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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-02-53-PT

Date: 28 March 2002

Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Florence Ndpele Mwachande Mumba
Judge Carmel Agius

Registrar: Mr. Hans Holthuis

Decision of: 28 March 2002

THE PROSECUTOR

v

Vidoje BLAGOJEVIĆ
Dragan OBRENOVIĆ
Dragan JOKIĆ

DECISION ON REQUEST FOR PROVISIONAL RELEASE OF ACCUSED JOKIĆ

The Office of the Prosecutor:
Mr. Peter McCloskey

Counsel for the Accused:
Mr. Michael Karnavas for Vidoje Blagojević
Mr. David Wilson and Mr. Dušan Slijepčević for Dragan Obrenović
Mr. Miodrag Stojanovic and Ms. Cynthia Sinatra for Dragan Jokić

I. PROCEDURAL BACKGROUND

1. Pursuant to Rule 65 of the Rules of Procedure and Evidence of the Tribunal (hereinafter "the Rules"), the Accused Dragan Jokić filed a "Proposal for a Provisional Release from Prison" on 10 January 2002 (hereinafter "the Proposal").

   Major Dragan Jokić is jointly charged with Colonel Vidoje Blagojević and Major Dragan Obrenović. In particular, as a participant in a joint criminal enterprise, the Accused is alleged to be responsible for crimes against humanity and war crimes committed during the fall of Srebrenica in 1995 when he was allegedly Chief of Engineering and Duty Officer of the Zvornik Brigade.

2. On 29 January 2002, the Office of the Prosecutor filed a "Motion to Delay Consideration of Proposal for Provisional Release from Prison for the Defendant Dragan Jokić" (hereinafter "the Motion"), in which the Prosecutor informed the Chamber that the Parties had agreed that consideration of the Proposal should be delayed pending further discussions between them. On 20 February 2002, at a Rule 65*ter* (I) meeting, the Parties agreed to postpone further consideration of the Proposal until after 15 March 2002.

3. The "Prosecution Response to Request for Provisional Release for Accused Jokić" (hereinafter "the Response") was filed on 20 March 2002. It stated that the Prosecution had no objection to the Proposal's being granted as long as several conditions were met.

4. On 21 March 2002, considering that in the determination of the matter it would be of assistance – if necessary – to seek oral clarification on the guarantees provided and to seek additional guarantees from an authorised Representative of the Government of Bosnia and Herzegovina, the Trial Chamber issued an Order to the Representative of the Government of Bosnia and Herzegovina to attend the oral hearing scheduled the same day.

5. On 21 March 2002, the Defence filed a "Reply to Response of Prosecution regarding Motion for Provisional Release" (hereinafter "the Reply"), essentially repeating the arguments set out in the Proposal.

6. The Host country, The Netherlands, did not object to the Proposal on the understanding that if released, the Accused would leave the Netherlands.

7. The Trial Chamber heard the oral arguments of the Parties on 21 March 2002. During the oral hearing the Prosecution confirmed that it had no objections to Jokić's provisional release and asserted that he had voluntarily surrendered to the jurisdiction of the Tribunal and that, even bearing in mind the serious crimes allegedly committed, there is no reason to believe that there is any risk of flight or that, if released, will pose a danger to any victim or witness.

8. On 22 March 2002 the Minister Counsellor of the Bosnia and Herzegovina Presidency Liaison Office in The Hague sent a letter to the International Tribunal in which informed the Trial Chamber that it was impossible for him to attend the oral hearing. In addition, he stressed "*the non-existence of state organs of Bosnia and Herzegovina that could provide conditions for complete and effective implementation of the Trial Chamber's decision*" as opposed to executive powers available in the entities.

II. APPLICABLE LAW

9. Rule 65 of the Rules sets out the basis upon which a Trial Chamber may order provisional release of an accused.

> "*(A) Once detained, an accused may not be released except upon an order of a Chamber.*
> *(B)Release may be ordered by a Trial Chamber only after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.*
> *(C)The Trial Chamber may impose such conditions upon release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others." [...]*

10. 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

of 19 December 1966 (hereinafter "the ICCPR") and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter "the ECHR").

