058 SCSL-2003-08-PT-058 1620

(1620 – 1725)

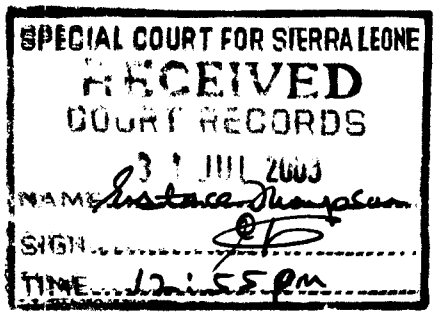
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

BEFORE THE PRESIDENT OF THE TRIBUNAL

Before: Judge Geoffrey Robertson

Registrar: Mr Robin Vincent

Date filed: 31 July 2003



THE PROSECUTOR

Against

SAM HINGA NORMAN

CASE NO. SCSL – 2003 – 08 – PT

PROSECUTION RESPONSE TO DEFENCE "MOTION FOR MODIFICATION OF THE CONDITIONS OF DETENTION"

Office of the Prosecutor:
James C. Johnson, Acting Chief of Prosecutions
Charles A. Caruso, Trial Counsel

Defence Counsel:
Mr. James Blyden Jenkins-Johnston
Mr Sulaiman Banja Tejan-Sie

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INTRODUCTION

The Defence Motion For Modification Of The Conditions Of Detention filed pursuant to Rule 64 of the Rules of Procedure and Evidence for the Special Court for Sierra Leone should be dismissed. It is respectfully contended that the Defence submission does not meet the burden of satisfying the President that the extant conditions should be modified.

II. BACKGROUND

1. The Prosecution files this response to the Defence Motion entitled "Motion for Modification of the Conditions of Detention" (the " **Defence Motion**"), filed on behalf of Sam Hinga Norman (the "**Accused**") on 23 July 2003 and served on the prosecution on 24 July 2003.

2. On 7 March 2003 the Indictment against the Accused was confirmed by the Designated Judge who thereafter issued a *Warrant of Arrest and Order for Transfer and Detention* of the Accused. On 10 March 2003, the Accused was arrested and thereafter transferred from the custody of the Sierra Leone Police to officials of the Special Court for Sierra Leone (the "**Court**") for detention at the Court's facility at Bonthe Island. On 15 March 2003 the Designated Judge ordered the detention on remand of the Accused until further order of the Court. The Accused at present remains detained.

3. The Accused predicates the motion presently before the President on allegations that: A) the State of Sierra Leone does not object/supports house arrest in this case pursuant to Rule 65B; B) other factors favouring modification to wit: i) the health of the Accused; ii) conditions in the Bonthe Island detention facility including those which are unique to the Accused; iii) the length of the Accused' detention; iv) the conditions under which the Accused is detained and ultimately that C) detention in this case is a violation of the Principle of Proportionality. Each of the Accused' arguments will hereinafter be addressed *seriatim*.

ARGUMENT

Rule 64

4. Rule 64 of the Rules of Procedure and Evidence for the Special Court for Sierra Leone (the "**Rules**"), in relevant part, provides that: "The President may, on the application of a party or the Registrar, order special measures of detention of an accused". This aspect of Rule 64 is, in substance, identical to the analogous rules that govern the proceedings at both the ICTY and the ICTR. It is likewise worthy of note at this point that, although the Accused seems at times to conflate the provisions of Rule 65(B) with those of Rule 64,

the jurisprudence of the ICTY regards these rules as separate entities and deals with them accordingly.[1]

5. In discussing the matters which should be considered in deciding motions for the modification of detention orders, then President Cassese of the ICTY delineated the following factors as amongst those to be considered: "... the risk that the detainee might escape; the likelihood that he might tamper with or destroy evidence or endanger possible witnesses; the likelihood that he will continue his criminal behaviour; potential danger to public order and peace".[2] Within the confines of the same case, Judge Cassese further noted that both "... 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" as well as the "... imperatives of security and order..." must be taken into account when considering a motion for modification of detention.[3]

The Defence Position

A. Defence Application of Rule 65(B)

6. To the Defence Motion, in support of which the provisions of Rule 65(B) are cited, the Accused attaches a letter (apparently only one of two) written by Defence Counsel, on behalf of the Accused, to the President of Sierra Leone.[4] The **sole** subject of this missive is the complaint of the Accused that he has not received his "[S]alary, allowances and other emoluments..." since the time of his incarceration. The letter further points out to His Excellency that the Accused is entitled, pursuant to Rule 5 of the Rules of Detention of this Court, to the presumption of innocence. Thereafter, an appeal is made to the President that the Accused' salary and other perquisites of employment be continued during the pendency of these proceedings. This letter makes no reference to other matters.

7. Nowhere in this communication is the subject of the present Defence Motion, i.e., modifying the conditions of the Accused' detention, mentioned. Nowhere in this letter is

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[1] See *Prosecutor v. Blaskic,* IT-95-14-T, "Decision on the Motion of the Defence filed pursuant to Rule 64 of the Rules of Procedure and Evidence", 3 April, 1996, paragraph 3c (*Blaskic,* 3 April, 1996).
[2] *Ibid.* at para. 3d.
[3] *Prosecutor v. Blaskic,* IT-95-14-T, "Decision on the Motion of the Defence Seeking Modification of the Conditions of Detention of General Bla[ki]", 9 January 1997 (*Blaskic,* 9 January 1997).
[4] See Annex 1, Defence Motion.

approval from the Government of Sierra Leone ("the **Government**") for such a proposal sought or support for its implementation requested. Notwithstanding the absence of such, Counsel for the Defence asserts that he has "consulted with the Government of Sierra Leone pursuant to Rule 65(B)" (See Defence Motion, page 4), and then opines that because "... they [the Government] did not expressly oppose[d] bail or an application for the modification of the conditions of detention..." and "... in the absence of any contrary view expressed in Annex 2 [the Government of Sierra Leone's response]..." it should be concluded that "... they will cooperate with any modification of the present conditions of detention...".[5] The Prosecution submits that this analysis as well as the remarkable conclusion drawn from it defy reason and cannot be seriously considered. While it cannot be gainsaid that the Government would abide the law and accede to orders of this Court, the Accused' assertion that by so stating the Government, by implication, has in some fashion taken a favourable position as to this matter, borders on fatuity.

8. While it appears that Counsel has, by virtue of a letter he has chosen not to annex, apparently made a request that the President support what is described as an "application for a bail", it appears equally certain that this request did not meet with success.[6] What is patently clear from the correspondence Defence Counsel **has** chosen to make a part of this record is that the Government of Sierra Leone wishes to play no role in the matter as it was presented to it by Counsel.[7]

9. Even assuming *arguendo* the Government was inclined to participate in this matter at the present juncture, inasmuch as the Accused has filed his motion pursuant to Rule 64, his reliance on Rule 65(B) is inapposite. Although Rule 65(B) contemplates a role for the recipient State, Rule 64 contains no such provision. Therefore, where the Accused proceeds under Rule 64 rather than Rule 65, the provisions of the latter are not applicable.[8] Thus, the Prosecution respectfully submits that the Accused' reliance upon Rule 65(B), as well as the baseless implications he derives from that reliance, are unavailing.

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[5] See Annex 2, Defence Motion, pp. 4-5.
[6] See Annex 2, Defence Motion, p.2.
[7] *Ibid.*
[8] See *Blaskic*, 3 April 1996, *supra* note 1

B. Other Factors Favouring Modification of Detention

i) The Health of the Accused

10. The Accused relies upon the communication of Dr. Kandeh, as well as his own assertions, to establish grounds for modification of detention based upon his health and age. However, apart from a history of recurrent inguinal hernia which apparently was successfully surgically corrected in 2002, at the time of Dr. Kandeh's examination there was "nothing of medical/surgical importance" to report.[9] The Prosecution further notes that in his current status of detention the Accused is being "constantly monitored by a doctor" and that he is further assured by the Registrar that "His health and general physical well-being will continue to be monitored and should there be any noticeable deterioration, it will be dealt with as necessary."[10] The Prosecution further notes that medical services are provided as a matter of rule to detainees pursuant to Rules 13, 16 and 22 of the Rules for Detention of the Special Court adopted 7 March 2003, as amended 9 May 2003. Under these circumstances, the Prosecution asserts that the Accused has not established that his health problems are of a nature that they can be dealt with only under the conditions he seeks to have imposed.

ii) "Conditions In Bonthe/Unique Features Which Relate[s] To The Accused"

11. While the Accused complains of conditions at the detention facility, he makes no claim not shared by other inmates and none sufficient to justify his request for modification. As to those complaints related to the location of the facility, it is the understanding of the Prosecution that the transfer of the Accused from the facility at Bonthe Island to the new detention facility at the Court's compound in Freetown is anticipated to take place within the month of August, 2003.[11] Thus, the Accused' complaints based upon logistical concerns will be ameliorated through the passage of a short period of time. As to those complaints the Accused claims to be unique to him and supportive of his motion for modification, it seems past understanding that prior government service, in any form, could be relevant to the issues material to the question of his continued detention . The Prosecution suggests that the matters offered by the Accused as unique to his condition, insofar as they concern his age, health and government service, fail to constitute any

[9] See Annex 3, Defence Motion.
[10] See Letter of R. A. Vincent, annexed hereto as Appendix I.
[11] See Declaration of Dr. Alan White, annexed hereto as Appendix II.

more sufficient reason to alter the terms of his detention than do those concerning the location of his present detention.

iii) Length of Detention

12. While the length of the Accused' detention to date is not in issue here inasmuch as he is not requesting provisional release but solely modification of the terms of that detention, it may be of use to review the issue in terms previously discussed by other tribunals: "... the length of current or potential future detention of the Accused cannot be considered material in these circumstances because it does not mitigate in any way that the Accused , who is charged with the grave offences coming under the subject matter jurisdiction of this Tribunal, which offences carry maximum term[s] of imprisonment of ... life, may be a flight risk or may oppose a threat to witnesses or to the community...".[12] Furthermore, the Prosecution submits there is no specific formula for calculating what is an acceptable period of detention before the Accused' right to trial without delay is violated, rather, several factors must be considered, i.e., the nature and character of international tribunals, including the complexity of the cases involving charges such as those before this Court.[13] It is therefore the position of the Prosecution that the Accused' length of detention is not a factor that should be considered in this instance.

iv) Conditions of Detention

13. The Accused has submitted a number of complaints relative to the conditions under which he is maintained in the detention facility. Each of the complaints in the present motion has been adequately addressed previously by the Registrar in his separate written replies to Counsel, only one of which is annexed to the Accused' pleadings.[14] However, it comes as a "surprise" not only to His Excellency The President of Sierra Leone, but to the Prosecution as well, that although a part of his exchange with the Office of the Registrar, Counsel has failed to annex relevant correspondence (the reply of the Registrar to Counsel's second letter of complaint) to his pleadings.[15] Finding it probative to the issues raised by Counsel, the Prosecution has appended that document hereto as

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[12] *Prosecutor v Bagosora*, ICTR-98-41-T, Decision on Defence Motion for Release, 12 July 2002, paragraph 27.
[13] *Prosecutor v Brdanin,* Decision of Motion of By Radoslav Brdanin For Provisional Release, IT-99-36-PT, 25 July 2000, para 24-28, (*Brdanin*, 25 July 2000).
[14] See Annexes 4(a), 4(b) & 5, Defence Motion.
[15] See also Annex 2, Defence Motion.

Appendix I. In this regard, the Prosecution is content to allow the exchange of correspondence to speak for itself.

C. The Principle of Proportionality

14. It is the contention of the Prosecution that continued detention is both suitable and necessary to ensure that the Accused does not escape, tamper with or destroy evidence, endanger possible witnesses or present a potential danger to public order and peace.[16] Under those circumstances, the Principle of Proportionality is satisfied in this case and thus of no avail to the Accused.[17]

The Prosecution Position

A. Risk of Flight

15. In modifying the present conditions of detention to house arrest, the President, by necessity, would reduce the security under which the Accused is held and thereby greatly increase his chances of success should he ultimately choose to flee. While the Accused asserts that he does not present such a risk, other factors must be taken into consideration in the President's final assessment as to the validity of such an assertion.[18] Amongst these is the reality that "this Court lacks its own means to execute a warrant of arrest, to re-arrest an accused..." and therefore must rely upon the resources of the State to assist it such endeavours.[19] However, the Sierra Leone Police, though they have made great progress, continue to rebuild after the disruption and reduction of numbers caused by the conflict in this country. The Prosecution submits that in the assessment of the present Inspector General of the Sierra Leone Police, his forces do not possess sufficient resources or the capability, in light of current conditions, to re-arrest the Accused should he chose to flee the jurisdiction of the Court and seek refuge in parts of Sierra Leone where he still maintains some support.[20] There can be no denying that others indicted before this Court, namely Johnny Paul Koroma and Sam Bockarie, have successfully evaded being brought before the Court by seeking refuge with former colleagues in arms.

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[16] See *Blaskic*, 3 April 1996, *supra* note 1.

[17] See *Prosecutor v Mrda*, IT-02-59-PT, "Decision on Darko Mrda's Request for Provisional Release", 15 April 2002.

[18] *Prosecutor v Ademi*, IT-01-46-PT, "Order On Motion For Provisional Release", 20 February 2002, para. 23 (*Ademi*, 20 February 2002).

[19] *Ibid* at para. 24.

[20] See Declaration of Brima Acha Kamara attached hereto as Appendix III.

There is equally no doubt that the Accused still enjoys a measure of support amongst former colleagues that would enable him to do the same should he so choose.[21] Should that eventuality occur and the Accused seek to avoid discovery or apprehension in certain areas of Sierra Leone where effective police presence is not fully established at this point, the authorities would be ill-equipped to effect his re-arrest.

16. Additionally, this Court's mandate is "... to try those who bear the greatest responsibility for serious violations of international humanitarian law...".[22] As such, those who appear before the Court "... may expect to receive, if convicted, a sentence that may be of considerable length. This very fact could mean that an accused may be more likely to abscond or obstruct justice in other ways."[23] Thus, while the Accused may at present give assurances that the reduction of the security obviously associated with house arrest would not lead to his fleeing, that assurance must be measured against the realities of a possible lengthy prison sentence. In this regard, and under the circumstances presently existing, it is the Prosecution position that modifying the present conditions of detention to a status of house arrest would not allow this Court to assure itself that the Accused would appear for trial.

B. Endangerment of Possible Witnesses and Destruction of Evidence

17. The Prosecution has attached hereto the Declaration of the Chief of Investigations of the Special Court for Sierra Leone, marked as Attachment II. In this Declaration it is asserted that the Investigation Unit of the Office of the Prosecutor is in possession of witness information to the following effect: that on December 13, 2002, in two separate meetings, the Accused addressed the attendees and informed them he was aware that there were individuals with whom he had formerly been associated who were providing information to agents of the Court as well as to the Truth and Reconciliation Commission; that the Accused at these meetings warned those present not to provide information to these organizations; that in attendance at one of these meetings was a group of individuals who are known to be loyal to the Accused and who were known as

[21] Defence Motion, Annex 6.
[22] See The Statute of the Special Court for Sierra Leone, Article I.
[23] *Prosecutor v Jokic,* IT-01-42-PT, 20 February 2002, para. 24, (*Jokic*, 20 February 2000). See also *Prosecutor v Brdanin*, IT-99-36-PT, "Decision on Motion By Momir Talic For Provisional Release", 28 March 2001 at para. 30, (*Brdanin*, 28 March 2001) (Given such places of "safe refuge, as a matter of common experience, any person in the position of the [the Accused], even if he is innocent, is likely to take advantage of the refuge [provided]").

the Death Squad or "Norman Boys"; that the Norman Boys threatened to "exterminate" those they found to be betraying the Accused; that the Accused threatened that when those who betrayed him were found out they would be dealt with according to "Kamajor laws"; that a committee was formed to travel around Sierra Leone for the express purpose of advising potential witnesses that they would be dealt with severely if they were found to have cooperated with theses authorities.[24]

18. There can be no doubt that if the extant detention order is modified to allow him to be placed under house arrest, the Accused will have far greater freedom to get in contact with his former colleagues by various means of communication, i.e. unmonitored mail, telephone and personal communication. It defies logic that any order the President could fashion, or any conditions he could impose relative to limiting those communications, could in any manner prevent, or even deter to any useful extent, the Accused' ability to continue the activities above-described.

19. It is axiomatic that "... 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".[25] Additionally the present lack of police presence in those parts of Sierra Leone where witnesses are located simply adds to the risk that these persons may be intimidated, if not physically harmed.[26] Indeed, at this point, the Accused has been provided with the statements of many of the witnesses who will testify against him at trial, albeit that many of those statements have been modified by Protective Order of this Court. Nevertheless, he now has greater knowledge concerning the witnesses against him, further enabling him to identify and threaten those prospective witnesses.[27] The Prosecution submits that should the President grant the motion presently before him, the Accused will be in a position to, and will, continue or expand upon the activities in which he engaged prior to his detention; a practice that will result in intimidation and possible harm to prospective witnesses.

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[24] See Declaration of Dr. Alan White, *supra*.
[25] *Jokic, supra* note 21, at para. 19.
[26] *Brdanin*, 28 March 2001, *supra* note 21, at para. 37.
[27] *Brdanin, supra* note 21, para. 34-36.

20. It is also clear that the above-noted concerns, i.e., risk of flight and endangerment or intimidation of witnesses, are matters that the Court must consider cumulatively in making decisions such as that required in this matter.[28] Therefore, "... if the Trial Chamber is not convinced that the accused will both appear for trial and not pose a risk to any victim, witness or other person, a request for provisional release [and thus, by analogy, a request for modification of conditions of detention] must be denied."[29]

CONCLUSION

It is respectfully submitted that the Accused has failed to provide justification to believe that if the conditions of detention are modified to include house arrest he will not pose a risk of flight or an endangerment to prospective witnesses. For all of the reasons discussed herein, the Defence Motion for Modification of the Conditions of Detention should be denied.

Freetown, 31 July 2003.

For the Prosecution,

James C. Johnson
Acting Chief of Prosecutions

Charles A. Caruso
Trial Attorney

[28] *Ademi*, 20 February 2002, *supra*, at paragraph 21.
[29] *Ibid.*

PROSECUTION INDEX OF ATTACHMENTS

PROSECUTION INDEX OF ATTACHMENTS

Appendix I, Letter of R. A. Vincent

File 1633

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +39 0831 257000 or +232 22 297000 or +1 212 963 9915 Ext:178 7000
FAX: +39 0831 257001 or +232 22 297001 or +1 212 963 9915 Ext: 178 7001

28 May 2003

J.B. Jenkins-Johnston Esquire
Barrister at Law, solicitor
Ayotunde Chambers
4 Percival Street
Freetown

Mr. Samuel Hinga Norman

Thank you for your letter of the 26 May 2003.I am surprised that you were distressed to hear that your client was said to be on hunger strike, not least because I have in my possession a note from your client, dated 16 May 2003, in which he states that during your visit to him he gave you a signed statement to the effect that he intended to begin a hunger strike on the morning of 16 May 2003. He also states that he gave the statement to you for you to provide that information to his family friends and relatives.

To have you claim some two weeks later that you know nothing of this is quite extraordinary. It is for the reason stated that I had not notified either you or his family.

Turning to Mr Norman's physical conditions, he is being constantly monitored by a Doctor and, whilst inevitably he has lost weight, his current weight is in excess of that when he was first taken into custody. Mr Norman continues to drink fruit juice and water and, whilst he is refusing the food from the menu, he has accepted in his cell packets of biscuits.

His health and general physical well-being will continue to be monitored and should there be any noticeable deterioration, it will be dealt with as necessary.

R. A. Vincent
Registrar

PROSECUTION INDEX OF ATTACHMENTS

Appendix II, Declaration of Dr. Alan White

DECLARATION

1. I, Alan W. White, Ph.D., Chief of Investigations for the Office of the Prosecutor of the Special Court for Sierra Leone (SCSL) do declare that the foregoing facts are true and accurate to the best of my knowledge.

2. I have served as Chief of Investigations for the Office of the Prosecutor of the SCSL since July 15, 2002. I have over 30 years of law enforcement experience both in and outside the United States, most of which has been spent conducting criminal investigations involving major crimes, such as homicide, rapes, sexual assault, white collar crime, and most recently crimes against humanity and violations of international law. I hold a bachelors degree in Criminal Justice, a master's degree in Management, and a Ph.D. in Criminal/Social Justice.

3. I have been working with confidential informants and witnesses for over 25 years, routinely conducting threat assessments of confidential informants and witnesses. As a result, I have extensive experience in providing security for witnesses and confidential informants, which in many cases required some sort of protection measures, including physical relocation. Immediately prior to my current assignment I served as the Director, Investigative Operations, and a Senior Executive Service member within the U.S. Government for the Defense Criminal Investigative Service (DCIS), the executive law enforcement agency within the U.S. Department of Defense. In addition to being responsible for the overall supervision of all DCIS criminal investigations worldwide, I was specifically responsible for the worldwide witness protection program within the DCIS.

4. In my current position as the Chief of Investigations for the Special Court for Sierra Leone, I have travelled throughout Africa and Europe conducting investigations involving crimes against humanity and international humanitarian law. During my travels I have spent a great deal of time in the West African Region conducting investigations and relocating witnesses, who have already had their lives, and their families lives threatened by some of the defendants who are either indicted or under investigation by the Office of The Prosecutor.

5. Among the duties of Chief of Investigations I am required to monitor and assess security developments in Sierra Leone and the neighbouring countries as they impact upon SCSL investigations and witness protection generally. In connection with my responsibilities with respect to security in Sierra Leone, I routinely discuss the local and regional security situation with the SCSL Chief of Security, as well as with the Inspector General, Sierra Leone Police. Also, I am constant contact with numerous other confidential sources of information within the region, which provide current security and threat information.

6. Based upon the information provided to me by these various sources, I have learned the following about the current security situation in Sierra Leone and the neighbouring countries. The security situation in most of Sierra Leone and the neighbouring countries is volatile. The perpetrators, the victims and the witnesses are not separated. They are co-habitants of the same communities. They live and work in a closely-knit setting. In the recent past, there have been increasing instances involving interference with and intimidation of Prosecutor's witnesses. The situation ranges from witnesses having their lives threatened either individually or by group, to witnesses' general fear and apprehension that they or their families will be harmed or harassed or otherwise suffer if they testify or co-operate with the court. This is due to the existence throughout West Africa of large numbers of members of the armed factions involved in the conflict that happened in Sierra Leone, including the Revolutionary United Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC) and other people who collaborated with such factions.

7. Further, I have first hand information that supporters and sympathizers of Samuel Hinga Norman, former Chief of the CDF, are actively attempting to identify and intimidate witnesses of the Special Court. Therefore, witnesses living in Sierra Leone, and also those living in other countries in West Africa, are directly affected by this situation and feel threatened.

8. Based upon the foregoing, together with information gathered by investigators employed in the Office of the Prosecutor and previously filed before this Court, I have learned the following: That supporters and sympathizers of Samuel Hinga Norman, former Chief of the CDF, are actively attempting to identify and intimidate witnesses of the Special Court. In one instance Samuel Hinga Norman was the guest of honour at a tree planting ceremony in Bo on 13 December 2002. Moinina Fofana CDF Director of War and Charles

Moiwo, the Public Relations Officer (P.R.O.) were present. Samuel Hinga Norman addressed the meeting, as did Charles Moiwo, who was the chairman. Before his address, Samuel Hinga Norman made comments in Mende that he knew there were persons betraying "secrets," and he threatened that such persons when caught will be dealt with according to the laws of the Kamajors.

9. In a second meeting that evening at Mahei Boima Road, Bo at which Moinina Fofana was present, clear threats were made by Samuel Hinga Norman that persons giving information to "non-Kamajors" will be "exterminated" together with their entire families. Samuel Hinga Norman specifically warned Kamajors not to cooperate with the Truth and Reconciliation Commission and the Special Court. As a show of force, a number of Kamajors known as the "Norman Boys," some of whom were former members of the Death Squad, flanked Samuel Hinga Norman and concurred with what he said. The Death Squad was a Kamajor unit which, during operations to remove the RUF/AFRC from power, took orders from and was answerable directly to Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa. The "Norman Boys" spoke out openly that they knew who the "betrayers" were, and were ready to carry out instructions to "exterminate" such persons.

10. To back up his threats, a committee was set up to go to Bonthe, Kailahun, Kenema and other parts of the country and get the message about non-cooperation with the Truth and Reconciliation Commission and the Special Court across. Moinina Fofana was a member of the committee. Each member was given Le150,000/00 in furtherance of this idea.

11. Intelligence reports to which I have been privy since then, indicate that members of the committee have indeed been going around informing their colleagues about Samuel Hinga Norman's orders not to co-operate with the work of these two institutions.

12. In another instance, I was informed by a witness who had previously given a statement that he no longer wished to have further dealings with me or the Special Court. The witness informed me that he had faced threats from members of his community for cooperating with the Special Court and did not feel safe to continue assisting the Court.

13. I have first hand knowledge about a Sierra Leone Police Officer and known CDF supporter, who while acting outside the scope of his official duties as a police officer, was

trying to identify witnesses who had provided information to the Special Court against the CDF.

14. Finally, recent intelligence reports indicate that CDF loyalists in parts of the southern and eastern provinces, particularly in Bo and Kenema, continue to organise themselves in the manner described above. Specifically, such individuals have been reported to be investigating and creating lists of those known or suspected to be cooperating with the Special Court, with the aim of preventing the continuation of such assistance. They are also reported to be planning in a non specific way, to prevent the prosecution of accused persons, particularly CDF members, and other ways to disrupt the work of the court. This has raised significant apprehension among potential witnesses. Reports I have received go as far to suggest that supporters of Sam Hinga Norman, Moinina Fofana, and Allieu Kondewa are attempting to find or otherwise acquire weapons and ammunition.

