IT-95-13/1-PT
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24 JULY 2002.

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AT

**UNITED NATIONS**

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| International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 | Case No. | IT-95-13/1-PT |
| | Date: | 24 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:** **24 July 2002**

**PROSECUTOR**

**v.**

**MILE MRKŠIĆ**

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# DECISION ON MILE MRKŠIĆ'S APPLICATION FOR PROVISIONAL RELEASE

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**The Office of the Prosecutor:**

Ms. Hildegard Uertz - Retzlaff
Mr. Mark J. McKeon

**Counsel for the Accused:**

Mr. Miroslav Vasić

# 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 ("the Tribunal") is seised of a motion entitled "Defence Motion for Provisional Release" ("Motion"), filed by the Defence for Mile Mrkšić ("Defence") on 23 May 2002 in which the Accused Mrkšić seeks to be provisionally released to his family home in Belgrade in the Federal Republic of Yugoslavia ("FRY").

2. The Defence for Mr. Mrkšić filed an "Urgent Request for Hearing on Motion for Provisional Release" on 30 May 2002 for hearing two medical experts who participated in the Accused's rehabilitation in Belgrade.

3. On 31 May 2002 the Trial Chamber issued the "Order on Mile Mrkšić's Motion for Provisional Release" instructing the Head of the United Nations' Detention Unit ("the Detention Unit") to file a report on the medical treatment, conditions and facilities, including any special dietary needs being provided to the Accused and ordered a medical examination of the Accused by experts identified by the Registry.

4. A Report of the Medical Officer of the Detention Unit was filed on 03 June 2002.

5. The Office of the Prosecutor ("Prosecution") filed its "Response to Motion For Provisional Release Filed by the Accused Mile Mrkšić") ("Response"), on 05 June 2002 requesting that the Trial Chamber deny Mr. Mrkšić's application for provisional release.

6. On 10 June 2002, the "Defence Reply to the Prosecution's response to Defence Motion for Provisional Release" was filed requesting the Trial Chamber to schedule an urgent hearing of the motion.

7. On 13 June 2002 the "Guarantee of the Federal Government of the Federal Republic of Yugoslavia and the Government of the Republic of Serbia", for the return of the Accused to the Tribunal, if provisionally released, was filed.

8. The defence on 27 June 2002 and 05 July 2002 filed the "Additional Defence Submission to Defence Motion for Provisional Release" and the "Second Additional Defense Submission to Defense Motion for Provisional Release" respectively, to schedule a hearing on the motion.

9. Two expert medical reports were filed with the registry on 09 July 2002 and 15 July 2002 in response to the Order of the Trial Chamber for the Accused to undergo a medical examination.

10. 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. The Trial Chamber also heard a representative from the Ministry of Justice of the FRY and the First Secretary from the FRY Embassy in The Hague in their capacity as *amici curiae*.

11. The Accused is jointly charged with Miroslav Radić and Veselin Šljivančanin, for allegedly being involved in the beatings and killings of more than 200 non-Serb men and women that occurred on 20 November 1991 at Ovčara farm near Vukovar, Croatia. The Accused was arrested and transferred from the FRY to the Tribunal on 15 May 2002. At his initial appearance on 16 May 2002, the Accused pleaded not guilty to all the charges against him.

## B. Arguments of the parties

### 1. Argument of the Defence

12. The Defence submits that the Accused is an ill man suffering from heart disease and had to undergo two open-heart surgeries. It is also submitted that the Accused's health has deteriorated since his arrival at the Detention Unit. The Defence submits that it would be conducive for the Accused to complete his rehabilitation in Belgrade, were he to be provisionally released.

13. The Defence submits that the Accused voluntarily surrendered to the Tribunal at a moment when he was to go for medical rehabilitation. This factor, they urge, demonstrates that Mr. Mrkšić recognises the Tribunal as the only forum where he can prove his innocence and present his Defence.

14. The Defence observes that since the time the indictment was presented against the Accused in 1997, he has not posed a risk to either the victims or witnesses identified by the Prosecution in the case. The Defence further submits that the Accused is not in a position to interfere with victims or witnesses as they live in a different country, unrelated to Yugoslavia.

15. The Defence submits that the governments of the FRY and the Republic of Serbia have issued guarantees of execution of any orders of this Trial Chamber provided that this motion for provisional release is granted. In addition, they submit that the Accused himself has provided his own personal guarantees, and that as a honourable military man and a human being, he would

certainly abide by his own word.

