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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-05-88-PT

Date: 10 May 2006

Original: English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Kevin Parker
Judge Jean-Claude Antonetti

Registrar: **Mr. Hans Holthuis**

Decision of: **9 May 2006**

THE PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVČANIN
ZDRAVKO TOLIMIR
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ
MILORAD TRBIĆ

DECISION ON DEFENCE APPLICATION FOR PROVISIONAL RELEASE OF THE ACCUSED LJUBOMIR BOROVČANIN

The Office of the Prosecutor:

Peter McCloskey

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Zoran Živanović for Vujadin Popović
John Ostojić and Christopher Meek for Ljubiša Beara
Jelena Nikolić and Stephane Bourgon for Drago Nikolić
Aleksandar Lazarević and Miodrag Stojanović for Ljubomir Borovčanin
Natacha Fauveau Ivanović for Radivoje Miletić
Dragan Krgović for Milan Gvero
Đorđe Sarapa for Vinko Pandurević
Colleen Rohan and Vesna Janjić for Milorad Trbić

I. INTRODUCTION

1. Trial Chamber II ("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 seised of the partially confidential "Defence Application for Provisional Release of the Accused Ljubomir Borovčanin with Annexes I, II, III and V, and Confidential Annex IV" ("Motion") filed on 2 March 2006 by Ljubomir Borovčanin ("Accused"). On 16 March 2006, the Prosecution filed the "Prosecution Response to Motion Seeking Provisional Release of Accused Ljubomir Borovčanin" ("Response"). The Accused then filed the partly confidential "Defence Application for Leave to Reply and Defence Reply to "Prosecution Response to Motion Seeking Provisional Release of Accused Ljubomir Borovčanin", with Confidential Annexes I to III, and Annex IV" on 23 March 2006 ("Reply"). The Trial Chamber grants the Accused leave to file the Reply.

2. In the Motion, the Accused requests that the Trial Chamber order, pursuant to Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rules"), his provisional release to the municipality of Bijeljina, Republika Srpska, pending the commencement of his trial. In support of his request, the Accused makes a number of submissions. In essence, the Accused emphasises that his own assurances that he will abide by any conditions imposed on his provisional release and will return to the Tribunal for trial are reinforced by the guarantee provided by the Council of Ministers of the Government of Serbia and Montenegro ("SM Guarantee") and the guarantee provided by the Republika Srpska ("RS Guarantee").[1] The Accused submits that, if provisionally released, he would not pose a threat to any victim, witness or other person.[2] He also submits that he surrendered voluntarily on 1 April 2005 and that he is ready to give an account of his whereabouts and movements at that time.[3] Finally, the Accused strongly disagrees with the Prosecution that the completion strategy of the Tribunal could serve as a disincentive for the Accused to return to the Tribunal.[4]

3. In the Response, the Prosecution asks the Trial Chamber to deny the Accused's request for provisional release. The Prosecution submits that the Accused did not surrender to the authorities in September 2002, as had been agreed, and that there is no evidence that the Accused voluntarily surrendered on 1 April 2005.[5] In this regard, it notes that the Accused provides no adequate explanation for why he did not surrender prior to 1 April 2005 and provides no information that

[1] Motion, paras. 9 – 18. Note that the Defence and Prosecution refer to the "Guarantees of Serbia and Montenegro and the Republic of Serbia".
[2] Motion, paras. 19 – 22.
[3] Motion, paras. 28 – 30.
[4] Motion, para. 35.
[5] Response, paras. 9 – 10.

could alleviate concerns that he could be a flight risk.[6] The Prosecution submits that the SM Guarantee should be given little weight.[7] It further submits that all the Guarantees should be assessed in light of the specific circumstances of the case.[8] The Prosecution also argues that the seriousness of the charges against the Accused militates strongly against his provisional release,[9] and that the Tribunal's completion strategy is a disincentive for the Accused to appear for trial.[10]