15. Additionally, I was informed on 29 July 2003, by the Chief of Security for the Special Court for Sierra Leone, that the detainees presently located at the Bonthe Island facility will be relocated to the Court's facilities at Freetown on or about 10 August 2003.

Signed at Freetown

The 30st day of July 2003

Alan W. White, Ph.D.
Chief of Investigations
Special Court for Sierra Leone

PROSECUTION INDEX OF ATTACHMENTS

Appendix III, Declaration of Brima Acha Kamara

DECLARATION

I, Brima Acha Kamara, Inspector-General of the Sierra Leone Police declare:

1. I assumed the position and duties of Inspector-General on 1 June 2003. I have reviewed the Declaration filed by Dr. Alan White, Chief of Investigations, Special Court for Sierra Leone, in the case of *Prosecutor v Sam Hinga Norman*, SCSL-2003-08-PT.

2. I concur in the statements made by Dr. White in paragraph 6 of his Declaration as well as those made by former Inspector-General of the Sierra Leone Police, Keith Biddle, in a Declaration filed in another case before this Court dated 15 May 2003, an accurate copy of which is attached hereto. Despite the pattern of continued improvement in the operational capacity of the Sierra Leone Police, the situation in Sierra Leone remains today much as it was on 15 May 2003 when then Inspector General Biddle completed his Declaration.

3. As the new Inspector General of the Sierra Leone Police and a member of the National Securtity Council of Sierra Leone, I am required to conduct ongoing assessments of the security situation in Sierra Leone and in surrounding countries.

4. In my assessment, security conditions in Sierra Leone, despite the presence of UNAMSIL, remain volatile. This situation poses a real threat to the security of victims and potential witnesses. Based upon the current capabilities of the Sierra Leone Police and the situation in the country, in my view, our police system does not have the capacity to guarantee the safety of witnesses or prevent them from injury or intimidation.

5. The contents of this Declaration are true to the best of my knowledge, information, and belief.

Done in Freetown, Sierra Leone
On 30 July 2003

Brima Acha Kamara
Inspector General of the Sierra Leone Police

DECLARATION

I, Keith Biddle, Inspector-General of the Sierra Leone Police of Spur Road, Freetown in Western Area of the Republic of Sierra Leone declare:

1. That in my position as Inspector General of the Sierra Leone Police and member of the National Security Council of Sierra Leone, I am required to conduct ongoing assessments of the security situation in Sierra Leone and in surrounding countries. In my assessment, security conditions in Sierra Leone, despite the presence of UNAMSIL, remain volatile, increasing the risk of flight and of finding safe refuge away from the authorities in Sierra Leone and the Special Court.

2. At the time of Mr. Brima's arrest by the Sierra Leone Police in January at the residence of Johnny Paul Koroma, he actively resisted such arrest. Johnny Paul Koroma escaped arrest at that time and has remained at large despite relentless efforts by the Sierra Leone Police to find and apprehend him. This demonstrates that, given the current situation in Sierra Leone, anyone can easily evade capture. Johnny Paul Koroma's believed presence in Liberia further demonstrates the porous nature of the Sierra Leone's borders and the ability to pass in to or out of Sierra Leone undetected, with or without proper documentation.

3. In Mr. Brima's affidavit in support of his application for bail dated 2 May 2003, at paragraph 20, he offers several possible measures involving the police to ensure his presence at trial. I do not believe that these measures would be effective nor do I have the manpower and capability to enforce such measures. Specifically, I do not have the ability to conduct continuing surveillance and I am not in a position to enforce or support the "house arrest" that he is proposing.

4. The armed factions with whom Mr. Brima is associated continue to have supporters and sympathisers within Sierra Leone. Mr. Brima could easily seek refuge among them, particularly in more remote areas where an effective police presence is not yet fully established. He alone or through these factions could obstruct justice including harming, harassing, or intimidating witnesses. Considering the current capabilities of the Sierra Leone Police and the situation in the country, in my view our police system does not have the capacity to guarantee the safety of witnesses or prevent them from injury or intimidation. I believe his release could easily aggravate the already volatile situation that I discussed above.

5. In my view, speaking as the Inspector-General, the police would be unable to provide adequate supervision of Mr. Brima, ensure his presence at trial and to prevent him or others on his behalf from obstructing justice. I further believe that his release would not be in the public interest and would have an unsettling effect on the public at large. I strongly recommend against Mr. Brima's release pending trial.

6. The contents of this declaration are true to the best of my knowledge, information, and belief.

Done in Freetown, Sierra Leone
On 15 May 2003

Keith Biddle
Inspector-General of the Sierra Leone Police

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Blaskic,* IT-95-14-T, "Decision on the Motion of the Defence filed pursuant to Rule 64 of the Rules of Procedure and Evidence", 3 April, 1996.

2. *Prosecutor v. Blaskic,* IT-95-14-T, Decision on the Motion of the Defence Seeking Modification of the Conditions of Detention of General Bla[ki], 9 January 1997.

3. *Prosecutor v Bagosora*, ICTR-98-41-T, Decision on Defence Motion for Release, 12 July 2002.

4. *Prosecutor v Brdanin,* Decision of Motion of By Radoslav Brdanin For Provisional Release, IT-99-36-PT, 25 July 2000.

5. *Prosecutor v Mrda*, IT-02-59-PT, "Decision on Darko Mrda's Request for Provisional Release", 15 April 2002.

6. *Prosecutor v Ademi*, IT-01-46-PT, "Order On Motion For Provisional Release", 20 February 2002.

7. *Prosecutor v Jokic,* IT-01-42-PT, 20 February 2002.

8. *Prosecutor v Brdanin*, IT-99-36-PT, "Decision on Motion By Momir Talic For Provisional Release", 28 March 2001.

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Blaskic,* IT-95-14-T, "Decision on the Motion of the Defence filed pursuant to Rule 64 of the Rules of Procedure and Evidence", 3 April, 1996.

TIHOMIR BLASKIC

Decision on the Motion of the Defence filed pursuant to Rule 64 of the Rules of Procedure and Evidence

President of the Tribunal: 3 April 1996.
CASE NO: IT-95-14-T
(Judge Cassese)

1. Factual Circumstances:

From 05/92-01/94, Bosnian-Croatian troops commanded by Blaskic committed the following with respect to Bosnian-Muslim civilians: widespread/systematic attacks, plunder/wanton destruction of property, causing death/serious injury, forced transfer, detention.

Defence requested, via Rule 64, that conditions of detention be modified to afford some limited liberty. As justification, Defence invoked: 1. the status of Blaskic as an important military officer; 2. Blaskic's voluntary surrender to the Tribunal even though Croatia would not have been legally capable of arresting him.

2. Issues before the Chamber

a. The accused claimed that Croatia was legally incapable of arresting him. Was this, indeed, the case?

b. If Croatia was legally incapable of arresting the accused, does this mean that Croatia was in breach of its international obligations?

c. Should the conditions of the detention of the accused be modified?

d. Under what conditions may house arrest be permitted for detainees of the Tribunal?

3. Decision of the Chamber

a. The claim of the accused that Croatia was not legally capable of arresting him was corroborated by a letter from the Croatian government that the requisite legislation had not yet been put into place. However, unless expressly or implicitly authorised to the contrary by an international legal rule, international judges cannot interpret national laws in lieu of national courts as they might easily misconstrue them. Thus, the Tribunal proceeded on the assumption that the interpretation of existing Croatian law by the Defence is correct (para. 6).

b. By its incapacity to arrest the accused, Croatia was in violation of the Statute and international law. This would have been the case even if there had been no request to Croatia to arrest the accused. Any time a State fails to take the necessary legislative measures to enable it to comply with orders or requests of the Tribunal, it is in breach of an international obligation even before the practical need arises to execute an arrest warrant or order of the Tribunal (para. 7, 8, 23).

c. The conditions of detention of the accused shall be modified. Instead of being detained in the detention facility, he shall be permitted to stay in a residence designated by Dutch authorities. He may only leave the designated residence to see his counsel, family, friends, and representatives of the Republic of Croatia accredited in Holland. The accused must bare all the costs resulting from this arrangement (para. 24). He must not leave the Netherlands or have any contact with the press or media. Because the accused proceeded under Rule 64 rather than Rule 65, provisional release is out of the question.

d. House arrest is a form of detention. Some of the factors to take into account in deciding to permit house arrest are: the risk that the detainee might escape; the likelihood that he might tamper with or destroy evidence or endanger possible witnesses; the likelihood that he will continue his criminal behaviour; potential danger to public order and peace. House arrest may be used when the accused is seriously ill, when he is aged, or when prison conditions are likely to jeopardise his life or health; or when there are special circumstances warranting house arrest as a measure rewarding particular behaviour of the accused (e.g. voluntarily offering evidence beyond what is being requested) (para. 19). In the case of the accused, his presence might disturb the peace. However, it was unlikely that he would escape, menace evidence or witnesses, or engage in continued crimes of the nature of those alleged against him (para. 21-23). Moreover, his voluntary surrender deserved some recognition.

4. Reasoning of the Tribunal

a/b. The principle relating to breaches of international obligations is a universally accepted rule that a State may not rely on defects in its national legislation, including constitutional law, to justify non-compliance with international law, *Polish Nationals in Danzig Case* (PCIJ, Ser. A/B, no.44, 1931).

c/d. The conditions for house arrest are derived from national law. The common theme of the various national jurisdictions is that the accused is permitted to live in his residence with his family and to see his counsel in his place of detention.

5. Authorities Cited

Statutory Law

Rules of Procedure and Evidence: Rules 64, 65, 101(E)
ICTY Statute: Article 29
ICTY Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal
United Nations Security Council Resolutions: 827(1993)

Case Law/Commentary

Case Law

German Interests in Upper Silesia (P.C.I.J. Ser. A, no. 7, 1926)
Polish Nationals in Danzig (P.C.I.J., Ser. A/B, no. 44, 1931)
Georges Pinson Case (France-Mexico Claims Commission, 18 October 1928, in *U.N. Reports of International Arbitral* Awards, vol. V)

Commentary

Yearbook of the International Law Commission, 1977, vol. II, part. II, p. 12.
Council of Europe, Resolution (65)11 adopted on 9 April 1965 by the Committee of Ministers, Articles 1(b) and 1(g).

PROSECUTION INDEX OF AUTHORITIES

2. *Prosecutor v. Blaskic,* IT-95-14-T, Decision on the Motion of the Defence Seeking Modification of the Conditions of Detention of General Bla[ki], 9 January 1997.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

Case No.: IT-95-14-T

Date: 9 January 1997

Original: French, English

BEFORE THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: **President Antonio Cassese**

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **9 January 1997**

PROSECUTOR

v.

TIHOMIR BLA[KI]

DECISION ON MOTION OF THE DEFENCE SEEKING MODIFICATION OF THE CONDITIONS OF DETENTION OF GENERAL BLA[KI]

The Office of the Prosecutor

Mr. Mark B. Harmon
Mr. Andrew Cayley

Counsel for the Accused

Mr. Anto Nobilo
Mr. Russell Hayman

I, Antonio Cassese, President of the International Criminal Tribunal for the former Yugoslavia,

CONSIDERING Rule 64 of the Rules and Procedure and Evidence,

CONSIDERING my previous Decisions rendered on 3 April 1996, 17 April 1996 and 9 May 1996,

CONSIDERING the Request for Modification of the Conditions of General Tihomir Bla{ki}'s detention filed by Counsel for the Accused on 5 December 1996 (hereinafter "the Request"),

CONSIDERING the Response of the Prosecutor filed on 5 December 1996, which does not oppose the Request insofar as it is "consistent with the security interests of the Tribunal and the host country",

HAVING HEARD the Prosecutor and Counsel for the Accused in closed session on 6 December 1996,

HAVING CONSULTED the Host Country,

CONSIDERING 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,

CONSIDERING also the imperatives of security and order, as set forth by the Host Country and the Registrar,

CONSIDERING that most of the requests made by Counsel for the Accused do not meet the requirements of security, as set out to me by the relevant authorities of the Host Country and the Registrar,

HEREBY DECIDE as follows:

(1) To grant the first request of Counsel for the Accused that the Accused be granted two hours of physical exercise per day, such exercise to be taken in the living room of the Accused's quarters;

(2) With respect to the second request of Counsel for the Accused, to grant the Accused seven hours of fresh air per week, to be taken on the terrace of his quarters, but not in the garden. The distribution of the seven hours over the course of the week will be decided upon by the security officers in light of the requirements of security;

(3) With respect to the third request, to permit the Accused's wife and children to visit him for up to seven consecutive days per month;

(4) To further allow the Accused to use the living room of his quarters from 9 a.m. to 8 p.m., to the extent that such use does not conflict with the requirements of security;

(5) To order that the present regime concerning the use of toilet facilities not be discontinued, at least until such time as technical modifications, if any, are made to the Accused's quarters which would allow him and his family free access to those facilities without jeopardising security and order,

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

_____

Antonio Cassese

President

Dated this 9th day of January 1997

At The Hague

The Netherlands

[Seal of the Tribunal]

PROSECUTION INDEX OF AUTHORITIES

3. *Prosecutor v Bagosora*, ICTR-98-41-T, Decision on Defence Motion for Release, 12 July 2002.

1654

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

Original: English

Before:
Judge Lloyd George Williams, Q.C., Presiding
Judge Pavel Dolenc
Judge Andrésia Vaz

Registrar: Mr. Adama Dieng

Date: 12 July 2002

THE PROSECUTOR
v.
THÉONESTE BAGOSORA
GRATIEN KABILIGI
ALOYS NTABAKUZE and
ANATOLE NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION ON THE DEFENCE MOTION FOR RELEASE

The Office of the Prosecutor:

Mr. Chile Eboe-Osuji
Mr. Drew White
Mr. Segun Jegede
Ms. Christine Graham

Defence Counsel
Mr. Raphaël Constant
Mr. Jean Yaovi Degli
Mr. Kennedy Ogetto
Mr. Gershom Otachi Bw'Omanwa
Mr. Clemente Monterosso
Mr. André Tremblay

The International Criminal Tribunal for Rwanda (the "Tribunal"), sitting today as Trial Chamber III

1655

composed of Judges Lloyd George Williams, Q.C., Presiding, Pavel Dolenc, and Andrésia Vaz (the "Chamber");

BEING SEISED OF the Motion for Release on behalf of the Accused, Bagosora, filed on 8 April 2002 and the Disclosure of Documents in Support of the Motion (collectively, hereinafter the "Motion");

CONSIDERING the Prosecutor's Request for Variation of the Order of 19 April 2002 in the Decision on the Prosecutor's Urgent Motion for Suspension of Time Limit for Response in the Matter of Defence "Requête en Demande de Mise en Liberté," filed on 29 April 2002 (hereinafter the "Prosecutor's Request");

RECALLING the Decision of 21 May 2002, in which the Tribunal granted the Prosecutor's request for additional time within which to file a response to the Motion;

CONSIDERING the Prosecutor's Response in the Motion for Release, filed on 29 May 2002 (hereinafter the "Prosecutor's Response");

THE TRIBUNAL NOW DECIDES the matter on the basis of the written briefs of the parties pursuant to Rule 73(A).

I.

SUBMISSIONS

A. Submissions of the Defence for Bagosora

1. In the Motion, the Defence recites the history of this case with respect to the detention of the Accused Bagosora and proceeds to catalogue the failures of the Prosecutor to discharge her duties to make certain disclosures under the Rules and the introduction of motions to amend the indictment, which necessitated adjournments of the trial proceedings on several occasions.

2. Significantly, contends the Defence, despite the many demands of the Bagosora Defence to fix a date for trial, no date was set. The date for trial was not fixed until the Prosecutor requested that the Trial Chamber Co-ordinator set a date, which request the Defence for Bagosora enthusiastically joined with on 26 June 2001. A status conference was held in November 2001 at which the Chamber fixed 2 April 2002 as the date trial was to commence. Moreover, during the Status Conference of 16 November 2001, the Defence recapitulated its various outstanding demands for disclosure of evidence from the Prosecutor. The Defence did not receive any response to its demands until 2 April 2002, more than four years after the demands were made.

3. Pursuant to a decision of the Chamber dated 5 December 2001 and in conformity with the provisions of Rule 73 *bis* on 20 January 2002 the Prosecutor disclosed to the Defence a series of documents, the vast majority of which were in English, and therefore incomprehensible to the Defence. It is not until 26 March 2002, i.e. as late as one week before the commencement date of the trial, that the Defence for Bagosora received the French versions of the Prosecutor's filings. The Motion goes on to recite particular procedural defects in the Prosecutor's filing of the reports of the expert Ms. Alison Des Forges and Investigator Kwende which caused the trial to again be postponed until September 2002.

4. Relying on the foregoing history of delays in the trial proceedings, the Defence insists that the interest of justice requires that the Accused, who has been detained for more than six years, be

provisionally released. In this respect, the Defence remarks that all notions of reasonable procedural delays in proceedings countenanced in most democratic states have been grossly exceeded in this case. Moreover, the Defence claims that the Accused Bagosora did nothing during his period of detention to oppose the commencement of trial. The Defence then asserts that *none* of the delays in the trial proceedings may be imputed to the Accused because the faults or omissions of the Prosecutor occasioned all adjournments in the trial proceedings.

5. The Defence next claims that it will not be possible to know the fate of the Accused for several more years, when one takes into account the large number of witnesses, i.e., 225, the Prosecutor intends to call in her case. The Defence believes that the Chamber was unreasonably optimistic in its 5 December 2001 Decision when it estimated that the trial of this matter may take from one to two years. Therefore, claims the Defence, Bagosora will have spent at least eight years in detention before there is a judgement.

6. The Defence invokes the fundamental right recognised in "civilised judicial systems," which require that an accused be tried without undue delay. The Defence avers that the extraordinarily long detention of Bagosora shocks any sense of justice and would not be countenanced in any of the civilised judicial systems. Among the factors that are ordinarily considered when determining whether delay in proceeding to trial has been reasonable are (i) the complexity of the case; and (ii) the extent to which the accused contributed to delays. While the Defence concedes that the nature of the crimes charged in the Indictment are indeed complex, in its estimation, this does not justify a delay of more than six years. Similarly, the Defence maintains that the current circumstances of the Accused Bagosora are repugnant to the provisions of Article 19(1) of the Statute, which provides: "The Trial Chamber shall ensure that a trial is fair and expeditious. . ." Furthermore, the Defence notes that all major judicial systems impose a sanction for the violation of the right of the accused to a trial free from undue delay. The primary relief, and the only relief here available, contends the Defence, is to release the Accused.

7. The Defence denounces what it perceives as an "obviously excessive" standard for provisional release pronounced in Rule 65. General principles dictate that pre-trial detention should be the exception; freedom being the rule. This principle, states the Defence was endorsed in the deliberations of the United Nations General Assembly on 14 December 1990. The Defence concludes that in comparison the standard announced in Rule 65, allowing release only "in exceptional circumstances" represents legal regression when compared to the more liberal standards adopted in Article 9 of the International Covenant on Civil and Political Rights.

8. Consequently, expostulates the Defence, Rule 65 should be construed in its broadest possible sense to bring it into conformity with the principles in the international instruments. The Defence notes that the ICTY Statute and practice diverge from those of this Tribunal with regard to provisional release. Finally the Defence contends that similarly situated Rwandan citizens, who are charged with crimes against humanity, are subject to discrimination when it comes to entitlement to provisional release. The Tribunal in rendering its decision on this Motion should therefore set aside Rule 65 as contrary to the standards of international law and practice extant in civilised judicial systems.

9. Nevertheless, the Defence argues that even if the Tribunal adheres to its demanding standard for provisional release, the Accused should be released because there is a surfeit of facts demonstrating that "exceptional circumstances" exist in the form of abnormal and unreasonable delay. The Defence further contends that although the undue delay by itself would warrant provisional release of the Accused, there are three additional factors in conformity with Rule 65 that militate in favour of provisional release. First, the Accused prays that The Netherlands, which has played host to his wife and children, should be heard on this Motion. Second, the Defence contends that the Trial Chamber should be assured that the Accused would appear for trial. Finally, the Defence avers that there is no

danger to victims and witnesses. Both these last conditions, submits the Defence, can be readily ensured in a country like The Netherlands, where the rule of law reigns. All that is necessary to ensure that the conditions for release are met is to hear The Netherlands to determine what type of measures are necessary to restrict the movements of Bagosora once he is there. The Defence adds that the Accused is not opposed to strict judicial control of the conditions of his release. Also in this respect, the Defence notes that the Accused has never attempted to secret himself from the authorities before his arrest or tried to escape since his incarceration.

10. Finally, the Defence declares that permitting the Accused to be provisionally released would give real credence to the presumption of innocence.

B. Submissions of the Prosecutor

11. First, referring to the existing "legal regime" of this Tribunal, the Prosecutor maintains that an accused must be kept in detention pending his trial. This Rule, states the Prosecutor, is justified by the gravity of the nature of the offences with which the accused are charged. The gravity and nature of the offences that fall under this Tribunal's jurisdiction, contends the Prosecutor, justify this general rule. Once incarcerated, however, claims the Prosecutor, an accused may be provisionally released only upon a showing that all the following conditions have been met: (i) exceptional circumstances; (ii) sufficient guarantees that the accused will appear for trial; (iii) if released, the accused will pose no threat to victims, witnesses and other persons; and (iv) hearing of the host country. *Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Defence Motion for the Provisional Release of the Accused (Trial Chamber II, 21 February 2001). Furthermore, claims the Prosecutor, in accordance with the jurisprudence of the Tribunal, the Chamber need not consider the criteria of Rule 65 requiring the Chamber to determine whether there are sufficient guarantees that the accused will appear for trial and whether to hear the host country if the Defence fails to demonstrate the threshold qualification for relief, the existence of exceptional circumstances. *See Kanyabashi*; *Prosecutor v. Bicamumpaka*, ICTR-99-50-T, Decision on the Defence Motion for Provisional Release Pursuant to Rule 65 of the Rules, 25 July 2001, para. 12.

12. Moreover, the Prosecution submits the Motion should fail because the Defence has not provided sufficient guarantees that Bagosora will appear for trial, if released. In this connection, the Prosecution notes that no guarantees, such as a surety or undertaking by a responsible person or authority has been posted. The Prosecutor also reminds the Chamber that on the day of the commencement of trial, 2 April 2002, the Accused Bagosora refused to appear before the Trial Chamber. The Prosecutor asks therefore, if the Accused refused to appear for trial while still in detention, how can there be any guarantee that he will appear for trial while out on bail? Furthermore, consideration of the severity of the sentence he may face if convicted, Bagosora's probable financial assets and connections in certain countries where he may seek refuge, all lead to the conclusion that Bagosora presents a clear and present danger of absconding, if released.

13. Similarly, posits the Prosecution, the Defence provides no basis on which the Chamber may reasonably conclude that if released, the Accused would pose no threat or danger to victims, witnesses and other persons. If released, contends the Prosecution, Bagosora could avail himself of his possible connections and influences unfettered. There is therefore, a considerable risk of collusion, subornation of witnesses, and/or pressure being brought to bear on witnesses, if Bagosora were to be released.

14. The Prosecutor notes further that neither the host country, Tanzania, nor The Netherlands, has been heard with respect to the Motion. Because the release of an accused who is charged with grave crimes would entail "extremely serious implications" for the host country, the hearing of the Tanzanian authorities is an indispensable requirement which may not be discharged through the hearing of a third

country, in this case The Netherlands, in which the Accused hopes to reside if provisionally released.

15. The Prosecutor then expresses what she believes to be the basis for the Defence conclusion that exceptional circumstances warrant the release of the Accused: (i) duration of his pre-trial detention; (i) that the accused engaged in no conduct causing delays in the proceedings; (iii) failure on the part of the Tribunal to deal with this matter diligently; and (iv) a sentence will not be issued for several years hence.

16. Addressing the issue of length of Bagosora's pre-trial detention, the Prosecutor first states that the length of his detention has not been six years as contended by the Defence, rather it has been five years and four months. This figure is based upon the Tribunal's Decision on Joinder, which held that the period he spent before transfer to the seat of the Tribunal is not to be imputed to the Tribunal. *See Prosecutor v. Bagosora*, ICTR-96-7, Decision on the Prosecutor's Motion for Joinder, at para. 97, 152, 153 (29 June 2000). Notwithstanding, the Prosecutor contends that the period of the Accused's pre-trial detention is not unreasonable because human rights law does not posit a "maximum length of pre-trial detention" and "the reasonableness of detention may not be assessed in the abstract." *See P. van Dijk et al*, Theory and Practice of the European Convention on Human Rights, Kluwer Law International 1998, 3rd ed., 379. Rather, says the Prosecutor, assessment of reasonableness of detention entails the consideration, on a case-by-case basis, of the following two factors: (i) complexity of the case and (ii) conduct of the parties.

17. The Prosecutor challenges the Defence contention that none of the delays in the proceedings in this case may be attributed to Bagosora, although conceding that Bagosora has filed a comparatively limited number of motions. However, claims the Prosecutor, his case has been joined for trial purposes with that of Kabiligi, Ntabakuze and Nsengiyumva. Here the Prosecutor reiterates the finding in the Joinder Decision stating that delays "will be minor as compared with the time saved as a whole." Joinder Decision at para. 154. The Chamber was confident that "any delay that the joinder of the case may occasion will not violate human rights standards."

18. As a practical matter, once the case of Bagosora was joined with the others, the actions of his co-accused will affect the rights of all the co-accused, ensuring the procedural principle of *beneficisum cohaesionis*. In this connection the Prosecutor observes that since July 1998 the four Accused in this case have lodged at least thirty-five applications. The four Accused in this joint trial also filed ten appeals of interlocutory decisions. Notably, all four Accused, Bagosora included, on 2 April 2002, the day the trial was to commence, filed a joint Appeal of the Chamber's Decision refusing to reconsider its decisions of 29 November and 5 December 2002 harmonizing protective measures for the Prosecutor's witnesses. The Accused also requested that the trial be adjourned *sine die* until the resolution of the Appeal. Also significant is the fact that Bagosora has availed himself of the benefits of the Joinder Decision by insisting to be heard in respect of matters which concerned only his co-accused. *See* Transcript of Hearing 15 November 2001, pp. 12-16. Therefore, Bagosora should not be allowed to enjoy the benefits of joinder without also being required to endure its inconveniences as well.

