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UNITED
NATIONS

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:	IT-02-60-AR65 & IT-02-60-AR65.2
Date:	3 October 2002
Original:	English

IN THE APPEALS CHAMBER

Before:	**Judge Mohamed Shahabuddeen, Presiding** **Judge David Hunt** **Judge Mehmet Güney** **Judge Fausto Pocar** **Judge Theodor Meron**
Registrar:	**Mr Hans Holthuis**
Decision of:	**3 October 2002**

PROSECUTOR

v

Vidoje BLAGOJEVIĆ, Dragan OBRENOVIĆ, Dragan JOKIĆ, Momir NIKOLIĆ

DECISION ON PROVISIONAL RELEASE OF VIDOJE BLAGOJEVIĆ AND DRAGAN OBRENOVIĆ

Counsel for the Prosecutor
Mr Peter McCloskey

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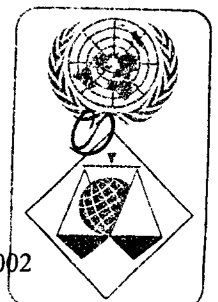
Mr Michael Karnavas, for Vidoje Blagojević
Mr David Eugene Wilson, for Dragan Obrenović



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1. Pursuant to leave granted by a Bench of the Appeals Chamber,[1] co-accused Dragan Obrenović ("Obrenović") and Vidoje Blagojević ("Blagojević") appealed against Trial Chamber II's "Decision on Dragan Obrenović's Application for Provisional Release" and "Decision on Vidoje Blagojević's Application for Provisional Release" ("Impugned Decisions"), both rendered on 22 July 2002, whereby the Trial Chamber denied provisional release to both co-accused.[2] On 6 September 2002, after leave to file a consolidated response had been granted by the Appeals Chamber,[3] the Prosecution filed its "Prosecution Consolidated Response to Obrenović and Blagojević Appeals regarding Provisional Release" ("Prosecution's Response"). On 9 and 10 September 2002 respectively, Blagojević and Obrenović filed their replies to the Prosecution's Response.[4]

2. In his appeal, Obrenović submits that the Trial Chamber erred in concluding that the guarantees or undertakings provided by the Republika Srpska on his behalf were inadmissible and should not be considered in determining whether he would appear for trial. Obrenović says that, despite its ambiguous language, the Trial Chamber's decision in fact relied heavily upon the perceived inadmissibility of those guarantees. He further points out that, by refusing to take them into account, the Trial Chamber explicitly rejected a controlling precedent – the *Jokić* Appeals Chamber decision[5] – which it was bound to obey. Such guarantees, he says, are in any case not a prerequisite for provisional release and the Trial Chamber's decision in fact discriminates between different accused depending on the authorities which are willing to provide guarantees for them. Obrenović concludes on that point by saying that it is not the Tribunal's function, however desirable it may be, to bolster and stabilize the governmental machinery of Bosnia and Herzegovina. In addition, Obrenović claims that the Trial Chamber erred when concluding that, despite the absence of any evidence to that effect, he was a flight risk solely because of the serious nature of the offences with which he is charged. He submits that the Trial Chamber merely accepted the Prosecution unsupported submissions that, if

[1] Decision on Application by Blagojević for Leave to Appeal, 27 August 2002 and Decision on Application by Obrenović for Leave to Appeal, 27 August 2002 ("Leave Decisions").

[2] Appeal of the Trial Chamber's Decision on Dragan Obrenović's Application for Provisional Release ("Obrenović Appellant's Brief"), 30 August 2002; Appeal from Trial Chamber's Impugned Decision on Vidoje Blagojević's Application for Provisional Release ("Blagojević Appellant's Brief"), 2 September 2002.

[3] Decision on Prosecution's Request for Leave to File Consolidated Response, 6 September 2002.

[4] Accused Blagojević's Reply to Prosecution's Consolidated Response to Obrenović and Blagojević Appeals Regarding Provisional Release, 9 September 2002; Accused Obrenović's Reply Brief to Prosecution Consolidated Response to Obrenović and Blagojević Appeals Regarding Provisional Release, 10 September 2002.

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convicted, he could be sentenced to life, thereby establishing a principle of mandatory detention on remand. Instead, the Trial Chamber should have performed a case by case assessment. He submits that, as a result, the Trial Chamber erred, the decision should be overturned and he should be provisionally released.

