in favour of provisional release.[214]

The jurisprudence of the Tribunal has, since the removal from Rule 65(B) of the requirement of exceptional circumstances, proceeded upon the basis that, where the accused has succeeded in establishing that he will appear for trial and that he will not pose a danger to victims, witnesses or other persons, he is entitled to provisional release unless the prosecution persuades the Trial Chamber to exercise its discretion *against* the grant of provisional release.

81. Such an approach is consistent with the relevant international norms to which the Tribunal will always have due regard in relation to provisional release. These would appear to be the following:

(i) The International Covenant on Civil and Political Rights, Article 9:

> *Liberty and Security of Person*
>
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> [...]
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial [...].
>
> [...]

(ii) The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5:

> **Right to liberty and security**
>
> §1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law:
>
> [...]
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence [...]
>
> [...]
>
> §3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> [...]

(iii) The American Convention on Human Rights, Article 7:

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Right to Personal Liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

[...]

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

[...]

(iv) The African Charter on Human and Peoples Rights, Articles 6 and 7:

Article 6

Every individual shall have the right to liberty and to the security of his person . No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained .

Article 7

Every individual shall have the right to have his cause heard. This comprises:

[...]

(d) the right to be tried within a reasonable time by an impartial court or tribunal .

[...]

(v) Resolution 43/173 adopted by the UN General Assembly, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 9 Dec 1998, Principles 37, 38 and 39:

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority , have the right to make a statement on the treatment he received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

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> Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

82. These norms make it clear that, as stated in the ECHR jurisprudence, it is for the State to justify the loss of a person's liberty prior to conviction,[215] and that any detention can only be justified in accordance with law. As already stated, the Tribunal has already departed from these norms in Rule 65(B), to the extent that it has placed the onus upon the accused to establish that he will appear for trial.[216] But there is nothing in Rule 65(B) to justify placing an onus upon an accused person who has already satisfied the Trial Chamber that he will appear also to persuade the Trial Chamber to exercise its discretion *in favour of* the grant of provisional release. Once the accused has satisfied the Trial Chamber that he will appear for trial and that he will not pose a danger to victims, witnesses or other persons, the introduction of an additional onus of persuasion upon the accused in relation to the exercise of discretion as well would effectively require the accused once more to establish the existence of exceptional circumstances. The attempt by the prosecution to alter the onus of persuasion fails.[217]

83. Before the Appeals Chamber, under the heading "Failure to consider relevant factors", the prosecution has argued that the Trial Chamber, by "failing" to address "other relevant factors that were fully argued before it", has erred in the exercise of its discretion.[218] These are then identified as the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation by the accused to date.[219] It has conceded that the Trial Chamber did consider these matters in relation to the issue of whether Sainovic and Ojdanic would appear for trial,[220] but it maintains its complaint that the Trial Chamber "failed" to consider them in relation to the exercise of its discretion. The simple answer to this complaint is that the prosecution, which bore the onus of persuasion in relation to the exercise of that discretion, never asked the Trial Chamber to consider them in relation to that issue. Its submission that these matters were "fully argued" before the Trial Chamber (in the context of the exercise of discretion) is simply not true.

84. The Prosecution Response before the Trial Chamber, so far as it dealt with the issue of discretion, referred only to the likely length of pre-trial detention,[221] which will be discussed shortly, and it denied that either of the accused had demonstrated that he would suffer any hardship by being held in detention. The Prosecutor submitted as her primary argument in the whole case that the application was premature as she had not yet been able to interrogate the accused, that it is the policy of her Office that provisional release should not be granted until there is no further reason to continue with its inquiry or to maintain the accused in detention, and that provisional release will be opposed until it was possible to interrogate them .[222] It was submitted that provisional release should not even be discussed until the accused had agreed to be interrogated .[223] It was estimated that several months may be necessary to prepare for and arrange the interrogation.[224] Moreover, once the interrogation had been conducted, there would be a danger that the accused would "confront" the sources of the prosecution evidence, and the OTP inquiries may be hindered.[225] The necessary consequence of such an argument, it seems, would be that the accused would not be entitled to provisional release once they had been interrogated. That is an extraordinary submission.[226] It was also argued that detention must remain the rule, notwithstanding the deletion of the requirement for exceptional circumstances.[227]

85. The Trial Chamber rejected this argument that provisional release should be refused as a matter of

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discretion until the accused could be interrogated.[228] It was correct to have done so. The Majority Decision has described the Prosecutor's argument as misconceived.[229] I agree , but I would go further. Such a policy of the OTP infringes the fundamental human rights of the accused, and the prosecution was not entitled to adopt that policy . It should be publicly repudiated by the OTP. The additional argument of the prosecution that provisional release should not even be discussed until the accused agreed to be interviewed is offensive to the right of an accused person to remain silent, a right enshrined in Rule 63(B),[230] which turn incorporates Rule 42(A)(iii),[231] and which is reinforced by Article 21.4(g) of the Tribunal's Statute.[232] Such an argument should never have been put. Moreover, the insistence of the prosecution that detention must remain the rule is unsustainable in the light of current jurisprudence of the Tribunal.

86. There was no submission made to the Trial Chamber that the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation by the accused to date should be taken into account in the exercise of the Trial Chamber's discretion.[233] The Interlocutory Appeal submits, for the first time, that these matters are relevant to the exercise of the Trial Chamber's discretion. The prosecution asserts that such factors may be considered not only as to whether the accused will appear for the trial but also as to:[234]

> [...]whether detention may be necessary in order to maintain confidence in the administration of justice by the Tribunal in its international setting, considering the Tribunal's objectives balanced with the rights of the accused.

This was expanded in the prosecution's Joint Reply by emphasising that this Tribunal's "very creation" was seen by the UN Security Council as a necessary contribution to the restoration and maintenance of international peace and security, and that public confidence in the administration of justice by the Tribunal, both in the former Yugoslavia and by the international community at large, is essential for the Tribunal to meet the objectives for which it was created.[235]

87. No such submission has been considered previously by a Trial Chamber – certainly no decision has been cited by the prosecution. The submission appears to have resulted from the discovery, after the present matter had been heard by the Trial Chamber , of the existence of a provision in the Criminal Code of Canada,[236] whereby the prosecutor is obliged to show cause why the detention of the accused in custody is justified,[237] and the justification which is permitted includes:[238]

> [...] where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

This provision forms part of a larger provision (Section 515(10)) in these terms :

> For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
>
> (b) where the detention is necessary for the protection or safety of the public, having

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> regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
>
> (c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

Section 457(7) – the predecessor of Section 515(10) – was similar in terms to pars (a) and (b) of Section 515(10), but it included in (b) an alternative justification for detention, that detention was "necessary in the public interest". This provision had been struck down by the Supreme Court of Canada as being in violation of the Canadian Charter of Rights and Freedom ("Charter"), because the term had no "workable meaning" and it permitted a court to order imprisonment "whenever it sees fit".[239] Section 515(10) was enacted in 1997, five years after the earlier provision had been struck down, but as a result of that decision. It has recently narrowly escaped being similarly struck down by the Supreme Court.[240]

88. This provision, that detention was necessary "in the public interest", had been interpreted by the Canadian courts so as to make detention necessary where the " public image" of the criminal laws (bail provisions) would be damaged – where, for example, "the citizen may, in wonderment and bewilderment, feel that the application of Sthose lawsC is a mockery or at least not being administered realistically or in the public interest".[241] Some judges attempted to contain the width of the expression to avoid bending to public hysteria. In *Regina v Lamothe*,[242] Baudouin JA sought to define the concept of the public interest in a way which avoided the "visceral and negative" reaction which the public often adopts to crime and to those charged with criminal offences, in these terms:[243]

> An *informed* public must understand that the existence of the presumption of innocence at all stages of the criminal process is not a *purely theoretical notion*, but a concrete reality and that, despite what may happen, in its perception , for certain inconveniences with respect to the effectiveness in the repression of crime, it is the *price that must be paid for life in a free and democratic society*. Therefore, the perception of the public must be situated at another level, that of the public reasonably informed about our system of criminal law and capable of judging and perceiving without emotion that the application of the presumption of innocence, even with respect to interim release, has the effect that people, who may later be SfoundC guilty of even serious crimes, will be released for the period between the time of their arrest and the time of their trial. In other words , the criterion of the public perception must not be that of the lowest common denominator.

Since the enactment of Section 515(10)(c), the Canadian courts have tended to equate the concept of the maintenance of confidence in the administration of justice with the concept of the interests of justice which the Supreme Court had struck down as being in violation of the Charter.[244] Section 515(10)(c) is contemplated as being used only where the prosecution has "a very strong case",[245] and on " probably fairly infrequent" occasions,[246] or "relatively rare" occasions.[247] Courts are enjoined to be careful "not to pander to public opinion or to take account of only the overly excitable".[248] In its most recent decision, the Supreme Court's majority judgment approved of this last statement,[249] and makes it clear that the circumstances in which recourse to Section 515(10)(c) would be justified "may not arise frequently".[250]

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89. Modern community attitudes towards the judicial institutions which administer justice are more questioning and challenging in nature than they used to be. That is a good thing. But confidence in those institutions does *not* require a belief that all judicial decisions are wise, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare, and that all their decisions are wise. What is required to sustain confidence in the judicial institutions which administer justice is a satisfaction that the justice system being administered is based upon values of independence, impartiality, integrity and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.[251]

90. The standing of this Tribunal is not so frail that the international community would lose confidence in its administration of justice because one Trial Chamber has given one decision upon a procedural issue based upon a finding of fact with which many may disagree, but which is not of such a nature as to be amenable to appellate review. Far more likely would have been the damage to the confidence which the international community has in this Tribunal's administration of justice if both the Trial Chamber and the Appeals Chamber had failed to criticise in very firm terms the extraordinary policy of the OTP which was put forward at the hearing before the Trial Chamber concerning provisional release, one which (if it had not been refuted by both Chambers) would have shocked the conscience of informed members of the international community.

91. The concept now put forward by the prosecution for the first time on appeal needs careful examination and a somewhat more careful definition than the prosecution has suggested. This Tribunal is not bound by specific legislative provisions in an individual national jurisdiction. This is, however, not the case in which that examination should be made. The prosecution cannot validly complain on appeal that the Trial Chamber failed to take into consideration in the exercise of its discretion a factor which the prosecution (as the party carrying the burden of persuasion on the issue) did not ask the Trial Chamber to consider, particularly a factor as novel to the jurisprudence of the Tribunal as this one was. The appeal process is not designed for the purpose of allowing appellants to reargue their cases on a different basis to that presented to the Trial Chamber in order to remedy the defects in the case which had been presented there.[252] Accordingly, the complaint now made is rejected.

92. The remaining issue raised by the prosecution on the issue of discretion relates to the likely length of pre-trial detention.[253] The prosecution had submitted to the Trial Chamber that the length of the pre-trial detention was relevant only where it would exceed the likely sentence to be imposed ,[254] but it had neither cited any authority nor provided any justification for such an extraordinary proposition. Counsel for Ojdanic suggested to the Trial Chamber that the case may not be ready for trial "for about two years".[255] The Trial Chamber replied to this estimate by stating that "We will hear more from the prosecution on that".[256] The prosecution, however, did not respond to the estimate which was made. In its decision , the Trial Chamber stated that it considered the length of pre-trial detention to be an important consideration, and it accepted that it "may be some considerable time before the trial can commence".[257] It did not identify the basis of its assessment.

93. In its Interlocutory Appeal, the prosecution expressed the thought that, in coming to that conclusion, the Trial Chamber may have been referring to remarks made by counsel for Ojdanic at the hearing,[258] and it has criticised the Trial Chamber for having "simply taken Sthat claimC at face value".[259] In the light of the silence of the prosecution when it had been invited to address the Trial Chamber upon this issue, this criticism is unfair. Both Sainovic and Ojdanic have sought

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to provide the Appeals Chamber with further information as to the basis for the estimate made before the Trial Chamber, and the prosecution has sought to respond to that information. Once again, it is necessary to point out that the appeal process is not designed for the purpose of allowing parties to reargue their cases on a different basis to that presented to the Trial Chamber in order to remedy the defects in the cases which had been presented there.

94. The Trial Chamber was entitled to form its own estimate as to the likely length of the pre-trial detention, taking into account the information which had been presented to it. It has not been suggested that these two accused, who presented themselves for hearing only in April this year, would be entitled to any priority over those who have been awaiting trial in custody since before that time. The number of trials awaiting hearing before the Tribunal with the accused in pre-trial detention and the probable length of those trials suggest that the prospects of a Trial Chamber becoming available to hear this particular trial within the immediate future is at best remote. This complaint is rejected.

Disposition

95. In my opinion, the appeal should be dismissed.

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

Dated this 30th day of October 2002,
At The Hague,
The Netherlands.

_____
Judge David Hunt

[Seal of the Tribunal]

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1 - The statistics relating to voluntary surrenders each year demonstrate that, in 1996, one accused voluntarily surrendered; in 1997, there were ten; in 1998 there were four (the last being in April); in both 1999 and 2000, no accused voluntarily surrendered; in 2001, there were eleven (one in January, one in March, and the remainder spread throughout the second half of the year); in 2002, there have been eight accused who have surrendered to date.
2 - (Substituted) Decision on Motion to Amend Indictment, 5 Sept 2002, pp 2-3.
3 - Defence Motion for Provisional Release (filed by Sainovic), 5 June 2002 ("Sainovic Application"); General Dragoljub Ojdanic's Motion for Provisional Release, 7 June 2002 ("Ojdanic Application").
4 - Decision on Applications of Nikola Sainovic and Dragoljub Ojdanic for Provisional Release, 26 June 2002 ("Trial Chamber Decision").
5 - Decision Granting Leave to Appeal, 16 July 2002, p 2.
6 - Prosecution's Appeal Against the Trial Chamber's Decision to Grant Provisional Release, 26 July 2002 ("Interlocutory Appeal").
7 - Defense [sic] Response to the Prosecutions [sic] Appeal Against the Trial Chamber's Decision to Grant Provisional Release (filed by Sainovic), 2 Aug 2002 ("Sainovic Response"); General Dragoljub Ojdanic's Brief of Appeal, 2 Aug 2002 ("Ojdanic Response").
8 - Prosecution's Joint Reply, 7 Aug 2002 ("Joint Reply").
9 - Defence Response to Prosecution's Joint Reply, 12 Aug 2002.
10 - Prosecution's Objection to "Defence Response to Prosecution's Joint Reply", 19 Aug 2002.
11 - The further response does not raise any new matter in any event.
12 - *Prosecutor v Brdjanin and Talic*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000 ("Brdjanin Appeal Decision"), pp 2-3; *Prosecutor v Blagojevic et al*, IT-02-53-AR65, Decision on Application by Dragan Jokic for Leave to Appeal, 18 Apr 2002 ("*Jokic* Leave Decision"), par 7.
13 - *Brdjanin* Appeal Decision, p 3; *Prosecutor v Krajisnik & Plavsic*, IT-00-38&40-AR73.2, Decision on Interlocutory Appeal by Momcilo Krajisnik, 26 Feb 2002 ("*Krajisnik* Appeal Decision"), par 21 (footnote 38).