19. The Prosecutor refutes the Defence accusation that this case has not been handled in an expeditious manner. The Prosecutor stresses the complexity of this case against Bagosora and his co-accused, which involves bringing to justice persons who are alleged to have been the masterminds of the Rwandan genocide. This case, states the Prosecutor, has been proceeding "with continuous activity". Citing to Chamber's finding in the Joinder Decision at para 151. As to the Defence contention that Bagosora will not be sentenced for several years, the Prosecutor submits that this fact does not render unreasonable his continued pre-trial detention. The factors involved in the pronouncement of judgement

are beyond the control of the Prosecution, but rather with the Trial Chamber, which must control the scheduling of the proceedings and its deliberations before delivering a judgement.

20. The Prosecutor finally submits that the Chamber should interpret the "exceptional circumstances in the context prevalent at the Tribunal as recently pronounced by the Appeals Chamber in *Prosecutor v. Blagojevic, Obrenovic and Jokic*, IT-02-53-A65, Appeals Chamber, Decision on Application for Leave to Appeal at p. 11. (18 April 2002) In *Blagojevic* the Appeals Chamber held that when applicable, it would uphold human rights principles. However, the Appeals Chamber recognised it was an international judicial body with a mandate to prosecute persons responsible for serious violations of international humanitarian law rather than a human rights body responsible for upholding general human rights.

21. At the outset, the Chamber notes that although the Defence has styled the Motion as one pursuant to Rule 65 challenging the length of his "pre-trial" detention, strictly speaking, the current posture of the case may not be characterised as "pre-trial" because the trial in this matter commenced on 2 April 2002. Also, the Chamber observes parenthetically that the tone of the Defence Motion is regrettable. Although zealous advocacy is encouraged, Counsel should nevertheless maintain a respectful and decorous tone in its submissions.

22. The Chamber will now address whether the Defence has made out the elements establishing "exceptional circumstances" entitling the Accused to be provisionally released. Under Rule 65, a showing of exceptional circumstances is the *sine qua non* condition for provisional release. *Prosecutor v. Kanyabashi*, ICTR–96-15-T at para. 6; Prosecutor *v. Rutaganda*, ICTR-96-3-T, Decision on the Defence on the Request Filed by the Defence for Provisional Release of Georges Rutaganda (25 February 1997). Although the length of an accused's detention is not, by itself, a determining factor, it may nevertheless be one factor to be assessed in consideration of the Defence's showing of "exceptional circumstances", the threshold showing that triggers the Chamber's consideration of the remaining three cumulative factors that must be weighed pursuant to Rule 65 (B) to justifying provisional release. *See Prosecutor v. Delalic*, (IT-96-21-T), Decision on Motion for Provisional Release Filed by the Accused Zejjnil Delalic (25 September 1996); Prosecutor *v. Kanyabashi*, ICTR-96-15-T Appeals Chamber Decision at para _ and; *Prosecutor v. Drljaca Kovacevic*, IT-97-24 (ICTY), Decision on the Defence Request for Provisional Release (20 January 1998), at para. 22.

23. Pursuant to Rules 64 and 65(A) and (B) an accused, after his transfer to the Tribunal, shall be detained. He may be provisionally released only upon an order of the Tribunal after establishing exceptional circumstances. The Rules do not define the exceptional circumstances, which may justify provisional release. However, a review of the jurisprudence of ICTY reveals that release was granted primarily for humanitarian reasons. *See Prosecutor v. Simic,* IT-95-9-P, Decision on the Provisional Release of the Accused (26 March 1998). This Tribunal has never provisionally released any of the accused.

24. The Chamber notes that ICTY indeed has amended its Rule 65 regarding provisional release in order to harmonize its provisions with internationally recognized standards. However, the Chamber is bound to apply the Rules of this Tribunal, including the provisions of Rule 65.

25. On the question of the perceived causes for the delays observed in this trial proceedings, the Defence neglects that some of the delays in setting a date for trial of this matter are owing to congestion in the Tribunal's calendar caused by limited human and physical resources of the Tribunal. With a growing number of accused in custody and only three Trial Chambers in place, some measure of delay in trials is inevitable. The Trial Chamber is currently actively engaged in the trial of two other matters, namely *Prosecutor v. Semanza*, ICTR-97-20-T, and *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T. In

addition, the Chamber diligently works on the motions, initial appearances, confirmation hearings, and other applications and issues arising in an additional twenty cases.

26. Moreover, the Chamber notes that the situation that exists in national jurisdictions cannot be equated with those extant at this Tribunal. The resources in the national jurisdictions may be allocated by governments to meet existing circumstances. At this Tribunal, only the United Nations may make the necessary changes or provide the additional judicial resources to assist in expediting the trials and thereby shorten the pre-trial detention of the accused.

27. The Chamber notes that in certain circumstances, six years of pre-trial detention may be a factor in the consideration of exceptional circumstances warranting the release of an accused. However, the length of current or potential future detention of the Accused cannot be considered material in these circumstances because it does not mitigate in any way that the Accused, who is charged with the grave offences coming under the subject matter jurisdiction of this Tribunal, which offences carry maximum term of imprisonment of is life, may be a flight risk or may pose a threat to witnesses or to the community if he were to be released. Detention under Rule 65 is intended to ensure the safety of the community and the integrity to the trial process. The Chamber observes that the Accused even while in custody found the opportunity to intentionally absent himself from the trial proceedings of 2 April 2002.

Conclusion

28. The Chamber finds that the Defence has failed to produce facts exhibiting exceptional circumstances. The Chamber does not agree that delays of the trial for more than five years in itself, without more, constitutes an instance of exceptional circumstances that would warrant the release of the Accused.

29. Nevertheless, the Chamber has considered the other arguments advanced by the Defence and finds them to be without merit.

For the foregoing reasons, the Tribunal:

DENIES the Motion in its entirety.

Arusha 12 July 2002

Lloyd G. Williams, Q.C.,	Pavel Dolenc	Andrésia Vaz
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

PROSECUTION INDEX OF AUTHORITIES

4. *Prosecutor v Brdanin,* Decision of Motion of By Radoslav Brdanin For Provisional Release, IT-99-36-PT, 25 July 2000.

1662

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
25 July 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON MOTION BY RADOSLAV BRDANIN FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Ms Joanna Korner
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 Introduction

1. Pursuant to Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rules "), the accused Radoslav Brdanin ("Brdanin") seeks provisional release pending his trial.[1] The application is opposed by the prosecution.[2] Brdanin has relied upon witnesses in support of his application, and both parties requested an oral hearing.[3] Difficulties were experienced by counsel for Brdanin in obtaining statements of the evidence to be given,[4] and – by reason of the Trial Chamber's other commitments – the request for an oral hearing further delayed the resolution of the Motion. The oral hearing took place on 20 July 2000.

1663

2. Brdanin is charged jointly with Momir Talic with a number of crimes alleged to have been committed in the area of Bosnia and Herzegovina now known as Republika Srpska. Those crimes may be grouped as follows:

(i) genocide[5] and complicity in genocide ;[6]

(ii) persecutions,[7] extermination,[8] deportation[9] and forcible transfer (amounting to inhumane acts),[10] as crimes against humanity;

(iii) torture, as both a crime against humanity[11] and a grave breach of the Geneva Conventions;[12]

(iv) wilful killing[13] and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity,[14] as grave breaches of the Geneva Conventions; and

(v) wanton destruction of cities, towns or villages or devastation not justified by military necessity[15] and destruction or wilful damage done to institutions dedicated to religion,[16] as violations of the laws or customs of war.

Each accused is alleged to be responsible both individually and as a superior for these crimes.

3. The allegations against the two accused assert their involvement in a plan to effect the "ethnic cleansing" of the proposed new Serbian Territory in Bosnia and Herzegovina (the area now known as Republika Srpska) by removing nearly all of the Bosnian Muslim and Bosnian Croat populations from the areas claimed for that territory .[17] Between April and December 1992 , forces under the control of the Bosnian Serb authorities (comprising the army, the paramilitary, and territorial defence and police units) are said to have caused the death of hundreds of, and the forced departure of thousands from, the Bosnian Muslim and Bosnian Croat populations from those areas.[18] Brdanin is alleged to have been the President of the Crisis Staff of the Autonomous Region of Krajina ("ARK"), one of the bodies responsible for the co-ordination and execution of most of the operational phase of the plan to create the new Serbian Territory, and (as such) to have had executive authority in the ARK and to be responsible for managing the work of the Crisis Staff and the implementation and co-ordination of Crisis Staff decisions.[19] The pleaded allegations are described in more detail in a previous Decision in these proceedings.[20]

4. Brdanin was arrested on 6 July 1999. He has since unsuccessfully moved to have the indictment against him dismissed upon the basis that the Tribunal has no jurisdiction in the matter,[21] and he has unsuccessfully petitioned for a Writ of Habeas Corpus upon the basis that he was illegally restrained .[22]

2 The relevant provision

5. Rule 65(A) states that an accused may not be released except upon an order of a Chamber. Rule 65(B) provides:

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

1664

other person.

3 The material put forward by the parties

6. Brdanin has filed a signed "Personal Guarantee", by which he agrees (so far as is presently relevant) to surrender his passport to the International Police Task Force in Banja Luka, to remain within the Municipalities of Banja Luka and Celinac , to report once a day to the local Banja Luka police, to receive occasional unannounced visits by the International Police Task Force to check on his whereabouts, and not to have any contact whatsoever with any prosecution witness or potential witness . He says that he understands that his failure to comply with any of these conditions "shall give the prosecution the right to request my immediate return to The Hague ".[23]

7. Brdanin has also filed a "Guaranty of the Government of the Republic of Srpska ", signed by Milorad Dodik as the "President of the Government", and by which the Government –

> [...] takes upon itself to follow all the orders of the Trial Chambre [sic] so that Mr Radoslav Brdanin would appear, in accordance with the court order, before the International Criminal Tribunal at any time.

More specifically, the Government recognises that its "guaranty and assurance" involves the –

> [...] [i]mmediate arrest of the accused if he attempts to escape or violate any of the conditions of his provisional release (as The International Criminal Tribunal informed Bosnia and Herzegovina), and inform the International Tribunal so that everything could be prepared for his return to the International Tribunal.[24]

8. Brdanin produced evidence from his wife, Mira Brdanin, by way of a notarised statement to the effect that he had been unemployed from March 1995 until February 1999. At the time of his arrest (in July 1999) Brdanin was employed at the Head Office for Restoration of the Republika Srpska. She outlines the financial difficulties she was encountering as a result of her husband's detention, and said that life for their two children (aged twentytwo and sixteen years) and herself had been " unbearably difficult". She expresses confidence that her husband would comply with any conditions imposed upon his release, that he would not in any way trouble, threaten or in any other way disturb anyone who is or who might be a prosecution witness against him, and that he would appear for his trial. The prosecution did not wish to cross-examine Mrs Brdanin upon that statement.

9. Evidence was also given by Milan Trbojevic ("Trbojevic") in support of the application . Trbojevic is presently an Advisor to the Prime Minister of the Republika Srpska , having formerly been the Minister for Justice and, before that, a judge for many years and a lawyer in Sarajevo. He has known Brdanin since 1991 when both men were members of parliament, and he says that he came to know Brdanin "quite well" over this time. In 1996, following the Dayton Peace Agreement, Brdanin and Trbojevic established a political party (called the "People's Party of Republika Srpska"), with which Trbojevic remained until late 1997 or early 1998. After that, they saw each other a few times in town at Banja Luka.[25]

10. Trbojevic describes Brdanin as an exceptional man who keeps his word and who honours his obligations. He says that he is convinced that Brdanin, if released , would not directly or indirectly harass, intimidate or otherwise interfere with any persons who are or who may be witnesses for the prosecution in the case against him. He is sure that Brdanin would appear at the Tribunal whenever

asked to do so and that he would comply with any reporting conditions imposed upon him.[26] Trbojevic agreed, however, that he is in no position himself to ensure that Brdanin did so. He said that he had read the indictment originally served on Brdanin (which contained but one charge, that of a crime against humanity), and it was left unclear as to whether he was unaware that Brdanin is now charged with genocide in the amended indictment.[27] The prosecution did not make any submission concerning Trbojevic's state of awareness of the charges against Brdanin.

11. Trbojevic said that, as Minister for Justice, he had played a part in establishing the policy of the Government of Republika Srpska with regard to guarantees given for persons detained by the Tribunal, that the guarantees will be strictly and absolutely enforced. This policy, he said, is explained to each detained person who seeks such a guarantee.[28]

4 The contentions of the parties, analysis and findings

(a) The recent amendment to Rule 65

12. Prior to December 1999, Rule 65(B) obliged an applicant for provisional release to establish "exceptional circumstances" in addition to the matters presently specified in the Rule. Brdanin has submitted that, as a result of the deletion of that provision , provisional release is no longer to be considered exceptional,[29] so that the presumption is that provisional release will now be the usual situation (or the norm).[30] The prosecution replies that the effect of the amendment has not been to establish provisional release as the norm and detention the exception, because the accused must still satisfy the Trial Chamber that – to use the words of Rule 65(B) – he "will appear for trial and, if released, will not pose a danger to any victim, witness or other person".[31] (For present purposes, the requirement that the host country be heard may be ignored .) The Trial Chamber agrees with the prosecution that the amendment to Rule 65 has not made provisional release the norm. The particular circumstances of each case must be considered in the light of the provisions of Rule 65 as it now stands .[32]

13. Brdanin has further submitted that the effect of the amendment to Rule 65 has been that, once the detained person has established that he will appear and will not pose such a danger, the onus passes to the prosecution to establish exceptional circumstances which require the application to be refused.[33] That submission misstates the onus. The wording of the Rule squarely places the onus at all times on the applicant to establish his entitlement to provisional release .[34]

(b) Appearance for trial

14. Brdanin relies upon the material referred to in Section 3 of this Decision as demonstrating that he will appear for trial. Reliance is also placed upon the fact that he has a wife and family in Banja Luka, and it is suggested that he would not willingly put himself in the position of losing his relationship with them by fleeing .[35]

15. The prosecution submits that the "Guaranty" of the Government of Republika Srpska should not be considered sufficient to satisfy the Trial Chamber that Brdanin, if released, would appear for trial in the light of the total failure so far of the Republika Srpska to abide by its basic obligations to comply with orders of the Tribunal for the arrest and transfer of persons.[36] Republika Srpska has in fact *transferred* some persons who have surrendered themselves, but the prosecution's point is well made in relation to the failure of Republika Srpska to *arrest* any indicted persons. The Trial Chamber accepts that, in this

respect, actions speak louder than words. Brdanin was a high level Government official at the time of the events which are alleged against him. The amended indictment describes him as having reached, by 1992, the positions of Minister for Construction, Traffic and Utilities and acting Vice-President in the Government of Republika Srpska.[37] Even if it be accepted that he was dismissed as a Minister in 1995, Brdanin inevitably has very valuable information which he could disclose to the Tribunal, if minded to co-operate with the prosecution for mitigation purposes.[38] That would be a substantial disincentive for Republika Srpska to enforce its guarantee to arrest, for the first time, an indicted person within its Territory.[39] The only sanction which the Tribunal possesses for the failure of Republika Srpska to comply with its "Guaranty" is to report it to the Security Council of the United Nations. Previous reports of non-compliance by Republika Srpska with its obligations to the Tribunal to arrest persons indicted by it have had no effect upon the continuing total failure of that entity to comply with those obligations.[40]

16. The prosecution has also submitted that Brdanin's own signed "Personal Guarantee " is insufficient to establish that he will appear, in the light of his obvious self-interest.[41] It says that Brdanin is charged with extremely serious crimes for which, if he is convicted, he faces a very substantial sentence of imprisonment because of his high level position in relation to those crimes.[42] In reply , Brdanin has argued that the nature of the crime charged does not amount to an exceptional circumstance which the prosecution may show as requiring the refusal of provisional release.[43] This argument misunderstands the point being made by the prosecution. 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.[44] It was to that issue (upon which the applicant bears the onus of proof) that the prosecution's submission was directed. The Trial Chamber accepts that, notwithstanding the evidence of Trbojevic, Brdanin has reason enough for not wanting to appear. Again, common experience suggests that any person in his position, even if he is innocent, is likely to take advantage of the refuge which Republika Srpska presently provides to other high-level indicted persons.

17. It is necessary to say something about one issue which commonly arises in these applications, if only for the purposes of putting it to one side in relation to the present case. Where an accused person has voluntarily surrendered to the Tribunal , and depending upon the circumstances of the particular case, considerable weight is often given to that fact in determining whether the accused will appear at his trial.[45] Conversely, and again depending upon the circumstances of the particular case, considerable weight would be given to the fact that the accused did not voluntarily surrender to the Tribunal when determining that issue. In the present case, Brdanin was arrested on a sealed indictment . There is no suggestion that he knew of its existence. He was thus given no opportunity to surrender voluntarily to the Tribunal if he had wished to do so, and he has been denied the benefit which such a surrender would have provided to him in relation to this issue. That is an unfortunate consequence of the use of sealed indictments , as it cannot be assumed one way or the other that, had he been given that opportunity , Brdanin would have taken or rejected it. It is important to emphasise, therefore , that in such a case – absent specific evidence directed to that issue – the Trial Chamber cannot take the fact that the applicant did not voluntarily surrender into account, and it has not done so in the present case.

18. 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. The Trial Chamber has not been satisfied by Brdanin that he will appear for his

trial.

(c) Interference with witnesses

19. The prosecution draws attention to the facts that Brdanin is seeking to be released in order to return to one of the very localities in which the crimes are alleged to have taken place, and that (as the prosecution has been ordered to provide unredacted statements of those witnesses not entitled to protective measures)[46] he will know the identity of several witnesses, thus heightening his ability to exert pressure on victims and witnesses.[47] The Trial Chamber does not accept that this heightened *ability* to interfere with victims and witnesses, by itself, suggests that he *will* pose a danger to them.[48] It cannot just be assumed that everyone charged with a crime under the Tribunal's Statute will, if released , pose a danger to victims or witnesses or others.[49] Indeed, it is a strange logic employed by the prosecution – that, once it has complied with its obligation 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 because his mere ability to exert pressure upon them is heightened. The Trial Chamber does not accept that logic.

20. The prosecution also says that the mere fact that Brdanin will be free to contact the witnesses directly or indirectly "could easily affect their willingness to testify in this and other cases".[50] That, however, would not constitute the "danger" to which Rule 65(B) refers. The Trial Chamber does not accept that this mere possibility – that the willingness of witnesses to testify would be affected by an accused's provisional release – would be a sufficient basis for refusing that provisional release were it otherwise satisfied that such accused will *not* pose a danger to the witnesses. If an applicant satisfies the Trial Chamber that he will *not* pose such a risk, it is for the prosecution to reassure its own witnesses; it would be manifestly unfair to such an applicant to keep him in detention because of a possible reaction by the prosecution's witnesses to the mere fact that he has been granted provisional release. Insofar as the prosecution's witnesses in other cases are concerned, the Trial Chamber repeats what it said in the Protective Measures Decision, that it is not easy to see how the rights of the accused in the particular case can properly be reduced to any significant extent because of the prosecution's fear that it may have difficulties in finding witnesses who are willing to testify in other cases.[51]

21. In view of the unfavourable finding that the Trial Chamber is not satisfied by Brdanin that he will appear for his trial,[52] it is unnecessary for a finding to be made as to whether, if released, Brdanin will pose a threat to any victim, witness or other person. It is, however, worth observing that the present case is, so far as the amended indictment presently discloses, in reality a case where the prosecution does not allege any particular proximity of Brdanin to the events which are alleged to have taken place, the real issue being the relationship between Brdanin and those persons who did the acts for which he is sought to be made responsible.[53] The prosecution claims that those witnesses who directly implicate the accused as being responsible for those acts (either as having aided and abetted in them or as a superior) are those whose identity should be disclosed at a later rather than an earlier time.[54] The application of that proposition in the present case is a matter which has yet to be resolved , but the timing of the disclosure of the identity of those witnesses could well be affected by whether the accused is in detention or not. The Trial Chamber does not propose to reject the application upon the basis that it is not satisfied by Brdanin that he will not pose a danger to anyone. It simply makes no finding upon that issue.

(d) Discretionary considerations

22. It is not in dispute that Rule 65(B), by the use of the word "may", gives to the Trial Chamber a

discretion as to whether release is ordered. But it should be clearly understood that, in general, it is a discretion to *refuse* the order notwithstanding that the applicant has established the two matters which that Rule identifies.[55] It is *not* , in general, a discretion to *grant* the order notwithstanding that the applicant has failed to establish one or other of those two matters.[56]

23. Brdanin has demonstrated that his wife has financial difficulties as a result of his detention.[57] He has also asserted that his pre-trial preparation will be greatly enhanced if he is on provisional release, because of the difficulties inherent in his incarceration in The Hague away from the place where the events to be investigated are alleged to have taken place.[58] The Trial Chamber accepts that these are very real considerations to any accused. But they cannot permit a detained person to be released provisionally if the Trial Chamber is not satisfied that he will appear for trial.

24. Another matter raised by Brdanin in this case relates to the length of his pre -trial detention. He was arrested on 6 July 1999. A trial is unlikely before sometime early in 2001. It is not always clear from the decisions given before the amendment of Rule 65(B) whether the length of pre-trial detention has been considered as relevant to the issue of exceptional circumstances or the exercise of discretion, although it seems generally to have been treated as being relevant to the former. Brdanin has submitted that delays in the commencement of a trial, such as are presently being experienced in the Tribunal, are still a relevant factor to an application for provisional release,[59] but he does not identify the issue to which they are said to be relevant. Nor has the prosecution identified how they may be relevant. Logically, pre-trial delays should still be relevant to the exercise of the Trial Chamber's discretion, so that due regard may be had to Article 5(3) of the European Convention on Human Rights and Fundamental Freedoms, which guarantees the right of an accused person to a trial within a reasonable time or to release pending trial, and other similar international norms to that effect.

25. Nevertheless, it is difficult to envisage *likely* circumstances where provisional release would be granted to an accused by reason of the likely length of his pre-trial detention where he has been unable to establish that he will appear for trial. In domestic jurisdictions, bail or other form of release would usually be granted where it is clear that the length of that pre-trial detention may well exceed the length of any sentence to be imposed upon conviction, but there are two reasons why such a course would be inapplicable in the Tribunal. First, as already referred to,[60] the Tribunal has no power to execute its own arrest warrant in the event that the applicant does not appear for trial, and it must rely upon local authorities within the former Yugoslavia or upon international bodies to effect arrests on its behalf. That is markedly different to the powers of a court granting release in a domestic jurisdiction. Secondly, the serious nature of the crimes charged in this Tribunal would be very unlikely to produce sentences of such a short duration.[61]

26. The prosecution has submitted that the likely period involved here (nineteen or twenty months) does not violate either the Statute of the Tribunal or "the recognised standards of international law", and it has referred to two decisions of the European Court of Human Rights and of the European Human Rights Commission which have upheld longer periods of pre-trial detention as being reasonable within the meaning of Article 5(3).[62] These decisions are often referred to by the prosecution in applications such as the present, but care should be taken that too great a reliance is not placed upon them as defining what is a reasonable length of pre-trial detention in an international criminal court or tribunal rather than in particular domestic jurisdictions in Europe.

27. What is a reasonable length of pre-trial detention must be interpreted, so far as this Tribunal is concerned, against the circumstances in which it has to operate . The Tribunal's inability to execute arrest warrants upon persons in the former Yugoslavia to whom provisional release has been granted if

1669

they do not appear for trial has to be considered, and it is unnecessary to repeat what has already been said upon this subject. On the other hand, the period considered reasonable by the two European bodies, in their supervisory role, result to some extent from a degree of deference given by them to the practices of the particular national courts and legislature when considering matters such as the reasonableness of pre-trial detention periods in the different European domestic jurisdictions, recognising that the national authorities are better placed to assess local circumstances within those jurisdictions.[63] The former consideration may lead to longer periods, and the latter may lead to shorter periods , being regarded as reasonable by the Tribunal.

28. Assuming (without needing to decide) that the length of pre-trial detention remains relevant to applications for provisional release since the amendment to Rule 65(B), the Trial Chamber is satisfied that the likely period of pre-trial detention in the present case does not exceed what is reasonable in this Tribunal. It is unfortunate that the limited resources possessed by the Tribunal do not permit an earlier trial for those in detention, and that a delay of even this length is necessary , but the likely period of pre-trial detention for Brdanin has not been demonstrated to be unreasonable.

5 Disposition

29. For the foregoing reasons, the application by Radoslav Brdanin for provisional release pending his trial is refused.

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

Dated this 25th day of July 2000,
At The Hague,
The Netherlands.

_____
Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

1- Motion for the Provisional Release of Radoslav Brdanin, 27 Apr 2000 ("Motion"), filed 28 Apr 2000.

2- Prosecution's Response to "Motion for the Provisional Release of Radoslav Brdanin", 9 May 2000 ("Response").
3- Motion, p 7; Response, par 19.
4- Motion for Extension of Time, 25 May 2000, filed 26 May 2000.
5- Count 1, Article 4(3)(a) of the Tribunal's Statute.
6- Count 2, Article 4(3)(e).
7- Count 3, Article 5(h).
8- Count 4, Article 5(b).
9- Count 8, Article 5(d).
10- Count 9, Article 5(i).
11- Count 6, Article 5(f).
12- Count 7, Article 2(b).
13- Count 5, Article 2(a).

