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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

Before: Judge Bankole Thompson
Designated Judge

Registrar: Robin Vincent

Date filed: 5 June 2003

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

also known as (aka) TAMBA ALEX BRIMA aka GULLIT

CASE NO. SCSL – 2003 – 06 – PT

PROSECUTION RESPONSE TO MOTION FOR BAIL OR FOR PROVISIONAL RELEASE

Office of the Prosecutor:

Luc Côté
Nicholas Browne-Marke
Boi-Tia Stevens

Defence:

Terrence Michael Terry

Bankole Thompson
5-06-03 17:16 hrs

754

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PROSECUTION RESPONSE TO DEFENCE MOTION FOR BAIL

I. INTRODUCTION

1. The Defence motion for bail or in the alternative for provisional release under Rule 65 of the Rules of Procedure and Evidence for the Special Court (the Rules) should be dismissed. The submission does not meet the burden of satisfying the Court that bail should be ordered.

II. BACKGROUND

2. On 7 March 2003 the Designated Judge approved the Indictment against this Accused. Based on the approved Indictment, on that same day the Designated Judge issued a *Warrant of Arrest and Order for Transfer and Detention* of the Accused. On 10 March 2003, the Accused was transferred from the custody of Sierra Leone Police to Special Court officials and detained at the detention unit of the Special Court in Bonthe. On 15 March 2003 the Designated Judge ordered the detention on remand of the Accused until further order of the Special Court. The Accused has remained in detention until present.

3. On 28 May 2003, Defence Counsel filed *Motion for Bail or for Provisional Release.* Attached to the said Motion were several documents including the *Warrant of Arrest and Order for Transfer and Detention.*

III. ARGUMENT

BAIL APPLICATION

4. The Prosecution submits that the legality of the arrest and detention of an accused person is not relevant to an application for bail. The Prosecution contends that by

applying for bail in this case, the Accused has conceded to the legality of his arrest and detention.

5. In the alternative, should the Honourable Judge or Trial Chamber deem the legality of an arrest and detention of relevance to an application for bail, the Prosecution hereby incorporates by reference the arguments on the validity of the Indictment against the Accused and the validity of the Warrant of Arrest and Order for Transfer and Detention of the Accused as contained in the Prosecution's Response to Defence Motion for Leave to Issue Writ of Habeas Corpus, which is annexed hereto as Attachment A.

6. Rule 65 (A) of the Rules mandates that "Once detained, an accused **shall** not be granted bail except upon an order of a Judge or Trial Chamber." Rule 65 (B) further states that "Bail **may** be ordered by a Judge or a Trial Chamber after hearing the State to which the accused seeks to be released 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."

7. The Prosecution notes that Rule 65 of the Rules of the Special Court is similar in material respects to Rule 65 of the ICTY Rules of Procedure and Evidence as amended on 12 December 2002, (IT/32/REV.26) which provides as follows:

> Rule 65 Provisional Release:
> (A) Once detained, an accused may not be released except upon an order of a Trial 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. The Defence, on page 2 of its Motion, erroneously states that there is a requirement of "exceptional circumstances" under Rule 65 of the ICTY Rules. The ICTY Rules as amended on 2 July 1999, (IT/32/Rev.16), removed the "exceptional circumstances" requirement which existed in the earlier version of the rule.

9. However, the Prosecution submits, the absence of the requirement of "exceptional circumstance" in Rule 65 of the Special Court, as in Rule 65 of the ICTY, does not make release the rule and detention the exception. The principle that release is not the rule and detention the exception is clearly reflected in the ICTY cases decided after the said amendment to Rule 65 on 12 December 1999. *See Prosecutor v. Kvocka et al*, IT-98-30, Decision on Motion For Provisional Release Of Miroslav Kvocka, 2 February 2000; *Prosecutor v. Brdanin,* IT-99-36-PT, Decision on Motion By Radoslav Brdanin For Provisional Release, 25 July 2000, paragraph 12.

10. The Prosecution also submits that Rule 65 of the Special Court is even stricter than the ICTY rules, given the mandatory effect of the word "**shall**" in Rule 65(A) of the Special Court's Rule. Nonetheless, the Prosecution submits that the recent ICTY jurisprudence provides relevant assistance in the determination of this matter.

11. The burden is on the Accused to satisfy the Court that he should be released on bail. *See Brdanin, supra,* Decision on Motion By Radoslav Brdanin For Provisional Release, paragraph 13; *Brdanin, supra,* Decision On Application For Leave To Appeal, 7 September 2000; *Brdanin, supra*, Decision On Motion By Momir Talic For Provisional Release, 28 March 2001, paragraphs 17, 18; *Prosecutor v. Ademi*, ICTY, IT-01-46-PT, Order On Motion For Provisional Release, 20 February 2002, paragraphs 19.

12. The Prosecution submits further that the Accused has not met the two part test set out in Rule 65 (B): he has presented insufficient evidence to satisfy the Court that he will appear for trial **and** that, if released, he will not pose a danger to any victim, witness or other person.

The Accused will appear for trial

13. The Prosecution submits that two major factors should be considered in determining whether the Accused has met his burden of satisfying the Court that he would appear for trial. Firstly, the Court should consider that it lacks its own means to execute a warrant of arrest, or to re-arrest an Accused who is released on bail. The Court must rely on the cooperation of States for the surveillance of an accused who has been released. This calls for a more cautious approach in assessing the risk of flight. *See Ademi, supra*, paragraph 24.

14. In the case herein, the Government of Sierra Leone is committed to cooperating with the Court. However, the Sierra Leone Police, though they have made great progress, continue to rebuild after the disruption and reduction of numbers caused by the conflict in this country. Today some areas within Sierra Leone still do not have a strong police presence. *See* the declarations made by Mr. Morie Lengor, former Investigator at the Office of the Prosecutor, Mr. Keith Biddle, former Inspector-General of the Sierra Leone Police and Mr. Brima Acha Kamara, Inspector-General of the Sierra Leone Police, attached hereto as Attachments B, C and D, respectively. This reality greatly adds to the difficulty of finding an accused who flees and seeks to evade capture.

15. In addition, the SLP currently lacks the means to guarantee the presence of the Accused at trial, i.e., to place the Accused under effective surveillance so as to ensure his presence, to prevent the Accused from fleeing to areas of this country in which he could be hidden by members of the armed faction with which he was affiliated during the conflict, or to prevent him from fleeing to another country given its inability to effectively control movement across its borders. *See* Attachments B, C and D annexed hereto.

16. This reality is further evidenced by the recent escape of Johnny Paul Koroma from police arrest within Sierra Leone, his successful evasion of capture within Sierra Leone and his apparent subsequent flight from Sierra Leone. *See* Attachment B, paragraph 14. The Accused has not given sufficient proof that he would not do the same.

17. In addition, if the Accused fled to countries such as Liberia or Ivory Coast, the unsettled and unstable situation in those countries, which situation is commonly known and reported, makes cooperation with the Court unlikely. This can be seen by the recently much publicized standoff between the Governments of Sierra Leone and of Liberia relating to the repatriation from Liberia of the alleged remains of Accused Sam Bockarie, and the apparent safe refuge of Accused Johnny Paul Koroma within Liberia. Given such places of "safe refuge", "as a matter of common experience, any person in the position of [the Accused], even if he is innocent, is likely to take advantage of the refuge [provided]" *See Brdanin, supra*, Decision On Motion By Momir Talic For Provisional Release, paragraph 30.

18. The Court should also consider that the subject matter jurisdiction of the Court is limited to serious offences, meaning that, if convicted, the Accused would likely face a lengthy prison sentence. This is especially true in light of the high position the Accused is alleged to have held in the AFRC/RUF. This reality gives the Accused more reason to flee. *Id; see also Ademi, supra*, paragraph 25

If released, the accused will not pose a danger to any victim, witness or other person

19. The Prosecution submits that there are two major factors the Court should consider in determining if the Accused has met his burden of satisfying the Court that, if released, he will not pose a danger to any victim, witness or other person. Firstly, the fact that the Accused would likely face lengthy confinement also increases the risk that the Accused will, if released on bail, attempt to harm,

intimidate or harass potential witnesses. *See Ademi, supra*, paragraph 25. This risk is further heightened by the fact that the Accused now knows the specific charges against him, enabling him to identify the potential evidence against him. *But see Brdanin, supra*, Decision on Motion By Radoslav Brdanin For Provisional Release, paragraphs 19 – 21; *Brdanin, supra*, Decision On Motion By Momir Talic For Provisional Release, paragraphs 34 – 36.

20. Secondly, the above mentioned lack of effective police presence in all areas of Sierra Leone, including the remote areas in which some potential witnesses may currently reside, adds to the risk of interference with potential witnesses. The SLP would be unable to ensure the Accused himself did not flee to these areas, and alone, with or through members of armed factions with which he is affiliated, interfere with potential witnesses. *See Brdanin, supra*, Decision On Motion By Momir Talic For Provisional Release, paragraph 37. Nor would the SLP be able to ensure the Accused did not undertake such activities in Freetown itself. *See* Attachments B, C, D.

21. If the Accused has not satisfied the Court that he will appear for trial and, if released, will not pose a danger to any victim, witness or other person, the analysis is complete and the Accused's bail application fails. *See Kvocka et al, supra*; *Ademi, supra*, paragraph 18, 21.

22. Even if the Accused satisfies the Court of these two prongs, the Court has the discretion to deny the Accused's application for bail. *Brdanin, supra,* Decision On Motion By Radoslav Brdanin For Provisional Release, paragraph 22; *Ademi, supra*, paragraph 22. In determining how to exercise this discretion, the Prosecution submits the Court should consider several factors.

The position taken by the Republic of Sierra Leone

23. Pursuant to the Rules the Court must hear, orally or in writing, the Republic of Sierra Leone, the country to which the Accused seeks to be released. The Prosecution submits that an Accused should not be released on bail where, as

herein, the country to which he seeks to be released to i.e. Sierra Leone has not stated it is prepared to accept responsibility for his attendance and appearance in Court.