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14 - *Jokic* Leave Decision, par 7. The expression "State" when used in the Rules is defined by Rule 2 as including the entities within the State of Bosnia and Herzegovina: *Ibid*, par 9. The prosecution concedes that these procedural requirements of Rule 65 are not in issue in this appeal: Interlocutory Appeal, par 6, footnote 4.
15 - *Prosecutor v Brdjanin & Talic*, IT-99-36-PT, Decision on Motion by Radoslav Brdjanin for Provisional Release, 25 July 2000 ("*Brdjanin* Decision"), par 22; *Krajisnik* Appeal Decision, par 16.
16 - One Trial Chamber has even doubted its existence: *Prosecutor v Hadzihasanovic et al*, IT-01-47-PT, Decision Granting Provisional Release to Enever Hadzihasanovic, 19 Dec 2001 ("*Hadzihasanovic* Decision"), par 13; but such doubts are contradicted by the Tribunal's jurisprudence.
17 - See pars 74-92, *infra*.
18 - Sainovic Application, par 10.
19 - *Ibid*, par 10; Confidential Annex to Defence Motion for Provisional Release, 5 June 2002, Exhibit 2 ("Sainovic Exhibit 2"), par 2. He also said that he had responded to the "invitation" of the FRY Government to surrender: Sainovic Exhibit 2, par 2. Although the Annex has been impermissibly filed on a confidential basis, the relevant contents of it were disclosed either in the Application itself or during the proceedings before the Trial Chamber.
20 - Sainovic Exhibit 2, par 4.
21 - Sainovic Application, par 12.
22 - Sainovic Exhibit 2, par 5.
23 - Sainovic Application, par 15.
24 - Transcript, 24 June 2002, pp 409-411.
25 - Sainovic Application, par 17.
26 - Ojdanic Application, par 7.
27 - *Ibid*, par 8.
28 - Confidential Annexes to General Dragoljub Ojdanic's Motion for Provisional Release, Annex 1, Exhibit A. Although the Annexes have been impermissibly filed on a confidential basis, their relevant contents were disclosed either in the Application itself or during the proceedings before the Trial Chamber.
29 - Confidential Annex 1, par 3.
30 - Ojdanic Application, par 26.
31 - *Ibid*, par 28.
32 - Annex 2.
33 - Annex 4.
34 - Ojdanic Application, pars 21-22.
35 - Transcript, p 415.
36 - *Ibid*, p 415.
37 - Prosecution's Response to Applications for Provisional Release, 19 June 2002 ("Prosecution Response").
38 - Prosecution Response, pars 4, 14-15, 24. Article 29 requires States to cooperate with the Tribunal in the prosecution of accused persons and to surrender or transfer such persons to the Tribunal. Rule 58 points out that this obligation prevails over any legal impediment existing under the State's national law.
39 - Prosecution Response, pars 15, 24.
40 - Transcript, p 426.
41 - Prosecution Response, pars 15, 24.
42 - *Ibid*, par 24.
43 - *Ibid*, pars 16, 25. The context in which these submissions were made is set out in a footnote to par 86, *infra*.
44 - Prosecution Response, pars 11, 21.
45 - Transcript, p 433.
46 - *Ibid*, p 433.
47 - Prosecution Response, pars 12, 22.
48 - *Ibid*, pars 13, 23.
49 - *Ibid*, pars 18, 25.
50 - Ojdanic Application, par 29
51 - Prosecution Response, par 27.
52 - Transcript, pp 424-425. Rule 63 provides that, after the initial appearance, any questioning of the accused shall not proceed (a) until the accused has been cautioned that he has a right to remain silent, and (b) without the presence of counsel, unless the accused has voluntarily and expressly agreed to proceed without counsel present.
53 - Transcript, p 427.
54 - *Ibid*, p 428.
55 - *Ibid*, p 429.
56 - *Ibid*, pp 433-434.
57 - *Ibid*, p 426.
58 - *Ibid*, p 431.
59 - *Ibid*, p 431.
60 - *Ibid*, p 422.

61 - *Ibid*, p 432.
62 - Trial Chamber Decision, par 12.
63 - *Ibid*, par 12.
64 - *Ibid*, par 12.
65 - *Ibid*, par 12.
66 - *Ibid*, par 14.
67 - *Ibid*, par 14.
68 - *Ibid*, par 17.
69 - *Ibid*, par 16.
70 - *Ibid*, par 17.
71 - *Ibid*, par 17.
72 - *Ibid*, par 17.
73 - *Ibid*, par 17.
74 - Interlocutory Appeal, par 6.
75 - Later in its Interlocutory Appeal, the prosecution asserts that the Trial Chamber placed "unreasonable" reliance upon the FRY/Serbia Guarantees (par 18).
76 - Interlocutory Appeal, pars 8-14; Joint Reply, pars 2-5.
77 - Joint Reply, pars 6-8.
78 - *Ibid*, par 9.
79 - Interlocutory Appeal, par 24.
80 - *Ibid*, pars 39-42; Joint Reply, par 21.
81 - The relevant authorities are cited in the footnotes to par 6, supra. It is unnecessary to discuss here the situation where the Trial Chamber is asked to exercise its discretion to grant provisional release even where those findings have not been made in favour of the accused. That situation is briefly considered in par 74, infra.
82 - *Prosecutor v Tadic*, IT-94-1-A, Judgment, 15 July 1999 ("*Tadic* Conviction Appeal"), par 64; *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal"), par 63; *Prosecutor v Furundzija*, IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundzija* Appeal"), par 37; *Prosecutor v Delalic et al*, IT-96-21-A, Judgment 20 Feb 2001 ("*Delalic* Appeal"), pars 434-435, 459, 491, 595; *Prosecutor v Kupreskic* et al, IT-96-16-A, Appeal Judgment, 23 Oct 2001 ("*Kupreskic* Appeal"), par 30; *Prosecutor v Milosevic*, IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 18 Apr 2002 ("*Milosevic* Appeal"), par 6.
83 - *Milosevic* Appeal, par 6.
84 - *Aleksovski* Appeal, par 63; *Delalic* Appeal, par 491; *Kupreskic* Appeal, par 30.
85 - *Tadic* Conviction Appeal, par 64; *Kupreskic* Appeal, par 30.
86 - In re W (An Infant) [1971] AC 682 at 700 (per Lord Hailsham), cited by Judge Shahabuddeen in his Separate Opinion in the Tadic Conviction Appeal, at par 30.
87 - *Prosecutor v Blagojevic et al*, IT-02-53-AR65, Decision on Application by Dragan Jokic for Provisional Release, 28 May 2002 ("*Jokic* Appeal Decision"), pp 2-3.
88 - *Prosecutor v Blagojevic et al*, IT-02-60-AR65 & IT-02-60-AR65.2, Decision on Provisional Release of Vidoye Blagojevic and Dragan Obrenovic, 3 Oct 2002, par 7; Separate Opinion of Judge David Hunt, par 9.
89 - *Kupreskic* Appeal, par 225.
90 - *Prosecutor v Tadic*, IT-94-1-A and IT-94-1-Abis, Judgment in Sentencing Appeals, 26 Jan 2000 ("*Tadic* Sentencing Appeal"), par 22; *Aleksovski* Appeal, par 187; *Furundzija* Appeal, par 239; *Delalic* Appeal, par 725; *Kupreskic* Appeal, par 408; *Milosevic* Appeal, par 5.
91 - *Tadic* Sentencing Appeal, par 20; *Furundzija* Appeal, par 239; *Delalic* Appeal, pars 725, 780; *Kupreskic* Appeal, par 408; *Milosevic* Appeal, par 5. See also *Serushago v Prosecutor*, ICTR-98-39-A, Reasons for Judgment, 6 Apr 2000 ("*Serushago* Appeal"), par 23.
92 - *Aleksovski* Appeal, par 186; *Milosevic* Appeal, par 6.
93 - cf Tribunal's Statute, Article 25.2; *Milosevic* Appeal, par 6.
94 - *Delalic* Appeal, par 498; this proposition is accepted by the prosecution: Interlocutory Appeal, par 37.
95 - *Kupreskic* Appeal, pars 32, 39, 135.
96 - *Delalic* Appeal, par 457; Prosecutor v Galic, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92bis (C), 7 June 2002 ("*Galic* Appeal"), par 19.
97 - Such a course was followed in the *Galic* Appeal, pars 19-20.
98 - Ground (c).
99 - Prosecution Response, par 27.
100 - Joint Reply, par 3.
101 - *Ibid*, par 5. The emphasis appears in the Joint Reply.
102 - *Brdjanin* Decision, at par 18.
103 - *Prosecutor v Ademi*, IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb 2002 ("*Ademi* Decision"), pars 23-24.
104 - IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 Apr 1996 ("*Blaskic* Decision"), p 5.

105 - It also happens to accord with statements of principle made by a highly respected and very eminent jurist, Sir Owen Dixon of the High Court of Australia, in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-363. See also *Rejfek v McElroy* (1965) 112 CLR 517 at 521.
106 - I believe that I am sufficiently qualified to identify the intended meaning of that statement: not only was I a member of the Trial Chamber which delivered that decision, I was also the author of the statement itself. The position is the same in relation to the similar statement made by the same Trial Chamber in *Prosecutor v Brdjanin & Talic*, IT-99-36-PT, Decision on Motion by Momir Talic for Provisional Release, 28 Mar 2001 ("Talic Decision"), par 18.
107 - Ground (a). See also Interlocutory Appeal, par 18.
108 - Interlocutory Appeal, par 8.
109 - The jurisprudence of the Tribunal is summarised in par 21, *supra*.
110 - The prosecution does submit that the Trial Chamber placed unreasonable reliance upon the FRY/Serbia Guarantees (Interlocutory Appeal, par 18), but that is not sufficient. The issue is whether the finding of fact itself is one which no reasonable tribunal of fact could have reached.
111 - The remaining matters are dealt with at pars 37 *et seq, infra*.
112 - Interlocutory Appeal, par 16.
113 - Paragraph 20, *supra*.
114 - Interlocutory Appeal, par 13, dealing with the burden of proof.
115 - *Tadic* Conviction Appeal, par 64; *Aleksovski* Appeal, par 61; *Kupreskic* Appeal, pars 30-31; *Prosecutor v Kunarac et al*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, pars 39-40.
116 - *Furundzija* Appeal, par 37, following what had been said in the *Serushago* Appeal, at par 22.
117 - Interlocutory Appeal, par 27. The emphasis has been added; it did not appear in the text of the Interlocutory Appeal.
118 - This confirmed by the passage in the *Furundzija* Appeal, at pars 37, 40, upon which the prosecution relies.
119 - Paragraph 11, *supra*.
120 - Paragraph 7, *supra*.
121 - Paragraphs 7 and 9, *supra*.
122 - Paragraph 11, *supra*.
123 - There was no challenge in this appeal to the statement by the Trial Chamber that, although the accused could have surrendered earlier, it considered that "it is the fact of surrender which is of significance" (par 12 of the Trial Chamber Decision). Such a statement may perhaps be appropriate in a particular case, but the circumstances in which a surrender takes place may well cause greater or less weight to be given to the fact of surrender in most cases.
124 - Trial Chamber Decision, par 14.
125 - Interlocutory Appeal, at pars 25-26. The complaint forms part of Ground (a).
126 - *Kordic* Decision, p 4; *Brdjanin* Decision, par 16.
127 - It should be noted, however, that the mere fact that such a sentence would be severe is an insufficient basis upon which a finding that the accused will appear for trial can be refused. It must be considered in relation to the circumstances of the particular accused which may point to the danger of absconding: *Neumeister* Case, Eur Court H R, Judgment of 27 June 1968, Series A no 8 ("*Neumeister* Case"), par 10; *Stögmüller* Case, Eur Court H R, Judgment of 10 November 1969, Series A no 9 ("*Stögmüller* Case"), par 15; *Letellier* Case, Judgment of 26 June 1991, Series A no 207 ("*Letellier* Case"), par 43.
128 - Hereinafter designated the "Majority Decision".
129 - Majority Decision, p 6.
130 - The Practice Direction on the Length of Briefs and Motions (IT/184 Rev 1, 5 Mar 2002), by par 6, provides: "An appendix or book of authorities will not contain legal or factual arguments, but rather references, source materials, items from the record, exhibits, and other relevant, non-argumentative material." That does not permit a party to avoid the limitations on the tender of additional evidence imposed by Rule 115.
131 - Rule 115 requires a party seeking to tender additional evidence before the Appeals Chamber upon an issue decided by the Trial Chamber to establish that such evidence could not have been discovered by it through the exercise of due diligence: *Prosecutor v Tadic*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 Oct 1998, pars 35-45; *Kupreskic* Appeal, par 50; *Prosecutor v Delic*, IT-96-21-R-R119, Decision on Motion for Review, 25 Apr 2002, par 10.
132 - Prosecution Response, par 15.
133 - *Ibid*, par 24.
134 - The prosecution cited a website *Glas Javnosti* for a statement by Ojdanic on 13 February 2002: "I will not surrender."
135 - Transcript, pp 429-430.
136 - Interlocutory Appeal, par 21.
137 - Paragraph 25, *supra*, citing the decision of the Appeals Chamber in the *Kupreskic* Appeal, at pars 32, 39, 135.
138 - Paragraph 25, *supra*, citing the decisions of the Appeals Chamber in the *Delalic* Appeal, at par 457, and the *Galic* Appeal, at par 19.
139 - Interlocutory Appeal, par 37, dealing with the exercise of discretion.
140 - Paragraph 25, *supra*.
141 - Interlocutory Appeal, par 20.
142 - *Ibid*, par 22.