4. In the Reply, the Accused reiterates that he did voluntarily surrender.[11] He provides statements concerning events relating to the time that he was a fugitive, his surrender, and concerning his co-operation with the Prosecution.[12] He also includes an announcement by the Government of the Republic of Serbia stating that the Accused voluntarily surrendered.[13] The Accused emphasises that he has requested to be provisionally released to Bijeljina, Republika Srpska, and thus that the RS Guarantee is the most significant.[14] The Accused notes that the Prosecution has made no specific objections regarding either the RS Guarantee or the co-operation of the Republika Srpska authorities with the Tribunal, but has rather focused its objections on the SM Guarantee and Serbia and Montenegro's lack of co-operation with the Tribunal.[15]

5. The background to the Accused's detention in The Hague can be briefly outlined. On 27 August 2002, the Accused agreed to surrender himself on 18 September 2002. On 29 August 2002, the Accused requested a change to the date on which he would surrender himself to 23 September 2002. The Prosecution filed the Indictment against the Accused on 4 September 2002. On 6 September 2002, the warrant of arrest and order for surrender were issued. On 23 September 2002, the Accused failed to surrender himself. On 27 September 2002, the Indictment and warrants of arrest and related orders were made public. On 17 October 2002, a warrant of arrest and surrender and an order for arrest and surrender directed to the authorities of the Federal Republic of Yugoslavia were issued. It was not, however, until 1 April 2005, that the Accused was transferred to The Hague.

II. THE LAW

6. Article 21 of the Statute of the Tribunal ("Statute"), which sets out the rights of the accused, provides, *inter alia*:

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[6] Response, paras. 12 – 13.
[7] Response, para. 14.
[8] Response, para. 17.
[9] Response, paras. 20 – 23.
[10] Response, para. 24.
[11] Reply, para. 6.
[12] Reply, paras. 7 – 11, and Confidential Annexes I – III.
[13] Reply, para. 8, and Annex IV.
[14] Reply, para. 14.
[15] *Ibid.*

> 1. All persons shall be equal before the International Tribunal.
>
> [...]
>
> 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
>
> [...]

7. Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rules") reads, insofar as is relevant:

> (A) Once detained, an accused may not be released except upon an order of a Chamber.
>
> (B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

8. Rule 65 of the Rules must be interpreted in accordance with Article 21(3) of the Statute. In order for provisional release to be granted by the Trial Chamber pursuant to Rule 65(B) the Accused must satisfy the Trial Chamber[16] that, *inter alia*, the following pre-conditions are met: (a) the Accused will appear for trial, and (b) if released, the Accused will not pose a danger to any victim, witness or other person. These pre-conditions must be established on a balance of probabilities,[17] a burden which has been recognised as "a substantial one in light of the jurisdictional and enforcement limitations of the Tribunal".[18] If the Accused fully discharges his burden in relation to these pre-conditions, the Trial Chamber must decide whether or not to exercise its discretion to order provisional release, having regard to the specific circumstances of the case.

III. DISCUSSION

A. Opportunity to be heard

9. On 1 February 2006, the Serbia and Montenegro Council of Ministers issued a decision providing the SM Guarantee and, on 3 February 2006, Republika Srpska issued a decision providing the RS Guarantee.[19] In light of these Guarantees, the Trial Chamber considers that the

[16] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.1, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 28, and *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 21.
[17] See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 5.
[18] *Prosecutor v. Jadranko Prlić et al.*, Case Nos. IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.3, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 25.
[19] Motion, Annexes II and III.

requirement of giving the "State to which the Accused seeks to be released" the opportunity to be heard, as required pursuant to Rule 65(B) of the Rules, is satisfied.[20]

