IT-99-37-AR65
A532 - A457
30 OCTOBER 2002.

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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 No.: IT-99-37-AR65

Date: 30 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:	**30 October 2002**

PROSECUTOR

v.

NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ

DECISION ON PROVISIONAL RELEASE

Counsel for the Prosecutor
Mrs. Carla Del Ponte
Mr. Geoffrey Nice

Counsel for the Accused
Mr. Toma Fila and Mr. Zoran Jovanović for Nikola Šainović
Mr. Tomislav Višnjić, Mr. Vojislav Seležan and Mr. Peter Robinson for Dragoljub Ojdanić

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1. Pursuant to leave granted by a Bench of the Appeals Chamber,[1] the Prosecution appealed against Trial Chamber III's "Decision on Application of Nikola Šainović and Dragoljub Ojdanić for Provisional Release" ("Impugned Decision") whereby the Trial Chamber granted provisional release to co-accused Nikola Šainović and Dragoljub Ojdanić ("Šainović" and "Ojdanić", the "Applicants").[2] On 2 August 2002, Šainović filed his "Defence Response to the Prosecution's Appeal Against the Trial Chamber's Decision to Grant Provisional Release" and Ojdanić his "General Dragoljub Ojdanić's Brief on Appeal". On 7 August 2002, the Appellant filed its "Prosecution's Joint Reply" (the "Reply").

2. In its Appellant's Brief, the Prosecution submits that the Trial Chamber committed an error of fact when it concluded that the two requirements of Rule 65(B) of the Rules of Procedure and Evidence ("Rules") had been met, and that it abused its discretion when deciding whether or not to release the accused. In relation to its first contention, the Prosecution submits that the Trial Chamber erred by omitting to consider the failure of the authorities of the Federal Republic of Yugoslavia ("FRY") to arrest co-accused Milan Milutinović ("Milutinović"), insisting instead on the FRY's "general level of co-operation". The Prosecution also submits that the Trial Chamber erred by giving unreasonable weight to the guarantees provided by the Applicants and by not giving sufficient weight to the fact that they could have surrendered earlier. In relation to the second contention, the Prosecution claims that the Trial Chamber abused its discretion when suggesting that the foreseeable length of pre-trial detention militated in favour of provisional release, because that delay was due only to the Defence and also because, in any case, the delay would not have been "exceptionally long" or "unreasonable". The Prosecution further submits that the Defence's estimate as to pre-trial delay should not have been accepted by the Trial Chamber at face value, but should instead have been properly assessed by the Trial Chamber. The Prosecution finally submits that the Trial Chamber abused its discretion when it failed to address other relevant factors inherent to a proper exercise of discretion such as the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted, as well as the absence of co-operation on the part of the relevant authorities.

3. In his Response, Šainović submits that the Prosecution is incorrect to claim that the FRY's and Serbia's guarantees are unreliable and points to the fact that, as soon as the Law on Co-operation with the Tribunal was passed, he surrendered to the Tribunal. Concerning the Trial

[1] Decision Granting Leave to Appeal, 16 July 2002.

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Chamber's exercise of discretion, Šainović says that the Prosecution failed to establish that the Chamber acted beyond the realm of its discretionary power. He finally submits that the factors which the Trial Chamber allegedly failed to consider would not in any case have prevented his release. Ojdanić submits that the Prosecution failed to demonstrate that there was a miscarriage of justice resulting from an error of fact or that the Trial Chamber abused its discretion. According to him, the failure of the FRY to transfer co-accused Milutinović does not amount to a lack of co-operation on the FRY's part which would bear consequences upon the weight of the guarantees which it provided concerning the present accused's provisional release. The Trial Chamber also properly took into account the likelihood of a lengthy sentence when coming to its decision. In relation to its exercise of discretion, Ojdanić points out that the Prosecution did not dispute at trial the Defence's estimate of the time needed before the trial may start and that the Trial Chamber did not abuse its discretion by taking the period of pre-trial detention into account to decide whether to release him. Finally, Ojdanić argues that the Trial Chamber took into account all the factors relevant to a proper exercise of its discretion.

4. In Reply, the Prosecution submitted, *inter alia*, that the reliability of the guarantees given by the FRY and Serbia is not an independent matter, and that the true issue should be whether the Trial Chamber is satisfied that the accused will appear at trial. The Prosecution suggests that provisional release is premised upon the assumption that the Tribunal will not need to have resort to Article 29 of the Statute and Rule 56 of the Rules for the arrest and transfer of accused persons and that, in case of doubt as to whether, if released, an accused will need to be re-arrested to appear for trial, provisional release should be rejected. The Prosecution contends that such a guarantee is a "secondary consideration" and that its absence would merely constitute an additional "negative factor" whereas its existence could not be regarded as a "positive factor" speaking in favour of provisional release. The same may be said, the Prosecution argues, of the Law on Co-operation with the Tribunal. Further, the Prosecution claims that, in view of the circumstances, the surrender of the co-accused may not legitimately be regarded as "voluntary" and that the Trial Chamber gave "no real consideration, or insufficient consideration" to the likely length of the sentence if they were convicted. Concerning the length of pre-trial detention, the Prosecution submits that it is for the Trial Chamber, not the parties, to set out the basis for its conclusion that there would be "considerable time" before the trial begins. It also points out that the Defence's assessment in that respect was grossly inflated. In addition, in the exercise of its discretion, the Trial Chamber should have once again taken into account those factors which it assessed to decide whether or not the

[2] Prosecution's Appeal Against the Trial Chamber's Decision to Grant Provisional Release, 26 July 2002 ("Appellant's Brief").

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conditions had been met pursuant to Rule 65(B). Finally, the Prosecution submits that public interest considerations weighed heavily against exercising its discretion in favour of provisional release.

5. On 12 August 2002, Šainović filed his "Defence Response to Prosecution's Joint Reply" ("response to the reply"). On 19 August 2002, the Appellant filed his "Prosecution's objection to 'Defence Response to Prosecution's Joint Reply'", in which the Prosecution argues that Šainović was not entitled to file such a response. Neither the Rules nor the practice of the Tribunal provide a party with a right to respond to a reply, although leave will usually be granted to file a further response where the reply raises a new issue. That is not the case here. Šainović did not seek leave with the Appeals Chamber to respond to the reply. His response to the reply is therefore disregarded for the purpose of the present appeal.

6. A Trial Chamber is not obliged to deal with all possible factors which a Trial Chamber can take into account when deciding whether it is satisfied that, if released, an accused will appear for trial. It must, however, render a reasoned opinion.[3] This obliges it to indicate all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. In relation to the present application for provisional release, a reasonable Trial Chamber would have been expected to consider, and thus to list, *inter alia*, the following factors: the fact that the applicants are charged with serious criminal offences; the fact that, if convicted, they are likely to face long prison terms; the circumstances in which they surrendered; the degree of co-operation given by the authorities of the FRY and Serbia; the fact that the government of the FRY and the government of the Republic of Serbia gave guarantees that they would ensure the presence of the accused for trial and guaranteed the observance of the conditions set by the Trial Chamber upon their provisional release;[4] the fact that both accused held very senior positions, so far as it is relevant to the weight of governmental guarantees; the fact that the FRY recently passed a Law on Co-operation with the International Tribunal; the fact that the Applicants gave personal guarantees in which they undertook to abide by the conditions set by the Trial Chamber should they be released; the likelihood that, in light of the circumstances prevailing at the time of the decision and, as far as foreseeable, the circumstances as they may turn out to be at the time when the accused will be expected to return for trial, the relevant authorities will re-arrest the accused should he decline to surrender; and the fact that the accused provisionally accepted to be

[3] This point is conceded by the Prosecution (pars 37-38 of the Appellant's Brief).

[4] Pursuant to Rule 65(C) of the Rules, the production of a guarantee from the relevant governmental body is advisable but not a prerequisite for provisional release. See *Prosecutor v Jokić*, Decision on Application by Dragan Jokić for

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interviewed by the Office of the Prosecutor, thereby showing some degree of co-operation with the Prosecution.

7. The circumstances of each accused who applies for provisional release must be evaluated individually as they weigh upon the likelihood that he will appear for trial. The weight to be attributed to guarantees given by a government may depend a great deal upon the personal circumstances of the applicant, notably because of the position which he held prior to his arrest. The Trial Chamber must assess these circumstances at the time when the decision on provisional release is being taken, but must also, as far as foreseeable, make an assessment as at the time when the case is due for trial and when the accused will be expected to return.

8. The Appeals Chamber is of the view that the Prosecution's argument that, as a matter of discretion, an accused person should not be released until the Prosecution has been able to interview him fully is misconceived.[5] An accused person is not, while in the custody of the International Tribunal, at the disposal of the Prosecution. An accused person may, if he decides to do so, co-operate with the Office of the Prosecutor, *inter alia*, by accepting to be interviewed by the Prosecution, but he does not have to do so and his provisional release is not conditioned, all other conditions being met, upon his giving such an interview while still in custody.

9. The Impugned Decision does not demonstrate that the Trial Chamber took into account all the factors which were relevant to its taking a fully informed and reasonable decision as to whether, pursuant to Rule 65(B), the accused will appear for trial if provisionally released. In particular, the Trial Chamber failed to consider the effect of the senior position of the two co-accused so far as it relied upon the guarantees. The position of an accused in the hierarchy and the consequence thereof upon the weight of governmental guarantees are indeed significant factors which the Trial Chamber is expected to address as they could have an important bearing upon a State's willingness and readiness to arrest that person if he refuses to surrender himself; those factors therefore reduce the likelihood of his appearing at trial. In failing to address these factors, the Trial Chamber committed an error of law.

10. The Appeals Chamber notes that the Trial Chamber emphasised the fact that the applicants surrendered voluntarily. It seems, however, that a question was raised as to whether their surrender was truly voluntary. The applicants' case was that, prior to the adoption on 11 April 2002 of the

Provisional Release, 28 May 2002 and *Prosecutor v Jokić*, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, pars 7-8.

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Law on Co-operation with the Tribunal, it would not have been possible for them to surrender, but that, thereafter, it was.[6] The Prosecution submitted that, for approximately three years prior to the adoption of the Law on Co-operation, the applicants did not surrender and that the true interpretation of the facts is that they eventually surrendered only after it became clear from the Law on Co-operation that they would no longer find a reliable refuge in the FRY.[7] It also pointed out in its submissions to the Trial Chamber that both accused made public statements to the media earlier this year to the effect that they would not surrender voluntarily.[8] In the Trial Chamber, the Defence did not dispute those statements.

At the appellate level, the Prosecution elaborated its position by citing particular statements that the accused or their counsel made. These statements were set out both in footnote 19 to the Prosecution's Response to Applications for Provisional Release and at p.79 of the Prosecution's Book of Authorities. The accused did not react to these statements. However, in respect of these statements, the Prosecution did not observe the usual procedure for the admission of additional evidence. Consequently, the Appeals Chamber would disregard these statements and the accused's lack of reaction to them.

In respect of the public statements made by the accused to the media and which were mentioned to the Trial Chamber, the Trial Chamber did not refer to them or to the Prosecution's submission concerning the voluntariness of the surrender. On appeal, the Prosecution did not complain about the failure of the Trial Chamber to refer to these statements. The Appeals Chamber gives no weight to this lack of complaint. The Prosecution continues to rely on those statements. These statements were highly relevant. In view of the Appeals Chamber, the Trial Chamber committed an error of law in not referring to them. Further, the Appeals Chamber notes that, although they were publicly indicted in May 1999, both accused "surrendered" only in April 2002, and then only in the circumstances mentioned above. As a result, the Appeals Chamber disagrees with the finding of the Trial Chamber that the surrenders were voluntary.

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[5] See hearing on application for provisional release, 24 June 2002, T 424-425.

[6] Šainović respondent's brief, par 5 and Ojdanić respondent's brief, par 49.

[7] Prosecution's Joint Reply, 7 August 2002, par 14.

[8] See paragraphs 15 ("The Prosecution notes also that the accused told the media earlier this year that he would not surrender voluntarily") and 24 ("As with the accused Šainović, the accused Ojdanić stated to the media earlier this year that he would not surrender voluntarily, explaining that domestic courts should have jurisdiction over him") of the "Prosecution's Response to Applications for Provisional Release", 19 June 2002. See also Trial Chamber Transcript pages 429-430 of 24 June 2002: "[...] Mr Ojdanić had indicated sometime fairly recently, as indicated in our pleadings, that he believed he would best be tried by domestic courts, in particular military courts. The Prosecution would just point out that in the Talić decision on provisional release, it was also found important in the context of that hearing that Talić had declared prior to the provisional release argument that he felt justice could only be done in the case – in his case before a military court, not allowing for – but however – sorry, however, allowing for the possibility of an international military court trying him. The Prosecution merely notes here that Mr. Ojdanić does not even allow for the possibility of international justice."

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11. The Trial Chamber thus erred in fact and in law, and misdirected itself. The Impugned Decision must therefore be quashed.

12. When it comes to decide upon the provisional release of both accused, the Appeals Chamber is in the circumstances of this case in the same position as the Trial Chamber. In the exercise of its power to revise the Impugned Decision, it may decide upon the matter itself rather than sending it back to the Trial Chamber for reconsideration. Having taken into account all the relevant factors mentioned by the Trial Chamber as well as the additional factors mentioned in its decision, the Appeals Chamber is not satisfied that, if released, the two co-accused would appear for trial as required by Rule 65(B). The remaining arguments of the Prosecution need not be addressed in the present appeal.

13. Accordingly, the Appeals Chamber [Judge Hunt dissenting]

a) Allows the Prosecution's appeal and quashes the Impugned Decision; and

b) Revises the Impugned Decision by denying the provisional releases of Šainović and Ojdanić.

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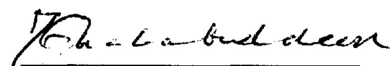
Done in both French and English, the English text being authoritative.



Mohamed Shahabuddeen
Presiding

Dated 30 October 2002
At The Hague,
The Netherlands.

Judge Shahabuddeen appends a separate opinion to this decision.

Judge Hunt appends a dissenting opinion to this decision.

[Seal of the Tribunal]

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SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the Appeals Chamber's disposition of this matter and propose to comment on two points. The first relates to the question whether the two accused had voluntarily surrendered to the Tribunal, this being, in my view, relevant to the question whether they would appear for trial. The second relates to the standard of proof by which the Trial Chamber had to be satisfied that the accused would fulfil certain conditions.

A. Voluntary surrender

2. The jurisprudence of the Tribunal establishes that, for good reason, the burden is on an applicant for provisional release to satisfy the Trial Chamber that the preconditions prescribed by the second part of Rule 65(B) of the Rules of Procedure and Evidence of the Tribunal will be met,[1] namely, that the applicant "will appear for trial and, if released, will not pose a danger to any victim, witness or other person". Whether the accused voluntarily surrendered to the Tribunal is relevant to the first of these preconditions. The Trial Chamber in this case proceeded on that basis. Paragraph 12 of its decision reads:

> As to the requirement that the accused satisfy the Chamber that they will appear for trial, the Trial Chamber attaches a significant weight to the fact that they have surrendered. This demonstrates a willingness to cooperate with the International Tribunal, and constitutes an indication that they will appear for trial. The Trial Chamber notes that the accused could have surrendered earlier but considers that it is the fact of surrender which is of significance. The Trial Chamber also takes into account and attaches importance to the Law on Co-operation passed in April of this year by the Federal Government of the FRY. This recent legislation sets out a procedure for the arrest and surrender of accused persons to the International Tribunal, and obliges the "organs of internal affairs" to arrest such persons. Procedures of this nature did not previously exist, and while it remains to be seen how the procedure will operate in practice, the Trial Chamber accepts that the Government has taken steps to lessen the chance of an accused evading arrest while in the territory of the FRY. The suggestion was made that the Governments' level of co-operation was generally

[1] The provision must, however, be interpreted in accordance with the principle *lex neminem cogit ad impossibilia*. Thus, a terminally ill accused who is released in the knowledge that he would not return for trial has not failed to satisfy the Trial Chamber that he would appear for trial; on its true construction, the provision does not impose a requirement to appear for trial in such a case. A Trial Chamber may interpret a provision and proceed to act in accordance with its interpretation of the provision; it may, for example, say that a provision is directory. On this approach, the question would not arise of having to find satisfactory authority for a Trial Chamber to act in the face of a clear provision.

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unsatisfactory. However, it is the particular level of co-operation relating to the issues of provisional release with which this application is concerned. In this connection, the Trial Chamber is satisfied that the proposed level of co-operation is satisfactory.[2]

3. Thus, the Trial Chamber considered that the surrenders were voluntary. It noted that the accused could have surrendered earlier but considered that it was the fact of surrender which was of significance. However, while it considered that it was the fact of surrender which was significant, it did not make reference to unrebutted material which showed that earlier this year, and therefore not long before their surrenders to the Tribunal, the accused made public statements to the media to the effect that they would not surrender voluntarily. It was the case for the prosecution that they eventually surrendered only because a change of attitude on the part of the government of the FRY, as indicated by the Law on Cooperation between the FRY and the Tribunal, made further residence in the FRY insecure for them. That Law took effect on 11 April 2002. Shortly after, Ojdanić surrendered on 25 April 2002 and Šainović on 2 May 2002. For the previous three years they had not surrendered although having knowledge of the indictments.

4. In paragraph 15 of its response made in the course of the proceedings before the Trial Chamber, dated 19 June 2002, the prosecution stated as follows:

> The Prosecution notes also that the accused [Šainović] told the media earlier this year that he would not surrender voluntarily.

5. In paragraph 24 of the same response, the prosecution also stated as follows:

> As with the accused Šainović, the accused Ojdanić stated to the media earlier this year that he would not surrender voluntarily, explaining that domestic courts should have jurisdiction over him.

6. In the course of the oral hearing before the Trial Chamber, on 24 June 2002 (at pages 429-430 of the transcript), the prosecution said as follows:

> ... Mr Ojdanić had indicated sometime fairly recently, as indicated in our pleadings, that he believed he would best be tried by domestic courts, in particular military courts. The

[2] Footnotes omitted.

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Prosecution would just point out that in the *Talić* decision on provisional release, it was also found important in the context of that hearing that *Talić* had declared prior to the provisional release argument that he felt justice could only be done in the case – in his case before a military court, not allowing for – but however – sorry, however, allowing for the possibility of an international military court trying him. The Prosecution merely notes here that Mr. Ojdanić does not even allow for the possibility of international justice.

7. Before the Trial Chamber, the accused did not deny the prosecution's allegation that earlier this year they had both made public statements to the media to the effect that they would not surrender voluntarily. On appeal, the prosecution gave particulars of those statements. The Appeals Chamber has correctly held that the particulars so given are new material which was not before the Trial Chamber and which therefore could not be considered on appeal unless admitted as additional evidence under the appropriate procedure, which did not happen.

8. I think, however, that it is open to the Appeals Chamber to take into account the attitude of the accused to this new material (as distinguished from the new material itself) and to consider whether it was a continuation of their attitude before the Trial Chamber to the allegations made there by the prosecution that they had made public statements to the media to the effect that they would not surrender voluntarily. In the Appeals Chamber, they did not move to strike out the particulars of the statements given by the prosecution or otherwise object to those particulars. This attitude was in continuation of their failure to object before the Trial Chamber to the assertions which the prosecution made there as to the public statements. In the circumstances, the accused fall to be regarded as having confirmed on appeal the inference which may be drawn from their attitude in the Trial Chamber that they accepted before the Trial Chamber that earlier this year they had made public statements to the effect that they would not surrender voluntarily.

9. The prosecution later referred to the statements as having been made "just prior to their transfer" to the Tribunal. That was said in paragraph 21 of the Prosecution's "Appeal", dated 26 July 2002. That document gave other details from which the meaning of that statement could be ascertained, including the fact that the accused, with knowledge of the indictment, had not surrendered for the previous three years. The prosecution statement was literally an overstatement, but in substance the facts were not far removed. This no doubt explains why the accused have not objected to the description.