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143 - *Prosecutor v Mrksic*, IT-95-13/1-AR65, Decision on Appeal Against Refusal of Provisional Release, 8 Oct 2002, pars 9-13.
144 - Interlocutory Appeal, par 23.
145 - *Ibid*, par 23.
146 - Paragraph 4, *supra*.
147 - Paragraph 17, *supra*.
148 - Paragraph 10, *supra*.
149 - The FRY/Serbia authorities obtain no assistance from the recent decision of the International Court of Justice in Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), Judgment of 14 Feb 2002 (the *Yerodia* Case), (General List No 121). In any event, the jurisdiction of this Tribunal is given primacy over the jurisdiction of the national courts (Statute, Article 9.2).
150 - Trial Chamber Decision, par 14.
151 - Interlocutory Appeal, par 22.
152 - Paragraph 51, *supra*.
153 - *Ibid*.
154 - Trial Chamber Decision, par 12.
155 - The footnote to the text demonstrates that this was a submission made by the prosecution at the hearing.
156 - Majority Decision, par 9.
157 - That issue is dealt with in this Separate and Dissenting Opinion at pars 86 et seq.
158 - Majority Decision, par 9.
159 - *Jokic* Appeal Decision, pp 2-3.
160 - Joint Reply, par 20. The prosecution goes on to assert that, having done so, the Trial Chamber should not have been satisfied that there was "no possible risk" that the accused would fail to return for trial (Interlocutory Appeal, par 26). This submission that the test is "no *possible* risk" places an even higher burden of proof upon the accused than the test of "no *real* risk" which has already been rejected (pars 27-31, *supra*).
161 - Under the heading "Failure to consider relevant factors in the exercise of the Trial Chamber's *discretion*", which is the subject of part of Ground (b), the Joint Reply says (at par 20): "Neither Sainovic's Brief nor Ojdanic's Brief addresses the core of the Prosecution's primary argument under this ground of appeal. Clearly, the Prosecution does not suggest that the Trial Chamber did not consider the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation when determining whether the accused would appear for trial. Rather, the Prosecution submits that these factors are also relevant to the exercise of the discretion as to whether to grant provisional release and that the Trial Chamber erred in failing to consider them at this stage of the Rule 65(B) process." The underlining has been inserted in order to supply emphasis. The reference to "this stage" is to the stage where the Trial Chamber may exercise a discretion.
162 - Prosecution Response, par 11.
163 - *Ibid*, pars 13 (in relation to Sainovic) and 23 (in relation to Ojdanic).
164 - *Ibid*, par 16.
165 - *Brdjanin* Decision, par 16.
166 - Prosecution Response, par 25. The context in which these submissions were made is set out in a footnote to par 86, *infra*.
167 - Transcript, p 433.
168 - This would appear to be a reference to Lt Col Vinka Pandurevic, who has been added as a defendant to the Srebrenica indictment (the relevant version of IT-98-33 was made public in December last year), and who is alleged to have been in command and in control (with General Mladic and General Krstic) of the events which led to the killing of a large number of Muslim men and boys.
169 - This would appear to be a mishearing for Mladic.
170 - Transcript, p 435.
171 - Trial Chamber Decision, par 14.
172 - The last ten words are the subject of another, unrelated, complaint by the prosecution, which is dealt with at par 40, *supra*.
173 - Interlocutory Appeal, par 22, an argument dealt with at par 53, *supra*.
174 - *Ibid*, par 23, an argument dealt with at par 52, *supra*.
175 - This requirement is discussed in par 25, *supra*.
176 - Ground (d).
177 - Paragraph 28, *supra*.
178 - cf *Prosecutor v Tadic*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, par 92.
179 - Trial Chamber Decision, par 15.
180 - Interlocutory Appeal, par 24. This has been designated as Ground (e) in par 19, *supra*.
181 - Trial Chamber Decision, par 16.
182 - Ground (c).

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183 - Paragraph 31, *supra*.
184 - Prosecution Response, pars 13, 23.
185 - Interlocutory Appeal, par 11.
186 - Transcript, pp 428, 433-434.
187 - *Brdjanin* Decision, par 19.
188 - *Talic* Decision, par 36.
189 - See, for example, *Prosecutor v Brdjanin & Talic*, IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("Brdjanin & Talic Decision on Protective Measures"), par 20.
190 - Paragraph 6, *supra*.
191 - In the *Krajisnik* Appeal Decision (par 22, footnote 41), the Appeals Chamber referred with approval to *Prosecutor v Djukic*, IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 Apr 1996, at p 4, where provisional release was granted by a Trial Chamber prior to the commencement of the trial, solely upon humanitarian grounds in the light of the extreme gravity of the accused's medical condition, upon the basis that he was suffering from an incurable illness in its terminal phase. A similar application was recently granted, after the trial had been underway for most of this year, in *Prosecutor v Brdjanin & Talic*, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 Sept 2002 ("Second *Talic* Decision"). Talic had a short time earlier been diagnosed as suffering from an incurable disease, and the prognosis was that he was unlikely to live until the trial would conclude. The prosecution nevertheless sought to distinguish Djukic on the basis that the Talic trial was under way, and it argued that provisional release could be extremely damaging to the institutional authority of the Prosecutor and her ability to conduct investigations in the territory of the former Yugoslavia, that victims and witnesses who had agreed to cooperate with the prosecution would not have a favourable view of such a release and that, in the context of their own suffering, they would not understand the humanitarian motivation behind such a release (par 14). The Trial Chamber responded by describing it as unjust and inhumane to prolong the detention of Talic any longer (par 33).
192 - *Brdjanin* Decision, par 22; leave to appeal refused by the Appeals Chamber: *Brdjanin* Appeal Decision, p 3: "FINDING that the Applicant had failed to demonstrate that the Trial Chamber may have erred in its application of Rule 65 in holding that the Applicant failed to discharge the burden [of proof] in this case [...]"; *Krajisnik* Appeal Decision, par 22, footnote 41.
193 - *Brdjanin* Decision, par 22; Second *Talic* Decision, par 22.
194 - For example, in *Prosecutor v Kordic & Cerkez*, IT-95-14/2-T, Order on Application by Dario Kordic for Provisional Release Pursuant to Rule 65, 17 Dec 1999, at p 4, the Trial Chamber, when refusing the application, took into account in part the facts that the application had been made during the trial, and that, if successful, his release would have disrupted the remaining course of the hearing. In *Prosecutor v Krajisnik & Plavsic*, IT-00-39&40-PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 Oct 2001 ("*Krajisnik* Decision"), at par 22, it was said that the proximity of the start of the trial or of the delivery of Judgment would weigh against a decision to grant provisional release.
195 - *Ademi* Decision, par 22.
196 - *James & Others Case*, Eur Court H R, Judgment of 21 February 1986, Series A no 98, par 50.
197 - *Wolfgram v Federal Republic of Germany*, Eur Commission H R, Decision of 6 October 1986, 11257/84 (DR 49, p 213); *Stewart v United Kingdom*, Eur Commission H R, Decision of 10 July 1984, 10044/82 (DR 39, p 162).
198 - *Dudgeon* Case, Eur Court H R, Judgment of 22 October 1981, Series A no 45, pars 53-54, 59-61; *Lingens* Case, Eur Court H R, Judgment of 8 July 1986, Series A no 103, pars 40, 47.
199 - *Handyside* Case, Eur Court H R, Judgment of 7 December 1976, Series A, no 24, par 49.
200 - *Young and others* Case, Eur Court H R, Judgment of 13 August 1981, Series A no 44, pars 63, 65; *Milan Rai v United Kingdom*, Eur Commission H R, Decision of 6 April 1995, 25522/94, (81 DR, p 146).
201 - *Ilijkov v Bulgaria*, Eur Court H R, Judgment of 26 July, 2000, Application no 33977/96 ("Ilijkov Case"), par 84. See also *Wemhoff* Case, Eur Court H R, Judgment of 27 June 1968, Series A no 7, pars 4-6; *Neumeister* Case, par 5; Stögmuller Case, par 4; *Letellier* Case, par 35.
202 - *Hadzihasanovic* Decision, par 8. The Trial Chamber stated that a measure in public international law is proportional only when it is "(1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target" (par 16). The same Trial Chamber has also said that proportionality "must" be taken into account in *Prosecutor v Hadzihasanovic et al*, IT-01-47-PT, Decision Granting Provisional Release to Mehmed Alagic, 19 Dec 2001, pars 8 and 16; *Ibid*, Decision Granting Provisional Release to Amir Kubura, 19 Dec 2001, pars 8 and 16; Prosecutor v Blagojevic et al, IT-02-53-PT, Decision on Request for Provisional Release of Accused Jokic, 28 Mar 2002, par 8; *Ibid*, Decision on Vidoje Blagojevic's Application for Provisional Release, 22 July 2002 ("*Blagojevic* Decision"), pars 29, 56-59; *Ibid*, Decision on Dragan Obrenovic's Application for Provisional Release, 22 July 2002 ("*Obrenovic* Decision"), pars 37, 67-70. Another Trial Chamber has now stated that the general principle of proportionality "must" be taken into account: Second Talic Decision, par 23.
203 - *Hadzihasanovic* Decision, par 6; *Blagojevic* Decision, par 26; *Obrenovic* Decision, par 34; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision on Mile Mrksic's Application for Provisional Release, 24 July 2002, par 34.
204 - *Barayagwiza v Prosecutor*, ICTR-97-19-AR72, Decision, 3 Nov 1999, par 40.
205 - *Ilijkov* Case, par 85.
206 - *Talic* Decision, par 18; *Krajisnik* Decision, 8 Oct 2001, par 13; *Ademi* Decision, par 24.

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207 - *Brdjanin* Decision, par 18.
208 - Rule 65(B) originally read: "Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person." That requirement was removed on 17 November 1999.
209 - *Blaskic* Decision, p 4; Prosecutor v Delalic et al, IT-96-21-T, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalic, 25 Sept 1996, par 21.
210 - *Brdjanin* Decision, pars 24-28.
211 - See, for example, *Krajisnik* Decision, par 22: "The Trial Chamber considers the length of pre-trial detention to be an important factor in the exercise of discretion in determining an application for provisional release."
212 - See paragraph 40, *supra*.
213 - This is quoted in full in par 19, *supra*.
214 - The underlining has been added in this Dissenting Opinion for the purposes of emphasis. See also The submission by the prosecution in its Joint Reply (at par 21), where the submission is made that "public interest considerations weigh heavily against exercising the discretion in favour of provisional release." Again, the underlining has been added for the purposes of emphasis.
215 - Paragraph 76, *supra*.
216 - Paragraph 76, *supra*.
217 - The exercise by a Trial Chamber of its discretion in favour of an accused to grant provisional release notwithstanding his failure to satisfy it that he will appear for trial was mentioned briefly in par 74, *supra*.
218 - Interlocutory Appeal, par 35.
219 - Ground (b); Interlocutory Appeal, pars 36-42; Joint Reply, pars 20-22.
220 - The concession was made in a limited form in the Interlocutory Appeal, at par 38, and in an unlimited form in the Joint Reply, at par 20. The conclusion of the Majority Decision (at par 9) that the Trial Chamber had failed to consider the effect of the senior position of the two accused so far as it relied upon the guarantees given by the FRY and the Republic of Serbia is discussed at pars 56-64, *supra*.
221 - Prosecution Response, at pars 18, 25.
222 - Transcript, pp 423-425.
223 - *Ibid*, p 428.
224 - *Ibid*, p 427.
225 - *Ibid*, p 428.
226 - Compare the strange logic of the prosecution based upon its obligations of disclosure, discussed at pars 72-73, *supra*.
227 - Transcript, p 426.
228 - Trial Chamber Decision, par 17.
229 - Majority Decision, par 8.
230 - Rule 63(B) ("Questioning of Accused") states: "The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42(A)(iii)."
231 - Rule 42(A)(iii) ("Rights of Suspects during Investigation") states: "A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect speaks and understands: [...] (iii) the right to remain silent [...]."
232 - Article 21.4(g) ("Rights of the accused") states: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...] (g) not to be compelled to testify against himself or to confess guilt." That right has been interpreted by Trial Chambers as extending beyond testimonial evidence, and as including, for example, an accused being required to give a blood sample: *Prosecutor v Delalic et al,* IT-96-21-T, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample, 19 Jan 1998, pars 47-60. See also Brdjanin & Talic Decision on Protective Measures, par 48.
233 - The Prosecution Response before the Trial Chamber does refer to these issues not only under the headings "The Guarantees" [Sainovic, pars 10-12; Ojdanic, pars 20-22], but also, so far as Sainovic is concerned, under the heading of "Discretionary Factors" (par 16). But it is made abundantly clear in the context of pars 16-17 that they are being referred to under the heading "Discretionary Factors" only for the purpose of demonstrating that, even if the Trial Chamber were satisfied that Sainovic had satisfied it that he would appear for trial, the Trial Chamber should proceed to consider "other" factors which militated against the granting of provisional release in the exercise of its discretion. Paragraphs 16-17 (which relate to Sainovic) state: "16. In determining the issue of whether the accused will appear for trial, it is relevant to take into account that the accused is a person who occupied a position of great responsibility at the time that the accused is a person who occupied a position of great responsibility at the time the alleged crimes were committed. The crimes alleged against him are gravely serious crimes. If the accused is convicted, he will face a long sentence of imprisonment. [...] 17. In the light of the substantial burden placed upon the accused and having regard to the above criteria, the Prosecution submits that the accused has adduced inadequate evidence and has failed to discharge the burden placed upon him. In the event that the Trial Chamber finds that the accused has discharged the burden, the Prosecution submits that the Trial Chamber should consider several other discretionary factors which militate against the granting of provisional release." There is no further reference to the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted or the

absence of cooperation by the accused to date. The corresponding paragraph relating to Ojdanic (par 25) merely states: "The accused in his motion states that 'General Ojdanic occupied the highest position in the army of the Federal Republic of Yugoslavia during the war in Kosovo, and has reason to expect a lengthy sentence if found guilty'. Given such a lengthy likely sentence there is a strong motive not to appear for trial." That paragraph and par 26 then proceed to deal with the likely length of pre-trial detention and the absence of hardship. Again, there is no further reference to the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation by the accused to date.

234 - Interlocutory Appeal, par 39.
235 - Joint Reply, pars 20-21.
236 - RSC 1985, as amended, Section 515.
237 - *Ibid*, Section 515(1).
238 - *Ibid*, Section 515(10)(c).
239 - *Regina v Morales* [1992] 3 SCR 711.
240 - *Hall v The Queen*, 2002 SCC 64, 10 October 2002, by a majority of 5 to 4.
241 - *Powers v Regina* (1972) 9 CCC (2d) 533, at 544-545.
242 - (1990) 58 CCC (3d) 530.
243 - *Ibid*, at 541. The emphasis is found in the quoted portion of this judgment which the prosecution, very properly, included in its Book of Authorities for the use of the Appeals Chamber.
244 - The Law of Bail in Canada, GT Trotter (Carswell, 2nd Edn, 1999), at 161.
245 - *Regina v Alexander* (1998) 51 OTC 261, pars 23-24.
246 - *Regina v MacDougal* (1999) 178 DLR 227, par 22.
247 - *Ibid*, par 24.
248 - *Ibid*, par 24.
249 - *Hall v The Queen*, at par 27.
250 - *Ibid*, par 31.
251 - The statements in this paragraph are based upon "Public Confidence in the Judiciary", an address by the Hon Murray Gleeson AC, Chief Justice of Australia, presented at the Colloquium of the Judicial Conference of Australia, on 27 April 2002. The full text of the address is available at the following address: www.hcourt.gov.au/speeches/cj/cj_jca.htm.
252 - *Prosecutor v Erdemovic*, IT-96-22-A, Judgment, 7 Oct 1997, par 15; *Tadic* Conviction Appeal, par 55; *Prosecutor v Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 20; *Furundzija* Appeal, par 174; *Delalic* Appeal, par 724; *Kupreskic* Appeal, pars 22, 408.
253 - The complaint forms part of Ground (b).
254 - Prosecution Response, pars 18, 25.
255 - Transcript, p 415.
256 - *Ibid*, p 415.
257 - Trial Chamber Decision, par 17.
258 - Interlocutory Appeal, par 30.
259 - *Ibid*, par 31.