B. Whether the Accused, if released, will appear for trial

10. The Trial Chamber is required to identify all the relevant factors that it takes into account when reaching its decision as to whether it is satisfied that, if released, an accused will appear for trial. The Appeals Chamber indicated a non-exhaustive set of factors to be considered in making this decision, including: whether the Accused is charged with serious criminal offences and, if convicted, is likely to face a long prison term; the circumstances in which he surrendered; the degree of co-operation given by the authorities of Serbia and Montenegro, Bosnia and Herzegovina, and Republika Srpska; the guarantees offered by those authorities and any personal guarantees offered by the Accused, and the weight to be given to the SM Guarantee and the RS Guarantee in light of the position held by the Accused prior to his being brought to the Tribunal; the likelihood that, in case of breach of the conditions of provisional release and where the Accused declines to surrender, the relevant authorities will arrest the Accused; and, the Accused's degree of co-operation with the Prosecution.[21]

1. The seriousness of the crimes charged

11. If the gravity of the offences charged is such that it raises the possibility of a lengthy sentence, it may constitute an incentive for an accused who has been provisionally released to flee.[22] In the Motion, the Accused submits that provisional release has been granted to accused charged with similar criminal offences and in relation to the same events as the Accused.[23] The Prosecution argues that the seriousness of the charges against the Accused militates strongly against his provisional release, and that it is appropriate to take the seriousness of the crimes charged into consideration when assessing the probability the Accused will appear for trial or will attempt to

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[20] On 11 October 2005, the Kingdom of the Netherlands, as host country, expressed that it did not object to the provisional release of the Accused, provided that the place of provisional release was outside Dutch territory.

[21] *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 6.

[22] See *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević's Application for Provisional Release, 3 October 2005, para. 5, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 6, where the Appeals Chamber stated that "the more severe the sentence, the greater the incentive to flee", and *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para. 25.

[23] Motion, paras. 24 – 25.

influence or harm potential witnesses.[24] In particular, the Prosecution notes that, if convicted, the charges will be likely to result in a substantial sentence.[25]

12. The Accused is charged under Articles 7(1) and 7(3) of the Statute with the crimes of genocide, conspiracy to commit genocide,[26] extermination, murder, persecutions, forcible transfer, and deportation, allegedly committed in the Srebrenica "safe area" and Žepa.[27] The Accused was Deputy Commander of the Republika Srpska Ministry of Interior ("MUP") Special Police Brigade ("SPB") until, on 10 July 1995, he was appointed Commander of a joint force of MUP units. As Commander of the joint MUP forces, the Accused was, *inter alia*, allegedly responsible for planning and directing the activities of all the subordinate formations under his command in accordance with directives received from his higher command.[28]

13. The Trial Chamber considers that, if convicted of the charges against him, the Accused will likely face a substantial term of imprisonment and that, consequently, the prospect of imprisonment could provide the Accused with a strong incentive not to return to face trial if he is provisionally released.[29] However, the seriousness of the charges cannot be the sole factor determining the outcome of an application for provisional release[30] and the Trial Chamber will now consider the other relevant factors.

2. Circumstances of transfer

14. While much attention is given to the question whether the Accused voluntarily surrendered or not on 1 April 2005, and while that is a relevant consideration in assessing if he will appear for

[24] Response, para. 20.
[25] Response, para. 21.
[26] At the Status Conference held on 4 April 2006, the Accused refused to enter a plea in relation to the charge of conspiracy to commit genocide. See T. 77 – 139, 112 – 117, 4 April 2006. On 7 April 2006, the Accused filed the "Borovčanin Defence Submission Regarding Prosecution's Motions to Amend Indictment", in which the charge of conspiracy to commit genocide was further challenged.
[27] See the Consolidated Amended Indictment, filed on 11 November 2005. Note that on 22 March 2006, the Prosecution filed the "Motion to Amend the Indictment Relating to Ljubomir Borovčanin", in which it seeks to amend the Consolidated Amended Indictment to "clarify that Borovčanin's separate and independent basis of liability under Article 7(1) of the Statute not only includes instigating and/or assisting and aiding and abetting, but also encompasses "committing" through his culpable "omission" of failing to intercede to protect prisoners he had a duty to protect" (para. 2).
[28] Consolidated Amended Indictment, para. 18.
[29] See *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para. 26, in which "the Trial Chamber observes that although all accused before the Tribunal will by definition face charges which are "serious", it is possible to recognize that certain accused are charged with offences that are *more serious* than others. This requires the Trial Chamber to consider the allegations in the indictment as proven and evaluate, *inter alia*, the nature of each charge, the factual allegations, the alleged form of participation of the Accused, and their alleged degree of responsibility. In cases involving co-accused that have applied for provisional release either jointly or in succession to one another, all other factors being equal, it may be possible for a large disparity between the seriousness of the offences charged against each co-accused to result in one being granted provisional release, and the other being denied it".
[30] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 6.

