



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-01-47-PT
Date: 19 December 2001
Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Florence Mumba
Judge Carmel A. Agius

Registrar: Mr. Hans Holthuis

Decision of: 19 December 2001

THE PROSECUTOR

v.

**ENVER HADŽIHASANOVIĆ
MEHMED ALAGIĆ
AMIR KUBURA**

**DECISION GRANTING PROVISIONAL RELEASE
TO ENVER HADŽIHASANOVIĆ**

Counsel for the Prosecutor:

**Ms. Jocelyne Bodson
Mr. Ekkehard Withopf
Ms. Cynthia Fairweather**

Counsel for the Defence:

**Ms. Edina Rešidović for Enver Hadžihasanović
Ms. Vasvija Vidović and Mr. John Jones for Mehmed Alagić
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura**

Gouvernement of Bosnia and Herzegovina:

**Mr. Sahbaz Dzihanovic, Deputy Minister of Justice
Mr. Tomislav Limov, Deputy Minister of Interior**

I. Procedural background

Pursuant to Rule 65 of the Rules of Procedure and Evidence of the Tribunal (hereinafter “the Rules”), the accused Enver Hadžihasanović filed a “Motion for Provisional Release of Enver Hadžihasanović” on 16 November 2001 (hereinafter “the Motion”). Enver Hadžihasanović is jointly charged with Mehmed Alagić and Amir Kubura on the basis of their responsibility as military commanders (7.3 of the Statute) with war crimes other than genocide and crimes against humanity allegedly committed in central Bosnia between 1993 and 1994.

The Prosecutor filed her Response to the Motion on 29 November 2001 in which she objected to the granting of provisional release (hereinafter the “Response”), without applying for a stay of the decision under Rule 65(E).

The host country, heard under Rule 65(B), did not object to the procedure for possible provisional release, but refrained from commenting on the merits of the Application.

The Trial Chamber heard the oral arguments of the parties and the submissions of the representatives of the Government of Bosnia and Herzegovina (hereinafter “BiH”) on 12 and 13 December 2001.

II. Applicable law

1. Rule 65 sets 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 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 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.*

2. Article 21(3) of the Statute of the Tribunal adopted by Security Council resolution 827 of 25 May 1993 (hereinafter “the 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 (hereinafter “the ICCPR”) of 19 December 1966 and Article 6 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter “the ECHR”).

3. Furthermore, Article 9(3) of the ICCPR emphasises *inter alia* that: “it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial”. Article 5 (3) of the ECHR provides *inter alia* that: “everyone arrested or detained...shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial,”

4. The underlying additional reasons for the application of these human rights instruments are

a) - as regards the ICCPR:

the following parts of the former Yugoslavia are today United Nations member States: Bosnia and Herzegovina, Croatia, FYROM, Slovenia, FRYugoslavia. Amongst 147 States, they are parties to the ICCPR;

A tribunal of the United Nations, the ICTY is committed to the standards of the ICCPR, and the inhabitants of member States of the United Nations enjoy the fundamental freedoms within the framework of a United Nations court;

b) – as regards the ECHR:

Members States of the Council of Europe and parties to the ECHR are Croatia, Slovenia and the former Yugoslav Republic of Macedonia. Other parts of the former Yugoslavia have candidate status within the Council of Europe which represents 43 Pan-European countries, 41 of which have ratified the ECHR;

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

international level. Additionally, a distinction cannot be drawn between inhabitants of States of the former Yugoslavia, regardless of whether they are members States of the Council of Europe.

6. Rule 65 must therefore be read in the light of the ICCPR and the ECHR.

III. Application of the law

7. The application of the aforementioned principles stipulates that *de jure* pre-trial detention should be the exception and not the rule as regards prosecution before an international court. Since unlike national courts the International Tribunal does not have its own coercive powers to enforce its decisions, pre-trial detention *de facto* seems to be rather the rule at ICTY. Additionally, one must take into account the fact that the full name of the ICTY mentions “serious” crimes only. Nevertheless, Rule 65 allows for provisional release, leaving the aforementioned human rights unchanged but applying them specifically for the purposes of an international criminal court. Any system of mandatory detention on remand is *per se* incompatible with Article 5 (3) of the Convention” (see *Ilijakov v. Bulgaria*, ECtHR, 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*.

8. 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 (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, it must be applied.

9. In its application of these criteria, the Trial Chamber finds it no longer necessary to execute the order for detention on remand pending trial. The Trial Chamber is satisfied that the 17 guarantees offered by the accused and the 7 guarantees offered by the Government of Bosnia and Herzegovina reasonably safeguard the proper conduct of the procedure. It is aware, however, that there will never be a total guarantee that an accused will appear for trial and, if released, will not pose a danger to sources of evidence.

10. The guarantees provided are the outcome of deliberations with the parties. The restrictions imposed on the accused’s personal liberty are, clearly, more stringent than those suggested by the Office of the Prosecutor. In contrast to certain national jurisdictions, the Trial Chamber is not bound

by motions from the Office of the Prosecutor. Conversely, the request of the Defense to order less urgent measures must be rejected. In the circumstances of this case, they would be insufficient.