Seriousness of the crimes charged

24. The Court may consider the nature of the crimes with which the Accused is charged, the most serious crimes under international humanitarian law. *See Kvocka et al, supra.*

Possibility of destruction of evidence

25. The Court should consider the possibility that, if released, an Accused may alone, with co-Accused who remain at large, or with members of armed factions with whom the Accused is affiliated, destroy documentary evidence or "[efface] traces of alleged crimes". *See Ademi, supra*, paragraph 22. In this regard it is significant to note that the Prosecution is still investigating in the case. *Id*, paragraph 27. *But see Brdanin, supra*, Decision on Motion By Radoslav Brdanin For Provisional Release, paragraphs 19 – 21; *Brdanin, supra*, Decision On Motion By Momir Talic For Provisional Release, paragraphs 34 – 36.

Potential conspiracy with co-Accused who remain at large

26. The Court should also consider that, if released, the Accused could conspire with other co-Accused who remain at large, e.g., Johnny Paul Koroma, the Accused's alleged superior and close associate, either to flee or to obstruct justice. *See Ademi, supra*, paragraph 22; *Brdanin, supra*, Decision On Motion By Momir Talic For Provisional Release, paragraph 37. It is worth noting that even when the Accused himself was arrested, as he states, he was at the residence of Johnny Paul Kamara. *See* paragraph 2 of the affidavit of the Accused.

27. Considering the factors discussed above in light of the Accused's submissions, he has failed to meet his burden to satisfy the Court of the two –prong test set out in

762

Rule 65, and has failed to satisfy the Court that the Court should exercise its discretion in favour of releasing the Accused on bail.

The Affidavit of the Accused

28. The Prosecution submits that the assertions made in paragraphs 1 through 8 of the affidavit, even if true, are not relevant to this bail application.

29. The Prosecution submits that the assertions made in paragraphs 9 through 11 of the affidavit are misleading or untrue. The understanding of the Prosecution is that security personnel at the detention unit of the Special Court did indeed make available to the Accused with food and water. In relation to the service of the Warrant of Arrest, the Prosecution relies on the submission made on this matter in the Prosecution's response to the Defence Motion for Habeas Corpus, annexed hereto as Attachment A.

30. The assertions in paragraphs 13 through 16 of the Accused's affidavit provide information of the unfortunate impact of criminal proceedings on families of accused persons. The Prosecution is not insensitive to this impact. However, the Prosecution submits that the assertions herein, if true, are not sufficient bases to allow bail for this Accused. *See Ademi, supra*, paragraph 27.

31. The assertions in paragraphs 17 and 18 of his affidavit do not support bail. The Prosecution submits that the Accused has not established that his health problems are so serious they can be dealt with only by releasing him from the custody of the Special Court. The Prosecution notes that medical services are provided for persons detained on the authority of the Special Court. *See* Rules 13, 16 and 22 of the Rules for Detention of the Special Court adopted 7 March 2003 as amended 9 May 2003.

763

32. The Prosecution submits that the assertions in paragraphs 19 through 21 and 27 are insufficient to justify granting bail to the Accused. For the reasons discussed above, the conditions on liberty the Accused proposes in paragraph 20 are insufficient to guarantee the Accused's presence at trial or that he would not contact or attempt to interfere with witnesses. The Prosecution further relies on and incorporates by reference the arguments made above in paragraphs 14, 15 and 20 of this response.

33. As for the assertions in paragraphs 22 and 29, the Prosecution submits that the length of pre-trial detention would be a factor for a Court to consider, if satisfied the two prong test has been met. *See Ademi, supra*, paragraph 26. However, the length of time this Accused has been in custody does not constitute a violation of his rights under Article 17.4.c.

34. Furthermore, the Prosecution submits there is no specific number of days of detention after which the Accused's right to trial without undue delay is automatically violated. Rather, several factors must be considered. The factors include: the nature and character of international tribunals, including the complexity of the cases involving charges such as those before this Court and the limited resources available to the Court. *See Brdanin, supra*, Decision on Motion By Radoslav Brdanin For Provisional Release, paragraphs 24 – 28.

35. The unfounded assertions in paragraph 30 do not justify releasing the Accused on bail. He has made no showing that the Registry has failed to work with Defence Counsel so as to ensure appropriate access to counsel.

36. The other assertions in the Accused's affidavit are unsupported and unworthy belief given the Accused's misleading and false statements in paragraphs 9 and 11.

B. VIOLATION OF PRACTICE DIRECTIVE FOR FILING DOCUMENTS

37. The Prosecution would have appreciated it if the Defence had complied with the spacing and page requirements for written motions as provided for under the Special Court's Directive for Filing Documents. Such compliance would have enhanced the legibility of the Defence Motion which would have in turn facilitated the reading of the document.

IV. CONCLUSION

38. The Accused has failed to provide sufficient proof to satisfy the two prong test of Rule 65 or to satisfy the Court that it should exercise its discretion in his favour. For all the reasons discussed above, the bail application should be denied.

Done in Freetown on this 5th day of June 2000

For the Prosecution,

Luc Côté
Chief of Prosecution

Nicholas Browne-Marke
Associate Trial Counsel

765

ATTACHMENTS

ATTACHMENTS

766

A. Prosecution Response to Defence Motion for Leave to Issue Writ of Habeas Corpus Ad Subjiciendum and for an Order for the Writ of Habeas Corpus ad Subjiciendum

B. Declaration of Morrie Lengor, former Investigator, Office of the Prosecutor

C. Declaration of Keith Biddle, former Inspector-General, Sierra Leone Police

D. Declaration of Brima Acha Kamara, Inspector-General, Sierra Leone Police

ATTACHMENT A

767

Prosecution Response to Defence Motion for Leave to Issue Writ of Habeas Corpus Ad Subjiciendum and for an Order for the Writ of Habeas Corpus ad Subjiciendum

768

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

Before: Judge Bankole Thompson
Designated Judge

Registrar: Mr. Robin Vincent

Date filed: 5 June 2003

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

also known as (aka) TAMBA ALEX BRIMA aka GULLIT

CASE NO. SCSL – 2003 – 06 – PT

PROSECUTION RESPONSE TO DEFENCE MOTION FOR LEAVE TO ISSUE WRIT OF HABEAS CORPUS AD SUBJICIENDUM AND FOR AN ORDER FOR THE WRIT OF HABEAS CORPUS AD SUBJICIENDUM

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions
Mr. James Johnson, Senior Trial Counsel
Mr. Abdul Tejan-Cole, Appellate Counsel

Defence Counsel:

Mr. Terrence Michael Terry

769

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

also known as (aka) TAMBA ALEX BRIMA aka GULLIT

CASE NO. SCSL – 2003 – 06 – PT

PROSECUTION RESPONSE TO DEFENCE MOTION FOR LEAVE TO ISSUE WRIT OF HABEAS CORPUS AD SUBJICIENDUM AND FOR AN ORDER FOR THE WRIT OF HABEAS CORPUS AD SUBJICIENDUM

INTRODUCTION

The Prosecution files this response to the "Defence Motion for Leave to Issue a Writ of Habeas Corpus, ad Subjiciendum as well as for the Order of the Writ of Habeas Corpus ad Subjiciendum releasing the Applicant herein from his present unlawful detention pursuant to Rule 54 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone and under the Habeas Corpus Acts of 1640 and 1816" (the "Defence Motion"), filed on behalf of the Accused on 28 May 2003 (RP 624-741).

For the reasons given below, the Prosecution submits that the Defence Motion should be rejected on the ground that neither the Statute nor the Rules of Procedure and Evidence (the "Rules") of the Special Court make provision for "a writ of habeas corpus", and that a "a writ of habeas corpus" is unknown in the procedures of the Special Court. Alternatively, for the further reasons given below, if the Court were to decide that the

Defence Motion should be dealt with as a motion under Rule 72 or Rule 73 challenging the lawfulness of the Accused's detention, the Prosecution submits that the Defence Motion should be rejected on its merits. 770

BACKGROUND

1. On 7 March, 2003 the designated Judge approved the Indictment against the Accused herein pursuant to Rule 47(H) of the Rules, and at the request of the Prosecutor, issued a warrant for the arrest of the Accused and ordered the transfer of the Accused and the detention of the Accused in the Special Court Detention Facility.
2. On 15 March 2003 the Accused made his initial appearance before the designated Judge, who ordered his detention on remand until further order of the Court.
3. The Defence Motion now seeks various forms of relief from the Special Court, to wit:
    (1) leave to issue a Writ of Habeas Corpus Ad Subjiciendum;
    (2) an Order for a Writ of Habeas Corpus Ad Subjiciendum;
    (3) an Order for the Release of the Accused; and
    (4) an Order setting aside or vacating the Order dated 7 March 2003 granting the Prosecution request for a Warrant to be issued for the Arrest of the Accused and the Order Approving the Indictment.

THE DEFENCE MOTION SHOULD BE REJECTED AS SEEKING A REMEDY WHICH DOES NOT EXIST IN THE PROCEDURE OF THE SPECIAL COURT

4. The Defence Motion relies on certain provisions of Sierra Leone national law, namely the Habeas Corpus Acts of 1640 and 1816, sections 17 and 170 of the 1991 Constitution of Sierra Leone, and section 74 of the Courts Act 1965 of Sierra Leone. However, these provisions are not applicable to the Special Court.

The Special Court does not form part of the judiciary of Sierra Leone nor is it a Sierra Leonean Court.[1] The Special Court is not bound by any national law.[2]

5. Section 10 of the Special Court Agreement, 2002 (Ratification) Act 2002 states that "(T)he Special Court shall exercise the jurisdiction and powers conferred upon it by the Agreement...." and section 11(2) provides that "(T)he Special Court shall not form part of the Judiciary of Sierra Leone." Article 1.2 of the Agreement between the United Nations and the Government of Sierra Leone states that "(T)he Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone." The jurisdiction of the Special Court, unlike the Superior Court of Judicature of Sierra Leone whose jurisdiction is inclusive and unlimited, is circumscribed by the provisions of Article 1 of the Statute of the Court. It follows that the Special Court cannot exercise the jurisdiction conferred on the Courts of Sierra Leone by Sections 17(3), 125 and 134 of the Constitution of Sierra Leone 1991; nor are the provisions of section 74 of the Courts Act 1965 or section 170(1) of the Constitution of Sierra Leone 1991 applicable to proceedings before the Special Court.
6. The Special Court has its own Statute and Rules and Procedure of Evidence which apply to its proceedings. The Prosecution submits that the Statute and Rules of Procedure and Evidence (the "Rules") of the Special Court do not make provision for a "writ of habeas corpus".
7. The Prosecution fully accepts that in the legal system of the Special Court, a detained individual has the right to have recourse to an independent judicial officer for review of the detaining authority's acts, and that this right allows a detainee to have the legality of his or her detention reviewed by the judiciary.[3] This is a fundamental right and is enshrined in international human rights norms.[4]
8. However, the procedural mechanism in the legal system of the Special Court by which a detained person can challenge the legality of his or her detention is not a

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1 See Article 8 of the Statute and Section 11(2) of the Special Court (Ratification) Act.