14- Count 10, Article 2(d).
15- Count 11, Article 3(b).
16- Count 12, Article 3(d).
17- Amended Indictment, pars 6-7.
18- Ibid, par 16.
19- Ibid, pars 14, 19.
20- Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 Mar 2000, par 4.
21- Decision on Motion to Dismiss Indictment, 5 Oct 1999; Interlocutory Appeal dismissed: Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72, 16 Nov 1999.
22- Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brdanin, 8 Dec 1999; Leave to appeal refused and application for a Writ of Mandamus directed to the Trial Chamber rejected: Decision on Application for Leave to Appeal, 23 Dec 1999.
23- Personal Guarantee of Radoslav Brdanin, undated, pp 2-3.
24- Guaranty of the Government of the Republic of Srpska, 8 Mar 2000, pp 1-2.
25- Oral hearing, 20 July 2000, Transcript, pp 152-154.
26- Ibid, pp 154-156.
27- Ibid, p 156.
28- Ibid, pp 154-156.
29- Motion, par 7.
30- Transcript, p 161.
31- Transcript, p 162. See Prosecutor v Kvocka, Case IT-98-30-PT, Decision on Motion for Provisional Release of Miroslav Kvocka, 2 Feb 2000 ("Kvocka Decision"), at p 4. See also Prosecutor v Kordic, Case IT-95-14/2-T, Order on Application by Dario Kordic for Provisional Release Pursuant to Rule 65, 17 Dec 1999 ("Kordic Decision"), 17 Dec 1999, p 4; Prosecutor v Aleksovski, Case IT-995-14/1-A, Order Denying Provisional Release, 18 Feb 2000, p 2; Prosecutor v Simic, Case IT-95-9-PT, Decision on Miroslav Tadic's Application for Provisional Release, 4 Apr 2000 ("Tadic Decision"), p 8; Prosecutor v Simic, Case IT-95-9-PT, Decision on Simo Zaric's Application for Provisional Release, 4 Apr 2000 ("Zaric Decision"), p 8; Leave to appeal from the Tadic and Zaric Decisions refused, on the basis that error had not been shown: Prosecutor v Simic, Case IT-95-9-AR65, Decision on Application for Leave to Appeal, 19 Apr 2000 ("Tadic/Zaric Appeal Decision"), p 3; Prosecutor v Simic, Case IT-95-9-PT, Decision on Milan Simic's Application for Provisional Release, 29 May 2000 ("Simic Decision"), p 5.
32- Kvocka Decision, p 4; Kordic Decision, p 4; Tadic Decision, p 8; Zaric Decision, p 7.
33- Transcript, pp 161, 164.
34- This is also apparent from the decisions cited in footnote 31.
35- Transcript, p 166.
36- Response, par 11; Transcript, p 163. See also Prosecutor v Kovacevic, Case IT-97-24-PT, Decision on Defence Motion for Provisional Release, 20 Jan 1998, par 27.
37- Amended Indictment, par 17.
38- See Rule 101(B)(ii).
39- The weight to be given to a guarantee by the Government of Republika Srpska may be different where it is not a high level indicted person who would have to be returned.
40- Tribunal's Fourth Annual Report (1997), pars 183-187 ("Republika Srpska is clearly and blatantly refusing to meet the obligations that it undertook when it signed the Dayton Peace Agreement, by which it solemnly undertook to co-operate with the Tribunal": par 187); Tribunal's Fifth Annual Report (1998), pp 81-83 (although the present Prime Minister of Republika Srpska is reported, at par 216, to have urged indicted individuals to surrender to the Tribunal); Tribunal's Sixth Annual Report (1999), par 106 (refusal of Republika Srpska to execute arrest warrants).
41- Response, par 12.

1671

42- Ibid, par 14; Transcript, p 162.
43- Transcript, p 160.
44- Kordic Decision, p 4.
45- Tadic Decision, p 8; Zaric Decision, p 8; Leave to appeal refused on the basis that error had not been shown: Tadic/Zaric Appeal Decision, p 3; Simic Decision, p 6. Provisional release was refused in one case, despite the applicant's surrender, in part because there was a dispute as to the circumstances in which the applicant had surrendered: Kordic Decision, p 5.
46- Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("Protective Measures Decision"), par 65.2.
47- Response, pars 15-16.
48- The Decision of the Trial Chamber in Prosecutor v Blaškic, Case IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 Apr 1996 (English version filed 1 May 1996), p 5, upon which the prosecution relies does not state anything to the contrary.
49- Prosecutor v Delalic, Case IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, 25 Sept 1996 (filed 1 Oct 1996), par 34.
50- Response, par 16.
51- Protective Measures Decision, pars 29-30.
52- Paragraph 18, supra.
53- cf Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 18.
54- Protective Measures Decision, par 34.
55- See, for example, the Kordic Decision (p 4), where the Trial Chamber took into account in part in refusing the application the fact that it had been made during the trial, and if successful would have disrupted the remaining course of the hearing.
56- In Prosecutor v Djukic, Case IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 Apr 1996, at p 4, the Trial Chamber granted to the accused provisional release solely upon humanitarian grounds in the light of the extreme gravity of the accused's medical condition, in that he was suffering from an incurable illness in its terminal phase.
57- Motion, pars 12-13; and see Section 3 of this Decision.
58- Motion, par 11.
59- Motion, par 10.
60- Paragraph 18, supra.
61- In Prosecutor v Aleksovski, Case IT-95-14/1-A, Judgment, 24 Mar 2000, at par 185, the Appeals Chamber stated that sentences of the Tribunal should make it plain that the international community is not ready to tolerate serious violations of international humanitarian law and human rights. The Tribunal was established in order to prosecute persons responsible for such serious violations: Statute of the Tribunal, Article 1.
62- Response, par 9. The decision of the Commission referred to is Ventura v Italy, report of European Commission of Human Rights of 15 Dec 1980, Application 7438/76, Decisions and Reports, Vol 23, p 5, in which a period of five years, seven months and twentyseven days was considered (at par 194). The decision of the Court referred to is the "Neumeister" Case, judgment of 27 June 1968, Series A, Judgments and Decisions, Vol 8. The prosecution asserts that, in this case, the Court found a period of three years pre-trial detention "to be in conformity with the ECHR": Response, par 9. That is not so. The relevant period considered by the Court was two years, two months and four days, and the finding of the Court was that Article 5(3) had been breached, as the length of the applicant's pre-trial detention had ceased to be reasonable once it became evident that appropriate guarantees for the applicant's return, if provisionally released, would meet the risk of absconding (pars 4, 6, 12, 15).
63- This degree of deference is explicitly recognised in the jurisprudence of the European Court of Human Rights, as the "margin of appreciation": Handyside Case, Series A, No 24, Judgment of 7 Dec 1976, at pars 48-49.

PROSECUTION INDEX OF AUTHORITIES

5. *Prosecutor v Mrda*, IT-02-59-PT, "Decision on Darko Mrda's Request for Provisional Release", 15 April 2002.

IN TRIAL CHAMBER II

Before:
Judge Wolfgang Schomburg, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar:
Mr. Hans Holthuis

Decision of:
15 April 2002

PROSECUTOR
v.
DARKO MRDA

DECISION ON DARKO MRDA'S REQUEST FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Nicholas Koumjian
Ms. Sureta Chana

Counsel for the Accused:

Mr. Vojislav M. Dimitrijevic

I. INTRODUCTION

A. Procedural history

1. Trial Chamber II 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 a motion entitled "Motion for Provisional Release of Darko Mrdja" ("Motion"), filed by the Defence for Darko Mrdja ("Defence") on 14 March 2003 in which the accused Mrdja seeks to be provisionally released to his family home in Prijedor in the Republika Srpska. Already by letter of 26 November, filed on 29 November 2002, the Government of Republika Srpska, Bosnia and Herzegovina, submitted guarantees relating to the request for provisional release of the accused Mrdja to the Tribunal.

2. The Office of the Prosecutor ("Prosecution") filed its partly confidential "Prosecution Response to Motion for Provisional Release" ("Response") on 25 March 2003, requesting that the Trial

Chamber deny Mr. Mrdja's application for provisional release.

3. Neither of the parties requested an oral hearing on the present Motion.

4. The accused Darko Mrdja is charged with extermination, murder and inhumane acts, as a crime against humanity and a violation of the laws or customs of war, in relation to the killing of approximately 200 non-Serb men on a road over Vlasic Mountain in August 1992. He was arrested on 13 June 2002 and entered an initial appearance on 17 June 2002, at which time he pleaded not guilty to all the charges against him.

B. Arguments of the parties

1. Arguments of the Defence

5. The Defence argues in the first place that, although it is aware of the seriousness of the offences, the accused is not charged on the basis of command responsibility under Article 7 (3) of the Statute, but under Article 7 (1), thus making the case against the accused a less complicated one.

6. The Defence submits that the accused was not aware of the existence of the indictment against him, prior to his arrest, and therefore had no opportunity to surrender voluntarily to the Tribunal.

7. The Defence refers to the guarantees provided by the authorities from the Republika Srpska and argues that, in addition to such guarantees, there is a strong presence of the international community in the Republika Srpska. The Defence further contends that the accused does not have any political influence in the Republika Srpska. All in all, this leads the Defence to the conclusion that the guarantees provided by the authorities from the Republik Srpska "are more credible than in most other cases" and that it "is very unlikely that competent authorities in Republika Srpska will not comply with taken responsibility".

8. The Defence also refers to personal circumstances of the accused which would support his commitment to comply with his obligations, if provisionally released . In the first place, it is argued that his family is faced with a difficult financial situation due to the fact that the accused is in pre-trial detention. In case of a provisional release, he would therefore not be in a material situation to escape from Prijedor. And in the second place, his nearly two year old son is suffering from a serious disease which requires intensive health care and health expenses.

9. The Defence further argues that the accused would not pose any danger to witnesses and victims. The survivors of the crime for which he is charged are publicly known . He has never tried to get in contact with them. And all potential witnesses, as far as their names have been disclosed to the Defence, are according to the Defence all living outside Prijedor municipality and Bosnia and Herzegovina.

10. The Defence in addition argues that no date has yet been fixed for the trial to start and that in light of the relevant international human rights provisions , pre-trial detention should be kept to a minimum.

11. According to the Defence, the accused will agree to any conditions the Trial Chamber might consider necessary for the provisional release. Moreover, the accused is willing to cooperate with the Prosecution "under conditions that will be agreed ".

1675

12. Lastly, the Defence submits that the presence of the accused in Prijedor would permit a more effective preparation of the defence case.

2. Arguments of the Prosecution

13. The Prosecution submits that the accused bears the burden of establishing that , if released he (i) will appear for trial and (ii) will not pose a danger to any victim, witness or other person. It further submits that even where the Defence has discharged its burden in this regard, under Rule 65 of the Rules the Trial Chamber has the discretion to refuse to order provisional release.

14. According to the Prosecution, the Chamber cannot be satisfied that the accused will appear for trial. The accused is charged with very serious crimes. He was in command of a police unit which, according to the Prosecution's case, perpetrated a massacre of approximately 200 men. If this case would be proven at trial, it will lead to a substantial sentence.

15. The Prosecution further submits that the Defence provides no evidence whatsoever for the alleged financial and family circumstances of the accused. The Motion does not provide any details about the financial situation of the accused or his family. There is no proof provided of any employment or income record of the accused prior to his arrest. Nor is there any official medical information supporting the alleged poor state of health of the accused's son.

16. As to the reliability of the information relating to the accused, the Prosecution observes that during the initial appearance of the accused, he has provided wrong information about his home address. Investigations into the address he had provided revealed that that address related to that of his father and sister and that he himself had not been living at that address since he got married several years before. Since he had left, he had moved residence four times. The Prosecution concludes that these factors affect the stability of the accused's personal circumstances and lead to fears for absconding if granted provisional release.

17. Finally, in relation to the question as to whether the accused will appear for trial, the Prosecution refers to the circumstances surrounding his arrest. According to the Prosecution, the statement of the accused that he had not been aware of the existence of an indictment against him, needs to be read in context with the fact that, when arrested by SFOR soldiers, the accused tried to resist this arrest and that a loaded pistol was found on him.

18. In relation to the second criterion, included in Rule 65 (B), i.e. that an accused will not pose a danger to any victim, witness or other person, the Prosecution expresses first of all its concern about the fact that the accused would, if released, return to Prijedor. As a former member of the Prijedor police, he can be considered a notorious figure, who has access to a vast amount of information. The return of the accused to Prijedor could have a deterring effect on victims and witnesses, who the Prosecution might want to call during this or other trials. The Prosecution is of the view that the accused would pose a grave danger to such persons and may attempt to intimidate witnesses in order to prevent them from testifying.

19. The Prosecution in addition considers that the guarantees provided by the authorities of the Republika Srpska are insufficient. In particular, it expresses serious concerns about the functioning of the police force, a factor of crucial importance in light of its fears that the accused may try to abscond if provisionally released.

20. All in all, the Prosecution concludes that, given the insufficient guarantees by the relevant

authorities, the lack of an own police force of the Tribunal, the need for the Tribunal to primarily rely upon international bodies to effect arrests on its behalf, the gravity of the crimes with which the accused is charged and the lack of sufficient information about his personal circumstances, the preconditions for provisional release, as laid down in Rule 65 (B) are not met and the Motion should be denied.

II. DISCUSSION

A. Applicable law

21. Rule 65 of the Rules sets out the basis upon which a Trial Chamber may order provisional release of an accused. It provides in relevant part:

> (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 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.
>
> (C) The Trial Chamber may impose such conditions upon the 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.
>
> [...]

22. Article 21(3) of the Statute of the Tribunal ("Statute") requires that the accused "be presumed innocent until proved guilty". This provision reflects international standards as enshrined in, *inter alia,* Article 14(2) of the International Covenant on Civil and Political Rights of 19 December 1966 (hereinafter "the ICCPR ") and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter "the ECHR"),

23. Moreover, Article 9(3) of the ICCPR emphasises, *inter alia*, that: "[i]t 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". Article 5(3) of the ECHR provides, *inter alia*, that: "[e]veryone arrested or detained [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial",

24. These human rights instruments form part of public international law.

25. As regards the ICCPR, it should be taken into account that the following parts of the former Yugoslavia are now United Nations Member States: Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Slovenia and Serbia and Montenegro. Amongst 149 States, they are parties to the ICCPR. As a tribunal of the United Nations, the Tribunal is committed to the standards of the ICCPR, and the inhabitants of Member States of the United Nations enjoy the fundamental freedoms within the framework of a United Nations court.

26. As regards the ECHR, Croatia, Bosnia and Herzegovina,[1] Slovenia, the former Yugoslav Republic of Macedonia and Serbia and Montenegro[2] are Member States of the Council of Europe. The Council of Europe represents, at present, 45 pan-European countries. Apart from Serbia and Montenegro, who recently [3] signed the ECHR, all Member States have ratified the Convention.[4]

27. The Tribunal is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and the innocent. Justice, however, also means respect for the alleged offenders' fundamental rights. Therefore, no distinction can be drawn between persons facing criminal procedures in their home country or on an international level. Additionally, a distinction cannot be drawn between the inhabitants of States on the territory of the former Yugoslavia, regardless of whether they are Member States of the Council of Europe.

28. Rule 65 must therefore be read in the light of the ICCPR and ECHR and the relevant jurisprudence.

29. The application of the aforementioned principles stipulates that, as regards prosecution before an international court, *de jure* pre-trial detention should be the exception and not the rule. Unlike national courts the Tribunal does not have its own coercive power to enforce its decisions, and for this reason pre-trial detention seems *de facto* to be rather the rule at the Tribunal. Additionally , one must take into account the fact that the full name of the Tribunal mentions "serious" crimes only. Nevertheless, leaving the aforementioned human rights unchanged but applying them specifically for the purposes of an international criminal court , Rule 65 of the Rules allows for provisional release. Any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention .[5] In view of this, the Trial Chamber must interpret Rule 65 of the Rules not in *abstracto* but with regard to the factual basis of the single case and with respect to the concrete situation of the individual applicant.

30. Pursuant to Rule 65(B) of the Rules, a Trial Chamber may order the provisional release of an accused "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 ."

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

B. Application of the law to the facts

32. The Trial Chamber will first inquire into the question whether the accused, if released, will appear for trial.

33. In considering this criterion, the following considerations, recently set out in the *Ademi* case, should be recalled:

> 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 . [...] it goes without saying that prior voluntary surrender of an accused is not without significance in the assessment of the risk that an accused may not appear for trial.[6]

34. In the present case, the Trial Chamber observes that the indictment against the accused was not publicly disclosed and that the accused, at the moment he was arrested on 13 June 2002 by SFOR, was not aware of the fact that an indictment had been issued against him. In his Motion, the accused indicates that he had therefore no opportunity to surrender voluntarily to the ICTY. He indicates furthermore that he fully recognizes the authority of the Tribunal. However, in its

1678

Response, the Prosecution makes it clear that, when he was arrested, he was carrying a loaded weapon and made an effort to resist his arrest. As far as the accused could have cooperated by immediately surrendering while arrested, the accused apparently chose to – unsuccessfully – try to resist his arrest. In the view of the Trial Chamber, this needs to be taken into account when assessing his request for provisional release.

35. In assessing whether an accused will appear for trial, the Trial Chamber also takes into account that the accused is charged with very serious crimes in relation to a massacre of which approximately 200 non-Serb men became victim. If the role of the accused could be proven by the Prosecutor, according to the charges laid down in the indictment, the accused may face a serious sentence. An accused that may face such a sentence could be attracted to attempt to subvert the proceedings by failing to present himself for trial. The Defence submits that the case against the accused is based on article 7 (1) and not on article 7 (3) of the Statute, thus making the present case a less complicated case compared with other cases in which provisional release has been granted. The Trial Chamber observes that the question as to whether a case is a more or less complicated one is not a relevant factor to be taken into account when deciding upon a request for provisional release. As far as this submission could be interpreted as meaning that a case based on article 7 (1) might be considered a less serious case than one based on article 7 (3), the submission fails as well. Whether an accused is considered criminally responsible under one of the modes of responsibility mentioned in article 7 (1) or one of those mentioned under article 7 (3), as such do not impact on the seriousness of the crimes for which the accused is charged.

36. Another aspect that needs to be taken into account is the guarantees provided by the government of the Republika Srpska in Bosnia and Herzegovina in support of this application for provisional release. As the Appeals Chamber has held, "as a matter of law and for the purposes of the Tribunal, an undertaking given by Republika Srpska qualifies for acceptance by the Trial Chamber, whether or not it is a sovereign State as defined in public international law".[7]

37. The Defence itself acknowledges that the guarantees of the Republika Srpska have in the past been treated with caution. However. the Defence refers to the fact that on 26 October 2001, the Law on Co-operation of the Republika Srpska with the Tribunal entered into force. The Trial Chamber has to observe though that the adoption of this law in itself has not led to a recognizable change in the performance of the Republika Srpska and its obligations towards the Tribunal. As the Appeals Chamber recently made clear, "Republika Srspka has so far failed to arrest any persons indicted by the Tribunal, ..."[8] Also the Defence seems to appreciate this factor, as it tries to convince this Chamber of the relevance of the guarantees by referring to the fact that in the Republika Srpska the international community, and in particular the Office of the High Representative (OHR) and the Stabilisation Forces (SFOR) have a broad mandate, which includes the execution of arrest warrants. The Trial Chamber is not convinced. Against the performance, or rather lack of performance, of the Republika Srspka, the guarantees provided can at best only be given a very limited substantive relevance.

38. The Trial Chamber finds itself unable to attach great importance to the Defence's comments on the accused's material and personal circumstances. The Trial Chamber agrees in this respect with the Prosecution, that these comments are entirely unsubstantiated. A mere allegation that the accused's family is faced with a difficult financial situation and that one of the two children needs medical attention does not convince this Chamber. Therefore, this Chamber is unable to follow the conclusion of the Defence that the accused, if provisionally released, would not be in a position to escape from the municipality of Prijedor. In this context, the Trial Chamber also expresses its serious concerns about the fact that the accused has been providing inaccurate

information about his whereabouts prior to his arrest. The fact that the accused has apparently been in a position to change from residence a couple of times over the last few years, leads this Chamber to the conclusion that nothing would stop the accused, if provisionally released, to do the same again in the future .

39. Moreover, the Trial Chamber is not satisfied, in relation to the second criterion set out in Rule 65 (B) that the accused, if released, "will not pose a danger to any victim, witness or other person". Quite to the contrary. If the accused would be provisionally released, he would return to Prijedor, close to where the crime for which he is charged has taken place. The accused has been a former police officer . It can therefore not be excluded that the accused may have, apart from public information about the names of the survivors of this crime, easy access to information about the whereabouts of such survivors or other witnesses or persons. The fear of the Prosecution in this context that the provisional release might have a deterring effect on victims and witnesses seems justified. The Defence argument that the accused has never tried to get in touch with surviving victims of the crime fails to convince the Trial Chamber. It moreover seems to contradict his argument that, prior to his arrest, the accused was not aware of the indictment against him. If the accused would now be provisionally released, with knowledge about the charges against him , it can not be excluded that he would take a different approach towards surviving victims. The Trial Chamber is consequently not convinced that he will not pose a danger to any victim, witness or other person.

40. This being said, the Trial Chamber in addition considers it necessary to decide whether or not an ongoing detention pending trial is proportional in the narrowest sense.

41. The Chamber observes that the accused has until now been detained for just over ten months and that there is, as yet, no date set for trial. Evidently, the length of pre-trial detention is one of the factors that must be considered in any application for provisional release. As was held by Trial Chamber I in the *Ademi* case:

> This issue may need to be given particular attention in view of the provisions of Article 9(3) of the ICCPR and Article 5(3) of the ECHR. This is all the more true , since in the system in the Tribunal, unlike generally in jurisdictions, there is no formal procedure in place providing for periodic review of the necessity for continued pre-trial detention.[9]

42. There is no doubt that an accused before this Tribunal is "entitled to trial within a reasonable time or to release (Article 9(3), sentence 1, of the ICCPR[10]) 'pending trial'" (Article 5(3) of the ECHR[11]), a requirement which is closely linked to the reasonable time requirement under Article 6 of the ECHR. Whether a time limit is appropriate can be evaluated only in light of all the circumstances of a given case, such as the complexity of the case, speed of handling, conduct of the accused, conduct of the authorities, no unjustified inertia[12], and no lack of adequate budgetary appropriations for the administration of criminal justice.[13]

43. Here, the duration of Mr. Mrdja's pre-trial detention to date has not yet exceeded those periods which the European Court of Human Rights or the Human Rights Committee has found to be reasonable for comparable cases of comparable weight in comparable circumstances. The Trial Chamber therefore concludes that the pre-trial detention of the accused is still proportional in its narrowest sense: this measure is suitable , necessary and its degree and scope remain in a reasonable relationship to the envisaged target.[14]

III. DISPOSITION

1680

44. For the foregoing reasons, this Trial Chamber denies Mr. Mrdja's application for provisional release of 14 March 2002.

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

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Judge Wolfgang Schomburg

Dated this fifteenth day of April 2003, Presiding
At The Hague
The Netherlands

[Seal of the Tribunal]

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1 - Bosnia and Herzegovina acceded to the CoE on 24 April 2002.
2 - Serbia and Montenegro acceded to the CoE on 3 April 2003.
3 - Serbia and Montenegro signed the ECHR on 3 April 2003.
4 - http://conventions.coe.int/Treaty/EN (ETS No. 005). The ECHR entered into force for Bosnia and Herzegovina on 12 July 2002.
5 - See *Ilijkov v. Bulgaria*, Application No. 33977/96, EcourtHR, Decision of 26 July 2001, par. 84. See http://hudoc.echr.coe.int
6 - *Prosecutor v. Ademi*, Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb. 2002.

7 - *Prosecutor v. Vidoje Blagojevic, Dragan Obrenovic, Dragan Jokic and Momir Nikolic*, Case No. IT-02-60-AR65.4, Decision on Provisional Release Application by Blagojevic, 17 February 2003, paragraph 3.
8 - Ibid, paragraph 18.
9 - *Prosecutor v. Ademi*, Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb. 2002.

10 - See Nowak, CCPR Commentary, p. 177 – 78.
11 - See *Peukert in Frowein & Peukert*, EMRK-Kommentar, 2. Auflage, pp. 125 – 134.
12 - Robert Kolb, The Jurisprudence of the European Court of Human Rights on Detention and Fair Trial in Criminal Matters from 1992 to the end of 1998 in Human Rights Law Journal, Vol. 21 No. 9-12, 31 December 2000, pp. 348, 363 – 65.
13 - *Fillastre and Bizouain v. Bolivia*, Committee No. 336/1998, para. 6.5.
14 - See paragraph 31 supra.

PROSECUTION INDEX OF AUTHORITIES

6. *Prosecutor v Ademi*, IT-01-46-PT, "Order On Motion For Provisional Release", 20 February 2002.

IN THE TRIAL CHAMBER

Before: Judge Daquin Liu, Presiding

Judge Amin El Mahdi

Judge Alphons Orie

Registrar:
Mr. Hans Holthuis

Order of:
20 February 2002

THE PROSECUTOR

v.

RAHIM ADEMI

ORDER ON MOTION FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Mark Ierace

Defence Counsel:

Mr. Cedo Prodanovic

I. Background

This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the "Tribunal") is seised of the "Motion for Provisional Release" filed on behalf of the accused Rahim Ademi (the "Accused") on 14 December 2001 (the "Motion") pursuant to Rule 65 of the Rules of Procedure and Evidence of the International Tribunal (the "Rules").[1]

The Accused requests that he be provisionally released and the Prosecution opposes his application.

