SCSL -2004-15-PT
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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before:

Registrar: Mr. Robin Vincent

Date filed: 7 May 2004

THE PROSECUTOR

Against

MORRIS KALLON ET AL

CASE NO. SCSL-2004-15-PT

KALLON - PROSECUTION RESPONSE TO "DEFENCE APPLICATION FOR LEAVE TO APPEAL AGAINST THE DECISION OF THE TRIAL CHAMBER REFUSING THE APPLICATION FOR BAIL BY MORRIS KALLON"

Office of the Prosecutor:

Mr. Luc Côté
Mr. Robert Petit
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Defence Counsel:

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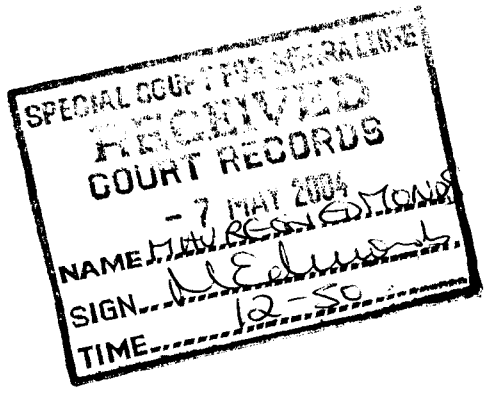

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I. INTRODUCTION

1. The Prosecution files this response to the "Defence Application for leave to Appeal against the Decision of the Trial Chamber refusing the Application for Bail by Morris Kallon" (the "**Defence Application**"), dated 4 May 2004 on behalf of Morris Kallon (the "**Accused**").[1] The Defence Application seeks to show purported errors committed by the Trial Chamber and good cause for leave to appeal pursuant to Rule 65(E) against the Decision of the Judge Boutet delivered on 27 February 2004 dismissing the "Confidential Motion for bail" filed by the Defence and denying the application for bail. The Prosecution files this Response to the Defence Application.

2. The primary reasons advanced by the Defence are as follows:

    a. That the purported errors of law and fact stated in the Defence Motion raise substantial issues of grave legal implications which will require the consideration of the Appeals Chamber.

    b. The Trial Chamber erred in law and in fact when it held that the elimination of the exceptional circumstances requirement does not eliminate the burden of proof required of the Defence.

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[1] Registry Page ("RP") 5519-5524.

c. The presence of the Special Court in Sierra Leone should not interfere with the rights of the Accused to bail.

d. That the submissions of the Government of Sierra Leone in this case is exactly the same as its submission in the case of *Prosecutor v. Tamba Alex Brima*. The stereotype submissions should not have influenced the decision of the Learned Judge.

e. The Learned Judge erred in law and fact by opining that the Accused does not have ties with Freetown, which is the seat of the Court.

f. The Learned Judge's reliance on the seriousness of the charges against the Accused unreasonably deprived the Accused of an individualised determination of eligibility for bail and exacerbated the problem of de facto mandatory detention and that the seriousness of the charges is not a requirement for the consideration of bail and that he did not give reasons for suggesting that if the Accused is released within the local community of Sierra Leone it would undermine his own safety.

g. The Learned Judge failed to consider the relevant conditions such as whether the Accused posed a danger to victims and witnesses as provided for under Rule 65 (B) of the Rules.

3. The Prosecution submits that reasons advanced by the Defence do not amount to "good cause" as required under Rule 65(E) and in consequence the Defence Application ought to be dismissed in its entirety.

II. ARGUMENTS

A. The Defence failed to show "good cause"

4. Rule 65(E) provides that "(A)ny decision rendered under this Rule shall be subject to appeal in cases where leave is granted by a Single Judge of the Appeals Chamber, upon good cause being shown. Applications for leave to appeal shall be filed within seven days of the impugned decision."

5. The Defence submits that the Learned Judge erred in law and fact on the issues stated in paragraph 2(a) – (h) above and submits that the same amounts to good cause to warrant the granting of leave to appeal against the Decision of the Learned Judge under Rule 65(E).

6. The Prosecution submits that in order to show "good cause" the Defence must show that the Trial Chamber may have erred in making the impugned decision.[2] In *Prosecutor v Fatmir Limaj et al*,[3] the Appeals Chamber of the ICTY noted that "(A) Trial Chamber 'may have erred' when it did not apply the law correctly or failed to take into account and assess all the decisive facts of a case."

7. The Prosecution submits that the Defence has failed to show any error in law or fact in the Decision of the Learned Judge. It submits that the correct principles of law were applied and all the decisive facts of the case correctly taken into account and assessed.

8. It is trite law in national as well as international tribunals that a Court of Appeal will not reverse the finding of a trial judge unless the Trial Judge has applied the wrong principles of law or misinterpreted the facts.[4] The Prosecution respectfully submits that the Defence Application show no error in law or fact in the Decision to warrant the reversal of the said Decision. In the absence of the same, the Prosecution submits that the Defence has failed to show "good cause" as required under Rule 65(E).

B. The Burden of Proof rests upon the Accused

9. The Defence submits that the Learned Judge committed an error of law and fact when he held that the elimination of the exceptional circumstances requirement does not eliminate the burden of proof required of the Defence. The Defence submits that this is in contravention of customary international norm. They argue that it was in a bid to

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[2] *Prosecutor v Brdanin and Talic*, (IT-99-36/1) "Decision on Application for Leave to Appeal" 7 September 2000 para 9; *Sagahutu v The Prosecutor*, ICTR-00-56-I, "Decision on Leave to Appeal against the Refusal to Grant Provisional Release" 26 March 2003 para 26 and *Ndayambaje v The Prosecutor*, ICTR-96-8-A, "Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002" 10 January 2003 para 29 and *Prosecutor v Simic et al* IT-95-9 "Decision on Application for Leave to Appeal" 19 April 2000 para 11.

[3] IT-03-66-AR65, "Decision on Fatmir Limaj's Request for Provisional Release" 31 October 2003 para 7.

[4] *Prosecutor v Aleksovski* IT-95-14/1 Judgement 24 March 2000 para. 74, the ICTY Appeals Chamber held that "(T)he Appeals Chamber therefore takes the view that, unless there is good reason to believe that the Trial Chamber has drawn unreasonable inferences from the evidence , it is not open to the Appeals Chamber to disturb the factual conclusions of the Trial Chamber." See also *Wellesley-Cole v Wellesley-Cole* 1967-68 ALR SL 210 and *Attorney-General v Shamel and Shamel* 1957-60 ALR SL 154.

avoid the "flagrant violations" of customary international law that the ICTY amended its rules.

10. The Defence does not substantiate its assertion nor does it specify the principle of customary international law violated. The Prosecution submits that the Learned Judge was right in his analysis of the law in rubric B headed "The Burden of Proof" paragraphs 22 – 35 of his Decision and in particular his conclusion "*that it is for the Defence to show that further detention of the Accused is neither justified nor justifiable in the circumstances at hand.*" The Prosecution submits that the Learned Judge's Decision is supported by overwhelming jurisprudence and the established practice of the ad hoc tribunals some of which are referred to by the Learned Judge in his Decision.[5]

11. The Prosecution further submits that the Learned Judge's Decision does not violate customary international law. In *Prosecutor v Krajisnik* the majority of the Judges of the ICTY Trial Chamber held that "*... there is nothing in customary international law to prevent the placing of the such a burden in circumstances where an accused is charged with very serious crimes, where an International Tribunal has no power to execute its own arrest warrants, and where the release of an accused carries with it the potential for putting the lives of victims and witnesses at risk. These factors lend further weight to placing the burden of proof upon the accused.*"[6]

12. The Prosecution submits that contrary to the assertion by the Defence, the ICTY did not amend Rule 65(B) of its Rules to conform to international law. According to Judge Patricia Wald, who was at the Tribunal in 1999 when the Rules Committee was considering amending Rule 65(B), the Rules Committee amended the rule as a matter

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[5] In *Prosecutor v. Ademi*, ICTY, IT-01-46-PT, Order On Motion For Provisional Release, 20 February 2002, paragraph 19 the ICTY held that even after the amendment the "(A)s 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." See also *Prosecutor v Issa Hassan Sesay* SCSL-04-15-PT "Decision on Application of Issa Sesay for Provisional Release" 31 March 2004; *Prosecutor v. Brdanin et al.*, Case No. IT-99-36-PT, *Decision on motion by Radoslav Brdanin for provisional release*, 25 July 2000 ("Brdanin")

[6] IT-00-39 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release 8 October 2001 Para 13. Even in the dissenting decision, Judge Patrick Robinson noted that it was not impermissible to impose a burden on an Accused person awaiting trial to justify his release. Para 7

of practicality, not necessity.[7] This position was endorsed by another author who stated in unequivocal terms that the amendment to ICTY Rule 65(B) had nothing to do with questions about consistency with customary international law.[8] The Prosecution therefore urges the Court to refuse leave to appeal as there was no error in law and all the decisive facts of the case were taken into account and assessed.

C. The Presence of the Special Court in Sierra Leone

13. The Defence argues that the presence of the Special Court in Sierra Leone should not interfere with the rights of the Accused to bail. It submits that the establishing parties of the Special Court recognised that the Special Court had no independent police force and the Sierra Leone Police had limited capacity but nonetheless seated the court in Sierra Leone.

14. The Prosecution submits that Learned Judge made no error in law or fact on this issue. In paragraph 38 of the Decision, the Learned Judge stated that *"(T)he Special Court, contrary to the ICTY and ICTR, has its seat in Freetown, Sierra Leone, which ~ given the special circumstances ~ does make the issue of bail somewhat different, not with respect to the applicable principles but when assessing the particular circumstances."* *The Learned Judge stated further that "(g)ranting bail to an Accused before the Special Court entails that he will be released in the country where he is alleged to have committed the crimes for which he has been indicted. In this respect, reference can be more properly made to the ICTR, the judicial history of which, it has to be noted, has never granted an application for provisional release. I would suggest that it could be argued that the particular situation of the Special Court and its direct presence in the territory of Sierra Leone makes it even more important, difficult,*

[7] Patricia Wald & Jenny Martinez, Provisional Release at the ICTY: A Work in Progress, in Essays on ICTY Procedure and Evidence 233 (Richard May et al. eds., 2001) quoted in Mathew M. DeFrank in "Provisional Release: Current Practice, A dissenting Voice, and the Case for a rule Change" 80 Texas Law Review 1429.

[8] Mathew M. DeFrank in "Provisional Release: Current Practice, A dissenting Voice, and the Case for a rule Change" 80 Texas Law Review 1429 at 1447. He stated further that (A)t the Tribunal, Judges amend and promulgate rule changes. Therefore, those who were present at the Tribunal in December 1999 would have had knowledge of, and a significant number would have directly participated in, the amending process. In none of the post amendment provisional-release cases did the Trial Chamber state that the Tribunal amended Rule 65(B) to create consistency with customary international law. In fact, Judge Robinson himself, sitting on one of the first post amendment provisional-release cases in early 2000, did not mention harmony with international norms as a justification for amending Rule 65.

critical and sensitive situation than that of the ICTR which sits in Tanzania, a neighbouring country of Rwanda."

15. The Defence submission points to no error of law or fact. The Learned Judge clearly stated in his Decision that the presence of the Court in Sierra Leone has no bearing on the applicable principles but took it into consideration only when examining the particular circumstances of the case. The Prosecution submits that the Learned Judge was right in considering this issue when examining the particular circumstances of the case. It further submits that the issue was rightly taken into consideration in a number of similar cases in the other ad hoc tribunals.[9] With respect to the Defence, they have failed to show good cause and in consequence the Application ought to be refused.

D. The submission of the Government of Sierra Leone

16. The Defence argues that the Government of Sierra Leone submitted the exact submission it submitted in the case of *Prosecutor v Tamba Alex Brima* in this case. It submits that as a result the submission is not objective and stereotype and should not have influenced the decision of the Learned Judge.

17. The Prosecution respectfully submits that the Defence complaint that the Government of Sierra Leone filed the exact submission in this case is not an error of law or fact on the part of the Learned Judge. Further, the Prosecution submits that there is no error of law or fact in the Decision of Learned Judge under this rubric or at all. In paragraph 37 of the Decision, the Learned Judge noted that the opinion of the Government of Sierra Leone was useful but it had to be assessed within the parameters of Rule 65(B). The Judge noted further that *"(h)owever, considering that the Special Court, an independent institution, has been established by means of a bilateral agreement between the United Nations and the Government of Sierra Leone, not only it would not appropriate but it cannot be bound by the opinion expressed by the Government of Sierra Leone as the question whether the Accused should be provisionally released or not. This is a matter for the Court and the Court only. Nonetheless, it is important to stress the fact that the present submissions have been given due consideration in so*

[9] In *Prosecutor v. Ademi*, ICTY, IT-01-46-PT, Order On Motion For Provisional Release, 20 February 2002, paragraph 24 the ICTY list as the first factor relevant in the decision-making process the fact that the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released.

far as they provide very valuable and substantial information on the current situation in Sierra Leone and is, in this respect, an important factor in determining the public interest aspect."

18. The Prosecution submits that the Learned Judge did not base his Decision on the opinion of the Government of Sierra Leone. As he rightly noted *"(T)his is a matter for the Court and the Court only."* The Learned Judge rightly used the information on the current situation in Sierra Leone provided in the opinion in determining the public interest aspect and that there was no error of law or fact in the same as alleged by the Defence. As the Defence has failed to show good cause, the Prosecution submits that its Application must fail.

E. The Community Ties

19. The Defence argues that the Learned Judge erred in law and fact by opining that the Accused does not have ties with Freetown, which is the seat of the Court and that the Accused has community ties in Freetown but stronger community ties in Bo, where he was born and where his extended family lives.

20. With utmost respect to the Defence, the Prosecution submits that the Learned Judge did not state that the Accused had no ties in Freetown. In paragraph 44 of the Decision, the Learned Judge pointed out "*that the evidence adduced by the Defence pertains to his community ties with Bo rather than with Freetown, which, considering the nature of the charges alleged against the Accused, as contained in the Indictment against him, I would suggest it could have been of more relevancy and of better assistance in assessing the factors in support of the bail application.*"

21. The Prosecution submits that the Learned Judge came to this conclusion based on the evidence presented before him. The Defence in their motion have not complained that the Learned Judge arrived at the wrong conclusion based on the evidence. In fact, in their motion they state that the Accused has stronger community ties in Bo, where he was born and where his extended family lives, thereby illustrating the same point made by the Trial Judge that he has more ties in Bo than in Freetown.

22. The Prosecution submits that the Learned Judge made no error of fact or law in arriving at his conclusion based on the evidence presented to the Court. Taking into

consideration the entire Decision, the Prosecution submits that this issue was not a primary consideration in determining this matter and in any event even if there was an error on this point the same does not amount to good cause to warrant the granting of leave to appeal.

F. Seriousness of the charges and Safety of the Accused

23. In paragraph 16 of the Defence Application, the Defence submits that the Learned Judge's reliance on the seriousness of the charges against the Accused unreasonably deprived the Accused of an individualised determination of eligibility for bail and exacerbated the problem of de facto mandatory detention. The Defence submits that the seriousness of the charges is not a requirement for the consideration of bail. The Defence further argues that the Decision contains no analysis of the allegations against the Accused beyond the "conclusory statement" that they are of "gravity and seriousness." They argue that as the jurisdiction of the Court is limited to "Serious Violations of Humanitarian Law" this would in effect mean that any accused will be denied bail on the basis of the indictment.

24. The Prosecution submits that the Learned Trial Judge made no error of law or fact in considering the seriousness of the charges against the Accused. The Prosecution submits that the same is a material issue to be taken into consideration.[10] In paragraph 44 of the Decision, the Learned Judge noted that "*In addition, I have also satisfied myself that the allegations against the Accused are of such gravity and seriousness that, if released within the local community of Sierra Leone, could well undermine his own safety and, indeed, his appearance for trial.*" The Prosecution submits that this was not the only factor but was one of several factors taken into consideration by the Learned Judge. In *Prosecutor v. Ademi*[11] under the rubric "factors relevant to the decision-making process", the ICTY noted that the fact that the Tribunal's jurisdiction is limited to serious offences should be taken into consideration as "this may mean

[10] *See Prosecutor v. Brdanin,* IT-99-36-PT, Decision On Motion By Momir Talic For Provisional Release, 28 March 2001, paragraph 30 wherein the Court noted that the Accused "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." In footnote 84 of the said Decision, it states that "The Trial Chamber emphasises that the prospect of a very substantial sentence is only one of the factors which it has taken into account."