2 See *the Prosecutor v Kanyabashi, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings*, Case No. ICTR-96-15-I, Trial Chamber, 23 May 2000.

3 See *Prosecutor v. Barayagwiza, Decision*, Case No. ICTR-97-19-AR72, Appeals Chamber, 3 November 1999, para. 88.

4 *Ibid.*

"writ of habeas corpus". As a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has observed, a *writ of habeas corpus* is one of the old forms of prerogative writ available in certain common law countries, under which documents were issued in the name of the Sovereign by which the named defendant was ordered to carry out a particular action and which, if the action was not carried out, led to proceedings in a court of generally civil (not criminal) jurisdiction, unless otherwise provided by statute. That Trial Chamber held that the ICTY has no power to issue writs in the name of any Sovereign or other head of state, and is not a court of civil jurisdiction which can hear the proceedings commenced by such a writ. It found that while the ICTY has both the power and the procedure to resolve a challenge to the lawfulness of a detainee's detention, the appropriate procedure for asserting that right in the legal system of the ICTY is by way of motion – pursuant to Rule 72 of the Rules of Procedure and Evidence ("Rules") if the application amounts to a challenge to jurisdiction, or pursuant to Rule 73 if it does not. In that case, the Trial Chamber treated a Defence request for the issue of a *writ of habeas corpus* as a wrongly entitled motion by the Accused under Rule 73 seeking to challenge the lawfulness of his detention.[5]

9. The Prosecution submits that this reasoning is equally applicable to the Rules of the Special Court for Sierra Leone, the wording of which is in material respects identical to that of the Rules of the International Criminal Tribunal for Rwanda ("ICTR") and the ICTY. While the *right* of a detainee to have the legality of his or her detention reviewed by the judiciary is universally applicable, the technical procedure of "*habeas corpus*", which exists in certain legal systems but not others, is not the procedure for giving effect to this right in the legal system of the Special Court. In the legal system of the Special Court, this right can be given effect by Rule 72 and Rule 73 of the Rules. The Prosecution submits that it is not desirable for technical procedures from national legal systems to be incorporated

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[5] *Prosecutor v. Brdanin, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radovan Brdanin*, Case No. IT-99-36-PT, Trial Chamber, 8 December 1999, paras. 2-7.

into the legal system of the Special Court, which should apply the provisions of its own Statute and Rules.

10. Accordingly, the Prosecution submits that the Defence Motion should be rejected on the ground that neither the Statute nor the Rules make provision for "a writ of habeas corpus", and that a "a writ of habeas corpus" is unknown in the procedures of the Special Court.

11. Alternatively, if the Court were to decide that the Defence Motion should be dealt with as a motion under Rule 72 or Rule 73 challenging the lawfulness of the Accused's detention, the Prosecution submits that the Defence Motion should be rejected on its merits, for the reasons given below.

THE DEFENCE MOTION SHOULD BE REJECTED ON ITS MERITS

12. The arguments advanced in the Defence Motion are not clearly articulated. The Prosecution submits that the burden is on a party seeking a procedural remedy from the Court to establish its entitlement to that right.[6] The burden is thus on the Accused to establish the factual and legal criteria upon which he claims that his detention is unlawful. Where a party seeks a remedy from the Court, but does not clearly articulate the reasons on which the request is based, the request should for that reason alone be rejected.

13. The Defence Motion essentially advances two main arguments (or two "planks" as they are referred to in the Defence Motion). These are (1) that the Prosecution did not comply with the conditions precedent as envisaged by Rule 47 when submitting the Indictment for confirmation; and (2) that the Indictment did not "on its merits satisfy the litmus test laid down under ... Rule 47", and that for this reason the designated Judge lacked jurisdiction or acted in excess of jurisdiction in confirming the Indictment. The Defence Motion also appears to advance additional arguments that (3) the Indictment is flawed *ex facie* because it "erroneously ... disclosed that the applicant herein joined the Sierra Leone (SLA)

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[6] See *Prosecutor v. Tadic, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence*, Case No. IT-94-1-A, Appeals Chamber, 15 October 1998, paras. 52, 53.

in 1985 and rose to the rank of Staff Sergeant"; (4) that the arrest warrant of 7 March 2003 did not on its true reading order the arrest of the Accused; (5) that the arrest warrant of 7 March 2003 was not served on the Accused; and (6) that in consequence the rights of the Accused have been grossly violated.

14. As to argument (1) referred to in paragraph 13 above (the argument that the Prosecution did not comply with the conditions precedent as envisaged by Rule 47), the Prosecution submits that the Defence Motion in no way establishes how the requirements of that Rule were not met. Rule 47(B) provides that:

> "The Prosecutor, if satisfied in the course of an investigation that a suspect has committed a crime or crimes within the jurisdiction of the Special Court, shall prepare and submit to the Registrar an indictment for approval by the aforementioned Judge."

15. Whether the Accused did or did not commit the crimes with which he is charged is a matter to be determined by the Trial Chamber following the trial—that is not the issue here. At the pre-trial stage, the Trial Chamber will not determine contentious issues requiring decisions on the merits of the evidence at trial,[7] and at the pre-trial stage, the Defence cannot allege facts to contradict the allegations in the indictment—these are matters for evidence at trial, and should not be raised at the preliminary motions stage.[8] At this stage of the proceedings, the only question is whether the Prosecution was *satisfied* at the time of preparing and

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[7] See *Prosecutor v. Kunarac, Decision on Defence Preliminary Motion on the Form of the Amended Indictment*, Case No. IT-95-23-PT, Trial Chamber II, 21 October 1998; *Prosecutor v. Bagambiki et al., Decision on the Defence Motion on Defects in the Form of the Indictment*, Case No. ICTR-97-36-(I), Trial Chamber II, 24 September 1998, para. 5; *Prosecutor v. Krstic, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Counts 7-8*, Case No. IT-98-33-PT, Trial Chamber I, 28 January 2000, pp. 3-4; *Prosecutor v. Naletilic and Martinovic, Decision on Defendant Vinko Martinovic's Objection to the Indictment*, Case No. IT-98-34-PT, Trial Chamber I, 15 February 2000, paras. 5-8; *Prosecutor v. Delalic et al. (Celebici), Decision on Application for Leave to Appeal by Hazim Delic (Defects in the Form of the Indictment)*, Case No. IT-96-21-AR72.5, Bench of the Appeals Chamber, 6 December 1996, para. 38; *Prosecutor v. Delalic et al. (Celebici), Decision on Motion by the Accused Esad Landzo Based on Defects in the Form of the Indictment*, Case No. IT-96-21-T, Trial Chamber, 15 November 1996, paras. 9- 11; *Prosecutor v. Delalic et al. (Celebici), Decision on Motion by the Accused Zejnil Delalic Based on Defects in the Form of the Indictment*, Case No. IT-96-21-T, Trial Chamber, 2 October 1996, paras. 7-8.

[8] See *Prosecutor v. Nyiramashuko and Ntahobali, Decision on the Preliminary Motion by Defence Counsel on Defects in the Form of Indictment*, Case No. ICTR-97-21-I, Trial Chamber I, 4 September 1998, paras. 19-20.

submitting the Indictment that the Accused has committed a crime or crimes within the jurisdiction of the Special Court.

16. The Defence Motion does not show that this was not the case, and this argument must accordingly be rejected.

17. The Defence Motion goes even further, by suggesting that the Prosecution acted in bad faith in submitting the indictment, and by alleging "prosecution lawlessness". No basis whatever is advanced for these allegations, and in making these allegations, the Defence Motion is frivolous. In this respect, the Prosecution draws the Court's attention to Rule 46(C).

18. As to argument (2) referred to in paragraph 13 above (the argument that the Indictment did not "on its merits satisfy the litmus test laid down under ... Rule 47"), the Prosecution submits that the Defence Motion similarly in no way establishes how the requirements of that Rule were not met. Rule 47(E) provides that:

> "The designated Judge shall review the Indictment and accompanying material to determine whether the indictment should be approved. The Judge shall approve the Indictment if he is satisfied that:
>
> (i) the indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and
>
> (ii) that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularized in the indictment."

19. In response to this argument, paragraphs 15-16 above apply *mutatis mutandis*. The issue at this stage is not whether the indictment actually charges the suspect with a crime or crimes within the jurisdiction of the Special Court (which may be an issue to be determined at the preliminary motions stage under Rule 72(B)(i), or to be determined in the final judgement of the Trial Chamber). Nor is the issue at this stage whether the allegations in the Indictment are proven, this being a matter pertaining to the merits of the case which is to be determined at trial. There is no

provision in the Rules which permits a Trial Chamber or designated Judge at the pre-trial stage to review the actual decision made by the confirming Judge, by way of appeal or in any other way.[9] The only issue at this stage is whether the designated Judge was *satisfied* of the matters referred to in Rule 47(E). The Defence Motion in no way establishes that the designated Judge was *not* so satisfied.