3. In his appeal, Blagojević essentially raises the same grounds of appeal. He first submits that the Trial Chamber erred by concluding that he was a flight risk and by relying solely on the Prosecution's assessment that this was the case because of the seriousness of the charges against him and because of the sentence which he would face if convicted. Blagojević further points out that the position of the Prosecution in this case is inconsistent with that taken in other cases, in particular that of co-accused Dragan Jokić. In tune with Obrenović's arguments on that point, Blagojević submits that the Trial Chamber erred in finding that the Tribunal could not accept guarantees from the government of the Republika Srpska.

4. In its Consolidated Response, the Prosecution submits that, because of the seriousness of the charges against them and the sentences which could be imposed if they are convicted, neither accused should be released as they present a substantial flight risk. This risk is heightened in the case of Obrenović, the Prosecution says, because he may flee to Serbia where his former commander and fugitive, Vinko Pandurević, and his brother now reside. The Prosecution further states that Obrenović may be inclined to exert improper influence over key witnesses, as he has allegedly already been trying to exert pressure on prospective witnesses into supporting an apparently untruthful alibi.

5. Blagojević replied that the Prosecution's argument that he represents a flight risk is improper as there is no evidence before the Trial Chamber supporting this conclusion and that the denial of provisional release therefore violated his right to be presumed innocent. He also contends that the Prosecution's suggestion that his whereabouts were only discovered shortly prior to his arrest is misleading and irreconcilable with the Trial Chamber's finding that it would draw no adverse inference from the fact that he failed to surrender voluntarily. Finally, he points out that the Prosecution failed to refute the proposition that the Republika Srpska is able and willing to carry out the terms and conditions of his guarantees. In his Reply, Obrenović states that the record before the Appeals Chamber does not support the argument

[5] *Prosecutor v Jokic,* IT-02-53-AR65, Decision on Application by Dragan Jokic for Leave to Appeal, 18 April

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that he may be inclined to exert undue pressure on key witnesses or that he is otherwise a flight risk.

6. In accordance with the *Aleksovski* Judgement of the Appeals Chamber,[6] the Trial Chamber was bound to accept and to apply the decision of the Appeals Chamber in *Jokić* which provides that, as a matter of law and for the purpose of the International Tribunal, an undertaking by Republika Srpska qualifies for acceptance, whether or not it is a sovereign state as defined under public international law.[7] The Appeals Chamber hereby reiterates that there is nothing in either the Tribunal's Statute or the Rules of Procedure and Evidence which limits the identity of the body giving an undertaking to a state as recognised by public international law, and therefore sees no cogent reason to depart from its previous jurisprudence.[8]

7. It was open to the Trial Chamber to assess whether the undertakings by the Republika Srpska constitute, in the cases under consideration, significant assurances that the accused will appear for trial. But an *a priori* exclusion of such undertakings on the basis that they emanate from an entity not recognised as a state by public international law amounts to an error of law. The Appeals Chamber is aware that the Trial Chamber might well have come to the same conclusion that the applicants would not appear for trial even if it had taken these guarantees into consideration. However, in view of the uncertainty as to whether it would have made a difference, the Appeals Chamber must come to the conclusion that this error of law invalidated the Trial Chamber's decision. The Impugned Decision is therefore quashed.

8. The matter is returned to the Trial Chamber for reconsideration. The Trial Chamber is directed to take into account the guarantees of the Republika Srpska when determining whether the accused would appear for trial if provisionally released.

2002, par 9.

6 *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment, 24 March 2000, par 113.

7 *See Prosecutor v Jokic*, IT-02-53-AR65, Decision on Application by Dragan Jokic for Provisional Release, 28 May 2002 and *Prosecutor v Jokic*, IT-02-53-AR65, Decision on Application by Dragan Jokic for Leave to Appeal, 18 April 2002, pars 7-8.

8 *Ibid. See* also Leave Decisions.

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

Dated 3 October 2002,

At The Hague,

The Netherlands.