[11] ICTY, IT-01-46-PT, Order On Motion For Provisional Release, 20 February 2002, paragraph 25.

that accused 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 the course of justice in other ways."[12]

25. The Defence further submits that the Learned Judge did not give reasons for suggesting that the detainee if released within the local community of Sierra Leone would undermine his own safety. With respect to the Defence, the Learned Judge did not say that releasing the Accused **would** undermine his own safety. In paragraph 44 of the Decision, he commented that *"In addition, I have also satisfied myself that the allegations against the Accused are of such gravity and seriousness that, if released within the local community of Sierra Leone, **could** well undermine his own safety and, indeed, his appearance for trial."* (Bold and italics ours) The Prosecution submits that the Learned Judge gave ample reasons to support his entire Decision and would contend that the Learned Judge was not obliged to give reasons to support every statement in his Decision. In any event, the Prosecution submits that the same does not amount to good cause as there was no error in law and the decisive fact were taken into account and assessed.

G. Danger to Victims and Witnesses

26. In paragraph 18 of the Defence Application, the Defence submits that the Learned Judge failed to consider the relevant conditions such as whether the Accused posed a danger to victims and witnesses as provided under Rule 65(B).

27. In paragraph 45 of the Decision, the Learned Judge stated that he found it unnecessary to examine in detail the question whether the Accused will pose a danger to any victim, witness or other person if granted bail as he was not satisfied that the Accused will appear for trial if granted bail.

28. The Prosecution submits that the Learned Judge applied the two-pronged test, namely, (a) the accused will appear for trial and (b) if released, the accused will not pose a danger to any victim, witness or other person.[13] This test is conjunctive and not

[12] *See also Prosecutor v. Kvocka et al*, IT-98-30, Decision on Motion For Provisional Release Of Miroslav Kvocka, 2 February 2000.
[13] Para 40 of the Decision.

disjunctive. If the Defence fails to prove any one of the two limbs of the test, its application must fail. The Prosecution submits that the Learned Judge having determined that the Defence had failed to satisfy him as regards the first pre-condition, to wit, that he will appear for trial, he rightly decided that there was no need to consider the other element for even if he decided this element in favour of the Accused his application was bound to fail. It would have, as the Learned Judge stated, been unnecessary to examine the same. The Prosecution submits that there is no error in law in failing to consider the second pre-condition after the Learned Judge had concluded that the Defence had failed to satisfy him as regards the first pre-condition.

III. CONCLUSION

29. The Prosecution submits that the onus is on the Defence to show good cause. With all due respect to the Defence, the Prosecution submits that they have failed to demonstrate "good cause" as required under Rule 65(E). The Defence showed no error either in law or fact. The Prosecution respectfully submits that the arguments advanced by the Defence do not amount to "good cause". Taking the totality of the evidence and examining the Decision in its entirety, the Prosecution respectfully submits that the Learned Judge applied the correct principles and arrived at the correct decision.

30. Taking into consideration current jurisprudence, the Prosecution submits that even if the Defence satisfies the two-pronged test the Trial Chamber still has a discretion to refuse to grant provisional release for any reason.

31. Accordingly, the Prosecution submits that the Defence Application be dismissed in its entirety.

Freetown, 7 May 2004.

For the Prosecution,

Luc Côté
Chief of Prosecution

Robert Petit
Senior Trial Attorney

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v Fatmir Limaj et al* IT-03-66-AR65, "Decision on Fatmir Limaj's Request for Provisional Release" 31 October 2003 para 7.
2. *Prosecutor v Brdanin and Talic*, (IT-99-36/1) "Decision on Application for Leave to Appeal" 7 September 2000 para 9;
3. *Sagahutu v The Prosecutor*, ICTR-00-56-I, "Decision on Leave to Appeal against the Refusal to Grant Provisional Release" 26 March 2003 para 26
4. *Ndayambaje v The Prosecutor*, ICTR-96-8-A, "Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002" 10 January 2003 para 29.
5. *Prosecutor v Simic et al* IT-95-9 "Decision on Application for Leave to Appeal" 19 April 2000 para 11.
6. *Prosecutor v Aleksovski* IT-95-14/1 Judgement 24 March 2000 para. 74
7. *Prosecutor v. Ademi*, ICTY, IT-01-46-PT, Order On Motion For Provisional Release, 20 February 2002, paragraph 19, 24 and 25
8. *Prosecutor v Krajisnik* IT-00-39 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release 8 October 2001 Para 13
9. *Prosecutor v. Brdanin et al.*, IT-99-36-PT, Decision on motion by Radoslav Brdanin for provisional release, 25 July 2000 ("Brdanin")
10. Mathew M. DeFrank in "Provisional Release: Current Practice, A dissenting Voice, and the Case for a rule Change" 80 Texas Law Review 1429 at 1447.
11. *Prosecutor v. Brdanin*, IT-99-36-PT, Decision On Motion By Momir Talic For Provisional Release, 28 March 2001, paragraph 30
12. *Prosecutor v. Kvocka et al*, IT-98-30, Decision on Motion For Provisional Release Of Miroslav Kvocka, 2 February 2000.

Annex 1

Prosecutor v Fatmir Limaj et al IT-03-66-AR65, "Decision on Fatmir Limaj's Request for Provisional Release" 31 October 2003 para 7.

Cases: IT-03-66-AR65

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Wolfgang Schomburg, Presiding
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar:
Mr. Hans Holthuis

Decision of:
31 October 2003

THE PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

DECISION ON FATMIR LIMAJ'S REQUEST FOR PROVISIONAL RELEASE

Counsel for the Prosecutor:

Mr. Andrew Cayley
Mr. Alex Whiting

Counsel for the Defence:

Mr. Karim A. A. Khan for Fatmir Limaj
Mr. Tome Gashi and Mr. Peter Murphy for Haradin Bala
Mr. Steven Powles for Isak Musliu

I. Background

1. This Bench of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (respectively, "Bench" and "International Tribunal") is seized of the "Application for Leave to Appeal Against the Decision on Provisional Release of Fatmir Limaj, Rendered by Trial Chamber I on 12 September 2003", filed by counsel for Fatmir Limaj (respectively, "Defence" and "Limaj") on 22 September 2003 ("Application for Leave to Appeal"), pursuant to Rule 65(D) of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. The Application for Leave to Appeal challenges a decision issued by Trial Chamber I on 12 September 2003, rejecting Limaj's request for provisional release ("Impugned Decision").[1] In the Impugned Decision, the Trial Chamber denied provisional release, *inter alia*, on the following grounds: (i) that "[it] cannot be satisfied that the Accused would have surrendered voluntarily to the Tribunal if he would not have been arrested"; (ii) that "the Accused alleged to have command responsaibility and is charged with participating in serious crimes... [and] that, if convicted, the Accused is charged with participating in serious crimes" and "that therefore if convicted, the Accused is likely to face long prison terms and he therefore has a stong incentive to flee"; (iii) that "according to the letter of Mr. Coffey [Director of the Department of Justice of UNMIK], UNMIK is not able to provide any guarantees that the Accused, if provisionally released would be available for trial"; and (iv) that "the Chamber is not satisfied that if released, the Accused would appear before the Tribunal".

3. With respect to the procedural background, the Bench granted the Office of the Prosecutor ("Prosecution") leave to file a joint response, and an extension of time, on 30 September 2003.[2] The Prosecution filed its response on 26 September 2003 ("Response").[3] Following an oral grant of an extension of time, the Defence replied on 13 October 2003 ("Reply").[4]

4. The question before the Bench is whether "good cause" pursuant to Rule 65(D) Sentence 1 for granting leave to pursue the appeal to the full Appeals Chamber has been shown.

II. Applicable Law

5. Rule 65(B) of the Rules sets out the basis upon which a Trial Chamber may order the provisional release of an accused. It states that provisional 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" (emphasis added).

6. Rule 65(D) of the Rules provides, *inter alia*, that leave to appeal a Trial Chamber's decision on provisional release may be "granted by a bench of three judges of the Appeals Chamber, upon good cause being shown". According to the settled jurisprudence of the Appeals Chamber, there is "good cause" within the meaning of Rule 65(D) for granting leave to appeal when it appears that the Trial Chamber "may have erred" in rendering the impugned decision.[5]

7. A Trial Chamber "may have erred" when it did not apply the law correctly or failed to take into account and assess all the decisive facts of a case.

8. Article 21(3) of the Statute of the Tribunal, adopted by Security Council Resolution 827 of 25 May 1993 ("Statute"), mandates that "the accused shall be presumed innocent until proved guilty". This provision both reflects and refers to international standards as enshrined, *inter alia*, in Article 14(2) of the International Covenant on Civil and Political Rights ("ICCPR") of 19 December 1966 and Article 6 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR").

9. Furthermore, Article 9(3) of the ICCPR emphasizes *inter alia* that: "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". Article 5 (3) of the ECHR provides *inter alia* that: "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".

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

11. The ICTY is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and other innocent people. Justice, however, also means respect for the alleged perpetrators' fundamental rights. Therefore, no distinction can be drawn between persons facing criminal procedures in their home country or on an international level.

12. Rules 65 (B) and (D) of the Rules must therefore be read in the light of the ICCPR and ECHR and the relevant jurisprudence.

13. Moreover, when interpreting Rule 65(B) and (D) of the Rules, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure than mandatory detention, it must be applied.[6]

III. Discussion

14. At the outset, the Bench notes that, in breach of Rule 65(D) of the Rules, the Application for Leave to Appeal was filed one day late (Monday 22nd of September instead of Friday 19th September 2003). In fairness to the Accused, who should not be held responsible for his counsel's negligence, the Bench has nevertheless decided to consider it. In the Application for Leave to Appeal, the Defence relies on five grounds of appeal. They will be dealt with in the following sections, grouped together where appropriate.

(a) The Trial Chamber erred in not granting an oral hearing, in not giving reasons for such a failure, and in failing to inform the parties of its decision (Grounds 1-3)

15. According to the Defence, the Trial Chamber erred in refusing its request for an oral hearing because there are no cases in the practice of the International Tribunal in which an application for provisional release has been refused "on paper " where such a hearing had been requested. This rejection, it is claimed, denied the Defence the opportunity to call important witnesses. The Defence also argues that the Trial Chamber erred in not giving any explanation for its denial, as it is under an obligation to provide reasons for its decisions. Lastly, the Defence contends that the Trial Chamber erred in failing to inform the Defence of its rejection of the request for an oral hearing because it deprived the Defence of the possibility to make detailed submissions in support of its request for an oral hearing, and to make fully informed decisions regarding how best to present certain evidence before the Trial Chamber.

16. The Prosecution submits that the decision whether or not to receive oral submissions in addition to written submissions is one reserved for the discretion of the Trial Chamber and that, when requesting an oral hearing, the Defence did not express its intention to call additional witnesses. The Prosecution contends that the duty to provide a reasoned opinion applies only when the Chamber is dealing with substantive aspects of the Application, and does not limit the Trial Chamber's discretion to decide whether or not to call an oral hearing. The Prosecution argues that the alleged failure by the Trial Chamber to notify the Defence of its decision did not prejudice the preparation of the case as the Defence had ample opportunity to present its case in its written submissions, which indeed amounted to more than 100 pages. Thus, if the Defence did not put before the Trial Chamber all the evidence it could have submitted, this was a miscalculation on the part of the Defence and not an error of the Trial Chamber.

17. The Bench largely concurs with the Prosecution's submissions. Another bench of the Appeals Chamber, rejecting an application for leave to appeal in *Odjanic* , reasoned as follows:

> "CONSIDERING that the right of an accused to be heard is not similar to what the accused regards as his right to be heard personally;
> CONSIDERING that the "right" of an accused, who is represented, to be heard personally is not unfettered and is subject to the discretion of the Chamber before which the accused is appearing;
> CONSIDERING that Ojdanic has not put forth any cogent reason why he should have been heard personally in the present case, nor has he shown that the Trial Chamber abused its discretion when refusing to hear him personally [the Chamber refuses leave to appeal].[7]

It follows that the right to be heard personally is not absolute. The granting of an oral hearing is a matter for the discretion of a Chamber, and it may legitimately be regarded as unnecessary when, as in the present case, the information before the Trial Chamber is sufficient to enable the Chamber to reach an informed decision. The Defence has failed to demonstrate the added value of an oral hearing, namely the reason why if granted, such a hearing could have led the Trial Chamber to another conclusion. Contrary to what was argued by the Defence, the tendering of "detailed submissions" in support of an oral hearing (if available) has to be done when the request for a hearing is made. Finally, the Trial Chamber is not obliged to explain prior to its final decision why a hearing is unnecessary or to notify the parties of this.

18. For the foregoing reasons, the Bench finds that the Defence's arguments under Grounds 1 to 3 do not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) of the Rules – see above paragraphs 5-13 - and, therefore, these grounds are dismissed.

(b) The Trial Chamber erred in failing to notify the parties that Mr. Steiner had not responded to the Pre-Trial Judge's letter of 31 July 2003 seeking his appearance (Ground 4)

19. The Defence submits that the Trial Chamber erred in deciding the application for provisional release without informing it that Mr. Steiner, the Director of the United Nations Interim Administration Mission in Kosovo ("UNMIK"), had not responded to a letter of 31 July 2003, in which the Pre-Trial Judge had requested that Mr. Steiner submit his comments on Limaj's provisional release ("Letter"). Had it been informed, the Defence argues, it would at least have sought a subpoena so as to obtain the "very important evidence" that Mr. Steiner could have offered with regard to Limaj's application for provisional release.

20. The Prosecution submits that the Letter only asked Mr. Steiner to respond "if he so wished", and that by no means was the Trial Chamber obliged to notify the Defence of Mr. Steiner's failure to respond. It argues that the Defence was at least on notice that Mr. Steiner had not responded as otherwise the response to the Letter would have been filed, and made available to the Defence. The Trial Chamber waited a full two weeks beyond the deadline of 25 August 2003 set out in the Letter before issuing the Impugned Decision, giving Mr. Steiner extra time to respond, and allowing the Defence ample opportunity to inquire as to whether any response had been received or was forthcoming by, for instance, contacting Chambers or the Registry.

21. First, the Bench wishes to stress that the Trial Chamber was under no obligation to notify the Defence that Mr. Steiner had not responded to the Letter. It was for the Defence, if it so wished, at the expiry of the deadline set out in the Letter, to contact the Registry, which is the channel of communication for the International Tribunal, in order to seek any available information. Secondly, the Bench notes that the Letter requested Mr. Steiner to respond by the 25th of August 2003; having received no answer from Mr. Steiner before the expiry of the deadline, it would have been evident, in the Bench's view, that Mr. Steiner, who had been appropriately asked by the Trial Chamber to respond

only "if he so wished", had chosen not to do so. This is all the more so because Mr. Coffey had already clearly stated UNMIK's position with regard to Limaj's provisional release, and thus it was neither realistic nor warranted to expect an additional response from UNMIK.

22. For the foregoing reasons, the Bench finds that Ground 4 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) of the Rules – see above paragraphs 5-13 - and, therefore, it is dismissed .

(c) The Trial Chamber failed to give appropriate consideration to the issue of "guarantees" (Ground 5)[8]

23. According to the Defence, the Trial Chamber placed excessive weight on the absence of guarantees from UNMIK and insufficient weight on the undertakings from the provisional authorities of Kosovo, including the statement by the Prime Minister of Kosovo and by Limaj himself.

24. The Prosecution responds that the Trial Chamber was correct in placing more weight on the representations from UNMIK as UNMIK, not the provisional government, remains responsible for public safety and order in Kosovo and for monitoring the borders of the province. Further, Mr. Coffey, the head of the UNMIK justice system, had stated that given the limited resources available to UNMIK, it would be relatively easy for Limaj to flee and that, the provisional authorities of Kosovo have no means to enforce their own undertakings, as the Prime Minister of Kosovo himself has publicly acknowledged.