10. Incidentally, it is to be noticed that, according to the prosecution, the accused did not say that they "could" not surrender; so the accused were not taking the position that they were willing

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to surrender but that something over which they had no control prevented them from doing so. The prosecution allegation was that the accused said that they "would not surrender voluntarily"; in other words, whatever explanation they might give, it was of their own will that they did not wish to surrender. That is what, on the evidence, the accused have to be understood to be accepting.

11. Evidence on all points does not have to be mechanically reproduced in a decision. In their obligation to give a reasoned opinion, Trial Chambers are expected, however, to indicate matters of major import to the decision which they take. In this case, the question was whether the two accused had voluntarily surrendered to the Tribunal, that question being in turn pertinent to the *factum probandum* whether they would appear for trial. The public statements which they made earlier this year to the effect that they would not surrender voluntarily were directly relevant to the determination of that *factum*.

12. The facts were different in *Brđanin and Talić*,[3] but the case shows that the Trial Chamber attached weight to a statement by *Talić* that "justice and law would be satisfied only if [he] were to be tried by a military court of law", and concluded that he would not appear for trial. Standing by itself, the statement made in this case by the accused Ojdanić led to a similar conclusion. It could conceivably have been neutralised by other circumstances; but the Trial Chamber did not make an argument to that effect. It could only make such an argument if it referred to Ojdanić's statement about not surrendering, and this it did not do.

13. The circumstance that the Trial Chamber made no reference to the unrebutted statements by the two accused does not mean that the Trial Chamber did not consider the statements. But, if it considered them, it presumably rejected them as immaterial. If it rejected them as immaterial, that, in my opinion, was a conclusion which no reasonable trier of fact could have reached; that conclusion should accordingly be reversed by the Appeals Chamber. The Appeals Chamber, as it has often indicated, must of course be watchful not to create the mischief of substituting its own opinion on a question of fact for that of a Trial Chamber *simply* because it prefers its own opinion. However, that well known view does not, because it cannot, restrain the Appeals Chamber from discharging its duty to intervene where it is of opinion that the decision of the Trial Chamber on a question of fact was one which could not be reached on the same evidence by a reasonable trier of fact.

[3] IT-99-36-PT of 28 March 2001, paras. 31-32. The prosecution was no doubt referring to this case in its submissions on 24 June 2002, cited above.

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14. If the Appeals Chamber is of the view that the Trial Chamber did not consider the matter or is not clear whether the Trial Chamber did so, the Appeals Chamber may send it back for consideration if the Appeals Chamber thinks that the Trial Chamber will be in a better position than the Appeals Chamber to consider it. But I do not think so: the statements were undisputed, their implications clear, and there are no considerations of which the Appeals Chamber does not have a reliable grasp. In this case, the Appeals Chamber needs no help in carrying out its responsibility under article 25(2) of the Statute to "affirm, reverse or revise the decisions taken by the Trial Chambers."

15. A possible objection may be noted. On appeal, the prosecution did not complain of the fact that the Trial Chamber did not advert to the public statements made by the accused earlier this year. Does that mean that the Appeals Chamber cannot take notice of the fact – for it is a fact - that the prosecution is relying before it on the public statements in question? An affirmative answer is possible only if it is the case that, by not adverting to the silence of the Trial Chamber, the prosecution should, through some mechanism of waiver, be understood to accept that the public statements were not material, and thus may not consistently argue the opposite. But the prosecution has not accepted that. It is in fact relying, even if with economy, on the public statements, and its reliance is made in the same appellate proceedings in which it did not mention that the Trial Chamber did not advert to the question. An assessment of its total position does not show any waiver. By relying on the public statements made by the accused, the prosecution was putting in issue the way that the Trial Chamber dealt with them or failed to deal with them. Further, the accused have not themselves raised such an objection. I am not persuaded that the objection has substance.

16. The situation resulting from the decision of the Trial Chamber may be considered. The accused were charged with serious violations of international humanitarian law, namely, crimes against humanity (including counts for deportation and murder) and violations of the laws or customs of war (murder). They were ordered to be provisionally released after about two months of pre-trial detention. My view is that the substantial ground for exercising the discretion in favour of the accused was that, as the Trial Chamber said, "it may be some considerable time before the trial can commence". That time was "about two years" in the estimation of counsel for Ojdanić. After that estimate was given, the prosecution was invited by the Trial Chamber to indicate, when its turn came, what the time might be.[4] When its turn came, the prosecution neglected to give an

[4] Trial Chamber's Transcript, 24 June 2002, p. 415.

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indication, and that was wrong. But this does not remove the fact that, on the face of the Trial Chamber's decision, no account was taken of the complexities of the case or other criteria relevant to the estimation of what is a reasonable pre-trial period for major alleged breaches of international humanitarian law. More importantly, the order for provisional release was made notwithstanding the statements made by the accused earlier this year to the effect that they would not surrender to the Tribunal, and notwithstanding that they did not surrender for the previous three years though having knowledge of the indictments against them. In the circumstances, their provisional release after about two months of pre-trial detention may not be easily understood by the international community. But why should that matter?

17. The decision of the Supreme Court of Canada in the recently concluded case of *R. v. Hall*[5] tells why. Skipping interesting details, the court - by a 5 to 4 majority, but the court nonetheless - held that denial of bail on the ground that "detention is necessary in order to maintain confidence in the administration of justice" does not contravene a constitutional guarantee of a right "not to be denied reasonable bail without just cause" or the presumption of innocence. For the most part, the particular provisions involved have no counterpart in the case of the Tribunal, but the principle in question is admissible in the exercise of the discretion available under Rule 65(B) to refuse provisional release even where the two preconditions of the second part of the rule have been satisfied. The result adverted to in the case at bar would weaken the confidence of the international community in the administration of justice by the Tribunal, and I fear that it would be trivialising public bewilderment to attribute this to uninformed hysteria.

18. A Trial Chamber has a residual discretion to exercise in these matters – in my view, both to grant and to refuse provisional release. The word "may" in Rule 65(B) shows that. To attract an exercise of the discretion in favour of his case, an applicant will sometimes put material before the Trial Chamber concerning the state of his health or the need to attend the funeral of a relative or, as in this case, the expected length of the pre-trial period. Assuming no other vitiating errors, the Appeals Chamber will only interfere with the Trial Chamber's exercise of its discretion where the Trial Chamber "has exceeded the generous ambit within which a reasonable disagreement is possible".[6] But here that limitation is not in point: what is in issue is whether there was in existence a significant fact relating to a condition which had to be satisfied before that discretion was exercised. And, for the same reason, the principle that pre-trial detention is not to degenerate into anticipatory punishment is not engaged.

[5] 2002 S.C.C. 64 of 10 October 2002.
[6] Using a formulation suggested by Lord Fraser of Tullybelton in *G. v. G. (Minors: Custody Appeal),* [1985] 2 All ER 210, HL, at 228.

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19. In sum, the Appeals Chamber is entitled to say that the surrenders were not voluntary, with the consequence that, in the circumstances of the case, the material was not enough to satisfy any reasonable trier of fact that the accused would appear for trial. An error of fact occasioning a miscarriage of justice was committed. That error of fact led in turn to an error of law invalidating the decision: a necessary precondition not having been satisfied, provisional release could not be granted in law. The decision of the Trial Chamber falls to be quashed under both limbs of article 25(1) of the Statute.

B. The standard of proof

20. Before the Appeals Chamber, the prosecution argued that an onerous standard of proof applied in relation to the requirement in Rule 65(B) that release may only be ordered by a Trial Chamber "if it is satisfied" of certain things. The argument was not made before the Trial Chamber and it cannot be said with certainty what standard the Trial Chamber in fact applied. For these reasons, it cannot be a ground of appeal, but, as the matter is important, I would add these observations to the record:

21. In a preliminary way, it may be convenient to note that the burden of proof tells which party has the obligation of satisfying the court of the factual matters on a point, while the standard of proof refers to the degree to which that obligation to satisfy the court has to be discharged. It has been observed that, notwithstanding this difference, a reference to the burden of proof is commonly used to refer to the standard of proof.[7] However, it is the latter which is the subject of the prosecution's submission.

22. Putting its case in paragraph 14 of its "Appeal", the prosecution submitted that "the correct standard for assessing the precondition in the first limb of Rule 65(B) should be that, based on the evidence before it, the Trial Chamber must be satisfied that there is no real risk that the accused will fail to appear for trial". I should have a difficulty if, by the use of the expression "no real risk," the prosecution intended to vary from the generally accepted position that to "require certainty of legal proof would be to produce absurdity".[8] But perhaps that was not the intention. The fuller term "a

[7] David Paciocco and Lee Stuesser, *The Law of Evidence*, 3rd ed. (Toronto, 2002), p. 428.
[8] *Phipson on Evidence*, 15th ed. (London, 2000), p. 77, para. 4-31. See also *R. v. Lifchus* (1997) 9 C.R. (5th) 1 (S.C.C.). For the purposes of this case, there is no need to consider possible qualifications of the proposition.

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real and not a fanciful risk" is known to the jurisprudence on bail law; it was used by Lord Lane C.J. in 1985.[9]

23. The prosecution has put its case in various ways. But, from an overview of its position, it appears to have been arguing that "the special circumstances in which this Tribunal operates warrant the application of a more onerous standard by a Trial Chamber when considering a motion for provisional release."[10] Is the argument correct?

24. There are cases which are capable of being used to show that the word "satisfied" in Rule 65(B) does not call for the standard of proof contended for by the prosecution. But I do not think that these cases are decisive of the meaning appropriate to the particular context in which the word appears in Rule 65(B). The following reasoning is suggested.

25. The need for different standards of proof was explained in Latham C.J.'s remark that "[t]he standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue. See Wills' Circumstantial Evidence (1902), 5th ed., p. 267, note n: 'Men will pronounce without hesitation that a person owes another a hundred pounds on evidence on which they certainly would not hang him, and yet all the rules of law applying to one case apply to the other and the processes are the same.'"[11] In another statement, Harlan, J., reasoned that -

> ...in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened. The intensity of this belief – the degree to which a factfinder is convinced that a given act actually occurred – can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.[12]

26. In large part, the common law world adheres to the traditional paradigm which admits of only two standards, namely, proof on a balance of the probabilities and proof beyond a reasonable

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[9] *R. v. Mansfield JJ, ex parte Sharkey* [1985] Q.B. 613, D.C.
[10] Prosecution's Appeal Brief, 26 July 2002, para. 9.
[11] *Briginshaw v. Briginshaw*, (1938), 60 C.L.R. 336 at 343-344.
[12] *In the Matter of Samuel Winship*, (1970), 397 U.S. 358 at 370. Followed in *Addington v. State of Texas*, (1979), 441 U.S. 418 at 423.

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doubt. That position was affirmed by Lord Tucker in 1961.[13] But in 1951 Denning L.J. had noted that there was "no absolute standard in either case" (i.e., civil and criminal cases); there "may be degrees of proof within [a criminal] standard." He added, "As Best, C.J., and many other great judges have said, 'in proportion as the crime is enormous, so ought the proof to be clear'. So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter".[14]

27. So, however much the traditional rule is affirmed – and it has been affirmed subsequent to Denning L.J.'s statement[15] - there is room for qualification. Indeed, there are several English cases which, according to a leading work, are capable of being regarded as resting on the application of an intermediate standard.[16] That is the position in the United States,[17] which knows of an intermediate standard called the clear and convincing evidence standard. Speaking of an allegation of adultery in a petition for divorce, in 1953 two members of a three-member appellate bench of the High Court of Australia (Kitto and Taylor, JJ.) said:

> We agree with respect with the observation of Lord McDermott that the evidence in such cases, 'must, no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy … "the guarded discretion of a reasonable and just man"'. But in saying this, we do not intend to agree that such a degree of proof is required in such cases as is indicated in the criminal jurisdiction by the expression 'proof beyond reasonable doubt'. The statute requires that the Court before making a decree, shall be satisfied on the evidence that the case of the petitioner has been proved, and we are content to conclude that 'satisfied' means satisfied having regard to the gravity of the issues involved. This aspect of the matter is fully discussed in Briginshaw v. Briginshaw and we do not wish to add anything to what was then said.[18]

28. Fullagar, J., (the third member of the appellate bench) did not think "that the general position with regard to standards of proof can be more accurately or more clearly stated than in the

[13] *Dingwall v. J. Wharton (Shipping) Ltd* [1961] 2 Lloyd's Rep 213 at 216, HL, stating that he was "quite unable to accede to the proposition that there is some intermediate onus between that which is required in criminal cases and the balance of probability which is sufficient in timeous civil actions".
[14] *Bater v. Bater*, [1951] P. 35, C.A.
[15] For the position in Canada, where Denning L.J.'s views have not been followed, see John Sopinka and others, *The Law of Evidence in Canada*, 2nd ed. (Toronto, 1999), p. 157, para. 5.45.
[16] *Cross and Tapper on Evidence*, 8th ed. (London, 1995), pp.171-172.
[17] *Addington v. State of Texas*, (1979), 441 US 418.
[18] *Watts v. Watts* (1953) 89 C.L.R. 200 at 210; footnotes omitted.

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well known passage in the judgment of Dixon J. in Briginshaw v. Briginshaw",[19] and his brothers Kitto and Taylor, JJ., were obviously concerned to link their views to that case. It seems clear, however, that these two members of the bench were of opinion that the requirement that the court should be satisfied on the evidence that the case of the petitioner had been proved was to be discharged "beyond a mere balance of probabilities" though not "beyond reasonable doubt".

29. In 1982, a court in Tasmania upheld a similar position, Cosgrove, J., stating: "...I must be satisfied of the voluntariness of confessional material before it can be admitted. That satisfaction requires a standard of proof, perhaps variable in content, but always intermediate between proof beyond reasonable doubt and proof on the balance of probabilities".[20] Interestingly, there are, on the other hand, cases in which the standard of proof is below proof on a balance of the probabilities.[21] So, even in the common law world, the position admits of some variety.

30. It seems to me that it is open to the Tribunal to select a rule which is appropriate to the particular case before it. In this respect, Rule 89(A) of the Rules declares that a Chamber "shall not be bound by national rules of evidence", and paragraph (B) of the Rule reads in relevant part:

> ...a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

31. In determining what should be the appropriate rule under these provisions, some guidance is to be had from the statement made by Harlan, J., as quoted above. To adopt and adapt his language, the correct standard of proof is that which instructs the factfinder of the degree of confidence which the international community should have in the correctness of his conclusions when adjudicating in provisional release matters. But why cannot the balance of the probabilities test do this?

32. As indicated above, the cases do indeed show that the balance of the probabilities test is workable even where the facts to be assessed are grave, the gravity of the facts being taken into account in determining whether the test has been met.[22] But there are two things to remember. On the one hand, as Dixon, J., himself said in *Wright v. Wright*,[23] barring some considerations, "the

[19] Ibid., at 204.
[20] *R. v. Askeland* [1983] 8 A. Crim. R. 338 at 347.
[21] *Fernandez v. Government of Singapore* [1971] 2 All ER 690, H.L., at 695-696 per Lord Diplock. And see *Cross on Evidence*, Sixth Australian Edition by J.D.Heydon (Sydney, 2000), p. 262.
[22] See the interesting arguments of Dixon, J., in *Briginshaw v. Briginshaw,* (1938), 60 C.L.R. 336, at 362-363.
[23] (1948) 77 C.L.R. 191 at 210.

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difference in the effect [of the two traditional standards] is not as great as is sometimes represented". But, if that is the practical situation, after a point it is conjuring with illusions to say that what is being applied is still the balance of the probabilities test. On the other hand, if there is a real distinction, it has to lie in the circumstance that, when the gravity of the facts has been taken into account in applying the balance of the probabilities test, the conclusion reached is yet, in strict logic, one which is more likely than not. This important distinction was noted by the High Court of Australia when it said that -

> ... the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words; it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.[24]

33. The High Court of Australia was there speaking of the two traditional standards of proof. However, I consider that the reasoning of the statement is capable of a more general application. Although the gravity of a case can be taken into account in the application of the standard of proof on a balance of the probabilities, there would be a material difference between a finding of grave facts made on that standard and a finding of grave facts made on a standard intermediate between that standard and the standard of proof beyond a reasonable doubt.

34. This is shown by the reasoning of Posner, Chief Judge, and Wood, Circuit Judge, dissenting in *United States of America v Rodriguez*[25]. At a sentencing hearing following the defendant's conviction for conspiracy to sell marijuana, the trial judge found by a preponderance of the evidence that the defendant had actually sold more than the stipulated amount, and that this amount, together with the defendant's criminal history, triggered a mandatory sentence of life imprisonment. Although there was no doubt that the evidence satisfied the preponderance of probability standard, the prosecution did not claim to have established the defendant's responsibility for the sale by clear and convincing evidence or beyond a reasonable doubt. Rehearing en banc was denied, but Posner,

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[24] *Rejfek v. McElroy*, (1965) 112 C.L.R. 517 at 521-522.
[25] 73 F.3d 161 (1996).

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Chief Judge, with whom Wood, Circuit Judge, agreed, said this in his dissenting opinion:

> It might be argued that the difference between the preponderance standard and the standard of clear and convincing evidence is too gossamer to change the outcome in any actual case. I doubt that. I agree that fine distinctions between standards of proof or of appellate review have little significance in practice...But the difference between the standard of proof by a preponderance of the evidence, a standard that in this case permitted the judge to send the defendant away for life if he thought the odds 51-49 in favor of the defendant's having sold the 1,000 kilograms, and proof beyond a reasonable doubt, is so large that there is room for an intermediate standard that can be practically, not merely conceptually, distinguished from the extremes.[26]

35. In the United States, as has been noticed, an intermediate standard of clear and convincing evidence is known. What was being said by Posner, Chief Judge, was that that standard should apply in the particular case. The reasoning was that, on the facts, it was inappropriate to apply the preponderance standard since all that this required was that the decision should be made on the odds being 51 to 49.

36. In Canada, the trend is to follow the two traditional standards. But in special situations there have been other views.[27] *Jory v. The College of Physicians and Surgeons of British Columbia*[28] was an appeal by a physician from the decision of the college finding him guilty of infamous conduct. Such a charge has, of course, to be established with due attention to its gravity. However, it is to be noticed that, in paragraph 16 of his decision, the judge hearing the appeal said that the "standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a bare balance of probabilities." In effect, the standard lay somewhere between a bare balance of probabilities and proof beyond a reasonable doubt.

37. So there could be a real need for an intermediate standard. In the present case, the issue was whether the accused, who were charged with serious violations of international humanitarian law before a tribunal without enforcement powers, would appear to stand trial. To determine that issue

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[26] Ibid., at 163.
[27] See, for example, *J.E.L. v. The Queen* [1989] 2 S.C.R.; *In the Matter of a Collective Agreement between Macdonald's etc.*, [1994] C.L.A.S.J. Lexis 8552; *In the Matter of an Arbitration between Sandpiper Pub etc.*, [1999] B.C.D.L.A.J. 317; and *In the Labour Relations Code of British Columbia, etc.*, [2001] C.L.A.S.J. Lexis 2289.
[28] (1985) 35 A.C.W.S. (2d) 363.

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on a balance of the probabilities test would mean that all the accused had to do to satisfy the Trial Chamber that they would appear for trial was to show that it was more likely than not that they would do so – that is, to use the language of Posner, Chief Judge, that the odds were 51 to 49 that they would appear. For, as Lord Diplock remarked in *Fernandez*, on that test it must be shown that the event in question is "more likely ... than ... not – which is all that 'balance of probabilities' means."[29] Would it be enough to satisfy the international community that the two accused were more likely than not to appear for trial by a distant court, given the circumstances in which it functions?

