



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-01-46-PT

Date: 20 February 2002

Original: English

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. Ćedo Prodanović

I- Background

1. 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 seized 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

2. 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 Granić, 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

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.

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 so⁴;
- 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 Granić put forward submissions.⁶

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.

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

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 Delalić, Prosecutor v. Zejnil Delalić 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 Delić, 24 October 1996. See also generally: Decision rejecting a request for*

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

provisional release, Prosecutor v. Tihomir Blaškić, 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 Kupreškić, Mirjan Kupreškić, Drago Josipović and Dragan Papić*, Prosecutor v. Kupreškić 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. Djukić, Case No. IT-96-20-T, 24 April 1996; *Decision on provisional release of the accused*, Prosecutor v. Simić et al., Case No. IT-95-9-PT, 26 March 1998; *Decision on the motion of defence counsel for Drago Josipović (request for permission to attend funeral)*, Prosecution v. Kupreškić et al., Case No. IT-95-16-T, 6 May 1999.

¹⁰ See for example: *Decision on motion by Radoslav Brđanin for provisional release*, Prosecutor v. Brđanin et al., Case No. IT-99-36-PT, 25 July 2000 (“Brđanin”); *Decision on motion by Momir Talić for provisional release*, Prosecutor v. Brđanin et al., Case No. IT-99-36-PT, 28 March 2001 (“Talić”); *Decision on motion for provisional release of Miroslav Kvočka*, Prosecution v. Kvočka et al., Case No. IT-98-30-PT, 2 February 2000; *Decision on Momčilo 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; *Brđanin*, para. 13; *Talić*, para. 18.

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

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*, 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*.”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 arrested¹⁷ 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.”

¹³ *Decision granting provisional release to Amir Kubura*, Prosecutor v. Enver Hadžihasanović 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 Hadžihasanović 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 Talić for Provisional Release*, Prosecution v. Brđanin 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 Talić (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. Brđanin 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.”

17. Rule 62 of the Rules provides that “[u]pon 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 “[o]nce 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

¹⁸ In the *Decision on Motions by Momir Talić (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. Brđanin 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 Jokić*, 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.

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

²¹ See also as examples of acceptance of this criteria: *Decision on Simo Zarić's application for provisional release*, Prosecution v. Simić et al., Case No. IT-95-9-PT, 4 April 2000; *Decision on Miroslav Tadić's application for provisional release*, Prosecution v. Simić et al., Case No. IT-95-9-PT, 4 April 2000; *Decision on Milan Simić's application for provisional release*, Prosecution v. Simić et al., Case No. IT-95-9-PT, 29 May 2000. *Decision on request for pre-trial provisional release*, Prosecution v. Halilović, Case No. IT-01-48-PT, 13 December 2001; *Decision on Biljana Plavšić's application for provisional release*, Case No. IT-00-39 and 40-PT, 5 September 2001; *Brđanin*; and *Talić*. 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.”

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.

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 *Brđanin*.

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

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. Delalić 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.

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 witnesses³⁰ 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

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.

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[s] 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 [his] 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 Medeckí 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,

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.

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 [him] 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 [Tribunal] 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

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.

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 Miljenić, 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

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.”

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

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.

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.

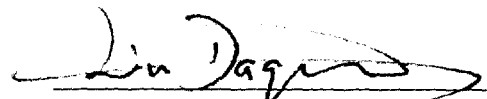
REQUESTS the Dutch authorities to:

- 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]