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Case No. IT-99-36-T

IN TRIAL CHAMBER II

Before:
Judge Carmel Agius, Presiding

Judge Ivana Janu

Judge Chikako Taya

Registrar:
Mr. Hans Holthuis

Decision of:
20 September 2002

PROSECUTOR
v.
RADOSLAV BRDJANIN
and
MOMIR TALIC

DECISION ON THE MOTION FOR PROVISIONAL RELEASE OF THE ACCUSED MOMIR TALIC

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Mr. Milan Trbojevic, for Radoslav Brdjanin
Mr. Slobodan Zecevic and Ms. Natacha Fauveau-Ivanovic, for Momir Talic

TRIAL CHAMBER II ("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 "Motion for Provisional Release of Momir Talic" ("Motion") filed confidentially by the Accused Momir Talic ("Talic") on 10 September 2002.

INTRODUCTION AND PROCEDURAL BACKGROUND

• In the Motion Talic seeks to be provisionally released pursuant to Rule 65(B) to his family home in Banja Luka on the grounds of his ill-health, under the terms and conditions that he shall remain within the confines of the municipality of Banja Luka, except for occasional visits for tests, medical treatment and therapy , as may be required by the medical doctors, to the Military-Medical Academy ("VMA ") in Belgrade. The VMA, according to Talic is the only specialised institution in the territory of Bosnia and Herzegovina and Federal Republic of Yugoslavia that can deal with the illness that he is suffering from, and the place where he can receive the satisfactory medical care.

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Subsequently, on 18 September 2002, Talic filed an "Amendment to the Motion for Provisional Release" ("Amendment") in which the condition to remain within the confines of a certain municipality was amended and supplemented to include the municipality of Belgrade, also as an alternative to that of Banja Luka.[1]

• On 9 September 2002, following receipt of the results of a series of medical tests, Dr. P.T.L.A. Falke ("Dr. Falke") – Medical Officer of the United Nations Detention Unit ("UNDU") communicated a confidential medical report to the Registrar of this Tribunal ("Registrar") and subsequently to this Trial Chamber. In the report Dr. Falke indicated that Talic is suffering from carcinoma and that Talic is not fit to stand trial and not fit to remain in detention.

• On 10 September 2002 the Trial Chamber heard the Parties in the absence of Talic who, due to his illness, could not attend. Talic had waived his right to be present.

• During the same hearing the Trial Chamber had an opportunity to hear the testimony of Dr. Falke and to examine the documents he produced. Dr. Falke explained that the diagnosis was a carcinoma in the liquid layers of the lungs without any possible cure except palliative care with prognosis of several months maximum.[2] The diagnosis was the result of a series of tests carried out on Talic, and followed the consultation of a lung specialist and an oncologist.[3] Dr. Falke stressed again that the present state of health of Talic was incompatible with the regime of detention.[4]

• On 10 September 2002, the Trial Chamber decided to hear a second opinion[5], and through the intervention of the Registrar[6], appointed two leading experts, namely Dr. Paul Baas ("Dr. Baas") – a lung cancer specialist and primary consultant in Antoine van Leeuwenhoek Hospital in Amsterdam - and Dr. Jan van Meerbeek ("Dr. van Meerbeek") – a consultant in the Department of Pulmonary Medicine at the Erasmus Medical Centre in Rotterdam, to examine Talic and report to it.

• On 10 September 2002, the Trial Chamber received a letter of guarantees from the Government of Republika Srpska undertaking to honour all the orders made by this Trial Chamber in the event that Talic were to be provisionally released.

• On 11 September 2002, the two medical experts testified in closed session before this Trial Chamber. Dr. Baas explained at the hearing that he had performed a medical examination of Talic in the penitentiary hospital unit and following a puncture of his pleura extracted some pleural liquid from the left side of his thoracic cavity in order to analyse it. Reserving his opinion on the final diagnosis until he obtained the results of such analysis, Dr. Baas informed the Trial Chamber that Talic is suffering from a localised but advanced form of cancer, probably originating from the lung.[7] This kind of cancer is inoperable and incurable. Chemotherapy would only serve as a palliative treatment.[8]

• Dr. van Meerbeek testified at the same hearing that he performed a medical examination of Talic in the penitentiary hospital unit and he informed the Trial Chamber that Talic is suffering of a carcinomatous pleurisy (malignant cancer cells in the left side of the thoracic cavity). He stated that this is an incurable disease , which cannot be cured by means of surgery, radiotherapy or chemotherapy.[9] The only possible treatment is palliative chemotherapy.[10] Asked by the Trial Chamber about the prognosis, Dr. van Meerbeek explained that the average survival of a patient in Talic's condition is about one year and that the chance that Talic will be alive in two years is about 40 per cent.[11]

• Both experts agreed that Talic, in his current state of health, was not unfit to remain in detention for some days pending the debate on the Motion and that for the short term Talic is fit to stand trial.[12]

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• On 12 September 2002, Dr. Baas submitted a written report informing the Trial Chamber that he had carried out a cytological diagnostic test and that he was able to confirm that Talic is suffering of advanced carcinoma probably of the lung, which is inoperable and incurable.[13]

• Following the testimonies of the medical experts, the Prosecution asked that , before the Trial Chamber should proceed with the hearing on the Motion, it be granted time to discuss the various implications involved with the Prosecutor who was at the time abroad on official business.[14]

• On 12 September 2002, the Trial Chamber granted the Prosecution's Request and adjourned the hearing on the Motion to 17 September 2002, indicating that, following the testimony of the two experts, there was no clear and present danger or prejudice attached to Talic's continued detention in the UNDU for a short period pending discussion and the determination of the Motion.

• On 13 September 2002 the Defence filed a Request[15] to lift the confidentiality of the Motion and all related documents and closed session hearings, which was granted by this Trial Chamber in the course of the hearing of 17 September 2002.[16]

• On 17 September 2002, the Prosecution filed a "Prosecution's Response to Motion for Provisional Release of Momir Talic" ("Prosecution's Response") objecting to Talic being provisionally released on the grounds that he is charged with the gravest possible violations of international humanitarian law that the public perception of such provisional release could be extremely damaging to the institutional authority of the Prosecutor and her ability to conduct investigations in the territory of the former Yugoslavia. Furthermore, the Prosecution argued that victims and witnesses who have agreed to co-operate with the Prosecution will not have a favourable view of such a release and in the context of their own suffering will not understand the humanitarian motivation behind such a release. Consequently the Prosecution suggested an alternative strategy, namely that the Accused remain in detention at the VMA in Belgrade, subject to certain conditions.[17]

• In the course of the hearing of 17 September 2002, the Trial Chamber heard oral submissions by the Parties.

• At the same hearing the Representative of the Government of the Federal Republic of Yugoslavia ("FRY") was heard. He confirmed the letter of intent filed on 13 September 2002 by the Federal Ministry of Justice of the FRY in which the Ministry provided guarantees regarding Talic's provisional release for treatment in the VMA, but he was unable to take a position on the additional guarantees would eventually be necessary in case the Trial Chamber decides to put Talic at home arrest.

• On 19 September 2002 Talic provided the Trial Chamber with signed written guarantees .

• In the course of the hearing held of 19 September 2002, the Trial Chamber heard again the Representatives of the FRY and further submissions by the Parties. The Representatives of FRY provided the Trial Chamber with a letter of guarantees signed by the President of FRY undertaking the obligation to comply with all orders of the Trial Chamber to ensure that, on being summoned by the Trial Chamber, Momir Talic will be able to appear before it at any time. The guarantees are made pursuant to the provisions contained in the Law of FRY on Co-operation with this Tribunal . These guarantees include the following: (a) the obligation of the Yugoslav authorities to take charge of the accused Momir Talic from the Dutch authorities at Schiphol airport, on the day and time determined by the Trial Chamber; (b) the obligation of the Yugoslav authorities to escort the accused during his journey to FRY; (c) the obligation of the Yugoslav authorities to return the accused from the FRY to Schiphol airport and to turn him over to the Dutch authorities, on the day and time determined by the Trial Chamber; (d) the accused shall be taken over from the Dutch authorities, escorted during the journey and return to the Dutch authorities by a representative to be appointed in due time by the

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Federal Government of the FRY ; (e) the obligation of the Federal Ministry of the Interior, through the appropriate secretariat of the Ministry of the Interior of the Republic of Serbia, to ensure that the accused shall report daily to the police station, that records shall be kept in this regard, and a monthly written report submitted confirming that the accused is adhering to these obligations, and to immediately inform the International Criminal Tribunal in case of accused's absence; (f) the obligation of the Yugoslav authorities to immediately arrest the accused if he tries to escape or violates any of the conditions of his provisional release from detention, and to inform the International Criminal Tribunal so that preparations can be made for his transfer back to the Tribunal.

DISCUSSION

Applicable law

• Rule 65 of the Rules of Procedure and Evidence ("Rules") sets out the basis upon which a Trial Chamber may order provisional release of an accused.

" (A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) Release may be ordered by a Trial Chamber only after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released , will not pose a danger to any victim, witness or other person.

(C) The Trial Chamber may impose such conditions upon release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others."

• Article 21(3) of the Statute of the Tribunal ("Statute") mandates that:

"*the accused shall be presumed innocent until proved guilty*".

This provision both reflects and refers to international standards as enshrined *inter alia* in Article 14 (2) of the International Covenant on Civil and Political Rights of 19 December 1966 ("ICCPR") and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR").

• The Trial Chamber, in interpreting Rule 65 of the Rules, believes it must focus on the concrete situation of the individual applicant and consequently that the provision cannot be applied in *abstracto,* but must be applied with regard to the factual basis of the particular case.[18]

• The burden of proof rests on the accused to satisfy the Trial Chamber that he will appear for trial and will not pose any danger to any victim, witness or other person. It should be noted that the Trial Chamber retains discretion not to grant provisional release even if it is satisfied the accused complies with the two requirements in the Rule.[19]

• Moreover, when interpreting Rule 65, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure , that measure must be applied.[20]

• In determining the factors relevant to the decision-making process, Trial Chamber recalls what Trial Chamber I has stated:

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"First the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. It must also rely on the co-operation of States for the surveillance of accused who have been released . This calls for a more cautious approach in assessing the risk that an accused may abscond. It depends on the circumstances whether this lack of enforcement mechanism creates such a barrier that provisional release should be refused. It could alternatively call for the imposition of strict conditions on the accused or a request for detailed guarantees by the government in question.

(...) Among other factors that may be relevant in relation to the circumstances of individual cases the following may be mentioned: completion of the Prosecution's investigation which may reduce the risk of potential destruction of documentary evidence; a change in the health of the accused or immediate family members". 21

• The Trial Chamber must make its own assessment and decide, taking into consideration the arguments, the submissions made, the facts of the case, the law, and the final assessment will in addition depend on all the contributions, the guarantees of the accused and all the guarantees provided by the relevant authorities taken as a whole .

Application of the law to the facts

• This Trial Chamber is seised of an application by the accused Talic for provisional release on humanitarian grounds, namely on the grounds of his ill-health. The humanitarian basis makes this application distinct from most of the other applications considered and decided by this Tribunal. It is different from the cases like those of Plašvic , Gruban, Had ihasanovic, Alagic and Kubura, for instance, because in all of those cases provisional release was sought during the pre-trial phase and there was no critical state of health involved. It is different from the *Đukic* case because in that case too, provisional release was sought in the pre-trial stage and in addition , the terminal cancer condition of the accused was such as to be unequivocally incompatible with any kind of detention. It is being pointed out from the very outset, therefore , that Talic's case cannot be considered and dealt with in the same manner as that adopted by this Tribunal in any of the above mentioned decisions and others with which this case cannot be strictly compared.

• Still, having heard the testimonies of the medical officer of the UNDU and of the two experts appointed by this Trial Chamber in addition to the documentation made available, there can be no doubt that Talic is suffering from an incurable and inoperable locally advanced carcinoma which presently is estimated to be at stage III-B with a rather unfavourable prognosis of survival even on short term.

• The Trial Chamber is of the view that Rule 65(B) is silent on the circumstances justifying provisional release specifically to enable individual cases to be determined on their merits and by application of discretion in the interests of justice. In determining these individual cases, it is necessary to bear in mind the *rationale* for the institution of provisional release, which is linked to the *rationale* for the institution of detention on remand.

• The Trial Chamber stresses that the *rationale* behind the institution of detention on remand is to ensure that the accused will be present for his/her trial. Detention on remand does not have a penal character, it is not a punishment as the accused, prior to his conviction, has the benefit of the presumption of innocence . This fundamental principle is enshrined in Article 21, paragraph 3 of the Statute and applies at all stages of the proceeding, including the trial phase.

• The argument of the Prosecution that it would be inappropriate for this Trial Chamber to grant Talic provisional release given the stage the trial has reached and the nature of the evidence that has been brought forward to date can only be relevant in the context of an application for provisional release in so far as it may convince the Trial Chamber that once provisionally released Talic may try

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to abscond or in any way interfere with the administration of justice by posing a danger to any victim, witness or other person. The Trial Chamber is satisfied that no evidence has been adduced to show that there are any such clear present or future dangers .

• The Trial Chamber has also considered the submission by the Prosecution that the provisional release of Talic could be "extremely damaging to the institutional authority of the Prosecutor and her ability to conduct investigation in the territory of the former Yugoslavia and the subsequent trial in The Hague". The Trial Chamber has carefully balanced two main factors, namely the public interest, including the interest of victims and witnesses who have agreed to co-operate with the Prosecution , and the right of all detainees to be treated in a humane manner in accordance with the fundamental principles of respect for their inherent dignity and of the presumption of innocence.[22] As a result it is convinced that what would indeed be extremely damaging to the institutional authority of the Prosecutor and even more so, that of this Tribunal, is if this Trial Chamber were to disregard the stark reality of Talic' s medical condition and ignore the fact that this is a Tribunal created to assert, defend and apply humanitarian law.