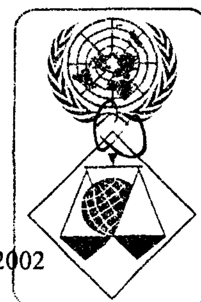
Mohamed Shahabuddeen

Presiding Judge

Judge Shahabuddeen appends a Declaration to this decision.

Judge Hunt appends a Separate Opinion to this decision.

[Seal of the Tribunal]



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DECLARATION OF JUDGE SHAHABUDDEEN

1. I agree with the outcome of today's decision but I have some difficulties and would like to mention them. The Trial Chamber was bound by the authority of the Appeals Chamber, but I am not sure that the structure of the actual decision of the latter in *Jokić*[1] prohibited the former from embarking on the inquiry on which it did.

2. Republika Srpska is a constituent entity of the state of Bosnia and Herzegovina. The guarantor is the former, not the latter. Nevertheless, the jurisprudence has developed in the direction of accepting a guarantee given by an entity of the state of Bosnia and Herzegovina. This, in turn, is because, as is visualised by the definition of "State" in Rule 2(A) of the Tribunal's Rules of Procedure and Evidence, the Tribunal has to take account of the *de facto* position. That point was made by the Appeals Chamber in *Jokić*. But there is need for care.

3. An important element of the formal constitutional position, as set out in annex 4 to the Dayton Peace Accords, is consonant with *Jokić*. Under article III, paragraph 1(g), of the constitution, responsibility for "International and inter-Entity criminal law enforcement, including relations with Interpol" lies with the state of Bosnia and Herzegovina. It seems to me that the *operative* part of the decision of the full bench of the Appeals Chamber in *Jokić* reflected that constitutional principle. Paragraphs 2 and 3 of the decision stated thus:

> 1. At Schiphol airport, the accused shall be provisionally released into the custody of the designated officials of the Government of Bosnia and Herzegovina ("BiH") (whose names shall be provided in advance to the Trial Chamber and Registry) and who shall accompany the Accused for the remainder of their travel to BiH and to his respective place of residence.
>
> 2. On his return flight, the accused shall be accompanied by a designated official of BiH (or by such other designated officials as the Trial Chamber may order or accept) who shall deliver the accused into the custody of the Dutch authorities at Schiphol Airport at a date and time to be determined by the Trial Chamber; the Dutch authorities shall then transport the accused back to the United Nations Detention Unit; .

4. Thus, the decision made a distinction between local responsibility and international responsibility, assigning the former to the entity and the latter to the state. It is true that the conditions appended to paragraph 4 of the decision included subparagraph "(m)", reading "to return to the Tribunal at such time and on such date as the Trial Chamber may order", and that

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responsibility for ensuring compliance with that condition was placed on the entity. But it appears to me that this referred to the local action which fell to be taken in effecting a return; the other conditions appended to paragraph 4, which the entity had to ensure were complied with, visualised the local presence of the accused.

5. When it came to the critically important matter of departure from and return to The Netherlands, paragraphs 2 and 3 of the operative part of the decision of the full bench of the Appeals Chamber in *Jokić* placed the responsibility on the shoulders of the state of Bosnia and Herzegovina. It is obvious that, if the representatives of the state of Bosnia and Herzegovina did not turn up at Schiphol Airport, any guarantee given by the entity to return the accused to the Tribunal would fail; indeed, without the participation of that state, the accused could not in the first instance leave Schiphol Airport. Those were the implications of the decision in *Jokić* itself.

6. Given the actual decision in *Jokić*, it appears to me that the guarantee of an entity is capable of acceptance only in the sense that, taken in conjunction with other matters, it could constitute assurance of return for trial. It will therefore be for the Trial Chamber in this case to consider whether there is a basis for adopting provisions similar to those of paragraphs 2 and 3 of *Jokić* and for holding that the guarantee of the entity is, on that footing, capable of acceptance. Alternatively, the Trial Chamber may consider whether, notwithstanding the want of similar provisions, the guarantee is capable of acceptance in view of other circumstances.

7. In this respect, it has to be borne in mind that a guarantee is not capable of acceptance *in vacuo*; if it is capable of acceptance, it is capable of acceptance as assurance of return for trial. And this is what the entity promised. The undertakings in both cases required the entity to take custody of the accused from the Dutch authorities in The Netherlands and to hand him back to the Dutch authorities in The Netherlands. That would at least seem to present a question as to the competence of the entity to do so.

