



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-95-14/1-T

Date: 23 January 1998

English

Original: French

IN THE TRIAL CHAMBER

Before: Judge Almiro Simões Rodrigues, Presiding
Judge Rafael Nieto Navia
Judge Lal Chand Vohrah

Registrar: Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of: 23 January 1998

THE PROSECUTOR

v.

ZLATKO ALEKSOVSKI

DECISION DENYING A REQUEST FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Anura Meddegoda
Mr. Michele Marchesiello

Defence Counsel:

Mr. Goran Mikuličić
Mr. Srdan Joka

THE TRIAL CHAMBER

CONSIDERING the oral motion presented by Defence Counsel on 6 January 1998 for the provisional release of the accused,

CONSIDERING the response of the Prosecutor,

PURSUANT to Sub-rule 65(B) of the Rules of Procedure and Evidence,

RENDERS THIS DECISION.

I - PROCEDURAL BACKGROUND

Basing its request on Rule 65 of the Rules of Procedure and Evidence, on 6 January 1998, the Defence presented an oral motion for the provisional release of the accused Zlatko Aleksovski.

The Defence concluded that all the conditions justifying the provisional release of the accused have been satisfied:

- the length of the detention, the health of the accused during that detention, the living conditions of his family and the good behaviour of the accused constitute exceptional circumstances;
- in a letter of 18 July 1996, the host country declared that it would defer to the decisions of the Tribunal and would do everything necessary to implement them;
- the accused promises to appear for trial and offers to surrender his passport as a guarantee;
- the accused has never posed a threat to the victims and will, if released, not pose a danger to them, especially since he will be residing on the territory of the Republic of Croatia;

After having reviewed the arguments in the motion, the Prosecution concluded that:

- Rule 65 of the Rules applies only before the commencement of the trial and that since the trial has already commenced, the rule cannot apply;
- furthermore, the Defence must prove the facts on which its motion is based and which, in its opinion, allow the conditions set forth in Sub-rule 65(B) to be satisfied; since it has not succeeded in so doing, the motion must be denied.

II - DISCUSSION

Two questions must be discussed:

- the procedural timeliness of the motion and
- the verification of the criteria set forth in Sub-rule 65(B) of the Rules.

1. The procedural timeliness

According to the Prosecution, Sub-rule 65(B) does not apply in this case because the rule is applicable only prior to the commencement of the trial. Since the trial began on 6 January 1998, the rule does not apply at this stage of the proceedings.

The Prosecutor bases her opinion on the fact that the rule has been placed in the fifth part of the Rules which deal with pre-trial proceedings. Had the Rules intended to provide for the possibility of provisional release once the trial has commenced, such a possibility would have been placed in part six which deals with proceedings before trial chambers.

The Trial Chamber does not agree with that conclusion and finds the argument therein neither cohesive nor decisive.

If, in fact, the rule were placed in the sixth part of the Rules, one could, for the same reasons, claim that a request for provisional release can be presented only once the trial has commenced (proceedings before trial chambers) and not before (pre-trial proceedings).

Conversely, the justification for provisional release must be seen as emanating from or as the corollary of the principle of the presumption of innocence. Thus, provisional release must accord with the presumption of innocence, and this principle applies until such time as the final decision has been taken.

In any case, in respect of questions of individual freedom, the Trial Chamber considers that an accused must be able to turn to it at any time.

The request for provisional release may therefore be presented throughout the duration of the preventive detention and until such time as the final decision has been taken. It may be granted as soon as the criteria and conditions provided in Sub-rule 65(B) have been satisfied.

The Defence motion is therefore admissible in respect of form.

2. Verification of the criteria and conditions

The Rules of Procedure and Evidence which were adopted pursuant to Article 15 of the Statute of the Tribunal provide for the provisional release of the accused in exceptional circumstances.

More specifically, Sub-rule 65(B) states that "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".

As suggested by the words "exceptional circumstances" and "only if it is satisfied ...", this rule must be very strictly applied.

The case-law of the Tribunal which is well known¹ has taken this approach. The only decision granting such a motion², "for humanitarian reasons", confirms and supports the assertion.

¹ *Inter alia* Case. no. IT-96-20-T: *The Prosecutor v. Djordje Djukić*, TC I, 24 April 1996; Case no. IT-95-14-T: *The Prosecutor v. Tihomir Blaškić*, TC I, 25 April 1996 and 20 December 1996; Case no. IT-96-21-T: *The Prosecutor v. Zejnir Delalić et al*; and *The Prosecutor v. Delić*, TC II, 25 September 1996 and 24 October 1997.

