UNITED NATIONS

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-02-60-PT

Date: 22 July 2002

Original: ENGLISH

IN TRIAL CHAMBER II

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

Registrar: **Mr. Hans Holthuis**

Decision of: **22 July 2002**

PROSECUTOR

v.

VIDOJE BLAGOJEVIĆ
DRAGAN OBRENOVIĆ
DRAGAN JOKIĆ
MOMIR NIKOLIĆ

DECISION ON DRAGAN OBRENOVIĆ'S APPLICATION FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Mr. Michael Karnavas, for Vidoje Blagojević
Mr. David Wilson, Mr Dušan Slijepčević, for Dragan Obrenović
Mr. Miodrag Stojanović, Ms. Cynthia Sinatra for Dragan Jokić
Mr. Veselin Londrović, Mr. Stephan Kirsch for Momir Nikolić

I. INTRODUCTION

A. Preliminary matters

1. Trial Chamber II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is seised of a motion entitled "Accused Obrenović's Motion for Provisional Release" ("Motion"), filed by the Defence for Dragan Obrenović ("Defence") on 11 June 2002 in which the accused Obrenović seeks to be provisionally released to his family home in Zvornik in the Republika Srpska.

2. The Office of the Prosecutor ("Prosecution") filed its response to the Motion on 25 June 2002, requesting that the Trial Chamber deny Mr. Obrenović's application for provisional release.

3. On 12 July 2002, the Prosecution filed a confidential "Motion to Include Partial Witness Statement in Response to Obrenović's Motion for Provisional Release".

4. On 18 July 2002, the Defence for Dragan Obrenović filed a confidential response to the Prosecution's Motion to Include Partial Witness Statement in Response to Obrenović Motion for Provisional Release.

5. On 19 July 2002 the Defence filed a personal guarantee of Dragan Obrenović signed by the accused and certain other confidential material in support of the application for provisional release.

6. An oral hearing on this motion was held on 19 July 2002 during which the parties were given an opportunity to address additional arguments to the Trial Chamber. Mr. Jovicić, a representative of the government of the Republika Srpska, and Mr. Lukovać, representing the Presidency of Bosnia and Herzegovina were present at the hearing as *amici curiae* to assist the Trial Chamber.

7. The accused Dragan Obrenović is jointly charged with the accused Vidoje Blagojević, Dragan Jokić and Momir Nikolić for crimes alleged to have been committed against the Bosnian Muslim population of the Srebrenica enclave in the summer and autumn of 1995. He was arrested on 15 April 2001 and entered an initial appearance on 18 April 2001, at which time he pleaded not guilty to all the charges against him.

B. Arguments of the parties

1. Arguments of the Defence

8. The Defence argues that, based upon the jurisprudence of this Tribunal, the accused's history of cooperation with the Prosecution, the guarantees provided by the government of the Republika Srpska and the accused's own guarantee that he will re-appear for trial, the Trial Chamber should grant Mr. Obrenović's request for provisional release.

9. The Defence submits that, prior to the confirmation of the indictment against him, the accused cooperated with the Prosecution by appearing, as requested for an interview and answering all the questions put to him. The Defence further submits that, following the confirmation of the indictment against him, the accused "was not provided an opportunity to self-surrender"; rather he was arrested, without incident near his home in the city of Zvornik.

10. The Defence observes that, as of the date of the filing of the motion, no date had been set for trial. The Defence further contends that it is likely that other individuals, who have either been publicly charged or may be charged in a sealed indictment for crimes arising out of the same events underlying the charges in the Amended Joinder Indictment will be joined for trial with the accused.

11. The accused has a wife and child in addition to other family relations in Zvornik. If provisionally released, the accused would live in Zvornik with his immediate family and assist in supporting them financially.

12. The Defence relies on this Trial Chamber's statement of the applicable law on provisional release as set forth in its decision on Dragan Jokić's application for provisional release. In particular, the Defence relies on the Trial Chamber's observation that pre-trial detention should be the exception and not the rule. The Defence submits that, according to the standards previously set forth by this Trial Chamber, the accused Obrenović is entitled to be provisionally released.