• The stark reality of Talic's medical condition is that there is no escape for him from the natural consequence that his illness will ultimately bring about because his condition is incurable and inoperable and can only deteriorate with or without treatment. The stark reality is that the odds in favour of his being alive a year from now are few indeed. This scenario ultimately also means that it is very unlikely that Talic would be still alive when this trial comes to its end, or more so, that if found guilty he would be in a position to serve any sentence. Indeed this is the stark reality of the situation that this Trial Chamber is faced with. Yet the Prosecution continues to show concern with the fact that the victims and witnesses who have agreed to co-operate with its Office will not have a favourable view of such a release and in the context of their own suffering they will not understand the humanitarian motivation behind such a release. The Trial Chamber is certainly not insensitive to the concerns of the Prosecution and even more so to those of the victims and witnesses who may fail to understand as suggested by the Prosecution . It is the duty of this Trial Chamber, however, to emphasise that such concerns cannot form the basis of any decision of this Tribunal, which would be tantamount to abdicating from its responsibility to apply humanitarian law when this is appropriate . There can be no doubt that when the medical condition of the accused is such as to become incompatible with a state of continued detention, it is the duty of this Tribunal and any court or tribunal to intervene and on the basis of humanitarian law provide the necessary remedies. In this context the Trial Chamber makes reference to the recent decision of the First Section of the European Court of Human Rights *in re* Mouisel v. France,[23] which ruled for admissibility in a case which dealt with the continued detention of a person suffering from cancer requiring intensive treatment involving transfer to hospital under escort as being in violation of Article 3 of the ECHR. The Trial Chamber has no doubt at all that Talic's medical condition is such as to warrant in an unequivocal manner a prompt and effective humanitarian intervention. It would be inappropriate for this Trial Chamber to wait until Talic is on the verge of death before considering favourably his application for provisional release and in the meantime allow a situation to develop which would amount to what is described in the Mouisel decision *supra* as being an inhumane one. This is all the more so when, as stated earlier, detention on remand is not meant to serve as a punishment but only as a means to ensure the presence of the accused for the trial. The Trial Chamber, given the scenario depicted above, fails to understand the request of the Prosecution for the continued detention of Talic knowing that before long and in all probability before this trial reaches its end, his condition will not be any different from Djjukic's and would, as in that case, necessitate a practically unconditional provisional release.

• The Trial Chamber believes that, given the medical condition of Talic, it would be unjust and inhumane to prolong his detention on remand until he is half-dead before releasing him. Basing itself upon the medical reports and the testimony of the medical doctors involved, the Trial Chamber is of the opinion that the gravity of Talic's current state of health is not compatible with any continued detention on remand for a long period. As explained in the Mouisel case, the palliative care and

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treatment, which Talic's condition requires, and will require more in the future , justifies a different environment. Moreover, it has rightly been pointed out by the Commander of the UNDU, as well as by the Prosecution, that security and logistical problems may arise if Talic seeks to have treatment by way of chemotherapy, while he remains in the custody of the UNDU and even if he is given treatment for some time in a hospital in The Netherlands.

• The Trial Chamber, in addition, believes that, for the same considerations outlined in the previous paragraphs, the suggestion of the Prosecution, namely that of providing for the continued detention of Talic at the VMA in Belgrade in a secure environment without the possibility of leaving that environment instead of continuing to detain him in the UNDU in the Hague, is not the appropriate solution as the circumstances that necessitate the humanitarian intervention of this Tribunal, would remain the same. The Trial Chamber, however, as stated earlier, has no doubt that Talic's case cannot be treated the same way as that of Djukic and a number of conditions attached to his release are necessary and appropriate to ensure that this on-going trial is in no way prejudiced. One of these conditions is in line with what the Prosecution has asked, namely that this Trial Chamber agrees that until and unless otherwise decided by this Tribunal, the request by Talic to enable him to return to the municipality of Banja Luka in Republika Sprska should not be acceded to. This Chamber believes that the fact that the trial against him is on-going justifies this measure or restriction and the Trial Chamber is further satisfied that no prejudice will be caused to him as a consequence because in any case he will be confined to Belgrade where he can equally have, and benefit from, the proximity of his family .

• For the same reason mentioned in the previous paragraph, namely that Talic's case cannot be treated the same as that of Djukic and a number of conditions attached to his release are necessary and appropriate to ensure that this on-going trial is in no way prejudiced, this Trial Chamber has reached the conclusion that the circumstances are such that his ability to move freely in the city to which he will be returned will be restricted. In the course of the debate before this Trial Chamber , the possibility of confining him to a specified residence under house arrest terms and conditions was explored and discussed. In this context, this Trial Chamber refers to the decision of 3 April 1996 of the then President of this Tribunal, Judge Antonio Cassese, in the Blaškic case, in which the notion of house arrest was considered *funditus*. Considering that house arrest is not a measure that is specifically dealt with by the Rules or the Statute of this Tribunal and is also not addressed by the laws of the FRY, and considering further that the notion of house arrest is more akin to the subject of non-custodial sanctions as an alternative form of post-conviction detention, this Trial Chamber believes that it is appropriate to distinguish it from the imposition of a residence requirement. The Trial Chamber believes that the circumstances are such that the imposition of a controlled residence requirement for the time being will be sufficient. This Trial Chamber believes that such a measure would for all intents and purposes be tantamount to what would technically be classified as house arrest, at least in so far as freedom of movement is concerned and as explained in the Blaškic decision *supra* can still be considered as a form of detention.

• The Trial Chamber will also impose all those conditions which, in its opinion , on the one hand are necessary to ensure that Talic receives all the medical treatment he requires and, on the other hand are appropriate in the circumstances to ensure that the requirements of Rule 65 governing provisional release are observed.

• Having premised all the above, the Trial Chamber next turns to examine the requirements set out in Rule 65. As a matter of procedure, the Trial Chamber, before provisionally releasing Talic, is required to hear from the host country.

• On 13 September 2002 the Dutch authorities communicated in writing to this Trial Chamber that they have no objections to Talic being provisionally released on condition that he does not reside in The Netherlands thereafter.[24]

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• As to the requirement that the accused satisfies the Trial Chamber that he will re-appear, in the event he recovers sufficiently to resume attending trial, the Trial Chamber takes into account and attaches importance to the Law of Co-operation passed in April 2002 by the Government of the FRY. This recent legislation sets out a procedure for the arrest and surrender of accused persons to the International Tribunal,[25] and obliges the "organs of internal affairs" to arrest such persons. Procedure of this nature did not previously exist, and the Trial Chamber accepts that the Government has taken steps to lessen chances of accused evading arrest while in the territory of the FRY. In this connection , the Trial Chamber is also satisfied that the proposed level of co-operation is satisfactory.

• In this context this Trial Chamber takes into consideration the guarantees provided by the FRY. As a whole, this Trial Chamber is satisfied with the assurances that have been put forward by the Government of the FRY, in particular that the local authorities will closely monitor Talic at his residence in Belgrade. Consequently , the Trial Chamber does not identify *in concreto* any clear and present risk that Talic will not re-appear for trial.

• As to the requirement that Talic, if provisionally released, will pose no risk to any victim, witness or other person, the Trial Chamber reiterates that no evidence or material has been adduced tending to prove that any clear and/or present danger of such risk exists and further notes that there is no suggestion that Talic has interfered with the administration of justice in any way whatsoever since March 14, 1999, the date when the indictment was confirmed against him. Nonetheless, in reaching its decision, this Trial Chamber has striven to minimise as much as possible any such risk in the future especially by restricting Talic's residence to an area distant from the one where he initially sought to be returned and which is part of the territory covered by the Indictment.

• Finally, this Trial Chamber observes that Pursuant to Rule 65(C) the Trial Chamber "may impose such conditions upon the release of the Accused as it may determine appropriate". It is noted that Talic has consented to the imposition of any conditions necessary to his provisional release. The Trial Chamber considers that the stringent conditions and the restrictions imposed on Talic's personal liberty and found in the disposition below, can adequately satisfy the requirements set out in the Rule . Therefore, the Trial Chamber, upon balancing all the relevant circumstances as required by Rule 65(B) and as discussed above, finds it appropriate to order that Talic should be provisionally released.

43. In reaching its decision the Trial Chamber has also taken into consideration Talic's offer to waive his right to be present, should the proceeding against him continue. The Trial Chamber is not imposing any such condition upon him as a pre -requisite for his provisional release mainly because of legal considerations, but certainly acknowledges his willingness not to obstruct the contination of the trial agains t him.

44. The Prosecution seeks a stay of the decision in order to appeal against the grant of provisional release. The Defence has entered its opposition. It is, however , fit and proper, considering the Prosecution's Response, that the grant of provisional release will therefore be stayed pending any appeal by the Prosecution.

DISPOSITION

For the foregoing reasons,

PURSUANT TO Rule 65 of the Rules

TRIAL CHAMBER II HEREBY GRANTS the Motion **AND ORDERS** the provisional release of Talic on the following terms and conditions:

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Talic shall be transported to Schiphol airport in the Netherlands by the Dutch authorities .

At Schiphol airport, Talic shall be provisionally released into the custody of the designated officials of the FRY (whose names shall be provided in advance) and who shall accompany him for the remainder of his travel to his place of residence in Belgrade.

During the period of his provisional release, Talic shall agree to abide and will abide the following conditions, and the FRY shall ensure compliance with each and every of them:

To reside and remain at all times at the address provided in Belgrade[26], except for occasional visits for tests, medical treatment and therapy, as may be required, to the VMA. For this purpose his address in Belgrade will be communicated by the Registrar to the authorities of FRY;

To inform the Representative of the Registry at the Field Office in Belgrade if he leaves the address provided for tests, medical treatment and therapy in VMA;

Without prejudice to condition a) above, to remain within the confines of the municipality of Belgrade;

Except when hospitalised at the VMA or when for reason of health unable to do so , to contact once a day the local police in Belgrade which will maintain a log and report accordingly to the Representative of the Registry at the Field Office in Belgrade at the end of each month;

To assume responsibility for, and bear all expenses necessary for his transport from Schiphol airport to Belgrade and back;

Under no circumstances will he travel to Banja Luka or any of the other municipalities covered by the Indictment, unless authorised by the Trial Chamber;

To surrender his passport to the Representative of the Registry at the Field Office in Belgrade or to the authorities of the FRY as required;

To surrender his driving license to the Representative of the Registry at the Field Office in Belgrade or to the authorities of FRY as required;

To consent to have the authorities of FRY verify his presence at the address provided in Belgrade or at the VMA, as may be required;

To consent to have a Representative of the Registry at the Field Office in Belgrade to verify his presence at the address provided in Belgrade or at the VMA, as may be required;

To consent to have a Representative of the Registrar of the Tribunal to have access to him at any time, in order to assess arrangements for his security and welfare ;

To consent to have a medical specialist appointed by the Registrar of the Tribunal to visit him once a month or as required, in order to assess and report his state of health;

Not to have any contacts with the other co-accused in the case;

Not to have any contacts whatsoever or in anyway interfere with victims or any person who may testify at his trial, or otherwise interfere in any way with the proceedings or the administration of justice;

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Not to discuss his case with anyone, including the media, other than his counsel ;

Not to occupy any official position;

To comply strictly with any requirements by the authorities of FRY necessary to enable them to comply with their obligations under the order for provisional release and their guarantees;

To comply with any other and further order and/or condition the Trial Chamber may deem necessary under the circumstances;

To return to the Tribunal at such time and on such date as the Trial Chamber may order;

To comply strictly with any order of the Trial Chamber varying the terms of, or terminating, the provisional release of the accused.

REQUIRES the Dutch authorities:

To transport Talic to Schiphol airport;

At Schiphol airport, to provisionally release Talic into the custody of the designated official(s) of the FRY (whose name(s) shall be provided in advance to the Registrar of the Tribunal) and who shall accompany Talic for the remainder of his travel to his place of residence in Belgrade;

On Talic's return flight, to take custody of the accused at Schiphol airport at a date and time to be determined by the Trial Chamber seised of the case;

To transport Talic back to the UNDU or to another place indicated by the Trial Chamber .

REQUIRES the authorities of FRY to assume responsibility for:

Transport expenses, jointly and severally with Talic, from Schiphol airport to his place of residence and back;

The personal security and safety of Talic while on provisional release;

Reporting immediately to the Registrar of the Tribunal the substance of any threats to the security of Talic, including full reports of investigations related to such threats;

Facilitating, at the request of the Trial Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;

Ensuring compliance with the conditions imposed on Talic by this or any future order ;

Submitting a written report to the Registrar of the Tribunal every month as to the presence of Talic and his compliance with the terms of this order and any further order;

Immediately detaining Talic should he breach any of the terms and conditions of his provisional release and reporting immediately any such breach to the Trial Chamber ;

Respecting the primacy of the Tribunal in relation to any existing or future proceedings in the FRY concerning Talic;

Not issuing to Talic any passport or document enabling him to travel.

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INSTRUCTS the Registrar of the Tribunal

To consult with the Ministry of Justice of the Netherlands and the authorities of FRY as to the practical arrangements for Talic's release and travel to Belgrade;

To keep Talic in custody until relevant arrangements are made for his travel, unless hospitalisation is needed instead;

To take any necessary measure to grant to Talic all the medical assistance he requires during the transfer from the UNDU to his place of residence in Belgrade;

To communicate to the authorities of FRY Talic's address in Belgrade;

To appoint a medical specialist to have access to Talic once a month or as may be required in order to assess his state of health and who will provide a written report to this Tribunal on such state of health.

REQUESTS the authorities of all States through which Talic will travel:

to hold Talic in custody for any time he will spend in transit at the airport;

to detain and arrest Talic pending his return to the United Nations Detention Unit , should he attempt to escape.

ORDERS

That the provisional release of Talic is stayed pending an appeal by the Prosecution pursuant to Rule 65(D), (E), (F) and (G).

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

Dated this twentieth day of September 2002
At The Hague

The Netherlands

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Carmel Agius
Presiding Judge

[Seal of the Tribunal]

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1 - Amendment para. 7, page 3.
2 - T. 9728, T. 9734.
3 - T. 9732.
4 - T. 9728, T. 9747.
5 - T. 9752-3.
6 - OLAD fax concerning "Review of Mr. Talic medical files" dated 10 September 2002, filed to the Trial Chamber on 13 September 2002.
7 - T. 9789.
8 - T. 9793.
9 - T. 9809.
10 - T. 9810.

