225) SCSL-2004-15-T (7329-7492) 7329

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Ayoola, Presiding Judge
Judge A. Rajan N. Fernando
Judge Winter
Judge Gelaga King

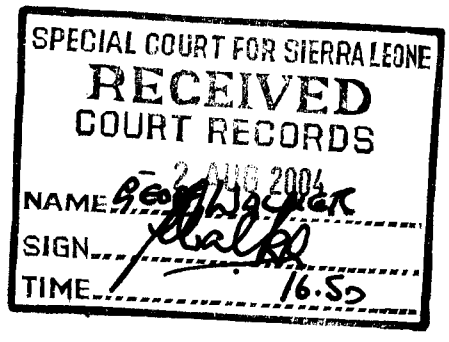
Registrar: Mr. Robin Vincent

Date filed: 2 August 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO



Case No. SCSL – 2004 – 15 – T

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

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The Prosecution files this objection and response to the Defence "Appeal Against the Decision of the Trial Chamber Refusing the Application for Bail by Morris Kallon", dated 23 July 2004, on behalf of Morris Kallon ('Accused'), requesting the Appeals Chamber to rule expeditiously and to grant an oral hearing on the matter.[1]

I. BACKGROUND

1. On 29 October 2003 the Defence filed a Confidential Motion for Bail on behalf of Accused Kallon ('Motion'). On 23 February 2004, the Trial Chamber issued a decision denying the Motion ('Decision to refuse bail').

2. On 27 February 2004, the Defence filed a motion requesting extension of time for filing an application for leave to appeal the Decision to refuse bail.

[1] Given the uncertain nature of the Defence Appeal, which could be interpreted as a notice of appeal or as Appellant's submissions, the Prosecution chose to file this document as a document for merits of interlocutory appeals, pursuant to article 6(D)(ii)b) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone.

3. On 19 April 2004, the Appeals Chamber granted an extension of the time limit, ordering that the application be filed within 14 days of that day.

4. On 4 May 2004, the Defence filed its "Application for Leave to Appeal Against the Decision of the Trial Chamber Refusing the Application for Bail by Morris Kallon" ('Application'), pursuant to Rule 65(E) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ('Rules').

5. On 7 May 2004, the Prosecution filed its Response to the Application ('Response').

6. On 12 May 2004 the Defence filed its Reply to the Response ('Reply').

7. On 23 June 2004, the Appeals Chamber issued its Decision on the Application, in which it granted the Defence leave to appeal against the Trial Chamber's Decision to refuse bail ('Decision granting leave to appeal').

8. On 23 July 2003, the Defence filed a document titled 'Appeal Against the Decision of the Trial Chamber Refusing the Application for Bail by Morris Kallon' ('Defence Appeal'). The Prosecution hereby files its objection to the Defence Appeal.

II. ARGUMENTS WHY NOTICE OF APPEAL SHOULD BE REJECTED

9. The Prosecution submits that the Defence Appeal should be rejected by the Trial Chamber since the Defence should have, pursuant to Rule 108, filed a notice of appeal within 7 days after the Decision granting leave to appeal was issued. Flagrant failure to do so warrants rejection of the Defence Appeal. Nonetheless, the Defence Appeal might be interpreted as a 'notice of appeal', as it is not titled 'Appellant's Brief' or 'Appellant's Submissions'. However, in that case, it is submitted that it should still be rejected, as it was filed well outside the time limit prescribed by the Rules; that the lateness was serious (23 days past the 7 day time limit); that the Defence have failed to specify the reasons for the delay; that the Defence failed to file an application for an extension of time; and that it has failed to conform to the requirements of Rule 108.

Defence Notice of Appeal should be summarily dismissed due to lateness of its filing

10. Pursuant to Rule 108(C) of the Rules, the Defence should have filed its notice and grounds of appeal "within seven days of the receipt of the decision to grant leave". Leave to appeal was granted on 23 June 2003. The Defence filed nothing related to the Decision granting leave to appeal until 23 July 2003, an entire month after the Decision granting leave to appeal was issued. In addition, the document eventually filed by the Defence on 23 July 2003 was titled 'Appeal Against the Decision of the Trial Chamber Refusing the Application for Bail by Morris Kallon', and contained submissions on the merits of the appeal, making it difficult to determine what the purpose of the document was.

11. The Prosecution submits that filing an Appellant's brief containing its submissions on the merits of an appeal is premature. A notice of appeal should have been filed, allowing the Chamber the opportunity to order the time table for submitting the parties' briefs, in accordance with Rule 117 of the Rules.

12. Rule 116 of the Rules allows the Appeals Chamber to "grant a motion to extend a time limit upon a showing of good cause". The Rules do not allow a late filing of a notice of appeal, except upon showing of good cause pursuant to Rule 166 of the Rules. The Defence failed to file a motion requesting such an extension of time.

13. Pursuant to Article 12 of the Practice Direction on Filing Documents before the Special Court for Sierra Leone, where a document is filed outside the time limits set by the Rules, the Party filing the document "shall indicate the reason for the delay on the relevant Court Management Section form". Furthermore, the provision states that "[t]he Judge or Chamber before which such document is filed shall decide whether to accept the document despite its late filing." The Defence Appeal does not articulate the reasons for the delay and thereby fails to provide the Chamber with reasons on which it could decide to accept the Defence Appeal, as notice of appeal or otherwise, despite its lateness.

14. In *Kayishema and Ruzindana* the ICTR Appeals Chamber rejected the Prosecution's appeal because the appeal brief was filed out of time while "unaccompanied by any showing of good cause or a request for permission to file out of time." [2] It stressed that

[2] *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ('*Kayishema and Ruzindana* Appeal Judgement, 1 June 2001'), para. 42. The Appeals Chamber found that "the Prosecution's

"procedural time-limits are to be respected, and that they are indispensable to the proper functioning of the Tribunal and to the fulfilment of its mission to do justice. Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated."[3]

15. In *Kajelijeli* the ICTR Appeals Chamber rejected the Prosecution's notice of appeal as it was filed late without good cause.[4] The Prosecution's was only 5 days late in filing its notice of appeal, and on the same day it filed a motion requesting the Chamber to accept its notice of appeal despite lateness of only 5 days. Nonetheless, the ICTR Appeals Chamber stated that "the Rules do not permit the filing of a notice of appeal out of time except upon a showing of good cause under Rule 116(A) of the Rules",[5] and that "the reasons offered in the Motion for the failure of the Office of the Prosecutor to file a timely notice of appeal do not constitute 'good cause' within the meaning of Rule 116(A) of the Rules."[6] In its analysis, it indicated that the Prosecution should have included in its motion material substantiating the reasons for the delay.[7] The Chamber accordingly denied the motion and rejected the notice of appeal.

16. In the present case, the Defence Appeal, if interpreted as a notice of appeal, was clearly filed well out of time. Furthermore, not only was the delay of 23 days without good cause, but the Appeal did not even acknowledge or explain the reasons for the delay, nor did it include material substantiating the reasons for the delay. In accordance with the Special Court Rules and with the jurisprudence of the other international criminal tribunals, the Defence Appeal is time-barred and inadmissible.

17. Even if the Defence Appeal is regarded as an 'Appellant's brief' containing its submissions on the merits of the appeal, it was filed improperly, as no order was given by

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Appellant's briefs are time-barred and inadmissible, and will not be considered in this Judgement." *Kayishema and Ruzindana* Appeal Judgement, 1 June 2001, para. 43.

[3] *Kayishema and Ruzindana* Appeal Judgement, 1 June 2001, para. 46. The Chamber subsequently stated that "[i]n this case, the Prosecution failed to file its Appellant's brief on time, on two occasions. It failed to file its motion for an extension of time, in a timely manner. It failed to request permission for late filing prior to its eventual filing. It did not demonstrate good cause for any of these failures. Its Respondent's briefs were also filed out of time. As a result, the Prosecution's Appeal, its Appellant's briefs, and its Respondent's briefs, are inadmissible." *Kayishema and Ruzindana* Appeal Judgement, 1 June 2001, para. 47.

[4] *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time, 23 January 2004 ('*Kajelijeli*, 23 January 2004').

[5] *Kajelijeli*, 23 January 2004, para. 9.

[6] *Kajelijeli*, 23 January 2004, para. 12.

[7] *Kajelijeli*, 23 January 2004, para. 10.

the Appeals Chamber to file such submissions. Nonetheless, it is logical to presume that if such an order was given, it would have prescribed a much shorter time limit than 30 days, as pursuant to Rule 117 of the Rules, an appeal under Rule 65 of the Rules "shall be heard expeditiously". Hence, since pursuant to Rules 111 and 108 of the Rules Appellant's briefs, in other cases, are to be filed within 30 days of the issuance of leave to appeal, it seems logical to assume that in this case a shorter time limit would have been ordered by the Appeals Chamber.

Defence Notice of Appeal should be summarily dismissed as it fails to conform to the requirement of Rule 108

18. If the Defence Appeal should be interpreted as a notice of appeal, it is further submitted by the Prosecution that it should be rejected as it fails to conform to the requirement of Rule 108. In accordance with the jurisprudence of the ICTR, "a notice of appeal need not set out in detail the arguments that the party intends to raise in support of its grounds of appeal."[8] The arguments in the Defence Appeal, nonetheless, relate to the substance of an appeal on the merits. These arguments should have been included in the applicant's brief pursuant to the Chamber's orders, which should have been given after notice of appeal under Rule 108 of the Rules was filed.

III. ARGUMENTS WHY APPEAL SHOULD BE DENIED

19. In the alternative, the Prosecution submits that the Defence Appeal should be denied since the Defence failed to establish that the Trial Chamber committed an error in its decision to refuse bail. The Prosecution asserts that the Trial Chamber did not err in its decision and submits the following arguments pertaining to the substance of the appeal on the merits. In addition, if the Appeals Chamber should consider the merits of granting bail, the Prosecution submits that the basis for granting bail is even further restricted now that the trial of the Accused has begun than it was during the pre-trial stage.

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[8] *Prosecutor v. Semanza*, ICTR-97-20-A, Decision on Defence Objections to the Prosecutor's Notice of Appeal, 25 July 2003 relying on *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Décision (Requête tendant à voir déclarer irrecevable l'acte d'appel du Procureur), 26 October 2001.

Defence Appeal should be denied since Trial Chamber did not err

The Burden of Proof

20. 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 norms and more specifically, of the presumption of innocence.

21. The Prosecution submits that the Learned Judge was right in his analysis of the law in paragraphs 22 to 35 of his Decision, and in particular when he stated "that it is for the Defence to show that further detention of the Accused is neither justified nor justifiable under the circumstances at hand."[9]

22. The Prosecution submits that the Learned Judge's Decision is supported by both Rule 65(A) which states that "[o]nce detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber", hereby providing that detention is the rule and bail the exception, and 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.[10]

23. 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 such a burden in circumstances where an accused is charged with very

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[9] Decision on the Motion by Morris Kallon for Bail, para. 32. Furthermore, in accordance with the minutes of the first plenary, under the relevant provision, the comment by Judge Robertson for deleting the 'exceptional circumstances' requirement was that it would expedite the proceeding, and not that it would switch the burden of proof. See 'Plenary 1 – Revision 5 - 7 March 2003' (available on SCSL Bulletin Board).

[10] 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")

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."[11]

24. It was furthermore held by the ICTY 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 affect the remaining requirements under that provision."[12]

25. In addition, the ICTY Appeals Chamber in *Blagojevic*, held that the Tribunal is an international judicial body mandated to prosecute international humanitarian crimes rather than a human rights body responsible for upholding general human rights principles.[13]

The Presence of the Special Court in Sierra Leone

26. 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. It further submits that the Learned Judge made an error by not looking at the position of the ICTY on this issue.

27. The Prosecution submits that Learned Judge made no error in law or fact on these issues. 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

[11] IT-00-39 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001, para 13. Even in paragraph 7 of his dissenting opinion, Judge Patrick Robinson noted that it was not impermissible to impose a burden on an Accused person awaiting trial to justify his release.
[12] *Prosecutor v. Simic et al.*, IT-95-9, Trial Chamber, 4 April 2000.
[13] *Prosecutor v. Blagojevic, Obrenovic and Jokic*, IT-02-53-A65, Appeals Chamber, Decision on Application for Leave to Appeal, 18 April 2002, para. 11.

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, critical and sensitive situation than that of the ICTR which sits in Tanzania, a neighbouring country of Rwanda." Thus, in regard with the presence of the Special Court in Sierra Leone, the Learned Judge made no error by electing to concentrate on the judicial history of the ICTR, which situation is more similar than that of the ICTY.

28. 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.[14]

29. 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.

30. 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." In its Appeal, the Defence admits that the Accused has stronger community

[14] 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.

ties in Bo than in Freetown, thereby supporting the Learned Judge's findings on this matter.

31. In any event, the Prosecution submits that this issue was not a primary consideration in determining this matter and even if there was an error on this point, the same does not amount to an error of law or fact, leading to grant the appeal for bail.

The Submissions of the Government of Sierra Leone

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

33. The Prosecution respectfully submits that the Defence complaint that the Government of Sierra Leone filed the exact same 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 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."

34. 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.

The Seriousness of the Charges and Safety of the Accused

35. 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 mean in effect that any accused will be denied bail on the basis of the indictment.

36. 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.[15] In paragraph 44 of the Decision, the Learned Judge noted that "[i]n 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*[16] 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 that accused may expect to receive, if convicted, a sentence that may be of considerable length. This very fact could mean that

[15] *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 "[t]he Trial Chamber emphasises that the prospect of a very substantial sentence is only one of the factors which it has taken into account."
[16] ICTY, IT-01-46-PT, Order On Motion For Provisional Release, 20 February 2002, paragraph 25.

an accused may be more likely to abscond or obstruct the course of justice in other ways."[17]

37. 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 **will** undermine his own safety. In paragraph 44 of the Decision, he commented that "[i]n 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." (emphasis added) 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.

The Issue of the Danger to Victims and Witnesses

38. In paragraph 28 of the Defence Appeal, 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).

39. 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.

40. 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.[18] This test is conjunctive and not 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

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

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.

Bail should not be granted once a trial has begun

41. The Prosecution further submits that the fact that the trial of the Accused has already begun, and that accused is confronted with witnesses who are testifying against him on a daily basis, creates a stronger incentive to flee than before. Hence the granting of bail could undermine the ongoing proceedings.

42. The Prosecution further submits that neither the ICTY nor the ICTR have granted bail to any accused while the trial was taking place, except for the case of *Momir Talic*, which had been granted bail for humanitarian reasons.[19] In addition, the ICTR Appeals Chamber upheld the Trial Chamber in denying provisional release due to the fact that the trial has commenced.[20]

43. The ICTY Trial Chamber granted provisional release to accused *Talic* after his trial had begun solely for humanitarian reasons, stating that "[t]he Trial Chamber believes that, given the medical condition of Talic, it would be unjust and inhumane to prolong his detention on remand until he is half-dead before releasing him. Basing itself upon the medical reports and the testimony of the medical doctors involved, the Trial Chamber is of the opinion that the gravity of Talic's current state of health is not compatible with any continued detention on remand for a long period."[21]

44. The ICTY Trial Chamber distinguished the case from other cases where provisional release was granted as "in all of those cases provisional release was sought during the pre-

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[19] *Prosecutor v. Brdanin and Talic*, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002 ('*Brdanin and Talic*, 20 September 2002')

[20] *Prosecutor v. Ndayambaje*, ICTR Appeals Chamber, 10 January 2003, upholding the Trial Chamber's position: "considering that the Trial Chamber rightly took into account the fact that there is an ongoing trial, which commenced in... and needs to be completed in an orderly manner, and found that in these circumstance, provisional release would not be justified."

[21] *Brdanin and Talic*, 20 September 2002, para. 33.

trial phase."[22] If finally decided to grant provisional release, distinguishably from other ICTY decision which deny provisional release after the trial has begun, as "[t]he humanitarian basis makes this application distinct from most of the other applications considered and decided by this Tribunal".[23]

45. Importantly, the Trial Chamber stressed that "the *rationale* behind the institution of detention on remand is to ensure that the accused will be present for his/her trial. Detention on remand does not have a penal character, it is not a punishment as the accused, prior to his conviction, has the benefit of the presumption of innocence. This fundamental principle is enshrined in Article 21, paragraph 3 of the Statute and applies at all stages of the proceeding, including the trial phase."[24]

46. The Prosecution submits that since the trial has started, upholding the right of the Accused to a speedy trial, the Appeals Chamber should take into consideration the practice of the ICTY and ICTR, which is to have the Accused in detention for the duration of his trial.

Defence Appeal should be denied since risk of flight particularly high to possible non-recognition by the Accused of the Court's legality

47. Furthermore, on 11 June 2004, Accused Kallon and his two co-Accused sent a letter to their respective Defence Counsel, titled 'OUTCOME OF THE JURISDICTION MOTION BEFORE THE SUPREME COURT OF SIERRA LEONE', in which they threatened to not addend the Special Court proceedings until the motion before Sierra Leone's Supreme Court challenging the legality of the Special Court is decided upon. In light of such an indication that the Accused may not recognize the legitimacy of the Special Court, the risk of flight seems particularly high.

[22] *Brdanin and Talic*, 20 September 2002, para. 26.
[23] *Brdanin and Talic*, 20 September 2002, para. 26.
[24] *Brdanin and Talic*, 20 September 2002, para. 29.

IV. CONCLUSION

48. The Prosecutor submits that for the foregoing reasons, the Appeals Chamber should summarily reject the Defence Notice of Appeal, or in the alternative deny the Defence Appeal.

Freetown, 2 August 2004

For the Prosecution,

Desmond de Silva Q.C.

Luc Côté

Annex 1: *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A,
Judgement (Reasons), 1 June 2001

N. FARRELL

ICTR-95-1-A
4TH DECEMBER 2001
(3774/A bis-3599/A bis)

3774/A bis

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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APPEALS CHAMBER

Before Judges: Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgment of: 1 June 2001

THE PROSECUTOR

v.

CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-A

JUDGMENT
(REASONS)

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Translation certified by LCSS, ICTR

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II. ADMISSIBILITY OF THE PROSECUTION'S APPEAL AND RESPONDENT'S BRIEFS

1. Arguments of the Parties

15. In their briefs in response to the Prosecution's Appellant's brief, Kayishema and Ruzindana argue that the Appeals Chamber should rule the Prosecution's Appellant's brief out of time and its appeal inadmissible.[7] They have repeated these requests, which had already been made in motions and to which, they contend the Chamber has not responded directly or explicitly. At the hearing, Kayishema revisited the issue of time-bar and requested the Appeals Chamber to rule definitively on his preliminary motion.

16. Appellants Kayishema and Ruzindana had indeed lodged motions to bar the Prosecution's appeal as out of time and, accordingly, for the Appeals Chambre to rule it inadmissible.[8] The Appellants pointed out that the Prosecution had not observed the time limits set by the Appeals Chamber Decision of 14 December 1999,[9] which ordered the parties to file their Appellant's briefs by the end of ninety days following the day on which the Addendum to the Registry Certificate on the Record of the instant case was communicated to them.[10]

17. Kayishema avers that the Prosecution was served on 25 October 1999 with the Addendum to the Registry Certificate ordered by the Appeals Chamber.[11] On 24 January 2000, the Prosecution had not yet filed its Appellant's brief and had not sought an extension of time to that effet.[12] Thus, according to Kayishema, the Prosecution was time-barred from filing the Appellant's brief provided for under Rule 111.[13]

18. Kayishema notes that under Rule 108, a party seeking to appeal a judgment shall file and serve upon the other parties a written notice of appeal, setting forth the grounds — "that is,

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[7] Kayishema's Provisional Response; Ruzindana's Response; Ruzindana's Response (Sentence).
[8] Kayishema's Motion Seeking Time-Bar; "Motion Filed by the Appellant Obed Ruzindana for Inadmissibility of the Prosecutor's Appeal", 28 March 2000.
[9] "Decision (Appellants' Motions for Extension of Time-Limits and for a Visit with Another Prisoner)," 14 December 1999.
[10] See Ruzindana's Response, para. 6; Ruzindana's Response (Sentence), para. 19; Kayishema's Provisional Response, paras. 8 and 9.
[11] Kayishema's Provisional Response, para. 9.
[12] *Ibid.*
[13] *Ibid.* at paras. 14, 40.

explain[ing] the basis of its arguments in accordance with Article 24 of the Statute."[14] Kayishema further submits that "because the Prosecutor failed to provide the slightest justification for her appeal ... by not filing a brief containing the arguments and authorities justifying her appeal"[15], "such appeal has no effect on the provisions of the Judgment acquitting Kayishema."[16] What is more, Kayishema contends, the Appeals Chamber cannot consider the Prosecution's Notice of Appeal or rule on its merits, that is, consider the grounds put forward by the Prosecution.[17] Kayishema also submits that the Prosecutor's Respondent's brief is time-barred and inadmissible, and that its being filed out of time, constitutes a tacit abandonment of its prosecution of Kayishema.[18] He maintains that as a result, he cannot be convicted of genocide.[19]

19. For the same reasons concerning the expiration of the time-limit set by the aforementioned Decision and the Prosecution's failure to file its briefs, Ruzindana submits that the Prosecutor's appeal is time-barred. Moreover, he emphasizes that the time-limit set for the Prosecution to file its Respondent's brief had also expired because it had not responded to his Appellant's brief within thirty days, in accordance with Rule 112.[20] The penalty for exceeding these two time-limits is, he argues, that the Prosecution appeal is inadmissible, including its initial Notice of Appeal, which, in violation of Rule 108, was not served on the Defence.[21] The Appellant asserts that Rules 108, 111, and 112 form an indissociable whole, a set of procedures dependent on the existence of all of the following items — notice of appeal, Appellant's brief, and Respondent's brief — each contributing to the validity of such whole.[22] Thus, the Prosecution has completely waived the right, by reason of the time-bar, to proceed before the Appeals Chamber seeking the setting aside of the Judgment and Sentence of 21 May 1999.[23]

20. Ruzindana also argues that, given that the Prosecution's appeal is deemed inadmissible, the Appeals Chamber ought not to take into account the Prosecution's Notice of Appeal, and consequently should have made the finding that the parts of the Judgment which have not been

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[14] Kayishema's Motion Seeking Time-Bar, para. 16. See also Kayishema's Provisional Response, para. 31.
[15] *Ibid.*, para. 19.
[16] *Ibid.*, para. 20.
[17] Kayishema's Provisional Response, para. 36.
[18] Kayishema's Definitive Reply, paras. 21, 36.
[19] *Ibid.* at para. 36.
[20] Ruzindana's Reply, para. 28.
[21] *Ibid.*, para. 33.
[22] *Ibid.*, para. 35.
[23] *Ibid.*, para. 35.

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appealed against by the parties are final.[24] He further avers that the Chamber may rule only within the limits of the Notice of Appeal, and that the Notice of Appeal sets forth no grounds as no brief has been filed in support thereof.[25] He adds that the Appeals Chamber judges cannot consider breaches of the Geneva Conventions and crimes against humanity in respect of which the Appellant has been found not guilty.[26]

21. Ruzindana further maintains that by failing to file a response to his Appellant's Brief, the Prosecutor must be taken as having tacitly accepted the brief and as having abandoned prosecution of the Appellant.[27] He argues that the Appeals Chamber has only Ruzindana's appeal before it and may not therefore make the outcome for him any worse by imposing a heavier sentence or amending, in the direction of greater severity, the characterization of his offences adopted by the Trial Chamber judges.[28]

22. In their responses to the Prosecution's Appellant's Brief, Kayishema and Ruzindana repeat their requests to the Appeals Chamber to time-bar the Prosecution appeal and rule it inadmissible.[29] Moreover, Ruzindana points out that the pre-hearing judge, by his Decision of 11 April 2000,[30] granted the Prosecution, at its request,[31] a new deadline of 28 April 2000, although the Prosecution was already out of time. Despite this order, the Prosecution's brief was filed on 2 May 2000, in other words, out of time, as evidenced by the Registry seal and the handwritten acknowledgement of receipt.

23. The Prosecution stresses in its written submission[32] that the Appeals Chamber has delivered several decisions concerning time-limits for the parties to file their briefs. The Decision of 14 December 1999 did indeed order the parties to file their briefs within ninety days from the date of service of the Addendum to the parts of the Record certified by the Registry. The Prosecution argues that it had previously filed, on 25 November 1999, a Motion to correct and

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[24] "Motion filed by the Appellant Obed Ruzindana for Inadmissibility of the Prosecutor's Appeal", 28 March 2000, para. 12.
[25] *Ibid.*
[26] *Ibid.* at paras 12, 15.
[27] Ruzindana's Reply, para. 37.
[28] *Ibid.*, para. 35.
[29] Kayishema's Provisional Response; Ruzindana's Response (Sentence).
[30] "Decision (Prosecutor's Motions for Correction and Clarification of Trial Record; for Clarification of Briefing Time-Limits, and to Extend the Time-Limit)," 11 April 2000.
[31] "Prosecution's Response to the Defence Motion Aimed at Denying the Prosecution the Right to File its Appeal Brief and the Prosecution's Motion to Extend the Time-Limit for Filing its Appeal Brief", 4 April 2000.

clarify the trial record[33] and that the Decision of 14 December 1999 did not address that Motion. By its Order of 29 December 1999,[34] the Appeals Chamber ordered the Prosecution to submit a draft order of the precise relief it had sought in its 25 November 1999 Motion. The Prosecution maintains that it filed the required draft Order,[35] in which it requested that the Registry rectify all errors and omissions in the record. On 2 March 2000, the Registry submitted a memorandum[36] to the Appeals Chamber with regard to the relief requested by the Prosecution in its 25 November 1999 Motion. The Prosecution avers that it did not receive it.[37] On 24 February 2000, the Prosecution filed a Motion[38] for it to be advised of the start date of the ninety-day time-limit.

24. In its briefs in reply[39] to the Respondent's briefs by Kayishema and Ruzindana, the Prosecution notes that by his Decision of 11 April 2000, [40] the pre-hearing judge granted its motion to extend the time-limit: it had been allowed up to 28 April 2000 to file its Appellant's Brief. The said Prosecution Appellant's Brief was dated 28 April 2000 and faxed to the Registry that same day. The pre-hearing judge ruled on the issue by stating in the Order of 26 May 2000[41] that the Prosecution Appellant's brief was filed on 2 May 2000, although the fax markings on the pages of the document show transmission on 28 April 2000.[42]

25. At the hearing,[43] Kayishema formally raised the issue of the Prosecution's briefs being time-barred. He recalled the various stages in the proceedings and submitted that procedural time-limits are mandatory. The Appellant contends that a request for an extension of time does not suspend the Prosecution's obligation to file its briefs within the prescribed time-limit. The issue of

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[32] *Ibid.*

[33] "Prosecutor's Motion for Correction and Clarification of the Trial Record on Appeal," 25 November 1999.

[34] "Order (Prosecutor's Motion for Correction and Clarification of the Trial Record and Record on Appeal)", 29 December 1999.

[35] "Response by the Prosecution to the 29 December 1999 *Order* of the Appeals Chamber", 5 January 2000.

[36] "Memorandum to the Appeals Chamber from the Registrar, Pursuant to Rule 33 (B), with Regard to the Prosecutor's Motion for Correction and Clarification of the Trial Record on Appeal of 25 November 2000", 2 March 2000.

[37] "Prosecution's Response to the Defence Motion Aimed at Denying the Prosecution the Right to File its Appeal Brief and the Prosecution's Motion to Extend the Time-Limit for Filing its Appeal Brief", 4 April 2000, para. 19.

[38] "Prosecutor's Motion to Seek Clarification on the Time-Limits to File the Legal Brief", 24 February 2000.

[39] Prosecution's Definitive Reply to Kayishema; Prosecution's Reply to Ruzindana.

[40] "Decision (Prosecutor's Motions for Correction and Clarification of Trial Record; for Clarification of Briefing Time-Limits, and to Extend the Time-Limit)," 11 April 2000.

[41] "Order (Appellant's Motions to Extend Time-Limits)," 26 May 2000.

[42] Prosecution's Reply (Ruzindana's Sentence), 7 July 2000, para. 2.47.

[43] Hearing on Appeal, 31 October 2000.

time-bar is not a scheduling, pre-hearing problem: it is a substantive issue which falls within the jurisdiction of the Appeals Chamber, and not of the pre-hearing judge who may not adjudicate on it. The pre-hearing judge's decisions granting the Prosecution extension of time do not have the effect of "saving" it from being out of time; the time-bar is therefore in effect. The Prosecution's Notice of Appeal of 18 June 1999, which sets forth no grounds, cannot suffice for the Chamber to consider it in the absence of a brief in support, in accordance with "Article 24 of the Statute." The Appeals Chamber, he argues, cannot make up for the Prosecution's failings by deciding the merits of the case solely on the basis of the Notice of Appeal.

26. In its response at the hearing,[44] the Prosecution revisited the main stages in the proceedings with respect to the filing of the parties' written submissions. It recalled all the motions filed by the Prosecution, either requesting extension of time limits or seeking clarification thereof. It submitted that in his 11 April 2000 Decision, the pre-hearing judge had indeed ordered the Prosecution to file its brief by 28 April 2000, which the Prosecution had done. For any other matters, the Prosecution requested the Chamber to refer to its written submissions.

2. Discussion

27. The primary issues raised by the Appellants concern the admissibility of the Prosecution appeal and its Appellant's briefs, as well as its responses to the Appellant's briefs by Kayishema and Ruzindana. The Appeals Chamber notes that two Prosecution Appellant's briefs are at issue, and that while each was filed separately, both constitute part of the Prosecution's appeal. They are the Prosecution's Brief Against Judgment (entitled "Prosecution's Appeal Brief" filed on 2 May 2000) and the Prosecution's Brief Against Sentence (entitled "Prosecution's Appeal Brief Against Sentence Imposed on Obed Ruzindana", filed on 2 May 2000). The Appeals Chamber considers that in order to resolve this issue of admissibility, it is necessary to examine the various relevant decisions, orders, and motions.

28. On 3 September 1999, the Appeals Chamber issued a Scheduling Order which established 28 October 1999 as the deadline for the Appellants to file their respective briefs. However, the following month, on 21 October 1999, the Appeals Chamber suspended the 28 October 1999 deadline, because of Kayishema's and Ruzindana's pending motions, filed on 7 October 1999,

[44] *Ibid.*

requesting an extension of time to file their briefs on grounds of incompleteness of the Trial Record.

29. On 25 November 1999, the Prosecution filed a Motion for correction and clarification of the trial record on appeal. The Prosecution alleged numerous defects in the trial record as certified by the Registrar.[45] The Prosecution also raised other problems relating to Prosecution and Defence exhibits—namely, witness protection and confidentiality issues, uncertified translations of documentary exhibits, and inaccuracies and other issues relating to Prosecution and Defence exhibits. However, the Prosecution did not raise the issue of the time-limit within which to file its Appellant's brief.

30. On 14 December 1999, the Appeals Chamber granted Appellants' Motions for extension of time, and ordered the Appellants and the Prosecution to file their briefs by the end of ninety days following the day on which the Addendum to the Registry Certificate on the Record was communicated to each of them. The Prosecution had received this Addendum on 25 October 1999.[46] Time-limits for the filing of briefs in response, as well as briefs in reply, were also set in the 14 December 1999 decision. However, the 25 November 1999 Prosecution Motion for correction and clarification was not addressed by the Appeals Chamber in this decision.

31. Fifteen days later on 29 December 1999, the Appeals Chamber ordered the Prosecution to submit within seven days a draft order of the relief it was seeking in its 25 November 1999 motion. On 6 January 2000, the Prosecution's draft order was stamped as received by ICTR Registry.

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[45] In particular, the Prosecutor claimed that:

a. the Registry [...] included in the transferred material, internal and confidential Office of the Prosecution documents which constituted privileged material in some instances [3 indexed documents];
b. the transmitted volumes contained an abundance of pre-trial documents that the Prosecution [submitted] were not part of the trial record on appeal;
c. the seven-case volumes contain[ed] correspondence between the parties and/or the Registry [which] documents were not filed before the Trial Chamber, cannot be considered part of the trial record, and were not designated by the parties as constituting part of the appeals record; and
d. transcripts: the Prosecution did not receive a complete or accurate electronic record of the trial proceedings.

See also "Prosecution Motion for Correction and Clarification of the Trial Record on Appeal", 25 November 1999.

[46] In its Notice of Receipt of Exhibits, filed on 27 October 1999, the Prosecution notified the Appeals Chamber that on 25 October 1999, it "received a copy of an '*Addendum to the Registry Certificate on the record in Case No. ICTR-95-1-A, The Prosecutor v. C. Kayishema and O. Ruzindana*,' dated 14 October 1999 and signed on behalf of the Registrar along with a box of exhibits which purport[ed] to contain copies of all the exhibits filed before the Trial Chamber in that case." Prosecution Notice of Receipt of Exhibits, 27 October 1999, para. 1.4.

32. On 24 February 2000, the Prosecution submitted a motion to seek clarification of the time-limits to file its Appellant's brief.[47] However, it merely set out a chronology of some of the orders of the Appeals Chamber, and did not specify the exact nature and source of its confusion regarding the time-limits. Hence, the Appeals Chamber considers that the Prosecution failed to substantiate the basis upon which it was seeking relief.

33. On 2 March 2000, the Registrar submitted a Memorandum to the Appeals Chamber, pursuant to Rule 33(B),[48] with regard to the Prosecutor's Motion for correction and clarification of the trial record on appeal of 25 November 1999. The Registrar specified the ways in which it would cure the errors or omissions regarding the Prosecution and Defence exhibits, mentioned in paragraphs 2.27 to 2.53 of the Prosecution motion. The Registrar also responded to other contentions raised by the Prosecution in its motion.[49]

34. On 4 April 2000, in its "Response to the Defence Motion Aimed at Denying the Prosecution the Right to File its Appeal brief" the Prosecution submitted as follows:

> [d]ue to the fact that the Appeals Chamber has not yet ruled on the Response the Prosecution filed on 5 January 2000 in relation to correction and clarification of the trial record and the record on appeal, the fact that the Prosecution has not received the documents which the Registry promised to send in its Memorandum on 2 March 2000, and the fact that there has as yet been no decision on the Prosecution motion of 24 February 2000, seeking clarification of the time-limit for filing the appeal briefs, the Prosecution submits with all due respect that the issue of the applicable time-limit is still pending before the Appeals Chamber.

Alternatively, the Prosecution moved for an order of the Appeals Chamber to extend the time-limit for filing its Appellant's Brief in case the Appeals Chamber regarded the date set in its Decision of 14 December 1999 as still valid. The Appeals Chamber notes that in its 14 December 1999 decision, it had made no reference to the pending 25 November 1999 Motion of the Prosecution for clarification and correction. Instead, it addressed this motion separately in a subsequent decision (order) dated 29 December 1999. Thus, consideration of the motion was not warranted in the motion on the setting of time-limits for the filing of briefs.

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[47] "Prosecutor's Motion to Seek Clarification on the Time-Limits to File the Legal Brief required under Rule 111 of the Rules", 24 February 2000.

[48] "Memorandum to the Appeals Chamber from the Registrar, Pursuant to Rule 33 (B), with Regard to the Prosecutor's Motion for Correction and Clarification of the Trial Record on Appeal of 25 November 2000," 2 March 2000.