trial, in the circumstances of this case, the fact that he did not surrender to the Tribunal on 23 September 2002 and remained a fugitive until 1 April 2005 is of much greater relevance.

15. In the Motion, the Accused states that he voluntarily surrendered on 1 April 2005 but he acknowledges that he should have surrendered earlier.[31] The Accused also notes that he is "ready to give an account of his whereabouts and movements in the period prior to his voluntary surrender as well as to explain the circumstances leading up to his late surrender",[32] although he does not do so in the Motion.

16. The Prosecution notes that the Accused did not voluntarily surrender, as had been agreed he would, on 23 September 2002. It states that the circumstances surrounding the Accused's transfer to the Tribunal on 1 April 2005 by Serb authorities are unknown and that the Prosecution doubts that the Accused did voluntarily surrender.[33] It also submits that the Accused's statements "do nothing to alleviate the continuing questions concerning his whereabouts during the two and a half years he was a fugitive or to allay the fears that once he is released to Republika Srpska he will not flee again".[34]

17. In the Reply, the Accused provides an account of why he did not voluntarily surrender on 23 September 2002, his whereabouts during the time he was a fugitive, and the events relating to his transfer to The Hague.[35] The Accused submits that this information demonstrates that he voluntarily surrendered on 1 April 2005.[36]

18. The Accused states that his planned surrender became "almost a generally well-known matter".[37] As a result "in September 2002, I became the object of pressures and I was under suspicion of being involved in some dishonourable conspiracy". The Accused and his family faced a "difficult situation". Consequently, in the words of the Accused, "all these events and circumstances affected my making an utterly unreasonable decision and, instead of abiding by the agreement – I avoided its realization".

19. The Accused explains that during the time he was a fugitive, he stayed in his family apartment in Bijeljina or his father's unfinished house in the nearby village of Velika Obarska.[38] He spent the majority of the time at the unfinished house and when he left it, he "would mainly go to the apartment in Bijeljina". The Accused notes that the apartment and unfinished house were

[31] Motion, para. 29; Reply, para. 6.
[32] Motion, paras. 29 – 30.
[33] Response, para. 10.
[34] Response, para. 12.
[35] Reply, paras. 7 – 11, and see, Confidential Annexes I – III and Annex IV.
[36] Reply, para. 7
[37] See Reply, Confidential Annex I.
[38] See Reply, Confidential Annex II.

under constant surveillance but that he avoided being discovered. He also states that he moved around very little and did not have any contacts with persons outside his immediate family.

20. In relation to his transfer to the Tribunal, the Accused states that his "surrender at the end of March 2005 is an exclusively personal and voluntary act, i.e., I was not arrested".[39] He explains that his family conveyed his intention to surrender to his present co-counsel, who made the "necessary arrangements", and that on 28 March 2005, accompanied by his present co-counsel, the Accused presented himself at a building of the Government of Serbia.

21. While the Accused accepts in his submissions that he should have surrendered earlier than 1 April 2005, that admission fails to reflect an adequate recognition of the fact that, with full knowledge of the warrant of arrest and order for surrender of this Tribunal, he reneged on his agreement to voluntarily surrender and was a fugitive from justice for two and a half years after the Indictment was made public. The Trial Chamber is of the view that the Accused provides only generalised, unsubstantiated and unconvincing reasons for not surrendering in September 2002 and his failure to surrender at any time between September 2002 and April 2005. Moreover, it is for the Accused to demonstrate that he voluntarily surrendered. In this regard, it is noteworthy that, although he says he surrendered on 1 April 2005, the Accused has not provided a satisfactory explanation of the circumstances that led to this change of mind and his decision to come out of hiding. In particular, on the basis of the present state of the evidence the Trial Chamber is not able to be satisfied that the Accused acted on his own volition, especially because, in the view of the Trial Chamber, significant uncertainty remains about the events leading to his transfer to The Hague.