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11 - T. 9810 – 9811.
12 - T. 9795, T. 9818.
13 - Letter of Dr. Baas on Mr. Talic's medical condition, dated 12 September 2002.
14 - T. 9824 ff.
15 - Requête aux fins de lever la confidentialité de la requête aux fins de la mise en liberté.
16 - T. 9845.
17 - Prosecution's Response, paras. 3-5.
18 - Prosecutor v. Hadzihasanovic et al., Case No. IT-01-47-PT, *Decision Granting Provisional Release to Amir Kubura*, 19 December 2001, para. 7.
19 - See, for example, Prosecutor v. Kovacevic, Case No. IT-97-24-PT, *Decision on Defence Motion for Provisional Release*, 21 January 1998; Prosecutor v. Brdjanin and Talic, Case No. IT-99-36-PT, *Decision on Motion by Momir Talic for Provisional Release*, 28 March 2001.
20 - Prosecutor. V. Dragan Jokic, Case No. IT-02-53-PT, *Decision on Request for Provisional Release of Accused Jokic*, 28 March 2002, para. 18.
21 - Prosecutor v. Ademi, Case No. IT-01-46-PT, *Order on Motion for Provisional Release*, 20 February 2002, paras. 24-27.
22 - Prosecutor v. Blaskic, Case No. IT-95-14-T, *Decision on Motion of the Defence seeking Modification of the Conditions of Detention of General Blaskic*, 9 January 1997.
23 - Appl. 67263/01 decided on 21/3/2002.
24 - Letter by the Deputy Director Cabinet and Protocol Department, dated 12 September 2002.
25 - Law on Co-operation between the FRY and the International Tribunal, artt. 18-31.
26 - The address was provided to the Trial Chamber as a confidential and ex parte filing on 18 September 2002.

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EUROPEAN COURT OF HUMAN RIGHTS

In the Letellier case*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")** and the relevant provisions of the Rules of Court***, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr Thór Vilhjálmsson,
Mr F. Matscher,
Mr L.-E. Pettiti,
Mr R. Macdonald,
Mr R. Bernhardt,
Mr A. Spielmann,
Mr J. De Meyer,
Mr S.K. Martens,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 26 January and 24 May 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

* The case is numbered 29/1990/220/282. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

*** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

PROCEDURE

1. The case was referred to the Court by the European

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Commission of Human Rights ("the Commission") on 21 May 1990, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12369/86) against the French Republic lodged with the Commission under Article 25 (art. 25) by a French national, Mrs Monique Letellier, on 21 August 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby France recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 §§ 3 and 4 (art. 5-3, art. 5-4) as regards the requirements of reasonable time and speediness.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Mr L.-E. Pettiti, the elected judge of French nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 24 May 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Matscher, Mr J. Pinheiro Farinha, Mr R. Bernhardt, Mr A. Spielmann, Mr J. De Meyer and Mr S.K. Martens (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently Mr R. Macdonald, substitute judge, replaced Mr Pinheiro Farinha, who was unable to take part in the further consideration of the case (Rules 22 § 1 and 24 § 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the French Government ("the Government"), the Delegate of the Commission and the applicant's representative on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence, the Registrar received the applicant's claims under Article 50 (art. 50) of the Convention on 28 June 1990 and the Government's memorial on 19 October. By a letter of 9 November the Deputy Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 16 November 1990 that the oral proceedings should open on 23 January 1991 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a

preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mrs E. Belliard, Deputy Director of Legal Affairs,
Ministry of Foreign Affairs, Agent,
Mr B. Gain, Assistant Director of Human Rights,
Legal Affairs Directorate, Ministry of Foreign Affairs,
Miss M. Picard, magistrat, seconded to the Legal Affairs
Directorate, Ministry of Foreign Affairs,
Mrs M. Ingall-Montagnier, magistrat, seconded to the
Criminal Affairs and Pardons Directorate, Ministry of
Justice, Counsel;

(b) for the Commission

Mr A. Weitzel, Delegate;

(c) for the applicant

Ms D. Labadie, avocat, Counsel.

7. The Court heard addresses by Mrs Belliard for the Government, by Mr Weitzel for the Commission and by Ms Labadie for the applicant, as well as their answers to its questions. On the occasion of the hearing the representatives of the Government and of the applicant produced various documents.

AS TO THE FACTS

I. The particular circumstances of the case

8. Mrs Monique Merdy, née Letellier, a French national residing at La Varenne Saint-Hilaire (Val-de-Marne), took over a bar-restaurant in March 1985. The mother of eight children from two marriages, she was separated from her second husband, Mr Merdy, a petrol pump attendant, and at the material time was living with a third man.

9. On 6 July 1985 Mr Merdy was killed by a shot fired from a car. A witness had taken down the registration number of the vehicle and on the same day the police detained Mr Gérard Moysan, who was found to be in possession of a pump-action shotgun. He admitted that he had fired the shot, but stated that he had acted on the applicant's instructions. He claimed that she had agreed to pay him, and one of his friends, Mr Michel Bredon - who also accused the applicant -, the sum of 40,000 French francs for killing her husband and that she had advanced him 2,000 francs for the purchase of the weapon.

Mrs Letellier denied these accusations although she admitted

having seen the murder weapon, having declared in public that she wished to get rid of her husband and having given her agreement "without thinking too much about it" to Mr Moysan who had proposed to carry out the deed. She maintained, moreover, that she had given 2,000 francs to Mr Moysan, whom she described as "a poor kid", so that he could buy a motor car.

10. On 8 July 1985, in the course of the first examination, the investigating judge of the tribunal de grande instance (Regional Court) of Créteil charged the applicant with being an accessory to murder and remanded her in custody.

A. The investigation proceedings

1. The first application for release of 20 December 1985

11. On 20 December 1985 the applicant sought her release arguing that there was no serious evidence of her guilt. She claimed in addition that she possessed all the necessary guarantees that she would appear for trial: her home, the business, which she ran single-handed, and her eight children, some of whom were still dependent on her.

12. On 24 December 1985 the investigating judge ordered her release subject to court supervision; she gave the following grounds for her decision:

> "... at this stage of the proceedings detention is no longer necessary for the process of establishing the truth; ... although the accused provides guarantees that she will appear for trial which are sufficient to warrant her release, court supervision would seem appropriate."

He ordered the applicant not to go outside certain territorial limits without prior authorisation, to report to him once a week on a fixed day and at a fixed time, to appear before him when summoned, to comply with restrictions concerning her business activities and to refrain from receiving visits from or meeting four named persons and from entering into contact with them in any way whatsoever.

Thereupon the guardianship judge (juge des tutelles) returned custody of her four minor children to Mrs Letellier.

13. On appeal by the Créteil public prosecutor, the indictments division (chambre d'accusation) of the Paris Court of Appeal set aside the order on 22 January 1986, declaring that it would thereafter exercise sole jurisdiction on questions concerning the detention. It noted in particular as follows:

> "...
>
> The file contains ... considerable evidence suggesting

that the accused was an accessory to murder, which is an exceptionally serious criminal offence having caused a major disturbance to public order, the gravity of which cannot diminish in the short lapse of time of six months.

The investigations are continuing and it is necessary to prevent any manoeuvre capable of impeding the establishment of the truth.

In addition, in view of the severity of the sentence to which she is liable at law, there are grounds for fearing that she may seek to evade the prosecution brought against her.

No measure of court supervision would be effective in these various respects.

Ultimately detention on remand remains the sole means of preventing pressure being brought to bear on the witnesses.

It is necessary in order to protect public order from the disturbance caused by the offence and to ensure that the accused remains at the disposal of the judicial authorities.

... ."

As a result, the applicant, who had been released on 24 December 1935, returned to prison on 22 January 1986.

14. At the hearing on 16 January 1986 Mrs Letellier had filed a defence memorial. In it she stressed that she had waited until the main phase of the investigation had been concluded before lodging her application for release; thus all the witnesses had been heard by the police or by the investigating judge, two series of confrontations with Mr Moysan had taken place and all the commissions rogatoires had been executed. She noted in addition that Article 144 et seq. of the Code of Criminal Procedure in no way regarded the gravity of the alleged offences as one of the conditions for placing and keeping an accused in pre-trial detention and that the parties seeking damages (parties civiles) had not filed any observations on learning of her release. She urged the indictments division to confirm the order of 24 December 1985 releasing her subject to court supervision and stated that she had no intention whatsoever of evading the prosecution, that she would comply scrupulously with the court supervision, that she could provide firm guarantees that she would appear in court and that further imprisonment would destroy, both financially and emotionally, a whole family, whose sole head she remained.

15. Mrs Letellier filed an appeal which the Criminal Division of the Court of Cassation dismissed on 21 April 1986 on the following grounds:

"...

In setting aside the order for the release subject to court supervision of Monique Merdy, née Letellier, accused of being an accessory to the murder of her husband, the indictments division, after having set out the facts and noted the existence of divergences between her statements and the various testimonies obtained, observed that the offence had caused a disturbance to public order which had not yet diminished, that, as the investigation was continuing, it was important to prevent any manoeuvre likely to impede the establishment of the truth and bring pressure to bear on the witnesses, and that the severity of the sentence to which the accused was liable at law raised doubts as to whether she would appear for trial if she were released; the indictments division considered that no measure of court supervision could be effective in these various respects;

That being so the Court of Cassation is able to satisfy itself that the indictments division ordered the continued detention of Monique Merdy, née Letellier, by a decision stating specific grounds with reference to the particular circumstances and for cases provided for in Articles 144 and 145 of the Code of Criminal Procedure;

... ."

2. The second application for release of 24 January 1986

16. On 24 January 1986 the applicant again requested her release; the indictments division of the Paris Court of Appeal dismissed her application by a decision of 12 February 1986, similar to its earlier decision (see paragraph 13 above).

17. On an appeal by Mrs Letellier, the Court of Cassation set aside this decision on 13 May 1986 on the ground that the rights of the defence had been infringed as neither the applicant nor her counsel had been notified of the date of the hearing fixed for the examination of the application. It remitted the case to the indictments division of the Paris Court of Appeal, composed differently.

18. The latter indictments division dismissed the application on 17 September 1986. It considered that there were "in the light of the evidence ..., serious grounds for suspecting that the accused had been an accessory to murder". It took the view that "under these circumstances ..., the accused's detention [was] necessary, having regard to the seriousness of the offence ... and the length of the sentence [which she risked], in order to ensure that she remain[ed] at the disposal of the judicial authorities and to maintain public order".

It also dismissed the complaints based on a violation of Article 5 §§ 3 and 4 (art. 5-3, art. 5-4) of the Convention, stressing that these complaints were not based on any provision of the Code of Criminal Procedure and that it had taken its decision with due dispatch in accordance with that code.

19. At the hearing on 16 September 1986, Mrs Letellier had submitted a defence memorial. In it she requested the indictments division to order her release "because her application for release had not been heard within a reasonable time" within the meaning of Article 5 § 3 (art. 5-3) of the Convention and to take formal note that she did not object to being placed under court supervision.

20. On an appeal by Mrs Letellier, the Court of Cassation overturned this decision on 23 December 1986. It found that the Court of Appeal had not answered the submissions concerning the failure to respect the "reasonable time" referred to in Article 5 § 3 (art. 5-3).

21. On 17 March 1987 the indictments division of the Amiens Court of Appeal dismissed the application, which had been remitted to it, on the following grounds:

> "...
>
> ... the charges are indeed based on sufficient, relevant and objective evidence despite the accused's claim to the contrary;
>
> Having regard to the complexity of the case and to the investigative measures which it necessitates, the time taken to conduct the investigation remains reasonable for the purposes of the European Convention, with reference to the dates on which Mrs Letellier was placed in detention and had her detention extended; the proceedings have never been neglected, as examination of the file shows;
>
> Mrs Letellier's complaint that a reasonable time has been exceeded is also directed against the time taken to hear her application for release ... and she infers therefrom, by analogy with Articles 194 and 574-1 of the French Code of Criminal Procedure, that such a decision should have been taken within a period of between thirty days and three months;
>
> However, none of the provisions of that code which are expressly applicable to the present dispute has been infringed and it must be recognised that the period of time which elapsed between the date of the application and that of the present judgment is only the inevitable result of the various appeals filed;

Finally the applicant's continued detention on remand remains necessary to preserve public order from the disturbance caused by such a - according to the present state of the investigation - decisive act of incitement to the murder of Mr Merdy; the extent of such disturbance, to the whole community, is not determined only on the basis of the reactions of the victim's entourage, contrary to what the defence claims ... . "

22. The applicant filed an appeal on points of law. She relied inter alia on Article 5 § 3 (art. 5-3) of the Convention, claiming that the indictments division had "failed to consider whether detention lasting more than twenty-two months, when the investigation [was] not yet concluded, exceeded a reasonable time". She also alleged violation of Article 5 § 4 (art. 5-4) inasmuch as the eighty-three days which had elapsed between the judgment of the Court of Cassation on 23 December 1986 and the judgment of the court to which the application was remitted could not be regarded as satisfying the requirement of speediness.

The Court of Cassation dismissed the appeal on 15 June 1987 on the following grounds:

"...

In order to reply to the accused's submissions based on the provisions of Article 5 § 3 (art. 5-3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which she had claimed had been infringed, the court to which the application was remitted found that, in relation to the dates on which Monique Letellier had been placed in detention on remand and had her detention extended, having regard to the complexity of the case and the necessary investigative measures, the proceedings had been conducted within a reasonable time within the meaning of the above-mentioned Convention; it found that the time which had elapsed between the date of her application for release of 24 January 1986 and that of the present judgment was only the inevitable result of the various appeals filed, cited in the judgment;

Moreover, in dismissing this application for release and ordering the accused's continued detention on remand, the indictments division, after having referred to the grounds for suspicion against Monique Letellier, noted that the latter denied having been an accessory in any way although the declarations in turn of the two main witnesses conflict with the accused's version. According to the indictments division, it remains necessary to keep the accused in detention on remand in order to protect public order from the disturbance to which incitement to the murder of a husband gives rise;

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In the light of the foregoing statements, the Court of Cassation is able to satisfy itself that the indictments division, before which no submissions based on the provisions of Article 5 § 4 (art. 5-4) of the European Convention were raised and which was not bound by the requirements of Article 145-1, sub-paragraph 3, of the Code of Criminal Procedure, which do not apply in proceedings concerning more serious criminal offences (matière criminelle), did, without infringing the provisions referred to in the defence submissions, give its ruling stating specific grounds with reference to the particular circumstances of the case, under the conditions and for the cases exhaustively listed in Articles 144 and 145 of the Code of Criminal Procedure;

... ."

3. The other applications for release

23. During the investigation, the applicant submitted six other applications for release: on 14 February, 21 March, 19 November and 15 December 1986 and then on 31 March and 5 August 1987. The indictments division of the Paris Court of Appeal dismissed them on 5 March, 10 April, 5 December and 23 December 1986 and on 10 April and 24 August 1987 respectively. It based its decisions on the following grounds:

Judgment of 5 March 1986

"...

The file thus contains considerable evidence suggesting that the accused was an accessory to murder, which is an exceptionally serious criminal offence having caused a major disturbance to public order, the gravity of which cannot diminish in the short lapse of time of seven months.

The investigations are continuing and it is necessary to prevent any manoeuvre capable of impeding the establishment of the truth.