20. As to argument (3) referred to in paragraph 13 above (the argument that the Indictment is flawed *ex facie* because it "erroneously ... disclosed that the applicant herein joined the Sierra Leone (SLA) in 1985 and rose to the rank of Staff Sergeant"), the Prosecution submits that the question whether or not a fact pleaded in the Indictment is correct is a matter pertaining to the merits of the case, which can only be determined by the Trial Chamber after hearing all of the evidence in the case. Again, paragraphs 15-16 and 19 above apply *mutatis mutandis* to this Defence argument. The Indictment in this case on its face meets the requirements of the Rules (in particular, Rule 47(C)). The Defence Motion in no way establishes any *ex facie* invalidity. The Prosecution will also rely on the transcripts of the proceedings at the initial hearing exhibited to the Accused's affidavit as "TAB3" and "TAB4" respectively in which he is recorded as having acknowledged that he is Tamba Alex Brima who is the very person charged in the Indictment confirmed by the designated Judge. The Prosecution therefore submits that the averments contained in and the attachments exhibited to the

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[9] See *Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagasora and 28 Others*, Case No. ICTR 98-37-A, Appeals Chamber, 8 June 1998; *Prosecutor v. Brdanin, Decision on Motion to Dismiss Indictment*, Case No. IT-99-36-PT, Trial Chamber II, 5 October 1999; *Prosecutor v. Brdanin and Talic, Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72*, Case No. IT-99-36-AR72, Appeals Chamber, 16 November 1999; *Prosecutor v. Brdanin, Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brdanin*, Case No. IT-99-36-PT, Trial Chamber II., 8 December 1999, paras. 12-15; *Prosecutor v. Talic, Decision on Motion for Release*, Case No. IT-99-36-PT, Pre-Trial Judge, 10 December 1999, at esp. para. 17; *Prosecutor v. Nahimana, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment*, Case No. ICTR-96-11-T, Trial Chamber, 24 November 1997, esp. para. 19; *Prosecutor v. Bagambiki et al., Decision on the Defence Motion on Defects in the Form of the Indictment*, Case No. ICTR-97-36-I, Trial Chamber, 24 September 1998, esp. para. 5; *Prosecutor v. Ntagerura, Decision on Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment*, Case No. ICTR-96-10-I, Trial Chamber, 28 November 1997, esp. para. 11.

affidavit of Ayo Max-Dixon filed in support of the Defence Motion are irrelevant to the determination of the Defence Motion.

21. As to argument (4) referred to in paragraph 13 above (the argument that the arrest warrant of 7 March 2003 did not on its true reading order the arrest of the Accused), the Prosecution submits that this argument is unfounded. The relevant provisions of the Rules (in particular, Rule 47(H) and Rule 55) prescribe no specific wording of a warrant of arrest. The warrant of arrest in this case complied with the requirements of those Rules.

22. The warrant of 7 March 2003 is clearly and unambiguously entitled "Warrant of Arrest and Order for Transfer and Detention". It cannot plausibly be suggested that a document so entitled does not order the arrest of the person to whom it relates. The language contained in the warrant confirms this, ordering the Registrar, *inter alia,* "(A) to address this Warrant of Arrest ... to the national authorities of Sierra Leone in accordance with Rule 55"; "(C) to cause to be served on the Accused, at the time of his arrest ... a certified true copy of the Warrant of Arrest"; and "(D) to remand the Accused, into the custody of the Special Court Detention Facility ...". The Prosecution submits further, that the use of the definite article "this" and not "the" in Order (A) above is sufficient proof that the designated Judge intended by that Order to issue a warrant for the arrest of the Accused. Thus the cumulative effect of the language used in the Warrant for Arrest is to effectuate the arrest of the Accused.

23. As to argument (5) referred to in paragraph 13 above (the argument that the arrest warrant of 7 March 2003 was not served on the Accused), the Prosecution submits that this is not correct. The Prosecution relies on paragraph 8 of the annexed Declaration dated 31 May 2003 of Morie Lengor, an investigator in the Office of the Prosecutor. The Prosecution submits that in this case there was full compliance with the requirements of Rule 52 (A) and (B) and Rule 55 (C) of the Rules.

24. As to argument (6) referred to in paragraph 13 above (the argument that the rights of the Accused have been grossly violated), the Prosecution submits that it follows from the submissions above that no violation of the rights of the Accused

have been established by the Defence Motion. The rights of the Accused are fully guaranteed by the Statute and Rules of the Special Court, in particular, Article 17 of the Statute. The Defence Motion does not suggest that Article 17 of the Statute has not been complied with.

778

CONCLUSION

25. The Court should therefore dismiss the Defence Motion.

Freetown, 5 June 2003.

For the Prosecution,

Luc Côté
Chief of Prosecutions

James Johnson
Senior Trial Counsel

Abdul Tejan-Cole
Appellate Counsel

ATTACHMENT B

779

Declaration of Morie Lengor, former Investigator, Office of the Prosecutor

78D

INVESTIGATOR'S DECLARATION

31 May 2003

Accused Alex Tamba Brima aka Tamba Alex Brima aka Gullit

I, MORIE LENGOR, Investigator in the Office of the Prosecutor, Special Court for Sierra Leone affirmatively state as follows:

1. I work as an Investigator in the Office of the Prosecutor and I have due authority to make this statement.

2. I am also a professionally trained Policeman of the rank of Assistant Commissioner in the Sierra Leone Police Force where I have been working as a Policeman since 1980.

3. I have considerable experience in detecting and investigating crimes, having worked in the Criminal Investigations Department of the Sierra Leone Police Force for about 15 years during my career as a policeman.

4. Since November 2002, I have been working in the Office of the Prosecutor, Special Court for Sierra Leone, where my duties include investigating crimes against international humanitarian Law and Sierra Leonean Law committed within the territory of Sierra Leone from 30th November 1996, during the period of armed conflict in Sierra Leone.

5. The mandate of the investigations, as set forth in the Statute of the Special Court for Sierra Leone, is to investigate and prosecute those who bear the greatest responsibility for crimes within the jurisdiction of the Special Court.

6. On 10 March 2003 I was present for the transfer of Accused from the custody of the Sierra Leone Police to the Special Court Detention Unit at Bonthe Island. Prior to 10 March 2003, the Accused had been arrested and detained at the Jui Police Station in Hastings, by the Sierra Leone Police for charges under the jurisdiction of Sierra Leone Law. At about 1400 hours at the Bonthe detention facility Mr Oliver Somasa, a senior Assistant Commissioner of Police, told the accused in my presence that he was not

obliged to say anything unless he wished to do so but that whatever he said would be taken down in writing and might be given in evidence.

7. After the accused was cautioned by Mr Somasa I introduced myself and informed him of his transfer and detention for crimes within the jurisdiction of the Special Court for Sierra Leone. I read to him his rights under Article 17 and Rules 42 and 43 and the Indictment in English, and on his request, explained in Krio the areas he said he did not understand.

8. I also served on the accused by handing over to him copies of the following documents:
   (a) Warrant of Arrest and Order for Transfer and Detention under Rule 47 of the Rules Of Procedure and Evidence of the Special Court for Sierra Leone, signed by Judge Thompson on 7 March 2003, for the transfer of Alex Tamba Brima;
   (b) A copy of the Rights of the Accused Article 17 of the SCSL Statute, Rules 42 and 43 of the SCSL Rules of Procedure and Evidence);
   (c) A copy of the Statute of the Special Court;
   (d) A copy of the approved indictment and ;
   (e) An acknowledgement of Receipt by an Accused.

9. I did these things in the presence of Mr Oliver Somasa and Inspector Brima Michael Conteh, who is attached to Bonthe Prisons Department. The accused accepted all the above mentioned documents, but refused to sign the Acknowledgement of Receipt. I recorded the service on the spot at about 1545 hours on another copy of the Acknowledgment of Receipt stating therein the accused's refusal to sign the acknowledgement Receipt. Both Mr Somasa and Inspector Conteh also signed the Acknowledgement. I herewith attach a copy of the Acknowledgement of Receipt bearing the signatures of Mr.Somasa, Inspector Conteh and myself as attachment to this declaration.

10. I was present in court on Monday the 17th of March 2003 when the accused appeared and the Judge asked him whether he had been served with a copy of the indictment and the accused answered in the affirmative.

782

11. My attention has been drawn to a Defence Motion for Bail or for Provisional Release, numbered SCSL-2003-06-PT-5D and the Affidavit of the accused in support thereof.

12. The assertion by the accused in paragraphs 10 and 11 of his Affidavit is not true; both the Warrant and Order for Transfer and the Indictment were part of the documents I served the accused on the 10th of March 2003, over a month before the stated 11th of April 2003 visit by Junior Counsel in the Chambers of the accused's Solicitor.

13. The Sierra Leone police are emerging from a crisis and are greatly constrained in human and other resources, and as of today recruitments are on going to raise the police to its pre-war strength to be able to effectively police the whole country including the very porous and volatile borders. The United Nations military drawdown programme is likely to exacerbate the problem.

14. One example of this current inability to effectively police the country and its borders is the earlier escape from police arrest of Johnny Paul Koroma. Despite diligent efforts by the Sierra Leone Police, he has evaded capture. This is also further evidence of the inability of the Sierra Leone Police, at this state of its rebuilding, to capture those who wish to evade the police.

15. I also have knowledge that, since the indictment and issuance of a Warrant of Arrest for Mr Koroma, he has not submitted himself to the Court, notwithstanding both national and international efforts to make him amendable to the law. The accused, whom I have reason to believe is a close confidant and colleague of Mr Koroma, could seek refuge with the fugitive Mr Koroma.

16. During our investigations potential witnesses personally expressed to me fear of reprisals not only from the accused persons but also from their relatives, friends and associates.

17. These fears expressed are genuine and, in my opinion, are well founded, especially considering that many of the potential witnesses live in remote areas without any police presence or other semblance of security, such as Kono where the accused was born and said he had a home in paragraph 21 of his affidavit.

18. In my view there is likelihood that, if released on bail, the accused would tamper or interfere with potential witnesses and other evidence, especially now that he knows the specifics of his indictment.

19. In view of the above described situation, it is unlikely that the police would be able to provide effective surveillance on the accused, which I believe would be necessary to ensure his presence at trial and to ensure that he would not tamper or interfere with witnesses and evidence.

20. Furthermore, during our investigations many victims countrywide of the crimes for which the accused is indicted openly expressed to me their desire to seek revenge against the perpetrators of these crimes and now that the accused has been indicted as one of those who bear the greatest responsibility for those crimes, I have reason to believe that he would be in danger if he is let out on bail.