25. According to the settled practice of the International Tribunal, it is the State into the territory of which the accused will be released, as the guarantor of public safety and order in that territory, that must provide the International Tribunal with guarantees that the accused will not flee and that if he does so, he will be arrested. As the Trial Chamber correctly noted, in the province of Kosovo, according to Security Council Resolution 1244 of 10 June 1999, UNMIK, and not the provisional institutions of Kosovo, is the authority which, in coordination with KFOR (the NATO Forces in Kosovo), is entrusted with ensuring public safety, and conducting bordering monitoring, and is given the necessary means to enforce such duties. Thus, there is no reason why the Trial Chamber should have taken into account guarantees given by other authorities.

26. For the foregoing reasons, the Bench finds that Ground 5 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) – see above paragraphs 5-13 - and, therefore, it is dismissed.

The Trial Chamber failed to give "the most anxious scrutiny" to the Defence's arguments (Ground 6)

27. Pursuant to this ground of appeal, the Defence submits that the Trial Chamber made three different kinds of error. They will be dealt with in turn.

28. First of all, the Defence submits that the Trial Chamber erred in relying on the seriousness of the charges against Limaj when refusing to grant provisional release because, in the ECHR jurisprudence, the severity of the sentence that may be imposed if the accused is convicted is not a ground for refusing an accused provisional release.

29. The Prosecution responds that the jurisprudence of the International Tribunal is fully consistent with international law and hat the Trial Chamber considered the seriousness of the charges and the possibility of a lengthy sentence together with several other factors.

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30. The Bench considers that, while under Rule 65(B) of the Rules the seriousness of the charges against an accused cannot be the sole factor that determines the outcome of an application for provisional release, it is certainly one that a Trial Chamber is entitled to take into account when assessing whether an accused, if released, would appear for trial.[9] It is evident that the more severe the sentence which an accused faces, the greater is the incentive to flee. As the Trial Chamber relied on the seriousness of the charges against Limaj in addition to several other factors, it did not err in taking this factor into account. Furthermore, this approach is not inconsistent with the ECHR jurisprudence. Rather, in the Bench's view, such an approach accords with that of the ECourtHR.[10]

31. Next, the Defence claims that Mr. Coffey was not asked for information in a neutral manner but was effectively "primed" by the Prosecution, and that he made his statement without the benefit of any representation from the Defence.

32. The Prosecution rebuts this, arguing that Mr. Coffey's letter was not submitted to the Trial Chamber in response to a Prosecution request but in response to the accused's request, and that it did not "prime" Mr. Coffey; to the contrary, "care was taken not to infringe the neutrality of UNMIK". It rejects as untrue the assertion that Mr. Coffey made his statement "without the benefit of any representation from the Defence" arguing that the Defence in fact met with Mr. Coffey to discuss Limaj's provisional release before Mr. Coffey replied to the letter.

33. The Bench notes that, contrary to what was argued by the Defence, the Defence appears to have met with Mr. Coffey before he sent his letter to the Trial Chamber and thus, Mr. Coffey did in fact have the opportunity to hear both the parties. The Bench does not accept the Defence's implication that the Director of Justice of UNMIK would give a false assessment of the security situation in Kosovo after being "primed" by the Prosecution. There is no basis for asserting that Mr. Coffey's assessment would not be reliable, and thus the Trial Chamber did not err in relying upon it.

34. Finally, the Defence contends that the Trial Chamber failed to explain why it found that Limaj did not voluntary surrender, notwithstanding the declarations to the contrary by individuals involved in Limaj's surrender, such as the Prime Minister of Kosovo, Mr. Steiner, and General Mini, the head of the KFOR, under whose command Limaj was arrested.

35. The Prosecution responds that the Impugned Decision makes explicit reference to the Accused's arrest by the Slovenian authorities, indicating his intention to return to the protection of Kosovo rather than surrender to the International Tribunal.

36. In exercising its discretion under Rule 65(B) of the Rules, the Trial Chamber must take into account all the decisive [material] facts of a case. The Trial Chamber was correct to consider, in addition to the submissions of the Defence in its original motion, Limaj's representations to the press and to the Kranj District Court in Slovenia, the reliability of which is not challenged by the Defence. Weighing all these facts together, it reached the reasonable conclusion that Limaj's surrender was not voluntary.

37. For the foregoing reasons, the Bench finds that Ground 6 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) – see above paragraphs 5-13 - and, therefore, it is dismissed.

(d) The Trial Chamber erred in not placing the burden of proof on the Prosecution to demonstrate that the accused is not entitled to provisional release (Ground 7)[11]

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38. According to the Defence, international humanitarian law and principles enshrined in the ICCPR and the ECHR impose upon the Prosecution the burden of proof in justifying detention pending trial before this International Tribunal. The Defence adds that the detention should be justified by clear and convincing evidence. In support of its view, the Defence quotes several cases from the Human Rights Committee, the European Court of Human Rights ("ECourtHR"), the United Kingdom. and the United States. It relies as well on Articles 60(2) and 58(1) of the Statute of the International Criminal Court ("ICC").

39. The Prosecution submits that the Defence's interpretation of international law is wrong and that the Impugned Decision is fully consistent with the settled jurisprudence of this International Tribunal, in which it is well established that the burden of proof rests on the accused. It recalls that, unlike national jurisdictions, the International Tribunal lacks a police force and has to rely on States to monitor and enforce conditions of release. It submits that the Trial Chamber's approach is fully consistent with its obligation to conduct a fair evaluation of the circumstances and interests at stake. With respect to the ICC Statute, the Prosecution observes that it is not binding on the International tribunal and it does not support the imposition of a burden of proof on the Prosecution to justify pre-trial detention.

40. It is the Bench's view, contrary to the argument put by the Defence, that the Trial Chamber did not err in not imposing the burden on the Prosecution to demonstrate that provisional release was inappropriate. First, Rule 65(B) does not place the burden of proof on the Prosecution. Pursuant to that Rule, the Trial Chamber was required to determine whether it was "satisfied" that Limaj, if released, would appear for trial. After taking into account the information submitted to it by the parties and weighing all the relevant factors, it held that it was not satisfied. There is thus no basis for holding that, by not placing the burden of proof on the Prosecution, the Trial Chamber erred in its application of Rule 65(B).

41. For the foregoing reasons, the Bench finds that Ground 7 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) – see above paragraphs 5 -13 – and, therefore, it is dismissed.

IV. Disposition

42. The Bench finds that the Application for Leave to Appeal does not demonstrate that the Trial Chamber may have erred in the exercise of its powers under Rule 65 (B) and that, therefore, there is no "good cause" within the meaning of Rule 65(D) for granting leave to appeal. Leave to appeal the Impugned Decision is, therefore, denied.

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

Dated this 31st day of October 2003,
At The Hague,
The Netherlands.

_____
Judge Wolfgang Schomburg
Presiding

[Seal of the Tribunal]

1 - *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No.: IT-03-66-PT, "Decision on Provisional Release of Fatmir Limaj", 12 September 2003.

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2 - *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case Nos.: IT-03-66-AR65, IT-03-66-AR65.2, IT-03-66-AR65.3, "Order on the Prosecution's Request for Leave to Respond Jointly to the Applications for Leave to Appeal", 30 September 2003.
3 - *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case Nos.: IT-03-66-AR65, IT-03-66-AR65.2, IT-03-66-AR65.3, "Prosecution's Motion for Leave to Respond Jointly to the Accused's Applications for Leave to Appeal the Trial Chamber's Provisional Release Decisions", 26 September 2003.
4 - *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case Nos.: IT-03-66-AR65, IT-03-66-AR65.2, IT-03-66-AR65.3, "Reply of Famir Limaj to Consolidated Response of Prosecution to Applications for Leave to Appeal Against Decisions on Provisional Release", 13 October 2003.
5 - See, *inter alia, Prosecutor v Blagojevic et al,* Case Nos.: IT-02-60-AR65.3 & IT-02-60-AR65.4, "Decision on Application by Blagojevic and Obrenovic for Leave to Appeal", 16 January 2003, par 8; *Prosecutor v Brdanin and Talic*, IT-99-36-AR65, "Decision on Application for Leave to Appeal", 7 September 2000, p 3; and Prosecutor v Jokic, IT-02-53-AR65, "Decision on Application for Leave to Appeal", 18 April 2002, par 3.
6 - See, among others, *Prosecutor v. Darko Mdjra*, Case No.: IT-02-59-PT, "Decision on Darko Mdra on Request for Provisional Release", 15 April 2002, *Prosecutor v. Enver Hadzihasonivic, Mehmed Alagic and Amir Kubura*, "Decision granting Provisional Release to Enver Hadzihasonivic", 19 December 2001.
7 - *Prosecutor v. Nikola Sainovic and Dragoljub Ojdanic*, Case No. IT-99-37-AR65.2, "Decision Refusing Ojdanic Leave to Appeal", 27 June 2003, p.4.
8 - In the Application for Leave to Appeal, this ground of appeal is (erroneously) referred to as Ground 4. See Application for Leave to Appeal at pp. 7 and 9. The numbers of this and the following grounds of appeal have been accordingly been adjusted in these reasons.
9 - *The Prosecutor v. Nikola Šainovic and Dragoljub Ojdanic*, "Decision on Provisional Release", 30 October 2002, para 6.
10 - See *Letellier v. France*, Judgement of 24 May 1991, ECourtHR, para. 43 and *Mansur v. Turkey*, Judgement of 25 November 1994, ECourtHR, para. 55.
11 - While not discussing this ground of appeal in its brief, the Defence has joined the submissions of the co-accused Bala on this issue. For the sake of clarity, these submissions are summarized again here.

Annex 2

Prosecutor v Brdanin and Talic, (IT-99-36/1) "Decision on Application for Leave to Appeal" 7 September 2000 para 9;

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BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Lal Chand Vohrah, Presiding
Judge Mohamed Shahabuddeen
Judge Rafael Nieto-Navia

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
7 September 2000

PROSECUTOR

v.

RADOSLAV BRDANIN
MOMIR TALIC

DECISION ON APPLICATION FOR LEAVE TO APPEAL

Counsel for the Prosecutor:

Ms. Joanna Korner

Counsel for the Defence:

Mr. John Ackerman for Radoslav Brdjanin
Mr. Xavier de Roux, Maître Michel Pitron for Momir Talic

THIS BENCH of the Appeals 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 International Tribunal"),

BEING SEIZED of the "Application for Leave to Appeal from Decision on Motion by Radoslav Brdanin for Provisional Release", filed by Radoslav Brdjanin ("the Applicant") on 1 August 2000 ("the Application for Leave to Appeal"),

NOTING that the Application for Leave to Appeal is made pursuant to sub-Rule 65(D) of the Rules of Procedure and Evidence of the International Tribunal ("the Rules"),

NOTING Trial Chamber II's "Decision on Motion by Radoslav Brdjanin for Provisional Release" issued 25 July 2000 denying the motion,

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NOTING the "Prosecution's Response to 'Application for Leave to Appeal from Decision on Motion by Radoslav Brdanin (sic) for Provisional Release'", filed on 11 August 2000,

CONSIDERING that sub-Rules 65(A) and (B) provide that once detained, an accused may not be released except upon an order of a Trial Chamber and that such order may only be made after hearing the host country and only if satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person,

CONSIDERING that sub-Rule 65(D) provides that decisions on provisional release by Trial Chambers are subject to appeal in cases where leave to appeal is granted upon good cause being shown,

CONSIDERING that the Applicant argues that "good cause" under sub-Rule 65(D) of the Rules exists for granting the Application for Leave to Appeal on the grounds that: i) the Trial Chamber erred by placing the burden at all times on the accused to establish his entitlement to provisional release and that, on the contrary, once a prima facie case is made out by the accused the burden shifts to the Prosecutor; ii) the Trial Chamber erred by interpreting Rule 65 to provide detention as the norm and provisional release as the exception in violation of the International Covenant on Civil and Political Rights of 16 December 1966; and iii) the issue raised is one of general importance to both the International Tribunal and to international law generally,

CONSIDERING that "good cause" within the meaning of sub-Rule 65(D) requires that the party seeking leave to appeal under that provision satisfy the Bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision,

CONSIDERING that under sub-Rule 65(B) of the Rules, the burden of proof is on an applicant to satisfy a Trial Chamber that provisional release should be ordered,

CONSIDERING FURTHER that internationally recognised standards relating to release of persons awaiting trial are applicable to proceedings before the International Tribunal, that in applying them account has to be taken of the different circumstances and situations envisaged by those standards which did not visualise the nature and character of the International Tribunal, and that the International Tribunal does not have the same facilities as are available to national courts to enforce appearance,

FINDING that the Applicant has failed to demonstrate that the Trial Chamber may have erred in its application of Rule 65 in holding that the Applicant failed to discharge the burden in this case and, therefore, the Applicant has failed to satisfy the requirement of "good cause" within the meaning of sub-Rule 65(D) of the Rules,

PURSUANT to Rule 65 of the Rules,

HEREBY REJECTS the Application for Leave to Appeal.

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

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Judge Lal Chand Vohrah
Presiding

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Dated this seventh day of September 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]

Annex 3

Sagahutu v The Prosecutor, ICTR-00-56-I, "Decision on Leave to Appeal against the Refusal to Grant Provisional Release" 26 March 2003 para 26

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Fausto POCAR, Presiding
Judge David HUNT
Judge Asoka de Z. GUNAWARDANA

Registrar: Mr. Adama DIENG

Decision of: 26 March 2003

Innocent SAGAHUTU
(Applicant)
v.
THE PROSECUTOR
(Respondent)

Case No. ICTR-00-56-I

DECISION ON LEAVE TO APPEAL AGAINST THE REFUSAL TO GRANT PROVISIONAL RELEASE

Counsel for the Appellant
Mr. Fabien Segatwa
Mr. Didier Patry

Counsel for the Prosecution
Ms. Ciré Ali Bâ
Ms. Christine Graham

THIS BENCH OF THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Bench" and "International Tribunal", respectively),

BEING SEISED OF the "*Requête aux fins de demande d'autorisation d'interjeter appel contre la décision rendue le 25 septembre 2002*", filed on 23 December 2002 ("Application") by Innocent Sagahutu ("Applicant");

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NOTING the *Decision on Sagahutu's Preliminary, Provisional Release and Severance Motions* ("Impugned Decision"), rendered on 25 September 2002 by Trial Chamber II ("Trial Chamber"), which dismissed the *"Requête de la défense soulevant des exceptions préjudicielles et demandant la mise en liberté provisoire de l'Accusé et la disjonction d'instance"*, filed by the Applicant on 25 June 2001 ("Motion");

NOTING that the Prosecution filed the "*Prosecutor's Response to the Accused Sagahutu's 'Requête aux fins de demande d'autorisation d'interjeter appel contre la décision rendue le 25 septembre 2002'*" on 6 January 2003 ("Prosecution Response");

NOTING that the Applicant has not filed a Reply to the Prosecution's Response;

NOTING that the Prosecution, in its Response, argues that the Application was untimely because the Defence failed to request an extension of time to the Appeals Chamber, pursuant to Rule 116 of the Rules of Procedure and Evidence of the International Tribunal ("Rules");

NOTING that the Impugned Decision was rendered on 25 September 2002, and that the Defence filed its Application only on 23 December 2002;

NOTING that Rule 65(D) of the Rules, as amended, provides that applications for leave to appeal decisions rendered under the rule "shall be filed within seven days of [the] filing of the impugned decision";

NOTING that the reason given by the Defence for its late filing is that it received the official French translation of the Impugned Decision on 17 December 2002;

CONSIDERING that Rule 116(A) of the Rules provides that "the Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause";

CONSIDERING that, in the view of the Appeals Chamber, a request for an extension of time should be filed prior to the expiration of the relevant time limit;

CONSIDERING that, in the view of the Appeals Chamber, notwithstanding that a decision is delivered in a working language other than that of the Defence, any request for an extension of time should be made in conformity with Rule 65(D), namely within seven days of the filing of the Impugned Decision, in its original language;

CONSIDERING FURTHER that, although the Defence may not have been in a position to understand fully the substance of the Impugned Decision without its translation, as the Defence was served with notice of the filing of the Impugned Decision, the calculation of the time limit to file its intent to appeal or a request for an extension before the Appeals Chamber commenced as of the date on which the Impugned Decision was filed;

FINDING that the Defence's failure to seek an extension of time to file its Application within seven days of the filing of the Impugned Decision renders the Application untimely;

CONSIDERING, nevertheless, that the Appeals Chamber deems it appropriate to consider the merits of the Application;