In addition, in view of the severity of the sentence to which she is liable at law, there are grounds for fearing that she may seek to evade the prosecution brought against her.

No measure of court supervision would be effective in these various respects.

Ultimately, detention on remand remains the sole means of preventing pressure being brought to bear on the witnesses.

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It is necessary to protect public order from the disturbance caused by the offence and to ensure that the accused remains at the disposal of the judicial authorities.

... ."

Judgments of 10 April and 5 December 1986

Identical to the preceding decision - itself very similar to that of 22 January 1986 (see paragraph 13 above) - except that the sixth paragraph was not included and that the first paragraph ended at the word "accessory".

Judgment of 23 December 1986

"...

In these circumstances there are strong indications of Mrs Merdy's guilt, indications which were moreover noted most recently by a judgment of this indictments division dated 5 December 1986.

The acts which Mrs Merdy is alleged to have carried out seriously disturbed public order and this disturbance persists. In addition there is a risk that, if she were to be freed, she would, in view of the severity of the sentence to which she is liable, seek to evade the criminal proceedings brought against her.

The constraints of court supervision would be inadequate in this instance.

The detention on remand of Mrs Merdy is necessary to preserve public order from the disturbance caused by the offence and to ensure that she remains at the disposal of the judicial authorities.

... ."

Judgment of 10 April 1987

"...

There are strong indications of Monique Letellier's guilt, having regard to the consistency of Mr Moysan's statements.

No new item of evidence has as yet been brought to the court's attention such as would be capable of altering the situation as regards Monique Letellier's incarceration.

The continuation of her detention on remand remains necessary to preserve public order from the serious disturbance caused by the offence and to ensure that she

will appear for trial.

The constraints of court supervision would clearly be inadequate to attain these objectives.

... ."

Judgment of 24 August 1987

"...

In the present state of the proceedings, Monique Letellier is the subject of an order for the forwarding of documents to the principal public prosecutor dated 8 July 1987 made by the Créteil investigating judge, which gives grounds for supposing that the investigation is close to conclusion so that the competent court will be able to give judgment within a reasonable time.

In consequence the detention on remand is absolutely necessary on account of the particularly serious disturbance caused by the offence.

It is to be feared that Mrs Letellier will seek to evade trial, having regard to the severity of the sentence which she risks.

It is consequently essential that the accused remains in detention in order to ensure that she is at the disposal of the trial court.

The guarantees of court supervision would clearly be inadequate to attain these objectives.

... ."

24. In the defence memorials which she submitted at the hearings on 23 December 1986, 3 March 1987 and 10 April 1987, Mrs Letellier stressed the contradictions in the investigation and the statements of the witnesses. Moreover, she contested the arguments put forward to justify the extension of her detention. She maintained that, once released, she would remain at the disposal of the judicial authorities and that public order would in no way be threatened; she would comply scrupulously with any court supervision; she would provide very firm guarantees for her appearance in court and her continued detention would destroy emotionally and financially a whole family, whose sole head she remained. She claimed the benefit of the presumption of innocence, a fundamental and inviolable principle of French law.

In her memorial of 3 March 1987, the applicant also invoked Article 5 § 3 (art. 5-3) of the Convention. She noted that "... in accordance with the case-law of the European Court of Human

Rights, the grounds given in the decision(s) concerning the application(s) for release, on the one hand, taken together with the true facts indicated by [her] in her applications, on the other, [made] it possible [for her] to affirm that those grounds contained both in the judgment ... of 12 February 1986 and in the preceding judgment of 22 January 1986 and in the subsequent judgments [were] neither relevant nor sufficient". She added that the parties seeking damages, the victim's mother and sister, had not formulated any observations when she had filed her applications for release of December 1985, January, February, March, November and December 1986, whereas they had energetically opposed those of Mr Moysan; she reiterated this last argument in her memorial of 10 April 1987.

25. The case followed its course. On 26 May 1987 the investigating judge made an order terminating the investigation and transmitting the papers to the public prosecutor's office. On 1 July the Créteil public prosecutor lodged his final submissions calling for the file to be transmitted to the principal public prosecutor's office of the Court of Appeal. This was ordered by the investigating judge on 8 July.

B. The trial proceedings

26. On 26 August 1987 the indictments division committed the applicant for trial on a charge of

> "having, in the course of 1985 in Val-de-Marne, being less than ten years ago, been an accessory to the premeditated murder of Bernard Merdy committed on 6 July 1985 by Gérard Moysan, inasmuch as she had by gifts, promises, threats, misuse of authority or power, incited the commission of this deed or given instructions for its commission".

27. On 9 September 1987 the Créteil public prosecutor's office advised Mrs Letellier's counsel that "the case [was] liable to be heard during the first quarter of 1988". By a letter of 21 October 1987, however, the lawyer in question gave notice that he would be unavailable from 1 February to 15 March 1988 on account of his participation in another trial before the Assize Court of the Vienne département.

28. On 23 March 1988 the public prosecutor informed the accused's lawyer that the case would be heard on 9 and 10 May 1988. On 10 May 1988 the Val-de-Marne Assize Court sentenced Mrs Letellier to three years' imprisonment for being an accessory to murder. It sentenced Mr Moysan to fifteen years' imprisonment for murder and acquitted Mr Bredon.

The applicant did not file an appeal on points of law; she was released on 17 May 1988, the pre-trial detention being automatically deducted from the sentence (Article 24 of the Criminal Code).

II. The relevant legislation

29. The provisions of the Code of Criminal Procedure concerning detention on remand, as applicable at the material time, are as follows:

Article 144

"In cases involving less serious criminal offences (matière correctionnelle), if the sentence risked is equal to or exceeds one year's imprisonment in cases of flagrante delicto, or two years' imprisonment in other cases, and if the constraints of court supervision are inadequate in regard to the functions set out in Article 137, the detention on remand may be ordered or continued:

1° where the detention on remand of the accused is the sole means of preserving evidence or material clues or of preventing either pressure being brought to bear on the witnesses or the victims, or collusion between the accused and accomplices;

2° where this detention is necessary to preserve public order from the disturbance caused by the offence or to protect the accused, to put an end to the offence or to prevent its repetition or to ensure that the accused remains at the disposal of the judicial authorities.

... ."

(An Act of 6 July 1989 expressly provided that Article 144 was to be applicable to more serious criminal cases (matière criminelle).)

Article 145

"In cases involving less serious criminal offences, an accused shall be placed in detention on remand by virtue of an order which may be made at any stage of the investigation and which must give specific reasons with reference to the particular circumstances of the case in relation to the provisions of Article 144; this order shall be notified orally to the accused who shall receive a full copy of it; receipt thereof shall be acknowleged by the accused's signature in the file of the proceedings.

As regards more serious criminal offences, detention is prescribed by warrant, without a prior order.

...

The investigating judge shall give his decision in chambers,

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after an adversarial hearing in the course of which he shall hear the submissions of the public prosecutor, then the observations of the accused and, if appropriate, of his counsel.

... ."

Article 148

"Whatever the classification of the offence, the accused or his lawyer may lodge at any time with the investigating judge an application for release, subject to the obligations laid down in the preceding Article [namely: the undertaking of the person concerned "to appear whenever his presence is required at the different stages of the procedure and to keep the investigating judge informed as to all his movements"].

The investigating judge shall communicate the file immediately to the public prosecutor for his submissions. He shall at the same time, by whatever means, inform the party seeking damages who may submit observations. ...

The investigating judge shall rule, by an order giving specific grounds under the conditions laid down in Article 145-1, not later than five days following the communication to the public prosecutor.

...

Where an order is made releasing the accused, it may be accompanied by an order placing him under court supervision.

... ."

Article 194

"...

[The indictments division] shall, when dealing with the question of detention, give its decision as speedily as possible and not later than thirty days [fifteen since 1 October 1988] after the appeal provided for in Article 186, failing which the accused shall automatically be released, except where verifications concerning his application have been ordered or where unforeseeable and insurmountable circumstances prevent the matter from being decided within the time-limit laid down in the present Article."

Article 567-2

"The criminal division hearing an appeal on a point of law against a judgment of the indictments division concerning detention on remand shall rule within three months of the file's reception at the Court of Cassation, failing which

the accused shall automatically be released.

The appellant or his lawyer shall, on pain of having his application dismissed, file his memorial setting out the appeal submissions within one month of the file's reception, save where exceptionally the president of the criminal division has decided to extend the time-limit for a period of eight days. After the expiry of this time-limit, no new submission may be raised by him and memorials may no longer be filed.

... ."

PROCEEDINGS BEFORE THE COMMISSION

30. In her application of 21 August 1986 to the Commission (no.12369/86) Mrs Letellier complained that her detention on remand had exceeded the "reasonable time" provided for in Article 5 § 3 (art. 5-3) of the Convention. She alleged furthermore that the various courts which had in turn examined her application for release of 24 January 1986 had not ruled "speedily" as is required under Article 5 § 4 (art. 5-4).

31. The Commission declared the application admissible on 13 March 1989. In its report of 15 March 1990 (Article 31) (art. 31), it expressed the opinion that there had been a violation of paragraph 3 (unanimously) and paragraph 4 (seventeen votes to one) of Article 5 (art. 5-3, art. 5-4). The full text of the Commission's opinion and the dissenting opinion accompanying the report is reproduced as an annex to this judgment*.

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* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 207 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

32. At the hearing the Government confirmed the submission put forward in their memorial, in which they asked the Court to "hold that there [had] not been in this instance a violation of Article 5 §§ 3 and 4 (art. 5-3, art. 5-4) of the Convention".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 3 (art. 5-3)

33. The applicant claimed that the length of her detention on remand had violated Article 5 § 3 (art. 5-3), which is worded as follows:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c), ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The Government contested this view. The Commission considered that after 22 January 1986 (see paragraph 13 above) the grounds for Mrs Letellier's detention had no longer been reasonable.

A. Period to be taken into consideration

34. The period to be taken into consideration began on 8 July 1985, the date on which the applicant was remanded in custody, and ended on 10 May 1988, with the judgment of the Assize Court, less the period, from 24 December 1985 to 22 January 1986, during which she was released subject to court supervision (see paragraph 12 above). It therefore lasted two years and nine months.

B. Reasonableness of the length of detention

35. It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 (art. 5-3) of the Convention (see, inter alia, the Neumeister judgment of 27 June 1968, Series A no. 8, p. 37, §§ 4-5).

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention (see the Stögmüller judgment of 10 November 1969, Series A no. 9, p. 40, § 4), but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty (ibid., and see the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 24-25, § 12, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 42, § 104). Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see the Matznetter judgment of 10 November 1969, Series A no. 10, p. 34,

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§ 12, and the B. v. Austria judgment of 28 March 1990, Series A no. 175, p. 16, § 42).

36. In order to justify their refusal to release Mrs Letellier, the indictments divisions of the Paris and Amiens Courts of Appeal stressed in particular that it was necessary to prevent her from bringing pressure to bear on the witnesses, that there was a risk of her absconding which had to be countered, that court supervision was not sufficient to achieve these objectives and that her release would gravely disturb public order.

1. The risk of pressure being brought to bear on the witnesses

37. The Government pointed out that the charges against Mrs Letellier were based essentially on the statements of Mr Moysan and Mr Bredon (see paragraph 9 above). The latter, who was examined by the investigating judge on 25 November 1985, could not, on account of his failure to appear, be confronted with the accused on 17 December 1985. The need to avoid pressure being brought to bear such as was liable to lead to changes in the statements of witnesses at confrontations which were envisaged was one of the grounds given in the decision of 22 January 1986 of the Paris indictments division (see paragraph 13 above).

38. According to the Commission, although such a fear was conceivable at the beginning of the investigation, it was no longer decisive after the numerous examinations of witnesses. Moreover, nothing showed that the applicant had engaged in intimidatory actions during her release subject to court supervision (see paragraphs 12-13 above).

39. The Court accepts that a genuine risk of pressure being brought to bear on the witnesses may have existed initially, but takes the view that it diminished and indeed disappeared with the passing of time. In fact, after 5 December 1986 the courts no longer referred to such a risk: only the decisions of the Paris indictments division of 22 January, 5 March, 10 April and 5 December 1986 (see paragraphs 13 and 23 above) regarded detention on remand as the sole means of countering it.

After 23 December 1986 in any event (see paragraph 23 above), the continued detention was therefore no longer justified under this head.

2. The danger of absconding

40. The various decisions of the Paris indictments division (see paragraphs 13, 16, 18 and 23 above) were based on the fear of the applicant's evading trial because of "the severity of the sentence to which she was liable at law" and on the need to ensure that she remained at the disposal of the judicial

authorities.

41. The Commission observed that during the four weeks for which she had been released - from 24 December 1985 to 22 January 1986 - the applicant had complied with the obligations of court supervision and had not sought to abscond. To do so would, moreover, have been difficult for her, as the mother of minor children and the manager of a business representing her sole source of income. As the danger of absconding had not been apparent from the outset, the decisions given had contained inadequate statements of reasons in so far as they had mentioned no circumstance capable of establishing it.

42. The Government considered that there was indeed a danger of the accused's absconding. They referred to the severity of the sentence which Mrs Letellier risked and the evidence against her. They also put forward additional considerations which were not however invoked in the judicial decisions in question.

43. The Court points out that such a danger cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (see, mutatis mutandis, the Neumeister judgment cited above, Series A no. 8, p. 39, § 10). In this case the decisions of the indictments divisions do not give the reasons why, notwithstanding the arguments put forward by the applicant in support of her applications for release, they considered the risk of her absconding to be decisive (see paragraphs 14, 19 and 24 above).

3. The inadequacy of court supervision

44. According to the applicant, court supervision would have made it possible to attain the objectives pursued. Furthermore, she had been under such supervision without any problems arising for nearly one month, from 24 December 1985 to 22 January 1986 (see paragraphs 12-13 above), and had declared her readiness to accept it on each occasion that she sought her release (see paragraphs 14, 19 and 24 above).

45. The Government considered on the other hand that court supervision would not have been sufficient to avert the consequences and risks of the alleged offence.

46. When the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, he must be released if he is in a position to provide adequate guarantees to ensure that he will so appear, for example by lodging a security (see the Wemhoff judgment, cited above, Series A no. 7, p. 25, § 15).

The Court notes, in agreement with the Commission, that the indictments divisions did not establish that this was not the case in this instance.

4. The preservation of public order

47. The decisions of the Paris indictments division of 22 January, 5 March and 23 December 1986 and of 10 April and 24 August 1987 (see paragraphs 13 and 23 above), like that of the Amiens indictments division of 17 March 1987 (see paragraph 21 above), emphasized the need to protect public order from the disturbance caused by Mr Merdy's murder.