8. In my opinion, on a close reading, the operative part of the decision made by the full bench of the Appeals Chamber in *Jokić* left it open to the Trial Chamber to consider whether the entity *alone* had that competence. In coming to the conclusion that the entity did not, the Trial Chamber expressed disagreement with a previous view taken by the Appeals Chamber in that case. The Trial

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[1] IT-02-53-AR65 of 28 May 2002.

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Chamber is bound by the authority of the Appeals Chamber; but it is, of course, an international court and not a common law court. It may express its views as it wishes where, as here, the structure of the actual decision of the Appeals Chamber permitted examination of the issue in question.

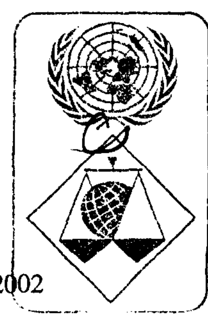
Done in both English and French, the English text being authoritative

Mohamed Shahabuddeen

Dated 3 October 2002

At The Hague

The Netherlands



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UNITED
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PROSECUTOR

v

Vidoje BLAGOJEVIĆ, Dragan OBRENOVIĆ, Dragan JOKIĆ & Momir NIKOLIĆ

SEPARATE OPINION OF JUDGE DAVID HUNT ON PROVISIONAL RELEASE OF VIDOJE BLAGOJEVIĆ AND DRAGAN OBRENOVIĆ

Counsel for the Prosecutor:

Mr Peter McCloskey

Counsel for the Accused:

Mr Michael Karnavas, for Vidoje Blagojević
Mr David Eugene Wilson, for Dragan Obrenović

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SEPARATE OPINION OF JUDGE DAVID HUNT

1. I agree that the appeals must be allowed, the decisions of the Trial Chamber quashed and the matters returned to the Trial Chamber for it to reconsider its decisions.

2. In my opinion, except in relation to the most formal matters, the Appeals Chamber is required, just as any court is required, to provide a reasoned opinion for the decisions which have been given. The revelation of those reasons is necessary to assist not only the parties and the Trial Chamber from which the appeal came but also others – the parties in other cases, other Trial Chambers, academic and opinion writers and the interested public – to understand how a particular decision was reached. The practice of this Tribunal to achieve wherever possible a consensus and thus to publish joint decisions means, of course, that such joint decisions reveal only the lowest common denominator of the judges' reasons for the decision given. That is not always a good thing, particularly in the Appeals Chamber, because it means that many of its decisions are of less assistance than they could ideally be.

3. In the present case, the Trial Chamber refused to follow a decision of the Appeals Chamber (by which it was bound) because it thought that that decision was wrong. The Appeals Chamber decision in question was, unfortunately, of a formal nature only, and provided no reasons beyond agreeing with the views of the Bench of three judges which had granted leave, in a decision in which it would not have been appropriate for the Bench of three judges to give the assistance which the full Bench of the Appeals Chamber itself could have given. I regret to say that I do not believe that the decision of the Appeals Chamber in the present case repairs that omission. Accordingly, I prefer to express for myself the basis upon which, in my opinion, the appeal must be allowed.

4. In each of the decisions of the Trial Chamber refusing the application by the accused for provisional release,[1] it was held that it was not possible for this Tribunal to accept a guarantee given by the Government of Republika Srpska supporting the claim by each accused that he will appear for trial,[2] and that the Trial Chamber would be acting *ultra vires* should it base its decision upon such a guarantee.[3] In doing so, the Trial Chamber expressly disagreed with a

[1] Decision on Vidoje Blagojević's Application for Provisional Release, 22 July 2002 ("Blagojević Decision"); Decision on Dragan Obrenović's Application for Provisional Release, 22 July 2002 ("Obrenović Decision").
[2] Blagojević Decision, pars 34, 36; Obrenović Decision, pars 44, 46.
[3] Blagojević Decision, par 50; Obrenović Decision, par 60.

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decision of the Appeals Chamber, *Prosecutor v Jokić*,[4] that a guarantee provided by Republika Srpska is valid although not necessarily sufficient in every case. This was part of the Appeals Chamber's *ratio decidendi*.