22. The Trial Chamber takes note of the letter from the National Council for Cooperation with the International Criminal Tribunal for the Former Yugoslavia dated 1 February 2006, which states that the Accused voluntarily surrendered on 1 April 2005,[40] and the Announcement of the Government of Serbia dated 29 March 2005, which states that the Accused had made a decision to go voluntarily to The Hague. There remains, however, a lack of convincing explanation for the apparent actions of the Accused.

23. The Trial Chamber reiterates that on the basis of the evidence the actual circumstances relating to the Accused's transfer to The Hague remain unclear. Unfortunately, the letter from the National Council and the Announcement of the Government of the Republic of Serbia do not shed any light on the issue. Neither is there any satisfactory explanation for the time being of the Accused's avoidance of arrest from September 2002 to April 2005 or of his failure to come forward

[39] See Reply, Confidential Annex I.
[40] Motion, Annex V.

during that lengthy period. In these circumstances, the Trial Chamber is persuaded that there is a significant likelihood that, if provisionally released, the Accused would attempt to evade justice again by not returning to face trial.

3. Co-operation with the Prosecution

24. The extent of the Accused's co-operation with the Prosecution is a factor that must be considered by the Trial Chamber. The Accused submits that on 20 February and 11 March 2002 he voluntarily gave two interviews to the Office of the Prosecutor, which lasted for three days in total, and that he supplied the Prosecution with relevant documents and video material.[41] These acts, the Accused submits, indicate that he "unequivocally showed his willingness and readiness to cooperate".[42] The Prosecution does not respond to these submissions of the Accused.[43]

25. While the Accused may have been willing to co-operate in early 2002, it has to be inferred that the Accused changed his position with regard to continuing to co-operate when he decided not to surrender voluntarily on 23 September 2002. Moreover, the co-operation the Accused refers to took place approximately four years ago, it was of a brief nature, and there has been a notable absence of any co-operation since then. As such, the Trial Chamber is of the view that the Accused's co-operation with the Prosecution in early 2002 has no significant bearing on whether the Accused will return to the Tribunal for trial if now provisionally released.[44]

4. Government guarantees

26. In relation to the SM and the RS Guarantees, the Accused argues that similar guarantees have been recognised and endorsed in several cases where provisional release has been granted. He submits that there have been significant improvements in Republika Srpska's co-operation with the Tribunal.[45] Moreover, the Accused states that he has provided the SM Guarantee only because he has dual citizenship and he wished to pre-empt an argument by the Prosecution that he might flee to Serbia and Montenegro.[46]

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[41] Motion, para. 27; Reply, para. 25 and Confidential Annex I.
[42] *Ibid.*
[43] The Prosecution refers only to the Accused's initial co-operation regarding his surrender in late August and early September 2002. See Response, para. 3. See also Declaration of Robert William Reid, Response, Annex A.
[44] In this regard, it can be noted that, even if it was accepted that the Accused voluntarily surrendered, it appears from the statement of the Government of the Republic of Serbia that he did not volunteer out of a desire to co-operate with the Prosecution or the Tribunal, or because he felt that he had an obligation to hand himself in because of the indictment issued against him. Rather, the Announcement notes the Accused's desire to help his people, and that he "does not wish that, because of him, the state suffers pressures and to be in the position of a hostage". See Reply, Annex IV.
[45] Motion, para. 15.
[46] Motion, paras. 16 – 17.