[49] These concerned, for instance, materials communicated by the Registry to the Parties in case files, as well as electronic transcripts. *Ibid.*

35. On 11 April 2000, the pre-hearing judge assigned to this case rendered a Decision on the Prosecutor's Motions for Correction and Clarification of the Trial Record; for Clarification of Briefing Time-Limits; and to Extend the Time-Limit. The decision dismissed the Motion for clarification of briefing time-limits, stating that

> the Prosecutor's Motion for Clarification of Briefing Time-Limits is without object, since (a) the Appeals Chamber's decision of 14 December 1999 did clearly settle such time-limits, (b) the Prosecutor's Motion for Correction which did not have a prayer for suspension of time-limits could not have affected the time-limits established in the decision of 14 December 1999, and [c] the Appellants had already filed their briefs before the Prosecutor's Motion for Clarification of Briefing Time-Limits.

Nevertheless, the pre-hearing judge concluded that a limited extension of time might be granted to the Prosecution for the filing of its brief, without prejudice being caused to the Appellants, and set 28 April 2000 as the deadline.

36. In addressing this issue of admissibility, the Appeals Chamber notes that the decision of 14 December 1999, fixing a deadline for the filing of briefs, was unambiguous. Further, it was issued approximately three weeks following the filing of the Prosecutor's 25 November 1999 motion, and the Appeals Chamber did not deem it necessary to take into account this motion, which did not raise the issue of time-limits, when determining the applicable deadline.

37. In addition, about four months after the Addendum to the Registry Certificate on the Record was communicated to the Prosecution,[50] the Prosecution filed a motion seeking clarification of the time-limits to file its Appellant's brief. Such lapse of time indicates a lack of diligence on the part of the Prosecutor in pursuing the matter, and furthermore, the motion did not substantiate the precise basis upon which the Prosecution was seeking relief. Neither did it put forward a request for an extension of time to file its brief, even though the deadline set in the 14 December 1999 decision had long expired.

38. The Prosecution's formal motion to extend the time-limits for the filing of its brief was finally submitted on 4 April 2000, that is two months after the deadline established in the 14 December 1999 Decision had expired. In that motion, the Prosecution acknowledged that the Appeals Chamber, in its 14 December 1999 Decision, had ordered that the briefs be filed within ninety days from the date on which the Addendum to the Registry Certificate on the Record was communicated to the parties (that is, by 24 January 2000 for the Prosecution). At the same time,

however, the Prosecution maintained that it had not yet filed its brief because uncertainty existed as to the applicable deadline.

39. The Prosecution also submitted, in said 4 April 2000 Motion, that the issue of the applicable time-limit was still pending before the Appeals Chamber because the Appeals Chamber had not yet ruled on its 6 January 2000 Response in relation to its 25 November 1999 Motion for correction and clarification of the trial record and record on appeal, because it had not received the documents which the Registry stated it would send in its 2 March 2000 memorandum (pertaining to the 25 November 1999 Motion), and because there had not been a decision on its 24 February 2000 Motion.

40. The Appeals Chamber disagrees with this contention. The 25 November 1999 Motion did not raise the issue of time-limits and did not indicate the material significance of the alleged defects in the trial record. Hence it is irrelevant to the issue of time-limits, as held by the pre-hearing judge in his Decision of 11 April 2000. The 24 February 2000 Motion for clarification of time-limits was unfounded, as found by the pre-hearing judge, because the 14 December 1999 decision was unambiguous, and furthermore, the Prosecution did not substantiate its claim in the motion.

41. However, the 11 April 2000 Decision of the pre-hearing judge granted the Prosecution an extension of time for the filing of its Prosecution's Brief (the Prosecutor's Motion for clarification on the time-limits to file the legal brief was dismissed). The said decision set 28 April 2000 as the deadline.

42. Nevertheless, the Prosecution did not comply with this deadline. As a result, the Appeals Chamber finds that it does not need to rule on the issue of whether the granting of the extension of time was justified; in any case, the Prosecution's briefs were filed outside the time-limit established in the 11 April 2000 Decision by the pre-hearing judge, a final example of its lack of diligence and untimeliness, unaccompanied by any showing of good cause or a request for permission to file out of time. It appears from the fax markings on the Prosecution's Brief Against Sentence that it was faxed to Arusha well after business hours on 28 April 2000.[51] It was

[50] See "Prosecution Notice of Receipt of Exhibits," 27 October 1999, para. 1.4, *supra*.

[51] According to Article 29 of the Directive for the Registry of ICTR (21 February 2000), after-hours filing refers to the filing of documents outside of the following hours: 9 a.m. to 5.30 p.m. Monday through Thursday and 9 a.m. to 2.30 p.m. on Friday, or on weekends or public holidays. The Directive further states that a party anticipating a late

filed on 2 May 2000. Similarly, the Prosecution's Brief Against Sentence was filed on 2 May 2000. It should be noted that Kayishema filed his Appellant's brief on 19 January 2000, and Ruzindana filed his brief on 20 October 1999.

43. For all of the above reasons, the Appeals Chamber holds that the Prosecution's Appellant's briefs are time-barred and inadmissible, and will not be considered in this Judgment.

44. Ruzindana has also submitted that the Prosecutor's Respondent's briefs should be found inadmissible, having been filed outside the applicable time-limits. According to Rule 112, "a Respondent's brief shall [...] be filed [...] within thirty days of the filing of the Appellant's brief." The Appeals Chamber notes that Ruzindana's Appellant's brief was filed on 20 October 1999 and communicated to the Prosecution on the same day. However, by 19 November 1999, the Prosecution had not filed its response to this brief; nor had it requested an extension of time to file same. Its Respondent's brief was eventually filed on 14 June 2000. In light of these circumstances, the Appeals Chamber holds that the Prosecution's Response to Ruzindana's brief is inadmissible.

45. The Appeals Chamber further notes that Kayishema's Appellant's brief was filed on 19 January 2000, and communicated to the Prosecution on 20 January 2000. In its decision of 14 December 1999, the Appeals Chamber had ordered the Prosecution to file its Respondent's brief by the end of thirty days following the day on which the Appellant's briefs were communicated to it. Yet, by 20 February 2000, the Prosecution had not filed its Respondent's brief; nor had it sought additional time to file same. In its 24 February 2000 Motion for clarification on the time-limits to file the legal brief, the Prosecution did not raise the issue of the time-limits pertaining to its Respondent's briefs; neither did it do so in its 4 April 2000 "Motion to extend the time-limit for filing its Appeal Brief".[52] Its response to Kayishema's Appellant's brief was eventually filed on 24 July 2000. In light of these circumstances, the Appeals Chamber holds that the Prosecution's response to Kayishema's Appellant's brief is inadmissible.

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filing must notify the Court Management Section during business hours to request permission and instructions for after-hours filing. This was not done in this case. The transmission of the Prosecution's Brief Against Sentence appears to have taken place on Friday, 28 April 2000, late in the afternoon, at approximately 17.00 hours (or 18.00 hours in Arusha), well past the working hours of the Registry in Arusha.

[52] In this motion, the Prosecution in fact pointed out that under Rule 112, a Respondent's Brief "shall be served on the other party and filed with the Registrar within thirty days of the Appellant's brief' [and that] accordingly, the Appellant will always have 30 days to respond to the brief filed [by] the Prosecutor." Para. 28. Despite its awareness of the applicable time-limits for the filing of respondent's briefs, it did not adhere to these limits.

46. The Appeals Chamber further finds that the failure to file an Appellant's brief in support of a notice of appeal carries serious consequences as to the admissibility of the entire appeal. Rule 111 states that an Appellant's brief shall contain all the argument and authorities. An appeal, which consists of a Notice of Appeal that lists the grounds of Appeal but is not supported by an Appellant's brief, is rendered devoid of all of the arguments and authorities: the right to appeal may therefore be considered as having been waived if the Notice of Appeal is not followed by the timely filing of an Appellant's brief. The Appeals Chamber notes that procedural time-limits are to be respected, and that they are indispensable to the proper functioning of the Tribunal and to the fulfilment of its mission to do justice.[53] Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated.[54]

47. In this case, the Prosecution failed to file its Appellant's brief on time, on two occasions. It failed to file its motion for an extension of time, in a timely manner. It failed to request permission for late filing prior to its eventual filing. It did not demonstrate good cause for any of these failures. Its Respondent's briefs were also filed out of time. As a result, the Prosecution's Appeal, its Appellant's briefs, and its Respondent's briefs, are inadmissible.

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[53] See *Istituto di Vigilanza v. Italy*, 265 Eur. Ct. H.R. (ser. A) at 35 (1993) ("...the finding is inescapable that the (European Commission of Human Rights) exceeded—albeit by only one day—the time allowed it. Furthermore, no special circumstance of a nature to suspend the running of time or justify its starting to run afresh is apparent from the file. The request bringing the case before the Court is consequently inadmissible as it was made out of time."); *Morganti v. France*, 320 Eur. Ct. HR (ser. A) at 48 (1995) ("(The Court) notes that the explanations put forward do not disclose any special circumstance of a nature to suspend the running of time or justify its starting to run afresh.... It follows that the application bringing the case before the Court is inadmissible as it is out of time."); *Kelly v. U.K.*, 42 Eur. Comm'n H.R. Dec. & Rep. 207, 208 (1985)("Delays in pursuing the case are only acceptable insofar as they are based on reasons connected with the case.... Notwithstanding the applicant's initial submission of 10 October 1980, the Commission considers in the present case 27 April 1983 to be the date of introduction of the application and it follows that the application, having thus been introduced out of time, must be rejected under Article 27, para. 3 of the Convention."); *Nauru v. Australia*, 97 I.L.R. 20 (I.C.J.) (1992) ("The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible.").

[54] In this regard, a brief discussion of Rule 127 of ICTY Rules of Procedure and Evidence is useful. The Rule states:

> (A) Save as provided by paragraph (C), a Trial Chamber may, *on good cause being shown by motion*,
>
> (i) enlarge or reduce any time prescribed by or under these Rules;
>
> (ii) recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, *as is thought just* and whether or not that time has already expired.
>
> (B) In relation to any step falling to be taken in connection with an appeal or application for leave to appeal, the Appeals Chamber or a bench of three Judges of that Chamber may exercise the like power as is conferred by paragraph (A) and in like manner and subject to the same conditions as are therein set out.
>
> ... (emphasis added).

The fact that an act performed after the expiration of a prescribed time may be recognized as validly done illustrates the following principle: timely filing is the rule, and filing after the expiration of a time-limit constitutes late filing, which is normally not permitted. However, if good cause is shown, the Rule establishes that despite the expiration of time and tardy filing, an act may be recognized as validly done, as a permitted derogation from the usual rule. Thus the Rule reinforces the principle that procedural time-limits are to be respected.

3. Conclusion

48. The Prosecution Appeal is inadmissible in its entirety. The Prosecution's Respondent's briefs are also inadmissible.

49. Judge Shahabuddeen appends a dissenting opinion in relation to the issues arising in this chapter.

Annex 2: *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time, 23 January 2004

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding Judge
Judge Mohamed Shahabuddeen
Judge Florence Mumba
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 23 January 2004

THE PROSECUTOR

v.

Juvénal KAJELIJELI

Case No. ICTR-98-44A-A

DECISION ON PROSECUTION URGENT MOTION FOR ACCEPTANCE OF PROSECUTION NOTICE OF APPEAL OUT OF TIME

Counsel for the Prosecution Counsel for the Appellant
Ms. Melanie Werrett Prof. Lennox S. Hinds

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 and 31 December 1994 ("International

Tribunal"),
BEING SEISED OF the "Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time," filed on 5 January 2004 ("Motion");
NOTING the Judgment and Sentence in The Prosecutor v. Juvénal Kajelijeli, No. ICTR-98-44A-T, issued by Trial Chamber II on 1 December 2003 ("Judgment");
NOTING the "Decision on Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal", issued by the Pre-Appeal Judge on 17 December 2003, which concluded that "good cause" within the meaning of Rule 116(A) of the Rules had not been shown to grant an extension of time for the filing of the Prosecution's notice of appeal from the Judgment and ordered the Prosecution to file its notice of appeal no later than 31 December 2003 ("Decision of 17 December 2003");
NOTING that the Prosecution's notice of appeal was submitted on 5 January 2004, together with the Motion, in which the Prosecution argues:
1) The Prosecution did not become aware of the Decision of 17 December 2003 until 5 January 2004;
2) The Prosecution's notice of appeal should be accepted by the Appeals Chamber in order to ensure a fair and expeditious appeal hearing;
3) If the notice of appeal is not accepted, the Prosecution will be precluded from pursuing several avenues of appeal they believe to be meritorious and significant to this case and to the jurisprudence of the ICTR generally, and that such a result would be drastically disproportionate to the failure of the Prosecution to file the notice of appeal in time; and
4) Given the very short delay between the day the notice of appeal was ordered to be filed, namely 31 December 2003, and the filing of the Motion on 5 January 2004, no prejudice has been caused;
NOTING the "Appellant's Opposition to the Prosecutor's Urgent Motion for Acceptance of Notice of Appeal Out of Time," filed on 12 January 2004;
NOTING Rule 108 of the Rules of Procedure and Evidence ("Rules"), which provides that a party seeking to appeal a judgement or sentence shall file a notice of appeal not more than thirty days from the date on which the judgement or the sentence was pronounced, setting forth the grounds of appeal;
NOTING 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 the Rules do not permit the filing of a notice of appeal out of time except upon a showing of good cause under Rule 116(A) of the Rules;

CONSIDERING that there is no evidence that the Office of the Prosecutor did not receive the Decision of 17 December 2003 on that date or, at the latest, 18 December 2003, and that the Prosecution could, for example, have produced its log books to show when the Decision of 17 December 2003 was in fact received in its office or could have sought appropriate access to the records of the International Tribunal on that point;

CONSIDERING that the Prosecution was aware that its "Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal," filed on 16 December 2003, was

pending before the Pre-Appeal Judge and should have made reasonable efforts to monitor the status of that request before the expiration of the thirty-day period for filing a notice of appeal under Rule 108 of the Rules;

CONSIDERING that the reasons offered in the Motion for the failure of the Office of the Prosecutor to file a timely notice of appeal do not constitute "good cause" within the meaning of Rule 116(A) of the Rules;

FOR THE FOREGOING REASONS,
HEREBY DENIES the Motion.
Done in French and English, the English text being authoritative.
_____ Theodor Meron
Presiding Judge
Done this 23rd day of January 2004,
At The Hague,
The Netherlands.
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Annex 3: *Prosecutor v. Semanza*, ICTR-97-20-A, Decision on Defence Objections to the Prosecutor's Notice of Appeal, 25 July 2003

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Monica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 25 July 2003

Laurent SEMANZA
V.
THE PROSECUTOR

Case No. ICTR-97-20-A

DECISION ON DEFENCE OBJECTIONS TO THE PROSECUTION'S NOTICE OF APPEAL

Counsel for the Defence
Mr. Charles Taku

Counsel for the Prosecution
Mr. Norman Farrell

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 and 31 December 1994 ("International Tribunal"),

BEING SEISED of the "Defence Objections to the Prosecutions Notice of Appeal", filed

on 26 June 2003 ("Motion"), in which the Defence alleges *inter alia* that the Prosecution's Notice of Appeal is "speculative, ambiguous, and imprecise and does not conform to the requirement Rule 108 of the Rules (sic)"[1] and should therefore be struck out;

NOTING the "Prosecution's Response to 'Defence Objections to the Prosecution's Notice of Appeal'", filed on 3 July 2003 ("Response"), in which the Prosecution submits that the Motion does not show that the Prosecution's Notice of Appeal fails to conform to the requirements of the Rules of Procedure and Evidence ("Rules") and of the Practice Direction and that the Motion is frivolous;

BEING SEISED ALSO of the "Defence Application to Strick (sic) Out the Prosecution's Response to 'Defence Objections to the Prosecution's Notice of Appeal' filed on the 3 July 2003", filed on 7 July 2003 ("Application"), which alleges that the Response was filed outside of the time limit;

NOTING the "Prosecution Response to the 'Application to Strike out Prosecution's Response to 'Defence Objection to the Prosecution's Notice of Appeal' filed on 3 July 2003'", filed on 14 July 2003 ("Response to the Application");

NOTING that the Defence did not file a reply either to the Response or to the Response to the Application;

CONSIDERING that the arguments developed in the Motion are either incomprehensible, patently misleading, or relate to the substance of the appeal on the merits, and that comments relating to the substance of the appeal could be included in the Defence's Respondent's Brief in due course;

CONSIDERING that the Response was filed within the period prescribed by paragraph 11 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal dated 16 September 2002 and therefore is not filed out of time;

CONSIDERING FURTHER that a Notice of Appeal need not set out in detail the arguments that the party intends to raise in support of its grounds of appeal,[2] and that the Prosecution's Notice of Appeal complies with the requirements of Rule 108 of the Rules and the Practice Direction on Formal Requirements of Appeals from Judgement dated 16 September 2002;

FINDING that both the Motion and the Application are frivolous within the meaning of Rule 73(F) of the Rules;

FOR THE FOREGOING REASONS,

DISMISSES the Motion and the Application and **DIRECTS** the Registrar, pursuant to Rule 73(F) of the Rules, not to pay the Defence Counsel any fees or costs associated with the Motion or the Application.

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

Theodor Meron
Presiding Judge of the Appeals Chamber

Done this 25th day of July 2003,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

[1] Motion, para. 1.

[2] *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, "Décision (Requête tendant à voir déclarer irrecevable l'acte d'appel du Procureur)", 26 October 2001, p. 4.

Annex 4: *Prosecutor v. Ademi*, ICTY, IT-01-46-PT, Order On Motion For Provisional Release, 20 February 2002

Case No. IT-01-46-PT

IN THE TRIAL CHAMBER

Before: Judge Daquin Liu, Presiding

Judge Amin El Mahdi

Judge Alphons Orie

Registrar:
Mr. Hans Holthuis

Order of:
20 February 2002

THE PROSECUTOR

v.