38. It seems to me that the gravity or importance of the issue has not merely to be taken into account in applying a standard of proof but may itself determine the choice of the standard of proof. Account has of course to be taken of the presumption of innocence. However, account has also to be taken of the very serious matters involved, as well as of the circumstances of the Tribunal, including its inability to execute its own arrest warrants. When account is taken of these matters, it appears to me that it would be incorrect for the Tribunal to tie itself to a classification which knows of only two standards of proof.

39. In *Prosecutor v. Brđanin & Talić*, concerning an application by the first accused for provisional release, the Trial Chamber remarked that the circumstances of the Tribunal "place a substantial burden upon any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released. That is not a re-introduction of the previous requirement that the applicant establish exceptional circumstances to justify the grant of provisional release. It is simply an acceptance of the reality of the situation in which both the Tribunal and the applicants for provisional release find themselves".[30] Eight months later, concerning the second accused in the same case, the Trial Chamber similarly said, "Placing a substantial burden of proof on the applicant for provisional release to prove these two matters is justified by the absence of any power in the Tribunal to execute its own arrest warrants".[31]

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[29] *Fernandez, supra*, at 695.
[30] IT-99-36-PT, 25 July 2000, para. 18.
[31] IT-99-36-PT, 28 March 2001, para. 18.

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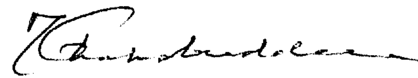
40. It could be argued that the reference to "a substantial burden ... to satisfy the Trial Chamber that [the applicant] will indeed appear for trial if released", and the associated reference to "a substantial burden of proof", visualised only a test based on the balance of the probabilities, the gravity of the condition to appear for trial being taken into account in the workings of that test. But I am not persuaded. The references, with which I respectfully agree, went to the kind of standard of proof by which that "substantial burden of proof" had to be discharged. There is a difference between saying that the Trial Chamber had to be satisfied that a condition of manifest gravity was likely to be fulfilled on the basis of the odds being 51 to 49, and saying that the Trial Chamber had to be satisfied on a higher basis than that that a condition of manifest gravity would in fact be fulfilled.

41. Rules requiring a court to be satisfied that a state of affairs exists do not normally stipulate any precise standard of proof in accordance with which the court must be satisfied. Rule 65(B) of the Rules does not depart from the norm; as has been seen, all it says is that the Trial Chamber may grant provisional release "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". However, the reasons given lead to the conclusion that the Trial Chamber has to satisfy itself of the prescribed matters by something more than a preponderance of probability though less than proof beyond a reasonable doubt. I consider that the required test is represented by an obligation of an applicant for provisional release to produce substantial grounds to the Trial Chamber to make it believe that he would in fact appear for trial and, if released, would not pose a danger to any witness, victim or other person.

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



Mohamed Shahabuddeen

Dated this 30th day of October 2002
At The Hague
The Netherlands

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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-99-37-AR65

Date: 30 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: 30 October 2002

PROSECUTOR

v

Nikola ŠAINOVIĆ & Dragoljub OJDANIĆ

DISSENTING OPINION OF JUDGE DAVID HUNT ON PROVISIONAL RELEASE

Counsel for the Prosecutor:

Ms Carla Del Ponte
Mr Geoffrey Nice

Counsel for the Defence:

Mr Toma Fila & Mr Zoran Jovanović for Nikola Šainović
Mr Tomislav Višnjić, Mr Vojislav Seležan & Mr Peter Robinson for Dragoljub Ojdanić

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DISSENTING OPINION OF JUDGE DAVID HUNT

The background to the appeal

1. As a result of a notable increase in the number of indicted persons appearing at the Tribunal voluntarily since the beginning of 2001,[1] there has been a similar increase in the number of applications for provisional release, many of them successful. The present appeal demonstrates how the prosecution is attempting to stem the tide by having the existing jurisprudence of the Tribunal changed in order to make provisional release more difficult to obtain. In my opinion, this attempt should be rejected.

2. Because this Separate and Dissenting Opinion leads to the conclusion that the prosecution's appeal should be dismissed, it must deal with every issue raised by the prosecution by way of complaint which could have led to the appeal being upheld. The Opinion is structured as follows:

The background to the appeal	pars 1-5
The proceedings before the Trial Chamber	pars 6-17
The Trial Chamber's Decision	par 18
The grounds of appeal	par 19
The approach on appeal	pars 20-25
Discussion and conclusions	
(A) ***Burden of proof on factual issues in provisional release applications***	pars 26-31
(B) ***Nature of prosecution attack upon Trial Chamber's finding of fact***	pars 32-36
(C) ***The reliability of the personal undertakings of the accused to appear for trial***	
Material "did not" establish that they would appear	par 37
The voluntary nature of the surrenders	par 38
The delay in surrendering	par 39
Likely length of the sentences	par 40
Prior statements by accused**	pars 41-48
(D) ***The reliability of the guarantees provided by the FRY/Serbian Governments***	
General considerations	pars 49-52
Failure to arrest co-accused Milutinović	pars 532-55
The senior position of the two accused**	pars 56-64
(E) ***Other issues relating to the finding that the accused will appear for trial***	
Dependence on guarantee denies right to provisional release	pars 65-66
Erroneous approach	pars 67-69
(F) ***Whether the accused will pose a danger to any victim or witness or others***	
The mere possibility of danger	pars 70-73
(G) ***The exercise of discretion***	
Current jurisprudence	pars 74-78
The issues raised by the prosecution relating to discretion	pars 79-94
Disposition	par 95

Only the two matters marked with the two asterisks (**) constitute the dissent.

[1] The statistics relating to voluntary surrenders each year demonstrate that, in 1996, one accused voluntarily surrendered; in 1997, there were ten; in 1998 there were four (the last being in April); in both 1999 and 2000, no accused voluntarily surrendered; in 2001, there were eleven (one in January, one in March, and the remainder spread throughout the second half of the year); in 2002, there have been eight accused who have surrendered to date.

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3. Nikola Šainović ("Šainović") and Dragoljub Ojdanić ("Ojdanić") were until recently co-accused with Slobodan Milošević ("Milošević"), Milan Milutinović ("Milutinović") and Vlajko Stojiljković ("Stojiljković"), in an indictment [IT-99-37] concerning events alleged to have occurred in Kosovo, Serbia, in 1998 and 1999. All five were jointly charged with:

(i) the forced deportation of approximately 800,000 Kosovo Albanian civilians, amounting to (a) deportation as a crime against humanity [Article 5(d) of the Tribunal's Statute; Count 1 of the indictment] and (b) other inhumane acts as a crime against humanity [Article 5(i); Count 2],

(ii) the murder of hundreds of Kosovo Albanian civilians in a number of massed killings, amounting to (a) murder as a crime against humanity [Article 5(a); Count 3] and (b) murder as a violation of the laws or customs of war [recognised by Common Article 3(1)(a) of the Geneva Conventions, and charged under Article 3 of the Tribunal's Statute; Count 4], and

(iii) a campaign of persecution against the Kosovo Albanian civilian population based upon political, racial or religious grounds, and constituted by:

(a) the forced deportation charged in Counts 1 and 2,

(b) the murders charged in Counts 3 and 4,

(c) sexual assaults by forces of the Federal Republic of Yugoslavia ("FRY") and Serbia of Kosovo Albanians, in particular women, and

(d) the wanton destruction or damage of Kosovo Albanian religious sites,

amounting to persecution as a crime against humanity [Article 5(h); Count 5].

4. Milošević was charged as the President of the FRY at the relevant time, Milutinović as the President of Serbia, Šainović as the Deputy Prime Minister of the FRY and as the designated representative of Milošević for Kosovo, Ojdanić as the Chief of the General Staff of the Armed Forces of the FRY ("VJ"), and Stojiljković as the Minister of Internal Affairs of Serbia with the responsibility for ensuring the maintenance of law and order in Serbia. The Trial Chamber recently granted leave to the prosecution to amend the indictment, by deleting from it both the charges against Milošević (as those charges are now part of a new indictment [IT-02-54] upon which he is presently standing trial) and the charges against Stojiljković (who is now deceased).[2] The three accused who remain on the amended indictment are thus Milutinović (who has not

[2] (Substituted) Decision on Motion to Amend Indictment, 5 Sept 2002, pp 2-3.

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been surrendered or arrested and who will remain the President of Serbia until the end of this year), Šainović and Ojdanić.

5. Šainović and Ojdanić applied for provisional release until the commencement of their trial.[3] After an oral hearing, and over the objections of the prosecution, the Trial Chamber granted provisional release to both accused.[4] Leave to appeal was granted upon the basis that there was a need for a full bench of the Appeals Chamber to give an opinion concerning issues relating to provisional release which arise in this particular case.[5] The prosecution has filed its Interlocutory Appeal,[6] the accused have responded,[7] and the prosecution has replied.[8] A further response was filed by Šainović,[9] seeking *ex post facto* leave to do so, but to which the prosecution has objected.[10] The issue to which the further response has been directed had not been raised by the prosecution in its Reply as a new issue, and no other reason has been put forward as justifying a further response. The further response filed by Šainović has accordingly been disregarded for the purposes of the appeal.[11]

The proceedings before the Trial Chamber

6. Rule 65(B) ("Provisional Release") of the Rules of Procedure and Evidence ("Rules") requires an applicant for provisional release to satisfy the Trial Chamber of only two matters:

(i) that he will appear for trial, and

(ii) that, if released, he will not pose a danger to any victim, witness or other person.[12]

The onus of proof of these two matters is placed upon the applicant, notwithstanding the deletion

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3 Defence Motion for Provisional Release (filed by Šainović), 5 June 2002 ("Šainović Application"); General Dragoljub Ojdanić's Motion for Provisional Release, 7 June 2002 ("Ojdanić Application").

4 Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release, 26 June 2002 ("Trial Chamber Decision").

5 Decision Granting Leave to Appeal, 16 July 2002, p 2.

6 Prosecution's Appeal Against the Trial Chamber's Decision to Grant Provisional Release, 26 July 2002 ("Interlocutory Appeal").

7 Defense [*sic*] Response to the Prosecutions [*sic*] Appeal Against the Trial Chamber's Decision to Grant Provisional Release (filed by Šainović), 2 Aug 2002 ("Šainović Response"); General Dragoljub Ojdanić's Brief of Appeal, 2 Aug 2002 ("Ojdanić Response").

8 Prosecution's Joint Reply, 7 Aug 2002 ("Joint Reply").

9 Defence Response to Prosecution's Joint Reply, 12 Aug 2002.

10 Prosecution's Objection to "Defence Response to Prosecution's Joint Reply", 19 Aug 2002.

11 The further response does not raise any new matter in any event.

12 *Prosecutor v Brđanin and Talić*, IT-99-36-AR65, Decision on Application for Leave to Appeal, 7 Sept 2000 ("*Brđanin* Appeal Decision"), pp 2-3; *Prosecutor v Blagojević et al*, IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 Apr 2002 ("*Jokić* Leave Decision"), par 7.

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in 1999 of an additional requirement that exceptional circumstances had to be shown.[13] Rule 65(B) also places upon the Trial Chamber the obligation to give both the host country and the State to which the accused seeks to be released the opportunity to be heard.[14] Rule 65(B) invests a Trial Chamber with a discretion as to whether provisional release should be granted.[15] There has been little consideration given to the circumstances in which it would be appropriate to exercise that discretion.[16] The present appeal requires such a discussion.[17]

7. In support of his claim that he would appear for trial, Šainović argued that he had surrendered to the Tribunal only after the Law on Cooperation between the FRY and the Tribunal entered into force on 11 April 2002, because he had not been "in a position to surrender" to it any earlier, as cooperation of Serbs with the Tribunal was "not regulated by the law".[18] But, as soon as the Law on Cooperation entered into force, he said, he responded to "the call [of the Government of the FRY] to surrender voluntarily to the [Tribunal]".[19] He accepted that the Tribunal would reach a decision which is wholly just and lawful,[20] thus (it is said) recognising the authority of the Tribunal.[21] He solemnly promised to make himself available whenever the Trial Chamber so demanded,[22] which is described as "his own personal undertaking to appear for the trial".[23]

8. Šainović produced a guarantee from the Governments of the FRY and of Serbia, signed by the Prime Ministers of both, whereby the FRY and Serbia undertake various obligations.

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13 *Brđanin* Appeal Decision, p 3; *Prosecutor v Krajišnik & Plavšić*, IT-00-38&40-AR73.2, Decision on Interlocutory Appeal by Momčilo Krajišnik, 26 Feb 2002 ("*Krajišnik* Appeal Decision"), par 21 (footnote 38).

14 *Jokić* Leave Decision, par 7. The expression "State" when used in the Rules is defined by Rule 2 as including the entities within the State of Bosnia and Herzegovina: *Ibid*, par 9. The prosecution concedes that these procedural requirements of Rule 65 are not in issue in this appeal: Interlocutory Appeal, par 6, footnote 4.

15 *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000 ("*Brđanin* Decision"), par 22; *Krajišnik* Appeal Decision, par 16.

16 One Trial Chamber has even doubted its existence: *Prosecutor v Hadžihasanović et al*, IT-01-47-PT, Decision Granting Provisional Release to Enever Hadžihasanović, 19 Dec 2001 ("*Hadžihasanović* Decision"), par 13; but such doubts are contradicted by the Tribunal's jurisprudence.

17 See pars 74-92, *infra*.

18 Šainović Application, par 10.

19 *Ibid*, par 10; Confidential Annex to Defence Motion for Provisional Release, 5 June 2002, Exhibit 2 ("Šainović Exhibit 2"), par 2. He also said that he had responded to the "invitation" of the FRY Government to surrender: Šainović Exhibit 2, par 2. Although the Annex has been impermissibly filed on a confidential basis, the relevant contents of it were disclosed either in the Application itself or during the proceedings before the Trial Chamber.

20 Šainović Exhibit 2, par 4.

21 Šainović Application, par 12.

22 Šainović Exhibit 2, par 5.

23 Šainović Application, par 15.

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These included the obligation of the FRY Ministry of the Interior to ensure (through its Serbian entity) that the accused reports daily to a police station and to inform the Tribunal immediately of the possible absence of the accused, and the obligation of "Yugoslav organs" to arrest the accused immediately if he tries to escape or violates any other condition of his provisional release and to inform the Tribunal of such fact. At the hearing, his counsel added that the Law on Cooperation gives to an accused person access to the archives of Yugoslavia (which, he claimed, only the prosecution had previously enjoyed), and that it was the view of the accused's lawyers that a fair trial would not have been available in the Tribunal until that access had been obtained by the accused.[24] It was not disclosed whether these views were also held by Šainović. On the issue of discretion, Šainović points to the unlikelihood of the trial commencing soon, so that the probable length of his pre-trial detention supports his request for provisional release.[25]

9. Ojdanić similarly explained that he surrendered immediately after the Law on Cooperation had been passed, and he asserts that he was the first to do so and that he had set a precedent for cooperation which has since been followed by others.[26] By surrendering, it is said, Ojdanić waived his right to the protections afforded by the "extradition procedure" contained in that Law on Cooperation.[27] Ojdanić produced documents demonstrating that he had previously asked the Chief Military Prosecutor of the FRY to conduct criminal proceedings against him in a military court for the actions upon which he had been indicted before the Tribunal.[28] He said in his personal undertaking to appear for trial that he continued to believe that trials relating to the events in Kosovo should be conducted by the national courts in his country and not by this Tribunal, but he nevertheless recognised that the Tribunal has authority to prosecute him.[29] The Ojdanić Application, but not his personal statement, asserts that, as he had held the highest position in the VJ during the events in Kosovo, he knew at the time of his voluntary surrender that he could expect a lengthy sentence if found guilty.[30] His Application, but not his personal statement, also asserts that he no longer has significant political support in his country.[31]

[24] Transcript, 24 June 2002, pp 409-411.
[25] Šainović Application, par 17.
[26] Ojdanić Application, par 7.
[27] *Ibid*, par 8.
[28] Confidential Annexes to General Dragoljub Ojdanić's Motion for Provisional Release, Annex 1, Exhibit A. Although the Annexes have been impermissibly filed on a confidential basis, their relevant contents were disclosed either in the Application itself or during the proceedings before the Trial Chamber.
[29] Confidential Annex 1, par 3.
[30] Ojdanić Application, par 26.
[31] *Ibid*, par 28.

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10. Statements by high ranking army officers and others associated with the VJ testified as to their belief that Ojdanić would appear for trial if granted provisional release.[32] He produced guarantees from the Governments of the FRY and of Serbia to the same effect as those produced by Šainović. Ojdanić also produced press reports of the position stated to have been taken by the Government of Serbia in relation to the accused Milutinović – that, in order "not to jeopardize the security and sovereignty of the state", Milutinović would not be delivered to the Tribunal while he is holding the office of the President of Serbia (which expires at the end of this year).[33] Finally, upon the issue of discretion, he submitted that, because of the time it was expected to take to provide and translate the relevant documents, the length of pre-trial detention in the event that he were not granted provisional release would be "very lengthy".[34] At the hearing, his counsel estimated that the time required to be ready for trial would be about "about two years".[35] Although invited to address on this issue,[36] the prosecution did not dispute it.

11. In its joint response to the applications,[37] the prosecution pointed out that the indictment had been made public in May 1999, and that neither applicant had chosen to surrender until he believed that, because of the Law on Cooperation, his Government could no longer avoid its obligations under Article 29 of the Tribunal's Statute and Rule 58 to surrender or transfer him to the Tribunal.[38] The surrender should therefore be seen, the prosecution said, as a carefully calculated course of self-interest, by appearing to cooperate with the Tribunal but in reality attempting to increase the prospects of being granted provisional release.[39] The prosecution suggested that the accused had surrendered only on the instructions of the Government.[40] Both of the accused had stated to the media earlier this year that he would not surrender voluntarily,[41] Ojdanić explaining that domestic courts should have jurisdiction over him.[42] Each of the accused occupied a position of great responsibility at the time the alleged crimes were committed, and accordingly each had a strong motive for not appearing for trial.[43]

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32 Annex 2.
33 Annex 4.
34 Ojdanić Application, pars 21-22.
35 Transcript, p 415.
36 *Ibid*, p 415.
37 Prosecution's Response to Applications for Provisional Release, 19 June 2002 ("Prosecution Response").
38 Prosecution Response, pars 4, 14-15, 24. Article 29 requires States to cooperate with the Tribunal in the prosecution of accused persons and to surrender or transfer such persons to the Tribunal. Rule 58 points out that this obligation prevails over any legal impediment existing under the State's national law.
39 Prosecution Response, pars 15, 24.
40 Transcript, p 426.
41 Prosecution Response, pars 15, 24.
42 *Ibid*, par 24.
43 *Ibid*, pars 16, 25. The context in which these submissions were made is set out in a footnote to par 86, *infra*.

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12. The prosecution submitted that little weight should be given to, and no confidence placed upon, the guarantees provided by the Governments of the FRY and Serbia, because of their "clear failure" to arrest the co-accused Milutinović,[44] and because the only arrest which Serbia had made was of a "medium level perpetrator" and that had been some time ago.[45] The guarantees had been given simply to "retrieve" political advantage.[46] The prosecution also submitted that only limited weight should be afforded to the undertakings given by the accused themselves.[47]

13. The prosecution said that, as it was still continuing to investigate the case against the two accused, it is "possible" that their release would in fact pose a danger to witnesses and victims.[48]

14. On the issue of discretion, the prosecution in its Response took issue with the relevance of the length of pre-trial detention upon which the accused relied, and it submitted that it is only where the length of pre-trial detention would exceed the likely sentence to be imposed that such a factor would be relevant to the exercise of the Trial Chamber's discretion.[49] The prosecution also asserted that no hardship had been demonstrated by the accused as a result of being held in detention. Then, in a response to an argument of Ojdanić that the material he had produced should "tip that balance" in favour of granting provisional release,[50] the prosecution asserted that "[i]t is clear that in order to satisfy the burden placed upon him, the accused must do more than simply tip the balance [in his favour]".[51]

15. The primary submission of the Prosecutor (who appeared in person on the hearing before the Trial Chamber) was that, in the exercise of its discretion, the Trial Chamber must take into account the policy of the Office of the Prosecutor ("OTP") that provisional release should not be granted until there was no further reason to continue with its inquiry or to maintain the accused in detention, and that provisional release will be opposed until it is possible to interrogate the

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44 Prosecution Response, pars 11, 21.
45 Transcript, p 433.
46 *Ibid*, p 433.
47 Prosecution Response, pars 12, 22.
48 *Ibid*, pars 13, 23.
49 *Ibid*, pars 18, 25.
50 Ojdanić Application, par 29
51 Prosecution Response, par 27.