27. The Prosecution submits that a guarantee by a state is not a prerequisite for provisional release[47] and that the SM Guarantee should be given little weight.[48] It argues that the degree of co-operation by Serbia and Montenegro and the Republic of Serbia has not reached a level such that the SM Guarantee would be sufficient to ensure that the Accused would appear for trial.[49] The Prosecution submits further that government guarantees need to be, and have been, assessed differently in light of the specific circumstances of the case, and that, in this case, the "demonstrated inability by the Serbian authorities to locate and apprehend high-profile indictees who are known to be at large in the territory of Serbia and Montenegro, and the fact that the Accused has in the past feigned cooperation, only to escape at the eleventh hour and remain a fugitive from justice for a period of approximately two and a half years" are specific circumstances that must be taken into account.[50] It also suggests that, although the Accused says that he will reside in Republika Srpska, his friends and former colleagues could "successfully keep him away from both guaranteeing authorities".[51]

28. In the Reply, the Accused submits that the Response only addresses the SM Guarantee and the alleged lack of co-operation by authorities of Serbia and Montenegro. The Accused emphasises that the RS Guarantee should be viewed as the main guarantee as he seeks to be provisionally released to the Republika Srpska and has no intention of fleeing to Serbia and Montenegro or elsewhere.[52] The Accused also contends that the Prosecution's allegation that he will be kept away from the guaranteeing authorities of both states by friends and colleagues is "pure speculation".[53]

29. The Trial Chamber agrees with the Accused that the Prosecution's assertion that he could be kept from the guaranteeing authorities by friends and colleagues is not supported by any evidence and, therefore, is not relevant to the assessment of the SM Guarantee and the RS Guarantee in the present case.

30. The extent of co-operation by the government authorities with the Tribunal is relevant to the assessment of the weight to be given to the SM Guarantee and the RS Guarantee. The Trial Chamber acknowledges that co-operation with the Tribunal is "improving in some areas".[54]

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[47] Response, para. 13. Note this reference is to the second paragraph numbered 13.
[48] Response, para. 14. The Prosecution submits, at paragraph 14 of the Response, that the following factors should be taken into account: (a) the inability of the authorities of the Republic of Serbia and Serbia and Montenegro to sufficiently cooperate with the ICTY in light of the fact that high profile indictees remain at large; (b) the serious nature of the charges faced by the Accused, with the likelihood of a substantial period of confinement upon conviction; and, (c) the Tribunal's completion strategy provides a disincentive for the Accused to appear for Trial.
[49] Response, para. 13. Note this reference is to the second paragraph numbered 13.
[50] Response, para. 15. The Prosecution also reiterates the fact that the Accused remained a fugitive for two and a half years (para. 19).
[51] Response, para. 18.
[52] Reply, para. 14 – 16.
[53] Reply, para. 18.
[54] Address of President Pocar to the Security Council, 15 December 2005.

However, the Trial Chamber notes the view of the Prosecution that the fact that two high profile indictees, Generals Zdravko Tolimir and Ratko Mladić, are still evading justice is indicative of the inability of the authorities of Serbia and Montenegro and the Republic of Serbia to sufficiently co-operate with the Tribunal.[55] The Prosecution did not address co-operation by Bosnia and Herzegovina or Republika Srpska in its Response. However, as the President of the Tribunal recently informed the Security Council, "with respect to the Republika Srpska within Bosnia and Herzegovina, while there are encouraging signs of cooperation, that cooperation remains insufficient because of the failure by Republika Srpska to provide information that could lead to the arrest of Radovan Karadžić and Ratko Mladić".[56] Moreover, in relation to Serbia and Montenegro's cooperation, "it has improved, but the failure to surrender the remaining fugitives is a serious concern".[57]

31. In this regard, the Trial Chamber notes that the Accused states in the Reply that while he was at large he stayed in the family apartment in Bijeljina and his father's unfinished house near Bijeljina.[58] Nothing has been placed before this Trial Chamber to explain how the Accused could stay in such obvious places and yet avoid arrest for two and a half years. The Trial Chamber considers that, notwithstanding the apparent improved co-operation between the relevant authorities and the Tribunal, there are doubts as to the likelihood of the authorities of Republika Srpska arresting the Accused if he failed to appear for trial.