3. Although the arguments raised by the Accused are considered in greater detail below, in general, he argues that "there are sufficient grounds to reasonably believe that, if provisionally released, [he] will appear for trial and will pose no danger to victims, witnesses or any other person."[2] The Accused

1683

supports the Motion with three attached documents: his own personal undertakings (Exhibit A); written guarantees provided by the Government of the Republic of Croatia (Exhibit B); and a supporting letter from the President of the Republic of Croatia (Exhibit C). The Trial Chamber has also received a letter, dated 28 December 2001, from the Mayor of Split to the President of the Tribunal, sent on behalf of the citizens of the city of Split requesting that the Accused "be freed from detention and provide his testimony liberally." Finally, at the hearing held on 1 February 2002, a delegation from the Republic of Croatia including Vice-President Granic, attended. Further information was provided by the latter in support of the Motion to the Trial Chamber.

4. In the "Prosecutor's Response to the Defence Motion for Provisional Release," filed 21 December 2001 (the "Prosecution Response"), the Prosecution objects to the Motion on the basis of the Accused's "failure to demonstrate to the satisfaction of the Trial Chamber that if released provisionally, he will 'appear for trial' and 'will not pose a danger to any victim, witness or other person."[3] It maintains that:

in view of the seriousness of the charges against the Accused, and consequently, the likelihood of a heavy sentence if they are proved, it is likely that the Accused will fail to appear for trial;

the strength of the evidence against the Accused (which is now known to him) is an important factor which may motivate him to abscond;

there "remains potential" for the Accused to influence victims, witnesses and other persons, while the Accused's high military rank will enable him to easily influence others to do so[4];

the guarantees offered by the Government of the Republic of Croatia are insufficient , since they have been made in general terms, while the lack of co-operation by the Government of the Republic of Croatia is well known (citing as an example the recent failure to arrest the accused Ante Gotovina);

should the Accused manage to re-locate himself outside Croatia, the Government of Croatia would be unable to secure his appearance before the International Tribunal ;

although voluntary co-operation, should an accused choose to offer it, is a factor that should be taken into account in assessing an accused's attitude, the extent of the Accused's co-operation with the Prosecution has been minimal.

5. The Prosecution further submits that should its arguments be rejected by the Trial Chamber, alternative more detailed guarantees (set out in the Prosecution Response), should be requested from either or both the Government of the Republic of Croatia and the Accused.

6. The Host Country does not object to the Motion, on the understanding that the Accused, if released, will be leaving the Netherlands.[5]

7. As mentioned above, oral argument on the Motion was held on 1 February 2002 and both parties together with Vice-President Granic put forward submissions.[6]

II. Applicable law

8. Rule 64 of the Rules provides in relevant part: "Upon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country."

1684

9. Rule 65(A) and (B) of the Rules set out the basis upon which a Trial Chamber may order the provisional release of an accused:

> (A) Once detained, an accused may not be released except upon an order of a Trial 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, witnesses or other person.

10. The Prosecution contends that although Rule 65(B) was amended in December 1999 , removing the requirement for an accused to show exceptional circumstances before provisional release could be granted,[7] the burden of proof remains on the accused to establish that he or she will not pose a danger to any victim, witness or other person and that he or she will appear for trial. It maintains that this burden is a substantial one.

11. The amendment of Rule 65 has resulted in various interpretations by Trial Chambers as to what the requirements of the Rule now are and how they should be satisfied . Consequently, this Trial Chamber feels it should set out how in its view, the question of detention and Rule 65(B) should be construed.

A. Amendment of Rule 65(B) of the Rules

12. In addition to those that are still included, Rule 65(B) originally included a requirement that provisional release could be ordered by a Trial Chamber "only in exceptional circumstances." Under this rule it seemed that detention was considered to be the rule and not the exception. However, some decisions issued by Trial Chambers concluded that the fact that the burden was on the accused and that he or she had to show that exceptional circumstances existed before release could be granted, was justified given the gravity of the crimes charged and the unique circumstances in which the Tribunal operated.[8]

13. The requirement to show "exceptional circumstances" meant that in reality Trial Chambers granted provisional release in very rare cases. These were limited to those where for example, very precise and specific reasons presented themselves which leant strongly in favour of release. Thus, for example, Trial Chambers, before the amendment was adopted, accepted that a life-threatening illness or serious illness of the accused or immediate family members constituted exceptional circumstances justifying release, while illnesses of a less severe nature did not.[9] As stated, the burden remained on an accused at all times to demonstrate to the satisfaction of the Trial Chamber that such circumstances existed. Should the Trial Chamber conclude that they did not, release would not be ordered.

14. After amendment of the rule, an accused no longer needed to demonstrate that such "exceptional circumstances" existed. Trial Chambers seem to have taken two approaches to the new provision. Most Trial Chambers have continued to find that the amendment did not change the other requirements in the Rule and that provisional release was not now the norm. They considered that the particular circumstances of each case should be assessed in light of Rule 65(B) as it now stood.[10] The burden still remained on the accused to satisfy the Trial Chamber that the requirements of Rule 65(B) had been met.[11] This was justified by some given the specific functioning of the Tribunal and absence of power to execute arrest warrants.[12] The second approach seems to have been the following. It has been concluded that based on international human rights standards, "*de jure* pre-trial detention should be the exception and not the rule as regards prosecution before an international court."[13] The Trial Chamber in question

referred to the fact that, at the Tribunal, in view of its lack of enforcement powers , "pre-trial detention *de facto* seems to be...the rule."[14] In addition, it stated that one must take account of the reference to serious crimes . Nevertheless, it found that, "any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention (see *Ilijkov v. Bulgaria* , ECourtHR, Decision of 26 July 2001, para. 84). Considering this, the Trial Chamber must interpret Rule 65 with regard to the factual basis of the single case and with respect to the concrete situation of the individual human being and not *in abstracto*."[15]

B. Effect of the Amendment of Rule 65 of the Rules

15. This Trial Chamber wishes to approach the question from two angles. First, on a point of procedure and second, with regard to interpretation of Rule 65(B) itself and how and when an accused can be provisionally released.

i. Procedural aspect

16. As to the first point, this Trial Chamber wishes to clarify the procedure for consideration by a Trial Chamber of detention and release of an accused. Proceedings with regard to an accused commence with review and confirmation of the indictment pursuant to Article 19 of the Statute and Rule 47 of the Rules. Generally speaking , once an indictment has been confirmed, an arrest warrant will be issued by the same Judge including an order for prompt transfer of the accused to the Tribunal upon arrest.[16] The arrest warrant provides the legal basis for detention of the accused as soon as he or she is arrested [17] and, upon being transferred to the seat of the Tribunal, Rule 64 provides that "the accused shall be detained in facilities provided by the host country, or by another country."

17. Rule 62 of the Rules provides that "?ugpon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber . The accused shall be brought before that Trial Chamber or a permanent Judge thereof without delay, and shall be formally charged." The Rule sets out the issues, which should be raised during this initial appearance. The issue of detention is not specifically included, most probably given the fact that the text of Rule 65(B) as it stood at that time meant that an accused could only be released in "exceptional circumstances ." Rule 65(A) provides that "?ognce detained, an accused may not be released except upon an order of a Chamber." As the accused is already detained as a result of the arrest warrant that has been issued, detention will continue unless further order is made. During the initial appearance, the Trial Chamber generally orders orally that detention will continue until further order and in some cases an order for detention on remand is formally issued.[18] The fact of detention and the reasons for it are rarely, if at all, raised as issues to be discussed at the initial appearance. Nevertheless, this Trial Chamber believes that an accused or indeed the Trial Chamber *proprio motu* is entitled to raise the matter of the accused's detention at this hearing, being his or her first before the Tribunal. This is so, in particular in view of this Trial Chamber's interpretation of the consequences of the amendment of Rule 65 which will be discussed below (including the fact that detention should not be considered to be the rule). Should the question of detention be raised at this time,[19] the provisions of Rule 65 will of course apply and must be satisfied before a Trial Chamber would in any event order release. Indeed, it may be, and is likely that, a Trial Chamber would adjourn the question in order to schedule a later hearing for arguments to be put or for filings to be received, in addition in view of the requirement to hear from the host country.

ii. Interpretation of Rule 65(B) of the Rules

18. The amendment of Rule 65 left one matter of procedure and two express pre-conditions that must be

met before a Trial Chamber will order provisional release.[20] As a matter of procedure, the Trial Chamber is required to hear from the host country . Thereafter release may be ordered only if the Trial Chamber is satisfied that the accused will both appear for trial and if released, pose no risk to any victim , witness or other person. However, as mentioned above, Rule 65 previously stipulated that notwithstanding satisfaction of these two criteria, provisional release was only to be granted in "exceptional circumstances." Detention was therefore in reality the rule. This Trial Chamber believes that removal of this requirement has had the following effect. It has neither made detention the exception and release the rule , nor resulted in the situation that despite amendment, detention remains the rule and release the exception. On the contrary, this Trial Chamber believes that the focus must be on the particular circumstances of each individual case,[21] without considering that the outcome it will reach is either the rule or the exception . Its task must rather be to weigh up and balance the factors presented to it in that case before reaching a decision. It may be that some unique circumstances of this Tribunal may weigh against a decision being taken to provisionally release (see below). Nevertheless, they must still be considered in the context of the individual case and facts presented, in order for the correct balance to be struck.

19. Consequently, this Trial Chamber does not believe that recourse to a so-called "rule-exception" system provides it with assistance in reaching a decision. As to the question of the burden of proof in satisfying the Trial Chamber that provisional release should be ordered, it is the case that in an application under Rule 65, this rests on the accused. This does not, however, exclude intervention by, for example, the Trial Chamber, should it for whatever reason require more information regarding what it may suspect is a factor that should or may result in a change in the detention situation of the accused (either with regard to modification of the conditions of detention under Rule 64, or, in the context of an application for provisional release under Rule 65). A Trial Chamber may seek this information either by ordering a party to supply it or by obtaining the information itself.

20. The Trial Chamber turns now to consider how the decision to release or maintain detention should be taken. First, it is useful to recall a decision issued by the European Court of Human Rights, in which it specifically acknowledged the existence of cases where continued detention may be justified. The Court stated that,

> ...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. Any system of mandatory detention on remand is *per se* incompatible with Article 5 § 3 of the Convention....Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention.... the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.[22]

Continued detention is therefore not prohibited. Nor does it have the nature of a sanction. Its purpose is to ensure the presence of the accused at trial, to preserve the integrity of victims and witnesses and to serve the public interest.

21. This Trial Chamber consequently considers that, as a general rule, a decision to release an accused should be based on an assessment of whether public interest requirements, notwithstanding the presumption of innocence, outweigh the need to ensure, for an accused, respect for the right to liberty of person. This balancing exercise is carried out as follows. First, it should be considered whether the two express pre-conditions laid down in Rule 65(B) have been met. These pre-conditions are cumulative. That is, if the Trial Chamber is not convinced that the accused will both appear for trial and not pose a risk to any victim, witness or other person , a request for provisional release must be denied.

1687

22. However, even if these requirements are met, this Trial Chamber does not believe that it is obliged to release the accused.[23] In this regard, it agrees with the interpretation that a Trial Chamber will still retain a discretion not to grant provisional release even if it is satisfied that the accused will appear for trial and will not pose a danger to any victim, witness or other person.[24] This applies even if the Prosecution does not object to the application for release. Consequently, the express requirements within Rule 65(B) should not be construed as intending to exhaustively list the reasons why release should be refused in a given case. There may be evidence of obstructive behaviour other than absconding or interfering with witnesses, which a Trial Chamber finds necessary to take into account. For example: the destruction of documentary evidence; the effacement of traces of alleged crimes; and potential conspiracy with co-accused who are at large. In addition, factors such as the proximity of a prospective judgement date or start of the trial may weigh against a decision to release. The public interest may also require the detention of the accused under certain circumstances, if there are serious reasons to believe that he or she would commit further serious offences.

iii. Factors relevant to the decision-making process

23. 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 assessment of the probability of the risk of absconding or interfering with witnesses. These factors would as such be neither decisive nor negligible in individual cases and must be considered in the context of all the information presented to the Chamber. They may however become decisive if they strongly support the risk that an accused will either fail to attend court or interfere with witnesses (as expressly mentioned in Rule 65(B)) and if the Chamber can find no counter-balancing circumstances in the particular case before it. These factors include the following.

24. 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. In this regard, it goes without saying that prior voluntary surrender of an accused is not without significance in the assessment of the risk that an accused may not appear for trial.

25. Second, the fact that the Tribunal's jurisdiction is limited to serious offences ("serious violations of international humanitarian law"[25]), means that accused may expect to receive, if convicted, a sentence that may be of considerable length.[26] This very fact could mean that an accused may be more likely to abscond or obstruct the course of justice in other ways.

26. Third, the duration of pre-trial detention is a relevant factor to be considered when deciding whether or not detention should continue. The complexity of the cases before the Tribunal and the fact that the Tribunal is located at great distance from the former Yugoslavia means that pre-trial proceedings are often lengthy. This issue may need to be given particular attention in view of the provisions of Article 9 (3) of the ICCPR and Article 5(3) of the ECHR.[27] This is all the more true, since in the system in the Tribunal, unlike generally that in national jurisdictions, there is no formal procedure in place providing for periodic review of the necessity for continued pre-trial detention. Consequently , if in a particular case detention is prolonged, it could be that, in a given case , this factor may need to be given more weight in considering whether the accused in question should be provisionally released.

1688

27. 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; or a change in the health of the accused or immediate family members. In addition, other Trial Chambers have taken into account: the accused's substantial co-operation with the Prosecution; guarantees offered by the accused and his or her government; and changes in the international context.

28. In light of the above analysis, the Trial Chamber turns now to examine the material put forward by the Accused and consider whether it is satisfied in this case that the Accused should be provisionally released. In doing so, it recalls that a determination as to whether release is to be granted must be made in light of the particular circumstances of each case and taking into account the considerations set out above.

III. The material put forward by the Accused

29. The Accused submits that the fact that he voluntarily surrendered to the custody of the Tribunal and provided his written undertakings, are "the greatest guarantees that he will not abuse the trust given by the Tribunal in any way" should he be released.[28] He maintains that his "recent private and professional life" and "his honour and honesty of a soldier and his quality of keeping promises, which were never questioned, are the guarantees of most important significance that (if released(he will appear for trial... and that he will not pose any danger to any victim, witness or any other person..."[29] With regard to the latter, he emphasises that he will not be in a position to influence witnesses[30] or obstruct justice and states that "he recognises that to do so would harm the very people to whom he has dedicated his professional life."[31]

30. The Trial Chamber notes, and takes due account of, the written undertaking filed by the Accused and his own oral submissions during the hearing. The Accused has stated, *inter alia*, that he "consistently hold?sg that the Tribunal is the only authority where the defence from such serious charges...should be presented."[32] He declared, *inter alia,* that: he will appear for trial and respond to any summons of the Tribunal; he will not influence any witnesses or obstruct justice in any way; and he will obey any order of the Trial Chamber.[33] In particular, he stated that he would "abide by all the decisions and orders of the court regarding the terms of ?hisg provisional release." [34]

31. The Accused further argued that his trial would not start before the beginning of 2003, meaning that he would remain in custody for up to one and a half years, despite his voluntary surrender.[35] Although the question was also addressed by the Government of Croatia, during his oral submissions Counsel for the Accused commented on the level of co-operation by the Government of Croatia. He stated that it was "absolutely satisfactory."[36] He referred to legislation that had been adopted and institutions for co-operation that had been set up in the region. Concerning evidence of co-operation he stated that "since April 2000, the Government of Croatia handed over to the ICTY 7.000 documents, that access was given to the archives of the Republic of Croatia, where it was made possible for them to photocopy 10.000 documents. A request was also put forth to obtain documents related to the Medecki Dzep (phoen) action, and these are 930 documents, and the government is going to provide these documents related to the Medak Pocket to the Tribunal within 90 days at the latest."[37] The latter was clarified later to be 846 documents.[38]

32. The Prosecution relied on its written filings (which are referred to above), clarifying several points during oral argument. It submitted that apart from the fact that he had voluntarily surrendered, the Trial

1689

Chamber should look to see what the Accused had actually done in terms of co-operation. Since he has now seen the evidence against him, it stated that he has more reason not to appear. In terms of his assertions of co-operation, the Prosecution referred to the fact that the Accused stated that had he known that as early as 1998 the Prosecution wished to question him, he would have done so. Despite this, he has maintained his right to silence. The Prosecution states that it is the Accused's right to not co-operate fully, but that "he cannot, at the same time, claim, in support of his application for provisional release, to have cooperated fully."[39] It maintains that, had the Accused chosen to fully co-operate with the Prosecution , "it would have entitled ?himg to a far greater degree of sympathy in his application ."[40]

33. It is emphasised that lack of co-operation of an accused should not, as a rule , be taken into consideration as a factor, which could lead a Trial Chamber to deny an application for provisional release. The alternative would easily result in infringement of the fundamental right of an accused to remain silent.

34. The Accused relies on the written (and later the oral) guarantees provided by the Government of the Republic of Croatia including its assurance that it will guarantee that the Accused will appear for trial and will not pose a danger to victims and witnesses. In its written guarantee, the Government has stated that it will "obey all the possible orders of the ?Tribunalg regarding" the appearance of the Accused and will "carry out all the necessary measures" to ensure that the Accused will appear at trial and will not pose a danger to any victim, witness or other person . It stated that it was "ready to give additional help of any kind and all possible necessary guarantees to help the request for provisional release."[41]

35. The Prosecution contends that the difficulty with these guarantees relates to lack of co-operation between the Republic of Croatia and the Tribunal. It referred to a failure to expeditiously arrest the accused Ante Gotovina while the sealed indictment was served to the Republic of Croatia, who since relocated to a third country. Although there has been some improvement in the area of documents, it disagreed with an assertion that there is full cooperation.[42] Lack of co-operation had been evident in the provision of documents, which it states caused considerable difficulty.[43] However, it acknowledged that in this regard, the situation had begun to improve .[44]

36. The Government of the Republic of Croatia refuted in general the allegations made by the Prosecution concerning lack of co-operation. It stated that as far as it was concerned "cooperation with The Hague Tribunal is of crucial importance. The Croatian government will comply with all requests from this Tribunal."[45] It stated that issues had been resolved and many were in the process of resolution .[46] It submitted that it would provide "guarantees that Mr. Ademi will not be performing any official duties. The Croatian government provides guarantees that it will undertake all technical steps necessary , and which are named... so that General Ademi remains in Croatia and that each time he is able to respond to any summons by this Court, and he will comply with the wishes of the Tribunal."[47] With regard to the particular issue of provision of documents, it rejected the Prosecution's assertions. It indicated that, prior to the hearing, it had reviewed, together with the Prosecution in Zagreb, all requests that had been made and their status as to whether they had been fulfilled. It stated that "it was determined jointly that there isn't any question of any kind of blockade."[48] In particular it referred to "mention ...about 846 documents which have been obtained during access to 107 record books and also records of the units of the Croatian army or war logs. The Croatian government, 15 days ago, informed the Zagreb office that these documents have been prepared, but they have not yet been taken over, so this is not our problem but a problem of the office of the Prosecutor."[49]

37. With regard to the last issue and the documents which the Government of Croatia asserted had been

provided to, but not retrieved by, the Prosecution, the latter was unable to clarify the position to the Trial Chamber during the hearing.[50] However, the Trial Chamber notes the letter dated 17 January 2002 from the Croatian liaison officer to the Tribunal, Mr. Orsat Miljenic, and addressed to the Prosecution , confirming compliance by the Republic of Croatia with a request for access to documents. It is therefore noted that it does not appear that the Prosecution made an expeditious effort to retrieve these documents.[51]

38. As a whole, the Trial Chamber is satisfied with the assurances that have been put forward by the Government of the Republic of Croatia. In particular, that the Accused will be closely monitored in order that he will reappear for his trial and not pose a danger to any victim, witness or other person.[52] The Trial Chamber is also satisfied with the undertakings made by the Accused. The Trial Chamber notes that it does not appear likely that the trial of the Accused will start soon.

39. 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 the Accused should be provisionally released.

40. Pursuant to Rule 65(C) of the Rules, the Trial Chamber "may impose such conditions upon the 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." It is noted that the Accused has consented to the imposition of any conditions necessary. Among the conditions to be imposed, this Trial Chamber intends to order that the Accused must not discuss the case with anyone, except his counsel. This order will include a prohibition on any contact with the media. In addition, the Accused will be prohibited from occupying any official function.[53] Generally, the conditions listed below aim at ensuring that the Accused will not abscond and that he will not interfere with the administration of justice in this case.

IV. Disposition

PURSUANT TO Rules 54 and 65 of the Rules,

THIS TRIAL CHAMBER

HEREBY GRANTS the Motion **AND ORDERS** the provisional release of Rahim Ademi on the following terms and conditions:

ORDERS the Accused:

1) to remain within the confines of the municipality of his chosen residence in the Republic of Croatia as communicated in point 3) below;

2) to surrender his passport to the Ministry of the Interior of the Republic of Croatia ;

3) to report the address at which he will be staying to the Ministry of Interior and the Registrar of the Tribunal, and not to change his address without seven days prior notification to the said Ministry and the Registrar of the Tribunal;

4) to report once a week to the local police;

5) to consent to having his presence checked, including by occasional, unannounced visits by the

1691

Ministry of Interior, or officials of the Government of the Republic of Croatia with the local police, or by a person designated by the Registrar of the Tribunal;

6) not to have any contact whatsoever or in any way interfere with victims or potential witnesses or otherwise interfere in any way with the proceedings or the administration of justice;

7) not to discuss the case with anyone, other than counsel including not to have any contact with the media;

8) not to have any contact with any other accused;

9) to comply strictly with any requirements of the authorities of the Government of the Republic of Croatia necessary to enable them to comply with their obligations under this Order;

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

11) to comply strictly with any order of the Trial Chamber varying the terms of, or terminating, the provisional release;

12) not to occupy any official position within the Republic of Croatia;

13) to report to the Registrar of the Tribunal, within three days of the start of employment or occupation, if any, the position occupied, as well as the name and address of the employer.

INFORMS the Accused that he shall, at any time, be entitled to bring any matters to the attention of the Trial Chamber and to request a modification of the terms and conditions of the Order, while reminding the accused that until such modification , if any, is made, the conditions set out in this Order shall apply in full.

REQUIRES the Government of the Republic of Croatia, including the local police , to:

1) ensure compliance with the conditions imposed on the Accused by the Trial Chamber ;

2) ensure that all expenses for transport of the Accused from the Dutch territory to his place of residence and back are covered;

3) upon the accused's release at Schiphol airport (or any other airport within the territory of the Kingdom of the Netherlands), have a designated official of the Government of the Republic of Croatia take custody of the Accused from the Dutch authorities and accompany the Accused for the remainder of his travel to his place of temporary residence;

4) ensure that a designated official of the Government of the Republic of Croatia accompanies the Accused on his return flight to the Kingdom of the Netherlands after termination of the provisional release upon an order of the Tribunal and hands the Accused over to the Dutch authorities in the Kingdom of the Netherlands at a date place and time to be determined by the Trial Chamber;

5) at the request of the Trial Chamber or of the parties to the case, facilitate all means of cooperation and communication between the parties and ensure the confidentiality of any such communication;

6) not to issue to the Accused any new passport or documents enabling him to travel ;

1692

7) monitor on a regular basis the presence of the Accused at the address communicated to the Registry of the International Tribunal and maintain a log of such reports ;

8) submit a written report, including *inter alia* the findings of the reports mentioned under point 7), to the Trial Chamber each month as to the compliance of the accused with the terms and conditions of this Order;

9) provide for the personal security and safety of the Accused while on provisional release;

10) report immediately to the Registrar of the International Tribunal the substance of any threats to the security of the Accused, including full reports of investigations related to such threats;

11) immediately arrest the Accused should he breach any of the terms and conditions of his provisional release and report immediately any such breach to the Trial Chamber .

REQUESTS the Registrar of the International Tribunal to:

1) consult with the Ministry of Justice of the Netherlands as to the practical arrangements for the Accused's release;

2) keep the Accused in custody until relevant arrangements are made for his travel;

3) transmit this Order to the competent governments.

REQUESTS the Dutch authorities to:

1) transport the Accused to Schiphol airport (or any other airport in the Kingdom Netherlands) as soon as practicable;

2) at this airport, provisionally release the Accused into the custody of the designated official of the Republic of Croatia;

3) on the Accused's return, take custody of the Accused at a place, date and time to be determined by the Trial Chamber and transport the Accused back to the United Nations Detention Unit.

REQUESTS the authorities of the States through whose territory the Accused may travel to:

1) hold the Accused in custody for any time he will spend in transit at the airport ;

2) arrest the Accused and detain him pending his return to the United Nations Detention Unit, should he attempt to escape.