CONSIDERING that Rule 65(B) of the Rules provides, *inter alia*, that provisional release may be

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ordered by a Trial Chamber only "in exceptional circumstances, after hearing the host country and only if it is satisfied that the Accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person";

NOTING that the Motion was dismissed by the Trial Chamber, on the grounds that:

1. this Tribunal, including the Appeals Chamber, has consistently recognised that Rule 65 (B) of the Rules, with its "exceptional circumstances" provision, is an appropriate rule governing provisional release, and that exceptional circumstances had to be proved;

2. because the International Tribunal is a sovereign body, with a competence *rationae materiae* and *ratione temporis* distinct from that of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), an amendment to the Rules, such as Rule 65, will be incorporated in the Rules of the International Tribunal only if the Judges so decide at a Plenary Meeting, and to the extent they deem it necessary;

3. because the International Tribunal is a distinct body from the ICTY, the Judges of the International Tribunal are bound to apply the Rules of the International Tribunal, and, for these reasons, the Trial Chamber must apply each requirement as specified in Rule 65; and

4. in accordance with the Appeals Chamber's jurisprudence [1], the Trial Chamber found that the "length of the proceedings, the general complexity of the case, and the length of the Applicant's detention remain within acceptable limits and in the interests of justice" and, consequently, no exceptional circumstances existed in the case to justify provisional release;

NOTING that the Applicant argues, *inter alia*, in his Application, that:

1. the Trial Chamber erred when it determined that, if it is not satisfied of the existence of exceptional circumstances, provisional release shall not be granted, without any need to consider the other criteria pursuant to Rule 65(B);

2. the Trial Chamber erred when it failed to define the concept of exceptional circumstances, thereby prejudicing the rights of the Defence, rendering the burden of proof impossible for the Defence to satisfy, violating international law, and contradicting the texts and jurisprudence of the ICTY; and

3. the Trial Chamber erred when it applied different standards from the ICTY, which has eliminated the "exceptional circumstances" language from its Rules, thereby discriminating against the accused of the International Tribunal;

CONSIDERING that Rule 65(D) of the Rules provides that decisions on provisional release "shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown";

CONSIDERING that "good cause" within the meaning of Rule 65(D) of the Rules requires that a party seeking leave to appeal under that provision satisfy the bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision; [2]

NOTING that the Prosecution argues in its Response that the Defence failed to demonstrate "good cause" under Rule 65(D) of the Rules;

NOTING that the Prosecution also argues in its Response that the Applicant's claim, that the burden of proving exceptional circumstances is too cumbersome for the accused and violates international law and principles of human rights, is specious because these issues were addressed and rejected during the adoption of the Rules;

CONSIDERING that, in the absence of exceptional circumstances, provisional release may not be granted;

CONSIDERING that, pursuant to Rule 65(B) of the Rules, if the Trial Chamber is not satisfied of the existence of exceptional circumstances, it need not make findings on each of the factors enumerated under the Rule, but that the Trial Chamber may consider evidence adduced in relation to those other factors, where relevant, when the issue of exceptional circumstances is raised;

CONSIDERING that the word "exceptional" provides a sufficiently clear meaning as to have no need of any further definition;

CONSIDERING that the International Tribunal is a distinct and separate jurisdiction from the ICTY, and that the International Tribunal, by applying its Rules equally to all parties, guards against any discrimination *vis-à-vis* the accused;

CONSIDERING that the Applicant has failed to establish that the Trial Chamber may have erred in its assessment of the requirements of Rule 65(B) and in denying the Applicant's request for provisional release;

FINDING that the Applicant therefore has failed to demonstrate good cause such that the Bench should grant leave to appeal;

REITERATING that the Application was not timely filed;

HEREBY DISMISSES the Application.

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

Fausto Pocar
Presiding Judge

Done this 26th day of March 2003,

At The Hague,
The Netherlands.

[Seal of the Tribunal]

[1] *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Appeals Chamber, Decision On Application for Leave to Appeal Filed Under Rule 65 (D) of the Rules of Procedure and Evidence, 13 June 2001, p. 3 .

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[2] *Ndayambaje v. Prosecutor*, Case No. ICTR-96-8-A, Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002, 10 Jan. 2003, p. 5.

Annex 4

Ndayambaje v The Prosecutor, ICTR-96-8-A, "Decision on Motion to Appeal Against the Provisional Release Decision of Trial Chamber II of 21 October 2002" 10 January 2003 para 29.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Fausto POCAR, Presiding
Judge Mohamed SHAHABUDDEEN
Judge Theodor MERON

Registrar: Mr. Adama DIENG

Decision of: 10 January 2003

Elie NDAYAMBAJE
(Applicant)
v.
THE PROSECUTOR
(Respondent)

Case No. ICTR-96-8-A

DECISION ON MOTION TO APPEAL AGAINST THE PROVISIONAL RELEASE DECISION OF TRIAL CHAMBER II OF 21 OCTOBER 2002

Counsel for the Appellant
Mr. Pierre Boule
Mr. Frédérick Palardy

Counsel for the Prosecution
Ms. Silvana Arbia
Mr. Jonathan Moses

THIS BENCH OF THE APPEALS CHAMBER of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 ("Tribunal"),

BEING SEISED OF the "*Demande d'autorisation au Collège de la Chambre d'appel, d'interjeter appel de la décision de la Chambre de Première Instance II, ayant rejetée la requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l'Accusé (Article 65(D) du Règlement)*", filed on 28 October 2002 ("Application") by Elie Ndayambaje ("Applicant");

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NOTING the *Decision on the Defence Motion for the Provisional Release of the Accused* ("Impugned Decision"), rendered on 21 October 2002 by Trial Chamber II ("Trial Chamber"), which dismissed the *"Requête en extrême urgence aux fins de remise en liberté provisoire et sous conditions de l'Accusé (Article 65(D) du Règlement)"*, filed by the Applicant on 21 August 2002 ("Motion");

NOTING that the Motion was dismissed by the Trial Chamber, on the grounds that:

1. this Tribunal, including the Appeals Chamber, has consistently recognised that Rule 65 (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), with its "exceptional circumstances" provision, is an appropriate rule governing provisional release, and that exceptional circumstances had to be proved;

2. because the Tribunal is a sovereign body, with a competence *rationae materiae* and *ratione temporis* distinct from that of the International Criminal Tribunal for the former Yugoslavia, the Judges of the Tribunal are bound to apply the ICTR Rules;

3. a lengthy detention does not constitute in itself good cause for release, [1] and that, having regard to the general complexity of the proceedings and the gravity of the offences, the Applicant's detention remains within acceptable limits;

4. since the trial of the Applicant, who is jointly tried with five others, began in June 2001, and the testimony of 14 witnesses has already been heard, provisional release would not be justified;

5. the Applicant's detention in Arusha, at a distance from his family, does not constitute exceptional circumstances; and

6. a decision to provisionally release an accused charged with serious violations of international law, including genocide, must weigh the request of the accused against community interests and the need to complete trial proceedings in an orderly manner [2], and, consequently no exceptional circumstances existed in the case to justify provisional release;

NOTING that the Applicant argues in his Application that:

1. the Trial Chamber erred when it stated in its decision that "a lengthy detention does not constitute in itself good cause for release", and it did not take into account the exceptional nature of the Applicant's case;

2. the Trial Chamber erred when it failed to take into consideration the period of seven years that he has already spent in detention, and it further failed to take into consideration the fact that unlike the situation in *Nahimana*, his trial has not yet reached a terminal stage;

3. the Trial Chamber erred when it stated that as the trial had begun in June 2001 and fourteen witnesses had been heard since then, the circumstances of the case did not justify the Applicant's release;

4. the Trial Chamber erred by failing to formally take note of the fact that the length of his trial will require an abnormally lengthy preventive detention, and that this should have been considered as an exceptional circumstance;

5. the Trial Chamber erred when it considered, separately, the factors put forward by the Applicant in

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his Motion; if those grounds had been analysed together rather than separately, their effect would have led the Trial Chamber to quite a different finding with regard to the "exceptional circumstances" test, and this failure amounts to the good cause referred to in Rule 65 of the Rules;

6. the Trial Chamber erred when it failed to take into consideration the factors put forward by the Applicant cumulatively, which may have prevented it from giving these factors all the weight that such an analysis would have allowed; [3] and

7. the Trial Chamber took no account of the Appellant's submission with regard to the inherent problems in the Prosecution case, namely the absence of witnesses who were held back in Rwanda, and as a result, the cumulative effect of the grounds put forward was not fully considered;

NOTING that the Prosecution filed the "*Prosecutor's Application for Summary Rejection of the Defence's Notice of Appeal Relating to a Request to Appeal Against the Trial Chamber of First Instance's Decision Denying Provisional Release* on 29 November 2002 ("Prosecution Response"), and on 2 December 2002 filed the *Prosecutor's Corrigendum to Application for Summary Rejection of the Defence's Notice of Appeal Relating to a Request to Appeal Against the Trial Chamber of First Instance's Decision Denying Provisional Release* ("Corrigendum"), twenty-two days and twenty-five days, respectively, after the time limit for the filing of its response had expired; [4]

NOTING that the reason given by the Prosecution for its late filing is that it has yet to receive an official translation of the Application, which was filed in French;

CONSIDERING that the Prosecution did not submit a request for extension of time prior to the expiration of the deadline, and that its request was made not in its Response but only subsequently in its Corrigendum;

CONSIDERING that Rule 116(B) of the Rules provides that "where the ability of the accused to make full answer and defence depends on the availability of a decision in an official language other than that in which it was originally issued, that circumstance shall be taken into account as a good cause...", yet there is no similar provision in the rule which is applicable to the Prosecution;

CONSIDERING that in the opinion of the Appeals Chamber, the Office of the Prosecutor must be able to work equally in English and in French;

FINDING that the Prosecution's reason for the late filing of its Response cannot be considered to constitute good cause within the meaning of Rule 116 of the Rules;

NOTING that the Applicant has not filed a Reply to the Prosecution's Response and Corrigendum;

CONSIDERING that Rule 65(B) of the Rules provides, *inter alia*, that provisional release may be ordered by a Trial Chamber only "in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person";

CONSIDERING that Rule 65(D) of the Rules also provides that decisions on provisional release "shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown," and that "...applications for leave to appeal shall be filed within seven days of filing of the impugned decision";

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CONSIDERING that the Application was filed within time;

CONSIDERING that "good cause" within the meaning of Rules 65(D) of the Rules requires that a party seeking leave to appeal under that provision satisfies the bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision;

CONSIDERING that the Appeals Chamber has affirmed that the length of pre-trial detention does not constitute *per se* exceptional circumstances for the purposes of provisional release [5] ;

CONSIDERING that the Applicant has not shown any reason why the Appeals Chamber should depart from its previous jurisprudence;

CONSIDERING that the Trial Chamber rightly took into account the fact that there is an ongoing trial, which commenced in June 2001 and needs to be completed in an orderly manner, and found that in these circumstances, provisional release would not be justified;

CONSIDERING that the Applicant has not shown how the Trial Chamber may have erred in failing to conclude that the anticipated length of the Applicant's ongoing trial is an exceptional circumstance warranting provisional release;

CONSIDERING that the Applicant has failed to establish that the Trial Chamber may have erred in its assessment of the conditions for ordering provisional release of the Applicant in its conclusions reached in paragraphs 19 to 28 of the Impugned Decision;

FINDING that the Applicant therefore has failed to demonstrate good cause such that the Bench should grant leave to appeal;

HEREBY REJECTS the Prosecution's request for an extension of time, **DEEMS INADMISSIBLE** the Prosecution Response and Corrigendum, and **DISMISSES** the Application.

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

Fausto Pocar
Presiding Judge

Done this tenth day of January 2003,
The Hague,
The Netherlands.

[Seal of the Tribunal]

[1] *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-A, Appeals Chamber, Decision (On Application for Leave to Appeal Filed Under Rule 65 (D) of the Rules of Procedure and Evidence), 13 June 2001, p. 3 ("*Kanyabashi* Decision") (citing *Prosecutor v. Barayagwiza*, Case No. ICTR-97-20-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para.74).

[2] *Prosecutor v. Nahimana,* Trial Chamber Decision, 5 Sept. 2002, para. 10.

[3] The Applicant cites the 11 November 1999 decision rendered in *Prosecutor v. Kunarac and Kovac* ("Decision on the Motion for the Provisional Release of Dragoljub Kunarac"), in which, with regard to the aforementioned aspect, the Trial Chamber stated (at para. 10): "In conclusion, the Trial Chamber is of the view that, in the circumstances of the present case, none of the factors put forward by the accused, either alone or in combination, amounts to exceptional circumstances within the ambit of Rule 65 of the rules." (emphasis added)

The Applicant also submits that this principle was further clearly reaffirmed in *Prosecutor v. Kupreskic et al*, Case No. 95-16-T, Decision of 30 July 1999, p. 2: "Considering that each of these grounds, by themselves, do not amount to the "exceptional circumstances" mentioned in Rule 65(B), and Considering, however, by a majority of the Trial Chamber (Judge Richard May dissenting) that the combination of the aforementioned grounds and their cumulative effect might be regarded as constituting an exceptional circumstance warranting provisional release for at least a limited period of time..." (emphasis added).

[4] This filing was made after the expiration of the ten-day limit prescribed in paragraph 5 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal.

[5] See *Prosecutor v. Kanyabashi*, Decision, 13 June 2001, p. 3.

Annex 5

Prosecutor v Simic et al IT-95-9 "Decision on Application for Leave to Appeal" 19 April 2000 para 11.

6055

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Lal Chand Vohrah, Presiding
Judge Rafael Nieto-Navia
Judge Fausto Pocar

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
19 April 2000

PROSECUTOR

v.

BLAGOJE SIMIC
MILAN SIMIC
MIROSLAV TADIC
STEVAN TODOROVIC
SIMO ZARIC

DECISION ON APPLICATION FOR LEAVE TO APPEAL

Counsel for the Prosecutor:

Mr. Grant Niemann

Counsel for the Defence:

Mr. Zarko Nikolic, for Milan Simic
Mr. Igor Pantelic, for Miroslav Tadic
Mr. Deyan Ranko Brashich, for Stevan Todorovic
Mr. Borislav Pisarevic, for Simo Zaric

THIS BENCH of the Appeals 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 International Tribunal"),

BEING SEIZED of the "Prosecution's Application for Leave to Appeal the Trial Chamber's 'Decision on Miroslav Tadic's Application for Provisional Release', Dated 4 April 2000 and the Trial Chamber's 'Decision on Simo Zaric's Application for Provisional Release', Dated 4 April 2000", filed on 5 April 2000 ("the Application for Leave to Appeal");

NOTING Trial Chamber III's "Decision on Mirosalv Tadic's Application for Provisional Release" and "Decision on Simo Zaric's Application for Provisional Release", both dated 4 April 2000 ("the Decisions"), in which the Trial Chamber granted requests for provisional release by the accused Miroslav Tadic and Simo Zaric and ordered, *inter alia*, their provisional release subject to certain terms and conditions; 6036

NOTING the "Defense Response in Opposition to Prosecution's Application for Leave to Appeal the Trial Chamber's Decision on Miroslav Tadic and Simo Zaric's Applications for Provisional Release, Dated April 4, 2000", filed by Counsel for accused Miroslav Tadic and Simo Zaric on 7 April 2000,

NOTING the "Opposition to Application for Leave to Appeal Against the Trial Chamber's Interlocutory Order of April 4, 2000", filed by Counsel for accused Stevan Todorovic on 7 April 2000,

CONSIDERING that the accused Stevan Todorovic did not make submissions before the Trial Chamber in respect of Miroslav Tadic's and Simo Zaric's requests for provisional release;

CONSIDERING, therefore, that the accused Stevan Todorovic has no *locus standi* to make submissions on the Application for Leave to Appeal;

CONSIDERING that the Prosecutor argues that "good cause" under Sub-rule 65(D) of the Rules of Procedure and Evidence ("the Rules") exists for granting the Application for Leave to Appeal on the ground that i) the present matter "represents one of the first interpretations and applications of amended rule 65(B)"; ii) the Trial Chamber erred in ruling that it was satisfied that, if released, both accused would appear for trial; iii) the Trial Chamber erred by finding that it was satisfied that, if released, both accused would not pose a danger to victims, witnesses or other persons; iv) the Decisions will cause irreparable prejudice to the Prosecutor; and v) the Trial Chamber misapplied the legal principles governing provisional release;

CONSIDERING that Sub-rules 65(A) and (B) provide that once detained, an accused may not be released except upon an order of a Trial Chamber and that a Trial Chamber may make such order only after hearing the host country and only if satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person;

CONSIDERING that Sub-rule 65(D) provides that decisions on provisional release are subject to appeal in cases where leave to appeal is granted upon good cause being shown;

CONSIDERING that "good cause" within the meaning of Sub-rule 65(D) requires that the party seeking leave to appeal under that provision satisfy the Bench of the Appeals Chamber that the Trial Chamber may have erred in making the impugned decision;

FINDING that the Prosecutor has failed to demonstrate such an error on the part of the Trial Chamber and that, therefore, the requirement of "good cause" within the meaning of Sub-rule 65(D) has not been met;

PURSUANT TO Rule 65,

HEREBY REJECTS the Application for Leave to Appeal and **ORDERS** the provisional release of Miroslav Tadic and Simo Zaric, subject to the Registry being satisfied that the practical arrangements for their provisional release have been made in accordance with the Decisions.

