



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

Case No. IT-00-41-PT
Date: 26 July 2005
Original: English

BEFORE THE TRIAL CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Amin El Mahdi
Judge Alphons Orié

Registrar: Mr. Hans Holthuis

Decision of: 26 July 2005

PROSECUTOR

v.

PAŠKO LJUBIČIĆ

**DECISION ON SECOND APPLICATION FOR PROVISIONAL
RELEASE**

The Office of the Prosecutor:

Mr. Mark Harmon

Counsel for the Accused

Mr. Tomislav Jonjić

I. Introduction

1. Trial Chamber I (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seized of the “Second Application for the Provisional Release of the Accused” filed on 18 October 2004 whereby the Defence for the accused Paško Ljubičić (“Defence” and “Accused” respectively) requests the Trial Chamber to enter an order for the provisional release of the Accused on the grounds that the Accused will appear for trial and will not pose any danger to victims, witnesses or other persons (“Application for Provisional Release”). The Defence had filed a first application for provisional release on 15 April 2002¹ denied by the Trial Chamber on 2 August 2002 on the ground that it was not satisfied that the Accused would reappear for trial if released.

II. Procedural background

2. The original indictment against Paško Ljubičić was confirmed on 26 September 2000. A corrected amended indictment was filed on 8 April 2002 and stands now against the Accused (“Corrected Amended Indictment”).² The Corrected Amended Indictment is comprised of 15 counts, an annex A (a list of 93 victims’ name) and a diagram (general organisational scheme of the military police of the HVO at the end of February 1993). On the basis of his alleged role in the events which occurred between June 1992 and July 1993 in the municipalities of Vitez and Busovača in Bosnia and Herzegovina, the Corrected Amended Indictment charges the Accused with the following crimes:

Persecutions (count 1) as a crime against humanity punishable under Article 5 of the Statute of the Tribunal;

Unlawful Attacks on Civilians (count 2) as violations of the laws or customs of war punishable under article 3 of the Statute of the Tribunal;

Murder (count 3) as a violation of the laws or customs of war punishable under article 3 of the Statute of the Tribunal;

Murder (count 4) as a crime against humanity punishable under Article 5 of the Statute of the Tribunal;

Violence to Life and Person (count 5) as a violation of the laws or customs of war punishable under article 3 of the Statute of the Tribunal;

¹ Defence Motion for the Provisional Release of the Accused, 15 April 2002.

² See this Chamber’s Decision on Motion for Leave to Amend the Indictment of 2 August 2002 finding the corrected amended indictment of 8 April 2002 as the one standing against the Accused.

Inhumane Acts (count 6) as a crime against humanity punishable under Article 5 of the Statute of the Tribunal;

Murder (count 7) as a violation of the laws or customs of war punishable under article 3 of the Statute of the Tribunal;

Murder (count 8) as a crime against humanity punishable under Article 5 of the Statute of the Tribunal;

Violence to Life and Person (count 9) as a violation of the laws or customs of war punishable under article 3 of the Statute of the Tribunal;

Inhumane Acts (count 10) as a crime against humanity punishable under Article 5 of the Statute of the Tribunal;

Devastation not Justified by Military Necessity (count 11) as a violation of the laws or customs of war punishable under article 3 of the Statute of the Tribunal;

Destruction or Wilful Damage to Institutions Dedicated to Religion or Education (count 12) as a violation of the laws or customs of war punishable under article 3 of the Statute of the Tribunal;

Plunder of Public or Private Property (count 13) as a violation of the laws or customs of war punishable under article 3 of the Statute of the Tribunal;

Cruel Treatment (count 14) as a violation of the laws or customs of war punishable under article 3 of the Statute of the Tribunal; and

Inhumane Acts (count 15) as crimes against humanity punishable under Article 5 of the Statute of the Tribunal.