32. The Trial Chamber is also aware that pursuant to Article 36 of the Law on Cooperation of Serbia and Montenegro with the International Tribunal, the Serbian and Montenegro Council of Ministers and the government of the republic of which the accused is a citizen *must* issue a guarantee for the provisional release of a person who has voluntarily surrendered. In this regard, the Trial Chamber notes Robert William Reid's statement that "although the Government of Serbia and Montenegro and the Republic of Serbia have facilitated the surrender of a number of indictees in the past, they have always been reluctant to acknowledge that they have carried out an arrest or detention of any person whom the Tribunal has indicted".[59]

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[55] Response, para. 14. Note that the paragraph numbering in the Response is not correct. The Trial Chamber refers here to the first para. 14. See also Declaration of Robert William Reid, Response, Annex A, para. 4.
[56] Address of President Pocar to the Security Council, 15 December 2005. See also Twelfth Annual Report 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, U.N. Doc. A/60/267 – S/2005/532, 15 August 2005, para. 191.
[57] Address of President Pocar to the Security Council, 15 December 2005.
[58] Reply, Confidential Annex II
[59] See, Response, Annex A, para. 4. See also, Response, para. 13.

33. In addition, the positions that the Accused held at the relevant time is a factor to be considered in the assessment of government guarantees.[60] The Accused argues that provisional release has been granted to several accused of similar or higher rank than him.[61] The Prosecution submits that "the fact that his rank and position may have been lower in comparison to the other Accused in this case is irrelevant given the gravity of the crimes with which he is charged".[62] While that overstates the position, the Trial Chamber considers that, as a Deputy Commander of the MUP SPB and a Commander of a joint force of MUP units, the Accused held positions of seniority sufficient to potentially impact on the willingness of relevant government authorities to arrest the Accused should he fail to comply with conditions of provisional release.

34. In light of all these considerations, the Trial Chamber is not satisfied that the existence of the SM Guarantee and the RS Guarantee will be sufficient to ensure that the authorities of Serbia and Montenegro or Republika Srpska would be able and prepared to arrest the Accused if he were to fail to return for trial.

5. Personal guarantees

35. An accused is not required to provide a signed personal undertaking that he will abide by certain conditions if released and comply with the orders of the Tribunal. However, this is often done in support of a provisional release application and is one of the factors to be taken into consideration.[63]

36. The Accused provides a personal guarantee that he will, *inter alia*, remain in the municipality of Bijeljina, surrender his travel documents, be under 24-hour surveillance, report once a day to the European Union Police Mission and/or the local police in Bijeljina and be subject to checks by these authorities, not have any contact with co-accused, not have contact or interfere with any persons who may testify at trial, and not discuss the case with any person except his counsel.[64]

37. The Trial Chamber considers that the Accused's personal guarantee must be evaluated in the context of the circumstances surrounding his failure to surrender between September 2002 and April 2005, his eventual transfer to the Tribunal, and the past history of his co-operation with the

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[60] See, for example, *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005, paras. 27 – 29, and *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 41.
[61] Motion, para. 24.
[62] Response, para. 22.
[63] *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 6, and *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-PT, Decision on Vinko Pandurević's Application for Provisional Release, 18 July 2005, para. 20.
[64] Motion, Annex I.

Prosecution.[65] In this regard, the Trial Chamber reiterates that the Accused has not provided sufficient justification for his decision not to surrender in September 2002 and to remain at large for two and a half years, and that his explanation of his whereabouts and movement during the time he was as fugitive is generalised and unsubstantiated. Moreover, the instances of co-operation by the Accused with the Prosecution took place so long ago, and have been totally absent since, that they cannot serve as support for the Accused's personal guarantee. As such, while the Trial Chamber acknowledges the personal guarantee made by the Accused, it does not consider it can place much weight on it.