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:

> (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 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 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

Dated this twentieth day of February 2002
At The Hague,

The Netherlands

[Seal of the Tribunal]

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

Brdanin et al., Case No. IT-99-36-PT, 25 July 2000 ("Brdanin"); *Decision on motion by Momir Talic for provisional release*, Prosecutor v. Brdanin et al., Case No. IT-99-36-PT, 28 March 2001 ("Talic"); *Decision on motion for provisional release of Miroslav Kvocka*, Prosecution v. Kvocka et al., Case No. IT-98-30-PT, 2 February 2000; *Decision on Momcilo Krajisnik's notice of motion for provisional release*, Prosecution v. Krajisnik et al., Case No. IT-00-39 and 40, 8 October 2001 ("*Krajisnik*"). In the latter decision, the Trial Chamber stated that "the change in the Rule does not alter the position that provisional release continues to be the exception and not the rule." Para. 12.

11 - *See* for example, *Krajisnik*, paras. 12 – 13; *Brdjanin*, para. 13; *Talic*, para. 18.

12 - For example, *Talic*, para. 18; *Krajisnik*, paras. 12 - 13.

13 - *Decision granting provisional release to Amir Kubura*, Prosecutor v. Enver Hadzihasanovic et al., Case No. IT-01-47-PT, 19 December 2001, para. 7. Identical decisions with regard to the law were issued on the same day in the same case with regard to the two other accused.

14 - *Decision granting provisional release to Amir Kubura*, Prosecutor v. Enver Hadzihasanovic et al., Case No. IT-01-47-PT, 19 December 2001, para.7.

15 - *Ibid.*

16 - Such arrest warrants are issued pursuant to Article 19 of the Statute and Rules 47 and 55 of the Rules.

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

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

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

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

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

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

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

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

25 - Article 1 of the Statute.

26 - Although not inconceivable, it is difficult to imagine that an accused may be charged with offences that may meet the requirements of Articles 2, 3, 4 or 5 of the Statute, but *in concreto* are in fact of a less serious nature. One example however is the case of plunder as considered in: Judgement, *Prosecutor v. Delalic et al.* Case No. IT-96-21-T, 16 November 1998, para. 1154.
27 - International Covenant on Civil and Political Rights (1966) and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), respectively.
28 - The Motion, para. 8 *See* also generally, Transcript, 1 February 2002, pp. 79 – 80.
29 - The Motion, para. 8.
30 - He states that most of them live either outside Croatia or those that live in Croatia are persons he could have had contact with during the past years but who he neither tried to influence nor pose any danger. He submits that he will not pose a danger to any of them in the future. The Motion, para. 9. *See* also, Transcript, 1 February 2002, pp. 43 – 44.
31 - The Motion, para. 11.
32 - The Motion, Exhibit A, para. 3.
33 - The Motion, Exhibit A, para. 4.
34 - Transcript, 1 February 2002, p. 80.
35 - Transcript, 1 February 2002, p. 44.
36 - Transcript, 1 February 2002, p. 47.
37 - Transcript, 1 February 2002, pp. 47-48.
38 - Transcript, 1 February 2002, p. 53.
39 - Transcript, 1 February 2002, p. 60.
40 - Transcript, 1 February 2002, p. 60.
41 - The Motion, Exhibit B.
42 - Transcript, 1 February 2002, pp. 55 – 56.
43 - Transcript, 1 February 2002, p. 62.
44 - Transcript, 1 February 2002, pp. 55, 56, 62, 63, 65, 77.
45 - Transcript, 1 February 2002, p. 69.
46 - Transcript, 1 February 2002, p. 66.
47 - Transcript, 1 February 2002, p. 69.
48 - Transcript, 1 February 2002, p. 66.
49 - Transcript, 1 February 2002, pp. 66 - 67.
50 - When questioned about this during the hearing, the Prosecution stated that "there had been some documents recently provided to the Zagreb office, and there are some further documents to pick up by the representatives of the OTP, and that is in keeping with the recent improvement in our dealings with the Croatian government authorities. In relation to whether there are 840 or so documents which have been available for two weeks and which have not been picked up, at this stage, at short notice, I can't clarify what the situation is." Transcript, 1 February 2002, pp. 76 – 77.
51 - The Trial Chamber also notes the memorandum filed 4 February 2002 in which the Prosecution confirms receipt of this letter and refers to the procedures for inspection and collection of documents and states that normal procedure "requires approximately three weeks."
52 - The Government stated at the hearing: "On behalf of the Government of Croatia, I take the obligation to provide for the organisation, and all costs of transporting the detainee from his place of residence to the airport and back be covered by the Government of Croatia; that the Government of the Republic of Croatia is going to ensure the personal safety and security of Mr. Ademi while he was in the Republic of Croatia, according to the relevant ruling of the Trial Chamber, if, of course, your decision on this matter is positive; that it will report to the Registry of the Tribunal any possible threat to the safety or security of General Ademi; that it will, upon request of the Trial Chamber, provide a full report on the results of the investigation on this particular case; that it will ensure all possible channels of communication between the parties concerned and that it will ensure the confidentiality of such communication; that, within a time deadline to be stipulated by this Trial Chamber, it will submit reports to the Registry of the Tribunal pertaining to the presence of the accused and his adherence to all the

conditions laid down by the Tribunal, i.e., reporting to a particular police station at his place of residence, having his passport taken and kept, or any other obligation that may be decided upon by this Trial Chamber; that it will arrest the accused if he violates any one of the conditions set forth in a decision on provisional release; and that it will respect the priority and supremacy of this Court in relation to any court and/or proceedings in the Republic of Croatia". Transcript, 1 February 2002, pp. 73-74.

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

Annex 5: *Prosecutor v. Issa Hassan Sesay*, SCSL-04-15-PT "Decision on Application of Issa Sesay for Provisional Release" 31 March 2004

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SCSL-2004-15-PT
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SPECIAL COURT FOR SIERRA LEONE
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IN THE TRIAL CHAMBER

Before: Judge Pierre Boutet

Registrar: Robin Vincent

Date: 31 March 2004

PROSECUTOR Against Issa Hassan Sesay
(Case No.SCSL-04-15-PT)

DECISION ON APPLICATION OF ISSA SESAY FOR PROVISIONAL RELEASE

Office of the Prosecutor:

Luc Côté
Robert Petit
Paul Flynn

Defence Counsel for Issa Hassan Sesay:

Timothy Clayson
Wayne Jordash
Serry Kamal

I, JUDGE PIERRE BOUTET of the Trial Chamber of the Special Court for Sierra Leone ("Special Court");

SEIZED of the Application for Provisional Release filed confidentially on 4 February 2004 ("Motion") on behalf of Issa Hassan Sesay ("Accused") pursuant to Rule 65 of the Rules of Procedure and Evidence of the Special Court ("Rules");

NOTING that the Motion was not served to the Office of the Prosecution ("Prosecution") until 19 February 2004;

NOTING the Confidential Order under Rule 65 (B) of the Rules on the Submissions from the Government of Sierra Leone, issued on 12 February 2004;

NOTING FURTHER the submissions filed confidentially by the Government of Sierra Leone on 23 February 2004;

NOTING the Order for Expedited Filing issued on 24 February 2004;

NOTING the Response to the Defence Motion for Provisional Release, filed on 27 February 2004 ("Response") by the Prosecution, to which the Defence filed a Reply on 2 March 2004 ("Reply");

MINDFUL of the Parties' oral submissions on the present issue made during the said hearing, which took place on 3 March 2004;

COGNISANT of Rule 65 of the Rules, relative to bail, and Article 17 of the Statute of the Special Court ("Statute");

HEREBY ISSUE MY DECISION:

I. THE SUBMISSIONS OF THE PARTIES

A. The Motion

1. The Defence seeks the provisional release of the Accused pursuant to Rule 65 of the Rules submitting that, if released, he will fulfil the conditions to satisfy the two-pronged test envisaged in Rule 65(B), namely that he will appear for trial and will not pose danger to any victim, witness or any other person.[1]

2. The Defence submitted various arguments in support of the Motion. These can be grouped into five sub-categories, the first two directly addressing the two-pronged test in Rule 65(B), namely, Appearance at Trial and No Danger to Any Victims, Witness or Other Person, and the remaining three setting out the arguments regarding the issue of the Character and Association of the Accused, the issue of Preservation of Public Order and the Guarantees by the Accused.

a. Appearance at Trial

3. Supported by different statements in annex to the Motion, the Defence submits that the Accused was long aware that, due to his position of interim leader of the Revolutionary United Front

[1] Motion, para. 4.

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("RUF"), he was likely to be the subject of investigations by the Special Court and nevertheless he did not attempt to flee Sierra Leone. In addition, the Defence submits that such conduct testifies to the Accused wilfulness to appear at trial in order to contest the allegations made against him.[2]

4. The Defence also states that the argument that the Special Court lacks its own means to execute a warrant of arrest, or to re-arrest an accused, is only a general one. The focus has to be on a particular accused and if a Judge or Trial Chamber were to be persuaded that a particular individual could be granted bail, the efficacy of the authorities in re-arresting an accused becomes irrelevant.[3]

5. The Defence furthermore contends that the Accused has strong family ties in Freetown, in particular with a wife and one young son, and will not willingly abandon his family by fleeing the country.[4]

b. No Danger to Any Victims, Witness or Other Person

6. The Defence submits that "unless it can be demonstrated that the Accused personally possess [sic] a danger to witnesses [...] any potential ongoing danger to witnesses from other sources should not be taken into consideration." The Accused's continued detention is therefore unnecessary and disproportionate.[5]

7. In addition, the Defence submits that all Prosecution witnesses are protected by the relevant orders concerning witness protection issued by this Trial Chamber[6] and therefore that the Accused is not in the position to know their identifying data.[7]

c. Character and Association

8. Supported by various statements in an annex to the Motion, the Defence asserts that the Accused played a strong role in the enforcement of the rule of law and in the disarmament process in Sierra Leone following the cessation of the hostilities. In particular, the Defence draws the attention to the fact that he was awarded the Sierra Leonean National Peace Award in January 2002 and to some specific activities of the Accused.[8]

d. Preservation of Public Order

9. The Defence submits that the presence of the Accused in Freetown for a period of fourteen months after the war and prior to his arrest did not cause any public disturbance within the local population.[9]

e. Guarantees

10. In support of his application, the Accused submits several guarantees. In particular, the Accused submits that, if released, he will:

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[2] *Id.*, paras 6-13 and Annexes A, B and C.
[3] *Id.*, para. 15.
[4] *Id.*, paras 16-17.
[5] *Id.*, para. 28.
[6] *Prosecution v. Issa Hassan Sesay*, SCSL-03-05-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003.
[7] Motion, para. 31.
[8] *Id.*, paras 18-22 and Annexes B-F and H.
[9] *Id.*, para. 33.

a) Surrender all his travel documents;
b) Live in Freetown or Makeni;
c) Abide to a 10pm to 7am curfew and consent to unannounced checks;
d) Report twice daily at the local police station or if appropriate to the UNAMSIL headquarter;
e) Travel to the Special Court whenever requested, bearing all expenses thereof;
f) Not contact directly or indirectly any witness or victim;
g) Not contact any of the other accused persons before the Special Court;
h) Not discuss his case with anyone, in particular with member of the press.[10]

B. The Response

11. In its Response, the Prosecution contends that the grounds contained in the Motion fail, cumulatively or individually, to satisfy the two-pronged test envisaged in Rule 65(B) and therefore submits that the bail application should be denied.[11]

12. Addressing the issue of the burden of proof in an application for bail, the Prosecution submits that case law from the International Criminal Tribunal for the former Yugoslavia ("ICTY") has established that "the burden is squarely on the Accused at all times to establish his entitlement to provisional release".[12]

a. Appearance at Trial

13. Relying on the submissions from the Government of Sierra Leone, the Prosecution contends that the Government has no capacity to guarantee the Accused appearance at trial, if released. In addition, the Prosecution also argues that the gravity of the crimes is a factor that should be taken into account when evaluating the risk of flight for an accused.[13]

14. The Prosecution also contests the Defence assertions that the Accused was aware of investigations being conducted against him because there is no evidence in support thereof, and the investigation were conducted confidentially. Following the indictment and the disclosure of evidence against him, the Accused might now resolve to flee the country if released.[14]

15. As far as concerns the Accused's family ties, the Prosecution contends that such ties are not sufficient to assure his appearance at trial.[15]

16. With reference to the Accused's involvement in the disarmament process, the Prosecution comments that the Accused himself had benefited from the Lomé Agreement. The Prosecution also submits that in the Decision on an application for bail in the case of the co-accused Morris Kallon, the Judge of the Trial Chamber was not convinced by similar arguments.[16]

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[10] *Id.* para. 36.
[11] Response, paras 4 and 7.
[12] *Id.*, para. 4, quoting *Prosecutor v. Brdanin and Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000 ("*Brdanin* Decision"), para. 13.
[13] Response, para. 8.
[14] *Id.*, para. 18.
[15] *Id.*, para. 19.
[16] *Id.*, para. 20, quoting *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Decision on the Motion by Morris Kallon for Bail, 24 February 2004 ("*Kallon* Decision"), para. 43.

b. Danger to Victims and Witnesses

17. The Prosecution submits that the lack of police enforcement and the gravity of the crimes increase the risks that the Accused, if released, will pose a danger to witnesses and victims. This risk is now further heightened by the knowledge of the specific crimes under which the Accused is charged, as well as of the potential evidence disclosed against him. Moreover, the continued detention of the Accused is not disproportionate when consideration is given to the risk of flight and the potential interference with witnesses and evidence.[17]

c. Discretion of the Special Court in Ordering Bail

18. The Prosecution concludes its submissions stating additional factors which should be taken into consideration besides the two-pronged test of Rule 65(B), namely public order and safety of the Accused, the proximity to trial, the submissions of the Government of Sierra Leone, the seriousness of the alleged crimes against the Accused, the possibility of destruction of evidence and the potential conspiracy with other accused and at large ex-combatants.[18]

C. The Submissions of the Government of Sierra Leone[19]

19. In its submissions, the Government of Sierra Leone deems that the Defence has not met the burden of satisfying that the Accused, if released on bail, will indeed appear for trial and will not represent a threat to victims, witnesses and other persons. Therefore, the Government of Sierra Leone is urging the Special Court to deny the Motion.

20. The Government of Sierra Leone underlines the practical consequences for the State of Sierra Leone should the provisional release be granted to this Accused. Unless these practical consequences were to be addressed satisfactorily, bail should not be granted. The Government of Sierra Leone insists on the grave consequences for the security situation in Sierra Leone and on the impossibility for its authorities to ensure that the Accused remains under house arrest in their custody. Also, the authorities of the Government of Sierra Leone may not be in a position to prevent the Accused from fleeing or hiding. While reiterating its commitment to assist the Special Court in accordance with its obligations under the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, the Government of Sierra Leone stresses its current lack of police and military capacities in remote areas of the country and generally in the whole of the territory, as well as its lack of financial resources, to be able to respond to the requirements that could be imposed by such a release.

D. The Reply

21. Relying on previous jurisprudence of the Special Court in the case of the *Prosecutor v. Alex Tamba Brima*[20], the Defence primarily contests the Prosecution assertion that the Defence solely bears the burden of proof in establishing the Accused entitlement to bail. While the Defence does not

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[17] Response, paras 21-22, 25.

[18] *Id.*, para. 27.

[19] Although generally regarded as an important requirement, the submissions of the Government of Sierra Leone filed on 23 February 2004 in the context of this application were not signed. However, in the interest of justice, Rule 89(C) of the Rules, providing that "A Chamber may admit any relevant evidence" was applied in the instant case in order to cure this defect.

[20] *Prosecutor v. Alex Tamba Brima*, SCSL-03-06-PT, Ruling on a Motion applying for Bail or Provisional Release, 22 July 2003 ("*Brima* Ruling").

dispute that it has to demonstrate that the Accused has fulfilled the conditions for his release, indeed, the Prosecution has the duty to demonstrate that there are good reasons to continue the detention of the Accused.[21]

22. Accordingly, the Defence submits that the Prosecution has failed in its Response to demonstrate the existence of such good reasons for the continuation of the detention of the Accused.[22]

a. On the Submissions of the Government of Sierra Leone

23. The Defence underlines that the submissions of the Government of Sierra Leone bear a strike out of the name of another accused. In addition, relying on a report from the United Nations Mission in Sierra Leone ("UNAMSIL"), the Defence submits that the security situation in the country remains calm and that therefore the statement of the Government of Sierra Leone is not accurate.[23]

b. Appearance at Trial

24. The Defence reiterates that the Prosecution has not demonstrated that the Accused will not appear at trial.[24]

25. In particular, the Defence again relies on five factors concerning the Accused previously spelled out in its Motion in order to reinforce its submissions that, if released, he will appear for trial, namely:

a) Prior knowledge of the establishment of the Special Court;
b) Possibility that the Special Court would have employed the death penalty;
c) The Accused expression that he will not flee Sierra Leone if indicted;
d) The Accused strong family ties in Sierra Leone; and
e) The Accused acknowledged position of interim leader of the RUF in consideration of his peaceful intentions and participation in the peace process.[25]

c. Danger to Victims and Witnesses

26. The Defence takes issue with the Prosecution submissions that the Accused faces a long confinement and is now aware of the specific charges and evidence against him, as well as the lack of police enforcement power as factors establishing that the Accused, if released, will pose danger to victims and witnesses. In particular, the Defence relies on jurisprudence from the ICTY in order to question the extent of the evidence materially before the Accused after disclosure and its relevance for the identification of the witnesses.[26]

d. Additional Submissions

27. The Defence further submits the following replies to the Prosecution's arguments:

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[21] Reply, para. 4.
[22] *Id.*, para. 6.
[23] *Id.*, paras 7-10 and Annex A: HQ UNAMSIL MILINFOSUM for the Period 101600Z - 111559Z FEB 04.
[24] *Id.*, para. 11.
[25] *Id.*, para. 12.
[26] *Id.*, paras 19-20. See *Brdanin* Decision, supra note 12, para 19.

a) *Public order and safety of the Accused*: The Accused is widely regarded as a man who played a large part in the peace process and was awarded the National Peace Prize;
b) *Proximity to trial*: The Trial Chamber has not fixed the trial date. In addition, the proximity to trial is not a factor that should be taken into account in such application;
c) *Seriousness of the alleged crimes*: To allow this factor to deny bail for the Accused would effectively mean that no accused will be granted bail;
d) *Possibility of destruction of evidence*: The Prosecution has failed to prove any conduct of the Accused that will establish any attempt to destroy evidence;
e) *Potential conspiracy with other accused and at large ex-combatants*: Similarly as above, no evidence has been provided by the Prosecution in support of this factor.[27]

E. Oral Submissions of 3 March 2004

28. In the public hearing held on 3 March 2004, the oral submissions of both Parties were largely repetitive of their written submissions. In particular the Defence reiterated that the Prosecution has the burden of proof to rebut the fulfilment by the applicant of the test contained in Rule 65(B) and it stressed specific activities of the Accused since the end of the hostilities.[28] The Prosecution stated again that the Motion does not satisfy the requirements of Rule 65(B). Furthermore, the involvement of the Accused in the peace process and the disarmament might be considered as mitigating factor, should the Accused be convicted, but should have no influence on the question whether the Accused will appear for trial.