16. The Defence submits that the likely length of pre-trial detention is another factor that is generally taken into account in determining applications for provisional release.

17. The Defence in addition raised two practical points. The first related to the possibility of facilitated cooperation with the Prosecution and the preparation of the Defence case. It was submitted that if the Accused were to be in a better state of health, that would facilitate a fair and expedient trial. Secondly, the Defence urged that the newly adopted Law on Cooperation of the FRY with the Tribunal, which entered into force on 11 April 2002, would meet with greater understanding and result in better cooperation were the Accused to be provisionally released.

18. The Accused has a wife and three daughters in Belgrade. If provisionally released, he would continue to reside in the address where he has resided so far in Belgrade.

19. During the oral hearing, the *amici curiae* urged that as the Accused surrendered voluntarily to the Tribunal that ought to be a reason for granting his request. They submitted that based on the general presumption of innocence, the Accused should not be subjected to pre-trial detention. They indicated that the past conduct of the Accused was not incriminating. They also urged that since the Accused is a serious cardiac patient and in a poor state of health, it would be advisable for him to be released to seek treatment in his home country. On the issue related to the guarantees, the *amici* submitted that in all previous cases, the guarantees have been abided, and will be adhered to in this case as well. They also assured the Trial Chamber that the Accused would be available to the Tribunal at any time, either at the request of the Prosecution or on the order of the Trial Chamber itself.

20. The Accused himself submitted that the conditions in the Detention Unit are influencing his state of health and that it is causing him great difficulties. He added that he is not a potential fugitive and that he has his honour and dignity and that he had voluntarily surrendered when the law on co-operation was adopted and he is prepared to co-operate with the Tribunal in every possible way.

21. Attached to the motion are (i) a personal guarantee signed by the Accused that, if provisionally released, he will abide by all the terms and conditions of that release; (ii) medical reports from the hospital in Belgrade where the accused underwent surgeries and a report on his

state of health prior to his admission to the Detention Unit.

2. Arguments of the Prosecution

22. The Prosecution submits that the rehabilitation suggested by the medical reports attached to the motion show that all of the suggested treatment could be done in the Netherlands and hence there is no reason to release the Accused.

23. It is argued that provisional release is not appropriate in this case as the Accused has failed to demonstrate that, if released, he will appear for trial. The Prosecution submits that nothing prevented the Accused from surrendering to the Tribunal, nor did the Yugoslav law contain any obstacle to do so.

24. On the issue of the guarantees of the governments of the FRY and the Republic of Serbia, the Prosecution submits that as two other indictees in the case, Miroslav Radić and Veselin Šljivančanin have yet to be arrested, there is nothing to demonstrate that the Accused would be arrested and returned to the Tribunal by the FRY or the Republic of Serbia, were he to abscond. The Prosecution hence argues that those guarantees do not carry much weight and they ought to be treated with much caution.

25. The Prosecution submits that as the Accused has now received the list of witnesses and statements in the case, the risk of interfering with those witnesses is now a possibility. In this connection the Prosecution submits that if the Accused were to provide a statement, they would know what his case would be at trial, and the potential risk of the Accused tampering with the witnesses and disturbing their testimony could be less.

26. For the foregoing reasons, the Prosecution submits that the accused Mrkšić request for provisional release should be denied.

# 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.

(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] ("the 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 ("the ICCPR") and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("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, this 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]

[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).

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 this 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 this Tribunal. Additionally, one must take into account the fact that the full name of this 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.

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 of the Rules, 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.

[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

## B. Application of the law to the facts

38. The Trial Chamber will first inquire into the question whether the Accused's health condition is such that would necessitate his release to Belgrade. The Trial Chamber notes that the Medical Officer at the Detention Unit is continuing the necessary medication the Accused requires in his situation and also, that at the time of his first physical examination of the Accused, "the physical examination did not show any acute alarming symptoms, though his medical history was somewhat alarming."[7]

39. The Report of the Medical expert filed subsequently concludes that the Accused is currently in a fairly good health following the bypass operation but has complaints. The report notes that the Accused suffers from high blood pressure and is advised medication to control the same. The Trial Chamber observes that the present medical condition of the Accused is such that it does not warrant his provisional release from the Detention Unit. Further, the Trial Chamber finds that there is no evidence to suggest that the necessary medication and treatment available in the Netherlands and the Detention Unit is inadequate to meet the medical needs of the Accused. Nothing in the record indicates that the treatment that the Accused would receive in detention would be less adequate than the treatment that he could receive were he to be returned to Belgrade. Thus, the Trial Chamber rejects this ground for provisional release.