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accused in accordance with Rule 63.[52] It was estimated that several months may be necessary to prepare for and to arrange the interrogation.[53] It was suggested that, because in the course of such an interrogation the prosecution reveals to an accused the evidence which it has against him, the interrogation should not take place whilst an accused is on provisional release because there would be a danger that the accused would "confront" the sources of the prosecution evidence, there may be collusion and the OTP inquiries may be hindered.[54] If the accused were on provisional release, it was said, he can prepare his answers and would not give spontaneous answers to the interrogation.[55] The issue of provisional release should therefore be discussed only when the two accused agree to be interrogated.[56] Detention must remain the rule, it was said, and despite the amendment to Rule 65 by deleting the requirement of exceptional circumstances.[57]

16. The accused did not file any reply to the Prosecution Response.

17. A representative of the FRY Government (Mr Sarkić) was permitted to address the Trial Chamber at the hearing. Apart from discussing the undertakings which had been given, he informed the Trial Chamber that:

(1) It was the intention of the Serbian authorities to hand Milutinović over to the Tribunal when his term of office expires, either voluntarily on his part or by compulsion.[58]

(2) He had asked the Prosecutor personally not to be "too loud" in her opposition to the applications because a favourable result would encourage his country's national interests and others to surrender or cooperate with the Tribunal,[59] and that other persons who had been indicted had told him that they would be willing to appear before the Trial Chamber "of course pending the outcome of [the present applications]".[60]

[52] Transcript, pp 424-425. Rule 63 provides that, after the initial appearance, any questioning of the accused shall not proceed (a) until the accused has been cautioned that he has a right to remain silent, and (b) without the presence of counsel, unless the accused has voluntarily and expressly agreed to proceed without counsel present.

[53] Transcript, p 427.

[54] *Ibid*, p 428.

[55] *Ibid*, p 429.

[56] *Ibid*, pp 433-434.

[57] *Ibid*, p 426.

[58] *Ibid*, p 431.

[59] *Ibid*, p 431.

[60] *Ibid*, p 422.

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The Trial Chamber very correctly made it plain to Mr Sarkić that it was totally independent of any discussions he may have had with the Prosecutor, and that such discussions would not affect its decision in the matter.[61]

The Trial Chamber's Decision

18. These, then, were the issues – and the only issues – which the Trial Chamber was invited to determine. Its findings were as follows:

(a) **Appearance of the accused for trial**

(i) The Trial Chamber attached "significant" weight to the fact that the accused had surrendered.[62]

(ii) It noted that the accused could have surrendered earlier, but considered that it is the fact of surrender which is of significance.[63]

(iii) It referred to the fact that, since the Law on Cooperation had been passed, the Government had taken steps to lessen the chance of the accused evading arrest whilst in FRY territory, although it remained to be seen how the procedures under the recent legislation will operate in practice.[64]

(iv) The proposed level of cooperation of the FRY Government in relation to the two accused with which this application for provisional release was concerned is satisfactory.[65]

(v) The Trial Chamber did not accept the prosecution's argument that the failure of the authorities to arrest Milutinović suggests that they would not arrest these accused if they failed to appear.[66]

(vi) The fact that an accused who is likely to face a long prison sentence if convicted has a strong reason not to appear is relevant to this issue, and it must be considered, but it is not by itself a reason for refusing provisional release.[67]

(vii) The Trial Chamber was satisfied that the particular circumstances of the case of each accused established that, if released, he will appear for trial.[68]

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[61] *Ibid*, p 432.
[62] Trial Chamber Decision, par 12.
[63] *Ibid*, par 12.
[64] *Ibid*, par 12.
[65] *Ibid*, par 12.
[66] *Ibid*, par 14.
[67] *Ibid*, par 14.
[68] *Ibid*, par 17.

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(b) **Danger to any victim, witness or other person**

(i) No suggestion had been made that either accused had interfered with the administration of justice since May 1999 when the indictment was first confirmed against him, and no evidence had been adduced in support of the prosecution suggestion that, if released, the accused may pose a danger to witnesses and victims.[69]

(ii) The Trial Chamber was satisfied that the particular circumstances of the case of each accused established that, if released, he will not pose a danger to victims, witnesses or other persons.[70]

(c) **Discretion**

(i) The absence of any opportunity for the prosecution to interview the accused is irrelevant to the application for provisional release, and arrangements could be made to interview them whilst on provisional release.[71]

(ii) The Trial Chamber accepted that, in this case, it may be some considerable time before the trial can commence.[72]

(iii) This fact, "along with all the other factors discussed above", militated in favour of the grant of provisional release, "subject to terms and conditions to ensure the presence of the accused at trial".[73]

The grounds of appeal

19. In its Interlocutory Appeal, the prosecution initially identified the issues for determination in the present appeal in the following terms:[74]

> "(a) the Trial Chamber committed an error of fact in determining that it was satisfied the accused would appear for trial. In particular, the Trial Chamber placed too much reliance on the FRY/Serbia Guarantees,[75] given the failure of the relevant authorities to arrest the co-accused, Milan Milutinović, to date. The prosecution also submits that the Trial Chamber erred in its treatment of the likelihood of a

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[69] *Ibid*, par 16.
[70] *Ibid*, par 17.
[71] *Ibid*, par 17.
[72] *Ibid*, par 17.
[73] *Ibid*, par 17.
[74] Interlocutory Appeal, par 6.
[75] Later in its Interlocutory Appeal, the prosecution asserts that the Trial Chamber placed "unreasonable" reliance upon the FRY/Serbia Guarantees (par 18).

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long prison sentence if the accused are convicted following trial as a factor relevant to provisional release; and

"(b) even if the Trial Chamber was justified in its assessment that the two substantive pre-conditions of Rule 65(B) were satisfied (*i e* 'that the accused will appear for trial and, if released will not pose a danger to any victim, witness or other person') it erred by then exercising its discretion in favour of provisional release. In particular, the Trial Chamber incorrectly analysed the likely length of pre-trial detention as a factor in favour of release and failed to consider several other relevant factors, namely: the senior position of the accused; the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation by the accused to date."

During the course of its Interlocutory Appeal, however, the prosecution sought to enlarge the issues for determination in the appeal. The Appeals Chamber has also been asked to rule upon, *inter alia*, the following additional issues:

(c) There should be, or is already, a more onerous burden of proof to be satisfied by an accused seeking provisional release than what is sometimes described as the balance of probabilities (that more probably than not what he asserts is true). The correct standard should be, or already is, that the accused must satisfy the Trial Chamber that there is "no real risk" that he will fail to appear for trial or pose any danger to victims or witnesses.[76]

(d) A Trial Chamber cannot be satisfied that the accused will appear for trial unless it is satisfied that he will do so voluntarily. If there is any question that he will appear only if arrested by the authorities, then the delays involved in his forcible arrest and transfer mean that he will not have appeared for trial. The existence of a guarantee by the relevant authority therefore does not militate in favour of granting provisional release, but is at best a neutral factor,[77] and any doubt which exists as to the performance by a State of its guarantee becomes a negative factor.[78]

(e) The Trial Chamber erred in stating that there was no evidence to negative the "proposition" that the accused would return for trial.[79]

(f) The Trial Chamber failed to consider the matters set out in (b), *supra*, in terms of "whether detention may be necessary in order to maintain confidence in the administration of justice by the Tribunal in its international setting, considering the Tribunal's objectives balanced with the rights of the accused". They are relevant "in evaluating the perception of the integrity of the judicial system". The Trial Chamber failed to give weight "or sufficient weight" to those relevant considerations.[80]

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[76] Interlocutory Appeal, pars 8-14; Joint Reply, pars 2-5.
[77] Joint Reply, pars 6-8.
[78] *Ibid*, par 9.
[79] Interlocutory Appeal, par 24.
[80] *Ibid*, pars 39-42; Joint Reply, par 21.

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The approach on appeal

20. A decision as to whether provisional release should be granted involves, first, findings of fact as to whether the accused will appear for trial and whether, if released, he will not pose a danger to any victim, witness or other person; and, secondly, whether, even if those findings of fact are made in favour of the accused, the Trial Chamber's discretion should be exercised to refuse provisional release.[81]

21. It is for the party challenging the Trial Chamber's findings of fact to demonstrate that the particular finding challenged was one which no reasonable tribunal of fact could have reached,[82] or that the finding was invalidated by an error of law,[83] or that the evaluation of the evidence was wholly erroneous.[84] These are alternative bases for challenge, not cumulative. So far as the first basis for such a challenge is concerned, it must be accepted that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[85] Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable.[86] So far as the second basis for such a challenge is concerned, an error of law invalidating a finding of fact exists where the Trial Chamber has misdirected itself upon an issue of law. Examples would be where, in refusing provisional release, a Trial Chamber took into account the failure of the applicant to prove what it held was a pre-requisite but which was not required by law,[87] or where it excluded relevant evidence from its consideration when making its factual finding.[88] So far as the third basis for a challenge to a Trial Chamber's finding of fact is concerned, the Appeals Chamber has declined to lay down any universal test as to what

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[81] The relevant authorities are cited in the footnotes to par 6, *supra*. It is unnecessary to discuss here the situation where the Trial Chamber is asked to exercise its discretion to grant provisional release even where those findings have not been made in favour of the accused. That situation is briefly considered in par 74, *infra*.

[82] *Prosecutor v Tadić,* IT-94-1-A, Judgment, 15 July 1999 ("*Tadić* Conviction Appeal"), par 64; *Prosecutor v Aleksovski,* IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal"), par 63; *Prosecutor v Furundžija,* IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundžija* Appeal"), par 37; *Prosecutor v Delalić et al,* IT-96-21-A, Judgment 20 Feb 2001 ("*Delalić* Appeal"), pars 434-435, 459, 491, 595; *Prosecutor v Kupreškić et al,* IT-96-16-A, Appeal Judgment, 23 Oct 2001 ("*Kupreškić* Appeal"), par 30; *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 ("*Milošević* Appeal"), par 6.

[83] *Milošević* Appeal, par 6.

[84] *Aleksovski* Appeal, par 63; *Delalić* Appeal, par 491; *Kupreškić* Appeal, par 30.

[85] *Tadić* Conviction Appeal, par 64; *Kupreškić* Appeal, par 30.

[86] *In re W (An Infant)* [1971] AC 682 at 700 (per Lord Hailsham), cited by Judge Shahabuddeen in his Separate Opinion in the *Tadić* Conviction Appeal, at par 30.

[87] *Prosecutor v Blagojević et al*, IT-02-53-AR65, Decision on Application by Dragan Jokić for Provisional Release, 28 May 2002 ("*Jokić* Appeal Decision"), pp 2-3.

[88] *Prosecutor v Blagojević et al*, IT-02-60-AR65 & IT-02-60-AR65.2, Decision on Provisional Release of Vidoye Blagojević and Dragan Obrenović, 3 Oct 2002, par 7; Separate Opinion of Judge David Hunt, par 9.

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constitutes a "wholly erroneous" evaluation of the evidence by a Trial Chamber.[89] As this is not an issue which has been raised by the prosecution in the present appeal, it is unnecessary to explore that question further. It is, however, clear from all of these tests that an appeal from a finding of fact is not a rehearing, and that the Appeals Chamber has no power to substitute its own finding of fact merely because it disagrees with the finding made by the Trial Chamber.

22. It is for the party challenging the exercise of a discretion based upon those findings of fact to identify for the Appeals Chamber a "discernible" error made by the Trial Chamber.[90] It must be demonstrated that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion.[91]

23. Both in determining whether the Trial Chamber incorrectly exercised its discretion and (in the event that it becomes necessary to do so) in the exercise of its own discretion, the Appeals Chamber is in the same position as was the Trial Chamber to decide the correct principle to be applied or any other issue of law which is relevant to the exercise of the discretion. Even if the precise nature of the error made in the exercise of the discretion may not be apparent on the face of the decision under appeal, the result may nevertheless be so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[92] Once the Appeals Chamber is satisfied that the error in the exercise of the Trial Chamber's discretion has prejudiced the party which complains of the exercise, it will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber.[93]

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[89] *Kupreškić* Appeal, par 225.

[90] *Prosecutor v Tadić*, IT-94-1-A and IT-94-1-A*bis*, Judgment in Sentencing Appeals, 26 Jan 2000 ("*Tadić* Sentencing Appeal"), par 22; *Aleksovski* Appeal, par 187; *Furundžija* Appeal, par 239; *Delalić* Appeal, par 725; *Kupreškić* Appeal, par 408; *Milošević* Appeal, par 5.

[91] *Tadić* Sentencing Appeal, par 20; *Furundžija* Appeal, par 239; *Delalić* Appeal, pars 725, 780; *Kupreškić* Appeal, par 408; *Milošević* Appeal, par 5. *See* also *Serushago v Prosecutor*, ICTR-98-39-A, Reasons for Judgment, 6 Apr 2000 ("*Serushago* Appeal"), par 23.

[92] *Aleksovski* Appeal, par 186; *Milošević* Appeal, par 6.

[93] *cf* Tribunal's Statute, Article 25.2; *Milošević* Appeal, par 6.

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24. In some cases where errors of fact or in the exercise of discretion have been established, it may not be possible, or convenient, for the Appeals Chamber to substitute its own findings or its own exercise of discretion for that of the Trial Chamber. This could be, for instance, because the Trial Chamber decision has depended upon that Chamber's own views of the credibility of a particular witness, or where the decision depends upon many other issues in the case which are not sufficiently placed before the Appeals Chamber. In such cases, it is appropriate to quash the decision of the Trial Chamber and to return the issue to the Trial Chamber for its reconsideration in the light of the decision of the Appeals Chamber.

25. In other cases, the Appeals Chamber may be unable with any certainty to determine whether or not a particular piece of evidence or a particular consideration has been taken into account. This could arise in many different situations. It is clear in the jurisprudence of the Tribunal that a Trial Chamber is not expected to refer in its decision to *every* fact and *every* consideration which has been placed before it,[94] but it is nevertheless expected to refer in its decision to certain relevant matters which have been strongly disputed or which are vital to the issues which it has to determine.[95] In some circumstances, the absence of any reference to a matter which it might have been expected would be referred to if it had in fact been considered may lead to the inference that it was not in fact considered.[96] That, however, is not a proposition of universal application. Where it remains unclear as to whether a particular issue was considered by the Trial Chamber, it is open to the Appeals Chamber to quash the decision and return the case to the Trial Chamber for clarification as to whether a particular matter had been considered by it, and for reconsideration if it had not.[97] If the Trial Chamber responds that it had in fact considered the particular issue, it need only say so and confirm its decision.

Discussion and conclusions

(A) *Burden of proof on factual issues in provisional release applications*

26. The logical starting point in this appeal by the prosecution is with the burden of proof, an issue which is applicable to both factual issues upon which the accused bears the onus, that he will appear for trial and that, if released, he will not pose a danger to any victim, witness or other

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[94] *Delalić* Appeal, par 498; this proposition is accepted by the prosecution: Interlocutory Appeal, par 37.

[95] *Kupreškić* Appeal, pars 32, 39, 135.

[96] *Delalić* Appeal, par 457; *Prosecutor v Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 ("*Galić* Appeal"), par 19.

[97] Such a course was followed in the *Galić* Appeal, pars 19-20.

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person. If the Trial Chamber accepted the case put forward by the accused after applying a lower burden of proof than that which it should have applied, then the decision would have to be quashed.

27. The prosecution argues that a Trial Chamber should not grant provisional release unless it is satisfied that there is "no real risk" that the accused will fail to appear for trial or pose any danger to victims or witnesses or other persons.[98] That is not what the Rule says. Rule 65(B) requires only a satisfaction that the accused will appear for trial, not that there is no real risk that he will not appear. The difference is substantial. Nor did the prosecution make any such submission to the Trial Chamber. The rather opaque comment in its original Response to the Ojdanić Application – that, in order to satisfy the burden placed upon him, Šainović must do more than simply tip the balance in his favour[99] – hardly suffices to make the point which is now sought to be made on appeal.

28. That the prosecution did not make this point before the Trial Chamber is conceded by it, but it says that this is irrelevant, because it was the duty of the Trial Chamber to ensure that it applies the correct standard of proof regardless of the submissions of the parties, yet it "did not adhere to the standard that every Trial Chamber is under an obligation to apply".[100] The prosecution does concede that the standard which it has now identified to the Appeals Chamber is "more *specific* than anything referred to in the jurisprudence so far", but nevertheless, the prosecution argues, the test it now proposes –

> [...] clearly falls within the general framework of, and is consistent with, all of the Tribunal's decisions emphasising the very substantial burden of proof upon an applicant for provisional release, given the particular context in which this Tribunal operates.[101]

The prosecution refers to three Trial Chamber decisions to support this argument. In the order in which the prosecution referred to them, they are:

Prosecutor v Brđanin & Talić,[102] in which the Trial Chamber said:

> The absence of any power in the Tribunal to execute its own arrest warrant upon an applicant in the former Yugoslavia in the event that he does not appear for trial, and the Tribunal's need to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf, place a substantial burden upon any applicant for provisional release to satisfy the Trial Chamber that he will indeed appear for trial if released. That is not a re-introduction of the previous requirement that the applicant

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[98] Ground (c).
[99] Prosecution Response, par 27.
[100] Joint Reply, par 3.
[101] *Ibid*, par 5. The emphasis appears in the Joint Reply.
[102] *Brđanin* Decision, at par 18.

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> establish exceptional circumstances to justify the grant of provisional release. It is simply an acceptance of the reality of the situation in which both the Tribunal and applicants for provisional release find themselves.

Prosecutor v Ademi,[103] in which the Trial Chamber said:

> In considering the two pre-conditions expressly laid down in Rule 65(B), it must be remembered that, there are factors that are specific to the functioning of the Tribunal which may influence the assessment of the probability of the risk of absconding or interfering with these witnesses. [...] 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.

Prosecutor v Blaškić,[104] in which the Trial Chamber said:

> **CONSIDERING** that the guarantees offered by General Blaškić, including the payment of a bail bond, are in no way sufficient to ensure that, if released, he would appear before this International Tribunal; that the gravity of the crimes allegedly committed and the sentences which might be handed down justify fears as to the appearance of the accused;
>
> **CONSIDERING**, furthermore, that it is not certain that, if released, the accused would not pose a danger to any victim, witness or other person; that the knowledge which, as an accused person, he has of the evidence produced by the Prosecutor would place him in a situation permitting him to exert pressure on victims and witnesses and that the investigation of the case might be seriously flawed;

29. None of these statements (except perhaps the second paragraph quoted from the *Blaškić* Decision) supports the prosecution argument that there exists a heavier burden in relation to proof that an accused person will appear for trial and will not pose a danger to victims, witnesses and other persons when seeking provisional release than that which is required for proof of any other fact in any other application for relief. Contrary to the prosecution's submission, there does not exist any standard of persuasion fixed at an intermediate point between the satisfaction beyond reasonable doubt required to establish guilt of a criminal charge and satisfaction that more probably than not what any applicant for relief asserts is true (sometimes referred to as the balance of probabilities). Satisfaction that what such an applicant asserts is more probably true than not depends upon the nature and consequences of the matter to be proved. The more serious the matter asserted, or the more serious the consequences flowing from a particular finding, the greater the difficulty there will be in satisfying the relevant tribunal that what is

[103] *Prosecutor v Ademi*, IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb 2002 ("*Ademi* Decision"), pars 23-24.