48. The applicant argued that disturbance to public order could not result from the mere commission of an offence.

49. According to the Commission, the danger of such a disturbance, which it understood to mean disturbance of public opinion, following the release of a suspect, cannot derive solely from the gravity of a crime or the charges pending against the person concerned. In order to determine whether there was a danger of this nature, it was in its view necessary to take account of other factors, such as the possible attitude and conduct of the accused once released; the French courts had not done this in the present case.

50. For the Government, on the other hand, the disturbance to public order is generated by the offence itself and the circumstances in which it has been perpetrated. Representing an irreparable attack on the person of a human being, any murder greatly disturbs the public order of a society concerned to guarantee human rights, of which respect for human life represents an essential value, as is shown by Article 2 (art. 2) of the Convention. The resulting disturbance is even more profound and lasting in the case of premeditated and organised murder. There were grave and corroborating indications to suggest that Mrs Letellier had conceived the scheme of murdering her husband and instructed third parties to carry it out in return for payment.

51. The Court accepts that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises - as in Article 144 of the Code of Criminal Procedure - the notion of disturbance to public order caused by an offence.

However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public

order. In addition detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence.

In this case, these conditions were not satisfied. The indictments divisions assessed the need to continue the deprivation of liberty from a purely abstract point of view, taking into consideration only the gravity of the offence. This was despite the fact that the applicant had stressed in her memorials of 16 January 1986 and of 3 March and 10 April 1987 that the mother and sister of the victim had not submitted any observations when she filed her applications for release, whereas they had energetically contested those filed by Mr Moysan (see paragraphs 14 and 24 in fine above); the French courts did not dispute this.

5. Conclusion

52. The Court therefore arrives at the conclusion that, at least from 23 December 1986 (see paragraph 39 above), the contested detention ceased to be based on relevant and sufficient grounds.

The decision of 24 December 1985 to release the accused was taken by the judicial officer in the best position to know the evidence and to assess the circumstances and personality of Mrs Letellier; accordingly the indictments divisions ought in their subsequent judgments to have stated in a more clear and specific, not to say less stereotyped, manner why they considered it necessary to continue the pre-trial detention.

53. There has consequently been a violation of Article 5 § 3 (art. 5-3).

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 (art. 5-4)

54. The applicant also alleged a breach of the requirements of Article 5 § 4 (art. 5-4), according to which:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

She claimed that the final decision concerning her application for release of 24 January 1986, namely the Court of Cassation's dismissal on 15 June 1987 of her appeal against the decision of the indictments division of the Amiens Court of Appeal of 17 March 1987 (see paragraphs 16, 21 and 22 above), was not given "speedily". The Commission agreed.

55. The Government contested this view. They argued that the length of the lapse of time in question was to be explained by

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the large number of appeals filed by Mrs Letellier herself on procedural issues: in thirteen months and three weeks the indictments divisions gave three decisions and the Court of Cassation two; the time which it took for these decisions to be delivered was in no way excessive and could not be criticised because it was in fact the result of the systematic use of remedies available under French law.

56. The Court has certain doubts about the overall length of the examination of the second application for release, in particular before the indictments divisions called upon to rule after a previous decision had been quashed in the Court of Cassation; it should however be borne in mind that the applicant retained the right to submit a further application at any time. Indeed from 14 February 1986 to 5 August 1987 she lodged six other applications, which were all dealt with in periods of from eight to twenty days (see paragraph 23 above).

57. There has therefore been no violation of Article 5 § 4 (art. 5-4).

III. APPLICATION OF ARTICLE 50 (art. 50)

58. According to Article 50 (art. 50),

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Under this provision, the applicant claimed compensation for damage and the reimbursement of costs.

A. Damage

59. Mrs Letellier sought in the first place 10,000 francs in respect of non-pecuniary damage and 435,000 francs for pecuniary damage; the latter amount was said to represent half the turnover which her bar-restaurant could have achieved between her arrest and the verdict of the assize court.

60. The Government did not perceive any causal connection between the alleged breaches and the pecuniary damage resulting for the applicant from her deprivation of liberty, which she would in any case have had to undergo once convicted. Furthermore, they considered that the finding of a violation would constitute sufficient reparation for the non-pecuniary damage.

61. The Delegate of the Commission expressed the view that she should be awarded compensation for non-pecuniary damage and, if appropriate, pecuniary damage, but did not put forward any figure.

62. The Court dismisses the application for pecuniary damage, because the pre-trial detention was deducted in its entirety from the sentence. As to non-pecuniary damage, the Court considers that the present judgment constitutes sufficient reparation.

B. Costs and expenses

63. For the costs and expenses referable to the proceedings before the Convention institutions, Mrs Letellier claimed 21,433 francs.

64. The Government did not express an opinion on this issue. The Delegate of the Commission left the quantum to be determined by the Court.

65. The amount claimed corresponds to the criteria laid down by the Court in its case-law and it accordingly considers it equitable to allow the applicant's claims under this head in their entirety.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 5 § 3 (art. 5-3);

2. Holds that there has been no violation of Article 5 § 4 (art. 5-4);

3. Holds that the respondent State is to pay to the applicant, in respect of costs and expenses, 21,433 (twenty-one thousand four hundred and thirty-three) French francs;

4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 June 1991.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar

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Office of the High Commissioner for Human Rights

Français | Español

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Adopted by General Assembly resolution 43/173 of 9 December 1988

Scope of the Body of Principles

These principles apply for the protection of all persons under any form of detention or imprisonment.

Use of Terms

For the purposes of the Body of Principles:

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

(d) "Detention" means the condition of detained persons as defined above;

(e) "Imprisonment" means the condition of imprisoned persons as defined above;

(f) The words "a judicial or other authority" means a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

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Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently. of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

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Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

Principle 12

1. There shall be duly recorded:

(a) The reasons for the arrest; (b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

Principle 13

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights.

Principle 14

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

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Principle 15

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

Principle 16

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.

3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.

4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

Principle 17

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Principle 18

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority

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in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

Principle 19

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

Principle 20

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

Principle 21

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.

2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

Principle 22

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

Principle 23

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.

2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

Principle 24

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

Principle 25

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A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

Principle 26

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

Principle 27

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

Principle 28

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

Principle 29

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Principle 30

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

Principle 31

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left with out supervision.

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Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

Principle 35

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules or liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

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Principle 36

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

General clause

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.

DECLARATION

I, IBRAHIM SORIE YILLAH, a Barrister at Law and Solicitor of the High Court of Sierra Leone presently attached to the Defence Office of the Special Court for Sierra Leone affirmatively state as follows:

1. I work as a Public Defence Associate in the Defence Office of the Special Court for Sierra Leone.

2. My duties include inter alia: "providing initial legal advice and representation to suspects and accused persons held pursuant to the authority of the Special Court for Sierra Leone".

3. I also serve as a Defence Investigator when the need arises as the Defence Office is understaffed and does not presently have investigators as staff members of the Defence Office.

4. On the instructions of the suspect, Moinina Fofana and the Acting Principal Defender, I interviewed a Mr. Eric Jumu, Regional Co-ordinator National Commission for Social Action (NACSA) for the Southern Province of the Republic of Sierra Leone co-ordinating amongst other things rehabilitation and reconstruction of the Southern Province of Sierra Leone. Further that his duties also include resettling and re-integrating ex-combatants in the Southern Province of the Republic of Sierra Leone, where he dealt officially with ex-combatants with the assistance of, among others, the suspect, Moinina Fofana.

5. I was informed by Eric Jumu that his duties as a Regional Co-ordinator includes engaging ex-combatants in skills training and other trauma-related counselling programmes and also integrating ex-combatants already skilled into profit-making projects.

6. I was also informed by Eric Jumu that he has been engaged in re-habilitation work since 1996 and in the process met the suspect, Moinina Fofana whom he has also now come to know in a personal capacity. He informed me that he knows for a fact that Moinina Fofana has four wives and eighteen children most of whom he has personally met.

7. He further informs me that at an official level, Moinina Fofana is presently Chiefdom Speaker in Gbap, Bonthe District. His duties as Chiefdom Speaker include the

following: assisting the Paramount Chief in the administration of the Chiefdom and acts in the office of Paramount Chief in the absence of the latter.

8. He further informs me that he knows for a fact that in his capacity as Chiefdom Speaker, he is a member of the Chiefdom's council of elders which said body is charged with the administration of law and order in Gbap Chiefdom. He also informed that he knows for a fact that in his capacity before his arrest and detention, members of his Chiefdom and a large number of ex-combatants who reside in Gbap area are also dependent upon Mr. Fofana and the projects he runs for their survival and livelihood.

9. Eric Jumu also informs me that he knows for a fact that Moinina Fofana was up to the time of his arrest and detention involved in a fishing project at Gbap Chiefdom which said programme attracts partnership from several developmental non-governmental organisations including World Vision, Adventist Rural Development Agency and NacSa.

10. He informs me that the projects include bringing together ex-combatants and other youths of Gbap Chiefdom and training them in the art of constructing traditional fishing canoes and also fishing.

11. He further informs me that he knows for a fact the project referred to in paragraph 9 above, was initiated by Mr. Fofana who approached NACSA (Jumu's Office) and requested support for the implementation of the Gbap Fishing Project since March of last year.

12. Eric Jumu also stated that he knows that since the approval and funding of the said project Mr. Fofana has been the key implementer of same. Further that Mr. Fofana has been the focal person through whom NACSA and other funding partners mentioned in paragraph 9 above have co-ordinated and supported the work of this project.

13. Mr. Eric Jumu also stated that he knows that from reports received in the past from this project that Mr. Fofana has been not only the catalyst but also the sole figure around whom the project revolves. He stated the importance of such projects for post-war Sierra Leone cannot be gainsaid as there are from reports reaching his desk over five hundred persons engaged in same and who including Mr. Fofana have been gaining their livelihood and survival in the past year from.

14. Eric Jumu also stated that Mr. Fofana's absence will impact considerably on the Gbap Fishing Project as he knows that his office, NacSa and other development partners would be reluctant to continue supporting such a project in the absence of Mr. Fofana who has been the sole manager and implementer of the Gbap Fishing Project.

15. I was also informed by Eric Jumu that he knows from his encounters with Mr. Fofana that he is highly regarded and held in high esteem by his people. Further that Mr. Fofana is regarded not only as a leader but as a very hard-working and dedicated man to his community upon whom his community can turn to in times of need.

16. I paid visit to Mr. Fofana in the Special Court Detention Facility in Bonthe on the day his initial hearing as a suspect was held by Judge Boutet.

17. Amongst other things Mr. Fofana expressed deep concern about the situation of his family (immediate and extended) that he says presently occupy a rented house at 136 New Jerehun Road, Bo Town. Mr.Fofana also stated that the rent on the house was due on the 1st April, 2003 and he wonders what would be the fate of his family in his absence as he was the sole bread-winner.

18. I was also informed by Mr.Fofana that up to the time of his arrest he never contemplated his arrest nor did he think about his possible naming as a suspect on alleged commission of war crimes and crimes against humanity by the Prosecutor of the Special Court for Sierra Leone.

19. The Defence Office had originally intended to file a declaration from Eric Jumu on behalf of the suspect. Mr. Jumu was scheduled to attend the Defence Office on Friday 20 June 2003 but was unable to do so because of urgent family business in Bo (so he informed me).

20. For all the reasons set out above, I believe his arrest will severely impact not only on his immediate and extended family but also on the community in Gbap Chiefdom who up to the time of his arrest was engaged in fishing and reconstruction under the control, guidance and supervision of Mr.Fofana.

I, IBRAHIM SORIE YILLAH, affirm that the information contained herein is true to the best of my knowledge, information and belief. I understand that wilfully and knowingly making false statements in this declaration could result in prosecution before the Special Court for giving false testimony. I have not wilfully and knowingly made any false statements in this declaration.

Dated this 23rd day of June 2003

Ibrahim Sorie Yillah
Public Defence Associate
Defence Office
Special Court for Sierra Leone

Witness Sam Scratch

DECLARATION

I, MOININA FOFANA, currently detained at the Special Court for Sierra Leone, Jomo Kenyatta Road, Freetown, declare the following.

1. On 29 May 2003, I was arrested and provisionally detained at Bonthe in the Bonthe District in the Southern Province of the Republic of Sierra Leone. I am now detained in the Special Court for Sierra Leone Detention Unit, Jomo Kenyatta Road, Freetown.

2. I am the current Chiefdom Speaker (Deputy Paramount Chief) of Nongoba Bullom Chiefdom in the Bonthe District in the Southern Province of the Republic of Sierra Leone. As the Chiefdom Speaker, I am the principal assistant to the Paramount Chief in the execution of the functions of the Office of the Paramount Chief. I am, among other things, responsible for upholding the moral and cultural values of the people, and, in particular, the general maintenance of law and order in the Chiefdom.

3. Besides being the current Chiefdom Speaker, I am a fisherman by occupation, a trade I have always engaged and which has been my main source of income for the maintenance of my family.

4. I am married according to native law and customs to four wives, namely Isata Fofanah, Marie Fofanah, Mballu Fofanah and Moyetu Fofanah with a total of 18 children, the youngest being two years old.

5. I am the sole breadwinner for my immediate and extended family which numbers about 85 including my mother Teneh Sengeh, aged 75. I am the cohesive force within the family and ensure that they are all well fed. In addition, I look after their medication, provide for their education and their general upkeep.

6. My continued detention has had an adverse impact not only in my immediate and extended family but on the general administration of Nongoba Bullom Chiefdom.

7. Prior to my arrest and detention, Gbap village in the Nongoba Bullum Chiefdom was my permanent place of residence.

8. I have never travelled outside Sierra Leone neither do I have a national passport nor have a bank account with any of the commercial banks in Sierra Leone or elsewhere, but I own two wattle buildings in Gbap.

9. If granted bail, I will ensure the following:
   (a) I will not apply for a passport or any other document that would allow me to leave the country.
   (b) I will live and remain within the confines of Gbap village, Nongoba Bullom Chiefdom.
   (c) I will abide by a curfew and remain at home from 10 pm to 7 am and I will consent to unannounced checks by the appropriate authorities at my home address to verify my presence.
   (d) I will report twice daily to the local police station and once a day to the Paramount Chief of the Nongoba Bullom Chiefdom.
   (e) I will not have any contact with the other accused or with persons who may testify at my trial.
   (f) I will not engage in any political activity and have no contact of any sort with the press and the media. I will refuse any interview or contact with reporters, journalists, photographers or television cameramen.
   (g) I will attend trial and respond promptly to all orders, summonses, subpoenas, warrants or requests issued by the Special Court.

I, MONINA FOFANA affirm that the information contained herein is true to the best of my knowledge, information and belief. I understand that wilfully and knowingly making false statements in this declaration could result in prosecution before the Special Court for Sierra Leone for giving false testimony. I have not wilfully and knowingly made any false statements in this declaration.

26th January 2004

Moinina Fofana
Detention Unit
Special Court for Sierra Leone