



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No: IT-00-39 & 40-PT

Date: 18 October 2002

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Decision of: 18 October 2002

PROSECUTOR

v.

**MOMČILO KRAJIŠNIK
&
BILJANA PLAVŠIĆ**

**DECISION ON MOMČILO KRAJIŠNIK'S
MOTION FOR PROVISIONAL RELEASE AND EVIDENTIARY HEARING**

Office of the Prosecutor:

Mr. Mark Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Deyan Brashich, for Momčilo Krajišnik
Mr. Robert. J. Pavich and Mr. Eugene O'Sullivan, for Biljana Plavšić

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“International Tribunal”),

BEING SEISED of the “Renewed Motion for Provisional Release” filed by counsel on behalf of the accused Momčilo Krajišnik (“Accused”) on 5 June 2002 (“Motion for Provisional Release”) which seeks the provisional release of the Accused to either the Republic of Serbia or Republika Srpska,

NOTING the “Prosecution’s Response to Krajišnik’s Renewed Motion for Provisional Release” filed by the Office of the Prosecutor (“Prosecution”) on 19 June 2002 (“Response”),

NOTING the further submissions of the Defence and the Prosecution at the hearing on provisional release on 10 July 2002 (“Hearing”) and the representations made by Mr. Trivan Vovičić, representative of the Government of Republika Srpska,

NOTING the arguments of the Defence set out in the Motion for Provisional Release and advanced at the Hearing that:

- (a) circumstances have changed since its last application for provisional release due to the passage “by the Republic of Serbia” of legislation on co-operation with the International Tribunal;¹
- (b) the Accused had been incarcerated, at the time the Motion for Provisional Release was filed, for two years and three months;
- (c) guarantees have now been provided by the Government of Republika Srpska and the Federal Government of the Federal Republic of Yugoslavia (“FRY”) and the Defence would endeavour to obtain a guarantee from the Republic of Serbia;
- (d) the Accused satisfies the conditions for the grant of provisional release in that he would appear for trial and, if released, he would pose no danger to any victim, witness or other person,

NOTING the Prosecution submissions made in the Response and at the Hearing that:

- (a) the Motion for Provisional Release amounts to reconsideration of the Trial Chamber’s earlier Decisions on provisional release, but there has been no relevant change in circumstances justifying such an application;
- (b) if there has been a change in circumstances, the FRY is in “a state of flux” and, if the FRY were to be reconfigured, the Republic of Serbia would be the operative body required to execute warrants of arrest and other tasks connected with the grant of provisional release, and that there is no guarantee from the Republic of Serbia;
- (c) the anticipated length of pre-trial detention is not one of the elements contained in Rule 65 and only becomes relevant once the Accused has demonstrated that he satisfies the requirements of Rule 65(B);
- (d) in any event, the Accused has not discharged his burden under Rule 65(B),

¹ In fact, the “Law on Co-operation of the Federal Republic of Yugoslavia with 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” was passed by the Federal Government of the Federal Republic of Yugoslavia (“Law on Co-operation”), not the Republic of Serbia as asserted by the Defence, and came into force on 12 April 2002.

NOTING the Order of the Trial Chamber issued on 17 July 2002 ordering the Defence to file a guarantee from the Government of the Republic of Serbia and an updated guarantee from the Federal Government of the FRY,

NOTING the Conclusion dated 26 July 2002, filed by the Defence the same day, signed by Milorad Ivanović, Secretary-General of the Federal Government of the FRY, stating that, on the 26 July 2002, the Federal Government of the FRY reached the conclusion to renew Guarantee No. 1116/01 dated 19 September 2001 issued in respect of the Accused (“Updated FRY Guarantee”),

NOTING the Conclusion dated 1 August 2002, filed by the Defence on 2 August 2002, signed by Dušan Mihajlović, Vice-President of the Government of the Republic of Serbia, stating that the Government of the Republic of Serbia reached the conclusion to adopt “the text of the Guarantee of the Federal Government”, but that “the Guarantee for [the Accused] shall be signed by the President of the Government, Dr. Zoran Djindjić” (“Republic of Serbia Guarantee”),