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

41. 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.[8]

42. There is a dispute between the parties as to whether Mr. Mrkšić should be treated, for the purposes of this application, as though he had voluntarily surrendered. The explanation offered by the Accused in response to the Prosecution's submission that he had evaded arrest for six years despite knowing that there was an international arrest warrant issued against him needs to be assessed. The Defence argue that the Accused was deterred from surrendering to the Tribunal as a

[7] Report of Paul T. Falke, Medical Officer, United Nations Detention Unit, appended to the Report of the Head of the Detention Unit dated 03 June 2002.

result of a decision of a competent military tribunal preventing him from surrendering to the Tribunal, and that once the Law on Co-operation was passed, the accused took the opportunity to surrender before this Tribunal, and even went to the extent of curtailing his rehabilitation consequent to two open-heart surgeries. This, the Defence submits demonstrates a willingness to co-operate with the Tribunal, and is a clear indication that he will appear for trial. The Prosecution contends that this surrender cannot be termed as a voluntary surrender. The Prosecution submits that the law merely provided the accused with "five years of legal cover so that he could have a place to hide from this Tribunal and a place to keep himself from being under the jurisdiction of this Tribunal."

43. In light of the circumstantial evidence surrounding his presence before this Tribunal, it seems rather doubtful whether the Accused, having failed to voluntarily surrender during all these years can be treated as if he had in fact, voluntarily surrendered. On a reading of the decision of the Military Court in Belgrade, appended to the motion, allegedly preventing the extradition of the Accused, it is clear that nothing prevented the Accused from voluntarily surrendering to the Tribunal as soon as he came to know of the pending indictment against him. Accordingly, this factor of surrender can have only limited impact upon the Trial Chamber's determination of this application.

44. The Trial Chamber next turns to consider the guarantees of the governments of the FRY and the Republic of Serbia as well as the submissions made by the *amici curiae*. While the content of the guarantees largely complies with that which the Tribunal would generally require for the purposes of provisional release, the Trial Chamber is not convinced that the Accused would present himself for trial. Although the *amici curiae* assured the Trial Chamber that the Accused would be available to the Tribunal at any time, either at the request of the Prosecution or of the Trial Chamber itself, it cannot be ignored that to date, the governments of the FRY and the Republic of Serbia have neither arrested the other two co-indictees in the case, nor arrested other high-ranking individuals indicted by the Tribunal. It is for this reason that the Trial Chamber treats the guarantees from those governments with much caution.

45. In relation to the guarantee provided by the accused himself, the Trial Chamber agrees, with the Prosecution that: "for over six years, the Accused had rejected the authority of the Tribunal... and...cloistered himself beyond the reach of the Tribunal."[9] Against this background the Trial Chamber is not satisfied with the personal undertakings of the Accused, that if released he would return to the Tribunal for trial.

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[8] *Prosecutor v. Ademi,* Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb. 2002.
[9] Prosecution Response, para. 21.

46. Although the Accused has agreed to fully cooperate with the Prosecution, on balance, considering the grave nature of the offences with which he is charged (grave breaches of the Geneva Conventions, crimes against humanity and violations of the laws or customs of war) 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, the Accused would appear for trial.

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

48. The Chamber must, in this context, consider the Defence submission that it should take into account the likelihood that the Accused might face a slightly longer pre-trial procedure in the light of the pending amendment to the indictment and the Schedule of this Trial Chamber. 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.[10]

49. 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[11]) 'pending trial'" (Article 5(3) of the ECHR[12]), 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 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[13], no lack of adequate budgetary appropriations for the administration of criminal justice.[14]

50. Here, the duration of the Accused's pre-trial detention (to date about two months) has by far not yet exceeded those periods which the European Court of Human Rights has found to be reasonable for comparable cases of comparable weight in comparable circumstances.

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[10] *Prosecutor v. Ademi,* Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb. 2002.
[11] *See Nowak,* CCPR Commentary, p. 177 – 78.
[12] *See* Peukert in *Frowein & Peukert,* EMRK-Kommentar, 2. Auflage, pp. 125 – 134.
[13] *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.
[14] *Fillastre and Bizouain v. Bolivia,* Committee No. 336/1998, para. 6.5.

## III. DISPOSITION

51. For the foregoing reasons, this Trial Chamber denies the Accused's application for provisional release of 23 May 2002.

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

W. Schomburg

Judge Wolfgang Schomburg
Presiding

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

**[Seal of the Tribunal]**