11. Taking the guarantees into account, the Trial Chamber cannot identify *in concreto* any danger to any kind of evidence. The Prosecutor has even failed to contribute any *indicia* to this test, which never can be assessed *in abstracto* only.

12. The Prosecutor submitted that the use of the word “may” in Rule 65(C) suggests that the Trial Chamber still has a certain degree of discretion when the other prerequisites explicitly mentioned are met. She expressed her view that provisional release, if granted, would send the wrong signal to both the victims of the crimes and the international community and, therefore, that there would be no space for provisional release.

13. The Trial Chamber does not accept this submission. It applies the law and is not mandated to “sending signals”. In the case in point, the question of whether the word “may” must be read as “shall” when all the prerequisites of Rule 65 are met or not can remain open. Normally the prerequisites for any deprivation of liberty should be established by law exclusively (see e.g. Statute of the International Criminal Court of 17 July 1998, Article 60(2)).

14. The Trial Chamber must take into account that the accused surrendered voluntarily to the ICTY. The existence of a warrant of arrest casts no doubt on the surrender’s being regarded as voluntary. The Prosecutor failed to establish a factual basis for successfully contesting the submissions of the accused. The Trial Chamber is satisfied that the accused did not only waive his right to surrender procedure in Bosnia and Herzegovina (simplified surrender). The Prosecution did not answer the question of the accused as to what else he should have done to show his willingness to stand trial before the International Tribunal.

15. In addition, the high level of co-operation with the ICTY in the past must be taken into account. The fact that, when being himself accused, Mr. Hadžihasanović made use of his right to remain silent - until now - as an accused cannot be held against him.

16. Bearing in mind the conditions imposed and the guarantees provided, the Chamber need not examine the next level, i.e., the question of proportionality in the narrow sense, balancing, *inter alia*, the weight of the crime and the weight of the suspicion against the period of detention already spent or to be expected.

IV. Disposition

THE TRIAL CHAMBER HEREBY GRANTS the Motion AND ORDERS the provisional release of Enver Hadžihasanović on 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 officials of the BiH Government (whose names shall be provided in advance) and who shall accompany the Accused for the remainder of their travel to BiH and to his respective place of residence, Sarajevo.
3. On his return flight, the accused shall be accompanied by a designated official of BiH (or by such other designated officials as the Trial Chamber may 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; the Dutch authorities shall then transport the accused back to the UNDU.
4. During the period of his provisional release, the accused shall abide by the following conditions, and the authorities of BiH shall ensure compliance with such conditions:
 - a) Within 3 days of his arrival, to report the address where the accused will be staying to the Registrar of the Tribunal and to indicate any change of address to the Registrar within 3 days of such change;
 - b) To surrender his passport to the Government of BiH;
 - c) To remain within the confines of Sarajevo;
 - d) To report once a week to the local police in Sarajevo;
 - e) To consent to having officials of BiH verify his presence with the local police and to occasional, unannounced visits to the accused by these officials or by a person designated by the Registrar of the Tribunal;
 - f) Not to have any contacts with any other co-accused in the case;
 - g) Not to have any contacts whatsoever or in anyway interfere with victims or potential witnesses or otherwise interfere in any way with the proceedings or the administration of justice;
 - h) Not to seek access to documents and archives;

- i) Not to discuss his case with anyone, including the media, other than his counsel and immediate members of his family;
- j) Not to occupy any official position in BiH;
- k) To report to the Registrar of the Tribunal, within 3 days of the start of employment, the position occupied, as well as the name and address of the employer;
- l) To comply strictly with any requirements of the authorities of the BiH necessary to enable them to comply with their obligations under the order for provisional release and their guarantees;
- m) To return to the Tribunal at such time and on such date as the Trial Chamber may order;
- n) To comply strictly with any order of the Trial Chamber varying the terms of, or terminating, the provisional release of the accused,

REQUIRES the Government of Bosnia and Herzegovina to assume responsibility for:

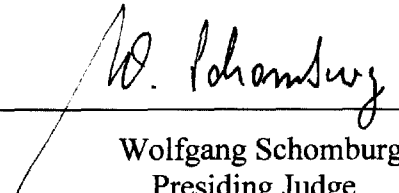
- a) Transport expenses of the accused from Schiphol airport to his place of residence and back;
- b) The personal security and safety of the accused while on provisional release;
- c) Reporting immediately to the Registrar of the Tribunal the substance of any threats to the security of the accused, including full reports of investigations related to such threats;
- d) 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;
- e) Submitting a written report to the Registrar of the Tribunal every month as to the presence of the accused and his compliance with the terms of this Order;
- f) Immediately detaining the accused should he breach any of the terms and conditions of his provisional release and reporting immediately any such breach to the Trial Chamber;
- g) Respecting the primacy of the Tribunal in relation to any existing or future proceedings in BiH concerning the accused;

INSTRUCTS the Registrar of the Tribunal to consult with the Ministry of Justice of the Netherlands and the authorities of BiH as to the practical arrangements for the release of the accused,

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

- a) to hold the accused in custody for any time he will spend in transit at the airport;
- b) to detain and arrest the accused pending his return to the United Nations Detention Unit, should he attempt to escape.

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



Wolfgang Schomburg
Presiding Judge

Done this nineteenth day of December 2001
At The Hague,
The Netherlands.

[Seal of the Tribunal]