3. Upon confirmation of the Indictment, Judge Almiro Rodrigues issued a Warrant of Arrest addressed to the authorities of the Republic of Croatia. On 30 October 2001, the confirming judge vacated the order for non-disclosure of the Indictment,³ and the Accused surrendered to the International Tribunal on 21 November 2001. Ljubičić was transferred to the United Nations Detention Unit (“UNDU”) the same day.⁴
4. On 1 November 2004 the Prosecution filed the “Prosecution Response to Second Application for Provisional Release” (the “Response”) opposing the Application for Provisional Release.
5. On 8 November 2004, the Defence for the Accused filed the “Defence Reply to the Prosecution’s Response to Second Application for Provisional Release” (the “Reply”).
6. On 30 December 2004, the Defence submitted a letter of guarantees by the government of the Federation of Bosnia and Herzegovina dated 23 December 2004 and guaranteeing that “Paško Ljubičić [will] obey any order of the International Tribunal to appear in the Hague or

³ Order on Prosecutor’s Motion to Unseal the Indictment, 30 October 2001.

any other location determined by the Chamber, and execute all orders issued by the International Tribunal, decided upon by the Trial Chamber”.⁵

7. During the first half of year 2005, two rounds of discussions requiring the presence of the Accused took place delaying the consideration by the Trial Chamber of the Application for Provisional Release.⁶
8. On 12 April 2005, upon failure of the first round of discussions, the Prosecution filed the “Prosecution’s Further Submissions Governing Provisional Release” (Prosecution Further Submissions”) to insist that the Accused does not meet the requirements to be provisionally released. On 19 April 2005, the Defence responded to the Prosecution Further Submissions that in the guarantees dated 23 December 2004, the Government of Bosnia and Herzegovina expressed its willingness to accept the Accused on its territory if released.
9. On 5 July 2005, upon failure of a second round of discussions, the Defence filed the “Defence’s Additional Submission Concerning the Second Application for Provisional Release” to reiterate that the Accused requests to be released in Mostar, Bosnia and Herzegovina, where his family resides.
10. On 18 July 2005 the Defence filed the “Defence’s Further Submission Concerning the Second Application for Provisional Release” to which is attached a letter of guarantee issued by the Ministry of Interior of the Herzegovina Neretva-county in Bosnia and Herzegovina on 18 July 2005 to confirm the Ministry readiness to fulfil the obligation of “constant surveillance” over the Accused and to comply with any order of the Chamber, including an order “on restricted movement”.
11. On 19 July 2005, the Prosecution filed the “Prosecution’s Further Submissions Concerning Provisional Release” whereby it informs the Trial Chamber that it has filed an application pursuant to Rule 11bis for the case to be referred to the authorities of Bosnia and Herzegovina and insists that the Trial Chamber should invite the authorities of Bosnia and Herzegovina to a hearing to further explore their capacity and willingness to effectively provide constant surveillance of the Accused in case house arrest is considered.

⁴ The arrest warrant was issued under seal. The seal was subsequently lifted by Judge Rodrigues.

⁵ Annex 1 to the Additional Submission to the Second Application for Provisional Release, 30 December 2004.

⁶ Rule 65ter Conference, T. 197.

III. Applicable Law

12. The Defence argues that the Accused is entitled to an expeditious trial, however he has been detained at the UN Detention Unit since 21 November 2001 and “the announced schedule of the trials clearly shows that his trial will not start soon”.⁷ The Defence further argues that “international human rights documents also consider detention to be an exception not a rule”⁸ and that when interpreting Rule 65, the general principle of proportionality must be taken into consideration as well as all details of this case, such as the fact that the Accused is married and father of a 7 year-old child.⁹
13. By contrast, the Prosecution argues that in the event the two conditions set out in Rule 65(B) are met, discretionary factors may weight for provisional release such as “the duration of pre-trial detention, and the health and age of the accused”.¹⁰ However the Prosecution emphasises that such factors are not critical because “the duration of the pre-trial detention has not been expressly included as a factor relevant to determination of application of provisional release under Rule 65, despite several amendments to that Rule”.¹¹
14. Rule 64 of the Rules provides that: “Upon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. In exceptional circumstances, the accused may be held in facilities outside the host country. The President may, on the application of a party, request modification of the conditions of detention of an accused”.
15. Rules 65(A) and (B) of the Rules set out the basis upon which a Trial Chamber may order the provisional release of an accused:
- (A) Once detained, an accused may not be released except upon an order of a Chamber.
 - (B) Release may be ordered by a Trial Chamber only after 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, witnesses or other person.