13. In reviewing the jurisprudence of the International Tribunal, the Defence submits that a factor generally considered to be important to a determination of this issue is whether the accused voluntarily surrendered to the International Tribunal. The Defence argues that while Mr. Obrenović in a meeting with the accused, prior to the confirmation of the indictment against him, had expressed his willingness to cooperate with the Prosecution, he was not given an opportunity to surrender. Rather, he was arrested in the vicinity of his home on 15 April 2001. The Defence submits that, considering these circumstances, and for the purposes of determining the application on provisional release, no adverse inferences should be drawn from the fact that the accused did not voluntarily surrender.

14. The Defence submits that the likely length of pre-trial detention is another factor which is taken into account in determining applications for provisional release. In this regard, the Defence

re-emphasises that there is as yet, no date set for the commencement of trial in this case. In its submission it is unlikely that a trial will begin before 2003, taking into account the fact that any number of potential co-accused may yet be arrested and joined to the Amended Joinder Indictment.

15. The Defence submits that the Trial Chamber should also consider Mr. Obrenović's willingness to cooperate with the Prosecution, not only at the pre-arrest stage (as discussed above), but subsequently (i.e. the Defence have entered into a reciprocal discovery agreement with the Prosecution, the Defence has expressed its willingness to stipulate to substantial portions of the Prosecution's case).

16. It is argued that the fact that Mr. Obrenović is charged with complicity to commit genocide, a very grave offence, should be no obstacle to his provisional release. In this regard, the Defence note that Biljana Plavsić, who is also charged with genocide has been provisionally released.

17. The Defence argues that Mr. Obrenović, if released, would re-appear for trial. It is submitted that, to date, Mr. Obrenović has voluntarily complied with all requests from the Prosecution, that he has a stable home life to which he wishes to return, that he recognises the futility of flight. Moreover, it is argued that the government of the Republika Srpska has undertaken to monitor Mr. Obrenović's movements whilst on provisional release and has provided a guarantee that he will return for any future appearances before the Tribunal. The Defence submits that the accused, if provisionally released, will not pose a danger to others as he has no prior criminal record and no history of behaving improperly towards witnesses or representatives of the Prosecution; rather his record has been one of cooperation with the Prosecution.

18. Attached to the motion are (i) a personal guarantee signed by the accused Obrenović that, if provisionally released, he will abide by all the terms and conditions of that release; (ii) the guarantee of the government of the Republika Srpska that its representatives will monitor Mr. Obrenović's provisional release and ensure that he complies with the terms and conditions thereof and (iii) a draft order granting the application for provisional release.

19. In relation to the allegations set forth in the Prosecution's Motion to Include Partial Witness Statement in Response to Obrenović Motion for Provisional Release, the Defence submits that the accused Obrenović never attempted to put pressure on the individual in question to provide an alibi for Mr. Obrenović for the night of 13 July 1995, nor was that individual punished as a result, allegedly, of his unwillingness to provide Mr. Obrenović with such an alibi.

2. Arguments of the Prosecution

20. The Prosecution submits that the accused bears the burden of establishing that, if released

he (i) will appear for trial and (ii) will not pose a danger to any victim, witness or other person. It further submits that even where the Defence has discharged its burden in this regard, under Rule 65 of the Rules the Trial Chamber has the discretion to refuse to order provisional release.

21. It is argued that provisional release is not appropriate in this case as the accused Obrenović has failed to demonstrate that, if released, he will appear for trial. Indeed, it is submitted that Mr. Obrenović poses a serious flight risk. The Prosecution argues that the severity of the crimes with which he is charged (including complicity in genocide for his alleged role in the organised executions of over 5000 Bosnian Muslim men in Srebrenica) weighs heavily in favour of denying the application for provisional release. The Prosecution observes that Dragan Jokić, a co-accused who was recently provisionally released, is facing much less serious charges. It is argued that, since the Prosecution may seek a sentence of life imprisonment for the crimes charged against Mr. Obrenović, "it is not illogical to suppose that Defendant Obrenović, a relatively young man who is faced with the prospect of spending the remainder of his life in prison, would attempt to subvert the proceedings by failing to present himself for trial."

22. The Prosecution further submits that, if provisionally released to Zvornik, it would be relatively easy for Mr. Obrenović to abscond (his house in Zvornik is several hundred metres from the boundary between BiH and Serbia). In support of this submission the Prosecution argues that "the Federal Army in Serbia is actively shielding former and active-duty military officers who have been indicted by the Tribunal" and that "there is no indication that the Army would apprehend him and return him to custody or that the political leadership in Serbia would order such an effort".