[104] IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 Apr 1996 ("*Blaškić* Decision"), p 5.

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asserted is more probably true than not. That is only common sense.[105] The nature of the issue necessarily affects the process by which such satisfaction is attained, but the burden of proof is the same: that more probably than not what is asserted by the applicant is true.

30. In the *Brđanin* Decision, the reference to the "substantial burden" placed upon an applicant in establishing that he will indeed appear for trial if released is a reference only to the substantial difficulty he will have, by reason of the context within which the Tribunal is forced to operate, in satisfying a Trial Chamber that more probably than not he will appear.[106] The reference in the *Ademi* Decision to a "more cautious approach" in assessing the risk that an accused may abscond is a reference to the same thing. The reference in the *Blaškić* Decision to the absence of certainty that the accused would not pose a danger to victims, witnesses and others (which, depending how it is interpreted, may assist the prosecution's argument) does not sit well with the somewhat lesser standard adopted in that decision for determining whether the accused will appear for trial, but the difference may be the result of a poor translation from the French original (the original French could just as readily be translated in this context as "it does not find it evident that" as "it is not certain that"). However, certainty can never be required except (in a limited sense) in proof of guilt of a criminal charge, and the difference between the burden of persuasion for guilt and the lesser burden of persuasion for other issues should not be confused. The difference between them is no mere matter of words; it is a matter of critical substance.

31. The prosecution's argument that there is, or should be, a burden of proof placed upon an applicant for provisional release to satisfy the Trial Chamber that there is no real risk that the accused will fail to appear for trial or pose any danger to victims or witnesses or other persons is rejected. The Trial Chamber made no error in relation to the burden of proof.

[105] It also happens to accord with statements of principle made by a highly respected and very eminent jurist, Sir Owen Dixon of the High Court of Australia, in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-363. See also *Rejfek v McElroy* (1965) 112 CLR 517 at 521.

[106] I believe that I am sufficiently qualified to identify the intended meaning of that statement: not only was I a member of the Trial Chamber which delivered that decision, I was also the author of the statement itself. The position is the same in relation to the similar statement made by the same Trial Chamber in *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Momir Talić for Provisional Release, 28 Mar 2001 ("*Talić* Decision"), par 18.

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Appearance for trial

(B) ***Nature of prosecution attack upon the Trial Chamber's findings of fact***

32. A preliminary issue to be considered is the nature of the attack which the prosecution has made upon the Trial Chamber's findings of fact. In its Interlocutory Appeal, the prosecution has asserted that the Trial Chamber "committed an error of fact in determining that it was satisfied that the accused would appear for trial".[107] Although the prosecution acknowledges the limitations upon the right of a party to have the Appeals Chamber reconsider a Trial Chamber's finding of fact,[108] which the prosecution has expressed in terms similar to those stated in the jurisprudence of the Appeals Chamber,[109] its submissions have failed to remain within those limitations. Considering those limitations in the order in which they have been stated in par 21, *supra*, the prosecution has taken the following positions:

(1) It has not alleged anywhere in its Interlocutory Appeal that the finding of fact by the Trial Chamber that the accused would appear for trial was one which no reasonable tribunal of fact could have reached.[110]

(2) It has alleged that the Trial Chamber's finding was invalidated by a number of errors of law. One of these has already been dealt with (the burden of proof, which applies to both factual issues which the accused must establish), and the remaining errors of law alleged will be dealt with later.[111]

(3) It has not stated that the Trial Chamber's evaluation of the evidence was *wholly* erroneous so as to enable its finding to be quashed, although it has alleged that the Trial Chamber made a number of errors, which are also dealt with later.

33. What the prosecution has also done, and this is where it appears to have departed from those limitations already recognised in the Tribunal's jurisprudence, is to approach its challenge to the factual finding made that the accused would appear upon the basis that the grant of provisional release is a discretionary matter, and therefore that it is sufficient to demonstrate that the Trial Chamber's factual finding resulted from a wrong exercise of its discretion.[112] Such an approach conflates the two issues which arise on appeal in an entirely impermissible way.

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[107] Ground (a). See also Interlocutory Appeal, par 18.
[108] Interlocutory Appeal, par 8.
[109] The jurisprudence of the Tribunal is summarised in par 21, *supra*.
[110] The prosecution does submit that the Trial Chamber placed unreasonable reliance upon the FRY/Serbia Guarantees (Interlocutory Appeal, par 18), but that is not sufficient. The issue is whether the finding of fact itself is one which no reasonable tribunal of fact could have reached.
[111] The remaining matters are dealt with at pars 37 *et seq*, *infra*.
[112] Interlocutory Appeal, par 16.

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34. To repeat what was said earlier,[113] a decision as to whether provisional release should be granted involves, first, findings of fact as to whether the accused will appear for trial and whether, if released, he will not pose a danger to any victim, witness of other person; and, secondly, whether, even if those findings of fact are made in favour of the accused, the Trial Chamber's discretion should be exercised to refuse provisional release. It is true that, as the prosecution states in a different context,[114] both issues identified in Rule 65(B) involve an assessment of future, rather than past, conduct and thus a degree of prediction in the determination to be made. But the determination of future conduct does not become an exercise of discretion. Such a determination does differ in some respects from the determination of past events, but the difference is one of degree and not of substance. Even in relation to the determination of past events, there is a difference in degree between the determination of a specific issue as to whether A killed B and the determination of a less specific issue such as whether an attack directed against a civilian population was widespread or systematic. A Trial Chamber is allowed a greater degree of latitude in making a determination of whether the attack was widespread or systematic than in its determination of whether A killed B, and similarly it is allowed a greater degree of latitude in making a determination of future conduct. But they are all findings of fact, not the exercises of discretion, and they are insulated against appeal as such.

35. The difference between a finding of fact and the exercise of a discretion is fundamental. The exercise of a discretion will usually be based upon facts which have been found by the trial court, and is permitted usually where there is a need for the application of the law, based upon the findings of fact which have been made, to be flexible and adaptable to the circumstances of the particular case. It would be quite wrong to approach the determination of the future conduct of the accused – upon the basis of which that discretion is to be exercised – in some such flexible and adaptable way. The two situations are wholly different. An appellate court may upset the exercise of such a discretion only where that exercise has miscarried. If the prosecution's appeal fails in relation to its challenge to the findings of fact upon which it was based, then the exercise of discretion must be examined on appeal in the light of the findings which were made and which must be accepted as correct for that purpose.

[113] Paragraph 20, *supra*.
[114] Interlocutory Appeal, par 13, dealing with the burden of proof.

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36. Arguments which are relevant only to a challenge to an exercise of discretion, such as a failure to give sufficient weight to relevant considerations, do not suffice in a challenge to a finding of fact unless the qualitative weight placed by the Trial Chamber upon any particular matter renders the factual finding one which no reasonable tribunal of fact could have reached. That is because it is for the Trial Chamber to assess and to weigh the evidence before it,[115] and the question as to whether the Trial Chamber gave due weight to any particular piece of evidence is itself a question of fact, not of law.[116] To interfere with a factual finding upon the basis that the Appeals Chamber merely disagreed with the Trial Chamber's assessment of the weight to be placed upon relevant evidence would amount to an unauthorised substitution of the Appeals Chamber's own views for that of the Trial Chamber on that question of fact.

(C) *The reliability of the personal undertakings of the accused to appear for trial*

37. **Material "did not" establish that they would appear** The prosecution has submitted that "the Trial Chamber has granted the accused provisional release when the material before it *did not* establish that they would return for trial", a result which is characterised as a "grossly unfair outcome in these judicial proceedings".[117] The submission is directed to the prosecution's challenge to the finding of fact made by the Trial Chamber that the accused would appear for trial. That manifestly is *not* the correct issue in an appeal which involves a challenge involving a finding of fact. Article 25 of the Tribunal's Statute ("Appellate proceedings") is concerned with "an error of fact which has occasioned a miscarriage of justice", but there must first be shown that there is an error of fact which can be upset on appeal.[118] Once again, it is necessary to emphasise that appeals in this Tribunal are *not* rehearings. The prosecution does not submit that the material before the Trial Chamber *could not* support the finding which it made. The challenge that the evidence "did not" establish that the accused will appear for trial is rejected. The prosecution has put forward other arguments that error has been established, although without always identifying the character of the error alleged to have been made. Attention will now be given to those other arguments.

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[115] *Tadić* Conviction Appeal, par 64; *Aleksovski* Appeal, par 61; *Kupreškić* Appeal, pars 30-31; *Prosecutor v Kunarac et al*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, pars 39-40.

[116] *Furundžija* Appeal, par 37, following what had been said in the *Serushago* Appeal, at par 22.

[117] Interlocutory Appeal, par 27. The emphasis has been added; it did not appear in the text of the Interlocutory Appeal.

[118] This confirmed by the passage in the *Furundžija* Appeal, at pars 37, 40, upon which the prosecution relies.

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38. **The voluntary nature of the surrenders** The accused did not give evidence in support of their applications. Ojdanić, but not Šainović, produced some testimonials from former colleagues asserting their belief that he would appear for trial. Otherwise, the case of the two accused rested upon their written undertakings and the fact that they had voluntarily surrendered. The prosecution has challenged the voluntary nature of the surrender by the accused, which it says occurred in response to the Government's instructions to do so.[119] Šainović did say that he had responded to the "invitation" or the "call" of the FRY Government to surrender.[120] The prosecution has not identified any such statement by Ojdanić. There is, however, nothing in the evidence which would have obliged the Trial Chamber as a matter of law to accept that the accused surrendered *only* because of instructions from the Government, and nothing has been shown which would justify the Appeals Chamber interfering with the Trial Chamber's findings on this basis.

39. **The delay in surrendering** The prosecution also challenged the weight to be given to the surrenders because of the delay of almost three years which occurred after the accused must have known that the indictment had been issued and before the surrenders took place. The explanation offered by both accused, that they were unable to surrender until the Law on Cooperation had been passed,[121] is unacceptable in law, but the issue is their state of mind, not the legality of their views. The prosecution's challenge to the honesty of that explanation is that the accused had chosen to surrender only when they believed that, because of the Law on Cooperation, their Government could no longer avoid its obligations to surrender or transfer them to the Tribunal.[122] Other Trial Chambers may perhaps have rejected the explanation put forward by the accused as inadequate, but this Trial Chamber was not obliged in law to do so, and it has not been said, nor could it be said, that the decision to grant provisional release was rendered, by its failure to accept the prosecution's argument upon this issue, one which no reasonable tribunal of fact could have reached.[123]

[119] Paragraph 11, *supra*.
[120] Paragraph 7, *supra*.
[121] Paragraphs 7 and 9, *supra*.
[122] Paragraph 11, *supra*.
[123] There was no challenge in this appeal to the statement by the Trial Chamber that, although the accused could have surrendered earlier, it considered that "it is the fact of surrender which is of significance" (par 12 of the Trial Chamber Decision). Such a statement may perhaps be appropriate in a particular case, but the circumstances in which a surrender takes place may well cause greater or less weight to be given to the fact of surrender in most cases.

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40. **Likely length of the sentences** The prosecution complains of the Trial Chamber's statement that, whilst the likely length of the sentence which may be imposed if an applicant for provisional release is convicted is "certainly" a factor to be considered in assessing whether that applicant will appear for trial, the likely length of sentence "by itself [...] is not a reason for refusing provisional release".[124] The prosecution submits that, to the extent that the Trial Chamber "excluded this factor from consideration altogether", it fell into error.[125] Any conclusion that the Trial Chamber "excluded this factor from consideration altogether" would necessarily fly in the face of the Trial Chamber's statement that such a factor is "certainly" one to be considered. What the Trial Chamber was responding to was the attitude so often expressed by the prosecution in these cases, which appears to assume that the likely length of the sentence which an accused would receive if convicted has some life of its own in relation to Rule 65. It does not. So far as the issues which the accused must establish in order to obtain provisional release are concerned, such a factor is relevant because it is a matter of common experience that the more serious the charge, and the greater the likely sentence if convicted, the greater the reasons for not appearing for trial.[126] It is therefore a matter to be considered when deciding whether the accused will appear for trial, notwithstanding any personal guarantee which he may have given and no matter what supporting evidence he has in relation to that issue.[127] But, if the undoubted existence of such common experience does not lead the Trial Chamber to reject the accused's case that he will appear for trial, that factor is manifestly not by itself a sufficient reason for refusing provisional release. That is all that the Trial Chamber was saying, and what the Trial Chamber said was correct. Such a factor is not relevant to any other issue which the accused must establish. The prosecution has argued that it is also relevant to the exercise of discretion, but the statement of the Trial Chamber to which its complaint is directed was made in relation to the issue as to whether the accused would appear for trial, and not in relation to the exercise of discretion, an issue to which reference will be made later.

[124] Trial Chamber Decision, par 14.
[125] Interlocutory Appeal, at pars 25-26. The complaint forms part of Ground (a).
[126] *Kordić* Decision, p 4; *Brđanin* Decision, par 16.
[127] It should be noted, however, that the mere fact that such a sentence would be severe is an insufficient basis upon which a finding that the accused will appear for trial can be refused. It must be considered in relation to the circumstances of the particular accused which may point to the danger of absconding: *Neumeister Case*, Eur Court H R, Judgment of 27 June 1968, Series A no 8 ("*Neumeister* Case"), par 10; *Stögmüller Case*, Eur Court H R, Judgment of 10 November 1969, Series A no 9 ("*Stögmüller* Case"), par 15; *Letellier Case*, Judgment of 26 June 1991, Series A no 207 ("*Letellier* Case"), par 43.

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41. **Prior statements by accused** The present decision of the Appeals Chamber, to which this Separate and Dissenting Opinion is appended,[128] concludes that the Trial Chamber erred in law by not referring to statements made by the two accused earlier this year that they did not intend to surrender voluntarily.[129]

42. The prosecution has included in the "Book of Authorities" which it filed in support of its appeal the text of statements alleged to have been made by the accused to the media. This material was not before the Trial Chamber, and any complaint concerning the Trial Chamber's treatment of those statements can only be based upon the material which the prosecution had chosen to place before the Trial Chamber. The procedure adopted by the prosecution on appeal was quite improper. In no sense can such a document validly be part of a book of authorities.[130] If the prosecution wished to place this material before the Appeals Chamber as additional evidence, it should have applied for its admission pursuant to Rule 115, an impossible task in the circumstances.[131] It has not made such an application, and I agree with the Majority Decision that the additional evidence must be disregarded on the appeal.

43. There was little attention paid to these statements at the hearing before the Trial Chamber. In dealing with the delay by the two accused until the Law on Cooperation was passed before they surrendered, the prosecution stated in relation to Šainović:[132]

> The Prosecution notes also that the accused told the media earlier this year that he would not surrender voluntarily.

In relation to Ojdanić, the prosecution stated:[133]

> As with the accused ŠAINOVIĆ, the accused OJDANIĆ stated to the media earlier this year that he would not surrender voluntarily, explaining that domestic courts should have jurisdiction over him.[134]

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[128] Hereinafter designated the "Majority Decision".

[129] Majority Decision, p 6.

[130] The Practice Direction on the Length of Briefs and Motions (IT/184 Rev 1, 5 Mar 2002), by par 6, provides: "An appendix or book of authorities will not contain legal or factual arguments, but rather references, source materials, items from the record, exhibits, and other relevant, non-argumentative material." That does not permit a party to avoid the limitations on the tender of additional evidence imposed by Rule 115.

[131] Rule 115 requires a party seeking to tender additional evidence before the Appeals Chamber upon an issue decided by the Trial Chamber to establish that such evidence could not have been discovered by it through the exercise of due diligence: *Prosecutor v Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 Oct 1998, pars 35-45; *Kupreškić* Appeal, par 50; *Prosecutor v Delić*, IT-96-21-R-R119, Decision on Motion for Review, 25 Apr 2002, par 10.

[132] Prosecution Response, par 15.

[133] *Ibid*, par 24.

[134] The prosecution cited a website *Glas Javnosti* for a statement by Ojdanić on 13 February 2002: "I will not surrender."

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At the hearing, the Prosecutor said to the Trial Chamber, at the very end of the submissions made:[135]

> [...] Mr Ojdanić had indicated sometime fairly recently, as indicated in our pleadings, that he believed he would best be tried by domestic courts, in particular military courts. The prosecution would just point out that in the *Talić* decision on provisional release, it was also found important in the context of that hearing that Talić had declared prior to the provisional release argument that he felt justice could only be done in the case – in his case before a military court, not allowing for – but, however – sorry, however, allowing for the possibility of an international military court trying him. The prosecution merely notes here that Mr Ojdanić does not even allow for the possibility of international justice.

It is unclear as to whether these earlier statements had been made in a context in which the accused were saying that they would *never* surrender themselves, even in the event that the Law on Cooperation were to be passed. The Interlocutory Appeal asserts that such statements were made "just prior to their transfer",[136] but that assertion depends upon the material illegitimately placed before the Appeals Chamber. The only material before the Trial Chamber identifies the statement by Ojdanić as having been made on 13 February this year, and the surrender by him as having taken place on 25 April. The assertion during argument that the statement was made "sometime fairly recently" must be read in the light of that material.

44. The Trial Chamber makes no reference in its Decision to the material concerning the earlier statements which *was* placed before it. As stated earlier, a Trial Chamber is expected to refer in its decision to certain relevant matters which have been strongly disputed or which are vital to the issues which it had to determine,[137] and in some circumstances the absence of any reference to such a matter if it had in fact been considered may lead to the inference that it was not considered.[138] It is difficult to see how these prior statements fell within such a proposition, bearing in mind the little attention paid to them by the prosecution when before the Trial Chamber. They must be viewed in the light of the fact that the two accused subsequently *did* surrender, and they appear to have little weight in resolving the issue as to whether, if they were now granted provisional release, they would appear for trial.

[135] Transcript, pp 429-430.
[136] Interlocutory Appeal, par 21.
[137] Paragraph 25, *supra*, citing the decision of the Appeals Chamber in the *Kupreškić* Appeal, at pars 32, 39, 135.
[138] Paragraph 25, *supra*, citing the decisions of the Appeals Chamber in the *Delalić* Appeal, at par 457, and the *Galić* Appeal, at par 19.

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45. The significance to be given to the absence of any reference to those statements in the Decision can be judged by the absence of any complaint by the prosecution in this appeal that the Trial Chamber failed to consider those earlier statements. It certainly does say in its Interlocutory Appeal that the safety net of a "water-tight" guarantee from a cooperative State was of great importance because these statements had been made by the two accused. But the prosecution does *not* suggest that the inference to be drawn from the absence of any reference to those two statements in the Trial Chamber Decision is that it had failed to consider them. Indeed, admittedly in a different context, the prosecution accepts that a Trial Chamber does not have to refer to every argument which has been presented to it.[139]

46. The Majority Decision says that it gives no weight to the absence of any complaint by the prosecution concerning the absence of any reference in the Trial Chamber Decision to these statements, because the prosecution continues to rely upon those statements, and thus that the Trial Chamber erred in law by not *referring* to them. With all due respect to the Majority Decision, that is not the issue. The issue here can only be whether the Trial Chamber *considered* those statements. If the failure to *consider* that material is to be established by the failure to *refer* to it in its decision, then the first issue to be determined is whether it would be expected that the Trial Chamber would refer to that material if it had indeed been considered by it. That is the only relevance of the absence of any *reference* by the Trial Chamber. Where the prosecution does not complain of the absence of any reference to this material, it is quite impossible to see how the Appeals Chamber could safely draw the inference that the Trial Chamber did not consider it when determining whether the two accused would appear for trial. It would certainly not be appropriate for the Appeals Chamber to substitute its own finding of fact unless it were clear that the Trial Chamber had failed consider these statements.