NOTING the letter dated 11 August 2002 from Lieutenant General John B. Sylvester, U.S. Army, Commander of the Stabilisation Force, Bosnia and Herzegovina, to Trial Chamber III (“SFOR Letter”), addressing the pending application by the Accused for provisional release,

NOTING the “Prosecution’s Motion for Leave to Make Further Submissions in Relation to Krajišnik’s Renewed Motion for Provisional Release” filed on 12 August 2002, seeking leave to file further submissions on the nature and character of the guarantees,

NOTING the Order Accepting Third Party Submission and Ordering Further Filings issued on 18 September 2002, which formally entered the SFOR Letter into the record of proceedings, and which directed the parties to file further submissions,

NOTING the “Motion and Request for an Evidentiary Hearing and the Issuance of a Subpoenas [sic] in Aid Thereof” filed by the Defence on 20 September 2002 (“Motion for Evidentiary Hearing”), seeking an evidentiary hearing on the matters raised in the SFOR Letter and that a subpoena be issued to ensure the attendance of Lieutenant General Sylvester at such hearing,

NOTING “the Krajišnik Defense Response to Order Accepting Third Party Submission and Ordering Further Filings” filed on 25 September 2002, repeating the request for an evidentiary hearing or, alternatively, requesting that the SFOR Letter be disregarded,

NOTING the “Prosecution’s Further Submissions Concerning Krajišnik’s Renewed Motion for Provisional Release” filed on 27 September 2002, which (a) outlines current events in the FRY relating to the republican presidential elections and changes in the constitutional status of the FRY, and their potential impact upon the weight to be afforded to the Republic of Serbia Guarantee and Updated FRY Guarantee, and (b) comments upon the matters raised in the SFOR Letter,

NOTING the “Prosecution’s Response to Krajišnik’s Motion for an Evidentiary Hearing and for Issuance of Subpoenas” filed on 4 October 2002 which opposes the Motion for Evidentiary Hearing,

NOTING the “Motion for Leave to File a Reply to Prosecution’s Response to Order Dated September 18, 2002” filed on 3 October 2002 seeking leave to file a reply in the form of a written statement made and signed by the Accused on 2 October 2002,²

NOTING that the Accused as sought provisional release on previous occasions, all of which have been denied by the Trial Chamber,

CONSIDERING that the passage of the Law on Co-operation, the submission of the Republic of Serbia Guarantee and the additional length of time the Accused will spend in detention prior to the commencement of his trial do constitute changes of circumstances warranting fresh consideration by the Trial Chamber of an application for provisional release,³

NOTING Rule 65 which provides in the 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.

CONSIDERING the views of the host country, as provided in a letter to the Deputy Registrar from the Dutch Ministry of Foreign Affairs dated 7 June 2002, filed on 13 June 2002, that the Government of the Netherlands does not object to the provisional release of the Accused,

CONSIDERING that the Trial Chamber has heard from the state and entity to which the Accused seeks to be released,

CONSIDERING that the Trial Chamber reaches its decision without taking into account the matters raised in the SFOR Letter,

CONSIDERING, by majority (Judges May and Kwon), that the following matters are relevant to a determination as to whether provisional release should be granted:

- (i) that, to date, the Accused has been in detention for two years and six months since his arrest on 3 April 2002 and, as the Accused’s trial is expected to start in January 2003, the total length of pre-trial detention can be expected to amount to two years and nine months, a period that, while an extensive period of time, is not unreasonable,
- (ii) in general, an accused can expect to remain in detention once the trial has commenced,⁴ consequently, if provisional release were granted to the Accused it would be for a period in the region of four months, and that release for such

² It may be noted that this filing bears the erroneous filing date of 3 September 2002.

³ When provisional release was denied by the Trial Chamber in its Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, 8 Oct 2001, the trial was expected to start “not many months hence” (*ibid.*, para. 28). When the Trial Chamber refused to reconsider that Decision when it issued its Decision on Motion for Provisional Release, 24 Jan 2002, the “anticipated time for commencement of Now the trial is expected to commence in 2003: see transcript of Status Conference, 20 Sept 2002, p. 315.