23. In relation to the Defence submission that Obrenović would have surrendered had he been given the chance, the Prosecution argue that in light of the overall circumstances, they were justified in not relying upon Obrenović's assurances of his continuing cooperation with the Prosecution.

24. For the foregoing reasons, the Prosecution submits that the accused Obrenović's request for provisional release should be denied.

25. Attached to the Prosecution's response are (i) a translation of an order promoting Dragan Obrenović to the rank of lieutenant colonel in the JNA; (ii) a translation of a document entitled "Analysis of the Combat Readiness and Activities of the Army of Republika Srpska in 1992; (iii) a declaration by an investigator for the Prosecution in support of the position taken in the Prosecution's response; and (iv) a translation of transcripts of an interview of Dragan Obrenović conducted by the Prosecution on 10 October 2000.

26. The Prosecution has asked the Trial Chamber to consider, in connection with the application for provisional release, certain information which was recently provided to an investigator for the Prosecution. According to the Prosecution, it has received information that during the period it was conducting interviews with members of the Zvornik Brigade personnel about the events in Srebrenica, Dragan Obrenović spoke to individuals who had given statements to the Prosecution. The Prosecution further submits that information has been received that Mr. Obrenović sought to establish an alibi by trying to make a certain individual confirm that Mr. Obrenović was with him on certain dates, in particular 13 July 1995, when in fact that individual had not been with him on that date. For this reason it is submitted the Trial Chamber cannot be satisfied that Mr. Obrenović, if released, "would not pose a danger to any victim, witness or other person."

II. DISCUSSION

A. Applicable law

27. Rule 65 of the Rules sets out the basis upon which a Trial Chamber may order provisional release of an accused. It provides in relevant part:

> (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 giving the host country and the State to which the accused seeks to be released the opportunity to be heard 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.
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> (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.
>
> [...]

28. Article 21(3) of the Statute of the International Tribunal[1] ("Statute") requires that the accused "be presumed innocent until proved guilty". This provision reflects international standards as enshrined in, *inter alia,* 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"),

29. Moreover, Article 9(3) of the ICCPR emphasises, *inter alia*, that: "[i]t 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: "[e]veryone 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",

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

31. As regards the ICCPR, it should 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 148 States, they are parties to the ICCPR. As a tribunal of the United Nations, the International

Tribunal 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.

32. As regards the ECHR, Croatia, Bosnia and Herzegovina,[2] Slovenia and the former Yugoslav Republic of Macedonia are Member States of the Council of Europe and parties to the ECHR.[3] Other parts of the former Yugoslavia have candidate status within the Council of Europe, which represents, at present, 44 pan-European countries, all having ratified the ECHR.[4]

33. The International Tribunal is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and the innocent. Justice, however, also means respect for the alleged offenders' fundamental rights.[5] 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 on the territory of the former Yugoslavia, regardless of whether they are Member States of the Council of Europe.

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

35. 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 International Tribunal. Additionally, one must take into account the fact that the full name of the International Tribunal 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 of the Rules allows for provisional release. Any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention.[6] In view of this, the Trial Chamber must interpret Rule 65 of the Rules 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.

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[1] The Statute was adopted by resolution 827 of the Security Council on 25 May 1993.
[2] Bosnia and Herzegovina acceded to the CoE on 24 April 2002.
[3] The ECHR entered into force for Bosnia and Herzegovina on 12 July 2002.
[4] http://conventions.coe.int/Treaty/EN (ETS No. 005).
[5] *See* Christoph Safferling, *Towards an International Criminal Procedure*, 2002, pp. 5 – 53, 46.
[6] See *Ilijkov v. Bulgaria*, Application No. 33977/96, EcourtHR, Decision of 26 July 2001, par. 84. See http://hudoc.echr.coe.int

36. Pursuant to Rule 65(B) of the Rules, a Trial Chamber may order the provisional release of an accused "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."

37. When interpreting Rule 65, the general principle of proportionality must be respected. 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 (proportionality in its narrowest sense). Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, that measure must be applied.