47. In my opinion, it is neither safe nor appropriate for the Appeals Chamber to do so, particularly as the accused have not been given the opportunity to respond to the point taken by the Appeals Chamber itself. If a complaint *had* been made by the prosecution that the Trial Chamber had failed to consider the earlier statements when determining that they would appear for trial, and if it remained unclear as to whether it had done so, the appropriate course (as previously discussed)[140] would be to quash the decision and return the case to the Trial Chamber

139 Interlocutory Appeal, par 37, dealing with the exercise of discretion.
140 Paragraph 25, *supra*.

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for clarification as to whether a particular matter had been considered by it, and for reconsideration if it had not.

48. I therefore disagree with the Majority Decision when it concludes that the Trial Chamber committed an error of law by not referring to statements made by the two accused that they did not intend to surrender voluntarily.

(D) ***The reliability of the guarantees provided by the FRY/Serbia Governments***

49. **General considerations** The prosecution states that the importance of a guarantee provided by a relevant authority that the accused will be arrested if he does not comply with the conditions of his provisional release (including his appearance for trial), and the degree of scrutiny to be accorded to its reliability, must be determined on a case by basis,[141] and not on the basis of an assessment of that authority's level of cooperation with the Tribunal generally.[142] The prosecution is correct that the reliability of such a guarantee must be determined in relation to the circumstances which arise in the particular case. This issue has been discussed recently by the Appeals Chamber.[143]

50. A Trial Chamber may accept a relevant authority's guarantee as reliable in relation to Accused A, whereas the same or another Trial Chamber may decline to accept that the same authority's guarantee as reliable in relation to Accused B, without there being any inconsistency involved between those two decisions. Accused A may have surrendered voluntarily as soon as he learnt that he had been indicted and have cooperated with the OTP in a way which demonstrated his *bona fide* intention to appear for trial. The reliability of the guarantee provided by the relevant authority is of less importance in such a case, and may more easily be accepted as sufficiently reliable in relation to this particular accused person. On the other hand, Accused B may have been a high level government official at the time he is alleged to have committed the crimes charged, and he may have since then lost political influence but yet possess very valuable information which he could disclose to the Tribunal if minded to cooperate should he be kept in custody. There would be a substantial disincentive for that authority to enforce its guarantee to arrest that particular accused if he were not to comply with the conditions of his provisional

[141] Interlocutory Appeal, par 20.
[142] *Ibid*, par 22.
[143] *Prosecutor v Mrkšić*, IT-95-13/1-AR65, Decision on Appeal Against Refusal of Provisional Release, 8 Oct 2002, pars 9-13.

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release. A finding that the guarantee is not sufficiently reliable in the case of Accused B would be completely reasonable, despite the finding that it was reliable in relation to Accused A. Academic and opinion writers and the interested public may, of course, nevertheless wrongly perceive an inconsistency in those two cases in relation to the same authority, and criticise the Tribunal for what has been wrongly perceived. Trial Chambers should take care to explain their decisions in a way to avoid such criticisms, but they cannot be expected to change their view of the facts in a particular case in order to avoid unfounded criticism. Nor should the Appeals Chamber interfere with either such case simply because of the possibility of such criticism.

51. There are many factors which are relevant to a Trial Chamber's determination of the reliability of the guarantee provided by the authority in question. Such reliability must be determined not by reference to any assessment of the level of cooperation by that authority with the Tribunal generally, but in relation to what would happen if that authority were obliged under its guarantee to arrest the particular accused in question. What would happen in the circumstances of *that* particular accused in question is a fact in issue to be decided when determining whether that accused will appear for trial. The general level of cooperation by the authority with the Tribunal does have some relevance in determining whether it would arrest the particular accused in question, but it is not itself a fact in issue. It is therefore both unnecessary and unwise to include in the 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 could easily be misunderstood by the parties in relation to subsequent applications for provisional release.

52. The reliability of guarantees by any particular authority necessarily depends to some extent, as the prosecution correctly points out,[144] upon the vagaries of politics and of personal power alliances within the relevant authority as well as upon the impact of any international pressure (including financial pressure) upon the authority at any time. The prosecution says that such political considerations can never be accommodated in criminal proceedings before this Tribunal, and therefore that (in the circumstances of the present case) "only a guarantee from a state who [*sic*] is cooperating unconditionally" would be sufficient to establish that the accused will appear for trial.[145] A distaste for political issues is not, however, a sufficient reason for

[144] Interlocutory Appeal, par 23.
[145] *Ibid*, par 23.

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avoiding the obligation of a Trial Chamber to determine an issue of fact posed for its determination and for adopting an alternative approach which would almost necessarily preclude success for any applicant for provisional release. For example, the likelihood in the future of a change in government in any particular case is something which is relevant to the reliability of a State guarantee. A difference in cooperation as a result of a change in government is a fact of life (even though a political one) which *must* be taken into account in determining whether a guarantee will be enforced by an authority in relation to the accused person in question.

53. **Failure to arrest co-accused Milutinović** As previously stated, Milutinović (the co-accused of Šainović and Ojdanić) presently remains in Serbia as its President,[146] the explanations given being that he will be handed over to the Tribunal when his office expires at the end of this year, either voluntarily on his part or by compulsion,[147] and that to arrest him before his office expires would jeopardise the security and sovereignty of the State.[148] Such explanations would appear to be unacceptable in law,[149] but they indicate that, whatever may be the legal position, FRY/Serbia appears to regard its obligations under Article 29 of the Tribunal's Statute as dependent upon its current political situation, and that the guarantees given by FRY/Serbia may selectively be complied with – only if it were thought to be appropriate in the political situation which exists at the time. That was a matter which was put to the Trial Chamber, and the Trial Chamber stated:[150]

> As to the Prosecutor's argument that the failure of the authorities to arrest the co-accused Milan Milutinović suggests that these accused would not appear at the International Tribunal, the Trial Chamber does not accept that argument. Merely because a co-accused has not yet been arrested does not mean that the general level of co-operation with the International Tribunal is not satisfactory.

Once again, other Trial Chambers may perhaps have thought that, even in relation to *these* two particular accused, the prosecution argument had considerable weight, but this Trial Chamber was not obliged in law to do so. It has not been suggested that the Trial Chamber's refusal to accept the argument based upon the failure to arrest Milutinović as demonstrating that these two accused would not appear for trial was a conclusion which no reasonable tribunal of fact could

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[146] Paragraph 4, *supra*.
[147] Paragraph 17, *supra*.
[148] Paragraph 10, *supra*.
[149] The FRY/Serbia authorities obtain no assistance from the recent decision of the International Court of Justice in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 Feb 2002 (the *Yerodia* Case), (General List No 121). In any event, the jurisdiction of this Tribunal is given primacy over the jurisdiction of the national courts (Statute, Article 9.2).
[150] Trial Chamber Decision, par 14.

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have reached. It is the Trial Chamber, not the Appeals Chamber, which has the primary responsibility for making that decision, and the Appeals Chamber cannot substitute its own view merely because it may disagree with the finding which the Trial Chamber made. If it were otherwise, then the Appeals Chamber would be converted into a court of rehearing. The Security Council did not make any such provision in the Tribunal's Statute, and the Appeals Chamber should not allow itself to become a court of rehearing by accepting arguments such as have been put forward by the prosecution in this appeal. No other basis has been suggested in the Interlocutory Appeal for interfering with the Trial Chamber's refusal to accept that argument.

54. But the prosecution nevertheless takes issue with the relevance of the Trial Chamber's reference in that passage to the "general level of cooperation" of the FRY/Serbia authorities with the Tribunal. It says that the degree of reliance to be placed upon any guarantee must be determined in relation to the particular case, and not upon the basis of a general assessment of the general level of cooperation which may be based upon factors extraneous to the present case.[151] This issue has already been discussed,[152] and the prosecution is correct to an extent. As previously stated, the general level of cooperation does have some relevance in determining whether the authority which gave the guarantee would arrest the particular accused in question, but it is both unnecessary and unwise for a Trial Chamber to make pronouncements in its decision as to that general degree of cooperation.[153] But the passage to which the prosecution takes exception has been wrenched from its proper context.

55. The Trial Chamber had previously defined the sense in which it was using the term "level of cooperation", which makes it clear that, in the passage to which the prosecution has taken exception, it was concerned with the level of cooperation *so far as it concerned the present applications*. The particular passage was in fact a reference to a submission which had been made by the prosecution itself. The Trial Chamber had earlier said:[154]

> The suggestion was made that the Government's level of cooperation was generally unsatisfactory.[155] However, it is the particular level of cooperation relating to the issues of provisional release with which this application is concerned. In this connection, the Trial Chamber is satisfied that the proposed level of cooperation is satisfactory.

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[151] Interlocutory Appeal, par 22.
[152] Paragraph 51, *supra*.
[153] *Ibid.*
[154] Trial Chamber Decision, par 12.
[155] The footnote to the text demonstrates that this was a submission made by the prosecution at the hearing.

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That clearly enough was the sense in which the Trial Chamber was using the term in the passage to which the prosecution now takes exception. It is true that the word "general" was used in the impugned passage, whereas the Trial Chamber had earlier, correctly, referred to the "particular" level of cooperation, but the prosecution can hardly take advantage of what is obviously an unfortunate slip when it had itself been raising the issue of the general level of cooperation. This is, however, a good illustration as to why Trial Chambers should avoid saying anything which can be misunderstood as an assessment of a particular State's general level of cooperation. That is primarily for the President of the Tribunal to state in the annual report made on behalf of the Tribunal to the United Nations, or in a separate report. This complaint is rejected.

56. **The senior position of the two accused** The Majority Decision concludes:

(a) that, in determining whether the accused would appear for trial, the Trial Chamber failed to consider the effect of the senior position of the two accused so far as it relied upon the guarantees,

(b) that the position of an accused in the hierarchy could have an important bearing upon a State's willingness and readiness to arrest that person if he refuses to surrender himself, and

(c) that those factors reduce the likelihood of his appearing at trial.[156]

(As the Majority Decision allows the appeal upon this issue, it was unnecessary for it to deal with the further issue of the relevance, if any, of the senior position of the accused to the exercise by the Trial Chamber of its discretion under Rule 65(B).)[157]

57. In failing to address these factors, the Majority Decision says, the Trial Chamber committed an error of law.[158] The reliability of guarantees provided by a State are, of course, relevant to the issue of whether the accused will appear for trial. It must be kept in mind that such an issue does not have a life of its own, as the prosecution sometimes suggests; indeed, the Appeals Chamber has made it clear that, although the production of a guarantee from the relevant governmental body is advisable, it is not a prerequisite for provisional release.[159]

[156] Majority Decision, par 9.
[157] That issue is dealt with in this Separate and Dissenting Opinion at pars 86 *et seq*.
[158] Majority Decision, par 9.
[159] *Jokić* Appeal Decision, pp 2-3.

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58. In reaching its conclusion that the Trial Chamber failed to consider this issue, the Majority Decision itself fails to mention that the prosecution has expressly conceded in this appeal that, in relation to the issue of whether the accused will appear for trial, the Trial Chamber *did* consider the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation on the part of the States giving guarantees.[160] That concession was made in a context which was clearly intended to refer to the reliability of both the undertakings of the accused that they will appear for trial and – insofar as the issue was raised before the Trial Chamber – the reliability of the guarantees provided to these two accused.[161]

59. That concession made by the prosecution was well based. The relationship between the senior position of the two accused and the reliability of the guarantees played a very minor role indeed in the arguments of the prosecution before the Trial Chamber. The only possible reference by the prosecution in its Response to such a relationship has to be read into this statement concerning the application by Šainović:[162]

> [...] the Prosecution submits that little weight should be given to such guarantees. It is noteworthy that the co-accused Milan MILUTINOVIĆ remains at large to this date. There has been a clear failure to arrest MILUTINOVIĆ on the part of the very same authorities upon whom the accused seeks to rely.

That statement – which can be interpreted (with the benefit of what was said during the hearing) as suggesting that the failure of the State to arrest a co-accused of Šainović resulted from the senior position of that co-accused – is not repeated in relation to Ojdanić. The other references in the Response to the senior position of the two accused with which this appeal is concerned are limited to two, and neither has any relevance at all to the relationship between their senior position and the reliability of the guarantees. In the first, the prosecution suggested that, "in the

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[160] Joint Reply, par 20. The prosecution goes on to assert that, having done so, the Trial Chamber should not have been satisfied that there was "no *possible* risk" that the accused would fail to return for trial (Interlocutory Appeal, par 26). This submission that the test is "no *possible* risk" places an even higher burden of proof upon the accused than the test of "no *real* risk" which has already been rejected (pars 27-31, *supra*).

[161] Under the heading "Failure to consider relevant factors in the exercise of the Trial Chamber's *discretion*", which is the subject of part of Ground (b), the Joint Reply says (at par 20): "Neither Šainović's Brief nor Ojdanić's Brief addresses the core of the Prosecution's primary argument under this ground of appeal. Clearly, the Prosecution does not suggest that the Trial Chamber did not consider the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation when determining whether the accused would appear for trial. Rather, the Prosecution submits that these factors are also relevant to the exercise of the discretion as to whether to grant provisional release and that the Trial Chamber erred in failing to consider them at this stage of the Rule 65(B) process." The underlining has been inserted in order to supply emphasis. The reference to "this stage" is to the stage where the Trial Chamber may exercise a discretion.

[162] Prosecution Response, par 11.

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light of the positions of authority held by the accused and the ongoing nature of the investigations", it was "possible" that the release of the two accused would pose a danger to witnesses and victims.[163] In the second, the prosecution said, in relation to Šainović:[164]

> In determining the issue of whether the accused will appear for trial, it is relevant to take into account that the accused is a person who occupied a position of great responsibility at the time the alleged crimes were committed. The crimes alleged against him are gravely serious crimes. If the accused is convicted, he will face a long sentence of imprisonment.

The prosecution then quoted from the *Brđanin* Decision:[165]

> It is a matter of common experience that the more serious the charge, and the greater the likely sentence if convicted, the greater the reasons for not appearing for trial.

A similar statement is made in relation to Ojdanić.[166] This is solely referable to the reliability of the personal undertakings of the accused to appear for trial.

60. At the hearing, the Prosecutor said:[167]

> [...] what it is absolutely unacceptable, we have had – we have received six voluntary surrenders, people who surrendered on the instructions of the government, pushed to surrender, but we never had one arrest except one which was a medium level perpetrator who we have had for a long time. But the military, the high responsible military who are here, Pandurević and other names,[168] and we've got Vladić [*sic*].[169] We know exactly, and everyone knows here, and I said so to the representative of Yugoslavia that he also – that Mladić is in Serbia, and everyone knows. So these arrests don't take place.

And, later:[170]

> [...] we have a cooperation for certain suspects, for certain ethnic groups, and there is no cooperation when you have Serbian suspects, and that has to be apprised [*sic*]. [...] But here one sees very clear, in particular in the case of the military of Serbia, that there is no cooperation at all. There again, one can't give a meaningful statistic even if you can confirm it. You have to see what sort of cooperation is at stake. If not, that's just a confirmation of this ethnical difference according to whether the suspects are Serbian, Albanian, or – one has to see that the question of the government of Yugoslavia will cooperate with us on all our requests.

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[163] *Ibid*, pars 13 (in relation to Šainović) and 23 (in relation to Ojdanić).
[164] *Ibid*, par 16.
[165] *Brđanin* Decision, par 16.
[166] Prosecution Response, par 25. The context in which these submissions were made is set out in a footnote to par 86, *infra*.
[167] Transcript, p 433.
[168] This would appear to be a reference to Lt Col Vinka Pandurević, who has been added as a defendant to the Srebrenica indictment (the relevant version of IT-98-33 was made public in December last year), and who is alleged to have been in command and in control (with General Mladić and General Krstić) of the events which led to the killing of a large number of Muslim men and boys.
[169] This would appear to be a mishearing for Mladić.
[170] Transcript, p 435.

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61. When dealing with the arguments put forward by the prosecution, the Trial Chamber said:[171]

> As to the Prosecutor's argument that the failure of the authorities to arrest the co-accused Milan Milutinović suggests that these accused would not appear at the International Tribunal, the Trial Chamber does not accept that argument. [...] Furthermore, in relation to the argument that there are strong reasons for the accused not to appear for trial as they are likely to face long prison sentences if convicted, the Trial Chamber considers that, while it certainly is a factor to take into consideration in assessing whether an accused will appear, by itself is not a reason for refusing provisional release.

The first of those two sentences refers directly to the argument put forward by the prosecution in its Response to the motions filed by the two accused, and repeated at the hearing, that the guarantees provided were not reliable where the accused held a senior position.[172] The second sentence refers to the argument, based upon the proposition put forward in the *Brđanin* Decision and quoted in that Response (which was concerned with the reliability of the personal undertaking given by the accused), that the greater the likely sentence if convicted, the greater the reasons for not appearing for trial. In the circumstances of these two accused, as the prosecution was suggesting, such sentences are likely to be greater in the case of conviction because of the senior position of the two accused. The reference to the "long prison sentences" is thus necessarily a reference to their "position of great responsibility at the time the alleged crimes were committed" referred to by the prosecution in its Response upon that issue.

62. The prosecution complains on appeal that the Trial Chamber was wrong to have rejected the argument which had been put forward based upon the failure of the relevant authorities to arrest Milan Milutinović, because that failure demonstrated the selective basis upon which those authorities were prepared to carry out their obligations to assist the Tribunal,[173] and that the political vagaries and personal power alliances within FRY/Serbia can never be accommodated in the criminal proceedings conducted before the Tribunal,[174] but it did not in any way suggest that the Trial Chamber had failed to *consider* the relevance of the senior position of these two accused to the reliability of the guarantees issued. The prosecution's only complaint is that, having considered the issue, the Trial Chamber reached the wrong conclusion.

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[171] Trial Chamber Decision, par 14.
[172] The last ten words are the subject of another, unrelated, complaint by the prosecution, which is dealt with at par 40, *supra*.
[173] Interlocutory Appeal, par 22, an argument dealt with at par 53, *supra*.
[174] *Ibid*, par 23, an argument dealt with at par 52, *supra*.

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63. In all these circumstances, it is, with all due respect to the Majority Decision, quite impossible for any appellate court safely to assert that the Trial Chamber failed to address the senior position of the accused in the hierarchy in relation to whether the accused will appear for trial, even though it may disagree with the conclusion which the Trial Chamber reached. It is true that, when repeating the argument of the prosecution, the Trial Chamber did not expressly include a reference to the specific phrase to which the Majority Decision refers, the "senior position" of the accused, but the reference which the Trial Chamber made to the arguments which had been put forward by the prosecution unmistakably refers to the senior position of the two accused as being relevant to that issue. Trial Chambers are not expected to write text books when giving their decisions on interlocutory matters of this type, even when dealing with issues which the prosecution put forward as important in the present case. It is easy to understand the pressures upon Trial Chambers – and this is a very busy Trial Chamber – to determine the issues which have been put forward by the parties as soon as reasonably possible, without the elaboration of specific phrases which were not used by the prosecution when appearing before it. The requirement that a Trial Chamber give a reasoned opinion[175] requires it only to deal with the matters which are vital to the issues which it has to determine, and (so far as it is necessary in order to answer them) any other matters which the parties have raised before it as being vital. A Trial Chamber is not required to deal with matters which the parties do not appear to regard as important, and even less is it required to deal with matters which the parties have not raised before it (other than, again, those which are vital to the issues which it has to decide).

64. I therefore disagree with the Majority Decision when it concludes that the Trial Chamber "failed to consider the effect of the senior position of the two accused so far as it relied upon the guarantees" and thereby committed an error of law. The Appeals Chamber should usually respect concessions made by parties which are directly against their interests. There may be a case where it is appropriate to disregard such concessions but, where such a case arises, it is imperative that the other party be given the opportunity to respond to the ground of appeal which the Appeals Chamber has itself taken contrary to that concession. An Appeals Chamber should never be seen to be interfering with the determination of an issue of fact by a Trial Chamber with which the Appeals Chamber may disagree but which withstands appellate interference if the proper judicial processes are followed.

