



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

Case No. IT-96-21-T
Date: 24 October 1996
Original: ENGLISH AND
FRENCH

IN THE TRIAL CHAMBER

Before: Judge Gabrielle Kirk McDonald, Presiding
Judge Ninian Stephen
Judge Lal C. Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 24 October 1996

PROSECUTOR

v.

ZEJNIL DELALIĆ
ZDRAVKO MUCIĆ also known as "PAVO"
HAZIM DELIĆ
ESAD LANDŽO also known as "ZENGA"

**DECISION ON MOTION FOR PROVISIONAL RELEASE
FILED BY THE ACCUSED HAZIM DELIĆ**

The Office of the Prosecutor:

Mr. Eric Ostberg
Ms. Teresa McHenry

Counsel for the Accused:

Mr. Salih Karabdić, for Hazim Delić

I. INTRODUCTION AND PROCEDURAL BACKGROUND

The accused Hazim Delić is currently being detained pursuant to an Order for Detention on Remand dated 18 June 1996. Pending before 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") is the Motion for Provisional Release ("Motion") filed on behalf of the accused on 20 August 1996. The Office of the Prosecutor ("Prosecution") filed its response ("Response") on 5 September 1996, along with a request for late filing. The request for late filing was granted by the Trial Chamber on 6 September 1996. Oral arguments on the Motion were heard on 1 October 1996 ("Hearing").

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

A. Applicable Provisions

1. This Decision addresses the Motion pursuant to Rule 65 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). This Rule provides:

Rule 65

(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 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.

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

(D) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty.

2. As discussed in the recent Decision of the Trial Chamber on Provisional Release of the co-accused Zejnil Delalić, Sub-rule 65(B) establishes the criteria which must be satisfied before a Trial Chamber can grant the release of an accused pending trial. *Prosecutor v. Zejnil Delalić*, Decision on Motion for Provisional Release Filed By the Accused Zejnil Delalić, No. IT-96-21-T, T.Ch.II., 25 Sept. 1996, at 3 ("*Delalić Decision*"). These criteria are fourfold, three of which are substantive and one procedural. They are conjunctive in nature, and the burden of proof rests on the Defence. Thus, the Defence must establish that there are exceptional circumstances, that the accused will appear for trial and that if released the accused will not pose a danger to any victim, witness or other person. Additionally, the host country must be heard. If any of these requirements are not met, the Trial Chamber is not authorised to grant provisional release and the accused must remain in detention.

3. The host country has clearly set out its position on provisional release in connection with the co-accused Zejnil Delalić by way of a letter to the Registrar of the International Tribunal dated 18 July 1996. In this letter it stated that it is for the International Tribunal to determine whether a request for provisional release should be granted, and that the host country could only comment on the practical consequences of such a release. These practical consequences include the obligation of the accused to apply for a residence permit to remain in the Netherlands pending trial. Official Record at Registry Page (“RP”) D781. There is no indication that the host country has been heard regarding the provisional release of this accused.

B. Pleadings

1. The Defence

(a) Exceptional circumstances

4. In the Motion the Defence argues that exceptional circumstances exist because the accused has been separated from his family since 1992 and his two young children need parental support. RP 1112. It also notes that further detention of the accused may result in “substantial damage and unforeseen consequences” although no indication is provided of the nature of the damage nor what the consequences may be. RP 1111.

5. During the Hearing the Defence supplemented this argument with the contention that the requirement of exceptional circumstances should not be applied, as general provisions of international law should be applied in its stead. Draft Transcript of the Hearing (“Tr.”) at 4. In that regard the Defence quotes Article 9.3 of the International Covenant on Civil and Political Rights (“ICCPR”) which states: “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 . . .”. The Defence also quotes Article 5.3 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms (“ECHR”) which stipulates that arrested or detained persons are “entitled to trial within a reasonable time or release pending trial”. The Defence thus concludes that the presumption of detention included in Rule 65 contravenes the “general rules on human rights” which are applicable to accused before the International Tribunal and therefore the requirement that exceptional circumstances be established to qualify for release should not be applied. Tr. 5. The Defence also uses this argument to contest the relevance of the host country’s opinion in considering provisional release, stating that release is a human right and should not be dependent on the will of a State. Tr. 6.

6. Additional arguments, such as the accused’s physical injuries, which may require surgery and the treatment of these injuries with narcotic drugs (Tr. 7), the illness of the accused’s mother (*id.*) and the need for the accused to be with his family to help them return to a normal life after the “frightening cataclysm” which they experienced during the war (Tr. 6-7), were also presented during the Hearing.