AND AFTER HAVING DELIBERATED:

II. THE APPLICABLE LAW

29. I have duly taken into consideration each of the written submissions and oral arguments of the parties, as well as those made on behalf of the Government of Sierra Leone, and I would like to state that I am very much aware of the sensitivity and the seriousness of this pending matter, both for the Government and the Accused.

30. The current applicable provisions of Rule 65 of the Rules, on application for bail, and in particular Rule 65(A) and (B), read as follows:

> (A) Once detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber.
>
> (B) Bail may be ordered by a Judge or a Trial Chamber after hearing the State to which the accused seeks to be released and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

31. Article 17 ("Rights of the accused") of the Statute reads in relevant part:

> (3) The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

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[27] Reply, para. 25.
[28] In particular, see Annexes B and H to the Motion.

(4) In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

[...]

(c) To be tried without undue delay;

[...]

A. On the Public Nature of this Decision

32. All written submissions filed by both parties and the Government of Sierra Leone in connection with the Motion were then marked as confidential and, accordingly, have not been disclosed to the public. As stated already in a previous decision,[29] all documents filed before the Special Court should be public, as a matter of general principle, unless a cogent reason is offered to the contrary.[30]

33. In reviewing this matter and in rendering this Decision on the Motion, I have come to the conclusion that there is no reason why this decision should not be made public. The justified confidentiality of particular submissions or evidence will not be endangered, herein being only limited to a general reference, the public nature of this Decision will better serve the fundamental rights of the Accused, and in particular his right to a fair and public hearing, as well as the right for the public to be properly informed of the nature of such Motion and of the Decision thereto, and of all matters forming part of the trial of an accused.

34. I will dispose of the confidential submissions pertaining to the Motion in accordance with Rule 54 and Rule 81(B) of the Rules.[31]

B. The Burden of Proof

35. Although the question of the burden of proof was not dealt with in the submissions of the parties in this case as extensively as in other applications for provisional release before this Trial Chamber, I deem it necessary to add comments to further clarify some issues that have been raised by this Motion.[32]

36. In a recent decision of the Appeals Chamber of the ICTY on a motion for provisional release in the case of *Prosecutor v. Limaj et al.*, rendered on October 2003, it was held that:

> It is the Bench's view, contrary to the argument of 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

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[29] *Kallon* Decision, supra note 16, paras 19-21.

[30] Rule 78 of the Rules, in particular, provides for the following: "All proceedings before a Trial Chamber, other than the deliberations of the Chamber, shall be held in public, unless otherwise provided."

[31] Rule 54 of the Rule provides for the following:

> "At the request of either party or of its own motion, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

Rule 81(B) of the Rules, on the records of proceedings, provides that:

> "The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist."

[32] For an extensive discussion of this question and the relevant jurisprudence from the ICTY, see *Kallon* Decision, supra note 16, paras 22-35.

> that Rule, the Trial Chamber was required to determine whether it was "satisfied" that [the Accused], 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 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).[33]

37. Although not generally bound by jurisprudence of the other International Tribunals,[34] I do however concur with this position – as stated also in the *Kallon* decision – and find based upon the preceding review and analysis that it is for the Defence to show that further detention of the Accused is neither justified nor justifiable in the circumstances at hand.

38. The Prosecution submitted that the burden is squarely on the Accused at all times to establish his entitlement to provisional release. However, the Prosecution still has some obligations in connection with such an application for bail. After hearing from the State and were the Defence to satisfy the two-prong test of Rule 65(B), i.e. the certainty that the Accused will appear to stand trial and that he will not pose any danger to victims and witnesses or other person, the Prosecution would then be compelled to submit information or evidence to rebut or challenge as appropriate what has been submitted by the Defence and demonstrate that, indeed in the circumstances, the public interest requirement for pre-trial detention does outweigh the right of the Accused to be released.[35]

39. When dealing with a request for bail, the focus must be on the particular circumstances of each individual case without considering that the eventual outcome is either the rule or the exception.[36] More explicitly, as stated in a decision in the case of *Prosecutor v. Darko Mrdja*, the Trial Chamber "must interpret Rule 65 of the Rules not *in abstracto* but with regard to the factual basis of the single case and with respect to the concrete situation of the individual applicant".[37] As a general rule, a decision to release an accused should then be based on an assessment of whether public interest requirements, demonstrated by the Prosecution, outweigh the need to ensure respect for an accused's right to liberty,[38] as formulated in the two-pronged test found in Rule 65(B).

40. Applications for bail require a close review and careful consideration of the requirements of Rule 65 given that they entail the risk of affecting the proceedings before the Special Court, as well as the risk of infringement upon the rights of the Accused. However, in so doing one should bear in mind that, in the specific nature of international tribunals, the crimes over which such tribunals have jurisdiction can be categorised as the most serious crimes under international law. Therefore, it can be said that the approach to bail that prevails in national courts of law may be different than that for

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[33] *Prosecutor v. Limaj et al.*, IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, App. Ch., 31 October 2003, para 41. The Appeal was brought against the Trial Chamber decision denying the provisional release. See *id.*, IT-03-66-PT, Decision on Provisional Release of Fatmir Limaj, 12 September 2003.

[34] *Prosecutor v. Issa Hassan Sesay*, SCSL-03-05-PT, *Prosecutor v. Alex Tamba Brima*, SCSL-03-06-PT, *Prosecutor v. Morris Kallon*, SCSL-03-07-PT, *Prosecutor v. Augustine Gbao*, SCSL-03-09PT, *Prosecutor v. Brima Bazzy Kamara*, SCSL-03-10-PT, *Prosecutor v. Santigie Borbor Kanu*, SCSL-03-13-PT, Decision on Prosecution Motions for Joinder, 27 January 2004, para 26. See also *Prosecutor v. Augustine Gbao*, SCSL-03-09PT, Decision on the Prosecutor Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003, paras 31-32.

[35] *Kallon* Decision, supra note 16, paras 32 and 33. See also the *Brima* Ruling, supra note 20, p. 9-10.

[36] *Prosecutor v. Miodrag Jokić* and *Prosecutor v. Rahim Ademi*, IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, Trial Chamber, 20 February 2002.

[37] *Prosecutor v. Darko Mrdja*, Decision on Darko Mrdja's Request for Provisional Release, 15 April 2002, para. 29.

[38] Accordingly, in *Ilijkov v. Bulgaria*, ECHR, Appl. 33977/96, 26 July 2001, at para. 84, the European Court of Human Rights reiterated 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 on innocence, outweighs the rule of respect for individual liberty".

an international tribunal, such as the Special Court.[39]

C. *The Opinion of the Government of Sierra Leone on Granting or Denying Bail*

41. One additional issue that needs to be addressed preliminarily in the present decision is that of the weight that should be afforded to the opinion of the Government of Sierra Leone on bail when it files, as in the present case, written submissions on the matter pursuant to Rule 65(B) of the Rules.

42. Again, as already stated in the *Kallon* Decision,[40] I deem that the opinion of the Government of Sierra Leone is important although not decisive of the issue, and is a matter that must be properly assessed within the parameters of Rule 65(B). However, 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 would it not be appropriate but it cannot be bound by the opinion as expressed by the Government of Sierra Leone on the question of whether the Accused should be provisionally released or not. This is a matter to be determined by the Special Court and the Special Court only. Nonetheless, it is important to stress the fact that the present submissions have been given due consideration in so far as they provide information on the current internal and security situation in Sierra Leone and are, in this respect, an important factor in determining the public interest aspect.

43. As the Accused would be released in the country where he is alleged to have committed the crimes for which he has been indicted, should the application for bail be granted, such submissions of the authorities of the host state have therefore to be regarded as an evaluation of the substantial situation within the Country, with particular reference to the law enforcement capacity of the Government and its ability to effectively control the territory of Sierra Leone.

III. THE MERITS OF THE APPLICATION

44. As discussed above at length, before granting this Motion for bail I must first be satisfied, considering the whole of the circumstances of this case, which includes also hearing the State to which the Accused seeks to be released, that (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.

45. Basing my findings on the submissions of the Accused, the Prosecution and the Government of Sierra Leone, the fulfilment of this two-pronged test, and consequently the right of the Accused to be released on bail, has to be ultimately based on an assessment of whether the public interest requirements related to the appearance of the Accused at trial and the safety of victims and witnesses outweigh the need to ensure the Accused's right to liberty in the particular circumstances of this case.[41]

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[39] This interpretation of the provisions of Rule 65 is consistent with that of Judge Robertson, who, in a ruling relative to an application seeking modification of the conditions of detention of an Accused into a regime arguably close to that of bail, has stated that "[t]here is no presumption in favour of bail, which is understandable given the very serious nature of the crimes charged". See *Prosecutor v. Sam Hinga Norman*, SCSL-03-08-PT, Decision on Motion for Modification of Conditions of Detention, 26 November 2003, at para. 8.

[40] *Kallon* Decision, supra note 16, paras 36-39.

[41] See supra para. 39.

A. Will the Accused, Issa Hassan Sesay, Appear for Trial if Granted Bail?

46. In this respect, the Accused has indeed provided numerous personal guarantees as well as submitted various pieces of evidence, mainly in the form of witness declarations, with the intent to demonstrate his general character, trustworthiness and willingness to face his trial before this Court. I note that different witnesses have stated that the Accused is a trustworthy man who actively engaged himself in numerous activities pertaining to the development of the peace process following the end of the conflict in Sierra Leone. It is observed that the Prosecution has not presented evidence in rebuttal of these assertions.

47. To further support his assertion that he intends to appear for his trial, the Accused also submitted that he had previous knowledge of the establishment of the Special Court and, because of the position he occupied as interim leader of the RUF, he knew that he would be the subject of investigations by the Prosecution. However, it has to be noted that the investigative activity against the Accused has been largely conducted confidentially and the indictment and related warrant of arrest were kept confidential until their execution in early March 2003[42], as remarked by the Prosecution.

48. Upon my review of the evidence, I am not satisfied that the Accused was aware of the existence of any indictment against him or that he would have then surrendered to the Special Court. In addition, and more importantly, the Accused has not satisfied me that prior to his arrest he was informed and aware of the extreme seriousness of the crimes falling within the jurisdiction of the Special Court.

49. In evaluating such factors to determine whether the Accused, if released, will appear at trial I must also take into account the inability of the Special Court to directly perform any arrest on the territory of Sierra Leone and the current diminished capability of the national authorities to promptly and efficiently provide any police supervision or intervention in case of flight of the Accused, as presented by the Government of Sierra Leone in its submission in relation to this Motion. Despite the Defence contention that the internal security situation "remains calm", it has to be carefully noted that the same excerpt of the report quoted by the Defence in its submissions continues as follows: "However the potential continues to exist for an extremist reaction to the Special Court".[43] Further guidance in making such a determination could also be drawn from the Report of the Secretary General of the United Nations on the UNAMSIL mission which refers to the forthcoming trials of the Special Court as "a potential source of instability" for Sierra Leone.[44]

50. Furthermore, the seriousness of the crimes brought against the Accused, which I believe he is sensibly aware of at this point in time, is in fact a factor which influences both the objective evaluation of the risk of flight for the Accused and therefore the use of the Court's judicial discretion in determining whether bail should be granted or not.

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[42] The original indictment, now consolidated in pursuance to the joinder of the trials, and the warrant of arrest against the Accused where approved confidentially on 7 March 2003. See *Prosecutor v. Issa Hassan Sesay*, SCSL-2003-05-I, Decision Approving the Indictment and Order for Non-Disclosure, 7 March 2003; and *id.*, Warrant of Arrest and Order for Transfer and Detention, 7 March 2003. Subsequently, their confidentiality has been lifted on 14 March 2003. See *id.*, Order for the Disclosure of the Indictment and the Warrant of Arrest and Order for Transfer and Detention, 14 March 2003.

[43] See supra note 23.

[44] Twenty-First Report of the Secretary General on the United Nations Mission in Sierra Leone, S/2004/228, 19 March 2004 ("Secretary General Report"). See in particular section B.1 on the strengthening of the capacity of the Sierra Leone's security sector. Attention is drawn also to paras 50-52 for comments on the Special Court.

51. Although the evidence indicates that the Accused participated in the peace process that followed the end of the hostilities, I do consider that this issue in these circumstances could be rather regarded as a possible mitigating factor, should he be convicted, than as evidence that he will appear for trial.

52. Finally, looking at the factor concerning the family ties of the Accused based upon the evidence brought in support of this factor, and the submissions made, my position regarding its relevance in this respect is not different from that stated in the *Kallon* Decision.[45] In the present case I also find that these allegations as submitted by the Accused do not suffice, by themselves or in combination with other factors, to meet the prescribed requirements for bail.

B. Will the Accused, Issa Hassan Sesay, Pose a Danger to Any Victim, Witness or Other Person if Granted Bail?

53. Having determined that the Accused does not satisfy me that, if released, will hence appear for trial, I do not need to go into detail to address the second part of the test prescribed in Rule 65(B), namely the possible danger to victims, witnesses or other persons following a release on bail of the Accused.

54. However, there is one particular issue raised by the Prosecution in its Response that I would like to comment upon. The Prosecution in fact submits that the possible threat to victims and witnesses, as well as to other persons, deriving from a release of the Accused might now be further heightened. The fact that the Accused knows the potential evidence against him following the progress of the disclosure process might put him in a position to identify witnesses in support of the Prosecution case, despite the applicable orders for protective measures. As rightfully quoted by the Defence, the mere ability of the Accused to exert pressure upon any witness following disclosure of evidence by the Prosecution cannot alone affect his release on bail, as stated in the *Brdanin* Decision.[46] I concur with such findings. Indeed, the issuance and enforcement of the protective measures as ordered by this Trial Chamber stands explicitly as safeguard of the relevant categories of witnesses and a certain measure of disclosure of any witness statement does not per se operate as a further burden on the detention of the Accused. Having so found, it is however, necessary to stress that the need to protect victims and witnesses is also part of the overall additional circumstances that this Chamber must consider to arrive at a proper decision.

C. Particular Circumstances

55. Contrary to the ICTY and the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court has its seat in Freetown, Sierra Leone, which makes the issue of bail somewhat different, not with respect to the applicable principles but when assessing the particular circumstances of an application for provisional release. Granting bail to an Accused before the Special Court entails that he will be released in the very 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, shows that it 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 and more specifically in Freetown, the capital of this Country, makes it an even more important, difficult, critical and sensitive situation than that of the ICTR which sits in Tanzania, a neighbouring country to Rwanda.

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[45] *Kallon* Decision, supra note 16, para. 43.
[46] *Brdanin* Decision, supra note 12, para. 19.

56. In my opinion, such a specific context should not be overlooked, and, in this respect, I duly take into consideration the information provided by the Government of Sierra Leone in its written submissions, as well as the situation further described in the Secretary General Report, as to the ability, I would say more accurately the inability, of the Sierra Leonean authorities to assist the Special Court should an application for bail being granted to this Accused.

57. In the present circumstances and, in particular, in consideration of the proximity of the trials, the lack of police enforcement capability by the Government of Sierra Leone and the potential threat to stability with the associated risk of affecting the public order would lead me to conclude that the public interest requirement in this case outweigh the Accused's right to be released on bail.

FOR ALL THE ABOVE-STATED REASONS,

I DISMISS THE MOTION,

AND HEREBY DENY THIS APPLICATION FOR BAIL

The Accused will accordingly continue to remain in the custody of the Special Court.

Done at Freetown this 31st day of March 2004

Judge Pierre Boutet

[Seal of the Special Court]

Annex 6: *Prosecutor v. Brdanin et al.,* ICTY, IT-99-36-PT, Decision on motion by Radoslav Brdanin for provisional release, 25 July 2000

IN TRIAL CHAMBER II

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

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
25 July 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON MOTION BY RADOSLAV BRDANIN FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Ms Joanna Korner
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

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

1 Introduction

1. Pursuant to Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rules "), the accused Radoslav Brdanin ("Brdanin") seeks provisional release pending his trial.[1] The application is opposed by the prosecution.[2] Brdanin has relied upon witnesses in support

of his application, and both parties requested an oral hearing.[3] Difficulties were experienced by counsel for Brdanin in obtaining statements of the evidence to be given,[4] and – by reason of the Trial Chamber's other commitments – the request for an oral hearing further delayed the resolution of the Motion. The oral hearing took place on 20 July 2000.