⁷ Application for Provisional Release, paras 2-3.

⁸ The Defence cites the International Covent for Civil and Political Rights, the European Convention for Human Rights, the American Convention on Human Rights, the African Charter on Human and People Rights, the General Assembly Resolution 43/173 adopting the Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment of 9 December 1998, Application for Provisional Release, paras 5-7.

⁹ Application for Provisional Release, para. 9.

¹⁰ Response, para. 27.

¹¹ Response, para. 28, footnote omitted.

16. Article 21(3) of the Statute of the Tribunal (“Statute”) mandates that the accused shall be presumed innocent until proved guilty. This provision both reflects and refers to international standards as enshrined *inter alia* in Article 14(2) of the International Covenant on Civil and Political Rights (“ICCPR”) and Article 6(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (“ECHR”).¹² The Chamber is of the view that Rule 65 must be read in the light of the ICCPR and ECHR and the relevant jurisprudence.
17. The Trial Chamber considers that, as a general rule, a decision to not release an accused should be based on an assessment of whether public interest requirements, notwithstanding the presumption of innocence, outweigh the need to ensure, for an accused, respect for the right to liberty of person.¹³ In this regard, the burden of proof rests on the accused to satisfy the Trial Chamber that he will appear for trial and will not pose a danger to any victim, witness or other person. The accused’s burden is a substantial one, due to the jurisdictional and enforcement limitations of the Tribunal.¹⁴
18. Moreover, when interpreting Rule 65, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when (1) it is suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, it must be applied.¹⁵
19. In that regard, the Defence submits that, alternatively, in case the Chamber would deny the Application for Provisional Release, the Accused should be placed under house arrest as a more lenient measure to be applied to an accused who has been detained pending his trial for a substantial period of time.¹⁶ Such a measure falls under the ambit of the exceptional circumstance envisaged by Rule 64 and the request of such a measure is made before the President of the Tribunal.

¹² Furthermore, Article 9(3) of the ICCPR emphasises *inter alia* that “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”. Article 5(3) of the ECHR provides *inter alia* that “everyone arrested or detained ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial”. These human rights instruments form part of public international law.

¹³ A balancing exercise must be carried out. First, it should be considered whether the two express pre-conditions laid down in rule 65 (B) have been met. These pre-conditions are cumulative. That is, if the Trial Chamber is not convinced that the accused will both appear for trial and not pose a risk to any victim, witness or other person, a request for provisional release must be denied, see *Prosecutor v. Rahim Ademi*, Order on Motion for Provisional Release, Case No. IT-01-46-PT, 20 February 2002, para. 21.

¹⁴ *Prosecutor v. Radoslav Brđanin and Momir Talić*, Decision on Motion by Radoslav Brđanin for Provisional Release, Case No. IT-99-36PT, 25 July 2000, para.18.

¹⁵ *Prosecutor v. Dragan Jokić*, Case No. IT-02-53-PT, Decision on Request for Provisional Release of Accused Jokić, 28 March 2002, para 18.

¹⁶ Application for Provisional Release, para. 13.