(b) Risk of flight

7. The Defence argues that there is no risk of flight because the accused voluntarily surrendered himself to the authorities of the Republic of Bosnia and Herzegovina, thus demonstrating that he has no intention of escaping from the International Tribunal. RP 1112, Tr. 8. Furthermore, the Defence notes that the authorities of the Republic of Bosnia and Herzegovina have guaranteed the accused’s return to the International Tribunal if released. RP 1112. The Defence submitted a copy of this guarantee. RP 1499. The Defence stipulates that if released the accused would reside in Orahovica, near Konjic, although it provided that the accused would be willing to reside in a country other than the Republic of Bosnia and Herzegovina, such as the Netherlands, upon his release if the Trial Chamber so requires. RP 1112.

8. During the Hearing the Defence expressed its opinion that the burden of proof in regard to the risk of flight rests not on the Defence, but on the Prosecution, as a result of the presumption of innocence. Tr. 8. According to the Defence, the

confirmation of an indictment does not constitute a finding of guilt and therefore the Prosecutor may not request the Defence to prove that the accused will not escape. Rather, the Prosecution must itself show that there are reasons to suppose the accused intends to flee. *Id.*

(c) Danger to victims, witnesses or any other person

9. In the Motion the Defence submits that the accused does not know where the witnesses are located nor their relatives and thus there is no danger to victims, witnesses or others. This position was not elaborated upon during the Hearing.

2. The Prosecution

(a) Exceptional circumstances

10. In the Response the Prosecution notes that, according to relevant international instruments, such as the ICCPR, the ECHR and the American Convention on Human Rights, as a general rule, an accused awaiting trial should not be detained. However, the Prosecution argues, the right to release is not absolute and courts are entitled to provide for continued detention in cases that justify it. RP D1263. In support of this position the Prosecution looks to Article 9.1 of the ICCPR, which provides: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." Thus, according to the Prosecution, pre-trial detention is allowed under international law if there are compelling reasons for it and proper legal procedures are followed. According to the Prosecution both of these factors are present in this case.

11. The Prosecution asserts that it followed the proper legal procedures to secure the accused's detention by submitting an indictment and supporting materials to a Judge of the International Tribunal for confirmation. In regard to the "compelling reasons", the Prosecution asserts that "the reasons for detention here are self-evident"

but nevertheless contends that they were articulated in the Order of 21 March 1996 confirming the indictment against the accused and the three co-accused (“Indictment”) when Judge Jorda noted that “from the case-file it appears that the conditions in the Čelebići camp were inhumane; that detainees were killed or tortured; that some were subjected to sexual abuse, beaten and, in general, that cruel and inhumane treatment was inflicted on the detainees”. RP 283 quoted in D1263.

12. The Prosecution then focuses on the legitimacy of requiring exceptional circumstances to justify release. The Prosecution notes that Rule 65 is designed to prevent accused from being too readily released

in light of the seriousness of the offences over which the [International] Tribunal has jurisdiction . . . ; the extreme dangers to the community that has been involved in intense armed conflicts, especially victims and witnesses; the distinct risk that accused persons would flee to avoid lengthy prison sentences; the relative ease, in the circumstances, by which an accused person could take flight and disappear . . . ; the obvious difficulties that would be involved in locating, arresting, and transferring an accused for a second time; and the lack of provisions which permit judicial proceedings to continue in the absence of the accused.

RP D1262-1261. For support the Prosecution relies on the decision of Trial Chamber I in the case of Prosecutor v. Tihomir Blaškić. *Prosecutor v. Tihomir Blaškić*, Decision Rejecting A Request for Provisional Release, No. IT-95-14-T, T. Ch. I, 25 Apr. 1996 (“*Blaškić Decision*”).

13. The Prosecution then contends that the Defence has failed to show the existence of the required exceptional circumstances. According to the Prosecution, the separation of the accused from his family does not constitute an exceptional circumstance, as these are personal circumstances that any detained person could encounter. RP D1261. In support of this argument the Prosecution relies on the interpretation of “exceptional circumstances” in the *Blaškić Decision*, in which Trial Chamber I stated that provisional release may be ordered “only in very rare cases in which the condition of the accused, notably the accused’s state of health, is not compatible with any form of detention”. *Blaškić Decision* at 4.

14. During the Hearing the Prosecution responded to the additional arguments raised by the Defence. In regard to the length of the accused's detention, the Prosecution noted that although the accused has been detained since 1994, that was a result of a prior conviction in Bosnia and Herzegovina for which he eventually received an amnesty and not as a result of proceedings before the International Tribunal. Tr. 10. Concerning the accused's medical concerns, the Prosecution noted that this was the first indication it had had in this regard and the Defence should contact the Registrar about acquiring a written report from an appropriate medical practitioner if it intended to continue with this line of argument. Tr. 11.