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

6007

Judge Lal Chand Vohrah, Presiding

Dated this nineteenth day of April 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]

Annex 6

Prosecutor v Aleksovski IT-95-14/1 Judgement 24 March 2000 para. 74

6059

IN THE APPEALS CHAMBER

Before:
Judge Richard May, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Wang Tieya
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 24 March 2000

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell

Counsel for the Appellant:

Mr. Srdjan Joka for Zlatko Aleksovski

The Appeals 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 ("International Tribunal" or " Tribunal") is seised of two appeals in relation to the written Judgement rendered by Trial Chamber I *bis* ("Trial Chamber") on 25 June 1999 in the case of *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T ("*Aleksovski* Judgement" or "Judgement").[1]

Having considered the written and oral submissions of both parties, the Appeals Chamber

HEREBY RENDERS ITS WRITTEN JUDGEMENT.

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B. Discussion

69. Article 7(3) provides that:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

70. In its Judgement, the Trial Chamber found that "the evidence did not establish beyond any reasonable doubt that the accused himself was a member of the military police".[167] However, in its view , "anyone, including a civilian, may be held responsible pursuant to Article 7(3) of the Statute if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations".[168] It went on to find that the Appellant had effective authority over the guards, as shown by his issuing orders to them and the availability to him of the means to report to superiors the situation in the prison, including incidents of mistreatment of prisoners.[169] The Trial Chamber found, however, that the Appellant failed to report to the superior authority the offences committed by the guards and HVO soldiers within the prison, and that he even joined in certain incidents of assault.[170]

71. The Appeals Chamber, on the basis of the submissions of the parties and the findings of the Trial Chamber, reaches the following conclusions regarding this ground of appeal.

72. The Appeals Chamber notes that the Appellant has agreed with the Trial Chamber in respect of the constituent elements of liability under Article 7(3).[171] Three elements have been identified by the Trial Chamber: 1) the existence of a superior-subordinate relationship; 2) the fact that the superior "knew or had reason to know that a crime was about to be committed or had been committed"; and 3) his obligation to take all the necessary and reasonable measures to prevent or to punish the perpetrators.[172]

73. The Appellant claims to appeal against the way in which the Trial Chamber applied the law to his case, but this ground of appeal in essence questions the inferences drawn from facts found by the Trial Chamber regarding his authority within the Kaonik prison. The Appeals Chamber therefore considers this ground to be factual in nature .

74. The Appellant disputes two facts found by the Trial Chamber. The first fact is that he had authority over the prison guards who were HVO military police, as demonstrated by his powers to issue orders to them, his generally elevated status within the Kaonik prison, and his right to report to the Military Police command and the Travnik Military Tribunal within whose jurisdiction the prison was placed . The second fact is that he failed to report the offences by his subordinates to either of the superior authorities. Both facts _were found to be proved by the Trial Chamber after examining evidence and arguments specific to them. Like the Trial Chamber, the Appellant also construes the authority of a superior to mean that he has the power to order and to enforce his orders in certain ways.[173] The Appeals Chamber therefore takes the view that, unless there is good reason to believe that the Trial Chamber has drawn unreasonable inferences from the evidence , it is not open to the Appeals Chamber to disturb the factual conclusions of the Trial Chamber.[174] In this appeal , the Appellant has failed to convince this Chamber that unreasonable conclusions were drawn by the Trial Chamber in respect of the two facts.

75. The legal aspect of this ground of appeal consists of a single issue as to whether the Appellant was a commander of the guards, who were military police, for the purposes of Article 7(3) of the Statute. 6041

76. Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision. In the instant appeal, the Appellant contends that, because he was appointed by the Ministry of Justice rather than the Ministry of Defence, he did not have such powers over the guards as a civilian prison warden,[175] whereas the Trial Chamber finds that he was the superior to the guards by reason of his powers over them.[176] The Appeals Chamber takes the view that it does not matter whether he was a civilian or military superior,[177] if it can be proved that, within the Kaonik prison, he had the powers to prevent or to punish in terms of Article 7(3). The Appeals Chamber notes that the Trial Chamber has indeed found this to be proven, thus its finding that the Appellant was a superior within the meaning of Article 7(3).[178]

Annex 7

Prosecutor v. Ademi, ICTY, IT-01-46-PT, Order On Motion For Provisional Release, 20 February 2002, paragraph 19, 24 and 25

Case No. IT-01-46-PT

IN THE TRIAL CHAMBER

Before: Judge Daquin Liu, Presiding

6043

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

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."

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: 6045

> (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.

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.

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

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

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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

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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 ;

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.

Judge Liu,

President of Trial Chamber I

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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." 6055

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

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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.

Annex 8

Prosecutor v Krajisnik IT-00-39 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release 8 October 2001 Para 13

IT-00-39&40-PT
D1860 - D1837
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UNITED
NATIONS

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

Case No: IT-00-39 & 40-PT

Date: 8 October 2001

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Patrick Robinson
Judge Mohamed Fassi Fihri

Registrar: **Mr. Hans Holthuis**

Decision of: **8 October 2001**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK
&
BILJANA PLAVŠIĆ

DECISION ON MOMČILO KRAJIŠNIK'S NOTICE OF MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor:

Mr. Mark Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Deyan Brashich, for Momčilo Krajišnik
Mr. Robert. J. Pavich and Mr. Eugene O'Sullivan, for Biljana Plavšić

I. BACKGROUND

1. The accused, Momčilo Krajišnik, was arrested and transferred to the United Nations Detention Unit on 3 April 2000: he is detained there under an Order for Detention on Remand dated 7 April 2000.

2. A co-accused, Biljana Plavšić, voluntarily surrendered to the custody of the International Tribunal on 10 January 2001 and was granted provisional release by order of the Trial Chamber dated 5 September 2001.[1]

3. On 28 August 2001 the Trial Chamber (by a majority, Judge Robinson dissenting) refused a motion that the accused be granted provisional release to attend a memorial service for his late father in Pale on 8 September 2001.[2]

4. The present Decision concerns a Motion filed by the accused on 9 August 2001, together with various addenda and supporting material, in which he seeks provisional release.[3] The Prosecution filed a response on 23 August 2001 objecting to the Motion. An oral hearing was held on 20 September 2001 when the Trial Chamber heard submissions from the parties and representations from a representative of the Government of Republika Srpska.[4]

5. The accused submits that he may be released since he would not pose any danger to victims or witnesses or others and would appear for trial. In support of this submission he refers to his undertaking to comply with the terms and conditions of any order for provisional release, to remain in Pale under the surveillance of the IPTF, to surrender his passport and to return to the Tribunal when required.[5] Furthermore, he and his family are willing to offer their real property as security for his release.[6]

6. The accused relies on guarantees from the Governments of Republika Srpska[7] and the Federal Republic of Yugoslavia[8] with respect to compliance by the accused

[1] Decision on Biljana Plavšić's Application for Provisional Release, 5 Sept. 2001.
[2] Oral Decision, 28 Aug. 2001, T. pp. 105-107.
[3] Notice of Motion for Provisional Release filed by the Defence for Momčilo Krajišnik on 9 Aug. 2001; Addendum, filed 20 Sept. 2001; Second Addendum, filed 20 Sept. 2001.
[4] Sinisa Djordjević, Adviser to the Prime Minister.
[5] Annex D to Motion for Provisional Release, 8 Aug. 2001.
[6] Addendum, 20 Sept. 2001.
[7] Guarantees dated 1 Nov. 2000, 31 Jan. 2001 and 27 Aug. 2001.

with any terms of provisional release, and undertakes to obtain similar guarantees from the Republic of Serbia, if required. The accused also relies on letters in support of his application from the Patriarch of the Serbian Orthodox Church and the President of the Federal Republic of Yugoslavia.[9]

7. The accused submits that in the light of the above guarantees and undertakings he should be released. He also submits that he should be released in light of the release of his co-accused and of the length of his own pre-trial detention (18 months already and with no guarantee that the trial will start in February 2002 as currently planned).[10] He further submits that since he was arrested on a sealed indictment he was not given the opportunity to surrender and would have done so had he been given that opportunity.[11]

8. In response, the Prosecution submits that the accused has failed to discharge the burden upon him satisfying the court that, if released, he would appear for trial and would not pose a danger to any victim, witness or other person; that burden being a substantial one due to the fact that the International Tribunal has no power to execute its arrest warrants and is forced to rely on others to do so.[12]

9. The Prosecution further submits that little weight can be attached to the guarantees and undertakings on which the accused relies in order to discharge this substantial burden, in particular, the guarantee of Republika Srpska is of little value, as Trial Chamber II and this Trial Chamber have held;[13] the Federal Republic has yet to pass legislation on co-operation with the Tribunal which would allow it to offer assurances that arrests would be made;[14] and the undertaking from the accused himself is unconvincing in the light of the substantial sentence he faces if convicted, and the hostile comments he has made about the International Tribunal[15] (as have the Patriarch and President).[16] Furthermore, the only support for the accused's contention

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[8] Guarantee dated 19 Sept. 2001.
[9] Letters dated 16 and 17 Aug. 2001 respectively, filed 24 Aug. 2001.
[10] Notice of Motion for Provisional Release ('Motion'), paras. 8-9, 12-14; Motion hearing, 20 Sept., T. pp. 144; 160.
[11] Motion, para. 10; Motion hearing, T. pp. 143-144.
[12] Prosecution Response to Krajisnik Defence's Motions for Provisional Release ('Response'), 23 Aug. 2001, paras. 1, 5-6.
[13] Response paras. 8-19, Motions hearing, p. 152.
[14] Motions hearing, T. p. 157.
[15] Response, paras. 21-27.
[16] Motions hearing, pp. 152-154.

that he would pose no threat to victims and witnesses is his own undertaking which cannot be relied on.[17]

10. The Prosecution also submits that discretionary factors are against a grant of provisional release. The length of detention is not a relevant factor until the accused has discharged his burden and, if it were, the ECHR have found periods of detention of up to five years reasonable.[18] The length of sentence which the accused would receive on conviction provides an incentive for him to escape and it would be unreasonable to expect SFOR to put its personnel at risk again in order to arrest him if he should do so.[19]

II. THE LAW

11. Rule 65 (B) sets out the basis upon which a Trial Chamber may order the provisional release of an accused:

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

The burden of proof rests on the accused to satisfy the Trial Chamber that the accused will appear for trial and will not pose a danger to any victim, witness or other person.[20]

12. Prior to December 1999, an accused was also obliged to establish the existence of "exceptional circumstances" before a Trial Chamber could consider provisional release. This requirement was abolished by a rule amendment.[21] However, subsequent jurisprudence shows that the removal of the requirement does not in any way alter the accused's burden of proving that he or she will appear for trial and will not pose a danger to any victim, witness or other person. In *Simić*, the Trial Chamber reiterated that release "may be granted only if the Trial Chamber is satisfied" that the accused

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[17] Response, paras. 28-31.
[18] Response, paras. 35-37.
[19] Response, para. 38.
[20] *See*, for example, *Prosecutor v. Kovačević*, Decision on Defence Motion for Provisional Release, [hereafter '*Kovačević* Decision'] 21 January 1998, para. 6; *Prosecutor v. Brđanin & Talić*, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000 (hereafter "*Brđanin* Decision"), para. 13 ("The wording of the Rule squarely places the onus at all times on the applicant to establish his entitlement to provisional release"); *Prosecutor v. Brđanin & Talić*, Decision on Motion by Momir Talić for Provisional Release, 28 March 2001(hereafter "*Talić* Decision"), para. 18. Numerous other decisions on provisional release before the International Tribunal reinforce this position.
[21] This amendment, made at the twenty-first session of the plenary, entered into force on 6 December 1999 (*see* IT/161).

has met the requirements set out in the Rule[22] and in *Talić*, the Trial Chamber stated that "[p]lacing a substantial burden of proof on the applicant for provisional release to prove these two matters [in Rule 65 (B)] is justified".[23] Furthermore, the change in the Rule does not alter the position that provisional release continues to be the exception and not the rule, a position justified by the absence of any power in the International Tribunal to execute its own arrest warrants.[24] Thus, only one accused is currently on provisional release, whilst 49 accused remain in custody.[25]

13. It has not been submitted by the parties in this case, quite rightly, that there is any breach of the norms of customary international law in placing the burden of proof upon the accused in these circumstances. Indeed, there is nothing in customary international law to prevent the placing of such a burden in circumstances where an accused is charged with very serious crimes, where an International Tribunal has no power to execute its own arrest warrants, and where the release of an accused carries with it the potential for putting the lives of victims and witnesses at risk. These factors lend further weight to the placing of the burden of proof upon the accused.

14. It should also be noted that (as Rule 65(B) makes clear) the Trial Chamber retains a discretion not to grant provisional release even if the accused satisfies it of both requirements in the rule. So, even if satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, etc. the Trial Chamber may still refuse provisional release.[26] For instance, in a decision in the *Kordić* case, the Trial Chamber stated that generally it would be inappropriate to grant provisional release during trial because, *inter alia*, release could disrupt the remaining course of the trial.[27]

15. In relation to the length of detention, the relevant international treaties express the proposition that provisional release should be granted where the accused cannot be

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[22] *Prosecutor v. Simić & Ors.*, Decision on Milan Simić's Application for Provisional Release, 29 May 2000, p. 5 (emphasis supplied). See the *Talić* and *Brđanin* Decisions that the placing of a substantial burden of proof upon the accused is justified (above note 20).
[23] *Talić* Decision, para. 18. See also, *Brđanin* Decision, para. 13.
[24] *Talić* Decision, para. 18. In the *Talić* Decision, the Trial Chamber said that it cannot be said that provisional release is now the rule rather than the exception (para. 17), a sentiment with which the Trial Chamber agrees.
[25] To date 55 applications for provisional release have been made before the International Tribunal, and of those eight have been granted (including short-term release granted on humanitarian grounds). Of those 55 applications, 20 were made after the entry into force of the amendments removing the requirement for "exceptional circumstances", of which only four have been granted. There has, therefore, been no increase in the number of applications granted since the December 1999 amendment.
[26] *Kovačević*, Decision, para. 7; *Brđanin* Decision, para. 22.
[27] *Prosecutor v. Kordić and Čerkez*, Order on Application by Dario Kordić for Provisional Release Pursuant to Rule 65, 17 December 1999, p. 4.

brought to trial within a reasonable period of time.[28] It is noted, however, that the European Court of Human Rights has found that extensive periods of pre-trial detention may be reasonable.[29]

III. DISCUSSION

16. The crucial issue in this Decision is to determine whether the accused has satisfied the Trial Chamber that, if released, he would appear for trial and would not pose a danger to any victim, witness or other person. In this connection, the Trial Chamber accepts that the burden on the accused of satisfying the Trial Chamber cannot be light because of the problems associated with the execution of arrest warrants if the accused were to abscond or threaten witnesses.

17. The evidence which the accused adduces in support of his application consists of various guarantees and undertakings. As to the undertaking given by the accused himself, the Trial Chamber cannot but note that it is given by a person who faces a substantial sentence if convicted and has, therefore, a considerable incentive to abscond.