[175] This requirement is discussed in par 25, *supra*.

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(E) ***Other issues relating to the finding that the accused will appear for trial***

65. **Dependence on guarantee denies right to provisional release** The prosecution has argued that, if there is any question in the collective mind of the Trial Chamber that the accused will appear for trial only if he is arrested by the authorities, then it *cannot* be satisfied that he will appear for trial, as the delays involved in his forcible arrest and transfer mean that he will not have appeared for trial.[176] That is certainly not how Trial Chambers have considered the issue in the past, as the passages quoted from the *Brđanin* and *Ademi* Decisions make clear.[177] That is no doubt because, when an accused person has been granted provisional release, the Trial Chamber has usually been wise enough to call him up for the trial in sufficient time in advance of the trial date (for pre-trial conferences and the like) so that any need to take action to enforce a State guarantee does not arise for the first time on the day the trial is to commence. In any event, the prosecution's reasoning does not accord with the manner in which the issue should be approached.

66. The issue as to whether the accused will appear for trial cannot be considered in isolation. It must be considered in the light of all of the evidence in the application,[178] which necessarily includes the deterrent effect upon the mind of the accused of the existence of the State guarantee and the likelihood that it will be enforced against him. It would be an overly subtle analysis of fine distinctions, and it would be productive of error, to consider, first, whether the accused's assertion that he will appear should be accepted without reference to the State guarantee, secondly, taking into account the deterrent effect of the State guarantee, and, finally, whether he will appear only if forcibly arrested and transferred. No such argument was put before the Trial Chamber and, if it had, the Trial Chamber would have been correct to dismiss it. The only issue is whether the accused will appear for trial, taking into account his assertion that he will do so, the existence of any State guarantee, the likelihood that such State guarantee will be enforced against the particular accused in question and any other specific evidence which is relevant to that issue. The Trial Chamber made no error of law upon this issue.

67. **Erroneous approach** The prosecution submits that the Trial Chamber made an error of law when making the statement:[179]

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176 Ground (d).
177 Paragraph 28, *supra*.
178 cf *Prosecutor v Tadić*, IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, par 92.
179 Trial Chamber Decision, par 15.

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> The Trial Chamber is thus satisfied that there is no evidence to negative the assertion that the accused will appear for trial.

The prosecution says that this was erroneous because "there was clearly evidence, namely the failure to arrest Milutinović [...] that presented a real risk that the FRY/Serbia guarantees are insufficient to ensure the return of the accused for trial", and that the Trial Chamber, by starting with an assumption that the accused *would* return for trial and then looking to see what evidence exists to the contrary, failed to meet "the very high burden of proof that Rule 65(B) imposes".[180]

68. The context in which the Trial Chamber made this statement is important to understanding what was intended by it. In determining whether the accused would appear for trial, the Trial Chamber had to determine whether it would accept the personal undertakings to appear which the two accused had given. Before the Trial Chamber accepted those undertakings, it was obliged to consider all of the arguments put by the prosecution as to why they should not be accepted. If, despite all of those matters put by the prosecution, the Trial Chamber accepted those personal undertakings of the two accused, then that was a sufficient basis for finding that they would appear for trial. The Trial Chamber accordingly dealt with the various matters put forward by both parties which were relevant to the acceptance or otherwise of those undertakings – the surrender (and the delays involved), the Law on Cooperation passed by the FRY Government, the guarantees given by the FRY/Serbia Governments (and the level of cooperation which could be expected in relation to these two accused concerning the execution of those guarantees, considering, *inter alia*, their failure to arrest Milutinović), and the length of sentences which the two accused might expect to receive if convicted.

69. In dealing with these issues, the Trial Chamber expressly referred to, and thus must have had regard to, the evidence concerning all those matters as to why the undertakings should not be accepted. The reference to "no evidence" obviously could not have been intended literally to be true. What the Trial Chamber clearly intended to say in the impugned passage was that, despite all of the matters which had been put by the prosecution, nothing had been demonstrated to show that the undertakings should not be accepted. Necessarily implicit in such a statement is an acceptance of the undertakings which were given. It must be conceded that the impugned passage could have been better expressed. It is unfortunate that, despite the need for applications for provisional release to be dealt with expeditiously (particularly when the application is to be

[180] Interlocutory Appeal, par 24. This has been designated as Ground (e) in par 19, *supra*.

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granted), loose terminology such as this was permitted to remain. It has given the unsuccessful party something more to exploit on appeal, even though the meaning intended is reasonably apparent when the offending words are seen in their proper context. The Appeals Chamber is not entitled to reverse a decision of a Trial Chamber merely because the particular phrase chosen by a Trial Chamber was not the best which could have been chosen, provided that the phrase chosen does not demonstrate an error of law. No error in the approach taken by the Trial Chamber in this case has been established.

(F) ***Whether the accused will pose a danger to any victim or witness or others***

70. The Trial Chamber expressed its satisfaction that neither of the accused will pose such a danger, noting that there was no suggestion that either of them had interfered in any way whatsoever with the administration of justice since the indictment became public (some four days after it was confirmed) in May 1999.[181] The prosecution has not directed any ground of appeal specifically to that finding beyond its complaint that the burden of proof applied was erroneous, and that the correct burden of proof should have been that there is no real risk that the accused will pose any danger to victims or witnesses or other persons.[182] This ground of appeal has already been rejected.[183] The prosecution has, however, made some general submissions concerning the issue to which some reference should be made.

71. The prosecution submitted to the Trial Chamber that, as it was still continuing to investigate the case against the two accused, it was "possible" that their release would in fact pose a danger to witnesses and victims.[184] At no stage did the prosecution provide any evidence to support the existence of such a possibility, nor did it raise any issue that there was more than such a possibility. This is not to suggest that the prosecution bears any legal onus upon this issue. However, where a party (here, the applicant for provisional release) bears the onus of establishing a negative proposition (here, that he will not pose a danger to any victim, witness or other person if released), there is little that he can do but give the appropriate undertaking and point to such things as the absence on his part of any significant political support through which such interference could be directed. If there are matters which could affect the reliability of the undertaking given, the other party has the obligation, in fairness, to put them forward before the

[181] Trial Chamber Decision, par 16.
[182] Ground (c).
[183] Paragraph 31, *supra*.
[184] Prosecution Response, pars 13, 23.

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Trial Chamber to enable the party seeking to prove the negative proposition to deal with them, and not to reserve such points until an appeal.

72. In its Interlocutory Appeal, the prosecution has nevertheless sought to rely upon a statement in the *Blaškić* Decision, quoted earlier, when the Trial Chamber in that case refused provisional release upon the basis, *inter alia*, of the knowledge which an accused has of the evidence produced to him by the prosecution, which (it was said) "would place him in a situation permitting him to exert pressure on victims and witnesses" so that "the investigation of the case might be seriously flawed".[185] This issue was reinforced during the oral hearing when the prosecution submitted that provisional release should not be discussed until the accused had agreed to be interviewed, and that, once interviewed, there would be a danger that the accused would "confront" the sources of the prosecution evidence, and the OTP inquiries may be hindered.[186]

73. It is a strange logic that, once the prosecution has complied with its obligations under Rule 66 to disclose to the accused the supporting material which accompanied the indictment and the statements of the witnesses it intends to call, the accused thereafter should not be granted provisional release merely because, once released, he would be in a position to exert pressure upon them. Such logic has since been correctly rejected by another Trial Chamber,[187] and this part of the *Blaškić* Decision was not accepted as correct in another decision by the same Trial Chamber.[188] Careful consideration as to where the balance should lie in resolving the tension between the protection of victims and witnesses and the rights of the accused, given since the *Blaškić* Decision, has accepted that Article 20.1 of the Tribunal's Statute makes the rights of the accused the first consideration (requiring "full respect" for those rights), and the need to protect victims and witnesses the secondary one (requiring "due regard" to their need for protection).[189] Those rights include the right of an accused person to be released from custody pending trial where – to repeat the words of Rule 65(B) – he has satisfied the Trial Chamber that, *inter alia*, he "will not pose a danger to any victim, witness or other person". The mere possibility upon which the prosecution relies in the present case cannot by itself deny provisional release.

[185] Interlocutory Appeal, par 11.
[186] Transcript, pp 428, 433-434.
[187] *Brđanin* Decision, par 19.
[188] *Talić* Decision, par 36.
[189] See, for example, *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("*Brđanin & Talić* Decision on Protective Measures"), par 20.

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(G) *The exercise of discretion*

74. **Current jurisprudence** As already stated, little consideration has been given to the circumstances in which it would be appropriate to exercise that discretion.[190] It has been exercised (in exceptional circumstances) to *grant* provisional release notwithstanding that the accused had failed to satisfy the Trial Chamber that he will appear for trial.[191] However, it has been said that, in general, the discretion is unlikely be exercised in favour of an accused who had failed to establish that he would appear for trial.[192] Rather, the discretion would in general be exercised in the appropriate case only to *refuse* provisional release notwithstanding that the accused had established both factual requirements of Rule 65(B).[193] Such a discretion has been exercised in what may be called obvious cases.[194] Some suggestions have also been made that it could be exercised in other, perhaps less obvious, cases. For example, one Trial Chamber has suggested that obstructive behaviour other than absconding or interfering with witnesses may be relevant to the exercise of the discretion to refuse provisional release – where there has been the destruction of documentary evidence, the effacement of crime traces or the potential that the accused would form a conspiracy with co-accused who remain at large.[195] Bearing in mind the

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[190] Paragraph 6, *supra*.

[191] In the *Krajišnik* Appeal Decision (par 22, footnote 41), the Appeals Chamber referred with approval to *Prosecutor v Djukić*, IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 Apr 1996, at p 4, where provisional release was granted by a Trial Chamber prior to the commencement of the trial, solely upon humanitarian grounds in the light of the extreme gravity of the accused's medical condition, upon the basis that he was suffering from an incurable illness in its terminal phase. A similar application was recently granted, after the trial had been underway for most of this year, in *Prosecutor v Brđanin & Talić*, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talić, 20 Sept 2002 ("Second *Talić* Decision"). Talić had a short time earlier been diagnosed as suffering from an incurable disease, and the prognosis was that he was unlikely to live until the trial would conclude. The prosecution nevertheless sought to distinguish *Djukić* on the basis that the Talić trial was under way, and it argued that provisional release could be extremely damaging to the institutional authority of the Prosecutor and her ability to conduct investigations in the territory of the former Yugoslavia, that victims and witnesses who had agreed to cooperate with the prosecution would not have a favourable view of such a release and that, in the context of their own suffering, they would not understand the humanitarian motivation behind such a release (par 14). The Trial Chamber responded by describing it as unjust and inhumane to prolong the detention of Talić any longer (par 33).

[192] *Brđanin* Decision, par 22; leave to appeal refused by the Appeals Chamber: *Brđanin* Appeal Decision, p 3: "FINDING that the Applicant had failed to demonstrate that the Trial Chamber may have erred in its application of Rule 65 in holding that the Applicant failed to discharge the burden [of proof] in this case [...]"; *Krajišnik* Appeal Decision, par 22, footnote 41.

[193] *Brđanin* Decision, par 22; Second *Talić* Decision, par 22.

[194] For example, in *Prosecutor v Kordić & Čerkez*, IT-95-14/2-T, Order on Application by Dario Kordić for Provisional Release Pursuant to Rule 65, 17 Dec 1999, at p 4, the Trial Chamber, when refusing the application, took into account in part the facts that the application had been made during the trial, and that, if successful, his release would have disrupted the remaining course of the hearing. In *Prosecutor v Krajišnik & Plavšić*, IT-00-39&40-PT, Decision on Momcilo Krajišnik's Notice of Motion for Provisional Release, 8 Oct 2001 ("*Krajišnik* Decision"), at par 22, it was said that the proximity of the start of the trial or of the delivery of Judgment would weigh against a decision to grant provisional release.

[195] *Ademi* Decision, par 22.

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presumption of innocence, some care would have to be exercised to ensure that there was at least a real prospect that such a conspiracy *would* occur, rather than a mere suspicion that it *may* occur, but this issue may be left for future determination in a case in which it does arise.

75. A more recent development has been the introduction into provisional release cases of a concept adopted from the jurisprudence of the European Court of Human Rights ("ECHR"), that of "proportionality". It is a concept of protean application in that jurisprudence, requiring that:

> [...] there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[196]

That was said in a case concerning the compulsory expropriation of property. It has also been applied by the name of "proportionality", for instance, in cases concerning the rights to life,[197] to privacy and family life,[198] to freedom of expression,[199] and to freedom of assembly.[200] A similar concept (although not always given the name of "proportionality") has been applied in ECHR jurisprudence in provisional release cases, requiring the existence of:

> [...] a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.[201]

The individual ingredients of that formula, in general terms, may be relevant considerations in the exercise of the Tribunal's discretion, in that a Trial Chamber must always keep in mind the somewhat general considerations of the public interest, including the presumption of innocence and the right to individual liberty, but statements that they "must" be proportional in the sense adopted in the ECHR jurisprudence could produce problems.[202] Similarly, statements that

[196] *James & Others Case*, Eur Court H R, Judgment of 21 February 1986, Series A no 98, par 50.
[197] *Wolfgram v Federal Republic of Germany*, Eur Commission H R, Decision of 6 October 1986, 11257/84 (DR 49, p 213); *Stewart v United Kingdom*, Eur Commission H R, Decision of 10 July 1984, 10044/82 (DR 39, p 162).
[198] *Dudgeon Case*, Eur Court H R, Judgment of 22 October 1981, Series A no 45, pars 53-54, 59-61; *Lingens Case*, Eur Court H R, Judgment of 8 July 1986, Series A no 103, pars 40, 47.
[199] *Handyside Case*, Eur Court H R, Judgment of 7 December 1976, Series A, no 24, par 49.
[200] *Young and others Case*, Eur Court H R, Judgment of 13 August 1981, Series A no 44, pars 63, 65; Milan Rai v United Kingdom, Eur Commission H R, Decision of 6 April 1995, 25522/94, (81 DR, p 146).
[201] *Ilijkov v Bulgaria*, Eur Court H R, Judgment of 26 July, 2000, Application no 33977/96 ("*Ilijkov* Case"), par 84. See also *Wemhoff Case*, Eur Court H R, Judgment of 27 June 1968, Series A no 7, pars 4-6; *Neumeister* Case, par 5; *Stögmuller* Case, par 4; *Letellier* Case, par 35.
[202] *Hadžihasanović Decision*, par 8. The Trial Chamber stated that a measure in public international law is proportional only when it is "(1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target" (par 16). The same Trial Chamber has also said that proportionality "must" be taken into account in *Prosecutor v Hadžihasanović et al*, IT-01-47-PT, Decision Granting Provisional Release to Mehmed Alagić, 19 Dec 2001, pars 8 and 16; *Ibid*, Decision Granting Provisional Release to Amir Kubura, 19 Dec 2001, pars 8 and 16; *Prosecutor v Blagojević et al*, IT-02-53-PT, Decision on Request for Provisional Release of Accused Jokić, 28 Mar 2002, par 8; *Ibid*, Decision on Vidoje Blagojević's Application for Provisional Release, 22 July 2002 ("*Blagojević* Decision"), pars 29, 56-
[Footnote continued on next page]

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Rule 65(B) "must" be read in the light of certain human rights treaties could also produce problems.[203] This Tribunal is not a European Court, and it is not bound by the jurisprudence of the ECHR, although it will always have due regard to it, 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 interpreting the Tribunal's applicable law, and the treaties as authoritative evidence of customary international law in relation to some of their provisions.[204]

76. It is unwise to introduce such a concept of "proportionality" as an additional matter, beyond the express requirements of Rule 65(B), which "must" be taken into account under Rule 65(B). The Tribunal has substantially departed from some of the ECHR jurisprudence in relation to provisional release. For example, that jurisprudence denies the propriety of the accused bearing the burden of proof that he will appear for trial,[205] but the Tribunal has placed that onus upon the accused in Rule 65(B). It has done so because it has recognised that the context in which it operates is in some respects very different to that in which the European domestic courts operate.[206] In particular, unlike European domestic courts, the Tribunal has no power to execute arrest warrants.[207] So far as this Tribunal is concerned, therefore, the terms of Rule 65(B) already provide the required balance between the public interest on the one hand and the respect which must be paid to the presumption of innocence and individual liberty on the other hand. It is to the terms of the Rule, and not to the ECHR jurisprudence concerning the principle of proportionality, that the Trial Chamber must turn when considering the matters which an accused must establish in support of an application for provisional release. As said earlier, of course, the somewhat general considerations of the public interest, including the presumption of innocence and the right to individual liberty, may all be relevant to the exercise of discretion in the particular case.

[Footnote continued from previous page]
59; *Ibid*, Decision on Dragan Obrenović's Application for Provisional Release, 22 July 2002 ("*Obrenović* Decision"), pars 37, 67-70. Another Trial Chamber has now stated that the general principle of proportionality "must" be taken into account: Second *Talić* Decision, par 23.

[203] *Hadžihasanović* Decision, par 6; *Blagojević* Decision, par 26; *Obrenović* Decision, par 34; *Prosecutor v Mrkšić*, IT-95-13/1-PT, Decision on Mile Mrkšić's Application for Provisional Release, 24 July 2002, par 34.

[204] *Barayagwiza v Prosecutor*, ICTR-97-19-AR72, Decision, 3 Nov 1999, par 40.

[205] *Ilijkov* Case, par 85.

[206] *Talić* Decision, par 18; *Krajišnik* Decision, 8 Oct 2001, par 13; *Ademi* Decision, par 24.

[207] *Brđanin* Decision, par 18.

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77. At the time when an applicant for provisional release had to establish exceptional circumstances,[208] the likely length of pre-trial detention, the need for the accused to assist in the preparation of the case and similar issues were routinely (but unsuccessfully) put forward by him as matters which made the circumstances exceptional. Insofar as they were relevant to that issue, the onus of persuasion was clearly upon the accused to establish that such matters operated in his favour upon that issue. In response, the prosecution just as routinely (but somewhat more successfully) put forward as matters which prevented the circumstances from being exceptional such issues as the extreme gravity of the crimes charged and the role alleged to have been played in those crimes by the applicant.[209] The prosecution carried no onus of persuasion in relation to exceptional circumstances.

78. Following the removal from Rule 65(B) of the requirement of exceptional circumstances, and despite at least one expression of some doubt as to the precise nature of their relevance other than generally in the exercise of discretion,[210] the same issues have continued to be put forward by accused when applying for provisional release. In particular, references have been made by Trial Chambers, in the context of an exercise of discretion, to the likely length of pre-trial detention in the event that provisional release is not granted, but there has been little explanation as to just *how* these issues are relevant to the exercise of that discretion.[211] No doubt because these issues could only operate somehow in their favour, the accused have continued to attempt to discharge an onus of persuasion in relation to them. There has been no decision produced by the prosecution which suggests that any Trial Chamber has accepted the extreme gravity of the crimes charged and the role alleged to have been played in those crimes by the applicant (previously relevant to exceptional circumstances) as now being relevant also to the exercise of discretion. Those matters have, however, been accepted as relevant to the sentence which the accused may expect if convicted, and thus to whether he will appear for trial.[212]

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[208] Rule 65(B) originally read: "Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person." That requirement was removed on 17 November 1999.

[209] *Blaškić* Decision, p 4; *Prosecutor v Delalić et al*, IT-96-21-T, Decision on Motion for Provisional Release filed by the Accused Zejnil Delalić, 25 Sept 1996, par 21.

[210] *Brđanin* Decision, pars 24-28.

[211] See, for example, *Krajišnik* Decision, par 22: "The Trial Chamber considers the length of pre-trial detention to be an important factor in the exercise of discretion in determining an application for provisional release."