(b) Risk of flight

15. In the Response the Prosecution argues that there is a great risk of flight. It notes that no safeguards concerning the accused's availability to the International Tribunal were proposed, only a general proposition that Bosnia and Herzegovina would guarantee his return. During the Hearing, after the guarantee from the Republic of Bosnia and Herzegovina had been submitted, the Prosecution reiterated its position that no specific practical measures were proposed. It also argues that, despite its gratitude for the cooperation of Bosnia and Herzegovina and its intention not to offend that Government in any way, it appears that the authorities of the Republic of Bosnia and Herzegovina will comply with their legal obligation to surrender the accused only if they are able to locate the accused in his home. There are no guarantees regarding how Bosnia and Herzegovina or the International Tribunal could be assured that the accused would, in fact, remain in his house. Tr. 12. The Prosecution also notes that there are several outstanding issues in relation to Bosnia and Herzegovina's ability to surrender the accused which are complicated by the new political structures after the Dayton Peace Agreement and the recent elections in the region. *Id.* Finally, the Prosecution points to the inability of the authorities to arrest the co-accused Zejnil Delalić in Bosnia and Herzegovina and their failure to execute their own arrest warrant against the accused in 1992. RP D1260. Thus the Prosecution requests that,

before reliance is placed on the guarantee, an official representative from the Republic of Bosnia and Herzegovina should be heard in open court. Tr. 12.

16. In relation to the accused's proposal to stay in the Netherlands if released, the Prosecution notes that the Dutch Government has not been heard on this issue but that, in regard to the co-accused Zejnil Delalić, the Dutch Government indicated that the accused would have to apply for a permit to remain in the Netherlands. Thus the Prosecution argues that it is not clear that, were the accused to be released to the Netherlands, he could remain in the country to await his trial.

17. In its Response, the Prosecution challenges the assertion of the Defence that there is no risk of flight because the accused voluntarily surrendered himself to the Bosnian authorities. The Prosecution argues that there is indeed a risk of flight because although the accused surrendered himself to the authorities of the Republic of Bosnia and Herzegovina immediately after an oral summons from the police, this occurred six weeks after the delivery of the Indictment and the arrest warrant to the Bosnian authorities. RP D1259. In addition, the accused contested his extradition to the International Tribunal in the Supreme Court of Bosnia and Herzegovina, claiming that he was not the person named in the Indictment and arrest warrant. RP D1258. According to the Prosecution these factors cast doubt on the accused's willingness to accept "his responsibilities towards the [International] Tribunal". RP D1258. Also mentioned by the Prosecution as factors increasing the likelihood of flight are the lengthy prison sentence which could be imposed if the accused were to be convicted and the relative ease with which an accused could flee and not reappear. *Id.*

(c) Danger to victims, witnesses or any other person

18. The Prosecution asserts that it has serious concerns about the potential for the accused to interfere with victims, witnesses and others. The authorities of the Republic of Bosnia and Herzegovina cannot, according to the Prosecution, guarantee that the accused, if released, would not interfere with victims, witnesses and other relevant persons. RP D1258. In support of this position the Prosecution points to the

fact that the accused was convicted of murder in 1994 by a military court in Bosnia and Herzegovina. RP D1258-1257. A copy of that judgment and the confirming judgment of the Supreme Court of Bosnia and Herzegovina were submitted. RP D1256-1233. The Prosecution also relies on the fact that the Indictment alleges that the accused personally participated in numerous horrific acts and that the accused has proposed to return to the location where those events allegedly occurred. Finally, the Prosecution notes that the mere ability of the accused to contact witnesses, either directly or indirectly, could easily unnerve the witnesses and may affect their willingness to testify in this case as well as other cases. RP D1257.

C. Findings

19. The Trial Chamber finds that the Defence has failed to fulfil the requirements for the provisional release of the accused. Each of the requirements will be addressed, although the failure to fulfil any one requirement is sufficient for the Trial Chamber to deny the request for provisional release. It should be noted that if the medical concerns raised by the accused during the Hearing are substantiated and surgery is required, the accused is entitled, in accordance with Rule 31 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, to be transferred to a hospital. In this case, however, the accused is not released but remains under the jurisdiction and control of the International Tribunal.