18. In relation to the guarantee given by the Government of Republika Srpska, this Trial Chamber noted, in giving its reasons for the dismissal of the earlier provisional release application by the accused, that the government has not so far arrested anyone and therefore the guarantee does not have the force which it would have if the government had done so: thus, the majority of the Chamber concluded that it could

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[28] 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."

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."

[29] See, for example, *W. v. Switzerland*, ECHR, 26 November 1992, Case No. 91/1991/344/417, and *Ferrari-Bravo v. Italy*, App. No. 9627/81, Comm. Report 14.3.84 (4 years and 11 months pre-trial detention).

not, with confidence, say that the prospect of the arrest of the accused was likely.[30] The Trial Chamber has now heard the representations of Mr. Djordjević, representing the government, about its changing attitude towards the Tribunal, the establishment of a bureau for relations with the Tribunal and the enactment of legislation to secure co-operation with it.[31] However, this is no more than an indication of good intentions and the Trial Chamber's earlier comment holds true: until there is evidence of arrests, any guarantee from the government must be treated with caution. Furthermore, it is noteworthy that the Federal Government of the Federal Republic of Yugoslavia has not to date co-operated with the International Tribunal by arresting indicted persons.

19. The Trial Chamber accepts the Prosecution submission (above) that any guarantee from the Government of the Federal Republic of Yugoslavia must also be treated with caution since it has no legislation in place with respect to co-operation with the Tribunal and is, therefore, not in a position to offer assurances that arrests would be made.

20. The Trial Chamber has considered what weight should be given to the submission of the accused that since he was arrested on a sealed indictment he was not given the opportunity to surrender and would have done so had he been given that opportunity. The Trial Chamber considers this to be a neutral factor which does not lend support to the contentions of either side. It does not permit the accused to rely in support of his application on the fact that he has surrendered. On the other hand, it does not permit the Prosecution to claim that he was evading arrest.

21. The Trial Chamber has also considered the submission that the accused should be treated in the same way as his co-accused, Biljana Plavšić. In fact, the two cases are not alike. First, there is the factor of age. Mrs. Plavšić is aged 71 and the accused is 56. Mrs. Plavšić's age is clearly a relevant factor in favour of her release. Secondly, Mrs. Plavšić surrendered voluntarily to the Tribunal: the accused did not. Whilst, as noted above, in the case of the accused this is a neutral factor, in the case of Mrs. Plavšić this is a positive factor. Thirdly, Mrs. Plavšić has co-operated with the Prosecution: the accused has only done so in a limited way, and the particular co-operation provided is not, in the Trial Chamber's view, relevant to this application.[32]

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[30] Oral ruling, 28 Aug. 2001, T. p. 105.
[31] Motion hearing, T. pp. 145-149.
[32] The extent of the accused's co-operation was to agree to an interview with the Prosecution in 1998, prior to his indictment. He has subsequently refused to co-operate with the Prosecution, a position which it is stated is at Defence Counsel's direction. *See* Addendum to Motion for Provisional Release,

For these reasons the two cases are readily distinguishable and, therefore, do not have to be treated alike. In any event, applications for provisional release must be treated on an individual basis.

22. The Trial Chamber considers the length of pre-trial detention to be an important factor in the exercise of discretion in determining an application for provisional release. In the instant case the length of detention, although long, does not exceed the periods which the European Court of Human Rights has found reasonable. However, a further factor is the date when the trial of an accused is likely to commence. At the moment the date anticipated is not many months hence; therefore, the Prosecution should proceed expeditiously with its preparations so as to ensure that the trial commences within a reasonable period of time.

23. In its ruling on the earlier application by the accused for provisional release, the majority of the Trial Chamber said:

> "In the earlier cases in which provisional release was granted, the accused in both cases had surrendered voluntarily, and their cases, it should be noted, were not as serious and as complex as the present case. In this case, this accused did not surrender voluntarily. He was arrested, and his case is a grave one.
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> Given the seriousness of this case. . .the majority of the Trial Chamber, is therefore not satisfied that he would return and appear for trial if he were released."[33]

The Trial Chamber can see no reason now to depart from this recent conclusion. The accused has not discharged the burden upon him and satisfied the Trial Chamber that, if provisionally released, he would appear for trial and would not pose a danger to any victim, witness or other person.[34] Accordingly, his application must be dismissed.

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10 August 2001; Prosecution Response, para. 34; Defence Reply, para. 3, and Motion Hearing, 20 September 2001, p. 144.

[33] Oral ruling, 28 Aug. 2001, T. pp. 106-107.

[34] The Trial Chamber notes the undertaking of the accused to obtain guarantees from the Republic of Serbia. The Trial Chamber has, therefore, asked itself whether in the circumstances of this particular case such guarantees, even if obtained, could make any difference to the outcome. Given the weight of the factors outlined above, against granting provisional release, the Trial Chamber is satisfied that they would not.

IV. DISPOSITION

24. For the foregoing reasons, by a majority, Judge Robinson dissenting, the Trial Chamber rejects the Defence Motion for Provisional Release pursuant to Rule 65 of the Rules of Procedure and Evidence.

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

Richard May

Presiding

Dated this eighth day of October 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE PATRICK ROBINSON

1. I have dissented in this matter both on a question of law as well as on issues relating to an assessment of the evidence relevant to the application for provisional release.

1. The question of law

2. Rule 65(B) of the Rules of Procedure and Evidence[1] provided:

> [r]elease may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

In November 1999 that Rule was changed because the Tribunal concluded that in providing for provisional release "only in exceptional circumstances", it conflicted with customary international law as reflected in the main international human rights instruments.[2]

3. That provision was interpreted as establishing that the legal principle is detention and that release is the exception, and that, generally, provisional release could only be granted in very rare cases.[3]

4. Paragraph 106 of the Report of the Secretary General[4] (to which the Tribunal's Statute is attached) states that the Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings, particularly those in Article 14 of the International Covenant on Civil and Political Rights[5] ("ICCPR").

5. Article 9(3) of the ICCPR provides, *inter alia,* "anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial . . . ".[6] An important part of the rationale for the underlined provision is that an accused, prior to conviction, has the benefit of the presumption of innocence, and thus there can be no general rule of detention prior to trial. Generally, in domestic jurisdictions, bail is not granted

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[1] As it stood in Rev. 16 of the Rules of Procedure and Evidence (2 July 1999), prior to its amendment in November 1999.
[2] The amendment to Rule 65(B), which was adopted at the twenty-first session of the plenary in November 1999, entered into force on 6 December 1999 (*see* IT/161).
[3] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Order Denying a Motion for Provisional Release, 20 Dec. 1996, para. 4; *Prosecutor v. Blaškić,* Case No. IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 Apr. 1996, para. 4.
[4] Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1992) S/25704.
[5] The International Covenant on Civil and Political Rights was adopted by the General Assembly of the United Nations on 16 December 1966 and entered into force on 23 March 1976.
[6] Emphasis added.

after conviction, unless there are exceptional circumstances for such a grant.[7] The Statute entrenches the principle of the presumption of innocence in Article 21, paragraph 3.

6. The customary rule, from which Rule 65(B) in its original form derogated, is the principle established in Article 9(3) of the ICCPR that it shall not be the general rule that persons awaiting trial shall be detained in custody. This customary rule is also reflected in Article 5(3) of the European Convention on Human Rights[8] and Article 7 of the American Convention on Human Rights[9]. There can be little doubt that the effect of this customary norm is to make pre-trial detention an exception, which is only permissible in special circumstances. Again, the foundation for this customary norm is the presumption of innocence. This is the way the European Court of Human Rights ("European Court"), in considering the question of bail, puts it:

> Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.[10]

7. The customary norm that detention must not be the general rule, when read with the right to trial within a reasonable time or to release, establishes a principle that detention is the exception. However, that does not mean that it is impermissible to impose a burden on an accused person awaiting trial to justify his release. Nor, obviously, does it mean that pre-trial detention cannot take place. However, there must be cogent reasons for that detention. The European Court expressed it in this way:

> The Court reiterates 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.[11]

8. That principle is equally applicable to the Tribunal. Any system of mandatory detention is *per se* incompatible with Article 9(3) of the ICCPR. And it is because the original Rule, in imposing a burden on the accused to establish exceptional circumstances to justify his release, came close to a system of mandatory detention that it was changed in 1999 by eliminating that requirement. Note the similarity between the original Rule and the situation that the European

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[7] *See e.g. Chamberlain v. The Queen* (1983) 153 CLR 514.
[8] The European Convention on Human Rights was signed in Rome on 4 November 1950 and entered into force on 3 September 1953. The relevant provision states: "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."
[9] The American Convention on Human Rights entered into force on 18 July 1978. The relevant provisions states: "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."
[10] *Ilijkov v. Bulgaria*, ECHR, Judgement of 26 July 2001 (*"Ilijkov v. Bulgaria"*), para. 85 (emphasis added).
[11] *Ilijkov v. Bulgaria*, para. 84.

Court dealt with in the case of *Ilijkov v. Bulgaria.* In that case, under the Bulgarian law that was being considered, charging a person with a crime punishable by 10 or more years' imprisonment gave rise to a presumption that there existed a danger of his absconding, re-offending or obstructing the investigation; that presumption was only rebuttable in very exceptional circumstances and the burden was on the accused to prove the existence of such exceptional circumstances. That is exactly similar to the pre-1999 Rule, which imposed a burden on the accused to demonstrate exceptional circumstances. In *Ilijkov v. Bulgaria*, the European Court found that there was a breach of Article 5(3) of the European Convention on Human Rights.

9. The presumption of innocence is an important, though not necessarily conclusive element in determining the burden of proof in bail applications. However, the significance of this element in bail applications has not been consistently acknowledged by judicial bodies. The United States Supreme Court in *Bell v. Wolfish,* held that "the presumption innocence is a doctrine that allocates the burden of proof in criminal trials [. . .] but it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[12] However, that dictum has been criticised,[13] and the better view is that the presumption of innocence applies at all stages of a trial, including the pre-trial period. The Secretary General has stressed that the rights of the accused are to be respected at all stages of the proceedings.[14] Steytler, in his *Constitutional Criminal Procedure* (1998) states: "The right to be released on bail and the right to be presumed innocent are thus to be viewed as 'parallel rights' giving effect to the same principle at different stages of the proceedings and in different forms".[15] For another statement affirming the application of the presumption of innocence throughout the entire trial process, see *R. v. Pearson*, where it was said that "the presumption of innocence is an animating principle throughout the criminal justice process".[16]

10. The Tribunal's jurisprudence is that the lack of a police force, and its dependence on domestic enforcement mechanisms to enforce its arrest warrants, justify a stricter approach to applications for provisional release than is the case with applications for bail in domestic jurisdictions.[17] It is to be expected that adjustments may have to be made at the international level in the application of norms which are more usually applied at the municipal level. Thus, it is generally accepted that the international context in which the Tribunal operates will warrant certain

[12] *Bell v. Wolfish,* 441 U.S. 520, 533 (1979).
[13] Jett, 22 *American Criminal Law Review* 805, 832 (1985).
[14] *Supra*, n 4.
[15] Steytler, *Constitutional Criminal Procedure* (1998), p. 134.
[16] *R. v. Pearson* (1992) 3 S.C.R. 665 at 683.
[17] *See e.g. Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Provisional Release, 28 Mar. 2001, para. 18.

modifications. For these modifications or adjustments to be valid, they must result from the application of the general rule of interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties; where they do not, they constitute breaches of relevant conventional or customary norms, such as those contained in the ICCPR. In other words, it is the interpretative function that must yield these modifications; otherwise the modifications are arbitrary and unlawful. In most cases they will result from an appropriate use of the teleological and contextual methods of interpretation. But care must be taken lest these adjustments go so far that their effect is to nullify the rights of an accused person under customary international law. There is no legal basis for interpreting the ICCPR as though it provided for one set of rights applicable at the municipal level, and another set applicable at the international level. Derogations from customary international law must be authorised by the Statute, e.g. Article 21, paragraph 2, authorises a derogation from the accused's right to a public hearing in the interest of the protection of victims and witnesses.

11. While the Tribunal's lack of a police force, its inability to execute its arrest warrants in States and its corresponding reliance on States for such execution may be relevant in considering an application for provisional release, on no account can that feature of the Tribunal's regime justify either imposing a burden on the accused in respect of an application under Rule 65[18] or rendering more substantial such a burden,[19] or warranting a detention of the accused for a period longer than would be justified having regard to the requirement of public interest, the presumption of innocence and the rule of respect for individual liberty. Regrettably, that factor has been given undue prominence in the Chamber's reasoning, both in relation to its view that the burden is on the accused, as well as for its rejection of the application for provisional release.

12. A judicial body cannot rely on peculiarities in its system to justify derogations from the rule of respect for individual liberty. As has been explained, Article 9(3) of the ICCPR reflects a customary norm that detention shall not be the general rule. In interpreting that provision in the context of the Tribunal it is, in my view, wholly wrong to employ a peculiarity in the Tribunal system, namely its lack of a police force and its inability to execute its warrants in other countries, as a justification for derogating from that customary norm. Nothing in the rule of interpretation as set out in the Vienna Convention warrants such a construction. There may be public interest considerations for imposing a burden on an accused. But the peculiarities in the Tribunal's regime would not constitute such a consideration. The Tribunal cannot say: because I cannot arrest you if you are granted bail and breach the conditions of bail, you must stay in detention. To do that is to

[18] *See* paragraph 12 of the Decision where it is said that the accused bears the "burden of proving that he or she will appear for trial and will not pose a danger to any victim, witness or other person".

give pre-trial detention a penal character, which would clearly be wrong in light of the fact that the accused has not been convicted. The purpose of pre-trial detention is simply to ensure that the accused will be present for his trial; it is not to punish him. 6071

13. The issue of law, to which the first part of this Opinion is devoted, is the location of the burden of proof in an application under Rule 65.

14. The view has been advanced that bail applications are *sui generis*, and that in such applications there is no question of a burden of proof.[20] This approach is not without its own attractiveness, particularly in relation to the Tribunal where Rule 65(B) makes the grant of provisional release conditional on the Chamber being satisfied as to certain matters, without indicating which party must satisfy the Chamber as to those matters. However, in my view, a question of a burden of proof does arise in an application for bail or provisional release, because, if at the end of the day there is a balance in the evidence, for and against bail or provisional release, the only way the issue can be settled is on the basis of an appreciation as to whether the burden is on the Prosecution or the Defence.

15. What must be done now is to examine the current Rule, using the accepted methods of interpretation, to determine the location of the burden of proof. It has to be stressed that the resolution of this issue brings into play the interpretative function. The Rule must, following Article 31(1) of the Vienna Convention on the Law of Treaties, be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Of special significance is the obligation to interpret the Rule in light of its purpose.

16. It would seem that, following the removal from Rule 65(B) of the requirement that release may be granted only in exceptional circumstances, the present position ought to be that there is no burden on the accused to prove the matters set out therein; rather, the position under the current Rule should be that the burden is on the Prosecution to establish that the conditions that the Rule sets for release are not met. This conclusion is supported by a consideration of the purpose of the amendment, which was to bring the Rule in line with modern international human rights law that detention shall not be the general rule.

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[19] *See* paragraph 16 of the Decision where it is said that "the burden on the accused of satisfying the Trial Chamber cannot be light because of the problems associated with the execution of arrest warrants if the accused were to abscond or threaten witnesses."

[20] *See* dicta of Van Schalkwyk J and Mynhardt J in *Ellish en andere v. Prokureur – Generaal,* WPA 1994 (2) SACR 579 (W).

17. The history of the amendment does not support an interpretation of the Rule as imposing a burden on the accused to prove the matters set out therein, because that would reflect the exceptional character of provisional release, which, as we have seen, was changed in November 1999. While, prior to the amendment, there was a basis to construe Rule 65 as imposing a burden on the accused to prove the matters set out therein, that basis has now disappeared. 6072

18. When the regime of provisional release was exceptional, as it was prior to the amendment, it would have been perfectly reasonable to conclude that the accused was required to prove the exceptional circumstances justifying provisional release. But the logic of the amendment must be that, consequent on the removal of the element of exceptional circumstances, the Tribunal's regime of bail was brought into line with the customary norm that detention shall not be the general rule for persons awaiting trial, with the result that there is no burden on the accused to prove the matters set out in Rule 65(B). I must not be understood to be saying that in such a situation, that is, where detention is not the general rule, the burden can never be on the accused to prove that he satisfies the criteria for bail. There are instances in which the legislation of many countries impose such a burden on an accused when he is charged with very serious offences. Rather, my contention is much narrower: it is that in the specific context of the history of the amendment to Rule 65(B), it is difficult not to conclude that the proper interpretation of the Rule following the amendment is that there is no general rule of detention and hence no burden on the accused; rather, the onus is on the Prosecution to establish that the accused has not satisfied the criteria for provisional release set out in the Rule.