B. Application of the law to the facts

38. The Trial Chamber will first inquire into the question whether the accused, if released, will appear for trial.

39. In considering this criterion, the following considerations, recently set out in the *Ademi* case, should be recalled:

> 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 cooperation 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 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.[7]

40. There is a dispute between the parties as to whether Mr. Obrenović should be treated, for the purposes of this application, as though he had voluntarily surrendered. The Defence has provided the Chamber with a copy of Mr. Obrenović's statement to the OTP investigator (prior to his arrest) in which he states:

> [...]I'm at your disposal, and I propose you call me whenever it's needed. Of course, I would like this to be resolved without indictments, but unfortunately I understand the status that you have given me. Simply, I won't run away, because I have no place to run. Secondly, I know that I didn't do anything in that sense, so I have no reason to run away. Therefore, as I came today for this interview, I'm ready to come whenever and for whatever.[8]

41. The Defence further alleges that on or about 15 April 2001 (some thirty days after the confirmation of the initial indictment against him and the issuance of an arrest warrant) "the accused was arrested without incident near his home and place of work in the city of Zvornik and transported in custody to the Tribunal."[9] None of this has been contested by the Prosecution in its response. The Prosecution, however, submits that based upon the discrepancies between statements

[7] *Prosecutor v. Ademi,* Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb. 2002.
[8] Prosecution interview with the accused, 19 October 2000, pp. 42 – 44.

made by Obrenović at the pre-arrest interviews and the Prosecution evidence, the Prosecution was correct in doubting the veracity of Obrenović's pledge to self-surrender, and arranging for his arrest.

42. In light of the circumstantial evidence surrounding his arrest, it seems to be at least doubtful whether Mr. Obrenović should be treated as though he had failed to voluntarily surrender. However, he cannot be treated as if he had in fact voluntarily surrendered. Accordingly, this factor can have only limited impact upon the Trial Chamber's determination of this application.

43. It should be recalled, however, that even in the absence of a voluntary surrender, there may be other indicia of an accused's willingness to cooperate with the Tribunal. Here, Mr. Obrenović urges the Trial Chamber to consider the level of his pre and post-arrest cooperation with the Prosecution in this regard. Some of the details of this cooperation are set out above. In addition, the Defence submits that prior to his arrest, the accused met with representatives of the Prosecution on two occasions and "answered all the questions put to him".[10] He also provided the Prosecution with records and "a large number of firearms from his military unit sought by the OTP for ballistic testing".[11] It is further alleged that, since his arrest and transfer to the Tribunal, the accused has cooperated with the Prosecution in numerous ways, including by "entering into a reciprocal discovery agreement with the OTP" and by expressing a willingness to "stipulate to substantial portions of the Prosecution's case."[12] The Prosecution has not contested these claims, other than to submit that "the statements provided by Obrenović in his two interviews are largely contradicted by the evidence".[13]

44. The Trial Chamber next turns to the guarantees given in support of this application for provisional release, which have been provided by the government of the Republika Srpska in Bosnia and Herzegovina. Even though this is not the decisive element of the conclusions, the Trial Chamber is of the opinion that it is not possible for this United Nations Tribunal to accept these guarantees.

45. The Trial Chamber is aware of the Appeals Chamber's Decision on Application by Dragan Jokić for Leave to Appeal of 18 April 2002[14] but believes, for reasons explained below, that an Entity of Bosnia and Herzegovina cannot be equalled to a State on the basis of the Rules of

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[9] Defence Motion, p. 2.
[10] Defence Motion, p. 1.
[11] Defence Motion, p. 7.
[12] Defence Motion, p. 7.
[13] Prosecution Response, p. 4.

Procedure and Evidence and that rules of this Tribunal can only be read in accordance with fundamental norms of public international law.

46. The Trial Chamber agrees with the Appeals Chamber that:

> It is nevertheless usual, and it is certainly advisable for an applicant for provisional release to provide [...] guarantees from [...] a governmental body, in order to satisfy the Trial Chamber that he will appear for trial. This is because the Tribunal has no power to execute its own arrest warrant upon an applicant who is in the territory of the former Yugoslavia in the event that he does not appear for trial [...]. Account must be taken of those circumstances in applying internationally recognised standards relating to the release of persons awaiting trial in the Tribunal. Rule 65 (C) permits the Chamber to impose conditions upon the release of an accused "to ensure the presence of the accused for trial", and frequently the production of a guarantee from the relevant governmental body is imposed as such a condition.[15]

However the Trial Chamber disagrees with the Appeals Chamber that the Tribunal can "rely upon local authorities within that territory" in so far as this refers specifically and exclusively to the Entities of Bosnia and Herzegovina.[16] In the absence of own executive powers in another sovereign State, co-operation in criminal matters is always, both on a vertical and a horizontal level, based on the willingness of the competent organs of that sovereign State. Insofar there is nothing special with the vertical relationship between the Tribunal and Bosnia and Herzegovina.