21. For all the reasons discussed above, I believe that it is essential to ensure the accused's presence for trial, for the safety and security of witnesses, and for his own personal safety, that the accused not be released on bail.

I, MORIE LENGOR, affirm that the information contained herein is true to the best of my knowledge and belief. I understand that wilfully and knowingly making false statements in this declaration could result in proceedings before the Special Court for giving false testimony. I have not wilfully and knowingly made any false statements in this declaration.

Morie Lengor
Senior Investigator, Task Force 1
Office of the Prosecutor
Special Court for Sierra Leone

ATTACHMENT C

Declaration of Keith Biddle, former Inspector-General, Sierra Leone Police

DECLARATION

I, Keith Biddle, Inspector-General of the Sierra Leone Police of Spur Road, Freetown in Western Area of the Republic of Sierra Leone declare:

1. That in my position as Inspector General of the Sierra Leone Police and member of the National Security Council of Sierra Leone, I am required to conduct ongoing assessments of the security situation in Sierra Leone and in surrounding countries. In my assessment, security conditions in Sierra Leone, despite the presence of UNAMSIL, remain volatile, increasing the risk of flight and of finding safe refuge away from the authorities in Sierra Leone and the Special Court.

2. At the time of Mr. Brima's arrest by the Sierra Leone Police in January at the residence of Johnny Paul Koroma, he actively resisted such arrest. Johnny Paul Koroma escaped arrest at that time and has remained at large despite relentless efforts by the Sierra Leone Police to find and apprehend him. This demonstrates that, given the current situation in Sierra Leone, anyone can easily evade capture. Johnny Paul Koroma's believed presence in Liberia further demonstrates the porous nature of the Sierra Leone's borders and the ability to pass in to or out of Sierra Leone undetected, with or without proper documentation.

3. In Mr. Brima's affidavit in support of his application for bail dated 2 May 2003, at paragraph 20, he offers several possible measures involving the police to ensure his presence at trial. I do not believe that these measures would be effective nor do I have the manpower and capability to enforce such measures. Specifically, I do not have the ability to conduct continuing surveillance and I am not in a position to enforce or support the "house arrest" that he is proposing.

4. The armed factions with whom Mr. Brima is associated continue to have supporters and sympathisers within Sierra Leone. Mr. Brima could easily seek refuge among them, particularly in more remote areas where an effective police presence is not yet fully established. He alone or through these factions could obstruct justice including harming, harassing, or intimidating witnesses. Considering the current capabilities of the Sierra Leone Police and the situation in the country, in my view our police system does not have the capacity to guarantee the safety of witnesses or prevent them from injury or intimidation. I believe his release could easily aggravate the already volatile situation that I discussed above.

5. In my view, speaking as the Inspector-General, the police would be unable to provide adequate supervision of Mr. Brima, ensure his presence at trial and to prevent him or others on his behalf from obstructing justice. I further believe that his release would not be in the public interest and would have an unsettling effect on the public at large. I strongly recommend against Mr. Brima's release pending trial.

6. The contents of this declaration are true to the best of my knowledge, information, and belief.

Done in Freetown, Sierra Leone
On 15 May 2003

Keith Biddle
Inspector-General of the Sierra Leone Police

787

ATTACHMENT D

Declaration of Brima Acha Kamara, Inspector-General, Sierra Leone Police

788

DECLARATION

I, Brima Acha Kamara, Inspector-General of the Sierra Leone Police declare:

1. I assumed the position and duties of Inspector-General of the Sierra Leone Police on 1 June 2003. I have reviewed the affidavit in support of the Defence Motion for Bail or for Provisional Release by Alex Tamba Brima, also known as Tamba Alex Brima, also known as Gullit. I have also reviewed the declaration signed by Keith Biddle on 15 May 2003, my predecessor in the position of Inspector General. Mr. Biddle's declaration was completed in response to a prior, but similar application for bail by Mr. Brima.

2. The situation in Sierra Leone remains today as it did on 15 May 2003 when then Inspector-General Biddle completed his declaration. I fully concur with the contents of his declaration and adopt his declaration as my own.

3. I do not believe that the measures offered in Mr. Brima's affidavit would be effective nor do I have the manpower and capability to enforce such measures. I further believe that his release would not be in the public interest and would have an unsettling effect on the public at large. As the new Inspector-General of the Sierra Leone Police, I strongly recommend against Mr. Brima's release pending trial.

4. Furthermore, the President of Sierra Leone, His Excellency Alhaji Dr. Ahmad Tejan Kabbah, has authorized me to act on behalf of the Government of Sierra Leone in matters pertaining to the Special Court for Sierra Leone that affect the Sierra Leone Police. A Motion for Bail or for Provisional Release clearly falls within the authorization given to me by the President. Therefore, acting and speaking on behalf of the Government of Sierra Leone, I strongly advise against the release of Mr. Brima pending trial.

5. The contents of this declaration are true to the best of my knowledge, information, and belief.

Done in Freetown, Sierra Leone
On 5/06 2003

Brima Acha Kamara
Inspector-General of the Sierra Leone Police

PROSECUTION INDEX OF AUTHORITIES

PROSECUTION INDEX OF AUTHORITIES

790

1. Special Court Rules of Procedure and Evidence, Rule 65
2. ICTY Rules of Procedure and Evidence, Rule 65
3. Prosecutor v. Kvocka et al, IT-98-30, Decision on Motion for Provisional Release of Miroslav Kvocka, 2 February 2000
4. Prosecutor v. Brdanin, IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000
5. Prosecutor v. Brdanin, IT-99-36-PT, Decision on Application for Leave to Appeal, 7 September 2000
6. Prosecutor v. Brdanin, IT-99-36-PT, Decision on Motion by Momir Talic for Provisional Release, 28 March 2001
7. Prosecutor v. Ademi, IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002
8. Special Court Rules of Detention, Rules 13, 16, 22

PROSECUTION INDEX OF AUTHORITIES

791

1. Special Court Rules of Procedure and Evidence, Rule 65

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • NEW ENGLAND • FREETOWN, SIERRA LEONE

RULES OF PROCEDURE AND EVIDENCE

TABLE OF CONTENTS

Rule 65: Bail

(A) Once detained, an accused shall not be granted bail except upon an order of a Judge or Trial Chamber.

(B) Bail may be ordered by a Judge or a Trial Chamber after hearing the State to which the accused seeks to be released 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.

(C) An accused may only make one application for bail to the Judge or Trial Chamber unless there has been a material change in circumstances.

(D) The Judge or Trial Chamber may impose such conditions upon the granting of bail to the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused at trial and the protection of others.

(E) Any decision rendered under this Rule shall be subject to appeal in cases where leave is granted by a Single Judge of the Appeals Chamber designated under Rule 28, upon good cause being shown. Applications for leave to appeal shall be filed within seven days of the impugned decision.

(F) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been granted bail or is for any other reason at large. The provisions of Section 2 of Part Five shall apply.

(G) The Prosecutor may appeal a decision to grant bail. In the event of such an appeal, the accused shall remain in custody until the appeal is hear, and determined.

(H) Appeals from bail decisions shall be heard by a bench of at least three Appeals Chamber Judges.

Rule 65 *bis*: Status Conferences

A status conference may be convened by a Trial Chamber or a Judge thereof as necessary. The status conference shall:

(i) organize exchanges between the parties so as to ensure expeditious trial proceedings;

(ii) review the status of his case and to allow the accused the opportunity to raise issues in relation thereto.

Section 3: Production of Evidence

Rule 66: Disclosure of materials by the Prosecutor

PROSECUTION INDEX OF AUTHORITIES

2. ICTY Rules of Procedure and Evidence, Rule 65

795

RULES OF PROCEDURE AND EVIDENCE

(ADOPTED 11 FEBRUARY 1994)
(AS AMENDED 5 MAY 1994)
(AS FURTHER AMENDED 4 OCTOBER 1994)
(AS AMENDED 30 JANUARY 1995)
(AS AMENDED 3 MAY 1995)
(AS FURTHER AMENDED 15 JUNE 1995)
(AS AMENDED 6 OCTOBER 1995)
(AS FURTHER AMENDED 18 JANUARY 1996)
(AS AMENDED 23 APRIL 1996)
(AS AMENDED 25 JUNE AND 5 JULY 1996)
(AS AMENDED 3 DECEMBER 1996)
(AS FURTHER AMENDED 25 JULY 1997)
(AS REVISED 20 OCTOBER AND 12 NOVEMBER 1997)
(AS AMENDED 9 & 10 JULY 1998)
(AS AMENDED 4 DECEMBER 1998)
(AS AMENDED 23 FEBRUARY 1999)
(AS AMENDED 2 JULY 1999)
(AS AMENDED 17 NOVEMBER 1999)
(AS AMENDED 14 JULY 2000)
(AS AMENDED 1 AND 13 DECEMBER 2000)
(AS AMENDED 12 APRIL 2001)
(AS AMENDED 12 JULY 2001)
(AS AMENDED 13 DECEMBER 2001)
(INCORPORATING IT/32/REV. 22/CORR.1)
(AS AMENDED 23 APRIL 2002)
(AS AMENDED 11 AND 12 JULY 2002)
(AS AMENDED 10 OCTOBER 2002)
(AS AMENDED 12 DECEMBER 2002)

(IT/32/REV.26)

CONTENTS

Rule 65
Provisional Release

796

(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.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

(D) Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal in cases where leave is granted by a bench of three Judges of the Appeals Chamber, upon good cause being shown. Subject to paragraph (F) below, applications for leave to appeal shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, the application shall be filed within seven days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

(E) The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.

(F) Where the Trial Chamber grants a stay of its decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision.

(G) Where the Trial Chamber orders a stay of its decision to release the accused pending an appeal by the Prosecutor, the accused shall not be released until either:

(i) the time-limit for the filing of an application for leave to appeal by the Prosecutor has expired, and no such application is filed;

(ii) a bench of three Judges of the Appeals Chamber rejects the application for leave to appeal;

(iii) the Appeals Chamber dismisses the appeal; or

(iv) a bench of three Judges of the Appeals Chamber or the Appeals Chamber otherwise orders.

(H) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty. The provisions of Section 2 of Part Five shall apply *mutatis mutandis*.