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

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

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

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

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

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

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

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

authority in the ARK and to be responsible for managing the work of the Crisis Staff and the implementation and co-ordination of Crisis Staff decisions.[19] The pleaded allegations are described in more detail in a previous Decision in these proceedings.[20]

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

2 The relevant provision

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

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

3 The material put forward by the parties

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

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

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

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

> [...] [i]mmediate arrest of the accused if he attempts to escape or violate any of the conditions of his provisional release (as The International Criminal Tribunal informed Bosnia and Herzegovina), and inform the International

Tribunal so that everything could be prepared for his return to the International Tribunal.[24]

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

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

10. Trbojevic describes Brdanin as an exceptional man who keeps his word and who honours his obligations. He says that he is convinced that Brdanin, if released , would not directly or indirectly harass, intimidate or otherwise interfere with any persons who are or who may be witnesses for the prosecution in the case against him. He is sure that Brdanin would appear at the Tribunal whenever asked to do so and that he would comply with any reporting conditions imposed upon him.[26] Trbojevic agreed, however, that he is in no position himself to ensure that Brdanin did so. He said that he had read the indictment originally served on Brdanin (which contained but one charge, that of a crime against humanity), and it was left unclear as to whether he was unaware that Brdanin is now charged with genocide in the amended indictment.[27] The prosecution did not make any submission concerning Trbojevic's state of awareness of the charges against Brdanin.

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

4 The contentions of the parties, analysis and findings

(a) The recent amendment to Rule 65

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

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

(b) Appearance for trial

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

15. The prosecution submits that the "Guaranty" of the Government of Republika Srpska should not be considered sufficient to satisfy the Trial Chamber that Brdanin, if released, would appear for trial in the light of the total failure so far of the Republika Srpska to abide by its basic obligations to comply with orders of the Tribunal for the arrest and transfer of persons.[36] Republika Srpska has in fact *transferred* some persons who have surrendered themselves, but the prosecution's point is well made in relation to the failure of Republika Srpska to *arrest* any indicted persons. The Trial Chamber accepts that, in this respect, actions speak louder than words. Brdanin was a high level Government official at the time of the events which are alleged against him. The amended indictment describes him as having reached, by 1992, the positions of Minister for Construction,

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

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

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

opportunity , Brdanin would have taken or rejected it. It is important to emphasise, therefore , that in such a case – absent specific evidence directed to that issue – the Trial Chamber cannot take the fact that the applicant did not voluntarily surrender into account, and it has not done so in the present case.

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

(c) Interference with witnesses

19. The prosecution draws attention to the facts that Brdanin is seeking to be released in order to return to one of the very localities in which the crimes are alleged to have taken place, and that (as the prosecution has been ordered to provide unredacted statements of those witnesses not entitled to protective measures)[46] he will know the identity of several witnesses, thus heightening his ability to exert pressure on victims and witnesses.[47] The Trial Chamber does not accept that this heightened *ability* to interfere with victims and witnesses, by itself, suggests that he *will* pose a danger to them.[48] It cannot just be assumed that everyone charged with a crime under the Tribunal's Statute will, if released , pose a danger to victims or witnesses or others.[49] Indeed, it is a strange logic employed by the prosecution – that, once it has complied with its obligation under Rule 66 to disclose to the accused the supporting material which accompanied the indictment and the statements of the witnesses it intends to call, the accused thereafter should not be granted provisional release because his mere ability to exert pressure upon them is heightened. The Trial Chamber does not accept that logic.

20. The prosecution also says that the mere fact that Brdanin will be free to contact the witnesses directly or indirectly "could easily affect their willingness to testify in this and other cases".[50] That, however, would not constitute the "danger" to which Rule 65(B) refers. The Trial Chamber does not accept that this mere possibility – that the willingness of witnesses to testify would be affected by an accused's provisional release – would be a sufficient basis for refusing that provisional release were it otherwise satisfied that such accused will *not* pose a danger to the witnesses. If an applicant satisfies the Trial Chamber that he will *not* pose such a risk, it is for the prosecution to reassure its own witnesses; it would be manifestly unfair to such an applicant to keep him in detention

because of a possible reaction by the prosecution's witnesses to the mere fact that he has been granted provisional release. Insofar as the prosecution's witnesses in other cases are concerned, the Trial Chamber repeats what it said in the Protective Measures Decision, that it is not easy to see how the rights of the accused in the particular case can properly be reduced to any significant extent because of the prosecution's fear that it may have difficulties in finding witnesses who are willing to testify in other cases.[51]

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

(d) Discretionary considerations

22. It is not in dispute that Rule 65(B), by the use of the word "may", gives to the Trial Chamber a discretion as to whether release is ordered. But it should be clearly understood that, in general, it is a discretion to *refuse* the order notwithstanding that the applicant has established the two matters which that Rule identifies.[55] It is *not* , in general, a discretion to *grant* the order notwithstanding that the applicant has failed to establish one or other of those two matters.[56]

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

24. Another matter raised by Brdanin in this case relates to the length of his pre -trial

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

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

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

27. What is a reasonable length of pre-trial detention must be interpreted, so far as this Tribunal is concerned, against the circumstances in which it has to operate . The Tribunal's inability to execute arrest warrants upon persons in the former Yugoslavia to whom provisional release has been granted if they do not appear for trial has to be considered, and it is unnecessary to repeat what has already been said upon this subject.

On the other hand, the period considered reasonable by the two European bodies, in their supervisory role, result to some extent from a degree of deference given by them to the practices of the particular national courts and legislature when considering matters such as the reasonableness of pre-trial detention periods in the different European domestic jurisdictions, recognising that the national authorities are better placed to assess local circumstances within those jurisdictions.[63] The former consideration may lead to longer periods, and the latter may lead to shorter periods , being regarded as reasonable by the Tribunal.

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

5 Disposition

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

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

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

_____
Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

1- Motion for the Provisional Release of Radoslav Brdanin, 27 Apr 2000 ("Motion"), filed 28 Apr 2000.
2- Prosecution's Response to "Motion for the Provisional Release of Radoslav Brdanin", 9 May 2000 ("Response").
3- Motion, p 7; Response, par 19.
4- Motion for Extension of Time, 25 May 2000, filed 26 May 2000.
5- Count 1, Article 4(3)(a) of the Tribunal's Statute.
6- Count 2, Article 4(3)(e).

7- Count 3, Article 5(h).
8- Count 4, Article 5(b).
9- Count 8, Article 5(d).
10- Count 9, Article 5(i).
11- Count 6, Article 5(f).
12- Count 7, Article 2(b).
13- Count 5, Article 2(a).
14- Count 10, Article 2(d).
15- Count 11, Article 3(b).
16- Count 12, Article 3(d).
17- Amended Indictment, pars 6-7.
18- Ibid, par 16.
19- Ibid, pars 14, 19.
20- Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 Mar 2000, par 4.
21- Decision on Motion to Dismiss Indictment, 5 Oct 1999; Interlocutory Appeal dismissed: Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72, 16 Nov 1999.
22- Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brdanin, 8 Dec 1999; Leave to appeal refused and application for a Writ of Mandamus directed to the Trial Chamber rejected: Decision on Application for Leave to Appeal, 23 Dec 1999.
23- Personal Guarantee of Radoslav Brdanin, undated, pp 2-3.
24- Guaranty of the Government of the Republic of Srpska, 8 Mar 2000, pp 1-2.
25- Oral hearing, 20 July 2000, Transcript, pp 152-154.
26- Ibid, pp 154-156.
27- Ibid, p 156.
28- Ibid, pp 154-156.
29- Motion, par 7.
30- Transcript, p 161.
31- Transcript, p 162. See Prosecutor v Kvocka, Case IT-98-30-PT, Decision on Motion for Provisional Release of Miroslav Kvocka, 2 Feb 2000 ("Kvocka Decision"), at p 4. See also Prosecutor v Kordic, Case IT-95-14/2-T, Order on Application by Dario Kordic for Provisional Release Pursuant to Rule 65, 17 Dec 1999 ("Kordic Decision"), 17 Dec 1999, p 4; Prosecutor v Aleksovski, Case IT-995-14/1-A, Order Denying Provisional Release, 18 Feb 2000, p 2; Prosecutor v Simic, Case IT-95-9-PT, Decision on Miroslav Tadic's Application for Provisional Release, 4 Apr 2000 ("Tadic Decision"), p 8; Prosecutor v Simic, Case IT-95-9-PT, Decision on Simo Zaric's Application for Provisional Release, 4 Apr 2000 ("Zaric Decision"), p 8; Leave to appeal from the Tadic and Zaric Decisions refused, on the basis that error had not been shown: Prosecutor v Simic, Case IT-95-9-AR65, Decision on Application for Leave to Appeal, 19 Apr 2000 ("Tadic/Zaric Appeal Decision"), p 3; Prosecutor v Simic, Case IT-95-9-PT, Decision on Milan Simic's Application for Provisional Release, 29 May 2000 ("Simic Decision"), p 5.
32- Kvocka Decision, p 4; Kordic Decision, p 4; Tadic Decision, p 8; Zaric Decision, p 7.

33- Transcript, pp 161, 164.
34- This is also apparent from the decisions cited in footnote 31.
35- Transcript, p 166.
36- Response, par 11; Transcript, p 163. See also Prosecutor v Kovacevic, Case IT-97-24-PT, Decision on Defence Motion for Provisional Release, 20 Jan 1998, par 27.
37- Amended Indictment, par 17.
38- See Rule 101(B)(ii).
39- The weight to be given to a guarantee by the Government of Republika Srpska may be different where it is not a high level indicted person who would have to be returned.
40- Tribunal's Fourth Annual Report (1997), pars 183-187 ("Republika Srpska is clearly and blatantly refusing to meet the obligations that it undertook when it signed the Dayton Peace Agreement, by which it solemnly undertook to co-operate with the Tribunal": par 187); Tribunal's Fifth Annual Report (1998), pp 81-83 (although the present Prime Minister of Republika Srpska is reported, at par 216, to have urged indicted individuals to surrender to the Tribunal); Tribunal's Sixth Annual Report (1999), par 106 (refusal of Republika Srpska to execute arrest warrants).
41- Response, par 12.
42- Ibid, par 14; Transcript, p 162.
43- Transcript, p 160.
44- Kordic Decision, p 4.
45- Tadic Decision, p 8; Zaric Decision, p 8; Leave to appeal refused on the basis that error had not been shown: Tadic/Zaric Appeal Decision, p 3; Simic Decision, p 6. Provisional release was refused in one case, despite the applicant's surrender, in part because there was a dispute as to the circumstances in which the applicant had surrendered: Kordic Decision, p 5.
46- Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("Protective Measures Decision"), par 65.2.
47- Response, pars 15-16.
48- The Decision of the Trial Chamber in Prosecutor v Blaškic, Case IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 Apr 1996 (English version filed 1 May 1996), p 5, upon which the prosecution relies does not state anything to the contrary.
49- Prosecutor v Delalic, Case IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, 25 Sept 1996 (filed 1 Oct 1996), par 34.
50- Response, par 16.
51- Protective Measures Decision, pars 29-30.
52- Paragraph 18, supra.
53- cf Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 18.
54- Protective Measures Decision, par 34.
55- See, for example, the Kordic Decision (p 4), where the Trial Chamber took into account in part in refusing the application the fact that it had been made during the trial, and if successful would have disrupted the remaining course of the hearing.

56- In Prosecutor v Djukic, Case IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 Apr 1996, at p 4, the Trial Chamber granted to the accused provisional release solely upon humanitarian grounds in the light of the extreme gravity of the accused's medical condition, in that he was suffering from an incurable illness in its terminal phase.
57- Motion, pars 12-13; and see Section 3 of this Decision.
58- Motion, par 11.
59- Motion, par 10.
60- Paragraph 18, supra.
61- In Prosecutor v Aleksovski, Case IT-95-14/1-A, Judgment, 24 Mar 2000, at par 185, the Appeals Chamber stated that sentences of the Tribunal should make it plain that the international community is not ready to tolerate serious violations of international humanitarian law and human rights. The Tribunal was established in order to prosecute persons responsible for such serious violations: Statute of the Tribunal, Article 1.
62- Response, par 9. The decision of the Commission referred to is Ventura v Italy, report of European Commission of Human Rights of 15 Dec 1980, Application 7438/76, Decisions and Reports, Vol 23, p 5, in which a period of five years, seven months and twentyseven days was considered (at par 194). The decision of the Court referred to is the "Neumeister" Case, judgment of 27 June 1968, Series A, Judgments and Decisions, Vol 8. The prosecution asserts that, in this case, the Court found a period of three years pre-trial detention "to be in conformity with the ECHR": Response, par 9. That is not so. The relevant period considered by the Court was two years, two months and four days, and the finding of the Court was that Article 5(3) had been breached, as the length of the applicant's pre-trial detention had ceased to be reasonable once it became evident that appropriate guarantees for the applicant's return, if provisionally released, would meet the risk of absconding (pars 4, 6, 12, 15).
63- This degree of deference is explicitly recognised in the jurisprudence of the European Court of Human Rights, as the "margin of appreciation": Handyside Case, Series A, No 24, Judgment of 7 Dec 1976, at pars 48-49.

Annex 7: *Prosecutor v. Krajisnik and Plasvic*, ICTY, IT-00-39 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001

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

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[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.
>
> 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. Brdanin 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.

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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.

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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.

Annex 8: *Prosecutor v. Simic et al.*, IT-95-9, Trial Chamber, 4 April 2000.

IN THE TRIAL CHAMBER

Before:
Judge Patrick Robinson, Presiding
Judge David Hunt
Judge Mohamed Bennouna

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
4 April 2000

PROSECUTOR

v.

BLAGOJE SIMIC
MILAN SIMIC
MIROSLAV TADIC
STEVAN TODOROVIC
SIMO ZARIC

DECISION ON MIROSLAV TADIC'S APPLICATION FOR PROVISIONAL RELEASE

The Office of the Prosecutor

Mr. Grant Niemann
Ms. Nancy Paterson
Ms. Suzanne Hayden

Counsel for the accused

Mr. Slobodan Zecevic, for Milan Simic
Mr. Igor Pantelic and Mr. Novak Lukic, for Miroslav Tadic
Mr. Deyan Ranko Brashich, for Stevan Todorovic
Mr. Borislav Pisarevic and Mr. Aleksander Lazarevic, for Simo Zaric

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 "Request for Provisional Release of Mr. Miroslav Tadic" filed on behalf of the accused Miroslav Tadic ("the Accused") on 19 January 1999 ("the Motion"), requesting provisional release from detention subject to certain terms and conditions as set out in the Motion,

NOTING the "Prosecutor's Response to the Defence Request for Provisional Release of Miroslav Tadic", filed by the Office of the Prosecutor ("Prosecution") on 28 January 1999,

NOTING the decision of this Trial Chamber issued on 15 February 1999,[1] denying the Accused's Motion for Provisional Release, which decision was then appealed,

NOTING the "Addendum to Defense Motions For Provisional Release of Mr. Miroslav Tadic and Mr. Simo Zaric", filed on 18 February 1999, in which the Defence for Miroslav Tadic and one of the co-accused, Simo Zaric, reserved the right to present oral argument on their respective applications for provisional release,

NOTING the decision of the Appeals Chamber dated 28 July 1999,[2] vacating the Trial Chamber's decision denying the Accused's application for provisional release, on the grounds that, contrary to the expectations of the Accused, the decision had been issued solely on the basis of written submissions, and directing the Trial Chamber to hold an oral hearing on the Accused's application for provisional release,

NOTING its Scheduling Order of 22 September 1999,[3] granting the Accused an oral hearing in relation to his application for provisional release,

NOTING the "Prosecution's Brief in Opposition to Provisional Release", dated 30 November 1999,

NOTING the "Addendum to Prosecution's Brief in Opposition to Provisional Release", filed on 1 December 1999, in which the Prosecution, pursuant to Rule 65(E) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), applies for a prospective stay of any decision granting the Accused's motion for provisional release,

NOTING the "Response by Miroslav Tadic and Simo Zaric to the Prosecution's Brief in Opposition to Provisional Release", filed on 7 December 1999, opposing the Prosecution's application pursuant to Rule 65(E) of the Rules, for a stay of any decision for provisional release of the Accused,

NOTING the "Addendum to the Response by Miroslav Tadic and Simo Zaric to the Prosecution's Brief in Opposition to Provisional Release", filed on 8 December 1999,

NOTING the arguments of the Accused, as set forth in his initial application for provisional release that,

(i) he voluntarily surrendered to the custody of the International Tribunal on 14 February 1998,

(ii) his advanced age renders life in the United Nations Detention Unit more difficult,

(iii) the period of his pre-trial detention will be extended due to the fact that one of the co-accused, Stevan Todorovic, who was arrested approximately seven months after the voluntary surrender of the Accused, must be given an opportunity to prepare his case for trial, which will inevitably delay the commencement of trial,

(iv) he is not facing charges on the most serious violations of international humanitarian law over which the International Tribunal has jurisdiction,

(v) he will provide guarantees, in addition to providing guarantees from the government of the Republika Srpska, that he will appear for trial,

(vi) if released, he will not pose a danger to victims, witnesses or other persons,

(vii) he is willing to comply with the conditions imposed on his provisional release by the Trial Chamber,

NOTING the arguments of the Prosecution as set forth in its initial submission in response to the Accused's application for provisional release,[4] *inter alia*, that,

(i) the International Tribunal lacks enforcement powers, making provisional release a risky undertaking;

(ii) the Trial Chamber, in determining an application on provisional release, must consider at least four factors, including whether there are reasonable grounds to believe that the accused committed the crimes alleged, his role therein, the length of time the accused has spent in detention and the position of the host country;

(iii) the Trial Chamber, when considering the period of detention, should be guided by the standards enunciated by the European Court of Human Rights;

(iv) in light of the Republika Srpska's record of non-cooperation with the International Tribunal to date, there is no reason to believe that the authorities of the Republika Srpska would arrest the Accused and return him to the custody of the International Tribunal should he fail to appear for trial;