47. It is noteworthy that according to Rule 65 (B) the Trial Chamber is required to provide the "State to which the accused seeks to be released" an opportunity to comment on the request for provisional release. In this context it should be noted that Rule 2 of the Rules provides the following definition of the term "State":

> A State Member or non-Member of the United Nations or a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not;

48. It is in this context necessary to make reference to the Constitution of Bosnia and Herzegovina, Article I, paragraph 1, of which provides that:

> 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 recognised 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.[17]

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[14] *Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić*, Case No. IT-02-53-AR65, Decision by the Appeals Chamber on Application by Dragan Jokić for Leave to Appeal, 18 Apr. 2002.
[15] *Ibid.*, para. 8.
[16] *Ibid.*
[17] Constitution of Bosnia and Herzegovina, Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, *initialled in* Dayton on 21 December 1995, *signed in* Paris on 14 December 1995.

49. Article I, paragraph 3, of the Constitution of Bosnia and Herzegovina furthermore provides that:

> Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter "the Entities").

The Constitution of Bosnia and Herzegovina, therefore, makes a clear distinction between the State of Bosnia and Herzegovina under public international law and its two component federal units, the Entities.

50. According to the 1933 Montevideo Convention on the Rights and Duties of States, which, albeit being a regional American convention, is considered to be an accurate reflection of customary international law on the issue of statehood, "The federal state shall constitute a sole person in the eyes of international law".[18]

51. The issue of international legal subjectivity and sovereignty of the Entities as federal units was addressed by the Constitutional Court of Bosnia and Herzegovina in its Third Partial Decision on the Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina. The Constitutional Court stated that:

> with regard to the question, whether Entities can be called states due to their sovereignty as the expert of the National Assembly [of the Republika Srpska] has outlined, the Court finds that the existence of a constitution, the name of "Republic", or citizenship are not per se proof of the existence of statehood. Although it is quite often the case also in federal states that their component entities do have a constitution, and that they might even be called a republic or do grant citizenship, all these institutional elements are granted or guaranteed by the Federal constitution. The same holds true for Bosnia and Herzegovina.[19]

52. It should be noted that this interpretation is in line with Article III, paragraph 2(b) of the Constitution of Bosnia and Herzegovina, which provides that:

> Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina[...]

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[18] Article 2, Montevideo Convention on the Rights and Duties of States, *signed at* Montevideo 26 December 1933, *entered into force* 26 December 1934

[19] Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina, para. (referred to as Case U 5/98-III), Constitutional Court of Bosnia and Herzegovina, Third Partial Decision of 1 July 2002 (HRLJ 22 No. 1-4, 31 October 2001, p. 127-146). *See also* the concurring opinion of Judge Hans Danelius, HRLJ 22, No. 1-4, 31 October 2002, p. 144-146) as referred to in the Trial Chamber's Decision on Request for Provisional Release of Accused Jokić in Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić (IT-02-53-PT), para. 27.

Thus, according to the Constitution of Bosnia and Herzegovina neither the Republika Srpska nor the Federation of Bosnia and Herzegovina are to be considered States. Instead, only Bosnia and Herzegovina is the legal subject under public international law in the territory in question.

53. In its Decision of 18 April 2002, the Appeals Chamber makes reference to Article III, paragraph 2(c) of the Constitution of Bosnia and Herzegovina, which reads:

> The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate.[20]

54. The Appeals Chamber moreover stated that:

> The Bench is able to take judicial notice of evidence given in numerous cases before the Tribunal that the entity of Republika Srpska does indeed exercise governmental functions within its territory, including the police powers of arrest.

It is not for the Trial Chamber to interpret the Constitution of Bosnia and Herzegovina however it is nevertheless clear that the above provision is restricted to "their respective jurisdictions" and so does not regulate international criminal matters.

55. Article III, paragraph 2(a), of the Constitution, which at first glance appears to support the Appeals Chamber's view, provides that:

> The Entities shall have the right to establish special parallel relationships with neighboring states, consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina.