⁴ See Prosecutor v. Kordić and Čerkez, Order on Application by Dario Kordić for Provisional Release Pursuant to Rule 65, 17 Dec 1991, p. 5; also defence counsel for the Accused accepted that, if provisional release were granted, the Accused would go back into detention at the time his trial was due to commence: Hearing Transcript, p. 301.

a relatively short period of time could offer an incentive to the Accused not to appear for trial,

CONSIDERING, unanimously, that the following matters are relevant to a determination as to whether provisional release should be granted:

- (i) during the time that the offences charges are alleged to have been committed (between 1 July 1991 and 30 December 1992) the Accused is said to have been a member of the Main Board of the Serbian Democratic Party of Bosnia and Herzegovina, President of the Assembly of Serbian People in Bosnia and Herzegovina, a member of the National Security Council of the Bosnian Serb Republic and a member of the expanded Presidency of the Bosnian Serb Republic,⁵ and therefore at all times is alleged to have been a political leader operating at the highest level of Bosnian Serb politics,
- (ii) he is charged with extremely serious offences: genocide, complicity in genocide, persecution, extermination, murder, deportation and inhumane acts (forced transfer) under Articles 3, 4 and 5 of the Statute of the International Tribunal,⁶ and therefore faces a lengthy custodial sentence, including life imprisonment, if convicted of any of the charges,
- (iii) the circumstances surrounding his arrest and transfer to the International Tribunal are a neutral factor,⁷
- (iv) the filing of a guarantee is not a pre-requisite for the grant of provisional release,⁸ but it is a significant factor in determining whether provisional release should be granted,
- (v) the Trial Chamber has heard no submissions nor received any new material to cause it to alter its view that the guarantee issued by the Government of Republika Srpska must be treated with caution,⁹
- (vi) the Trial Chamber accepts that since the passage of the Law on Co-operation the value of the Updated FRY Guarantee is greater than during earlier applications for provisional release,¹⁰ but in considering what would happen if that authority were obliged under its guarantee to arrest the Accused,¹¹ the Trial Chamber is not satisfied that the authorities of the FRY would be in a position to arrest the Accused,
- (vii) the Republic of Serbia Guarantee does not appear to be effective since by its own terms it calls for signature by the President of the Republic of Serbia and no such signature has been provided; and the Defence had an opportunity to address the submission of the Prosecution on this point but failed to do so,

⁵ Amended Consolidated Indictment, 7 March 2002, para 1.

⁶ Amended Consolidated Indictment, 7 March 2002, paras 15-27.

⁷ See *Prosecutor v. Krajišnik and Plavšić*, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 Oct 2001, para 20, which states that the circumstances relating to the Accused's arrest on a sealed indictment did not enable the Prosecution to argue that the Accused was evading arrest nor permit the Accused to claim that, because he was arrested on a sealed indictment, he was deprived of the opportunity of surrendering, and would have done so if given that opportunity.

⁸ *Prosecutor v. Blagojević et al.*, IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, paras 7-8.

⁹ See *Prosecutor v. Krajišnik and Plavšić*, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 Oct 2001, para 18.

¹⁰ See *Prosecutor v. Krajišnik and Plavšić*, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 Oct 2001, para 19.

¹¹ See *Prosecutor v. Mrksić*, Decision on Appeal Against Refusal to Grant Provisional Release, 8 Oct 2002, para 11.

CONSIDERING, unanimously, that, in all the circumstances, the Trial Chamber is not satisfied that the Accused will appear for trial, and that there is no need to further consider the requirement that the Accused, if released, would not pose a danger to any victim, witness or other person,

PURSUANT to Rule 65 of the Rules

HEREBY DISMISSES

- (i) the Motion for Provisional Release; and
- (ii) the Motion for Evidentiary Hearing.

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



Richard May

Presiding

Dated this eighteenth day of October 2002

At The Hague

The Netherlands

[Seal of the Tribunal]