(I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that:

(i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;

(ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and

(iii) special circumstances exist warranting such release.

797

The provisions of paragraphs (C) and (H) shall apply *mutatis mutandis*.

Rule 65 *bis*
Status Conferences

(A) A Trial Chamber or a permanent Trial Chamber Judge shall convene a status conference within one hundred and twenty days of the initial appearance of the accused and thereafter within one hundred and twenty days after the last status conference:

(i) to organize exchanges between the parties so as to ensure expeditious preparation for trial;

(ii) to review the status of his or her case and to allow the accused the opportunity to raise issues in relation thereto, including the mental and physical condition of the accused.

(B) The Appeals Chamber or an Appeals Chamber Judge shall convene a status conference, within one hundred and twenty days of the filing of a notice of appeal and thereafter within one hundred and twenty days after the last status conference, to allow any person in custody pending appeal the opportunity to raise issues in relation thereto, including the mental and physical condition of that person.

(C) With the written consent of the accused, given after receiving advice from his counsel, a status conference under this Rule may be conducted

(i) in his presence, but with his counsel participating either via tele-conference or video-conference; or
(ii) in Chambers in his absence, but with his participation via tele-conference if he so wishes and/or participation of his counsel via tele-conference or video-conference.

3. Prosecutor v. Kvocka et al, IT-98-30, Decision on Motion for Provisional Release of Miroslav Kvocka, 2 February 2000

IN THE TRIAL CHAMBER

799

Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 February 2000

PROSECUTOR

v.

MIROSLAV KVOCKA
MILOJICA KOS
MLADO RADIC
ZORAN ZIGIC

DECISION ON MOTION FOR PROVISIONAL RELEASE OF MIROSLAV KVOCKA

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Michael Keegan
Mr. Kapila Waidyaratne

Counsel for the Accused:

Mr. Krstan Simic, for Miroslav Kvocka
Mr. Zarko Nikolic, for Milojica Kos
Mr. Toma Fila, for Mladjo Radic
Mr. Simo Tosic, for Zoran Zigic

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

BEING SEISED of the "Motion for a Provisional Release of Mr. Kvocka", and the "Addition of Motion for Provisional Release of Miroslav Kvocka of the 12th January, 2000", filed on behalf of the accused

800

Miroslav Kvocka ("the Accused") on 12 and 14 January 2000, respectively ("the Motion"), requesting provisional release from detention subject to certain terms and conditions as set out in the Motion,

NOTING the "Prosecution's Response to Miroslav Kvocka's 'Motion for a Provisional Release of Mr. Kvocka'", filed by the Office of the Prosecutor ("Prosecution") on 19 January 2000,

HAVING HEARD the oral arguments of the parties in open session on 21 January 2000,

NOTING the arguments of the Accused, *inter alia*, that since the Trial Chamber then seised of the case, issued its decision denying the original motion for provisional release on 20 October 1998,[1] circumstances have changed so as to warrant a fresh application,

NOTING the following particular arguments of the Accused that,

(i) the delay in bringing this case to trial raises serious concerns under Article 21, paragraph 4, of the Statute of the International Tribunal ("Statute"), the adverse consequences of which may be minimised by provisional release;

(ii) the recent amendment to Sub-rule 65 (B)[2] of the Rules of Procedure and Evidence ("Rules") has considerably liberalised the legal regime governing a grant of provisional release;

(iii) there is no evidence to suggest that Miroslav Kvocka was involved in any wrongdoing in connection with the allegations in the Second Amended Indictment,[3] and therefore, if released, he is unlikely to pose a danger to witnesses;

(iv) the guarantees provided by the Government of the Republika Srpska and the Accused will ensure that, if released, he will continue to appear for trial;

(v) the Accused's family has suffered on account of his prolonged detention, and Mrs. Kvocka's health has deteriorated significantly in her husband's absence,

NOTING the arguments of the Prosecution, *inter alia*, that

(i) the length of the Accused's pre-trial detention in this case does not violate the Statute, nor does it breach standards contained in international and regional human rights instruments;

(ii) the amendment to Sub-rule 65 (B) of the Rules, removing the requirement that an accused must demonstrate exceptional circumstances, does not establish release as the norm and detention as the exception, as an accused is still obliged to meet the remaining requirements under that provision;

(iii) the submissions of the Defence relating to the lack of evidence to substantiate the charges against the Accused are not relevant here, rather, the consideration of such matters is appropriately reserved for trial;

(iv) the guarantees of the Republika Srpska should be accorded little weight on account of that entity's failure, to date, to comply with any of its obligations to the International

801

Tribunal, and the fact that the Accused has had an opportunity to examine much of the Prosecution's evidence against him, gives rise to serious concerns that, if released, he would not appear for trial;

(v) while not insensitive to the hardship caused to the Accused's family due to his lengthy detention, the Prosecution submits that such factors are not relevant here,

NOTING also the Prosecution argument that as it has, to date, released the names of 186 witnesses to the Defence, the potential for harassment is heightened, and it is likely that Miroslav Kvocka, if released, would pose a danger to victims and witnesses,

NOTING the guarantee provided by the Government of the Republika Srpska,

HAVING CONSIDERED all of the arguments of the parties, and the material filed by the Defence in support of the Motion,

CONSIDERING that, while Sub-rule 65 (B), as amended, no longer requires an accused to demonstrate exceptional circumstances before release may be ordered, this amendment does not affect the remaining requirements under that provision,

CONSIDERING therefore that the effect of the amendment is not to establish release as the norm and detention as the exception, and that a determination as to whether release is to be granted must be made in the light of the particular circumstances of each case, and only if the Trial Chamber is satisfied that the accused "will appear for trial and, if released, will not pose a danger to any victim, witness or other person,"

CONSIDERING that the accused is charged with the gravest offences under international humanitarian law,

CONSIDERING the legitimate concerns expressed by the Prosecution regarding the likelihood that the Accused may pose a danger to victims, witnesses or other persons,

CONSIDERING that the Trial Chamber is not satisfied that the Accused, if released, will appear for trial,

CONSIDERING that the Trial Chamber now anticipates that an early date will be set for the commencement of trial in this case,

HEREBY DENIES THE APPLICATION.

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

_____
Richard May
Presiding

Dated this second day of February 2000
At The Hague
The Netherlands

[Seal of the Tribunal]

802

1. *Prosecutor v. Meakic et al.,* Case No. IT-95-4-PT, Decision Rejecting a Motion for Provisional Release, T.Ch. I, 20 Oct. 1998.
2. This amendment entered into force on 7 December 1999, pursuant to IT/161, "Amendment to the Rules of Procedure and Evidence", 30 November 1999.
3. *Prosecutor v. Kvocka et al.,* Case No. IT-98-30-PT, Second Amended Indictment, T. Ch. III, 31 May 1999.

4. Prosecutor v. Brdanin, IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000

IN TRIAL CHAMBER II

804

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
25 July 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON MOTION BY RADOSLAV BRDANIN FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Ms Joanna Korner
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 Introduction

1. Pursuant to Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rules "), the accused Radoslav Brdanin ("Brdanin") seeks provisional release pending his trial.[1] The application is opposed by the prosecution.[2] Brdanin has relied upon witnesses in support of his application, and both parties requested an oral hearing.[3] Difficulties were experienced by counsel for Brdanin in obtaining statements of the evidence to be given,[4] and – by reason of the Trial Chamber's other commitments – the request for an oral hearing further delayed the resolution of the Motion. The oral hearing took place on 20 July 2000.

2. Brdanin is charged jointly with Momir Talic with a number of crimes alleged to have been committed in the area of Bosnia and Herzegovina now known as Republika Srpska. Those crimes may be grouped as follows:

(i) genocide[5] and complicity in genocide ;[6]

(ii) persecutions,[7] extermination,[8] deportation[9] and forcible transfer (amounting to inhumane acts),[10] as crimes against humanity;

(iii) torture, as both a crime against humanity[11] and a grave breach of the Geneva Conventions;[12]

(iv) wilful killing[13] and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity,[14] as grave breaches of the Geneva Conventions; and

(v) wanton destruction of cities, towns or villages or devastation not justified by military necessity[15] and destruction or wilful damage done to institutions dedicated to religion,[16] as violations of the laws or customs of war.

Each accused is alleged to be responsible both individually and as a superior for these crimes.

3. The allegations against the two accused assert their involvement in a plan to effect the "ethnic cleansing" of the proposed new Serbian Territory in Bosnia and Herzegovina (the area now known as Republika Srpska) by removing nearly all of the Bosnian Muslim and Bosnian Croat populations from the areas claimed for that territory .[17] Between April and December 1992 , forces under the control of the Bosnian Serb authorities (comprising the army, the paramilitary, and territorial defence and police units) are said to have caused the death of hundreds of, and the forced departure of thousands from, the Bosnian Muslim and Bosnian Croat populations from those areas.[18] Brdanin is alleged to have been the President of the Crisis Staff of the Autonomous Region of Krajina ("ARK"), one of the bodies responsible for the co-ordination and execution of most of the operational phase of the plan to create the new Serbian Territory, and (as such) to have had executive authority in the ARK and to be responsible for managing the work of the Crisis Staff and the implementation and co-ordination of Crisis Staff decisions.[19] The pleaded allegations are described in more detail in a previous Decision in these proceedings.[20]

4. Brdanin was arrested on 6 July 1999. He has since unsuccessfully moved to have the indictment against him dismissed upon the basis that the Tribunal has no jurisdiction in the matter,[21] and he has unsuccessfully petitioned for a Writ of Habeas Corpus upon the basis that he was illegally restrained .[22]

2 The relevant provision

5. Rule 65(A) states that an accused may not be released except upon an order of a Chamber. Rule 65(B) provides:

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, witness or

806

other person.