However, while it is undeniable that both police and military powers currently rest on the Entity level in Bosnia and Herzegovina, according to the view of the Constitutional Court of Bosnia and Herzegovina, "the Entities are subject to the sovereignty of Bosnia and Herzegovina", just as Article III, paragraph 2(a) clearly prescribes.[21] Article III, paragraph 1(g), of the Constitution is of particular importance here and vests the State institutions of Bosnia and Herzegovina with responsibility for "International and inter-Entity criminal law enforcement including relations with Interpol." Thus, even though the Republika Srpska and the Federation of Bosnia and Herzegovina exercise governmental functions within their territories as Entities or component parts of a federal state, this is done subject to the Constitution of the State of Bosnia and Herzegovina.

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[20] *Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić*, Case No. IT-02-53-AR65, Decision by the Appeals Chamber on Application by Dragan Jokić for Leave to Appeal, 18 Apr. 2002, para. 9.

[21] Case U 5/98-III, para. 29.

56. Only Bosnia and Herzegovina has been recognised by the United Nations as a Member State.[22] The Tribunal, as an institution of the United Nations, is obligated to respect the decision of the Organisation to recognise Bosnia and Herzegovina as a Member State. Moreover, only Bosnia and Herzegovina was admitted to the Council of Europe as a full member on 24 April 2002. It is therefore not for the Tribunal to pronounce upon what is or is not a State under public international law should its opinions or that expressed in the Rules differ from the situation under public international law or in the territory in question.

57. The relationship between the Tribunal and the State to which the accused seeks to be released under Rule 65 (B) is a relationship on the level of public international law. The provision of guarantees to the Tribunal, as one form of cooperation in criminal matters, has to be regarded, *in concreto,* as an international agreement between two subjects of international law, as a result of the general obligation to cooperate with the Tribunal under Article 29 of its Statute.

58. Article 29 of the Statute forms the legal basis for this general obligation to enter into a concrete judicial relationship on the vertical level; on the horizontal level the basis might be a convention on extradition or other forms of cooperation in criminal matters. The only special problem this Tribunal has to overcome is that the host country does not allow for an accused being provisionally released to stay in the Netherlands awaiting trial. The absence of such a possibility makes it necessary to rely on guarantees given by the accuseds' home countries to ensure that the individual on provisional release is re-transferred. But then again, in case of a State's non-compliance with its obligations under Article 29 of the Statute, the mechanisms of Rule 7 *bis* can only be triggered *vis a vis* a State, in this case Bosnia and Herzegovina, being a Member State of the United Nations.

59. As has previously been noted by the Trial Chamber with regard to the situation in Bosnia and Herzegovina, there might still be a gap between the factual situation and the constitutional situation[23], particularly as regards the effective implementation of Trial Chamber decisions.[24] However, it is not for the Tribunal to interfere in the domestic matters of Bosnia and Herzegovina and determine which organ shall be requested to comment on applications for provisional release. It is for the Tribunal to take care that the accused – if possible - does not come to harm from the existence of any inconsistency between de facto and de jure situations. However, that is not such a

[22] Resolution on the recognition of Bosnia and Herzegovina, GA/Res/46/237Ć, 22 May 1992. Prior to this recognition, Bosnia and Herzegovina was recognised by the European Union on 6 April 1992, following a referendum on sovereignty independence held on 29 February and 1 March 1992.

[23] In the terms of Rule 2: "entity de facto exercising governmental functions."

[24] *Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić*, Case No. IT-02-53-PT, Decision by the Trial Chamber on Request for Provisional Release of Accused Jokić, para. 28.

problem if only the authorities are really willing to cooperate. It should be noted that it is normally the case in federal states that guarantees are provided by, through, or on behalf of the authorities of the federal government as opposed to by component units of the state.

60. The Trial Chamber therefore concludes that it would act *ultra vires* should it base itself upon any guarantees offered by a federal unit under Rules 2 and 65 (B). With regard to Rule 65 (B), the term "state" must be interpreted in such a way that the Tribunal does not refer to an Entity as being a State. Thus, the phrase "state to which the accused seeks to be released" in Rule 65 (B) must therefore be considered to refer to Bosnia and Herzegovina, which, both as a subject of public international law and according to its Constitution, is responsible for ensuring compliance with conditions imposed by the Trial Chamber in accordance with domestic regulations. Whether or not compliance with this obligation in the present case is carried out by the component part of the Republika Srpska, which appears likely in light of Article III, paragraph 2(b) of the Constitution, or by the institutions of Bosnia and Herzegovina is a matter for the State of Bosnia and Herzegovina to determine.