11. 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".

12. These human rights instruments form part of public international law.

13. Additionally, as regards the ICCPR, it must be taken into account that the following parts of the former Yugoslavia are now United Nations member States: Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Slovenia and the Federal Republic of Yugoslavia. Amongst 147 States, they are parties to the ICCPR. As 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.

14. As regards the ECHR, Croatia, Slovenia and the former Yugoslav Republic of Macedonia are member States of the Council of Europe and parties to the ECHR. Other parts of former Yugoslavia have candidate status within the Council of Europe which represents 43 pan-European countries, 41 of which have ratified the ECHR. Based on its application of 10 April 1995, Bosnia and Herzegovina will accede as number 44 in April 2002[1].

15. 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 the inhabitants of States of the former Yugoslavia, regardless of whether they are members States of the Council of Europe.

16. Rule 65 must therefore be read in the light of the ICCPR and ECHR and the relevant jurisprudence.

III. APPLICATION OF THE LAW

17. The application of the aforementioned principles stipulates that, as regards prosecution before an international court, *de jure* pre-trial detention should be the exception and not the rule. Unlike national courts the International Tribunal does not have its own coercive power to enforce its decisions, and for this reason pre-trial detention seems *de facto* to be rather the rule at the ICTY. Additionally, one must take into account the fact that the full name of the ICTY mentions "serious" crimes only. Nevertheless, leaving the aforementioned human rights unchanged but applying them specifically for the purposes of an international criminal court, Rule 65 allows for provisional release. Any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention.[2] In view of this, the Trial Chamber must interpret Rule 65 not in *abstracto* but with regard to the factual basis of the single case and with respect to the concrete situation of the individual applicant.

18. 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, that measure must be applied.

19. In determining the factors relevant to the decision-making process, Trial Chamber I stated recently[3]:

> *"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*

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[1] Decision of CoE Council of Ministres of 22 March 2002.
[2] See *Ilijkov v. Bulgaria*, Application No. 33977/96, EcourtHR, Decision of 26 July 2001, par. 84. See http://hudoc.echr.coe.int
[3] *Order on Motion for Provisional Release*, Prosecutor v. Ademi, Case No. IT-01-46-PT, 20 February 2002, pars. 24-27.

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.

Second, the fact that the Tribunal's jurisdiction is limited to serious offences ("serious violations of international humanitarian law") means that the accused may expect to receive, if convicted, a sentence that may be of considerable length. This very fact could mean that an accused might be more likely to abscond or obstruct the course of justice in other ways.

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 case 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 very lengthy. This issue may need to be given particular attention in view of the provisions of Article 9(3) of the ICPR and Article 5(3) of the ECHR. This is all the more true, since in the system in the Tribunal, unlike generally in 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 might need to be given more weight in considering whether the accused in question should be provisionally released.

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

20. In the present case, the first issue to be raised is whether the Trial Chamber is bound by the motions of the Parties or the assessment of the Office of the Prosecutor.

21. The Trial Chamber is aware that there are different approaches as to whether a judge responsible for depriving a person of his liberty is bound by motions or opinions of the public prosecutor. In Germany, for instance, we found the concept of a freedom judge during the pre-trial phase controlling only the application of law by the Prosecutor, and in so doing protecting the rights of the individual. This concept, *inter alia*, is expressly stated in Section 120 of the German Code of Criminal Procedure:

"(1) The warrant of arrest shall be revoked as soon as the conditions for remand detention no longer exist, or if the continued remand detention would be disproportionate to the importance of the case or to anticipated penalty or measure of reform and prevention. (.....) (3) The warrant of arrest shall also be revoked if the public prosecution office makes the relevant application before the public charges have been preferred. Simultaneously with this application, the public prosecution office may order the release of the accused".[4]

[4] Section 120 of the German Code of Criminal Procedure, Federal Law Gazette III/FNA 312-2.

It follows that under a system of this kind a judge has no discretion during the pre-trial phase and is therefore bound by the decision of the prosecution.