3 The material put forward by the parties

6. Brdanin has filed a signed "Personal Guarantee", by which he agrees (so far as is presently relevant) to surrender his passport to the International Police Task Force in Banja Luka, to remain within the Municipalities of Banja Luka and Celinac , to report once a day to the local Banja Luka police, to receive occasional unannounced visits by the International Police Task Force to check on his whereabouts, and not to have any contact whatsoever with any prosecution witness or potential witness . He says that he understands that his failure to comply with any of these conditions "shall give the prosecution the right to request my immediate return to The Hague ".[23]

7. Brdanin has also filed a "Guaranty of the Government of the Republic of Srpska ", signed by Milorad Dodik as the "President of the Government", and by which the Government –

> [...] takes upon itself to follow all the orders of the Trial Chambre [sic] so that Mr Radoslav Brdanin would appear, in accordance with the court order, before the International Criminal Tribunal at any time.

More specifically, the Government recognises that its "guaranty and assurance" involves the –

> [...] [i]mmediate arrest of the accused if he attempts to escape or violate any of the conditions of his provisional release (as The International Criminal Tribunal informed Bosnia and Herzegovina), and inform the International Tribunal so that everything could be prepared for his return to the International Tribunal.[24]

8. Brdanin produced evidence from his wife, Mira Brdanin, by way of a notarised statement to the effect that he had been unemployed from March 1995 until February 1999. At the time of his arrest (in July 1999) Brdanin was employed at the Head Office for Restoration of the Republika Srpska. She outlines the financial difficulties she was encountering as a result of her husband's detention, and said that life for their two children (aged twentytwo and sixteen years) and herself had been " unbearably difficult". She expresses confidence that her husband would comply with any conditions imposed upon his release, that he would not in any way trouble, threaten or in any other way disturb anyone who is or who might be a prosecution witness against him, and that he would appear for his trial. The prosecution did not wish to cross-examine Mrs Brdanin upon that statement.

9. Evidence was also given by Milan Trbojevic ("Trbojevic") in support of the application . Trbojevic is presently an Advisor to the Prime Minister of the Republika Srpska , having formerly been the Minister for Justice and, before that, a judge for many years and a lawyer in Sarajevo. He has known Brdanin since 1991 when both men were members of parliament, and he says that he came to know Brdanin "quite well" over this time. In 1996, following the Dayton Peace Agreement, Brdanin and Trbojevic established a political party (called the "People's Party of Republika Srpska"), with which Trbojevic remained until late 1997 or early 1998. After that, they saw each other a few times in town at Banja Luka. [25]

10. Trbojevic describes Brdanin as an exceptional man who keeps his word and who honours his obligations. He says that he is convinced that Brdanin, if released , would not directly or indirectly harass, intimidate or otherwise interfere with any persons who are or who may be witnesses for the prosecution in the case against him. He is sure that Brdanin would appear at the Tribunal whenever

807

asked to do so and that he would comply with any reporting conditions imposed upon him.[26] Trbojevic agreed, however, that he is in no position himself to ensure that Brdanin did so. He said that he had read the indictment originally served on Brdanin (which contained but one charge, that of a crime against humanity), and it was left unclear as to whether he was unaware that Brdanin is now charged with genocide in the amended indictment.[27] The prosecution did not make any submission concerning Trbojevic's state of awareness of the charges against Brdanin.

11. Trbojevic said that, as Minister for Justice, he had played a part in establishing the policy of the Government of Republika Srpska with regard to guarantees given for persons detained by the Tribunal, that the guarantees will be strictly and absolutely enforced. This policy, he said, is explained to each detained person who seeks such a guarantee.[28]

4 The contentions of the parties, analysis and findings

(a) The recent amendment to Rule 65

12. Prior to December 1999, Rule 65(B) obliged an applicant for provisional release to establish "exceptional circumstances" in addition to the matters presently specified in the Rule. Brdanin has submitted that, as a result of the deletion of that provision , provisional release is no longer to be considered exceptional,[29] so that the presumption is that provisional release will now be the usual situation (or the norm).[30] The prosecution replies that the effect of the amendment has not been to establish provisional release as the norm and detention the exception, because the accused must still satisfy the Trial Chamber that – to use the words of Rule 65(B) – he "will appear for trial and, if released, will not pose a danger to any victim, witness or other person".[31] (For present purposes, the requirement that the host country be heard may be ignored .) The Trial Chamber agrees with the prosecution that the amendment to Rule 65 has not made provisional release the norm. The particular circumstances of each case must be considered in the light of the provisions of Rule 65 as it now stands .[32]

13. Brdanin has further submitted that the effect of the amendment to Rule 65 has been that, once the detained person has established that he will appear and will not pose such a danger, the onus passes to the prosecution to establish exceptional circumstances which require the application to be refused.[33] That submission misstates the onus. The wording of the Rule squarely places the onus at all times on the applicant to establish his entitlement to provisional release .[34]

(b) Appearance for trial

14. Brdanin relies upon the material referred to in Section 3 of this Decision as demonstrating that he will appear for trial. Reliance is also placed upon the fact that he has a wife and family in Banja Luka, and it is suggested that he would not willingly put himself in the position of losing his relationship with them by fleeing .[35]

15. The prosecution submits that the "Guaranty" of the Government of Republika Srpska should not be considered sufficient to satisfy the Trial Chamber that Brdanin, if released, would appear for trial in the light of the total failure so far of the Republika Srpska to abide by its basic obligations to comply with orders of the Tribunal for the arrest and transfer of persons.[36] Republika Srpska has in fact *transferred* some persons who have surrendered themselves, but the prosecution's point is well made in relation to the failure of Republika Srpska to *arrest* any indicted persons. The Trial Chamber accepts that, in this

808

respect, actions speak louder than words. Brdanin was a high level Government official at the time of the events which are alleged against him. The amended indictment describes him as having reached, by 1992, the positions of Minister for Construction, Traffic and Utilities and acting Vice-President in the Government of Republika Srpska.[37] Even if it be accepted that he was dismissed as a Minister in 1995, Brdanin inevitably has very valuable information which he could disclose to the Tribunal, if minded to co-operate with the prosecution for mitigation purposes.[38] That would be a substantial disincentive for Republika Srpska to enforce its guarantee to arrest, for the first time, an indicted person within its Territory.[39] The only sanction which the Tribunal possesses for the failure of Republika Srpska to comply with its "Guaranty" is to report it to the Security Council of the United Nations. Previous reports of non-compliance by Republika Srpska with its obligations to the Tribunal to arrest persons indicted by it have had no effect upon the continuing total failure of that entity to comply with those obligations.[40]

16. The prosecution has also submitted that Brdanin's own signed "Personal Guarantee " is insufficient to establish that he will appear, in the light of his obvious self-interest.[41] It says that Brdanin is charged with extremely serious crimes for which, if he is convicted, he faces a very substantial sentence of imprisonment because of his high level position in relation to those crimes.[42] In reply , Brdanin has argued that the nature of the crime charged does not amount to an exceptional circumstance which the prosecution may show as requiring the refusal of provisional release.[43] This argument misunderstands the point being made by the prosecution. 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.[44] It was to that issue (upon which the applicant bears the onus of proof) that the prosecution's submission was directed. The Trial Chamber accepts that, notwithstanding the evidence of Trbojevic, Brdanin has reason enough for not wanting to appear. Again, common experience suggests that any person in his position, even if he is innocent, is likely to take advantage of the refuge which Republika Srpska presently provides to other high-level indicted persons.

17. It is necessary to say something about one issue which commonly arises in these applications, if only for the purposes of putting it to one side in relation to the present case. Where an accused person has voluntarily surrendered to the Tribunal , and depending upon the circumstances of the particular case, considerable weight is often given to that fact in determining whether the accused will appear at his trial.[45] Conversely, and again depending upon the circumstances of the particular case, considerable weight would be given to the fact that the accused did not voluntarily surrender to the Tribunal when determining that issue. In the present case, Brdanin was arrested on a sealed indictment . There is no suggestion that he knew of its existence. He was thus given no opportunity to surrender voluntarily to the Tribunal if he had wished to do so, and he has been denied the benefit which such a surrender would have provided to him in relation to this issue. That is an unfortunate consequence of the use of sealed indictments , as it cannot be assumed one way or the other that, had he been given that opportunity , Brdanin would have taken or rejected it. It is important to emphasise, therefore , that in such a case – absent specific evidence directed to that issue – the Trial Chamber cannot take the fact that the applicant did not voluntarily surrender into account, and it has not done so in the present case.

18. 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 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. The Trial Chamber has not been satisfied by Brdanin that he will appear for his

809

trial.

(c) Interference with witnesses

19. The prosecution draws attention to the facts that Brdanin is seeking to be released in order to return to one of the very localities in which the crimes are alleged to have taken place, and that (as the prosecution has been ordered to provide unredacted statements of those witnesses not entitled to protective measures)[46] he will know the identity of several witnesses, thus heightening his ability to exert pressure on victims and witnesses.[47] The Trial Chamber does not accept that this heightened *ability* to interfere with victims and witnesses, by itself, suggests that he *will* pose a danger to them.[48] It cannot just be assumed that everyone charged with a crime under the Tribunal's Statute will, if released , pose a danger to victims or witnesses or others.[49] Indeed, it is a strange logic employed by the prosecution – that, once it has complied with its obligation 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 because his mere ability to exert pressure upon them is heightened. The Trial Chamber does not accept that logic.

20. The prosecution also says that the mere fact that Brdanin will be free to contact the witnesses directly or indirectly "could easily affect their willingness to testify in this and other cases".[50] That, however, would not constitute the "danger" to which Rule 65(B) refers. The Trial Chamber does not accept that this mere possibility – that the willingness of witnesses to testify would be affected by an accused's provisional release – would be a sufficient basis for refusing that provisional release were it otherwise satisfied that such accused will *not* pose a danger to the witnesses. If an applicant satisfies the Trial Chamber that he will *not* pose such a risk, it is for the prosecution to reassure its own witnesses; it would be manifestly unfair to such an applicant to keep him in detention because of a possible reaction by the prosecution's witnesses to the mere fact that he has been granted provisional release. Insofar as the prosecution's witnesses in other cases are concerned, the Trial Chamber repeats what it said in the Protective Measures Decision, that it is not easy to see how the rights of the accused in the particular case can properly be reduced to any significant extent because of the prosecution's fear that it may have difficulties in finding witnesses who are willing to testify in other cases.[51]

21. In view of the unfavourable finding that the Trial Chamber is not satisfied by Brdanin that he will appear for his trial,[52] it is unnecessary for a finding to be made as to whether, if released, Brdanin will pose a threat to any victim, witness or other person. It is, however, worth observing that the present case is, so far as the amended indictment presently discloses, in reality a case where the prosecution does not allege any particular proximity of Brdanin to the events which are alleged to have taken place, the real issue being the relationship between Brdanin and those persons who did the acts for which he is sought to be made responsible.[53] The prosecution claims that those witnesses who directly implicate the accused as being responsible for those acts (either as having aided and abetted in them or as a superior) are those whose identity should be disclosed at a later rather than an earlier time.[54] The application of that proposition in the present case is a matter which has yet to be resolved , but the timing of the disclosure of the identity of those witnesses could well be affected by whether the accused is in detention or not. The Trial Chamber does not propose to reject the application upon the basis that it is not satisfied by Brdanin that he will not pose a danger to anyone. It simply makes no finding upon that issue.