20. In considering the two pre-conditions expressly laid down in Rule 65 (B), it must be recalled that factors specific to the functioning of the Tribunal may influence the assessment of the risk of absconding or interfering with witnesses. These factors are as such neither decisive nor negligible in individual cases and must be considered in the context of all the information presented to the Trial Chamber. They may however become decisive if they distinctly heighten the risk that an accused will either fail to attend court or interfere with witnesses and if the Trial Chamber can find no counter-balancing circumstances in the particular case before it.¹⁷ It should be noted that the Trial Chamber retains a discretion not to grant provisional release in cases where it is satisfied that the accused complies with the two requirements of the Rule.¹⁸
21. In sum, the Trial Chamber, in interpreting Rule 65 of the Rules, deems that it must focus on the concrete situation of the individual applicant, and consequently the provision must not be applied in *abstracto*, but with regard to the factual basis of the particular case.¹⁹
22. The Trial Chamber now turns to an assessment, taking into consideration the arguments and submissions made by the parties, the facts of the case, the law, as well as the guarantees of the Accused and the guarantees provided by the relevant authorities, taken as a whole.

IV. Discussion

23. In support of its statement that the Accused will appear for trial, the Defence argues, *inter alia*, that:
- (i) Ljubičić has, by his voluntary surrender, unequivocally shown his intentions to promptly obey every summons of the court.²⁰

¹⁷ Among the aforementioned circumstances are that the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. The Tribunal must also rely on the co-operation 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 will abscond. It depends on the circumstances whether this lack of an enforcement mechanism creates such a barrier that provisional release should be refused. The situation could alternatively call for the imposition of strict conditions on the accused or a request for detailed guarantees by the government in question. In this regard, prior voluntary surrender of an accused is not without significance in the assessment of the risk that an accused will not appear at trial, *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42-PT, Order on Miodrag Jokić's Motion for Provisional Release, 20 February 2002, paras 22-22.

¹⁸ See for example, *Prosecutor v. Kovačević*, Case No. IT-97-24-PT, Decision on Defence Motion for Provisional Release, 21 January 1998, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Provisional Release, 28 March 2001; see also *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42-PT, Order on Miodrag Jokić's Motion for Provisional Release, 20 February 2002, para 21.

¹⁹ *Prosecutor v. Hadžihašanović et al.*, Case No. IT-01-47-PT, Decision Granting Provisional Release to Amir Kubura, 19 December 2001, para. 7.

- (ii) Ljubičić is ready to place all his possessions and property as a guarantee and to remain under house arrest until the beginning of the trial.²¹
- (iii) If released, the Accused would be staying in Mostar (Bosnia and Herzegovina) in his wife's apartment.²²
- (iv) The fact that the Accused has dual citizenship cannot be an obstacle to the provisional release of the Accused.²³
- (v) References to crimes committed in Ahmići made in the *Blaškić* Appeals Chamber Judgement do not add to the risk of flight of the Accused who will have the opportunity during his trial to disprove certain statements made therein.²⁴
- (vi) The government of Bosnia and Herzegovina has issued guarantees for the appearance of the Accused at trial and expressed its readiness to act fully in compliance with any orders of the Chamber.²⁵

24. In support of the statement that the Accused will not pose a danger to any victim, witness or other person, the Defence argues that:

- (i) After the conflict the Accused could have abused his position of officer at the Ministry of Internal Affairs "to influence witnesses. He never did any such thing".²⁶ There are "no indications whatsoever that, during that period, the Applicant threatened the victims, witnesses or any other persons in any way or that he tried to influence them, in any manner".²⁷
- (ii) Ljubičić "manifested his determination to fully protect the interests of fair trial, as well as the safety of the victims, witnesses and other persons" by agreeing to the

²⁰ Application for Provisional Release, para. 11.

²¹ Application for Provisional Release, paras 12-13.

²² Application for Provisional Release, para. 12.

²³ Reply, para. 3.

²⁴ Reply, para. 5.