5. The Trial Chamber was bound by that ruling of the Appeals Chamber,[5] and it erred in law by refusing to follow it. It is open to a Trial Chamber to express a reasoned disagreement with such a decision of the Appeals Chamber (as indeed the Trial Chamber did here), and such reasoned disagreement may in the appropriate case lead to a reconsideration by the Appeals Chamber of its earlier decision. But the Trial Chamber is in the meantime required to accept loyally the decision by which it is bound.

6. The reasoned disagreement which the Trial Chamber has expressed does not persuade me that the *Jokić* Decision given by the Appeals Chamber was wrong. The Trial Chamber's view proceeds upon an assumption that a guarantee to be used in an application for provisional release – one which ensures that an accused who applies for provisional release will be arrested if he fails to comply with the conditions of his provisional release (including his obligation to appear for trial in accordance with his own undertaking) – can only be accepted from a sovereign state as recognised under public international law. As neither of the two entities of the State of Bosnia and Herzegovina (the Federation of Bosnia and Herzegovina and Republika Srpska) are recognised as such states, the Trial Chamber reasoned, it would be *ultra vires* to accept their guarantees. There is nothing in either the Tribunal's Statute or its Rules of Procedure and Evidence which imposes any such limitation upon the identity of a guarantor which a Trial Chamber may accept. If a guarantee is offered, the Tribunal expects it to be provided by an authority which has the power to arrest the accused in the event of his breach of any conditions of his grant of provisional release. There would be nothing *ultra vires* if a Trial Chamber were to accept a guarantee from the local police sergeant if he has been shown to have the power to arrest the accused in the event of such a breach, although obviously such a guarantee would not ordinarily be regarded as sufficient.

7. The basis of the Trial Chamber's decision appears to be that, in the event of a failure by the guarantor to carry out its obligations, the Tribunal can report that failure to the United

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[4] IT-02-53-AR65, Decision on Application by Dragan Jokić for Provisional Release, 28 May 2002 ("*Jokić* Decision"), p 2, concurring with the decision of a Bench of the Appeals Chamber granting leave in that matter: Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, pars 4-10. (Dragan Jokić is a co-accused of the two accused involved in the present decision.)

[5] *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000, par 113.

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Nations Security Council only if it concerns a state recognised as such under public international law.[6] The fact is that Republika Srpska, amongst others, *has* been reported by the Tribunal to the Security Council for its failure to comply with its obligations to assist the Tribunal.[7] But even if there be an absence of recourse to the Security Council in the event of a failure by an entity to perform the guarantees it has given, that does not render *ultra vires* the decision of a Trial Chamber to accept and rely upon such a guarantee from an entity in the circumstances of a particular case. The absence of such recourse may affect the weight to be given to an undertaking from an entity, but it does not affect the validity of that undertaking. The Trial Chamber in the present case had itself earlier accepted a guarantee from the Federation of Bosnia and Herzegovina, rather than from the State of Bosnia and Herzegovina, to arrest an accused and to transfer him to The Netherlands.[8] Other Trial Chambers have similarly relied upon such guarantees from the Federation of Bosnia and Herzegovina and Republika Srpska.[9] What is important in these cases is the power of arrest, which Republika Srpska does have, and the political will to effect an arrest of the particular accused in question, which may be in question so far as Republika Srpska is concerned in the particular case. It is significant that the prosecution has not sought in this appeal to support the decision of the Trial Chamber.

8. Insofar as the Blagojević and Obrenović Decisions of the Trial Chamber are based to an extent upon the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, and upon the jurisprudence of the European Court of Human Rights ("ECHR"),[10] it is necessary to point out that this Tribunal is not a European Court, and that it is not bound by either the Convention or the jurisprudence of the ECHR. The Tribunal will always have due regard to that jurisprudence, and to the European Convention and all other relevant human rights treaties – the jurisprudence as persuasive authority which may be of assistance in applying and

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[6] Blagojević Decision, pars 48, 50; Obrenović Decision, pars 58, 60.

[7] See, for example, the Fourth Annual Report (pars 183-187), the Fifth Annual Report (pp 81-83) and the Sixth Annual Report (par 106).