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

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Judge Liu,

1693

President of Trial Chamber I

Dated this twentieth day of February 2002
At The Hague,

The Netherlands

[Seal of the Tribunal]

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1 - The Motion was filed immediately prior to the judicial recess in December 2001 and therefore placed before the Duty Judge, Judge Alphons Orie, in accordance with Rule 28 of the Rules. Rule 28(D) of the Rules provides that "[t]he duty Judge may, in his or her discretion, if satisfied as to the urgency of the matter, deal with an application in a case already assigned to a Chamber out of normal Registry hours as an emergency application." In the "Decision on the Defence Motion for Provisional Release" issued on 21 December 2001, Judge Orie remitted the Motion to the Trial Chamber seized of the case to decide on the merits.
2 - The Motion, para. 3.
3 - The Prosecution Response, p. 2.
4 - The Prosecution Response, p. 9.
5 - Letter from the Ministry of Foreign Affairs, dated 21 December 2001 and filed on 10 January 2002.
6 - The Accused had filed the "Defence Motion for Hearing of the Representative of the Government of the Republic of Croatia," on 9 January 2002, requesting that the Trial Chamber call the said representative to provide further information on the guarantees that would be offered.
7 - Rule 65 (B) of the Rules was amended during the twenty-first Plenary Session held between 15-17 November 1999. The amendment entered into force on 7 December 1999 (*See* IT/161).
8 - *See*, e.g., *Decision on motion for provisional release filed by the accused Zejnil Delalic*, *Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, 25 September 1996. In the same case: *Decision on motion for provisional release filed by the accused Hazim Delic*, 24 October 1996. See also generally: *Decision rejecting a request for provisional release,* Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, 25 April 1996 ("the Rules have incorporated the principle of preventive detention of accused persons because of the extreme gravity of the crimes...and, for this reason, subordinate any measure for provisional release to the existence of 'exceptional circumstances'"); and, in the same case *Order denying a motion for provisional release*, 20 December 1996 ("both the letter of this text [Rule 65] and the spirit of the Statute...require that the legal principle is detention of the accused and that release is the exception"); *Decision on motion for provisional release filed by Zoran Kupreskic, Mirjan Kupreskic, Drago Josipovic and Dragan Papic*, Prosecutor v. Kupreskic et al., Case No. IT-95-16-PT, 15 December 1997; *Decision denying a request for provisional release*, Prosecutor v. Aleksovski, Case No. IT-95-14/1-PT, 23 January 1998 (By considering the extreme gravity of crimes against humanity, the Rules thus establish a presumption of detention according to which detention is the rule and provisional release the exception.").
9 - In the following cases, release was ordered by the Trial Chamber for humanitarian reasons: *Decision by Trial Chamber I rejecting the application to withdraw the indictment and order for provisional release*, Prosecutor v. Djukic, Case No. IT-96-20-T, 24 April 1996; *Decision on provisional release of the accused*, Prosecutor v. Simic et al., Case No. IT-95-9-PT, 26 March 1998; *Decision on the motion of defence counsel for Drago Josipovic (request for permission to attend funeral)*, Prosecution v. Kupreškic et al., Case No. IT-95-16-T, 6 May 1999.
10 - See for example: *Decision on motion by Radoslav Brdanin for provisional release*, Prosecutor v. Brdanin et al., Case No. IT-99-36-PT, 25 July 2000 ("Brdanin"); *Decision on motion by Momir Talic for provisional release*, Prosecutor v. Brdanin et al., Case No. IT-99-36-PT, 28 March 2001 ("Talic"); *Decision on motion for provisional release of Miroslav Kvocka*, Prosecution v. Kvocka et al., Case No. IT-98-30-PT, 2 February 2000; *Decision on Momcilo Krajisnik's notice of motion for provisional release*, Prosecution v. Krajisnik et al., Case No. IT-00-39 and 40, 8 October 2001 ("*Krajisnik*"). In the latter decision, the Trial Chamber stated that "the change in the Rule does not alter the position that provisional release continues to be the exception and not the rule." Para. 12.
11 - *See* for example, *Krajisnik*, paras. 12 – 13; *Brdjanin*, para. 13; *Talic*, para. 18.
12 - For example, *Talic*, para. 18; *Krajisnik*, paras. 12 - 13.
13 - *Decision granting provisional release to Amir Kubura*, Prosecutor v. Enver Hadzihasanovic et al., Case No. IT-01-47-PT, 19 December 2001, para. 7. Identical decisions with regard to the law were issued on the same day in the same case with regard to the two other accused.
14 - *Decision granting provisional release to Amir Kubura*, Prosecutor v. Enver Hadzihasanovic et al., Case No. IT-01-47-PT, 19 December 2001, para.7.
15 - *Ibid.*
16 - Such arrest warrants are issued pursuant to Article 19 of the Statute and Rules 47 and 55 of the Rules.
17 - *See* also, *Decision on Motion by Momir Talic* for Provisional Release, Prosecution v. Brdjanin et al., Case No. IT-99-36-

PT, 28 March 2001, para. 21: "The detention of an accused person is justified in accordance with the Tribunal's procedures by the issue of the arrest warrant, which in turn is justified by the review and confirmation of the indictment which is served." In addition, *Decision on Motions by Momir Talic (1) to dismiss the indictment, (2) for release, and (3) for leave to reply to response of prosecution to Motion for Provisional Release*, Prosecution v. Brdjanin et al., Case No. IT-99-36-PT, 1 February 2000, para. 21: "According to the Tribunal's 'procedures [...] established by law', therefore, the only actions by the Tribunal which are necessary to justify the detention of the accused are the review and the confirmation of the indictment and the issue of the arrest warrant."

18 - In the *Decision on Motions by Momir Talic (1) to dismiss the indictment, (2) for release, and (3) for leave to reply to response of prosecution to Motion for Provisional Release*, Prosecution v. Brdjanin et al., Case No. IT-99-36-PT, 1 February 2000, para. 21, Judge Hunt stated that the order for detention in that case was "strictly, otiose."

19 - Parties may also simply notify the Chamber at this time that they intend to file an application for provisional release. *See* e.g., *Prosecutor v. Miodrag Jokic*, Case No. IT-01-42-PT, Transcript of 14 November 2001 (initial appearance), pp. 52 – 53.

20 - As has been stated, although the requirement to show exceptional circumstances has been removed, this does not affect the remaining provisions of the Rule.

21 - *See* also as examples of acceptance of this criteria: *Decision on Simo Zaric's application for provisional release*, Prosecution v. Simic et al., Case No. IT-95-9-PT, 4 April 2000; *Decision on Miroslav Tadic's application for provisional release*, Prosecution v. Simic et al., Case No. IT-95-9-PT, 4 April 2000; *Decision on Milan Simic's application for provisional release*, Prosecution v. Simic et al., Case No. IT-95-9-PT, 29 May 2000. *Decision on request for pre-trial provisional release*, Prosecution v. Halilovic, Case No. IT-01-48-PT, 13 December 2001; *Decision on Biljana Plavsic's application for provisional release*, Case No. IT-00-39 and 40-PT, 5 September 2001; *Brdjanin; and Talic*. In the last two cases, the Trial Chamber stated: "The particular circumstances of each case must be considered in the light of the provisions of Rule 65 as it now stands."

22 - Decision of the European Court of Human Rights, dated 26 July 2001 in the case *Ilijkov v. Bulgaria* (Application No. *33977/96*.

23 - The Trial Chamber refers in particular to the use of the word "may" in Rule 65(B) of the Rules and considers that based on an interpretation of this provision, provisional release is not mandatory upon satisfaction of the two express pre-conditions.

24 - *See* for example, *Krajisnik;* and *Brdjanin*.

25 - Article 1 of the Statute.

26 - Although not inconceivable, it is difficult to imagine that an accused may be charged with offences that may meet the requirements of Articles 2, 3, 4 or 5 of the Statute, but *in concreto* are in fact of a less serious nature. One example however is the case of plunder as considered in: Judgement, *Prosecutor v. Delalic et al.* Case No. IT-96-21-T, 16 November 1998, para. 1154.

27 - International Covenant on Civil and Political Rights (1966) and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), respectively.

28 - The Motion, para. 8 *See* also generally, Transcript, 1 February 2002, pp. 79 – 80.

29 - The Motion, para. 8.

30 - He states that most of them live either outside Croatia or those that live in Croatia are persons he could have had contact with during the past years but who he neither tried to influence nor pose any danger. He submits that he will not pose a danger to any of them in the future. The Motion, para. 9. *See* also, Transcript, 1 February 2002, pp. 43 – 44.

31 - The Motion, para. 11.

32 - The Motion, Exhibit A, para. 3.

33 - The Motion, Exhibit A, para. 4.

34 - Transcript, 1 February 2002, p. 80.

35 - Transcript, 1 February 2002, p. 44.

36 - Transcript, 1 February 2002, p. 47.

37 - Transcript, 1 February 2002, pp. 47-48.

38 - Transcript, 1 February 2002, p. 53.

39 - Transcript, 1 February 2002, p. 60.

40 - Transcript, 1 February 2002, p. 60.

41 - The Motion, Exhibit B.

42 - Transcript, 1 February 2002, pp. 55 – 56.

43 - Transcript, 1 February 2002, p. 62.

44 - Transcript, 1 February 2002, pp. 55, 56, 62, 63, 65, 77.

45 - Transcript, 1 February 2002, p. 69.

46 - Transcript, 1 February 2002, p. 66.

47 - Transcript, 1 February 2002, p. 69.

48 - Transcript, 1 February 2002, p. 66.

49 - Transcript, 1 February 2002, pp. 66 - 67.

50 - When questioned about this during the hearing, the Prosecution stated that "there had been some documents recently provided to the Zagreb office, and there are some further documents to pick up by the representatives of the OTP, and that is

in keeping with the recent improvement in our dealings with the Croatian government authorities. In relation to whether there are 840 or so documents which have been available for two weeks and which have not been picked up, at this stage, at short notice, I can't clarify what the situation is." Transcript, 1 February 2002, pp. 76 – 77.

51 - The Trial Chamber also notes the memorandum filed 4 February 2002 in which the Prosecution confirms receipt of this letter and refers to the procedures for inspection and collection of documents and states that normal procedure "requires approximately three weeks."

52 - The Government stated at the hearing: "On behalf of the Government of Croatia, I take the obligation to provide for the organisation, and all costs of transporting the detainee from his place of residence to the airport and back be covered by the Government of Croatia; that the Government of the Republic of Croatia is going to ensure the personal safety and security of Mr. Ademi while he was in the Republic of Croatia, according to the relevant ruling of the Trial Chamber, if, of course, your decision on this matter is positive; that it will report to the Registry of the Tribunal any possible threat to the safety or security of General Ademi; that it will, upon request of the Trial Chamber, provide a full report on the results of the investigation on this particular case; that it will ensure all possible channels of communication between the parties concerned and that it will ensure the confidentiality of such communication; that, within a time deadline to be stipulated by this Trial Chamber, it will submit reports to the Registry of the Tribunal pertaining to the presence of the accused and his adherence to all the conditions laid down by the Tribunal, i.e., reporting to a particular police station at his place of residence, having his passport taken and kept, or any other obligation that may be decided upon by this Trial Chamber; that it will arrest the accused if he violates any one of the conditions set forth in a decision on provisional release; and that it will respect the priority and supremacy of this Court in relation to any court and/or proceedings in the Republic of Croatia". Transcript, 1 February 2002, pp. 73-74.

53 - When Judge Liu asked for comment on the fact that "the Croatian news agency, on January 13th, 2002, the Croatian Minister of Defence, Mr. Jozo Rados told Croatian television that General Ademi could return to work at the Croatian army's chief inspectorate if he's released," Counsel responded that "the joint standpoint of General Ademi and myself as his Defence counsel is he's not going to avail himself of that opportunity." Transcript, 1 February 2002, p. 48.

PROSECUTION INDEX OF AUTHORITIES

7. *Prosecutor v Jokic,* IT-01-42-PT, 20 February 2002.

1697

Case No. IT-01-42-PT

IN THE TRIAL CHAMBER

Before:
Judge Daquin Liu, Presiding

Judge Amin El Mahdi

Judge Alphons Orie

Registrar:
Mr. Hans Holthuis

Order of:
20 February 2002

THE PROSECUTOR

v.

MIODRAG JOKIC

ORDER ON MIODRAG JOKIC'S MOTION FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Ms. Susan Somers

Defence Counsel:

Mr. Alun Jones

I. Background

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the "Tribunal") is seized of the "Motion for the Provisional Release of Miodrag Jokic" filed on behalf of the accused Miodrag Jokic (the "Accused") on 18 December 2001 (the "Motion") pursuant to Rule 65 of the Rules of Procedure and Evidence of the International Tribunal (the "Rules").[1] Attached to the Motion were an undertaking by the Accused (Annex A) and guarantees from the Republic of Serbia (Annex B).

2. The Prosecution filed the "Prosecution's Response to Motion for the Provisional Release of Miodrag Jokic" on 19 December 2001 (the "Response"). It stated that it had no objection to the Motion being granted on condition that: the Accused provide an undertaking that he will not attempt to contact, either

personally or through intermediaries, witnesses for the Prosecution; the Accused provide a signed undertaking in the terms set out in Annex A to the Motion but including the aforementioned condition ; an official letter of guarantee signed by an authorised representative of the Government of the Republic of Serbia be filed.

3. On 21 December 2001, the Accused filed the "Defendant's Response to the Prosecutor's Response to the Motion for the Provisional Release of Miodrag Jokic" in which he confirmed that the Prosecution conditions had been complied with, to the extent that Annex A to the Motion had been signed and filed and an official letter of guarantee signed by Minister of Justice, Dr. Vladan Batic, on behalf of the Government of Serbia (Annex B to the Motion) had been filed. The Accused filed the requested documents attached to a second identical copy of the Motion filed on 19 December 2001. Although the condition concerning contact with witnesses had not been included in Annex A , a signed assurance by the Accused was filed on 21 December 2001.

4. In support of his application for provisional release, the Accused argues, *inter alia* that:

- there are no grounds to believe that he will not appear for trial or pose any danger to any victim, witness or other person;

- he voluntarily surrendered to the custody of the International Tribunal on 12 November 2001 and therefore the Tribunal should be confident that he will return as required;

- it is important that the Accused has full opportunities, within the terms of his release, to develop his defence outside prison in the Netherlands;

- his daughter is ill and lives with her parents on whom she is dependant;

- amendment of Rule 65(B) of the Rule means that, in view of the presumption of innocence, an accused is entitled as of right to provisional release when the other two conditions are satisfied.

5. The Host Country does not object to provisional release of the accused on the understanding that if released the Accused will be leaving the Netherlands.[2]

6. Both parties and the Minister of Justice of the Republic of Serbia, Dr. Vladan Batic, were heard by the Trial Chamber on 31 January 2002.

II. Applicable law

7. Rule 64 of the Rules provides in relevant part: "Upon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country."

8. Rule 65(A) and (B) of the Rules set out the basis upon which a Trial Chamber may order the provisional release of an accused:

(A) Once detained, an accused may not be released except upon an order of a Trial 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, witnesses or other person.

9. The Accused refers to the fact that Rule 65 (B) was amended with effect from the 7 December 1999, in that the requirement to show "exceptional circumstances" was removed.[3] He states that this amendment brought Rule 65 in line with Article 5.3 of the European Convention on Human Rights , which provides that everyone arrested or detained shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or release pending trial and that release may be conditioned by guarantees.[4]

10. The amendment of Rule 65 has resulted in various interpretations by Trial Chambers as to what the requirements of the Rule now are and how they should be satisfied . Consequently, this Trial Chamber feels it should set out how, in its view, the question of detention and Rule 65(B) should be construed.

A. Amendment of Rule 65(B) of the Rules

11. In addition to those that are still included, Rule 65(B) originally included a requirement that provisional release could be ordered by a Trial Chamber "only in exceptional circumstances." Under this rule it seemed that detention was considered to be the rule and not the exception. However, some decisions issued by Trial Chambers concluded that the fact that the burden was on the accused and that he had to show that exceptional circumstances existed before release could be granted, was justified given the gravity of the crimes charged and the unique circumstances in which the Tribunal operated.[5]

12. The requirement to show "exceptional circumstances" meant that in reality Trial Chambers granted provisional release in very rare cases. These were limited to those where for example, very precise and specific reasons presented themselves which leant strongly in favour of release. Thus, for example, Trial Chambers, before the amendment was adopted, accepted that a life-threatening illness or serious illness of the accused or immediate family members constituted exceptional circumstances justifying release, while illnesses of a less severe nature did not.[6] As stated, the burden remained on an accused at all times to demonstrate to the satisfaction of the Trial Chamber that such circumstances existed. Should the Trial Chamber conclude that they did not, release would not be ordered.

13. After amendment of the rule, an accused no longer needed to demonstrate that such "exceptional circumstances" existed. Trial Chambers seem to have taken two approaches to the new provision. Most Trial Chambers have continued to find that the amendment did not change the other requirements in the Rule and that provisional release was not now the norm. They considered that the particular circumstances of each case should be assessed in light of Rule 65(B) as it now stood.[7] The burden still remained on the accused to satisfy the Trial Chamber that the requirements of Rule 65(B) had been met.[8] This was justified by some given the specific functioning of the Tribunal and absence of power to execute arrest warrants.[9] The second approach seems to have been the following. It has been concluded that based on international human rights standards, "*de jure* pre-trial detention should be the exception and not the rule as regards prosecution before an international court."[10] The Trial Chamber in question referred to the fact that at the Tribunal, in view of its lack of enforcement powers , "pre-trial detention *de facto* seems to be...the rule."[11] In addition it stated that one must take account of the reference to serious crimes . Nevertheless, it found that that "any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention (see *Ilijkov v. Bulgaria*, ECourtHR, Decision of 26 July 2001, para. 84). Considering this , the Trial Chamber must interpret Rule 65 with regard to the factual basis of the single case and with respect to the concrete situation of the individual human being and not *in abstracto*."[12]

1760

B. Effect of the Amendment of Rule 65 of the Rules

14. This Trial Chamber wishes to approach the question from two angles. First, on a point of procedure and second, with regard to interpretation of Rule 65(B) itself and how and when an accused can be provisionally released.

i. Procedural aspect

15. As to the first point, this Trial Chamber wishes to clarify the procedure for consideration by a Trial Chamber of detention and release of an accused. Proceedings with regard to an accused commence with review and confirmation of the indictment pursuant to Article 19 of the Statute and Rule 47 of the Rules. Generally speaking , once an indictment has been confirmed, an arrest warrant will be issued by the same Judge including an order for prompt transfer of the accused to the Tribunal upon arrest.[13] The arrest warrant provides the legal basis for detention of the accused as soon as he or she is arrested [14] and, upon being transferred to the seat of the Tribunal, Rule 64 provides that "the accused shall be detained in facilities provided by the host country, or by another country."

16. Rule 62 of the Rules provides that "?ugpon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber . The accused shall be brought before that Trial Chamber or a permanent Judge thereof without delay, and shall be formally charged." The Rule sets out the issues, which should be raised during this initial appearance. The issue of detention is not specifically included, most probably given the fact that the text of Rule 65(B) as it stood at that time meant that an accused could only be released in "exceptional circumstances ." Rule 65(A) provides that "?ognce detained, an accused may not be released except upon an order of a Chamber." As the accused is already detained as a result of the arrest warrant that has been issued, detention will continue unless further order is made. During the initial appearance, the Trial Chamber generally orders orally that detention will continue until further order and in some cases an order for detention on remand is formally issued.[15] The fact of detention and the reasons for it are rarely, if at all, raised as issues to be discussed at the initial appearance. Nevertheless, this Trial Chamber believes that an accused or indeed the Trial Chamber *proprio motu*, is entitled to raise the matter of the accused's detention at this hearing, being his or her first before the Tribunal. This is so, in particular in view of this Trial Chamber's interpretation of the consequences of the amendment of Rule 65 which will be discussed below, (including the fact that detention should not be considered to be the rule). Should the question of detention be raised at this time,[16] the provisions of Rule 65 will of course apply and must be satisfied before a Trial Chamber would in any event order release Indeed, it may be, and is likely that, a Trial Chamber would adjourn the question in order to schedule a later hearing for arguments to be put or for filings to be received, in addition in view of the requirement to hear from the host country.

ii. Interpretation of Rule 65(B) of the Rules

17. The amendment of Rule 65 left one matter of procedure and two express pre-conditions that must be met before a Trial Chamber will order provisional release.[17] As a matter of procedure, the Trial Chamber is required to hear from the host country . Thereafter release may be ordered only if the Trial Chamber is satisfied that the accused will both appear for trial and if released, pose no risk to any victim , witness or other person. However, as mentioned above, Rule 65 previously stipulated that notwithstanding satisfaction of these two criteria, provisional release was only to be granted in "exceptional circumstances." Detention was therefore in reality the rule. This Trial Chamber believes that removal of this requirement has had the following effect. It has neither made detention the exception and release the rule , nor resulted in the situation that despite amendment, detention remains

1701

the rule and release the exception. On the contrary, this Trial Chamber believes that the focus must be on the particular circumstances of each individual case,[18] without considering that the outcome it will reach is either the rule or the exception . Its task must rather be to weigh up and balance the factors presented to it in that case before reaching a decision. It may be that some unique circumstances of this Tribunal may weigh against a decision being taken to provisionally release (see below). Nevertheless, they must still be considered in the context of the individual case and facts presented, in order for the correct balance to be struck.

18. Consequently, this Trial Chamber does not believe that recourse to a so-called "rule-exception" system provides it with assistance in reaching a decision. As to the question of the burden of proof in satisfying the Trial Chamber that provisional release should be ordered, it is the case that in an application under Rule 65, this rests on the accused. This does not, however, exclude intervention by, for example, the Trial Chamber, should it for whatever reason require more information regarding what it may suspect is a factor that should or may result in a change in the detention situation of the accused (either with regard to modification of the conditions of detention under Rule 64, or, in the context of an application for provisional release under Rule 65). A Trial Chamber may seek this information either by ordering a party to supply it or by obtaining the information itself.

19. The Trial Chamber turns now to consider how the decision to release or maintain detention should be taken. First, it is useful to recall a decision issued by the European Court of Human Rights, in which it specifically acknowledged the existence of cases where continued detention may be justified. The Court stated that,

> ...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. Any system of mandatory detention on remand is *per se* incompatible with Article 5 § 3 of the Convention....Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention.... the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.[19]

Continued detention is therefore not prohibited. Nor does it have the nature of a sanction. Its purpose is to ensure the presence of the accused at trial, to preserve the integrity of victims and witnesses and to serve the public interest.

20. This Trial Chamber consequently considers that, as a general rule, a decision to release an accused should be based on an assessment of whether public interest requirements, notwithstanding the presumption of innocence, outweigh the need to ensure, for an accused, respect for the right to liberty of person. This balancing exercise is carried out as follows. First, it should be considered whether the two express pre-conditions laid down in Rule 65(B) have been met. These pre-conditions are cumulative. That is, if the Trial Chamber is not convinced that the accused will both appear for trial and not pose a risk to any victim, witness or other person , a request for provisional release must be denied.

21. However, even if these requirements are met, this Trial Chamber does not believe that it is obliged to release the accused.[20] In this regard, it agrees with the interpretation that a Trial Chamber will still retain a discretion not to grant provisional release even if it is satisfied that the accused will appear for trial and will not pose a danger to any victim, witness or other person.[21] This applies even if the Prosecution does not object to the application for release. Consequently, the express requirements within Rule 65(B) should not be construed as intending to exhaustively list the reasons why release should be refused in a given case. There may be evidence of obstructive behaviour other than absconding or interfering with

1702

witnesses, which a Trial Chamber finds necessary to take into account. For example: the destruction of documentary evidence; the effacement of traces of alleged crimes; and potential conspiracy with co-accused who are at large. In addition, factors such as the proximity of a prospective judgement date or start of the trial may weigh against a decision to release. The public interest may also require the detention of the accused under certain circumstances, if there are serious reasons to believe that he or she would commit further serious offences.

iii. Factors relevant to the decision-making process

22. 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 assessment of the probability of the risk of absconding or interfering with witnesses. These factors would as such be neither decisive nor negligible in individual cases and must be considered in the context of all the information presented to the Chamber. They may however become decisive if they strongly support the risk that an accused will either fail to attend court or interfere with witnesses (as expressly mentioned in Rule 65(B)) and if the Chamber can find no counter-balancing circumstances in the particular case before it. These factors include the following.

23. 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. In this regard, it goes without saying that prior voluntary surrender of an accused is not without significance in the assessment of the risk that an accused may not appear for trial.

24. Second, the fact that the Tribunal's jurisdiction is limited to serious offences ("serious violations of international humanitarian law"[22]), means that accused may expect to receive, if convicted, a sentence that may be of considerable length.[23] This very fact could mean that an accused may be more likely to abscond or obstruct the course of justice in other ways.

25. Third, the duration of pre-trial detention is a relevant factor to be considered when deciding whether or not detention should continue. The complexity of the cases before the Tribunal and the fact that the Tribunal is located at great distance from the former Yugoslavia means that pre-trial proceedings are often lengthy. This issue may need to be given particular attention in view of the provisions of Article 9 (3) of the ICCPR and Article 5(3) of the ECHR.[24] This is all the more true, since in the system in place in the Tribunal, unlike generally that in national jurisdictions, there is no formal procedure in place providing for periodic review of the necessity for continued pre-trial detention . Consequently, if in a particular case, detention is prolonged, it could be that , in a given case, this factor may need to be given more weight in considering whether the accused in question should be provisionally released.

26. 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; or a change in the health of the accused or immediate family members. In addition, other Trial Chambers have taken into account: the accused's substantial co-operation with the Prosecution; guarantees offered by the accused and his or her government; and changes in the international context.

27. In light of the above analysis, the Trial Chamber turns now to examine the material put forward by

1703

the Accused and consider whether it is satisfied in this case that the Accused should be provisionally released. In doing so, it recalls that a determination as to whether release is to be granted must be made in light of the particular circumstances of each case and taking into account the considerations set out above.

III. The material put forward by the Accused

28. The Accused submits that among the grounds for his application are the fact that he voluntarily surrendered to the custody of the International Tribunal on 12 November 2001. In addition, he refers to the fact that his daughter is ill and that, if necessary, she would give evidence at a hearing. The Trial Chamber accepts that these circumstances may be of some relevance to it in reaching a decision. However, it emphasises that alone, these circumstances will not suffice in order for a decision to be taken to provisionally release an accused.

29. The Trial Chamber notes and takes due account of the written undertaking filed by the Accused in support of his application. In addition it notes the submissions made by the Accused himself at the hearing. In particular, the Accused has stated that if released: he will not leave the territory of the Republic of Serbia; he will reside at one of the two addresses disclosed to the Registry of the Tribunal ; he will surrender his passport to the Office of the Ministry of Interior; he will consent to have his presence checked by the Ministry at his address; he will report daily to the said Ministry or as directed by the Ministry; he will not communicate with his co-accused, nor discuss the case with anyone, except his lawyers; he will return to the Tribunal when required; and he will comply with any amendment or alteration to any decision for provisional release. During the oral hearing, the Accused himself submitted that if granted provisional release, he would return before the Trial Chamber whenever required but that in the interests of fairness he should be given the opportunity to prepare his defence in better circumstances.[25]

30. Together with his own guarantees, the Accused relies on those provided by the Government of the Republic of Serbia to support his assertion that he will appear for trial and will not pose a danger to victims and witnesses. These guarantees were also given in both written form (as seen above), and verbally during the hearing , by the Minister for Justice, Dr. Batic, on behalf of the Government of the Republic of Serbia. This Government has accordingly stated that it will guarantee compliance of the Accused with the terms and conditions imposed by the Trial Chamber and that it wishes to ensure intensive co-operation by the Government of the Republic of Serbia with the Tribunal, although this should be two-way.