22. As opposed to this the aforementioned Rule 65 of the ICTY Rules envisages the possibility of an Accused being released by a decision of the Trial Chamber "*only if it is satisfied*" (emphasis added) with the prerequisites expressly stated. Consequently the Trial Chamber must make its own assessment and take decisions based on the arguments and documents provided by the Parties. The Trial Chamber is not bound by the motions of the Parties or the assessment of the Office of the Prosecutor.

23. The final assessment can be based only on all the contributions and guarantees of the Accused and all the guarantees provided by the States taken as a whole.

24. The guarantees have to be provided "*by the State to which the accused seeks to be released*" (emphasis added).

25. The Accused seeks to be released to the Republika Srpska which has to be regarded only as an entity within the State of Bosnia and Herzegovina.

26. Under the Constitution of Bosnia and Herzegovina, only Bosnia and Herzegovina as such is a State under international law. This appears from the text of Article I.1:

> "*1. **Continuation**. The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina", shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations*".

Moreover Article I.3 of the Bosnia and Herzegovina Constitution provides that Bosnia and Herzegovina shall consist of two "entities", namely the Federation of Bosnia and Herzegovina and the Republika Srpska. Nowhere the term "state" is used in that Constitution in respect of entities.

Consequently, there is clearly no basis in the Bosnia and Herzegovina Constitution for calling Republika Srpska a State.[5]

27. This concept was established in a decision of the Constitutional Court of Bosnia and Herzegovina which, in declaring some provisions or part of provisions of the Constitution of Republika Srpska to be in contradiction with the Constitution of Bosnia and Herzegovina, stated:

> "(...) the Entities are subject to the sovereignty of Bosnia and Herzegovina. (...) the Constitution of Bosnia and Herzegovina does not give room for any "sovereignty" of the Entities or a right of "self-organization" based on the idea of "territorial separation". (...) In the same way the "governmental functions", according to Article III.3.a) of the Constitution of Bosnia and Herzegovina, are thereby allocated either to the common institutions or to the Entities so that their powers are in no way an expression of their statehood, but are derived from this allocation of powers through the Constitution of Bosnia and Herzegovina".[6]

28. The Trial Chamber is aware of former decisions of the International Tribunal as well as of the arguments put forward by the Minister Counsellor of the Bosnia and Herzegovina Presidency Liaison Office in the letter mentioned above (see *supra* par. 8). Furthermore, the Trial Chamber is also aware of the practical difficulties arising from the gap between the constitutional and factual situations, especially as regards the effective implementation of a Trial Chamber decision.

29. Nevertheless it is not for the Trial Chamber to interfere in the intra-state matters of Bosnia and Herzegovina. It is for the Government of Bosnia and Herzegovina to elaborate internally a *modus procedendi* which provides the International Tribunal with the necessary and reliable guarantees of a State in the sense of Rule 65.

30. As regards, the content of the guarantees to be provided by the State, the Trial Chamber wishes to draw the attention of the Parties to guarantees given in former cases which are to be considered as the minimum to be expected, notwithstanding further specific conditions arising from the individual case and its development.

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[5] Constitutional Court of Bosnia and Herzegovina, Decision of 1 July 2000 in the Case no. U 5/98-III, Concurring Opinion by Judge Hans Danelius, in HRLJ 31 October 2001, Vol. 22 No. 1-4, pag. 127.
[6] *Ibidem*, par. 29-33.

31. In particular the State should 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 any such breach immediately to the Trial Chamber;
g) respecting the primacy of the Tribunal in relation to any existing or future proceedings in Bosnia and Herzegovina concerning the accused.

32. On the basis of the above considerations, the Trial Chamber, without going into further details of other prerequisites of Rule 65, is not satisfied with the guarantees provided.

IV. DISPOSITION

FOR THE FOREGOING REASONS, the Trial Chamber

PURSUANT to Rule 65 of the Rules

HEREBY DENIES the Motion for Provisional Release of Dragan Jokić.

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

Done the twenty-eighth day of March 2002
At The Hague
The Netherlands

Wolfgang Schomburg
Presiding Judge

[Seal of the Tribunal]