61. As a last point, it should be noted that in light of the politically fragile situation in Bosnia and Herzegovina a reference by the Tribunal to one of the Entities as a State would not be in line with the Tribunal's mandate "to contribute to the restoration and maintenance of peace in the former Yugoslavia."[25] The recognition of the State of Bosnia and Herzegovina and its powers is the only means by which future peaceful cohabitation of the peoples of this country may be achieved. Accepting guarantees given by or through the State is therefore the sole way to strengthen the protection of all citizens in Bosnia and Herzegovina while complying with the dictates of public international law.

62. It must, however, be re-emphasised that the final basis for the conclusion reached in this decision on the accused's application for provisional release is not the Trial Chamber's finding that it cannot accept guarantees from the Entity of the Republika Srpska in connection with such an application under Rule 65 of the Rules.

63. In relation to the guarantee provided by the accused himself, the Trial Chamber agrees, always bearing the presumption of innocence in mind, that: "it is not illogical to suppose that Defendant Obrenović, a relatively young man who is faced with the prospect of spending the

[25] S/Res 827 (1993), Preamble, para. 6.

remainder of his life in prison, would attempt to subvert the proceedings by failing to present himself for trial."[26]

64. While the accused Obrenović appears to have demonstrated good faith in cooperating with the Prosecution to date, on balance, considering the grave nature of the offences with which he is charged (complicity in genocide) and having reasonable doubts whether the guarantees offered can eliminate or significantly minimise the risk of flight, the Trial Chamber is not satisfied that, if released, Mr. Obrenović would appear for trial.

65. Moreover, the Trial Chamber is not fully satisfied, in relation to the second criterion set out in Rule 65(B) that the accused Obrenović, if released, "will not pose a danger to any victim, witness or other person". Indeed, the Prosecution has provided evidence to suggest that Mr. Obrenović has, already in the past on at least one occasion, attempted to influence a certain individual to agree to provide Mr. Obrenović with an alibi for the night of 13 July 1995.

66. However, with a view to the Defence response and the supporting material, the Trial Chamber wishes to emphasise that it is primarily on account of the risk of flight that the Trial Chamber finds that it is necessary to order Mr. Obrenović's ongoing detention.

67. It only remains to be decided whether or not this necessary, ongoing detention pending trial is proportional in the narrowest sense.

68. The Chamber must, in this context, consider the Defence submission that it should take into account the fact that the accused Obrenović has already been detained for fifteen months and that there is, as yet, no date set for trial. Evidently, the length of pre-trial detention is one of the factors that must be considered in any application for provisional release. As was recently held by Trial Chamber I in the *Ademi* case:

> 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. 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.[27]

69. There is no doubt that an accused before this Tribunal is "entitled to trial within a reasonable time or to release (Article 9(3), sentence 1, of the ICCPR[28]) 'pending trial'" (Article 5(3) of the ECHR[29]), a requirement which is closely linked to the reasonable time requirement under Article 6 of the ECHR. Whether a time limit is appropriate can be evaluated only in light of all the

[26] Prosecution Response, para. 10.
[27] *Prosecutor v. Ademi*, Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb. 2002.
[28] *See Nowak*, CCPR Commentary, p. 177 – 78.
[29] *See* Peukert in *Frowein & Peukert*, EMRK-Kommentar, 2. Auflage, pp. 125 – 134.

circumstances of a given case, such as the complexity of the case, speed of handling, conduct of the accused, conduct of the authorities, no unjustified inertia[30], and no lack of adequate budgetary appropriations for the administration of criminal justice.[31]

70. Here, the duration of Mr. Obrenović's pre-trial detention to date has not yet exceeded those periods which the European Court of Human Rights or the Human Rights Committee has found to be reasonable for comparable cases of comparable weight in comparable circumstances.

[30] *Robert Kolb,* The Jurisprudence of the European Court of Human Rights on Detention and Fair Trial in Criminal Matters from 1992 to the end of 1998 in *Human Rights Law Journal,* Vol. 21 No. 9-12, 31 December 2000, pp. 348, 363 – 65.
[31] *Fillastre and Bizouain v. Bolivia,* Committee No. 336/1998, para. 6.5.

III. DISPOSITION

71. For the foregoing reasons, this Trial Chamber denies Mr. Obrenović's application for provisional release of 11 June 2002.

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

Judge Wolfgang Schomburg
Presiding

Dated this twenty-second day of July 2002,
At The Hague
The Netherlands

[Seal of the Tribunal]