² Case no. IT-96-20-T: *The Prosecutor v. Djordje Djukić*, TC I, 24 April 1996.

The Trial Chamber bears in mind that human beings constitute the essential foundation of the entire social structure in modern societies within the scope of humanist philosophy. For this reason, the structure of a system of modern criminal procedure must have as its objective the defence of the dignity of the individual.

However, if such an objective cannot be compromised in any manner, the same does not hold for other principles which must also be protected by the system of criminal procedure: the attainment of Justice and the discovery of truth; the preservation of the rights, liberties and guarantees of citizens; the promotion of the values of security, *inter alia* of the very security of the application of law and the preservation of the values of effectiveness and economy (that is, the promotion of simplification and expeditious proceedings).

The difficulty therefore is to restrict certain values so as to permit the achievement of others. Another way of ensuring equilibrium is to have provided in law the conditions of necessity and the exceptional character of the preventive detention.

Moreover, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the Council of Europe³ have provided for the strictly exceptional, non-binding and subsidiary character of detention prior to sentencing.

Recourse to this measure must always be subject to the principles of necessity, suitability and proportionality.

These principles are merely the emanation of the presumption of innocence which requires that any limits placed on the freedom of the accused prior to the final sentence must be not only socially necessary but also tolerable.

Nonetheless, modern criminal procedures have also taken into account serious criminality and its impact on public opinion. This includes violations of humanitarian law.

It is in the light of what has just been affirmed that the Rules state that only "in exceptional circumstances" may the Trial Chamber order the provisional release of the accused. 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. For this reason, the Rules subordinate provisional release to the demonstration of proof that "exceptional circumstances" exist.⁴

Several plausible reasons exist for suspecting that the accused committed the serious crimes ascribed to him. In fact, the confirming Judge considered that the indictment and the supporting materials permitted "reasonable support" for such suspicion.

On 10 November 1995, Zlatko Aleksovski was, in fact, accused of having committed grave breaches of the Geneva Conventions and the Laws or Customs of War. The accusation was reviewed and confirmed by the International Tribunal which issued a warrant of arrest. Aleksovski was arrested in Croatia on 8 June 1996, transferred to The Hague on 28 April 1997 and brought before the Tribunal on 29 April 1997. His trial began on 6 January 1998. Before the commencement of the trial, he had therefore spent 577 days in the Detention Unit in The Hague.

³ Recommendation no. 82 (80) of 27 June 1980 and resolution (65) 11, of 9 April 1965.

⁴ Case no. IT-95-14-T: *The Prosecutor v. Tihomir Blaškić*, TC I, Decision of 25 April 1996, p. 3.

For the Trial Chamber to be able to evaluate and to reach a decision on provisional release, Sub-rule 65(B) sets forth four conditions, three substantive criteria and one procedural criterion. "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 detained"⁵.

The Defence alleges certain facts in order to respond to the criteria mentioned in Sub-rule 65(B) of the Rules but does not succeed in proving them. However, even assuming that it had proved them, they would not have been appropriate or sufficient to satisfy either the notion of "exceptional circumstances" or the other criteria.

The above holds because the acts which have been alleged but not proved are normal and characteristic of the condition of detention itself. They are part of all the expected and foreseeable events in such a situation and under normal circumstances whether this is understood statistically, ontologically or ethically.

In fact, the length of the preventive detention is not at all excessive in view of the crimes ascribed to the accused; his physical condition has not been demonstrated to be so serious as to justify provisional release⁶; moreover, the effects of his detention on the living conditions of his family are not unusual and the behaviour of the accused in prison need not be seriously taken into account for provisional release.

The Trial Chamber considers that the alleged facts do not constitute the exceptional circumstances as stipulated in the Rules.

Therefore, since that condition has not been verified, it is not necessary to review the other criteria despite the fact that they were the subject of an analysis by the Prosecution.

⁵ Case no. IT-96-21-T: *The Prosecutor v. Zejnir Delalić*, Decision of 15 November 1996, p. 3.

⁶ The Trial Chamber to date has, in fact, ordered such a measure only in the case of an incurable illness and for "humanitarian reasons".

III - DISPOSITION

FOR THE FOREGOING REASONS,

The Trial Chamber

States that the motion for the provisional release of the accused Aleksovski is admissible,

Declares that it is substantively not well founded and therefore denies it.

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

Done this twenty-third day of January 1998

At The Hague

The Netherlands

(signed)

Judge Almiro Simões Rodrigues
Presiding Judge of the Trial Chamber

SEAL OF THE TRIBUNAL