[212] See paragraph 40, *supra*.

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79. **The issues raised by the prosecution relating to discretion** The prosecution has raised issues relating to the exercise of discretion in its Interlocutory Appeal which it had not raised before the Trial Chamber. A party who seeks to have a discretion exercised in its favour is obliged to draw to the attention of the Trial Chamber exercising that discretion the matters upon which it relies. A Trial Chamber is not required to have the ability to read that party's mind and, if the party is unsuccessful before the Trial Chamber, it cannot raise those matters before the Appeals Chamber for the first time in the guise of a complaint that the Trial Chamber failed to take them into account when exercising its discretion.

80. The prosecution has attempted to avoid the rejection of its new arguments by the simple expedient of reversing the onus of persuasion in relation to the exercise of discretion. In Ground (b),[213] the prosecution says:

> (b) even if the Trial Chamber was justified in its assessment that the two substantive pre-conditions of Rule 65(B) were satisfied (*i e* 'that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person') it erred by then exercising its discretion in favour of provisional release.[214]

The jurisprudence of the Tribunal has, since the removal from Rule 65(B) of the requirement of exceptional circumstances, proceeded upon the basis that, where the accused has succeeded in establishing that he will appear for trial and that he will not pose a danger to victims, witnesses or other persons, he is entitled to provisional release unless the prosecution persuades the Trial Chamber to exercise its discretion *against* the grant of provisional release.

81. Such an approach is consistent with the relevant international norms to which the Tribunal will always have due regard in relation to provisional release. These would appear to be the following:

(i) The International Covenant on Civil and Political Rights, Article 9:

> *Liberty and Security of Person*
>
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> [...]

[213] This is quoted in full in par 19, *supra*.

[214] The underlining has been added in this Dissenting Opinion for the purposes of emphasis. See also The submission by the prosecution in its Joint Reply (at par 21), where the submission is made that "public interest considerations weigh heavily against exercising the discretion in favour of provisional release." Again, the underlining has been added for the purposes of emphasis.

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3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial [...].

[...]

(ii) The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5:

Right to liberty and security

§1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law:

[...]

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence [...]

[...]

§3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

[...]

(iii) The American Convention on Human Rights, Article 7:

Right to Personal Liberty

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.

[...]

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

[...]

(iv) The African Charter on Human and Peoples Rights, Articles 6 and 7:

Article 6

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

Every individual shall have the right to have his cause heard. This comprises:

[...]

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(d) the right to be tried within a reasonable time by an impartial court or tribunal.

[...]

(v) Resolution 43/173 adopted by the UN General Assembly, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 9 Dec 1998, Principles 37, 38 and 39:

Principle 37

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment he received by him while in custody.

Principle 38

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

Principle 39

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

82. These norms make it clear that, as stated in the ECHR jurisprudence, it is for the State to justify the loss of a person's liberty prior to conviction,[215] and that any detention can only be justified in accordance with law. As already stated, the Tribunal has already departed from these norms in Rule 65(B), to the extent that it has placed the onus upon the accused to establish that he will appear for trial.[216] But there is nothing in Rule 65(B) to justify placing an onus upon an accused person who has already satisfied the Trial Chamber that he will appear also to persuade the Trial Chamber to exercise its discretion *in favour of* the grant of provisional release. Once the accused has satisfied the Trial Chamber that he will appear for trial and that he will not pose a danger to victims, witnesses or other persons, the introduction of an additional onus of persuasion upon the accused in relation to the exercise of discretion as well would effectively require the accused once more to establish the existence of exceptional circumstances. The attempt by the prosecution to alter the onus of persuasion fails.[217]

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[215] Paragraph 76, *supra*.

[216] Paragraph 76, *supra*.

[217] The exercise by a Trial Chamber of its discretion in favour of *an accused* to grant provisional release notwithstanding his failure to satisfy it that he will appear for trial was mentioned briefly in par 74, *supra*.

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83. Before the Appeals Chamber, under the heading "Failure to consider relevant factors", the prosecution has argued that the Trial Chamber, by "failing" to address "other relevant factors that were fully argued before it", has erred in the exercise of its discretion.[218] These are then identified as the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation by the accused to date.[219] It has conceded that the Trial Chamber did consider these matters in relation to the issue of whether Šainović and Ojdanić would appear for trial,[220] but it maintains its complaint that the Trial Chamber "failed" to consider them in relation to the exercise of its discretion. The simple answer to this complaint is that the prosecution, which bore the onus of persuasion in relation to the exercise of that discretion, never asked the Trial Chamber to consider them in relation to that issue. Its submission that these matters were "fully argued" before the Trial Chamber (in the context of the exercise of discretion) is simply not true.

84. The Prosecution Response before the Trial Chamber, so far as it dealt with the issue of discretion, referred only to the likely length of pre-trial detention,[221] which will be discussed shortly, and it denied that either of the accused had demonstrated that he would suffer any hardship by being held in detention. The Prosecutor submitted as her primary argument in the whole case that the application was premature as she had not yet been able to interrogate the accused, that it is the policy of her Office that provisional release should not be granted until there is no further reason to continue with its inquiry or to maintain the accused in detention, and that provisional release will be opposed until it was possible to interrogate them.[222] It was submitted that provisional release should not even be discussed until the accused had agreed to be interrogated.[223] It was estimated that several months may be necessary to prepare for and arrange the interrogation.[224] Moreover, once the interrogation had been conducted, there would be a danger that the accused would "confront" the sources of the prosecution evidence, and the OTP inquiries may be hindered.[225] The necessary consequence of such an argument, it seems,

[218] Interlocutory Appeal, par 35.
[219] Ground (b); Interlocutory Appeal, pars 36-42; Joint Reply, pars 20-22.
[220] The concession was made in a limited form in the Interlocutory Appeal, at par 38, and in an unlimited form in the Joint Reply, at par 20. The conclusion of the Majority Decision (at par 9) that the Trial Chamber had failed to consider the effect of the senior position of the two accused so far as it relied upon the guarantees given by the FRY and the Republic of Serbia is discussed at pars 56-64, *supra*.
[221] Prosecution Response, at pars 18, 25.
[222] Transcript, pp 423-425.
[223] *Ibid*, p 428.
[224] *Ibid*, p 427.
[225] *Ibid*, p 428.

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would be that the accused would not be entitled to provisional release once they had been interrogated. That is an extraordinary submission.[226] It was also argued that detention must remain the rule, notwithstanding the deletion of the requirement for exceptional circumstances.[227]

85. The Trial Chamber rejected this argument that provisional release should be refused as a matter of discretion until the accused could be interrogated.[228] It was correct to have done so. The Majority Decision has described the Prosecutor's argument as misconceived.[229] I agree, but I would go further. Such a policy of the OTP infringes the fundamental human rights of the accused, and the prosecution was not entitled to adopt that policy. It should be publicly repudiated by the OTP. The additional argument of the prosecution that provisional release should not even be discussed until the accused agreed to be interviewed is offensive to the right of an accused person to remain silent, a right enshrined in Rule 63(B),[230] which turn incorporates Rule 42(A)(iii),[231] and which is reinforced by Article 21.4(g) of the Tribunal's Statute.[232] Such an argument should never have been put. Moreover, the insistence of the prosecution that detention must remain the rule is unsustainable in the light of current jurisprudence of the Tribunal.

86. There was no submission made to the Trial Chamber that the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation by the accused to date should be taken into account in the exercise of the

[226] Compare the strange logic of the prosecution based upon its obligations of disclosure, discussed at pars 72-73, *supra*.
[227] Transcript, p 426.
[228] Trial Chamber Decision, par 17.
[229] Majority Decision, par 8.
[230] Rule 63(B) ("Questioning of Accused") states: "The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42(A)(iii)."
[231] Rule 42(A)(iii) ("Rights of Suspects during Investigation") states: "A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect speaks and understands: [...] (iii) the right to remain silent [...]."
[232] Article 21.4(g) ("Rights of the accused") states: "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: [...] (g) not to be compelled to testify against himself or to confess guilt." That right has been interpreted by Trial Chambers as extending beyond testimonial evidence, and as including, for example, an accused being required to give a blood sample: *Prosecutor v Delalić et al*, IT-96-21-T, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, 19 Jan 1998, pars 47-60. See also *Brđanin & Talić* Decision on Protective Measures, par 48.

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Trial Chamber's discretion.[233] The Interlocutory Appeal submits, for the first time, that these matters are relevant to the exercise of the Trial Chamber's discretion. The prosecution asserts that such factors may be considered not only as to whether the accused will appear for the trial but also as to:[234]

> [...]whether detention may be necessary in order to maintain confidence in the administration of justice by the Tribunal in its international setting, considering the Tribunal's objectives balanced with the rights of the accused.

This was expanded in the prosecution's Joint Reply by emphasising that this Tribunal's "very creation" was seen by the UN Security Council as a necessary contribution to the restoration and maintenance of international peace and security, and that public confidence in the administration of justice by the Tribunal, both in the former Yugoslavia and by the international community at large, is essential for the Tribunal to meet the objectives for which it was created.[235]

87. No such submission has been considered previously by a Trial Chamber – certainly no decision has been cited by the prosecution. The submission appears to have resulted from the discovery, after the present matter had been heard by the Trial Chamber, of the existence of a provision in the Criminal Code of Canada,[236] whereby the prosecutor is obliged to show cause

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[233] The Prosecution Response before the Trial Chamber does refer to these issues not only under the headings "The Guarantees" [Šainović, pars 10-12; Ojdanić, pars 20-22], but also, so far as Šainović is concerned, under the heading of "Discretionary Factors" (par 16). But it is made abundantly clear in the context of pars 16-17 that they are being referred to under the heading "Discretionary Factors" only for the purpose of demonstrating that, even if the Trial Chamber were satisfied that Šainović had satisfied it that he would appear for trial, the Trial Chamber should proceed to consider "other" factors which militated against the granting of provisional release in the exercise of its discretion.
Paragraphs 16-17 (which relate to Šainović) state: "16. In determining the issue of whether the accused will appear for trial, it is relevant to take into account that the accused is a person who occupied a position of great responsibility at the time that the accused is a person who occupied a position of great responsibility at the time the alleged crimes were committed. The crimes alleged against him are gravely serious crimes. If the accused is convicted, he will face a long sentence of imprisonment. [...] 17. In the light of the substantial burden placed upon the accused and having regard to the above criteria, the Prosecution submits that the accused has adduced inadequate evidence and has failed to discharge the burden placed upon him. In the event that the Trial Chamber finds that the accused has discharged the burden, the Prosecution submits that the Trial Chamber should consider several other discretionary factors which militate against the granting of provisional release." There is no further reference to the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted or the absence of cooperation by the accused to date.
The corresponding paragraph relating to Ojdanić (par 25) merely states: "The accused in his motion states that 'General Ojdanić occupied the highest position in the army of the Federal Republic of Yugoslavia during the war in Kosovo, and has reason to expect a lengthy sentence if found guilty'. Given such a lengthy likely sentence there is a strong motive not to appear for trial." That paragraph and par 26 then proceed to deal with the likely length of pre-trial detention and the absence of hardship. Again, there is no further reference to the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted and the absence of cooperation by the accused to date.

[234] Interlocutory Appeal, par 39.

[235] Joint Reply, pars 20-21.

[236] RSC 1985, as amended, Section 515.

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why the detention of the accused in custody is justified,[237] and the justification which is permitted includes:[238]

> [...] where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

This provision forms part of a larger provision (Section 515(10)) in these terms:

> For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:
>
> (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
>
> (b) where the detention is necessary for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
>
> (c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

Section 457(7) – the predecessor of Section 515(10) – was similar in terms to pars (a) and (b) of Section 515(10), but it included in (b) an alternative justification for detention, that detention was "necessary in the public interest". This provision had been struck down by the Supreme Court of Canada as being in violation of the Canadian Charter of Rights and Freedom ("Charter"), because the term had no "workable meaning" and it permitted a court to order imprisonment "whenever it sees fit".[239] Section 515(10) was enacted in 1997, five years after the earlier provision had been struck down, but as a result of that decision. It has recently narrowly escaped being similarly struck down by the Supreme Court.[240]

88. This provision, that detention was necessary "in the public interest", had been interpreted by the Canadian courts so as to make detention necessary where the "public image" of the criminal laws (bail provisions) would be damaged – where, for example, "the citizen may, in wonderment and bewilderment, feel that the application of [those laws] is a mockery or at least not being administered realistically or in the public interest".[241] Some judges attempted to

[237] *Ibid*, Section 515(1).
[238] *Ibid*, Section 515(10)(c).
[239] *Regina v Morales* [1992] 3 SCR 711.
[240] *Hall v The Queen*, 2002 SCC 64, 10 October 2002, by a majority of 5 to 4.
[241] *Powers v Regina* (1972) 9 CCC (2d) 533, at 544-545.

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contain the width of the expression to avoid bending to public hysteria. In *Regina v Lamothe*,[242] Baudouin JA sought to define the concept of the public interest in a way which avoided the "visceral and negative" reaction which the public often adopts to crime and to those charged with criminal offences, in these terms:[243]

> An *informed* public must understand that the existence of the presumption of innocence at all stages of the criminal process is not a *purely theoretical notion*, but a concrete reality and that, despite what may happen, in its perception, for certain inconveniences with respect to the effectiveness in the repression of crime, it is the *price that must be paid for life in a free and democratic society*. Therefore, the perception of the public must be situated at another level, that of the public reasonably informed about our system of criminal law and capable of judging and perceiving without emotion that the application of the presumption of innocence, even with respect to interim release, has the effect that people, who may later be [found] guilty of even serious crimes, will be released for the period between the time of their arrest and the time of their trial. In other words, the criterion of the public perception must not be that of the lowest common denominator.

Since the enactment of Section 515(10)(c), the Canadian courts have tended to equate the concept of the maintenance of confidence in the administration of justice with the concept of the interests of justice which the Supreme Court had struck down as being in violation of the Charter.[244] Section 515(10)(c) is contemplated as being used only where the prosecution has "a very strong case",[245] and on "probably fairly infrequent" occasions,[246] or "relatively rare" occasions.[247] Courts are enjoined to be careful "not to pander to public opinion or to take account of only the overly excitable".[248] In its most recent decision, the Supreme Court's majority judgment approved of this last statement,[249] and makes it clear that the circumstances in which recourse to Section 515(10)(c) would be justified "may not arise frequently".[250]

89. Modern community attitudes towards the judicial institutions which administer justice are more questioning and challenging in nature than they used to be. That is a good thing. But confidence in those institutions does *not* require a belief that all judicial decisions are wise, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare, and that all their decisions are wise. What is

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[242] (1990) 58 CCC (3d) 530.
[243] *Ibid*, at 541. The emphasis is found in the quoted portion of this judgment which the prosecution, very properly, included in its Book of Authorities for the use of the Appeals Chamber.
[244] *The Law of Bail in Canada*, GT Trotter (Carswell, 2nd Edn, 1999), at 161.
[245] *Regina v Alexander* (1998) 51 OTC 261, pars 23-24.
[246] *Regina v MacDougal* (1999) 178 DLR 227, par 22.
[247] *Ibid*, par 24.
[248] *Ibid*, par 24.
[249] *Hall v The Queen*, at par 27.
[250] *Ibid*, par 31.

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required to sustain confidence in the judicial institutions which administer justice is a satisfaction that the justice system being administered is based upon values of independence, impartiality, integrity and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.[251]

90. The standing of this Tribunal is not so frail that the international community would lose confidence in its administration of justice because one Trial Chamber has given one decision upon a procedural issue based upon a finding of fact with which many may disagree, but which is not of such a nature as to be amenable to appellate review. Far more likely would have been the damage to the confidence which the international community has in this Tribunal's administration of justice if both the Trial Chamber and the Appeals Chamber had failed to criticise in very firm terms the extraordinary policy of the OTP which was put forward at the hearing before the Trial Chamber concerning provisional release, one which (if it had not been refuted by both Chambers) would have shocked the conscience of informed members of the international community.

91. The concept now put forward by the prosecution for the first time on appeal needs careful examination and a somewhat more careful definition than the prosecution has suggested. This Tribunal is not bound by specific legislative provisions in an individual national jurisdiction. This is, however, not the case in which that examination should be made. The prosecution cannot validly complain on appeal that the Trial Chamber failed to take into consideration in the exercise of its discretion a factor which the prosecution (as the party carrying the burden of persuasion on the issue) did not ask the Trial Chamber to consider, particularly a factor as novel to the jurisprudence of the Tribunal as this one was. The appeal process is not designed for the purpose of allowing appellants to reargue their cases on a different basis to that presented to the Trial Chamber in order to remedy the defects in the case which had been presented there.[252] Accordingly, the complaint now made is rejected.

[251] The statements in this paragraph are based upon "Public Confidence in the Judiciary", an address by the Hon Murray Gleeson AC, Chief Justice of Australia, presented at the Colloquium of the Judicial Conference of Australia, on 27 April 2002. The full text of the address is available at the following address: www.hcourt.gov.au/speeches/cj/cj_jca.htm.

[252] *Prosecutor v Erdemović*, IT-96-22-A, Judgment, 7 Oct 1997, par 15; *Tadić* Conviction Appeal, par 55; *Prosecutor v Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 20; *Furundžija* Appeal, par 174; *Delalić* Appeal, par 724; *Kupreškić* Appeal, pars 22, 408.

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92. The remaining issue raised by the prosecution on the issue of discretion relates to the likely length of pre-trial detention.[253] The prosecution had submitted to the Trial Chamber that the length of the pre-trial detention was relevant only where it would exceed the likely sentence to be imposed,[254] but it had neither cited any authority nor provided any justification for such an extraordinary proposition. Counsel for Ojdanić suggested to the Trial Chamber that the case may not be ready for trial "for about two years".[255] The Trial Chamber replied to this estimate by stating that "We will hear more from the prosecution on that".[256] The prosecution, however, did not respond to the estimate which was made. In its decision, the Trial Chamber stated that it considered the length of pre-trial detention to be an important consideration, and it accepted that it "may be some considerable time before the trial can commence".[257] It did not identify the basis of its assessment.

93. In its Interlocutory Appeal, the prosecution expressed the thought that, in coming to that conclusion, the Trial Chamber may have been referring to remarks made by counsel for Ojdanić at the hearing,[258] and it has criticised the Trial Chamber for having "simply taken [that claim] at face value".[259] In the light of the silence of the prosecution when it had been invited to address the Trial Chamber upon this issue, this criticism is unfair. Both Šainović and Ojdanić have sought to provide the Appeals Chamber with further information as to the basis for the estimate made before the Trial Chamber, and the prosecution has sought to respond to that information. Once again, it is necessary to point out that the appeal process is not designed for the purpose of allowing parties to reargue their cases on a different basis to that presented to the Trial Chamber in order to remedy the defects in the cases which had been presented there.

94. The Trial Chamber was entitled to form its own estimate as to the likely length of the pre-trial detention, taking into account the information which had been presented to it. It has not been suggested that these two accused, who presented themselves for hearing only in April this year, would be entitled to any priority over those who have been awaiting trial in custody since before that time. The number of trials awaiting hearing before the Tribunal with the accused in pre-trial detention and the probable length of those trials suggest that the prospects of a Trial

[253] The complaint forms part of Ground (b).
[254] Prosecution Response, pars 18, 25.
[255] Transcript, p 415.
[256] *Ibid*, p 415.
[257] Trial Chamber Decision, par 17.
[258] Interlocutory Appeal, par 30.
[259] *Ibid*, par 31.

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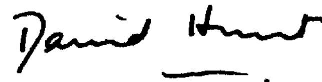
Chamber becoming available to hear this particular trial within the immediate future is at best remote. This complaint is rejected.

Disposition

95. In my opinion, the appeal should be dismissed.

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

Dated this 30th day of October 2002,
At The Hague,
The Netherlands.



Judge David Hunt

[Seal of the Tribunal]

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