[8] *Prosecutor v Hadžihasanović et al*, IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović, 19 Dec 2001, pars 9-11. Although the Decision refers to the "Government of Bosnia and Herzegovina", the undertakings themselves make it clear that they were given by the Federation of Bosnia and Herzegovina and not by the State of Bosnia and Herzegovina, and those appearing before the Trial Chamber were representatives of the Federation, not of the State. The Trial Chamber also accepted such guarantees when granting provisional release to Hadžihasanović's two co-accused, Mehmed Alagić and Amir Kubura, in separate decisions given on the same day.

[9] Federation of Bosnia and Herzegovina: *Prosecutor v Halilović*, IT-01-48-PT, Decision on Request for Pre-Trial Provisional Release, 13 Dec 2001. Republika Srpska: *Prosecutor v Simic et al*, IT-95-9-PT, Decision on Provisional Release of the Accused (Milan Simic), 26 Mar 1998; Decision on Zarić's Application for Provisional Release, 4 Apr 2000; Decision on Miroslav Tadić's Application for Provisional Release, 4 Apr 2000; *Jokić* Decision [Appeals Chamber Decision], p 2. There are many decisions by Trial Chambers where the rejection of provisional release was based upon the unreliability of guarantees given by Republika Srpska, but not upon any point relating to their validity.

[10] Blagojević Decision, par 26; Obrenović Decision, par 34.

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interpreting the Tribunal's applicable law, and the treaties as authoritative evidence of customary international law in relation to some of their provisions.[11] But the Tribunal has recognised that the context in which it operates is in some respects very different to that in which the European domestic courts operate. For example, unlike those domestic courts, the Tribunal does not possess the extensive enforcement powers of a State in order to control matters which could materially affect the fairness of a trial, and the Appeals Chamber has therefore given a more liberal interpretation to the principle of equality of arms than that which has been given to it by the ECHR, by requiring Trial Chambers to provide both parties with every practicable facility available to assist them in presenting their case.[12] Relevantly to provisional release, the fact that the applicant has the burden of establishing that he will appear and that he will not interfere with witnesses has been justified upon the basis that, unlike the European domestic courts, the Tribunal has no power to execute arrest warrants.[13]

9. In my view, therefore, the *Jokić* Decision should remain the law to be applied in this Tribunal. By refusing to follow that decision in the present cases, the Trial Chamber excluded from its consideration of whether each of the two accused would appear for trial the guarantees which had been provided by the Government of Republika Srpska. That was evidence which was directly relevant to the decisions of the Trial Chamber, although of course the reliability of such guarantees so far as they relate to these two accused was (and remains) a matter for the Trial Chamber to determine.[14] The exclusion of relevant evidence amounts to an error of law which would normally invalidate the finding of the Trial Chamber that it was not satisfied that the accused would appear for trial.[15]

10. The consequence of such invalidity would ordinarily lead to the quashing of the decisions to refuse provisional release, unless the Appeals Chamber can be sure that the decision would

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[11] *Barayagwiza v Prosecutor*, ICTR-97-19-AR72, Decision, 3 Nov 1999, par 40. Reference should also be made to Article 9 (3) of the International Covenant on Civil and Political Rights: "It shall not be the general rule that persons awaiting trial shall be detained in custody [...]."

[12] *Prosecutor v Tadić*, IT-94-1A, Judgment, 15 July 1999, pars 48-52. In that case, the accused had been prevented from securing the attendance of a witness by conditions beyond the control of the Tribunal. The prosecution had relied upon ECHR jurisprudence to argue that, because the Tribunal had no control over the Republika Srpska authorities, there had been no breach of the equality of arms principle.

[13] *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Momir Talić for Provisional Release, 28 Mar 2001, par 18; *Prosecutor v Krajišnik & Plavšić*, IT-00-38&40-PT, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 Oct 2001, par 13; *Prosecutor v Ademi*, IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb 2002, par 24.

[14] *Prosecutor v Tadić*, IT-94-1-A, Judgment, 15 July 1999, par 64; *Prosecutor v Aleksovski*, IT-95-14/1-A, Judgment, 24 Mar 2000, par 61; *Prosecutor v Kupreškić et al*, IT-96-16-A, Appeal Judgment, 23 Oct 2001, pars 30-31; *Prosecutor v Kunarac et al*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, pars 39-40.

[15] *Prosecutor v Milošević*, IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal From Refusal to Order Joinder, 18 Apr 2002, par 6.