31. At the hearing, Dr. Batic admitted that "at the federal level, the law on cooperation with the Tribunal has not as yet been adopted."[26] However, relying on certain developments which had taken place, he put forward his view that these indicated that the Republic of Serbia had adopted a new approach to the Tribunal. He spoke of the decision reached on 28 June 2001 by the Government of Serbia, providing for the automatic application of the Statute, on which basis Mr. Slobodan Milosevic and the "brothers Banovic" were transferred to the Tribunal . He stated that this is the legal basis on which the Government must act and is cooperating with the Tribunal and that if the Accused in this case refused to comply with the "summons of" the Tribunal it would then be obliged to arrest and transfer him to the Tribunal.[27] He asserted that the Accused would "have absolute and permanent 24-hour monitoring by the Ministry of Internal Affairs of the Republic of Serbia, both as a guarantee of his own security and in order to comply with all the obligations contained in the written guarantees of the Republic of Serbia."[28] Finally , he referred to the fact that the accused Biljana Plavsic was also granted provisional release by Trial Chamber III who, in that case, accepted the guarantees offered by the Government of the Republic of Serbia[29]: "the government of the Republic of Serbia, by providing guarantees, places its international

1704

legal credibility, as well as its dignity in general, at a risk, and it would like very much to keep and to preserve this international credibility which has been quite hard to earn."[30]

32. The Trial Chamber is satisfied with the assurances that have been put forward by the Government of the Republic of Serbia and is satisfied with the undertakings by the Accused. It also notes that the trial of the Accused is unlikely to start soon.

33. 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 the Accused should be provisionally released.

34. Pursuant to Rule 65(C) of the Rules, the Trial Chamber "may impose such conditions upon the 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." Among others , the Trial Chamber intends to order that the Accused must not discuss the case with anyone, except his counsel. This order will include a prohibition on any contact with the media. In addition, the Accused will be prohibited from occupying any official function. Generally, the conditions listed below aim at ensuring that the Accused will not abscond and that he will not interfere with the administration of justice in this case.

IV. Disposition

PURSUANT TO Rules 54 and 65, and with the agreement of the parties,

THIS TRIAL CHAMBER

HEREBY GRANTS the Motion **AND ORDERS** the provisional release of Miodrag Jokic on the following terms and conditions:

ORDERS the Accused:

1) to remain within the confines of the municipality of his chosen residence in the Republic of Serbia as communicated in point 3) below;

2) to surrender his passport to the Ministry of the Interior, Ministarstvo Unutrasnjih poslova, Republic of Serbia, Kneva Milosa 101, 11000 Belgrade;

3) to report the address at which he will be staying to the Ministry of Interior, and the Registrar of the Tribunal and not to change his address without seven days prior notification to the said Ministry and the Registrar of the Tribunal;

4) to report once a week to the local police;

5) to consent to having his presence checked, including by occasional, unannounced visits by the Ministry of Interior, or officials of the Government of the Republic of Serbia with the local police, or by a person designated by the Registrar of the Tribunal;

6) not to have any contact whatsoever nor in any way interfere with victims or potential witnesses or otherwise interfere in any way with the proceedings or the administration of justice;

7) not to discuss the case with anyone, other than counsel, including not to have any contact with the

1705

media;

8) not to have any contact with any other accused or the co-accused in this case;

9) to comply strictly with any requirements of the authorities of the Government of the Republic of Serbia necessary to enable them to comply with their obligations under this Order;

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

11) to comply strictly with any order of the Trial Chamber varying the terms of, or terminating the provisional release;

12) not to occupy any official position within the Republic of Serbia;

13) to report to the Registrar of the Tribunal, within 3 days of the start of employment or occupation, if any, the position occupied, as well as the name and address of the employer.

INFORMS the Accused that he shall, at any time, be entitled to bring matters to the attention of the Trial Chamber and to request a modification of the terms and conditions of the Order, while reminding the accused that until such modification , if any, is made, the conditions set out in this Order shall apply in full.

REQUIRES the Government of the Republic of Serbia, including the local police, to:

1) ensure compliance with the conditions imposed on the Accused by the Trial Chamber;

2) ensure that all expenses for transport of the Accused from the Dutch territory to his place of residence and back are covered;

3) upon the accused's release at Schiphol airport (or any other airport within the territory of the Kingdom of the Netherlands), have a designated official of the Government of the Republic of Serbia take custody of the Accused from the Dutch authorities and accompany the Accused for the remainder of his travel to his place of temporary residence;

4) ensure that a designated official of the Government of the Republic of Serbia accompanies the Accused on his return flight to the Kingdom of the Netherlands after termination of the provisional release upon an order of the Tribunal and hands the Accused over to the Dutch authorities in the Kingdom of the Netherlands at a date, place and time to be determined by the Trial Chamber;

5) at the request of the Trial Chamber or of the parties to the case, facilitate all means of cooperation and communication between the parties and ensure the confidentiality of any such communication;

6) not to issue to the Accused any new passport or documents enabling him to travel ;

7) monitor on a regular basis the presence of the Accused at the address communicated to the Registry of the International Tribunal and maintain a log of such reports ;

8) submit a written report, including *inter alia* the findings of the reports mentioned under point 7), to the Trial Chamber each month as to the compliance of the accused with the terms and conditions of this Order;

1706

9) provide for the personal security and safety of the Accused while on provisional release;

10) report immediately to the Registrar of the International Tribunal the substance of any threats to the security of the Accused, including full reports of investigations related to such threats;

11) immediately arrest the Accused should he breach any of the terms and conditions of his provisional release and report immediately any such breach to the Trial Chamber .

REQUESTS the Registrar of the Tribunal to:

1) consult with the Ministry of Justice of the Netherlands as to the practical arrangements for the Accused's release;

2) keep the Accused in custody until relevant arrangements are made for his travel;

3) transmit this Order to the competent governments.

REQUESTS the Dutch authorities to:

1) transport the Accused to Schiphol airport (or any other airport in the Kingdom of the Netherlands) as soon as practicable;

2) at that airport, provisionally release the Accused into the custody of the designated official of the Republic of Serbia;

3) on the Accused's return, take custody of the Accused at a place, date and time to be determined by the Trial Chamber and transport the Accused back to the United Nations Detention Unit.

REQUESTS the authorities of the States through whose territory the Accused may travel to:

1) hold the Accused in custody for any time he will spend in transit at the airport ,

2) arrest the Accused and detain him pending his return to the United Nations Detention Unit, should he attempt to escape.

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

_____

Judge Liu,

President of Trial Chamber I

Dated this twentieth day of February 2002

At The Hague,

1707

The Netherlands

[Seal of the Tribunal]

1 - The Motion was filed during the judicial recess in December 2001 and therefore placed before the Duty Judge, Judge Alphons Orie, in accordance with Rule 28 of the Rules. Rule 28(D) of the Rules provides that "[t]he duty Judge may, in his or her discretion, if satisfied as to the urgency of the matter, deal with an application in a case already assigned to a Chamber out of normal Registry hours as an emergency application." In the "Order on the Motion for Provisional Release of the Accused Miodrag Joki}," issued on 21 December 2001, Judge Orie remitted the Motion to the Trial Chamber seized of the case to decide on the merits.
2 - Letter of the Ministry of Foreign Affairs dated 30 January 2002 and filed on 31 January 2002.
3 - Rule 65 (B) was amended during the 21st session of the Plenary of judges on 15-17 November 1999 and entered into force on 7 December 1999 (See IT/161).
4 - The Motion, para. 6.
5 - *See*, e.g., *Decision on motion for provisional release filed by the accused Zejnil Delalic*, Prosecutor v. Zejnil Delalic et al., Case No. IT-96-21-T, 25 September 1996. In the same case: *Decision on motion for provisional release filed by the accused Hazim Delic*, 24 October 1996. *See* also generally: *Decision rejecting a request for provisional release*, Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, 25 April 1996 ("the Rules have incorporated the principle of preventive detention of accused persons because of the extreme gravity of the crimes...and, for this reason, subordinate any measure for provisional release to the existence of 'exceptional circumstances'"); and, in the same case *Order denying a motion for provisional release*, 20 December 1996 ("both the letter of this text [Rule 65] and the spirit of the Statute...require that the legal principle is detention of the accused and that release is the exception"); *Decision on motion for provisional release filed by Zoran Kupreskic, Mirjan Kupreskic, Drago Josipovic and Dragan Papic*, Prosecutor v. Kupreskic et al., Case No. IT-95-16-PT, 15 December 1997; *Decision denying a request for provisional release*, Prosecutor v. Aleksovski, Case No. IT-95-14/1-PT, 23 January 1998 ("By considering the extreme gravity of crimes against humanity, the Rules thus establish a presumption of detention according to which detention is the rule and provisional release the exception").
6 - In the following cases, release was ordered by the Trial Chamber for humanitarian reasons: *Decision by Trial Chamber I rejecting the application to withdraw the indictment and order for provisional release*, Prosecutor v. Djukic, Case No. IT-96-20-T, 24 April 1996; *Decision on provisional release of the accused*, Prosecutor v. Simic et al., Case No. IT-95-9-PT, 26 March 1998; *Decision on the motion of defence counsel for Drago Josipovic (request for permission to attend funeral)*, Prosecution v. Kupreskic et al., Case No. IT-95-16-T, 6 May 1999.
7 - See for example: *Decision on motion by Radoslav Brdjanin for provisional release*, Prosecutor v. Brdjanin et al., Case No. IT-99-36-PT, 25 July 2000 ("*Brdjanin*"); *Decision on motion by Momir Talic for provisional release*, Prosecutor v. Brdjanin et al., Case No. IT-99-36-PT, 28 March 2001 ("*Talic*"); *Decision on motion for provisional release of Miroslav Kvocka*, Prosecution v. Kvocka et al., Case No. IT-98-30-PT, 2 February 2000; *Decision on Momcilo Krajisnik's notice of motion for provisional release*, Prosecution v. Krajisnik et al., Case No. IT-00-39 and 40, 8 October 2001 ("*Krajisnik*"). In the latter decision, the Trial Chamber stated that "the change in the Rule does not alter the position that provisional release continues to be the exception and not the rule." Para. 12.
8 - *See* for example, *Krajisnik*, paras. 12 – 13; *Brdjanin*, para. 13; *Talic*, para. 18.
9 - For example, *Talic*, para. 18; *Krajisnik*, paras. 12 - 13.
10 - *Decision granting provisional release to Amir Kubura*, Prosecutor v. Enver Hadzihasanovic et al., Case No. IT-01-47-PT, 19 December 2001, para. 7. Identical decisions as to the law were issued on the same day in the same case with regard to the two other accused.
11 - *Decision granting provisional release to Amir Kubura*, Prosecutor v. Enver Hadzihasanovic et al., Case No. IT-01-47-PT, 19 December 2001, para.7.
12 - *Ibid.*
13 - Such arrest warrants are issued pursuant to Article 19 of the Statute and Rules 47 and 55 of the Rules.
14 - *See* also, *Decision on Motion by Momir Talic for Provisional Release*, Prosecution v. Brdjanin et al., Case No. IT-99-36-PT, 28 March 2001, para. 21: "The detention of an accused person is justified in accordance with the Tribunal's procedures by the issue of the arrest warrant, which in turn is justified by the review and confirmation of the indictment which is served." In addition, *Decision on Motions by Momir Talic (1) to dismiss the indictment, (2) for release, and (3) for leave to reply to response of prosecution to Motion for Provisional Release*, Prosecution v. Brdjanin et al., Case No. IT-99-36-PT, 1 February 2000, para. 21: "According to the Tribunal's 'procedures [...] established by law', therefore, the only actions by *the Tribunal* which are necessary to justify the detention of the accused are the review and the confirmation of the indictment and the issue of the arrest warrant."
15 - In the *Decision on Motions by Momir Talic (1) to dismiss the indictment, (2) for release, and (3) for leave to reply to response of prosecution to Motion for Provisional Release*, Prosecution v. Brdjanin et al., Case No. IT-99-36-PT, 1 February 2000, para. 21, Judge Hunt stated that the order for detention in that case was "strictly, otiose."
16 - Parties may also simply notify the Chamber at this time that they *intend* to file an application for provisional release. *See* e.g., *Prosecutor v. Miodrag Jokic*, Case No. IT-01-42-PT, Transcript of 14 November 2001 (initial appearance), pp. 52 – 53.

1708

17 - As has been stated, although the requirement to show exceptional circumstances has been removed, this does not affect the remaining provisions of the Rule.
18 - *See* also as examples of acceptance of this criteria: *Decision on Simo Zaric's application for provisional release*, Prosecution v. Simic et al., Case No. IT-95-9-PT, 4 April 2000; *Decision on Miroslav Tadic's application for provisional release*, Prosecution v. Simic et al., Case No. IT-95-9-PT, 4 April 2000; *Decision on Milan Simic's application for provisional release*, Prosecution v. Simic et al., Case No. IT-95-9-PT, 29 May 2000. *Decision on request for pre-trial provisional release*, Prosecution v. Halilovic, Case No. IT-01-48-PT, 13 December 2001; *Decision on Biljana Plavsic's application for provisional release*, Case No. IT-00-39 and 40-PT, 5 September 2001; *Brdjanin*; and *Talic*. In the last two cases, the Trial Chamber stated: "The particular circumstances of each case must be considered in the light of the provisions of Rule 65 as it now stands."
19 - Decision of the European Court of Human Rights, dated 26 July 2001 in the case *Ilijkov v. Bulgaria* (Application No. 33977/96.
20 - The Trial Chamber refers in particular to the use of the word "may" in Rule 65(B) of the Rules and considers that based on an interpretation of this provision, provisional release is not mandatory upon satisfaction of the two express pre-conditions.
21 - *See* for example, *Krajisnik*; and *Brdjanin*.
22 - Article 1 of the Statute.
23 - Although not inconceivable, it is difficult to imagine that an accused may be charged with offences that may meet the requirements of Articles 2, 3, 4 or 5 of the Statute, but *in concreto* are in fact of a less serious nature. One example however is the case of plunder considered in: Judgement, *Prosecutor v. Delalic et al.* Case No. IT-96-21-T, 16 November 1998, para. 1154.
24 - International Covenant on Civil and Political Rights (1966) and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), respectively.
25 - Transcript, 31 January 2002, p. 74.
26 - Transcript, 31 January 2002, pp. 70 – 71.
27 - Transcript, 31 January 2002, p. 67.
28 - Transcript, 31 January 2002, pp. 67 – 68.
29 - Transcript, 31 January 2002, p. 68.
30 - Transcript, 31 January 2002, p. 68.

PROSECUTION INDEX OF AUTHORITIES

8. *Prosecutor v Brdanin*, IT-99-36-PT, "Decision on Motion By Momir Talic For Provisional Release", 28 March 2001.

1710

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mr Hans Holthuis

Decision of:
28 March 2001

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIC

DECISION ON MOTION BY MOMIR TALIC FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Ms Joanna Korner
Mr Nicolas Koumjian
Mr Andrew Cayley
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 Introduction

1. Pursuant to Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rules "), the accused Momir Talic ("Talic") seeks provisional release pending his trial .[1] The application is opposed by the prosecution.[2] Talic has relied upon a witness in support of his application, and he requested an oral hearing.[3] An oral hearing took place as requested.[4]

2. Talic is charged jointly with Radoslav Brdanin ("Brdanin") with a number of crimes alleged to have

1711

been committed in the area of Bosnia and Herzegovina now known as Republika Srpska. Those crimes may be grouped as follows:

(i) genocide[5] and complicity in genocide ;[6]

(ii) persecutions,[7] extermination,[8] deportation[9] and forcible transfer (amounting to inhumane acts),[10] as crimes against humanity;

(iii) torture, as both a crime against humanity[11] and a grave breach of the Geneva Conventions;[12]

(iv) wilful killing[13] and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity,[14] as grave breaches of the Geneva Conventions; and

(v) wanton destruction of cities, towns or villages or devastation not justified by military necessity[15] and destruction or wilful damage done to institutions dedicated to religion,[16] as violations of the laws or customs of war.

Each accused is alleged to be responsible both individually and as a superior for these crimes.

3. The allegations against the two accused assert their involvement in a plan to effect the "ethnic cleansing" of the proposed new Serbian Territory in Bosnia and Herzegovina (the area now known as Republika Srpska) by removing nearly all of the Bosnian Muslim and Bosnian Croat populations from the areas claimed for that territory .[17] They are alleged to have been responsible for the death of a significant number of Bosnian Muslims and Bosnian Croats within the Autonomous Region of Krajina ("ARK"), and for the forced departure of a large proportion of the Bosnian Muslim and Bosnian Croat populations from that region, between 1 April and 31 December 1992.[18] Talic is alleged to have been the Commander of the 5th Corps/1st Krajina Corps, with responsibility for implementing the policy of incorporating the ARK into a Serb state.[19]

4. Despite the repetition in the current indictment of the allegation that Talic "committed" the crimes charged within the meaning of Article 7.1 of the Tribunal's Statute, it is conceded by the prosecution that it has no evidence that he physically perpetrated the crimes himself.[20] The bases asserted for his individual criminal liability[21] are that, in various ways, he aided and abetted those who did physically perpetrate them,[22] or participated with them in their criminal enterprise with the common purpose of removing the majority of the Bosnian Muslim and Bosnian Croat inhabitants from the planned Serbian state.[23] The basis asserted for his criminal responsibility as a superior[24] is that he knew or had reason to know either that the forces under his control were about to commit those crimes and failed to prevent them doing so, or that they had committed those crimes and he failed to punish them for having done so.[25] Previous decisions in these proceedings give greater detail of these allegations .[26]

5. Talic was arrested on 25 August 1999. He has made two previous applications for release, each of them unsuccessfully based upon an assertion that his detention was unlawful.[27] Neither application was for provisional release pursuant to Rule 65(B), and the rejection of those motions has therefore been ignored for present purposes.

1712

2 The relevant provision

6. Rule 65(A) states that an accused may not be released except upon an order of a Chamber. Rule 65(B) provides:

> 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.

The host country has been heard.

3 The material put forward by the parties

7. Talic has filed with his Motion a signed document entitled "Promise and Guarantee ", by which he undertakes (so far as is presently relevant) that, in the event of being provisionally released, he will remain within the Municipality of Banja Luka , he will surrender his passport to the International Police Task Force ("IPTF") in Banja Luka, he will report once a day to the Public Security Centre there, he will permit the IPTF to monitor his presence at the local police station and by making random visits (to check upon his whereabouts), and that he will not contact any other person charged in the indictment, he will not disturb or contact in any manner any person who may be a witness in the case, and he will not discuss this case with any person other than his counsel. Talic undertakes also to observe strictly all modifications which may be ordered to the conditions of his provisional release or its revocation.

8. The Motion asserts that Talic –

> [...] proposes to provide a bail bond, in the amount set by the Tribunal, in order to assure the Tribunal of his presence at trial and the protection of others.[28]

There is no reference to this in the document presently signed by Talic, but the Trial Chamber accepts that such a bond would be executed by Talic in the event that it is made a condition of his provisional release.

9. Talic has also filed with his Motion a document entitled "Guarantees by the Government of Republika Srpska", signed by Milorad Dodik as the Prime Minister, by which the Government guarantees:

> [...] that the Public Security Centre in Banja Luka will ensure that the accused reports to the police station on a daily basis, keep a logbook and submit a monthly report confirming that the accused has complied with his obligations and inform the International Criminal Tribunal immediately should the accused fail to report [...and] that the accused will be immediately arrested should he attempt to flee or should he be in breach of one of his obligations as notified to Bosnia-Herzegovina by the International Tribunal and so inform the Tribunal in order that it may prepare his transfer to the Tribunal.

10. This Guarantee was signed by Mr Dodik on 10 November 2000, the day before the elections in Bosnia in which Mr Dodik lost office. Following a submission by the prosecution that it was unclear what effect, if any, a guarantee from Mr Dodik would have had on any future Governments,[29] Talic submitted that a State remains bound by its international commitments even after a change of Government.[30] Talic subsequently filed two further documents, each entitled "Conclusion", signed by the current Prime Minister of Republika Srpska (Mladen Ivanic), and sealed with the Seal of that Government. In one of the documents, the new Government "adopted the position and accepted the

1713

guarantees for Mr Momir Talic" given in the previous document,[31] and in the other it confirmed the "previously provided guarantees for General Momir Talic".

11. Talic also called as a witness the current Minister of Internal Affairs for Republika Srpska, Mr Perica Bundalo.

12. In his statement,[32] Mr Bundalo attested to the capacity of the Government of Republika Srpska "and its organs" to ensure the Guarantees which had been given, and that Talic will appear before the Tribunal. He said that the organs have the resources to monitor the movements and activities of Talic. Mr Bundalo's Ministry, which is responsible for the police , was prepared to assign a police patrol to follow Talic day and night, thereby precluding any possibility of escape or illegal contact. It would guarantee that the witnesses enjoy "appropriate" protection if their names are supplied. Reports would be made daily to Mr Bundalo to ensure that the obligations of Republika Srpska to the Tribunal are respected.

13. In his evidence, Mr Bundalo confirmed what had been said in his statement. He said that he has been given assurances by his colleagues in the Ministry that there were the necessary personnel – with special training in surveillance and security [33] – and technical requirements to carry out the guarantees.[34] He conceded that the intelligence service of Republika Srpska was not under the control of his Ministry, it being accountable only to the President of Republika Srpska and, to a lesser extent, to the Prime Minister.[35] He attested to the great respect which Talic enjoys among the people and the Army .[36]

14. In cross-examination, Mr Bundalo said that his government would accept only those obligations undertaken by Mr Dodik's government which it considers it should in each particular case.[37] He accepted that the issue of his government's co-operation with this Tribunal was a challenge and a hard question,[38] and he admitted that this was a sensitive question for his government.[39] He said that, as his government had been elected only on 12 January, it was not in a position to undertake any specific moves to arrest anyone against whom Tribunal indictments were outstanding[40] – they had not had the time yet to discuss such arrests.[41] When asked during his cross-examination about any efforts made to arrest Radovan Karadžic (the former Prime Minister of Republika Srpska whose indictment was publicly disclosed in 1995),[42] Mr Bundalo replied "I know the name", but he said that he did not know where Karadžic lived.[43] He nevertheless expressed his personal conviction that his government would address the issue of co-operation with the Tribunal from a different standpoint and in a different way to that of the previous government.[44]

15. Finally, Talic asserts that, in order to carry out a peace mission, he was put in command of the armed forces of Republika Srpska with the consent of the United Nations and NATO authorities, that he travelled to the seat of NATO in Brussels several times, and that, at the time when he was arrested, he was attending an OSCE meeting in Vienna to which he had expressly been invited by the United Nations military authorities.[45]

4 The contentions of the parties, analysis and findings

16. Talic submits that, in the light of the presumption of innocence in his favour ,[46] the Tribunal's Statute and Rules , by making detention the rule rather than the exception, run contrary to the relevant international norms,[47] which are identified .[48] The purpose of such norms, Talic submits, is to require provisional release once his continuing detention ceases to be reasonable.[49]

1714

17. The Trial Chamber does not accept that the Tribunal's Statute and Rules make detention the rule rather than the exception. The Rules previously required an applicant for provisional release to establish, in addition to the matters presently specified in Rule 65, the existence of "exceptional circumstances" in order to obtain such release. This requirement was removed in December 1999. However, because the applicant for provisional release must still satisfy the Trial Chamber that – to use the words of Rule 65 (B) – he "will appear for trial and, if released, will not pose a danger to any victim, witness or other person", it cannot be said that provisional release is now the rule rather than the exception. The particular circumstances of each case must be considered, in the light of the provisions of Rule 65 as it now stands.[50]

18. Placing a substantial burden of proof on the applicant for provisional release to prove these two matters is justified by the absence of any power in the Tribunal to execute its own arrest warrants; in the event that a person granted provisional release does not appear for trial or interferes with a witness, the Tribunal is dependent upon local authorities and international bodies to act on its behalf.[51] The challenge to the validity of the Tribunal's Statute and Rules is rejected.

19. The primary reason put forward by Talic justifying his application for provisional release is the failure of the previous indictment – which has been referred to as the amended indictment – to provide an adequate factual basis to enable him to identify the charges against him.[52] His counsel described the inadequacy of that indictment, after Talic had spent so long in detention , as the "very heart of this matter",[53] making this application "well grounded".[54]

20. The Trial Chamber has already upheld the objection by Talic to the adequacy of the amended indictment.[55] A new indictment has now been filed.[56] The Trial Chamber has not considered the adequacy of this new indictment. Talic has nevertheless argued that the inadequacy of the previous indictment is such that it provided no valid basis for his detention.[57] This argument was not elaborated in the Motion or in argument, but it appears to be at least similar to one or more of those put forward in support of the two motions for release earlier filed by Talic and dismissed by the Trial Chamber.[58]

21. The detention of an accused person is justified in accordance with the Tribunal's procedures by the issue of the arrest warrant, which in turn is justified by the review and confirmation of the indictment which is served.[59] Once the indictment has been confirmed, the only issue as to the validity of the indictment is whether it pleads sufficient facts to support the charges laid. That is an issue to be determined in a preliminary motion pursuant to Rule 72 challenging the form of the indictment. No such issue was raised by Talic in the preliminary motion which he filed and which has been dealt with.[60] The Trial Chamber does not propose to re-consider that issue in the present application .