(v) the Accused has been provided with a significant number of statements from Prosecution witnesses, thereby increasing his ability to locate them and attempt to influence their testimony;

(vi) as noted in the *Blaskic* case, periods of pre-trial detention ranging from nineteen months to five years have been found reasonable;

(vii) the Accused has failed to ascertain the position of the host country government as to whether the Accused could be readmitted to the Netherlands, in the event that he were to be released,

NOTING the argument of the Prosecution that the amendment to Rule 65,[5] removing the "exceptional circumstances" requirement, is *ultra vires* the Statute of the International Tribunal ("Statute") and, accordingly, should be deemed non-operative or, alternatively, that the Accused's application for provisional release should be considered pursuant to Rule 65(B) as it stood before amendment,

NOTING further the arguments of the Prosecution, set forth in its submission dated 30 November 1999, that, even if Rule 65(B), as amended, is applied, provisional release should not be granted for the following reasons:

(i) the views of the government of the Netherlands, as the host country, should be sought and obtained prior to a grant of provisional release;

(ii) the fact that the Accused voluntarily surrendered to the International Tribunal is no guarantee that, if released, he would appear for trial;

(iii) due to the absence of effective enforcement measures, the International Tribunal loses all control over an accused who is released from the United Nations Detention Unit;

(iv) the Republika Srpska's record to date of non-compliance with its obligations to the International Tribunal, suggests that assurances from the government of that entity should be accorded little weight;

(v) if released, the potential for witness harassment is heightened in this case, as the Accused has received the names of up to sixty Prosecution witnesses whose statements have been disclosed to the Defence;

(vi) provisional release of the Accused would have a chilling effect on the cooperation of other witnesses appearing before the International Tribunal;

(vii) provisional release of the Accused would undermine the threefold purpose of the International Tribunal: to do justice, to deter future crimes and to contribute to the restoration and maintenance of peace and security in the former Yugoslavia;

(viii) the Trial Chamber should take into account the extremely serious nature of the crimes with which the Accused is charged, the possible dangers to the community if the Accused is released and the genuine risk that the Accused would take flight to avoid the possibility of serving a lengthy prison sentence;

(ix) the present length of the Accused's pre-trial detention falls within the acceptable range under international human rights standards;

(x) a court's inability to hear a case does not justify release of an accused;

(xi) the Accused has failed to demonstrate the existence of circumstances justifying his release prior to trial,

NOTING further the Declaration of Agnes Inderhaug, appended to the Prosecution's response, detailing the suggested detrimental impact that provisional release of the Accused would have on the victims and witnesses in this case,

NOTING the arguments of the Accused in reply to the Prosecution's arguments in response, that:

(i) the Trial Chamber acted properly in considering the Accused's application for release under Rule 65(B), as amended;

(ii) the amendment to Rule 65(B) constitutes an important development in the legal regime governing provisional release at the International Tribunal, bringing the Rule into conformity with international human rights standards;

(iii) while, under the pre-amended version of Rule 65(B), pre-trial detention was the norm and release the exception, under the Rule as amended, provisional release is no longer considered exceptional;

(iv) an accused must satisfy only two substantive criteria to meet the requirements under Rule 65(B), namely to demonstrate that he will appear for trial and that, if released, he will not pose a danger to others;

(v) relevant considerations in this regard should include whether the accused surrendered voluntarily, the relative gravity of the crimes alleged against the

accused, and the accused's behaviour in the United Nations Detention Unit;

(vi) the Accused surrendered voluntarily, and further, he is not charged with the most serious offence provided for in the Statute;

(vii) the Prosecution's submissions relating to a risk of the Accused's flight, and the potential that the Accused, if released, will pose a danger to others, are unfounded;

(viii) delays in the commencement of a trial are a relevant factor in considering an application for provisional release, and, according to a recent case of the European Court of Human Rights,[6] the right of an accused to be tried within a reasonable time or to be released pending trial under Article 5(3) of the European Convention on Human Rights is violated where the delay is attributable to the judicial system;

(ix) in this case, the Accused has been in detention for approximately two years awaiting trial, even though the Prosecution and the four accused have expressed their readiness and have urged the Trial Chamber to set a date for the commencement of trial;

(x) the slight prospect of an early commencement to this trial mitigates in favour of releasing the Accused on a provisional basis;

(xi) in the event that his application for provisional release is granted, the Accused opposes all attempts by the Prosecution to seek a stay,

NOTING this Trial Chamber's Order, filed on 29 February 2000,[7] requiring the Defence for Miroslav Tadic to provide undertakings and guarantees in writing from the Accused himself, and from the "appropriate authorities", as set out therein,

NOTING the Defence submission in response to the Trial Chamber's Order of 29 February 2000, filed 13 March 2000,[8] in which the Accused provides guarantees from the following individuals or entities: (i) the Government of the Republika Srpska, (ii) the local police in Bosanski Samac, and (iii) himself ("Defence guarantees"), and further provides a valid open-dated air ticket on Yugoslav Airlines from Schiphol airport, in the Netherlands, through Zurich, in Switzerland, to Banja Luka in Bosnia and Herzegovina,

NOTING the Prosecution's Motion for Dismissal of the Accused Tadic and Zaric's Requests for Provisional Release, filed on 14 March 2000, seeking dismissal of the Accused's application for provisional release on the grounds that the Defence guarantees do not comply with the Trial Chamber's Order of 29 February 2000 and arguing that such guarantees are not legally valid pursuant to the Constitution of Bosnia and Herzegovina,

NOTING the Defence Response to the Prosecution's Motion for Dismissal, filed on 17 March 2000,[9] in which the Accused argues that the Defence guarantees comply fully with the Trial Chamber's Order of 29 February 2000, and further that such guarantees are constitutionally valid,

HAVING HEARD the oral arguments of the parties in open session on 23 November 1999,

HAVING HEARD the host country as required by Rule 65(B) of the Rules,

HAVING CONSIDERED all of the arguments of the parties, and the supporting material filed by the Prosecution and the Defence,

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 affect the remaining requirements under that provision,

CONSIDERING that the Trial Chamber finds no merit in the contention of the Prosecution that the amendment to Rule 65(B), removing the requirement of exceptional circumstances, is *ultra vires* the Statute, for the reason that it is not inconsistent with any provision in the Statute and is wholly consistent with the internationally recognised standards regarding the rights of the accused which the International Tribunal is obliged to respect,[10]

CONSIDERING 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 may be granted 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 voluntarily surrendered to the custody of the International Tribunal,

CONSIDERING that the Accused has provided, both on his own behalf, and through the Government of the Republika Srpska, the guarantees required by the Trial Chamber, and further that the Government of the Republika Srpska is competent to issue such guarantees,[11]

CONSIDERING that the Trial Chamber is satisfied that the Accused, if released, will appear for trial and further, that he will not pose a danger to victims, witnesses or other persons,

CONSIDERING that the Accused has, to date, been held in detention, awaiting trial, for more than two years,[12] and that there is no likelihood of an early date being fixed for the

commencement of his trial,

PURSUANT TO Rule 65 of the Rules,

HEREBY GRANTS the motion **AND ORDERS** the provisional release of Miroslav Tadic under the following terms and conditions:

1. the Accused shall be transported to Schiphol airport in the Netherlands by the Dutch authorities;

2. at Schiphol airport, the Accused shall be provisionally released into the custody of the designated official of Bosnia and Herzegovina, Trivun Jovicic (or such other designated official as the Trial Chamber may, by order, accept), who shall accompany the Accused for the remainder of his travel to Bosnia and Herzegovina;

3. on his return flight, the Accused shall be accompanied by the same designated official of Bosnia and Herzegovina, Trivun Jovicic (or by such other designated official as the Trial Chamber may, by order, accept), who shall deliver the Accused into the custody of the Dutch authorities at Schiphol airport at a date and time to be determined by the Trial Chamber, and the Dutch authorities shall then transport the Accused back to the United Nations Detention Unit;

4. During the period of his provisional release, the Accused shall abide by, and the authorities of the Republika Srpska, including the local police in Bosanski Samac, shall ensure compliance with, the following conditions:[13]

a) to remain within the confines of the municipality of Bosanski Samac;

b) to surrender his passport to the International Police Task Force (IPTF) in Oraska or to the Office of the Prosecutor in Sarajevo;

c) to report each day to the local police in Bosanski Samac;

d) to consent to having the IPTF check with the local police about his presence and to the making of occasional, unannounced visits by the IPTF to the Accused;

e) not to have any contact with any other co-accused in the case;

f) not to have any contact whatsoever nor in any way interfere with any persons who may testify at his trial;

g) not to discuss his case with anyone other than his counsel;

h) to assume responsibility for all expenses concerning transport from Schiphol airport to Bosanski Samac and back;

i) to comply strictly with any order of this Trial Chamber varying the terms of or terminating his provisional release,

and **FURTHER ORDERS** that, being seised of the Prosecution's application for a stay of any decision granting the Accused's motion for provisional release, pursuant to Rule 65(E) of the Rules,[14] the order of release of the Accused is hereby **STAYED**, such that the Accused shall not be released before 5 p.m. on Wednesday 5 April 2000 at the earliest (being one full day from the rendering of this decision), and, if the Prosecution has filed an application for leave to appeal this Decision within that time, then, pursuant to Rule 65 (G), the Accused shall not be released until either:

(i) a bench of three Judges of the Appeals Chamber rejects the application for leave to appeal;

(ii) the Appeals Chamber dismisses the appeal; or

(iii) a bench of three Judges of the Appeals Chamber or the Appeals Chamber otherwise orders.

In the event of the Accused's release, the Trial Chamber:

INSTRUCTS the Registrar to consult with the Ministry of Justice of the Netherlands as to the practical arrangements for his release; and

REQUESTS the authorities of all States through which he will travel:

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

(ii) to arrest and detain the Accused pending his return to the United Nations Detention Unit, should he attempt to escape,

and **FURTHER ORDERS** that the Accused shall be immediately detained should he breach any of the foregoing terms and conditions of his provisional release.

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

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Patrick Robinson

Presiding Judge

Dated this fourth day of April 2000
At The Hague
The Netherlands

[Seal of the Tribunal]

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1. *Prosecutor v. Simic et al.,* Case No. IT-95-9-PT, Decision on Motion for Provisional Release of Miroslav Tadic, 15 Feb. 1999.
2. *Prosecutor v. Simic et al.,* Case No. IT-95-9-AR73, Decision Relating to the Trial Chamber's Ruling on the Basis of Written Submissions Prior to Holding Oral Arguments as Scheduled, A. Ch., 28 July 1999.
3. *Prosecutor v. Simic et al.,* Case No. IT-95-9-PT, Scheduling Order, 22 Sept. 1999.
4. In light of the recent amendment to Rule 65(B) which removed the "exceptional circumstances" requirement, those arguments of the Prosecution relating to the need for the Accused to demonstrate "exceptional circumstances" before release may be ordered are no longer relevant, and therefore have not been here included.
5. Rule 65(B) of the Rules was amended at the twenty-first plenary session of the Judges of the International Tribunal (15 – 17 November 1999).
6. *Affaire Deboub alias Husseini Ali c. France,* Eur.Ct.H.R., Judgement of 9 November 1999.
7. *Prosecutor v. Simic et al.,* Case No. IT-95-9-PT, Order on Request for Provisional Release by Miroslav Tadic, 29 Feb. 2000.
8. *Prosecutor v. Simic et al.,* Case No. IT-95-9-PT, Defence Submission Regarding Trial Chamber's Order of 29 February 2000 in the Matter of Provisional Release of Miroslav Tadic, 13 March 2000.
9. *Prosecutor v. Simic et al.,* Case No. IT-95-9-PT, Response to Prosecution's Motion for Dismissal of the Accused Tadic and Zaric's Requests for Provisional Release, 17 March 2000.
10. *See* paragraph 106 of the Report of the Secretary-General introducing the articles on the rights of the accused in the Statute, U.N. Doc. S/25704, 3 May 1993.
11. Rule 2 of the Rules defines "State" as including any "self-proclaimed entity *de facto* exercising governmental functions, whether recognised as a State or not." Under the Constitution of Bosnia and Herzegovina ("Constitution"), the Republika Srpska is one of two Entities comprising the State of Bosnia and Herzegovina. Article II, paragraph 8 of the Constitution states: "All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to . . . the International Tribunal for the Former Yugoslavia". Further, Article III, paragraph 2 (c) of the Constitution provides: "The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies . . . ." Further, in granting provisional release to Milan Simic, Trial Chamber I accepted the guarantees of the authorities of the Republika Srpska without objection from the Prosecution. *See Prosecutor v. Simic et al.,* Case No. IT-95-9-PT, Decision on Provisional Release of the Accused (Milan Simic), 26 March 1998.
12. Miroslav Tadic was admitted to the United Nations Detention Unit on 15 February 1998.
13. These conditions are set forth in this Trial Chamber's Order of 29 February 2000 and have been agreed to by the Accused in the Defence Submission Regarding the Trial Chamber's Order of 29 February 2000 in the Matter of Provisional Release of Miroslav Tadic, *Prosecutor v. Simic et al.,* Case No. IT-95-9-PT, 13 March 2000.
14. *Prosecutor v. Simic et al.,* Case No. IT-95-9-PT, Addendum to Prosecution's Brief in Opposition to Provisional Release, 1 Dec. 1999.

Annex 9: *Prosecutor v. Blagojevic, Obrenovic and Jokic*, IT-02-53-A65, Appeals Chamber, Decision on Application for Leave to Appeal, 18 April 2002

IT-02-53-AR65
A22-A18
18 APRIL 2002

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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: IT-02-53-AR65

Date: 18 April 2002

Original: English

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: Judge David Hunt, Presiding
Judge Mehmet Güney
Judge Asoka de Zoysa Gunawardana

Registrar: Mr Hans Holthuis

Decision of: 18 April 2002

PROSECUTOR

v

Vidoje BLAGOJEVIĆ
Dragan OBRENOVIĆ
Dragan JOKIĆ

DECISION ON APPLICATION BY DRAGAN JOKIĆ FOR LEAVE TO APPEAL

Counsel for the Prosecutor:

Mr Norman Farrell
Mr Peter McCloskey

Counsel for the Applicant:

Mr Miodrag Stojanović and Ms Cynthia Sinatra for Dragan Jokić

1. On 28 March 2002, an application for provisional release made by Dragan Jokić (the "Applicant") was refused by Trial Chamber II ("Trial Chamber").[1] He has now sought leave to appeal from that refusal.[2]

2. Rule 65(D) of the Rules of Procedure and Evidence ("Rules") requires applications for leave to appeal from a decision to grant or refuse provisional release to be filed within seven days of the impugned decision being filed. That time expired on 4 April 2002. The date of filing is the date upon which the document is placed in the custody of the Tribunal's Registry,[3] which is open to receive documents until 5.30 pm.[4] The Application was sent to the Registry by the Applicant's co-counsel (who practises in Texas, USA) by fax at 1419 local time on 4 April, according to the time imprint in its header. However, at that particular time, Texas was eight hours behind The Hague, and the fax was received at The Hague after the Registry had closed on 4 April. In accordance with the usual practice for documents received by fax after the Registry is closed, the Application was not filed until the following day, 5 April, one day out of time. Although co-counsel should have been aware of the time difference and made allowance for it, the situation is one in which it would be appropriate for the Appeals Chamber to recognise the application as having been validly filed on 5 April.[5]

3. Rule 65(D) provides that leave to appeal may be granted by a Bench of three Judges of the Appeals Chamber "upon good cause being shown". Good cause will have been shown if the applicant for leave satisfies the Bench that the Trial Chamber "may have erred" in making the impugned decision.[6]

4. The Trial Chamber dismissed the application for provisional release upon the basis that it was "not satisfied with the guarantees provided", without considering what it described as the "other prerequisites of Rule 65".[7] The Applicant has argued that, insofar as it was necessary to provide guarantees, he had provided such a guarantee from the Government of Republika Srpska.[8] There are therefore two issues raised in the leave application:

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1 Decision on Request for Provisional Release of Accused Jokić, 28 Mar 2002 ("Trial Chamber Decision").
2 Dragan Jokić's Application for Leave of Court to Appeal Denial of Provisional Release, 3 April 2002 ("Application").
3 Directive for the Registry – Judicial Department – Court Management and Support Services, 1 Mar 1997 (IT/121), Article 25.3.
4 *Ibid*, Article 27.1.
5 Rule 127(A)(ii).
6 *Prosecutor v. Brđanin and Talić*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000 ("*Brđanin* Appeal Decision"), p 3.
7 Trial Chamber Decision, par 32.
8 Application, pars 9-13.

(i) Is it a prerequisite to obtain provisional release for an applicant to provide a guarantee from a governmental body that he will appear for trial?

(ii) If so, is a guarantee from the Government of Republika Srpska valid for that purpose?

5. The prosecution did not file a response to the application for leave to appeal. It had informed the Trial Chamber that the Applicant, when interviewed as a suspect, had offered to surrender should an indictment be issued, that he had voluntarily surrendered to the authorities immediately upon request, that it did not believe that he presented a serious flight risk and that it did not have any reason to believe that he presented a danger to any victim, witness or other person.[9]

6. In a reserved decision, the Trial Chamber held that "guarantees have to be provided '*by the State to which the accused seeks to be released*'".[10] No further explanation was given for this ruling, which assumed that such a guarantee was a "prerequisite" of Rule 65. The words in italics appear in Rule 65(B) in this context:

> Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

The words quoted by the Trial Chamber were inserted in that Rule in December 2001. Previously, the Trial Chamber only had the obligation to hear the host country (The Netherlands). The words were inserted in order to reflect the emerging practice of Trial Chambers to hear evidence from the governmental body in the area to which the applicant would be released if successful in his application.