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necessarily have been the same had the Trial Chamber taken the excluded evidence into account. Had the Trial Chamber, for example, said that, even if it *had* taken the guarantees provided by Republika Srpska into account, it would still not have been satisfied that each of the two accused would appear for trial, the error of law would not have invalidated the decision. But the Trial Chamber did not do so. Instead, the Trial Chamber said in both decisions that its inability to accept the Republika Srpska guarantees was not "the decisive element" for refusing the application,[16] and not "the final basis" for its decision,[17] and that it had "reasonable doubts whether the guarantees offered can eliminate or significantly minimise the risk of flight".[18] The first two statements implicitly accept that such inability as a matter of law to accept the Republika Srpska guarantees *was* at least one element (even though not the decisive one) in its finding that it was not satisfied that the accused would appear for trial, or at least one basis (though not the final one) upon which its finding was made. It is unclear from the third statement whether the doubts expressed relate to the issue of law decided or to the reliability of the guarantees if they could validly be relied upon. The Trial Chamber's position in relation to the reliability of the Republika Srpska guarantees remains ambiguous in both decisions.

11. In my opinion, these ambiguities prevent the Appeals Chamber being sure that either of the decisions would necessarily have been the same had the Trial Chamber been prepared to take those guarantees into account. It is therefore necessary to quash both of its decisions to refuse provisional release. It is open to the Appeals Chamber in the appropriate case to proceed then to determine for itself whether provisional release should be granted.[19] But it is appropriate to do so only when the material before it enables it to make that decision.

12. The Trial Chamber found that Blagojević could not be treated as having voluntarily surrendered,[20] and that Obrenović should not be treated as if he had voluntarily surrendered.[21] In those circumstances, the reliability of the Republika Srpska guarantees could become of some importance. That reliability must be determined not by reference to any assessment of the level of cooperation by Republika Srpska with the Tribunal generally, but in relation to what would

[16] Blagojević Decision, par 34; Obrenović Decision, par 44.
[17] Blagojević Decision, par 52; Obrenović Decision, par 62.
[18] Blagojević Decision, par 54; Obrenović Decision, par 64.
[19] The Appeals Chamber did so in the *Jokić* Decision.
[20] Blagojević Decision, par 32. The indictment against him was a sealed one, and he had no opportunity to surrender voluntarily. In those circumstances, absent specific evidence directed to the particular issue, the Trial Chamber could neither take into account in favour of Blagojević that he had surrendered voluntarily nor take into account against him the fact that he had not done so: *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, par 17.
[21] Obrenović Decision, par 42.

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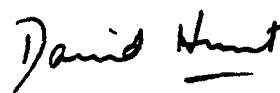
happen if Republika Srpska were obliged under its guarantees to arrest each of *these* two accused. What would happen in the circumstances of *these* particular cases is a fact in issue to be decided when determining whether the accused will appear for trial. The general level of the cooperation by Republika Srpska with the Tribunal does have some relevance in determining whether it would arrest *these* two accused, but it is not itself a fact in issue. It is therefore both unnecessary and unwise to include in a Trial Chamber's decision a separate finding concerning that general level of cooperation – unnecessary because any such finding can only be applicable to a particular point in time, and unwise because it will inevitably be misunderstood by the parties in relation to subsequent applications for provisional release.

13. In all these circumstances, whether Republika Srpska would arrest *these* two accused would therefore more appropriately be determined by the Trial Chamber. There is another, subsidiary, reason why this matter should be returned to the Trial Chamber. The pleadings before the Appeals Chamber indicate that there are strongly disputed issues of fact involved in the matters upon which the prosecution now relies in its opposition to the grant of provisional release in relation to both accused. There are presently no clear findings of fact in relation to those disputed issues, and it will be necessary for the Trial Chamber to determine them.

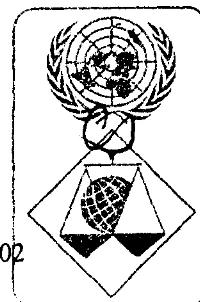
Done in English and French, the English text being authoritative.

Dated this 3rd day of October 2002,
At The Hague,
The Netherlands.



Judge David Hunt

[Seal of the Tribunal]



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