6. Completion strategy

38. The Prosecution submits that the completion strategy of the Tribunal should result in less weight being given to the SM and RS guarantees and that it creates an incentive for the Accused not to return for trial "since the Accused might assume that he can escape criminal accountability by simply remaining in hiding until the Tribunal completes its mandate".[66] The Accused disagrees that the completion strategy is a relevant factor to be taken into account and cites a previous conclusion of the Trial Chamber, namely, "the anticipated date of the completion of the Tribunal's mandate is not so imminent as to give any great force to this view [that the completion date may reduce the likelihood of the Accused's return for trial] in the present case".[67]

39. In the present case, the Trial Chamber will not give weight to the implementation of the completion strategy in determining this application, but it is conscious that this may become a matter of relevance as the date for completion of trials becomes closer.

C. Whether the Accused, if released, will pose a danger to victims, witnesses or other persons

40. The Accused submits that he has never and will not pose a threat to any victim, witness or other person.[68] He states that he has never had any information as to the identity or the whereabouts of any victim and/or witness.[69] Moreover, the Accused reiterates that in his personal guarantee he has agreed to refrain from any contact or interference with any person who may testify at trial and

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[65] See *Prosecutor v. Vujadin Popović*, Case No. IT-02-570-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović's Application for Provisional Release, 28 October 2005, para. 6, and *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88, Decision on Drago Nikolić's Request for Provisional Release, 9 November 2005, para. 24.
[66] Response, para. 24.
[67] Motion, para. 35. The Accused refers to the finding in, *inter alia*, *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-PT, Decision Concerning Motion for Provisional Release of Radivoje Miletić, 19 July 2005, para. 16, and *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, 19 July 2005, para. 16. The Accused reaffirms this argument in the Reply, para. 21.
[68] Response, para. 19.
[69] Response, para. 20.

from discussion about the case with any person except his counsel.[70] The Prosecution does not dispute the Accused's submissions in this respect.[71]

41. As there is no evidence to the contrary, the Trial Chamber is satisfied that the Accused would not pose a danger to any victim, witness or any other person, if he were provisionally released.

D. Trial date and discretion

42. There is one further factor which has some limited relevance to the question of whether, if provisionally released, the Accused will appear for trial and also to the exercise of the Trial Chamber's discretion. It is a factor which has recently assumed greater relevance. Since the Motion was filed, the prospects for an early trial of the Accused have become much clearer. It is now anticipated that this case will be the next trial to commence. This may even be possible in July 2006. To a limited degree, the imminent prospect of trial, *inter alia*, heightens the significance for the Accused of the seriousness of the crimes charged and the likelihood of a substantial term of imprisonment if convicted.

43. With regard to the exercise by the Trial Chamber of the discretion to grant provisional release, the Accused now faces only a limited time in custody before the trial commences, which lessens the justification for provisional release. Further, this is a time of heightened activity as the preparations for trial are concluded. It is to be anticipated that the Accused's ready availability in The Hague during this time will, on balance, facilitate the process of final preparations for trial.

IV. CONCLUSION

44. Having weighed the various factors in light of the specific circumstances of the case, the Trial Chamber is not satisfied that the Accused, if provisionally released pending trial, would appear for trial. The Trial Chamber must refuse a request for provisional release if it is not satisfied that one of the conditions in Rule 65(B) is met and, thus, it is obliged to deny the Motion. Further, for the reasons indicated, even if it were open to the Trial Chamber to grant the Motion, the Accused has not persuaded the Trial Chamber that it should exercise its discretion to grant provisional release at this time.

[70] Response, para. 22.
[71] The Accused notes this in the Reply, para. 26.

V. DISPOSITION

FOR THE FOREGOING REASONS, pursuant to Rule 65 of the Rules, the Trial Chamber

GRANTS the Accused leave to file the Reply; and

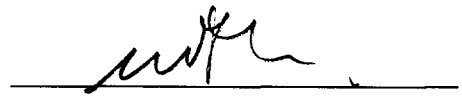
DENIES the Motion.

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

Dated this tenth day of May 2006,

At The Hague

The Netherlands



Judge Carmel Agius

Presiding Judge

[Seal of the Tribunal]