²⁵ Annex 1 to the Additional Submission to the Second Application for Provisional Release (Guarantee for the Provisional Release of Paško Ljubičić signed by the Prime Minister Dr. Ahmet Hadžipašić on 23 December 2004) and Annex 1 to the Defence Further Submissions filed on 18 July 2005 (Guarantees for the constant surveillance of Paško Ljubičić signed by the Minister of Interior of the Herzegovina Neretva-county in Bosnia and Herzegovina Tomislav Martinović and the police director Srećko Glibić on 18 July 2005).

²⁶ Application for Provisional Release, paras 15-17. In particular the Defence submits that the Accused "has not been residing in Central Bosnia since autumn 1993. Nevertheless, he continued working in the HVO Military Police Administration, and afterwards he became an Assistant Minister of Interior", para. 17.

²⁷ Application for Provisional Release, para. 17.

Prosecution's request for an order relating to witnesses and victims' protective measures.²⁸

- (iii) Ljubičić accepted, alternatively, to be placed under house arrest and this would theoretically exclude any possibility of interfering with witnesses or victims.²⁹
- (iv) Ljubičić received the Prosecution lists of exhibits and witnesses two years ago and "has not in the meantime tried to influence witnesses, victims or third persons, directly or indirectly".³⁰

25. The Trial Chamber notes that the Accused "is ready to accept and unconditionally comply with all the conditions and orders the Trial Chamber gives him in passing the decision on his provisional release".³¹

26. In its Response and Further Submissions, the Prosecution opposes the Application for Provisional Release and argues that the Accused has failed to establish that, if released, he will appear for trial because:

- (i) "the accused has shown that is capable of evading arrest; he has used a false name and has shown that he has the means and knows how to obtain false documents; there is a risk that the accused's behaviour could again turn "irrational"; the accused has a dual citizenship which could facilitate his flight and further, mean that it is a more likely to be successful; the assessment given by the Croatian Court in respect of the risk of flight of the accused; and the comments made by the Croatian Government in the letter from the Deputy Prime Minister of the Government of the Republic of Croatia to the Prosecution, dated 14 May 2002".³²
- (ii) The Accused requested to be provisionally released in Mostar but the Government of Bosnia and Herzegovina has not produced any guarantees supporting the Accused's application. Even in the event guarantees were produced, their weight would be reduced by the Accused's proven ability to affectively avoid arrest.³³

²⁸ Application for Provisional Release, para. 18.

²⁹ Application for Provisional Release, para. 20.

³⁰ Reply, para. 6.

³¹ Application for Provisional Release, para. 19.

³² Response, paras 6-8.

³³ Response, paras 9-14.

- (iii) The only assurance before the Chamber that the Accused will appear for trial is that of the Accused himself but no weight can be attached to this assurance in view of what has been said above.³⁴
- (iv) The incentive of the Accused to flee has increased since the Appeals Chambers Judgement in the *Blaškić* case was rendered in July 2004 because this judgement makes many reference to the responsibility of the Accused's military police battalion in the mass killing at Ahmići which are likely to lead the Accused to believe that he faces a substantial period of imprisonment if proved true at trial.³⁵
- (v) The Accused's appreciation of the strength of the Prosecution case against him and therefore of a potentially harsh sentence is greater now that the Prosecution has filed its pre-trial brief, summaries of Prosecution witness statements and a list of exhibits and may constitute a strong incentive to attempt to escape while on provisional release.³⁶
- (vi) Little weight may be attached to the Accused's offer to place all his possessions and property as a guarantee if release because "he has already demonstrated his ability to avoid arrest for 14 months without any apparent income".³⁷
- (vii) The guarantees of the authorities of Bosnia and Herzegovina dated 23 December 2004 do not contain an expression of their willingness to have the Accused reside on their territory.³⁸

27. The Prosecution argues that that the Accused has failed to demonstrate that, if released, he will not pose a danger to any victim, witness or any other person because:

- (i) the Application for Provisional Release "merely contains negative statement that prior to his transfer to the Tribunal, 'there are no indications whatsoever' that the accused threatened victims, witnesses or other persons. This kind of negative statement is insufficient to discharge the burden of demonstrating that Ljubičić would not pose a danger to any victim, witness or any other persons."³⁹

³⁴ Response, para. 15.