19. It is against that background that I comment on several passages from the Decision.

20. The first is in paragraph 12, where, after referring to the amendment of 1999, it is said that, "[h]owever, subsequent jurisprudence shows that the removal of the requirement does not in any way alter the accused's burden of proving that he or she will appear for trial and will not pose a danger to any victim, witness or other person". I regret to say that one of the cases cited – *Prosecutor v. Simić et al.* – does not support that proposition. The matter is of importance to me, as I was a member of the Trial Chamber in that case. In effect, all that that decision says is that the removal of the requirement for the accused to prove exceptional circumstances leaves untouched the other requirements that the Chamber must be satisfied that the accused will appear for trial, and if released, will not pose a danger to any victim, witness or other persons.[21] That is fair enough, since it is an accurate description of the present Rule. However, the *Simić* decision does not address

[21] The decision in the *Simić* case provides in relevant part: "Considering that, while Rule 65(B), as amended, no longer requires an accused to demonstrate exceptional circumstances before release may be ordered, this amendment does not

the question of which party, following the amendment, has the onus to satisfy the Chamber as to the criteria set out in Rule 65(B). In any event, if *Simić*, or any other decision in which I have participated, either states, or is open to the interpretation that there is a burden on the accused to establish that he meets the criteria set out in the Rule, I have to say that, on further reflection, for the reasons set out in this Opinion, I have reconsidered that aspect of those decisions.

21. The second passage, which is also from paragraph 12, states: "Furthermore, the change in the Rule does not alter the position that provisional release continues to be the exception and not the rule, a position justified by the absence of any power in the International Tribunal to execute its own arrest warrants. Thus, only one accused is currently on provisional release, whilst 49 accused remain in custody." This passage flies directly in the face of the amendment of 1999, and, in my opinion, reflects a wrong appreciation of the law. For, if the purpose of removing the requirement to show exceptional circumstances was to bring the Tribunal's regime of bail in line with the customary position, as reflected in the ICCPR, that detention shall not be the general rule, how can it be right to conclude that after the amendment, provisional release remains the exception and not the rule? What then would have been the purpose of the amendment? If that be the case, then the interpretation of the Rule after the amendment would be exactly the same as its interpretation prior to the amendment, and to which I have referred in paragraph 3 of this Opinion; the Rule now would be as violative of international human rights law as it was in the past, and it would be so, not because the amendment was inherently incapable of resolving the conflict, but rather, because its interpretation and application set up the violation. The case law is, therefore, at odds with the amendment. It is not as though under the old Rule there was a dichotomy between the element of exceptional circumstances and the other condition that the Chamber must be satisfied that the accused "will appear for trial and, if released, will not pose a danger to any victim, witness or other person." The regime prior to the amendment was an integrated one in which proof of exceptional circumstances was the overarching requirement, and the other conditions a subset of that requirement. By removing the requirement of exceptional circumstances, the overarching, underpinning element has been eliminated, and what is left is a transformed regime in which it would no longer be appropriate to characterise provisional release as the exception and not the rule.

22. If the passage from the Decision, cited in paragraph 21 above, is a statement of law, it is erroneous for the reasons that I have given, and it is scarcely helpful to cite in support of that legal proposition the Tribunal practice in which 49 accused remain in custody and only one is on provisional release. For it is precisely that practice which is being challenged as reflecting a wrong

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affect the remaining requirements under that provision." *See Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision

appreciation of the Rule. And I regret to say it is a practice that has established within the Tribunal a culture of detention that is wholly at variance with the customary norm that detention shall not be the general rule. I must also reiterate that it is wrong to justify a principle that provisional release is the exception and not the rule on the basis of the absence within the Tribunal of a police force to execute its own warrants. For, as I have explained before, an accused, whether appearing before the Tribunal or a domestic court, has the benefit of the customary norm that detention shall not be the general rule, and the Tribunal cannot, any more than a domestic court could, rely on the peculiarities in its constitution as a justification for derogating from that norm.

23. While it is correct, as is stated in paragraph 13 of the Decision, that there is nothing in customary international law that prevents placing a burden on an accused in relation to an application for provisional release, it is clear that such an approach is, by reason of the presumption of innocence, exceptional, and I can do no better than to reiterate the significant passage from the judgement of the European Court of Human Rights in *Ilijkov v. Bulgaria*, which dealt with the question of bail:

> Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.[22]

24. The ratio of that case is not that the burden may never be shifted to the detained person, but rather that the effect of such a shift is to "overturn" the norm that detention is the exception rather than the general rule, and that this can only be done in strictly defined cases. Again, although it is correctly stated in paragraph 13 of the Decision that the burden may be imposed on the accused when he is charged with very serious crimes, the jurisprudence of the European Court of Human Rights makes it clear that detention of an accused awaiting trial that is based solely on the gravity of the charges is not justified:

> the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand.[23]

I make this comment in full recognition of the fact that the Decision relies on elements other than the gravity of the offence.

25. Moreover, while it may be appropriate to impose a burden on the accused where his release carries with it "the potential for putting the lives of victims and witnesses at risk"[24], I cannot but

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on Milan Simić's Application for Provisional Release, 29 May 2000, p. 5.
[22] *Ilijkov v. Bulgaria*, para. 85.
[23] *Ilijkov v. Bulgaria*, para. 81.

note that in this case no concrete evidence has been adduced to show that the release of the accused would place the lives of victims and witnesses at risk. It would be wrong, in the absence of any supporting evidence, to deprive the accused of release on the basis that his release would have the potential for putting the lives of victims and witnesses at risk.

26. The present position surely is that if a Chamber is satisfied that the accused will appear for trial and will, if released, not pose a danger to any victim, witness or other person, it must make its decision on an application for provisional release, uninfluenced by a consideration that provisional release is the exception and detention the rule. A Chamber that is so satisfied must grant the application; if it does not, and its refusal is made on the basis of a doctrine that provisional release is the exception and not the rule, it would have acted on a wrong principle of law. For "the real purpose of bail" is to "safeguard the liberty of an applicant who will stand his trial."[25]

27. This last comment brings me to the next passage. In paragraph 14 it is said that "the Trial Chamber retains a discretion not to grant provisional release even if the accused satisfies it of both requirements in the rule. So, even if satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, etc. the Trial Chamber may still refuse provisional release." Again, this passage reflects a wrong appreciation of the law; the word "may" which appears in the provision – "[r]elease 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" – does not mean that a Chamber is free to refuse an application on bases other than those set out in the Rule. The Chamber is not at liberty to reject an application for reasons other than those set out in the text; if it does so, it would have acted arbitrarily and unlawfully. All that the word "may" means is that the Chamber has the power to, that is, it is competent to grant bail, but its jurisdiction to do so is strictly delimited by the considerations explicitly identified in the Rule. Properly construed, the word "may" indicates that provisional release is grantable by a Chamber, but grantable in the specific circumstances expressly set out in the Rule.

28. The 'grantability' of provisional release comes against the background of the position that domestic courts in most jurisdictions do not have an inherent power to grant bail. The position is the same in the Tribunal: a Chamber has no inherent power to grant provisional release. Express provision for the power to grant provisional release is made in the first paragraph of Rule 65: "once detained an accused may not be released except on an order of a Chamber." Having invested the

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[24] Decision, para. 13.
[25] Du Toit et al., *Commentary on Criminal Procedure Act* (1999), p. 9-3.

Chamber with jurisdiction to grant provisional release, the Rule goes on in paragraph (B) to set out the circumstances in which that jurisdiction is to be exercised. But it is a jurisdiction that must be exercised within the four corners of the Rule. It must be noted that the Rule does not have, as is the case in the legislation of some countries, in addition to certain listed grounds, a catch-all provision allowing a Chamber to reject an application for provisional release for any other reason if it is in the interests of justice to do so. The conclusion that the jurisdictional power to grant provisional release is confined to the circumstances set out in the Rule is supported by the use on two occasions of the limiting word "only" for emphasis. In sum, the word "may" imports not so much discretionary power as jurisdictional competence.

29. The case cited (*Kordić*) as support for the proposition that a Trial Chamber retains a discretion not to grant provisional release even if the accused satisfies it of both requirements in the Rule, does not in fact provide such support. In that case, among the Trial Chamber's reasons for refusing the application, which was filed after the close of the Prosecution's case, was that release could disrupt the remaining course of the trial. However, the ratio of the decision is, firstly, that the risk of potential interference with witnesses was increased because the accused had detailed information about witnesses who had testified and who were yet to testify in the case, and secondly, that the Chamber was not satisfied that, if released, the accused would appear for the continuation of his trial, because of the grave offences with which he was charged and the severity of the sentences that could be imposed. The specific reason that release could disrupt the remaining course of the trial is but an aspect of the overriding consideration reflected in the latter ratio; that is, that the Chamber was not satisfied that the accused would appear for the continuation of his trial. Clearly, release would only have that effect if he would not appear for the continuation of his trial. The *Kordić* case, therefore, is not an example of a Chamber denying provisional release even if it were satisfied that the accused would appear for trial and, if released, would not pose a danger to any victim, witness or other person.

30. No perils to the Tribunal's mandate for the prosecution of persons responsible for serious violations of international humanitarian law result from the conclusion that the burden under Rule 65 is on the prosecution, and not on the defence. In the first place, there would be no necessary increase in the grant of applications for provisional release, since each case would have to be decided on its own merits, and a Trial Chamber would be obliged to take into account all the factors that are traditionally regarded as relevant to bail; for example, the gravity of the offence, the likely sentence if convicted, and generally any other factor that would bear upon the likelihood of the accused appearing for trial. Secondly, in any event, the burden, whether it be on the Prosecution or on the accused, in an application under Rule 65 is discharged not on the standard of proof beyond reasonable doubt, but on the standard of the balance of probabilities.

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Annex 9

Prosecutor v. Brdanin et al., IT-99-36-PT, Decision on motion by Radoslav Brdanin for provisional release, 25 July 2000

IN TRIAL CHAMBER II

6078

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.

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: 6079

(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

other person.

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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

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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.

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(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] 6084

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

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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). 6c 86
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.

42- Ibid, par 14; Transcript, p 162.
43- Transcript, p 160.
44- Kordic Decision, p 4.
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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.

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Annex 10

Mathew M. DeFrank in "Provisional Release: Current Practice, A dissenting Voice, and the Case for a rule Change" 80 Texas Law Review 1429 at 1447. (extracts)

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concern about the Tribunal's treatment of the rights of the accused under current practice, his dissent has been given great attention within the Office of the Prosecutor [hereinafter OTP] and the Tribunal as a whole. But Judge Robinson's proposal is not a justifiable alternative to current practice. While his premise that the Tribunal can do more to protect the rights of the accused sounds appealing, neither international law nor statutory interpretation supports his arguments.
Judge Robinson's position on provisional release is not that Rule 65(B) should be changed or amended, but rather that Rule 65(B) should be interpreted accurately. For Judge Robinson, amended Rule 65(B) is not necessarily inconsistent with international norms, but the Trial Chamber's incorrect interpretation of the rule has made it inconsistent with those norms.
He justifies this assertion by combining two distinct arguments. The first, that the defense, not the prosecution, must carry the burden of proof, combines in modes of interpretation both reference to international case law and statutory analysis. The second, that the Trial Chamber has no discretion to deny provisional relief once the prosecution has failed to satisfy its burden of proving that the accused will abscond and will harass witnesses, is solely based on statutory analysis of Rule 65(B). Both arguments are untenable.

A. Burden of Proof on the Prosecution
Judge Robinson's argument that the burden of proof to deny provisional release must lie with the prosecution has three parts. First, he argues that, because the Trial Chamber granted few provisional releases under preamendment Rule 65(B), the Tribunal's provisional-release practice had a general rule of **detention** or was a general **detention** regime. Such a system, he claims, necessarily violates **customary international law**. Second, he contends that, because of this inconsistency, the current rule should be ***1445** interpreted in light of the amenders' desire to harmonize provisional-release practice with **customary international law**. Finally, he insists that the Tribunal's Rules Committee explicitly rejected a general **detention** regime when it removed the exceptional-circumstances language of preamendment Rule 65(B). This body's rejection of a general **detention** regime means there can be no burden on the defense to justify provisional release because such a burden would simply reimpose a general rule of **detention**.
1. Preamendment Rule 65(B) is inconsistent with **customary international law**. --Whether preamendment Rule 65(B) created a general **detention** regime inconsistent with **customary international law** is an open question. But even if the preamendment rule was inconsistent with **customary international law**, that does not necessarily mean that the Tribunal's Rules Committee amended the statute with the express purpose of bringing Rule 65(B) in line with **customary international law**. Nor does maintaining the burden of proof on the defendant necessarily create a general **detention** regime inconsistent with **customary international law**.
Judge Robinson compares a Bulgarian provisional-release statute, which he claims created a general **detention** system, with preamendment Rule 65(B). He argues that the similarity between the texts of preamendment Rule 65(B) and the Bulgarian statute, rejected by the European Court of Human Rights for being inconsistent with Article 5(3), demonstrates that preamendment Rule 65(B) creates a general detention regime. He then assumes that such a general detention system is necessarily inconsistent with customary international law. [FN58]
Undoubtedly, these two rules are very similar; however, they are not "exactly similar" as Judge Robinson asserts. [FN59] A "presumption that there was a danger of absconding, re-offending or obstructing the investigation" for ***1446** those accused of serious crimes is very different from a judicial body allocating the burden of proof to one party or another. [FN60]
Preamendment Rule 65(B) never began with the baseline assumption that the accused would commit crimes such as obstruction of justice or other offenses. The Trial Chamber merely recognized that given the Tribunal's inherent limitations, including the lack of a police force to enforce judicial orders, the burden should more appropriately lie with the defense to demonstrate that the accused would not harass witnesses or abscond. [FN61] Again, while the accuracy of Judge Robinson's assertion that preamendment Rule 65(B) is inconsistent with customary international law is not critical to this analysis, very strong arguments militate against his view.
2. Rule 65(B) was amended to harmonize it with customary international law. --Judge Robinson's assertion that the Tribunal's Rules Committee promulgated the December 1999 amendment to harmonize Rule 65(B) with international norms provides the foundation for his argument that the prosecution maintains the burden of proof. He gives only one authority to support this contention: IT/161. [FN62] But IT/161 is merely a citation to a document containing the text of all amended rules from December 1999. This document contains no evidence of the reasoning behind these

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amendments. Thus, this source does not support his position that the Tribunal's Rules Committee promulgated the December amendment to bring the rule in line with customary international law. At the Tribunal, Judges amend and promulgate rule changes. Therefore, those who were present at the Tribunal in December 1999 would have had knowledge of, and a significant number would have directly participated in, the amending process. In none of the postamendment provisional-release cases did the Trial Chamber state that the Tribunal amended Rule 65(B) to create consistency with **customary international law**. In fact, Judge Robinson himself, sitting on one of the first postamendment provisional-release cases in early 2000, did not mention harmony with **international** norms as a justification for amending Rule 65(B). [FN63] Even more telling, Judge Robinson noted without exception that "in the Blaskic case, periods of **pretrial detention** ranging from nineteen months to five years have been found ***1447** reasonable." [FN64] This contention has never been challenged in any Trial Chamber.

A much more plausible justification for the amendment, which Judge Patricia Wald's analysis of the Tribunal's provisional-release regime supports, is that the Tribunal's Rules Committee amended the rule as a matter of practicality, not necessity. According to Judge Wald, who was at the Tribunal in 1999 when the Rules Committee was considering amending Rule 65(B), the amendment was "prompted in part by an investigation into the death of two defendants in the **detention** unit, [when] the judges became increasingly concerned about the depressive effects of lengthy **pre-trial detention** without regular contact with the Court." [FN65]

This concern had nothing to do with questions about consistency with **customary international law**. According to Judge Wald, "The Tribunal nevertheless rejected suggestions that the Rule be amended to adopt the [European Court of Human Rights'] approach in full with a presumption in favour of release. . . .," and "[i]nstead . . . adopted a requirement of status conferences every 120 days at which the defendant would be present and asked about the conditions of his detention." [FN66] This requirement of status conferences every 120 days embodied in current Rule 65 bis does not represent an attempt to bring the provisional-release regime in line with international norms.