1. Exceptional circumstances

20. Sub-rule 65(B) requires that in order to qualify for provisional release the accused must show exceptional circumstances. As explained in the *Delalić Decision*, although international instruments regard pre-trial detention, in general, as an exception, the International Tribunal's shifting of the burden to the accused and the requirement that he show exceptional circumstances to qualify for provisional release are justified by the extreme gravity of the offences with which persons before the International Tribunal are charged and the unique circumstances under which the

International Tribunal operates. *Delalić Decision* at 11-12. As such, the argument raised by the Defence during the Hearing that the requirement for exceptional circumstances should not be applied because it contravenes the position of international instruments is not persuasive.

21. The Trial Chamber in the *Delalić Decision* discussed the factors which it considers in determining whether an accused has established exceptional circumstances. In this regard the Trial Chamber stated that it “looks to determine whether there is reasonable suspicion that he committed the crime or crimes as charged, his alleged role in the said crime or crimes, and the length of the accused’s detention”. *Delalić Decision* at 12. The parameters of these three factors are also discussed in that Decision. *Id.* at 13-16.

22. Applying these factors to the case before it the Trial Chamber finds that the Defence has failed to establish exceptional circumstances. First, there is reasonable suspicion as defined in the *Delalić Decision* at 13 that the accused committed the crimes charged. The Indictment and supporting material were found by the confirming Judge to provide “reasonable grounds for believing” that the accused committed the crimes alleged, as required by Sub-rule 47(A), and no material disputing this evidence was submitted by the Defence.

23. Second, in regard to the role of the accused in the crimes alleged, the accused is charged with both command responsibility for, and individual participation in, many of the serious violations of international humanitarian law described in the Indictment including murder, torture and rape. Thus, if proven, the accused would have a significant role in the crimes charged.

24. Finally, although the accused has been separated from his family for much of the last four years, this is primarily a result of his military activities and time spent in prison for his murder conviction in Bosnia and Herzegovina. The accused has been in the custody of the International Tribunal for four months. Under the circumstances, this period of detention does not appear to be unreasonable. Thus, according to the

factors enunciated in the *Delalić Decision*, no exceptional circumstances have been established.

2. Risk of flight

25. The Defence has also failed to establish that there is no risk of flight. As discussed above, and more extensively in the *Delalić Decision*, the burden of proving the requisite elements for provisional release rests on the Defence. Thus the Defence's position that it is incumbent on the Prosecution to establish that there is a risk of flight is rejected.

26. The most convincing argument put forward by the Defence to establish that there is no risk of flight is the guarantee provided by the Republic of Bosnia and Herzegovina. However, as discussed in the *Delalić Decision*, although the International Tribunal greatly appreciates the cooperation of the Bosnian authorities and does not doubt that they would do their utmost to facilitate the return of the accused to the International Tribunal if released, the difficulties in actually implementing this obligation are, for these purposes, overwhelming. The other arguments put forward by the Defence, such as the accused's voluntary surrender to the authorities, are not sufficient to establish that the accused would return for trial if released. Relevant in this regard is the fact that the accused challenged his extradition to the International Tribunal by claiming that he was not the individual named in the Indictment and arrest warrant and the length of the potential sentence which the accused could receive if convicted of the crimes charged.

3. Danger to victims, witnesses or any other person

27. As discussed in the *Delalić Decision*, although this Trial Chamber does not assume that every individual charged with a crime before the International Tribunal will, if released, present a danger to victims, witnesses or others, Sub-rule 65(B) places the burden of demonstrating the absence of these factors on the Defence. Under this standard the Defence has failed to establish that, if released, the accused

would not pose a danger to victims, witnesses or others. Relevant to this determination is the fact that the accused wishes, upon his release, to return to the location where the alleged crimes took place. In addition, the accused is a convicted murderer and, therefore, his mere presence in the vicinity of victims and witnesses may have a more substantial impact on them and on their willingness to cooperate with the International Tribunal, than may be the case for other accused. The Defence argument that the accused does not know where the witnesses or their relatives are located fails to alleviate this concern.

4. Consultation with the host country

28. In view of the above findings, the fact that the host country has not been consulted with respect to this particular accused does not affect the determination of the Trial Chamber.

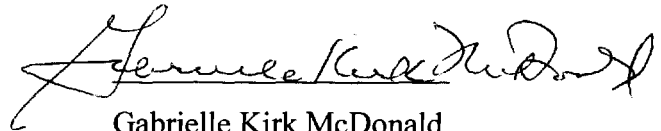
III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence, and

PURSUANT TO RULE 65,

HEREBY DENIES the Motion for Provisional Release.

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



Gabrielle Kirk McDonald

Presiding Judge

Dated this twenty-fourth day of October 1996

At The Hague

The Netherlands

[Seal of the Tribunal]