³⁵ Response, paras 16-20.

³⁶ Response, paras 21-22.

³⁷ Response, para. 23.

³⁸ Prosecution Further Submissions.

³⁹ Response, para. 25.

- (ii) The Accused has the means to interfere with witnesses since “the accused is now aware of the identities and potential evidence of the witnesses against him [...]”.⁴⁰

28. The Prosecution finally argues that in the event that the two Rule 65’s conditions for granting provisional release are met, discretionary factors weighing against provisional release which could be an accused’s health, age and long pre-trial detention do not apply in the present case. The Prosecution submits that the Accused is not old nor ill and that the duration of his pre-trial detention is not unreasonable in view of the seriousness of the crimes he is charged with.⁴¹

29. The Trial Chamber must rely on the information before it to decide whether to grant the Application for Provisional Release. Considering that no suggestion has been made that the Accused has interfered with the administration of justice since the Indictment was confirmed against him, the Prosecution’s suggestion that, if released, the Accused may pose a danger to witnesses and victims is insufficiently supported by the evidence. No concrete danger has been identified. The assessment under Rule 65 cannot be done only *in abstracto*.

30. The Accused is charged with participating in serious crimes; if convicted, he is likely to face a long prison term. This may give him a strong incentive to flee. However, in itself, this argument made *in abstracto* cannot be used against the Accused. All accused before this Tribunal, if convicted, are likely to face heavy sentences.

31. However, the Trial Chamber notes that the fact that the Accused absconded prior to his transfer to the UNDU supports the likelihood that he may not appear for trial when so ordered by the Trial Chamber. The Accused went into hiding when receiving indications that he was a suspect or accused falling within the Tribunal’s jurisdiction and used a false name.

32. The Trial Chamber has balanced all the circumstances, including the present circumstances of the Accused and his family, and the control the guarantor can effectively exercise in its territory, in determining whether the Accused may be released. It concludes that the Accused cannot be provisionally released.

33. The Trial Chamber finds it appropriate to order that the Accused be maintained in detention.

⁴⁰ Response, para. 25.

⁴¹ Response, paras 26-32.

34. However, the Trial Chamber considers that in this case, in view of the substantial period of time spent in pre-trial detention, a more lenient measure than pre-trial detention in the United Nations Detention facilities may be more appropriately applied to the Accused, such as his placement under house arrest. Such a determination is however not of the competence of this Trial Chamber.

35. As mentioned above and pursuant to Rule 64 of the Rules,⁴² a request for modified conditions of detention must be made before the President of the Tribunal. The Accused made the alternative request to be placed under house arrest in Mostar, Bosnia and Herzegovina, in the Application for Provisional Release. Accordingly, the Trial Chamber remits the Application for Provisional Release to the President of the Tribunal to the extent that it concerns a request for modified conditions of detention.

V. Disposition

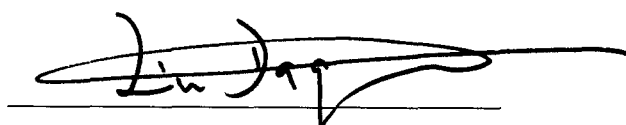
PURSUANT TO Rules 54 and 65 of the Rules,

THIS TRIAL CHAMBER,

HEREBY DENIES the Application for Provisional Release **AND REMITS** the Application for Provisional Release to the President of the Tribunal for consideration of the Accused's request for house arrest pursuant to Rule 64 of the Rules.

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

Dated this 26th day of July 2005,
At The Hague
The Netherlands



Judge Daqun Liu
President of Trial Chamber 1

[Seal of the Tribunal]

⁴² Supra, para. 19.