22. The fact that an indictment is inadequate is unlikely ever to be sufficient, by itself, to warrant the provisional release of an accused. Where this inadequacy is of such a nature that it causes the trial to be delayed, that fact *may* , in the appropriate case, enliven the discretion which the Trial Chamber discussed in its decision refusing provisional release to Brdanin.[61] Talic has complained that the period during which he has been in custody, without a resolution of the procedural formalities or the production of a credible indictment or the disclosure of the prosecution's statements and exhibits, infringes international norms; he asserts that a decision upholding his continued detention would be tantamount to forcing him to accept the procedural failures acknowledged by the prosecution .[62] Notwithstanding the time taken in resolving the procedural irregularities for which the prosecution has been responsible , the Trial Chamber does not accept that the time which Talic has spent in custody exceeds what is reasonable in this Tribunal.[63] Nor does the Trial Chamber accept that the stage has yet been reached where the

1715

delays caused by the procedural irregularities will cause the trial to be delayed . It would not have been heard yet in the ordinary course. Unfortunately, there is a long backlog of cases awaiting hearing in which cases the accused persons were taken into custody before the accused in this case. This argument is rejected.

23. Talic submits that the indictment was in any event factually inaccurate. He says that its factual basis was contradicted in 1999 by Lt General Satish Nambiar , who had been Commander and Head of Mission of the UN Forces in the former Yugoslavia in 1992-1993.[64] Talic also says that the indictment fails to take into account the history of Yugoslavia's disintegration process,[65] and that it relies in the main upon a political assumption that he had participated or was complicit in a resolve on the part of the political authorities of Republika Srpska to commit genocide .[66] However, an objection to the form of an indictment is not an appropriate procedure for contesting the accuracy of the facts pleaded.[67]

24. Talic also submits that criminal responsibility cannot be imposed upon an accused person unless it is based upon that person's individual responsibility, and that , as the case put forward by the prosecution does not involve such individual responsibility on his part, it runs contrary to all international norms.[68] The Trial Chamber does not accept the assertion that the indictment does not allege an individual responsibility on the part of Talic. Both the previous and the current indictments allege that he aided and abetted those who physically perpetrated the crimes charged. That asserts an individual responsibility on the part of Talic. Insofar as this submission was intended to challenge the notion of command responsibility referred to in Article 7.3 of the Tribunal's Statute, the existence of such a responsibility at the relevant time is now well accepted in the Tribunal's jurisprudence.[69] The Trial Chamber is bound by that jurisprudence.

25. Reference has already been made to the material provided by Talic directed to the real issues which are in dispute in the present application – whether Talic will appear for trial and, if released, will not pose a danger to any victim, witness or other person.[70] Talic submits that the guarantees which have been provided and which he is prepared to provide will assure the Trial Chamber that this is the case.[71]

Appearance for trial

26. In the *Brdanin* Decision, the Trial Chamber referred to the fact that Republika Srpska has never arrested any persons indicted by the Tribunal. It concluded that, where an accused person seeking provisional release was a high level Government official at the time of the events which are alleged against him and has very valuable information which he could disclose to the Tribunal, if minded to co-operate with the prosecution for mitigation purposes,[72] there would be a substantial disincentive for Republika Srpska to enforce its guarantee to arrest, for the first time, an indicted person within its territory.[73] The recent arrest of one Milomir Stakic has not changed that situation.[74]

27. It is clear that, as the Commander of the forces alleged to have committed the crimes for which he is charged as having responsibility, Talic is in the same position in this regard as was Brdanin so far as the Government of Republika Srpska is concerned . It is true that there is now a new Government of that entity, but the Trial Chamber prefers to wait to see whether that new Government demonstrates *by its actions* that it *will* arrest persons indicted by the Tribunal who are within its territory before its promises to do so are accepted.[75] There are many such indicted persons within its territory who could be arrested by it. The Trial Chamber was not persuaded by the evidence of Mr Bundalo that this will be done.

28. Talic has sought to deflect the conclusion of the Trial Chamber in the *Brdanin* Decision identified in

1716

paragraph 26 by the submission that, as he has indicated his willingness to appear at trial by the guarantees he is offering, Republika Srpska would not prevent him from surrendering himself to the Tribunal.[76] The Trial Chamber observes that a willingness by Republika Srpska to *permit* Talic to surrender where he is willing to do so is hardly the same as a guarantee to arrest him if he is *not* willing to do so. The guarantee that Republika Srpska will arrest him where he is *not* willing to appear for trial is an essential element in his case that he will appear for trial.

29. Talic has argued that the role carried out by the Stabilisation Force ("SFOR ") in the detention and transfer of indicted persons to the Tribunal has been assimilated to that of a police force in domestic legal systems.[77] The Trial Chamber observes that the comparison upon which Talic relies was made by one judge in a Separate Opinion appended to a Trial Chamber decision; there is no support for it in the Decision to which the Separate Opinion was appended.[78] The views of that judge do not assist Talic in persuading the Trial Chamber that he will appear for trial. The Dayton Peace Agreement[79] does not require SFOR to operate as the Tribunal's police force. It appears that SFOR is given authority to arrest persons indicted by the Tribunal, but that it is *presently* placed under no obligation to do so.[80] Whether or not that is so, the North Atlantic Council – under whose authority, direction and political control the original Implementation Force ("IFOR") operated, and under which SFOR now operates in the place of IFOR[81] – has expressed its understanding of SFOR's obligation to arrest as being that it –

[...] should detain any persons indicted by the International Criminal Tribunal who come into contact with SSFORC in its execution of assigned tasks, in order to assure the transfer of these persons to the International Criminal Tribunal.[82]

The use of the word "should" demonstrates the reality that SFOR does not accept any legal obligation on its part to arrest anyone. The resolution does not even contemplate any obligation upon SFOR to seek out indicted persons in order to arrest them. The inaction by SFOR during the period following the publication of the SFOR Decision only underlines the unfortunate fact that reliance cannot be placed upon SFOR to arrest indicted persons who fail to appear for trial, in the way a police force may be expected to act in domestic legal systems.

30. In relation to the "Promise and Guarantee" signed by Talic himself, the Trial Chamber accepts that, because the original indictment was a sealed one, Talic was not given the opportunity to surrender voluntarily to the Tribunal if he had wished to do so and thus demonstrate in a very clear way his willingness to appear for trial before the Tribunal. For this reason, the Trial Chamber does not take into account the fact that Talic did not voluntarily surrender.[83] However, the Trial Chamber accepts that Talic has reason enough for not wanting to appear. He has been charged with very serious offences for which, if convicted , he faces a very substantial sentence because of his high level position in relation to those crimes.[84] The Trial Chamber also accepts that, as a matter of common experience, any person in the position of Tadic, even if he is innocent, is likely to take advantage of the refuge which Republika Srpska presently provides to other high-level indicted persons,[85] and notwithstanding the "bail bond" which he is prepared to execute.[86]

31. It is nevertheless asserted that Talic is willing to appear.[87] No evidence was given by Talic himself in support of this assertion. The Trial Chamber drew the attention of his counsel to the statement made by Talic at the time he pleaded to the amended indictment:[88]

As far as I know, all the crimes that were done by military personnel in war are tried by military courts or international military courts or the warring states. This is logical and just because the military

1717

prosecution and military justice system is there to deal with the army and has the best knowledge of military organisation [...]. I personally feel that justice and law would be satisfied only if I were to be tried by a military court of law; that is to say, Generals who have taken part in civil wars [...].

His counsel replied that this statement had been made in a completely different context, when no guarantee had been considered and when Talic had not seen the exhibits in the case. Counsel suggested that Talic could not be criticized today for what he had said earlier. He suggested that the best thing to do may be to ask Talic directly about the statement he made. The Trial Chamber pointed out that it was a matter for counsel to decide whether Talic should be asked about the statement , but he was not called as a witness for that purpose.[89]

32. The Trial Chamber regards this statement by Talic as important in the context of all the matters to which reference has been made. Talic has strongly expressed a personally held belief that justice and law would not be satisfied in a trial conducted by the Tribunal. The Trial Chamber respects the rights of Talic to hold such an opinion, but upon the basis of all of the material before it – viewed in the light of the opinion which he stated, and in the absence of evidence from him which demonstrated a clear willingness on his part to appear for trial notwithstanding that opinion – the Trial Chamber is not satisfied that Talic will appear for trial .

Interference with witnesses

33. The prosecution has repeated a submission which it had made during Brdanin's application for provisional release. It says that, because Talic has had revealed to him the identity of witnesses (in accordance with Rule 66), and because he intends to return to the locality where the crimes are alleged to have been committed and where the witnesses live, it is very seriously concerned about his potential to interfere with victims and witnesses and his heightened ability to exert pressure on them.[90]

34. In the *Brdanin* Decision, the Trial Chamber did not accept that this heightened *ability* of an accused person to interfere with victims and witnesses, by itself, suggests that he *will* pose a danger to them.[91] It cannot just be assumed that every one charged with a crime under the Tribunal's Statute will, if released, pose a danger to victims or witnesses or others.[92] The Trial Chamber did not accept the logic employed by the prosecution – that, once it has complied with its obligation 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 because his mere ability to exert pressure upon them is heightened.[93]

35. In repeating its submission in the present case, the prosecution relies once more upon a Trial Chamber decision in *Prosecutor v Blaškic*.[94] The passage to which reference is made is in the following terms:[95]

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.

As the Trial Chamber observed in the *Brdanin* Decision, that decision does *not* state that this heightened *ability* of an accused person to interfere with witnesses establishes that he *will* pose a danger to them.[96] As this Trial Chamber has pointed out (earlier in the present case), protective measures for witnesses delaying the disclosure of their identity to the accused and their defence teams will not be granted by a

1718

Trial Chamber unless some objective foundation is demonstrated for fears expressed that they will be interfered with .[97] The situation can be no different in relation to the decision which a Trial Chamber must make in relation to the grant of provisional release to an accused person pending trial.

36. Insofar, as the Trial Chamber in the *Blaškic* case appears to have considered that the mere existence of a heightened ability of an accused person to interfere with witnesses is sufficient to refuse that person provisional release, this Trial Chamber does not, with respect, accept that decision as correct. It was given as long ago as 1996, in a formal decision which does not reveal the reasoning which led the Trial Chamber to that conclusion. A lot of water has passed under the bridge since then. Careful consideration has since been given to where the balance should lie in resolving the tension between the due regard to be paid to the protection of victims and witnesses and the full respect for the rights of the accused. The conclusion reached by this Trial Chamber (also earlier in the present case) is that Article 20.1 of the Tribunal's Statute makes the rights of the accused the first consideration, and the need to protect victims and witnesses the secondary one.[98] This was conceded by the prosecution.[99] 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 heightened ability of an accused person to interfere is relevant to the determination of that issue, but its mere existence is *not* sufficient in itself to deny provisional release.

37. On the other hand, it is argued by Talic that an accused who has been provisionally released has no interest in contacting the witnesses, as he knows that any such action on his part would occasion the revocation of his provisional release; such an action would be contrary to his own character, principles and morals.[100] The Trial Chamber observes, first, that this statement could hardly be said to be one of universal application. It depends upon whether any particular accused believes that his action will be discovered. Secondly, it provides no guarantee that the contact will not be made indirectly through an intermediary.

38. However, in view of the finding that the Trial Chamber is not satisfied by Talic that he will appear for his trial, it is unnecessary to make a finding as to whether , if released, Talic will pose a threat to any victim, witness or other person. In those circumstances, it is unnecessary to examine the likelihood that, if released , Talic would show to the authorities of Republika Srpska redacted witness statements – even if directly and specifically necessary for the preparation of his case – knowing that they would be able to identify that witness from the content of the statement, thus revealing to them the identity of witnesses in whose favour protective measures have been granted. This was an issue raised indirectly late last year in relation to the likelihood that his defence team may have done so.[101] Nor is it necessary in those circumstances to say anything in relation to the arrangement proposed by Mr Bundalo's Ministry of Internal Affairs, that the police would provide "appropriate" protection for prosecution witnesses if their names were supplied,[102] other than to point out that there might well be difficulties involved in such a procedure.

39. The Trial Chamber does not propose to reject the application upon the basis that Talic has failed to satisfy it that he will not pose a threat to any victim , witness or other person. It simply makes no finding upon that issue.

5 A new pleading issue

40. Reference was made earlier to the inclusion in the Further Amended Indictment of the allegation that Talic "committed" the crimes charged within the meaning of Article 7.1 of the Tribunal's Statute, notwithstanding the concession by the prosecution that it has no evidence that he physically perpetrated

1719

the crimes himself.[103] The prosecution has claimed that it is entitled to do so because it has relied upon a case of his participation in a common purpose to perpetrate those crimes. The Trial Chamber does not accept that claim.

41. Article 7.1 provides:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The prosecution claims that, in *Prosecutor v Tadic*,[104] the Appeals Chamber held that a common purpose was comprehended by the word "committed " in Article 7.1.[105]

42. The Trial Chamber does not so interpret the *Tadic* Conviction Appeal Judgment . The relevant passages in the Judgment for present purposes are in the following terms:

186. [...] Article 7(1) also sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute.

187. Bearing in mind the preceding general propositions, it must be ascertained whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7(1) of the Statute.

188. This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.

Then – after an extensive review of the existence of "common design", also called "common purpose", in customary international law – the Appeals Chamber held that common purpose was "a form of accomplice liability":

220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal

43. A "form of accomplice liability" cannot be the same as the liability for the physical perpetration of the crime by the accused himself. The Appeals Chamber's description of Article 7.1 as covering "first and foremost the physical perpetration of a crime by the offender himself" expresses the natural and ordinary meaning of "committed" in the collocation in which it is used in Article 7.1. Common purpose as a "form of accomplice liability" is more naturally comprehended within the words "otherwise aided and abetted in the planning, preparation or execution" in Article 7.1. To permit the prosecution to include within the word "committed", when used in the collocation of Article 7.1, both the physical perpetration of the crime by the accused himself and his participation in a common purpose to perpetrate that crime would virtually ensure the ambiguity in the pleading which the Appeals Chamber has now twice criticised.[106]

1720

44. The prosecution relies upon the Appeals Chamber's use of the word "commission " in the second sentence of par 188 as coming to the opposite conclusion. However , in the light of the clear description of common purpose as a "form of accomplice liability" after the Appeals Chamber's extensive review of the concept, it is obvious that the word "commission" in this context was used in its generic sense, not in the particular sense of the word when used in the collocation of Article 7.1.

45. It is the task of Trial Chambers to ensure that indictments are not ambiguous . The arguments of the prosecution in this case necessarily lead to ambiguity. They are rejected.

6 Disposition

46. For the foregoing reasons, the application by Momir Talic for provisional release pending his trial is refused.

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

Dated this 28th day of March 2001,
At The Hague,
The Netherlands.

_____
Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

1- Request for Release, 8 Dec 2000 ("Motion").
2- Prosecution's Response to "Motion for Release" Filed by Counsel for the Accused Momir Talic, 20 Dec 2000 ("Response").
3- Motion, III. Guarantees Provided by General Talic, B. Guarantees by the Public Authorities, par 2 (tenth unnumbered page, English translation).
4- The hearing was on 2 February 2001, such date having been selected by the Defence as the earliest when they would be ready to proceed.
5- Count 1, Article 4(3)(a) of the Tribunal's Statute.
6- Count 2, Article 4(3)(e).
7- Count 3, Article 5(h).
8- Count 4, Article 5(b).
9- Count 8, Article 5(d).
10- Count 9, Article 5(i).
11- Count 6, Article 5(f).
12- Count 7, Article 2(b).
13- Count 5, Article 2(a).
14- Count 10, Article 2(d).
15- Count 11, Article 3(b).
16- Count 12, Article 3(d).
17- Further Amended Indictment, dated 9 Mar 2001 and filed 12 Mar 2001, pars 5-6. Although the Motion was based upon the previous indictment (dated 17 Dec 1999), referred to as the "amended indictment", it is more realistic, and therefore preferable, to consider the Motion upon the basis of the current indictment. Talic is not prejudiced by such an approach, because the Trial Chamber has also considered his argument based upon the inadequacy of the previous indictment: pars 19-22, infra.
18- Ibid, pars 36, 50-51, 58-59.

1724

19- Ibid, pars 12-13, 15.
20- Prosecutor's Further Amended Indictment, 12 Mar 2001, par 4. This new pleading point is considered in Section 5, infra.
21- Tribunal's Statute, Article 7.1.
22- Further Amended Indictment, pars 24-26, 33.
23- Ibid, par 27.
24- Tribunal's Statute, Article 7.3.
25- Further Amended Indictment, par 25.
26- Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 Mar 2000, par 4; Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001 ("Talic Decision on Form of Indictment"), par 2. Note, however, that these decisions were based upon the previous indictment (the amended indictment) in which the allegations are not entirely identical to those in the current indictment (the Further Amended Indictment).
27- Motion for Release, 1 Dec 1999, par 4; dismissed: Decision on Motion for Release, 10 Dec 1999, par 18; Motion for Release, 18 Dec 2000, par 3; dismissed: Decision on Motions by Momir Talic (1) to Dismiss the Indictment, (2) for Release, and (3) for Leave to Reply to Response of Prosecution to Motion for Release, 1 Feb 2000 ("Decision on Second Motion for Release"), par 23; Leave to Appeal refused: Prosecutor v Brdanin and Talic, Case IT-99-36-AR73.2, Decision on Request to Appeal, 1 Mar 2000, p 3.
28- Motion, III. Guarantees Provided by General Talic, A. Personal Guarantees, par 2 (ninth unnumbered page, English translation); see also the Reply, par 3.1.
29- Response, par 17.
30- Application for Leave to Reply and the Reply to the Prosecutor's Response of 20 December 2000, 11 Jan 2001 ("Reply"), par 3. Reliance is placed upon "the London Protocol" of 1831.
31- This document included a direction that was not to be published in the Official Gazette of Republika Srpska.
32- Declaration of the Minister in the Government of Republika Srpska, filed with Addition to the Request for Release Dated 8 December 2000, 26 Jan 2001.
33- Transcript, 2 Feb 2001, p 241.
34- Ibid, pp 233-234.
35- Ibid, pp 242-243.
36- Ibid, p 231.
37- Ibid, p 236.
38- Ibid, p 236. The new President of Republika Srpska, Mirko Šaravic, was quoted by Reuters as having used those terms in his inaugural address when sworn in as President: Response, par 17.
39- Ibid, p 237.
40- Ibid, p 237.
41- Ibid, p 239.
42- Prosecutor v Karadžic and Mladic, Review of Indictment, (1995) II ICTY JR 1153.
43- Transcript, p 245.
44- Ibid, pp 237-239.
45- Reply, par 4.
46- Reference is made to the Universal Declaration of Human Rights, Article 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. The International Covenant on Civil and Political Rights ("International Covenant"), Article 14(2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. The European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), Article 6(2): Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The American Convention on Human Rights ("American Convention"), Article 8(2): Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. The African Charter on Human and Peoples Rights, Article 7(1)(b): Every individual shall have [...] the right to be presumed innocent until proved guilty by a competent court or tribunal. The Tribunal's Statute, Article 21.3: The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute. The Statute of the International Criminal Court, Article 66: 1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law. 2.The onus is on the Prosecutor to prove the guilt of the accused.
47- Motion, Second, Third, Seventh and Eighth unnumbered pages (English translation); Reply, par 2.
48- International Covenant, Article 9(3): 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 [...]. European Convention, Article 5(3): Everyone arrested or detained [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. American Convention, Article 7(5): Any person detained [...] 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. [Footnotes continued next page] 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, Principle 38: [...] a person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial subject to the conditions that may be imposed in accordance with the law.

1722

49- "Neumeister" Case, Judgment of 27 June 1968, Series A, Judgment and Decisions (European Court of Human Rights), Vol 8 ("Neumeister Case"), par 4 (p 37): Until conviction he [an accused] must be presumed innocent, and the purpose of the provision under consideration [Article 5(3) of the European Convention] is essentially to require his provisional release once his continuing detention ceases to be reasonable.
50- Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000 ("Brdanin Decision"), pars 12-13; Leave to Appeal refused: Prosecutor v Brdanin and Talic, Case IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000 ("Brdanin Leave Decision"), p 3. The many decisions at Trial Chamber level supporting the statement in the text are identified in footnotes 31 and 32 of the Brdanin Decision.
51- Brdanin Decision, par 18; Brdanin Leave Decision, p 3.
52- Motion, fourth unnumbered page (English translation).
53- Transcript, 2 Feb 2001, pp 228-229.
54- Ibid, p 247.
55- Talic Decision on Form of the Indictment.
56- Further Amended Indictment, dated 9 Mar 2001, filed 12 Mar 2001.
57- Motion, fourth unnumbered page (English translation).
58- Decision on Motion for Release, 10 Dec 1999; Decision on Second Motion for Release. Leave to appeal from the Decision on Second Motion for Release was refused: Decision on Request to Appeal, 1 Mar 2000.
59- Decision on Second Motion for Release, pars 18-21.
60- Talic Decision on Form of the Indictment.
61- Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000 ("Brdanin Decision"), pars 22-25; Leave to Appeal refused: Prosecutor v Brdanin and Talic, Case IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000 ("Brdanin Leave Decision").
62- Motion, seventh and eighth unnumbered pages (English translation).
63- Brdanin Decision, pars 24-28.
64- Motion, fifth and sixth unnumbered pages (English translation). The letter from General Nambiar, dated 6 Apr 1999, is annexed to the Motion.
65- Ibid, sixth unnumbered page (English translation).
66- Reply, par 2.
67- Prosecutor v Delalic, Case IT-96-21-T, Decision on the Accused Mucic's Motion for Particulars, 26 June 1996, pars 7-8; Prosecutor v Blaškic, Case IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, par 20; Prosecutor v Kupreškic, Case IT-95-16-PT, Order on the Motion to Withdraw the Indictment Against the Accused Vlatro Kupreškic, 11 Aug 1998, p 2; Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, par 20.
68- Ibid, seventh unnumbered page (English translation).
69- See, for example, the Judgment of the Appeals Chamber in Prosecutor v Delalic, Case-IT-96-21-A, Judgment, 20 Feb 2001, pars 189-198.
70- Section 3, supra.
71- Motion, eighth unnumbered page (English translation).
72- See Rule 101(B)(ii).
73- Brdanin Decision, par 15.
74- Milomir Stakic, a Bosnian Serb, was indicted on 13 March 1997 in relation to crimes alleged to have been committed in the area which is now Republika Srpska. He was arrested late last week in the territory of the Federal Republic of Yugoslavia by the authorities there. It has not been suggested that the authorities of Republika Srpska played any part in that arrest.
75- Talic suggests that the recent surrender to the Tribunal of her own accord by Biljana Plavšic (described as "the former President of Republika Srpska") can be no better demonstration that the highest ranking officers from the Republika Srpska are fully cooperating with the Tribunal, so that guarantees given by such officials should be given their full value: Reply, par 3.2. With all due respect to counsel for Talic, this submission appears to the Trial Chamber to be a complete non sequitur.

76- Motion, tenth unnumbered page (English translation).
77- Ibid, tenth unnumbered page (English translation).
78- This comparison was made in the Separate Opinion of Judge Robinson, in Prosecutor v Simic, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 Oct 2000 ("SFOR Decision"), par 6.
79- General Framework Agreement for Peace in Bosnia and Herzegovina, and associated documents.
80- The legal situation is discussed in helpful detail by Susan Lamb, "The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia", British Year Book of International Law (1999), 167 (in particular at 188-194). Her conclusion is that the better view is that, under both the Dayton Peace Agreement and customary international law, SFOR has authority to arrest persons indicted by the Tribunal, but that it is under no obligation to do so.
81- SFOR Decision, pars 39-42.
82- Resolution of 16 Dec 1995, quoted by Susan Lamb (at 191).
83- Brdanin Decision, par 17.
84- The Trial Chamber emphasises that the prospect of a very substantial sentence is only one of the factors which it has

1723

taken into account: cf the following two decisions of the European Court of Human Rights: Neumeister Case, par 10; Stogmuller Case, 10 Nov 1969, A 9, par 15.
85- Ibid, par 16.
86- Paragraph 8, supra.
87- Motion, tenth unnumbered page (English translation).
88- 11 Jan 2000, Transcript, pp 63, 64.
89- 2 Feb 2001, Transcript, pp 248-250.
90- Response, pars 18-19.
91- Paragraph 19.
92- Prosecutor v Delalic, Case IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, 25 Sept 1996 (filed 1 Oct 1996), par 34.
93- Brdanin Decision, par 19.
94- Case IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 Apr 1996 (English version filed 1 May 1996).

95- Ibid, p 5 (English version).
96- Paragraph 19, footnote 48.
97- Decision on the Motion by Prosecution for Protective Measures, 3 July 2000 ("First Protective Measures Decision"), par 26; Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000 ("Second Protective Measures Decision"), par 19; Decision on Fourth Motion by Prosecution for Protective Measures, 15 Nov 2000 ("Fourth Protective Measures Decision"), par 16.
98- First Protective Measures Decision, par 20; Second Protective Measures Decision, par 18.
99- Ibid.
100- Motion, ninth unnumbered page (English translation).
101- Fourth Protective Measures Decision, par 13; Decision on Motion by Prosecution for Order to Defence Counsel, 30 Nov 2000, par 10; Defence Observations on the Decision of 30 November 2000, 8 Dec 2000.
102- Paragraph 12, supra.
103- Paragraph 4, supra.
104- Case IT-94-1-A, Judgment, 15 July 1999 ("Tadic Conviction Appeal Judgment").
105- Prosecutor's Further Amended Indictment, 12 Mar 2001, par 3(i).
106- Prosecutor v Aleksovski, Case IT-95-14/1-A, Judgment, 24 Mar 2000, par 171, footnote 319, citing Prosecutor v Krnolejac, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 60; Prosecutor v Delalic, Case IT-96-21-A, Judgment, 20 Feb 2001, par 351.

055

1724

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JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

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