Ultimately, the amended rule was part of an effort to "liberalize" current practice. According to Judge Wald, the 1999 amendment was also influenced by a recommendation from United Nations experts "that the Tribunal experiment with granting provisional release more liberally in cases where the Defendant had voluntarily surrendered." [FN67] The Tribunal complied with the experts' recommendation to "liberalize" the current regime by removing the exceptional- circumstances language of preamendment Rule 65(B).

These experts recommended a policy change to reward those who voluntarily surrendered to the Tribunal. This concession is extremely practical, as the Tribunal has no police force to arrest its indictees. Further, the Tribunal faces, at best, a tepid willingness of the Stabilization Force [FN68] and absolute refusal by the governments of the Republika Srpska and the Federal ***1448** Republic of Yugoslavia to arrest any of the as many as thirty publicly indicted persons in these territories. [FN69]

The inability to arrest and enforce the Tribunal's orders in the areas where serious crimes such as genocide are alleged to have been committed substantially undermines one of the main missions of the Tribunal--to end the sense of impunity and lawlessness in the former Yugoslavia created by the lack of legal accountability for one's crimes. Practical reasons to amend Rule 65(B), such as the desire to encourage self-surrender, go beyond a desire to bring the rule in line with international norms.

Further, a provisional-release system incorporating the approaches of the European Court of Human Rights or of other international-law bodies has been explicitly rejected. [FN70] Judge Robinson gives no evidence to support his position that the Tribunal's Rules Committee amended Rule 65(B) to harmonize it with international law. In addition, Judge Wald has specifically rejected such an argument, citing a 1999 experts' report as justification for the amendment being made to "liberalize," rather than to overhaul, the system. [FN71] Were the substantial change envisioned by Judge Robinson embodied in the 1999 amendment, other Judges in the numerous provisional-release cases since 1999 would have called into question the current jurisprudence. They have not done so. Substantial evidence outweighs Judge Robinson's unsupported claim that the amendment attempted to bring the Tribunal's provisional-release practice into compliance with international norms.

3. No general rule of detention means a prosecutorial burden of proof. -- Judge Robinson's convoluted argument for a prosecutorial burden begins with the assertion that the exceptional-

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circumstances requirement of preamendment Rule 65(B) accounts for the relatively few provisional releases. Because there were few releases, preamendment Rule 65(B) had a general rule of detention or a general detention scheme. According to Judge Robinson, a general rule of detention violates customary international law because "the customary norm [is] that detention shall not be the general rule for persons awaiting trial." [FN72]

***1449** He further claims when the Tribunal's Rules Committee removed the exceptional-circumstances language, the Tribunal explicitly rejected a general rule of detention. Finally, even though the Rules Committee removed the exceptional-circumstances language in the December 1999 amendment, by maintaining the burden of proof on the defense, pre- and postamendment provisional-release practices operate in exactly the same manner. Again, he claims preamendment practice violated customary international law because of its general detention regime. He argues that since current practice operates in the same manner as preamendment practice, current Rule 65 (B) necessarily establishes a general detention scheme, and, therefore, violates customary international law. He states:

[I]t is difficult not to conclude that the proper interpretation of the Rule following the amendment is that there is no general rule of detention and hence no burden on the accused; rather, the onus is on the Prosecution to establish that the accused has not satisfied the criteria for provisional release set out in the Rule. [FN73]

Judge Robinson's analysis is not supported by the realities of the Tribunal's postamendment practice or customary international law. Placing the burden of proof on the defense does not mean that current practice is the same as preamendment Rule 65(B). First, the Trial Chamber has reversed its own decisions to deny provisional release because of the removal of the exceptional-circumstances requirement. The amendment has changed the Trial Chamber's provisional-release decisionmaking. Second, current prac-tice does not have a general rule of detention because the Trial Chamber grants a substantial number of provisional-release requests. Finally, even if postamendment Rule 65 (B) created a general detention regime, very strong arguments suggest the Tribunal's provisional-release practice would not violate customary international law.

a. Equivalence of pre- and postamendment provisional-release practices.-- Judge Robinson accurately states that the Tribunal's preamendment provisional- release practice constituted a general rule of detention where the accused almost never received provisional release. [FN74] This practice may have violated customary international law. It is also accurate that under former Rule 65(B), the defense maintained the burden of proof to justify release. But no direct causal relationship exists between the defense's burden of proof and a general rule of detention. The defense's burden of proof worked in conjunction with the requirement to demonstrate "exceptional circumstances." The Trial Chamber often treated this exceptional-circumstances language as a threshold issue when deciding ***1450** provisional release, making it an extremely common ground for denial. [FN75] The removal of the exceptional- circumstances language satisfied the amendment's true goal--to liberalize the Tribunal's provisional-release regime. [FN76]

Keeping the burden of proof on the defense under amended Rule 65(B) has not resulted in the continuation of the preamendment provisional-release system's general rule of detention. The amendment has changed Trial Chamber provisional-release decisions, and the number of provisional releases has substantially increased.

Judge Robinson's contends that keeping the burden of proof on the defense means that there may as well have never been an amendment removing the exceptional-circumstances requirement. If this were an accurate contention, then postamendment Trial Chamber judges would not have reversed their own decisions to deny provisional release. Judge Robinson reversed two of his own decisions to deny provisional release, while simultaneously maintaining the burden of proof on the prosecution. He justified these reversals on the removal of the exceptional-circumstances language.

On February 15, 1999, before the Rules Committee amended Rule 65(B), Judge Robinson denied both Miroslav Tadic's and Simo Zaric's requests for provisional release because they had failed to establish exceptional circumstances. [FN77] On April 4, 2000, Judge Robinson reversed himself, allowing provisional release for both Mr. Tadic and Mr. Zaric, since "Rule 65(B), as amended, no longer requires an accused to demonstrate exceptional circumstances before release may be ordered." [FN78] For this Trial Chamber, the amendment had completely changed the outcome of two defendants' provisional- release requests while simultaneously maintaining the burden of proof on the prosecution.

***1451** b. Current practice's consistency with a general detention regime. --Variations in the cases themselves could account for some of the difference in pre- and postamendment practice. But if pre-

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and post-amendment practice were the same, as Judge Robinson contends, then the outcomes of provisional-release requests should not be dramatically different. But in less than two years under amended Rule 65(B), the Trial Chamber has more than doubled the number of provisional releases that were granted between 1995 and December 1999. [FN79] Under preamendment Rule 65(B), between 1995 and December 1999, the Trial Chamber only granted four provisional releases. [FN80] In the two years since the amendment, the Trial Chamber has provisionally released nine individuals. [FN81] In half the time, the ***1452** Trial Chamber has more than doubled the total number of provisional releases that occurred under four years of preamendment Rule 65(B). [FN82] Further, under preamendment Rule 65(B), all the provisional releases were based on humanitarian concerns. [FN83] Current practice has granted provisional release on several other grounds, [FN84] suggesting that the 1999 amendment has "liberalized" current provisional-release practice. [FN85] The substantial increase in the number of provisional releases and the variety of grounds for provisional release demonstrate that current practice is not equivalent to preamendment Rule 65(B)--or to a general detention regime, as Judge Robinson contends.

The amendment has changed the outcome of Mr. Tadic's and Mr. Zaric's provisional-release requests, and the number of provisional releases has more than doubled. [FN86] These aspects of current practice are completely different from preamendment Rule 65(B)'s system of a limited number of releases justified only on humanitarian grounds. These differences demon-strate that maintaining the burden of proof on the defense has not reinstated preamendment practice and its alleged general-detention system.

c. An ICTY general detention system's consistency with international law. -- Even if postamendment practice constituted a general detention system, the Tribunal's provisional-release practice would not violate customary international law. The Tribunal's mandate demands that it prosecute "serious violations of international humanitarian law." [FN87] The Tribunal only hears the gravest offenses under international criminal law: genocide, crimes against humanity, violations of the laws and customs of ***1453** war, and grave breaches of the Geneva Conventions. Few crimes are more heinous. These offenses encompass mass murder, rape, and other atrocities.

Both domestic jurisdictions and the European Court of Human Rights give substantial weight to the gravity of the crime when determining whether to grant provisional release. [FN88] In Canada, a single murder is a nonbailable offense. [FN89] Many of the Tribunal's cases involve hundreds, if not thousands, of killings. [FN90] It is grossly inappropriate to equate the entirety of the European Court's or a domestic jurisdiction's provisional- release practice, which includes nonviolent offenses, with the ICTY's, which often prosecutes those charged with attempting to destroy an entire ethnic group. The ICTY provisional-release practice should be compared with these jurisdictions' treatment of their most serious class of offenses. As previously mentioned, gravity of the crime is given substantial weight in the provisional-release practices of both the European Court of Human Rights and of domestic courts.

Postamendment practice does not reinstate preamendment Rule 65(B)'s general rule of detention. Even if it did, such a provisional-release practice would still be consistent with customary international law given the gravity of the offenses charged at the Tribunal.

B. No Discretionary Power for the Trial Chamber

Judge Robinson goes beyond his aforementioned contention that the burden of proof under Rule 65 (B) must lie with the prosecution, arguing that the Trial Chamber has no discretion to deny provisional release. Mixing statutory analysis and international law precedents, Judge Robinson argues that the Trial Chamber has no discretion to deny provisional release if the Trial Chamber determines that the accused will return for trial and will not harass witnesses.

He makes two arguments to support this position. First, using statutory analysis, he argues that the phrase "release may be ordered by the Trial Chamber" does not grant the Trial Chamber discretionary power. Instead, ***1454** "may" "indicates that provisional release is grantable by a Chamber, but grantable only in the specific circumstances expressly set out in the Rule." [FN91] Second, he suggests that customary international law does not provide for discretion to refuse to grant provisional release. He states:

The present position surely is that if a Chamber is satisfied that the accused will appear for trial and will, if released, not pose a danger to any victim, witness or other person, it must make its decision on an application for provisional release, uninfluenced by a consideration that provisional release is the exception and detention the rule. A Chamber that is so satisfied must grant the application; if it does not, and its refusal is made on the basis of a doctrine that provisional release is the exception

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Annex 11

Prosecutor v. Brdanin, IT-99-36-PT, Decision On Motion By Momir Talic For Provisional Release, 28 March 2001, paragraph 30

IN TRIAL CHAMBER II

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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

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

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(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.

2 The relevant provision

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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

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". 6047

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]

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

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. 6099

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

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

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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 [...]. 6102

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

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. 6103

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

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. 6104

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]

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. 6105

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.

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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.

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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

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.
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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.

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Annex 12

Prosecutor v. Kvocka et al, IT-98-30, Decision on Motion For Provisional Release Of Miroslav Kvocka, 2 February 2000.

IN THE TRIAL CHAMBER

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Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 February 2000

PROSECUTOR

v.

MIROSLAV KVOCKA
MILOJICA KOS
MLADO RADIC
ZORAN ZIGIC

DECISION ON MOTION FOR PROVISIONAL RELEASE OF MIROSLAV KVOCKA

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Michael Keegan
Mr. Kapila Waidyaratne

Counsel for the Accused:

Mr. Krstan Simic, for Miroslav Kvocka
Mr. Zarko Nikolic, for Milojica Kos
Mr. Toma Fila, for Mladjo Radic
Mr. Simo Tosic, for Zoran Zigic

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 ("International Tribunal"),

BEING SEISED of the "Motion for a Provisional Release of Mr. Kvocka", and the "Addition of Motion for Provisional Release of Miroslav Kvocka of the 12th January, 2000", filed on behalf of the accused

Miroslav Kvocka ("the Accused") on 12 and 14 January 2000, respectively ("the Motion"), requesting provisional release from detention subject to certain terms and conditions as set out in the Motion, 6111

NOTING the "Prosecution's Response to Miroslav Kvocka's 'Motion for a Provisional Release of Mr. Kvocka'", filed by the Office of the Prosecutor ("Prosecution") on 19 January 2000,

HAVING HEARD the oral arguments of the parties in open session on 21 January 2000,

NOTING the arguments of the Accused, *inter alia*, that since the Trial Chamber then seised of the case, issued its decision denying the original motion for provisional release on 20 October 1998,[1] circumstances have changed so as to warrant a fresh application,

NOTING the following particular arguments of the Accused that,

(i) the delay in bringing this case to trial raises serious concerns under Article 21, paragraph 4, of the Statute of the International Tribunal ("Statute"), the adverse consequences of which may be minimised by provisional release;

(ii) the recent amendment to Sub-rule 65 (B)[2] of the Rules of Procedure and Evidence ("Rules") has considerably liberalised the legal regime governing a grant of provisional release;

(iii) there is no evidence to suggest that Miroslav Kvocka was involved in any wrongdoing in connection with the allegations in the Second Amended Indictment,[3] and therefore, if released, he is unlikely to pose a danger to witnesses;

(iv) the guarantees provided by the Government of the Republika Srpska and the Accused will ensure that, if released, he will continue to appear for trial;

(v) the Accused's family has suffered on account of his prolonged detention, and Mrs. Kvocka's health has deteriorated significantly in her husband's absence,

NOTING the arguments of the Prosecution, *inter alia*, that

(i) the length of the Accused's pre-trial detention in this case does not violate the Statute, nor does it breach standards contained in international and regional human rights instruments;

(ii) the amendment to Sub-rule 65 (B) of the Rules, removing the requirement that an accused must demonstrate exceptional circumstances, does not establish release as the norm and detention as the exception, as an accused is still obliged to meet the remaining requirements under that provision;

(iii) the submissions of the Defence relating to the lack of evidence to substantiate the charges against the Accused are not relevant here, rather, the consideration of such matters is appropriately reserved for trial;

(iv) the guarantees of the Republika Srpska should be accorded little weight on account of that entity's failure, to date, to comply with any of its obligations to the International

Tribunal, and the fact that the Accused has had an opportunity to examine much of the Prosecution's evidence against him, gives rise to serious concerns that, if released, he would not appear for trial; 6112

(v) while not insensitive to the hardship caused to the Accused's family due to his lengthy detention, the Prosecution submits that such factors are not relevant here,

NOTING also the Prosecution argument that as it has, to date, released the names of 186 witnesses to the Defence, the potential for harassment is heightened, and it is likely that Miroslav Kvocka, if released, would pose a danger to victims and witnesses,

NOTING the guarantee provided by the Government of the Republika Srpska,

HAVING CONSIDERED all of the arguments of the parties, and the material filed by the Defence in support of the Motion,

CONSIDERING that, while Sub-rule 65 (B), as amended, no longer requires an accused to demonstrate exceptional circumstances before release may be ordered, this amendment does not affect the remaining requirements under that provision,

CONSIDERING therefore that the effect of the amendment is not to establish release as the norm and detention as the exception, and that a determination as to whether release is to be granted must be made in the light of the particular circumstances of each case, and only if the Trial Chamber is satisfied that the accused "will appear for trial and, if released, will not pose a danger to any victim, witness or other person,"

CONSIDERING that the accused is charged with the gravest offences under international humanitarian law,

CONSIDERING the legitimate concerns expressed by the Prosecution regarding the likelihood that the Accused may pose a danger to victims, witnesses or other persons,

CONSIDERING that the Trial Chamber is not satisfied that the Accused, if released, will appear for trial,

CONSIDERING that the Trial Chamber now anticipates that an early date will be set for the commencement of trial in this case,

HEREBY DENIES THE APPLICATION.

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

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Richard May
Presiding

Dated this second day of February 2000
At The Hague
The Netherlands

[Seal of the Tribunal]

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1. *Prosecutor v. Meakic et al.,* Case No. IT-95-4-PT, Decision Rejecting a Motion for Provisional Release, T.Ch. I, 20 Oct. 1998.
2. This amendment entered into force on 7 December 1999, pursuant to IT/161, "Amendment to the Rules of Procedure and Evidence", 30 November 1999.
3. *Prosecutor v. Kvocka et al.,* Case No. IT-98-30-PT, Second Amended Indictment, T. Ch. III, 31 May 1999.