7. Rule 65(B), however, requires an applicant for provisional release to satisfy the Chamber to which he has applied of only two matters: (i) that he will appear for trial, and (2) that, if released, he will not pose a danger to any victim, witness or other person.[11] The obligation is placed upon the Trial Chamber to give both the host country and the State to which the accused seeks to be released "the opportunity to be heard". There is no reference in Rule 65(B), or elsewhere in Rule 65, to an obligation upon the accused, as a prerequisite to

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[9] Prosecution Response to Request for Provisional Release for Accused Jokić, 20 Mar 2002, p 2; Oral hearing of application for provisional release, 21 Mar 2002, Transcript, p 67.

[10] Trial Chamber Decision, par 24. The italics and the underlining appear in the Trial Chamber Decision.

[11] *Brđanin* Appeal Decision, pp 2-3; *Prosecutor v Krajišnik*, IT-00-38&40-AR73.2, Decision on Interlocutory Appeal by Momčilo Krajišnik, 26 Feb 2002, par 21 (footnote 38).

obtaining provisional release, to provide guarantees from that State, or from anyone else, that he will appear for trial.

8. It is nevertheless usual, and it is certainly advisable, for an applicant for provisional release to provide such a guarantee from such a governmental body, in order to satisfy the Trial Chamber that he will appear for trial. That is because the Tribunal has no power to execute its own arrest warrant upon an applicant who is in the territory of the former Yugoslavia in the event that he does not appear for trial, and it needs to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf. Account must be taken of those circumstances in applying internationally recognised standards relating to the release of persons awaiting trial in the Tribunal.[12] Rule 65(C) permits the Chamber to impose conditions upon the release of an accused "to ensure the presence of the accused for trial", and frequently the production of a guarantee from the relevant governmental body is imposed as such a condition. But it is not a prerequisite.

9. The Trial Chamber ruled that the reference to "State" in the words quoted from Rule 65(B) did not include Republika Srpska, as it had "to be regarded only as an entity within the State of Bosnia and Herzegovina".[13] The Trial Chamber justified this assertion by references to the Constitution of Bosnia and Herzegovina and a decision of the Constitutional Court of that State.[14] It did not refer to Rule 2, which defines the word "State" when used in the Rules as:

> A State Member or non-Member of the United Nations or a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not.

The Constitution of Bosnia and Herzegovina to which the Trial Chamber referred states that the entities (including Republika Srpska) have the responsibility to maintain civilian law enforcement agencies in order to provide a safe and secure environment for all persons in their respective jurisdictions.[15] The Bench is able to take judicial notice of evidence given in numerous cases before the Tribunal that the entity of Republika Srpska does indeed exercise governmental functions within its territory, including the police powers of arrest.[16] The Trial Chamber in the present case had before it a letter from the Minister Counsellor – Liaison Officer for Republika Srpska to the Tribunal in The Hague, in which it was made clear that

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[12] *Brđanin* Appeal Decision, p 3.
[13] Trial Chamber Decision, par 25.
[14] *Ibid*, pars 26-27.
[15] Annex 4 to the Dayton Peace Accords, Article III.2(c), Responsibilities of the Entities.
[16] See, for example, *Prosecutor v Brđanin & Talic*, Decision on Motion by Momir Talić for Provisional Release, 28 Mar 2001, pars 9-14.

the State of Bosnia and Herzegovina did *not* exercise such powers in the territory of Republika Srpska and that the government of Republika Srpska *was* the appropriate authority to give a guarantee.[17] The letter referred the Trial Chamber to three cases in which other Trial Chambers had accepted guarantees from Republika Srpska and granted provisional release. The Trial Chamber did refer to the "practical difficulties arising from the gap between constitutional and factual situations",[18] but it declined (without explanation) to follow those previous decisions.

10. In both respects, the Bench is satisfied that the Trial Chamber "may have erred" in refusing the application for provisional release upon the basis that a guarantee was a prerequisite to obtaining such relief and that a guarantee from Republika Srpska was not valid for that purpose. Accordingly, good cause has been established for the grant of leave to appeal from the Trial Chamber's refusal. Whether any guarantee should be required as a condition of granting provisional release in the particular circumstances of the present case, and (if it is) whether a guarantee from Republika Srpska should be accepted as sufficient (rather than merely valid) are matters for argument at a later stage. Leave to appeal will be granted.

Disposition

11. For these reasons –

(i) The application for leave to appeal is recognised as having been validly filed on 5 April 2002.

(ii) Leave to appeal from the Trial Chamber's Decision refusing provisional release is granted.

The parties are required to comply with the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, pars 7-9.[19]

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

Dated this 18th day of April 2002,
At The Hague,
The Netherlands.

David Hunt

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

[17] Trial Chamber Decision, par 8; the full text of the letter is Exhibit "A" to the Application.
[18] Trial Chamber Decision, par 28.
[19] 7 Mar 2002 (IT/155 Rev 1).

Annex 10: *See Prosecutor v. Brdanin,* IT-99-36-PT, Decision on Motion by Momir Talic for Provisional Release, 28 March 2001

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IN TRIAL CHAMBER II

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

Registrar:
Mr Hans Holthuis

Decision of:
28 March 2001

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIC

DECISION ON MOTION BY MOMIR TALIC FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

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

Counsel for Accused:

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

1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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2 The relevant provision

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

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

The host country has been heard.

3 The material put forward by the parties

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

8. The Motion asserts that Talic –

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

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

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

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

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

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

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

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

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

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

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

4 The contentions of the parties, analysis and findings

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

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.

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

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

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

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

Interference with witnesses

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

34. In the *Brdanin* Decision, the Trial Chamber did not accept that this heightened *ability* of an accused person to interfere with victims and witnesses, by itself, suggests that he *will* pose a danger to them.[91] It cannot just be assumed that every one charged with a crime under the Tribunal's Statute will, if released, pose a danger to victims or witnesses or others.[92] The Trial Chamber did not accept the logic employed by the prosecution – that, once it has complied with its obligation under Rule 66 to disclose to the accused the supporting material which accompanied the indictment and the statements of the witnesses it intends to call, the accused thereafter should not be granted provisional release because his mere ability to exert pressure upon them is heightened.[93]

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

CONSIDERING, furthermore, that it is not certain that, if released, the accused would not pose a danger to any victim, witness or other person; that the knowledge which, as an accused person, he has of the evidence produced by the Prosecutor would place him in a situation permitting him to exert pressure on victims and witnesses and that the investigation of the case might be seriously flawed.

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

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

36. Insofar, as the Trial Chamber in the *Blaškic* case appears to have considered that the mere existence of a heightened ability of an accused person to interfere with witnesses is sufficient to refuse that person provisional release, this Trial Chamber does not, with respect, accept that decision as correct. It was given as long ago as 1996, in a formal decision which does not reveal the reasoning which led the Trial Chamber to that conclusion. A lot of water has passed under the bridge since then. Careful consideration has since been given to where the balance should lie in resolving the tension between the due regard to be paid to the protection of victims and witnesses and the full respect for the rights of the accused. The conclusion reached by this Trial Chamber (also earlier in the present case) is that Article 20.1 of the Tribunal's Statute makes the rights of the accused the first consideration, and the need to protect victims and witnesses the secondary one.[98] This was conceded by the prosecution.[99] Those rights include the right of an accused person to be released from custody pending trial where – to repeat the words of Rule 65(B) – he has satisfied the Trial Chamber that, *inter alia*, he "will not pose a danger to any victim, witness or other person". The heightened ability of an accused person to interfere is relevant to the determination of that issue, but its mere existence is *not* sufficient in itself to deny provisional release.

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

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

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

5 A new pleading issue

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

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

41. Article 7.1 provides:

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

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

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

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

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

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

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

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

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

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

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

6 Disposition

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

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

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

Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

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

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.

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

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

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

Annex 11: *Prosecutor v. Kvocka et al*, IT-98-30, Decision on Motion For Provisional Release of Miroslav Kvocka, 2 February 2000

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IN THE TRIAL CHAMBER

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,

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

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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;

(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.

Annex 12: *Prosecutor v. Brdanin and Talic*, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002

Case No. IT-99-36-T

IN TRIAL CHAMBER II

Before:
Judge Carmel Agius, Presiding

Judge Ivana Janu

Judge Chikako Taya

Registrar:
Mr. Hans Holthuis

Decision of:
20 September 2002

PROSECUTOR
v.
RADOSLAV BRDJANIN
and
MOMIR TALIC

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

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

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

TRIAL CHAMBER II ("Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of the "Motion for Provisional Release of Momir Talic" ("Motion") filed confidentially by the Accused Momir Talic ("Talic") on 10 September 2002.

INTRODUCTION AND PROCEDURAL BACKGROUND

• In the Motion Talic seeks to be provisionally released pursuant to Rule 65(B) to his family home in Banja Luka on the grounds of his ill-health, under the terms and conditions that he shall remain within the confines of the municipality of Banja Luka, except for occasional visits for tests, medical treatment and therapy , as may be required by the medical doctors, to the Military-Medical Academy ("VMA ") in

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Belgrade. The VMA, according to Talic is the only specialised institution in the territory of Bosnia and Herzegovina and Federal Republic of Yugoslavia that can deal with the illness that he is suffering from, and the place where he can receive the satisfactory medical care. Subsequently, on 18 September 2002, Talic filed an "Amendment to the Motion for Provisional Release" ("Amendment") in which the condition to remain within the confines of a certain municipality was amended and supplemented to include the municipality of Belgrade, also as an alternative to that of Banja Luka.[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

• In the course of the hearing held of 19 September 2002, the Trial Chamber heard again the Representatives of the FRY and further submissions by the Parties. The Representatives of FRY provided the Trial Chamber with a letter of guarantees signed by the President of FRY undertaking the obligation to comply with all orders of the Trial Chamber to ensure that, on being summoned by the Trial Chamber, Momir Talic will be able to appear before it at any time. The guarantees are made pursuant to the provisions contained in the Law of FRY on Co-operation with this Tribunal . These guarantees include the following: (a) the obligation of the Yugoslav authorities to take charge of the

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accused Momir Talic from the Dutch authorities at Schiphol airport, on the day and time determined by the Trial Chamber; (b) the obligation of the Yugoslav authorities to escort the accused during his journey to FRY; (c) the obligation of the Yugoslav authorities to return the accused from the FRY to Schiphol airport and to turn him over to the Dutch authorities, on the day and time determined by the Trial Chamber; (d) the accused shall be taken over from the Dutch authorities, escorted during the journey and return to the Dutch authorities by a representative to be appointed in due time by the Federal Government of the FRY ; (e) the obligation of the Federal Ministry of the Interior, through the appropriate secretariat of the Ministry of the Interior of the Republic of Serbia, to ensure that the accused shall report daily to the police station, that records shall be kept in this regard, and a monthly written report submitted confirming that the accused is adhering to these obligations, and to immediately inform the International Criminal Tribunal in case of accused's absence; (f) the obligation of the Yugoslav authorities to immediately arrest the accused if he tries to escape or violates any of the conditions of his provisional release from detention, and to inform the International Criminal Tribunal so that preparations can be made for his transfer back to the Tribunal.

DISCUSSION

Applicable law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application of the law to the facts

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

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

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

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of detention on remand.

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

• The argument of the Prosecution that it would be inappropriate for this Trial Chamber to grant Talic provisional release given the stage the trial has reached and the nature of the evidence that has been brought forward to date can only be relevant in the context of an application for provisional release in so far as it may convince the Trial Chamber that once provisionally released Talic may try to abscond or in any way interfere with the administration of justice by posing a danger to any victim, witness or other person. The Trial Chamber is satisfied that no evidence has been adduced to show that there are any such clear present or future dangers .

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

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

application for provisional release and in the meantime allow a situation to develop which would amount to what is described in the Mouisel decision *supra* as being an inhumane one. This is all the more so when, as stated earlier, detention on remand is not meant to serve as a punishment but only as a means to ensure the presence of the accused for the trial. The Trial Chamber, given the scenario depicted above, fails to understand the request of the Prosecution for the continued detention of Talic knowing that before long and in all probability before this trial reaches its end, his condition will not be any different from Djjukic's and would, as in that case, necessitate a practically unconditional provisional release.

• The Trial Chamber believes that, given the medical condition of Talic, it would be unjust and inhumane to prolong his detention on remand until he is half-dead before releasing him. Basing itself upon the medical reports and the testimony of the medical doctors involved, the Trial Chamber is of the opinion that the gravity of Talic's current state of health is not compatible with any continued detention on remand for a long period. As explained in the Mouisel case, the palliative care and treatment, which Talic's condition requires, and will require more in the future , justifies a different environment. Moreover, it has rightly been pointed out by the Commander of the UNDU, as well as by the Prosecution, that security and logistical problems may arise if Talic seeks to have treatment by way of chemotherapy, while he remains in the custody of the UNDU and even if he is given treatment for some time in a hospital in The Netherlands.

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

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

movement is concerned and as explained in the Blaškic decision *supra* can still be considered as a form of detention.

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

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

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

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

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

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

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

43. In reaching its decision the Trial Chamber has also taken into consideration Talic's offer to waive his right to be present, should the proceeding against him continue. The Trial Chamber is not imposing any

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such condition upon him as a pre -requisite for his provisional release mainly because of legal considerations, but certainly acknowledges his willingness not to obstruct the contination of the trial agains t him.

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

DISPOSITION

For the foregoing reasons,

PURSUANT TO Rule 65 of the Rules

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

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

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

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

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

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

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

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

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

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

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

To surrender his driving license to the Representative of the Registry at the Field Office in Belgrade or

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to the authorities of FRY as required;

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

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

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

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

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

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

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

Not to occupy any official position;

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

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

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

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

REQUIRES the Dutch authorities:

To transport Talic to Schiphol airport;

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

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

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

REQUIRES the authorities of FRY to assume responsibility for:

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

back;

The personal security and safety of Talic while on provisional release;

Reporting immediately to the Registrar of the Tribunal the substance of any threats to the security of Talic, including full reports of investigations related to such threats;

Facilitating, at the request of the Trial Chamber or of the parties, all means of co-operation and communication between the parties and ensuring the confidentiality of any such communication;

Ensuring compliance with the conditions imposed on Talic by this or any future order ;

Submitting a written report to the Registrar of the Tribunal every month as to the presence of Talic and his compliance with the terms of this order and any further order;

Immediately detaining Talic should he breach any of the terms and conditions of his provisional release and reporting immediately any such breach to the Trial Chamber ;

Respecting the primacy of the Tribunal in relation to any existing or future proceedings in the FRY concerning Talic;

Not issuing to Talic any passport or document enabling him to travel.

INSTRUCTS the Registrar of the Tribunal

To consult with the Ministry of Justice of the Netherlands and the authorities of FRY as to the practical arrangements for Talic's release and travel to Belgrade;

To keep Talic in custody until relevant arrangements are made for his travel, unless hospitalisation is needed instead;

To take any necessary measure to grant to Talic all the medical assistance he requires during the transfer from the UNDU to his place of residence in Belgrade;

To communicate to the authorities of FRY Talic's address in Belgrade;

To appoint a medical specialist to have access to Talic once a month or as may be required in order to assess his state of health and who will provide a written report to this Tribunal on such state of health.

REQUESTS the authorities of all States through which Talic will travel:

to hold Talic in custody for any time he will spend in transit at the airport;

to detain and arrest Talic pending his return to the United Nations Detention Unit , should he attempt to escape.

ORDERS

That the provisional release of Talic is stayed pending an appeal by the Prosecution pursuant to Rule 65 (D), (E), (F) and (G).

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

Dated this twentieth day of September 2002
At The Hague

The Netherlands

Carmel Agius
Presiding Judge

[Seal of the Tribunal]

1 - Amendment para. 7, page 3.
2 - T. 9728, T. 9734.
3 - T. 9732.
4 - T. 9728, T. 9747.
5 - T. 9752-3.
6 - OLAD fax concerning "Review of Mr. Talic medical files" dated 10 September 2002, filed to the Trial Chamber on 13 September 2002.
7 - T. 9789.
8 - T. 9793.
9 - T. 9809.
10 - T. 9810.
11 - T. 9810 – 9811.
12 - T. 9795, T. 9818.
13 - Letter of Dr. Baas on Mr. Talic's medical condition, dated 12 September 2002.
14 - T. 9824 ff.
15 - Requête aux fins de lever la confidentialité de la requête aux fins de la mise en liberté.
16 - T. 9845.
17 - Prosecution's Response, paras. 3-5.
18 - Prosecutor v. Hadzihasanovic et al., Case No. IT-01-47-PT, *Decision Granting Provisional Release to Amir Kubura*, 19 December 2001, para. 7.
19 - See, for example, Prosecutor v. Kovacevic, Case No. IT-97-24-PT, *Decision on Defence Motion for Provisional Release*, 21 January 1998; Prosecutor v. Brdjanin and Talic, Case No. IT-99-36-PT, *Decision on Motion by Momir Talic for Provisional Release*, 28 March 2001.
20 - Prosecutor. V. Dragan Jokic, Case No. IT-02-53-PT, *Decision on Request for Provisional Release of Accused Jokic*, 28 March 2002, para. 18.
21 - Prosecutor v. Ademi, Case No. IT-01-46-PT, *Order on Motion for Provisional Release*, 20 February 2002, paras. 24-27.
22 - Prosecutor v. Blaskic, Case No. IT-95-14-T, *Decision on Motion of the Defence seeking Modification of the Conditions of Detention of General Blaskic*, 9 January 1997.
23 - Appl. 67263/01 decided on 21/3/2002.
24 - Letter by the Deputy Director Cabinet and Protocol Department, dated 12 September 2002.
25 - Law on Co-operation between the FRY and the International Tribunal, artt. 18-31.
26 - The address was provided to the Trial Chamber as a confidential and ex parte filing on 18 September 2002.

Annex 13: *Prosecutor v. Ndayambaje*, ICTR-96-8-A, Decision on Motion to Appeal against the Provisional Release Decision of Trial Chamber II of 21 October 2002, Appeals Chamber, 10 January 2003

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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

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";

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.