(d) Discretionary considerations

22. It is not in dispute that Rule 65(B), by the use of the word "may", gives to the Trial Chamber a

810

discretion as to whether release is ordered. But it should be clearly understood that, in general, it is a discretion to *refuse* the order notwithstanding that the applicant has established the two matters which that Rule identifies.[55] It is *not* , in general, a discretion to *grant* the order notwithstanding that the applicant has failed to establish one or other of those two matters.[56]

23. Brdanin has demonstrated that his wife has financial difficulties as a result of his detention.[57] He has also asserted that his pre-trial preparation will be greatly enhanced if he is on provisional release, because of the difficulties inherent in his incarceration in The Hague away from the place where the events to be investigated are alleged to have taken place.[58] The Trial Chamber accepts that these are very real considerations to any accused. But they cannot permit a detained person to be released provisionally if the Trial Chamber is not satisfied that he will appear for trial.

24. Another matter raised by Brdanin in this case relates to the length of his pre -trial detention. He was arrested on 6 July 1999. A trial is unlikely before sometime early in 2001. It is not always clear from the decisions given before the amendment of Rule 65(B) whether the length of pre-trial detention has been considered as relevant to the issue of exceptional circumstances or the exercise of discretion, although it seems generally to have been treated as being relevant to the former. Brdanin has submitted that delays in the commencement of a trial, such as are presently being experienced in the Tribunal, are still a relevant factor to an application for provisional release,[59] but he does not identify the issue to which they are said to be relevant. Nor has the prosecution identified how they may be relevant. Logically, pre-trial delays should still be relevant to the exercise of the Trial Chamber's discretion, so that due regard may be had to Article 5(3) of the European Convention on Human Rights and Fundamental Freedoms, which guarantees the right of an accused person to a trial within a reasonable time or to release pending trial, and other similar international norms to that effect.

25. Nevertheless, it is difficult to envisage *likely* circumstances where provisional release would be granted to an accused by reason of the likely length of his pre-trial detention where he has been unable to establish that he will appear for trial. In domestic jurisdictions, bail or other form of release would usually be granted where it is clear that the length of that pre-trial detention may well exceed the length of any sentence to be imposed upon conviction, but there are two reasons why such a course would be inapplicable in the Tribunal. First, as already referred to,[60] the Tribunal has no power to execute its own arrest warrant in the event that the applicant does not appear for trial, and it must rely upon local authorities within the former Yugoslavia or upon international bodies to effect arrests on its behalf. That is markedly different to the powers of a court granting release in a domestic jurisdiction. Secondly, the serious nature of the crimes charged in this Tribunal would be very unlikely to produce sentences of such a short duration.[61]

26. The prosecution has submitted that the likely period involved here (nineteen or twenty months) does not violate either the Statute of the Tribunal or "the recognised standards of international law", and it has referred to two decisions of the European Court of Human Rights and of the European Human Rights Commission which have upheld longer periods of pre-trial detention as being reasonable within the meaning of Article 5(3).[62] These decisions are often referred to by the prosecution in applications such as the present, but care should be taken that too great a reliance is not placed upon them as defining what is a reasonable length of pre-trial detention in an international criminal court or tribunal rather than in particular domestic jurisdictions in Europe.

27. What is a reasonable length of pre-trial detention must be interpreted, so far as this Tribunal is concerned, against the circumstances in which it has to operate . The Tribunal's inability to execute arrest warrants upon persons in the former Yugoslavia to whom provisional release has been granted if

811

they do not appear for trial has to be considered, and it is unnecessary to repeat what has already been said upon this subject. On the other hand, the period considered reasonable by the two European bodies, in their supervisory role, result to some extent from a degree of deference given by them to the practices of the particular national courts and legislature when considering matters such as the reasonableness of pre-trial detention periods in the different European domestic jurisdictions, recognising that the national authorities are better placed to assess local circumstances within those jurisdictions.[63] The former consideration may lead to longer periods, and the latter may lead to shorter periods , being regarded as reasonable by the Tribunal.

28. Assuming (without needing to decide) that the length of pre-trial detention remains relevant to applications for provisional release since the amendment to Rule 65(B), the Trial Chamber is satisfied that the likely period of pre-trial detention in the present case does not exceed what is reasonable in this Tribunal. It is unfortunate that the limited resources possessed by the Tribunal do not permit an earlier trial for those in detention, and that a delay of even this length is necessary , but the likely period of pre-trial detention for Brdanin has not been demonstrated to be unreasonable.

5 Disposition

29. For the foregoing reasons, the application by Radoslav Brdanin for provisional release pending his trial is refused.

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

Dated this 25th day of July 2000,
At The Hague,
The Netherlands.

_____
Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

1- Motion for the Provisional Release of Radoslav Brdanin, 27 Apr 2000 ("Motion"), filed 28 Apr 2000.

2- Prosecution's Response to "Motion for the Provisional Release of Radoslav Brdanin", 9 May 2000 ("Response").
3- Motion, p 7; Response, par 19.
4- Motion for Extension of Time, 25 May 2000, filed 26 May 2000.
5- Count 1, Article 4(3)(a) of the Tribunal's Statute.
6- Count 2, Article 4(3)(e).
7- Count 3, Article 5(h).
8- Count 4, Article 5(b).
9- Count 8, Article 5(d).
10- Count 9, Article 5(i).
11- Count 6, Article 5(f).
12- Count 7, Article 2(b).
13- Count 5, Article 2(a).

812

14- Count 10, Article 2(d).
15- Count 11, Article 3(b).
16- Count 12, Article 3(d).
17- Amended Indictment, pars 6-7.
18- Ibid, par 16.
19- Ibid, pars 14, 19.
20- Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 Mar 2000, par 4.
21- Decision on Motion to Dismiss Indictment, 5 Oct 1999; Interlocutory Appeal dismissed: Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed Under Rule 72, 16 Nov 1999.
22- Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brdanin, 8 Dec 1999; Leave to appeal refused and application for a Writ of Mandamus directed to the Trial Chamber rejected: Decision on Application for Leave to Appeal, 23 Dec 1999.
23- Personal Guarantee of Radoslav Brdanin, undated, pp 2-3.
24- Guaranty of the Government of the Republic of Srpska, 8 Mar 2000, pp 1-2.
25- Oral hearing, 20 July 2000, Transcript, pp 152-154.
26- Ibid, pp 154-156.
27- Ibid, p 156.
28- Ibid, pp 154-156.
29- Motion, par 7.
30- Transcript, p 161.
31- Transcript, p 162. See Prosecutor v Kvocka, Case IT-98-30-PT, Decision on Motion for Provisional Release of Miroslav Kvocka, 2 Feb 2000 ("Kvocka Decision"), at p 4. See also Prosecutor v Kordic, Case IT-95-14/2-T, Order on Application by Dario Kordic for Provisional Release Pursuant to Rule 65, 17 Dec 1999 ("Kordic Decision"), 17 Dec 1999, p 4; Prosecutor v Aleksovski, Case IT-995-14/1-A, Order Denying Provisional Release, 18 Feb 2000, p 2; Prosecutor v Simic, Case IT-95-9-PT, Decision on Miroslav Tadic's Application for Provisional Release, 4 Apr 2000 ("Tadic Decision"), p 8; Prosecutor v Simic, Case IT-95-9-PT, Decision on Simo Zaric's Application for Provisional Release, 4 Apr 2000 ("Zaric Decision"), p 8; Leave to appeal from the Tadic and Zaric Decisions refused, on the basis that error had not been shown: Prosecutor v Simic, Case IT-95-9-AR65, Decision on Application for Leave to Appeal, 19 Apr 2000 ("Tadic/Zaric Appeal Decision"), p 3; Prosecutor v Simic, Case IT-95-9-PT, Decision on Milan Simic's Application for Provisional Release, 29 May 2000 ("Simic Decision"), p 5.
32- Kvocka Decision, p 4; Kordic Decision, p 4; Tadic Decision, p 8; Zaric Decision, p 7.
33- Transcript, pp 161, 164.
34- This is also apparent from the decisions cited in footnote 31.
35- Transcript, p 166.
36- Response, par 11; Transcript, p 163. See also Prosecutor v Kovacevic, Case IT-97-24-PT, Decision on Defence Motion for Provisional Release, 20 Jan 1998, par 27.
37- Amended Indictment, par 17.
38- See Rule 101(B)(ii).
39- The weight to be given to a guarantee by the Government of Republika Srpska may be different where it is not a high level indicted person who would have to be returned.
40- Tribunal's Fourth Annual Report (1997), pars 183-187 ("Republika Srpska is clearly and blatantly refusing to meet the obligations that it undertook when it signed the Dayton Peace Agreement, by which it solemnly undertook to co-operate with the Tribunal": par 187); Tribunal's Fifth Annual Report (1998), pp 81-83 (although the present Prime Minister of Republika Srpska is reported, at par 216, to have urged indicted individuals to surrender to the Tribunal); Tribunal's Sixth Annual Report (1999), par 106 (refusal of Republika Srpska to execute arrest warrants).
41- Response, par 12.

813

42- Ibid, par 14; Transcript, p 162.
43- Transcript, p 160.
44- Kordic Decision, p 4.
45- Tadic Decision, p 8; Zaric Decision, p 8; Leave to appeal refused on the basis that error had not been shown: Tadic/Zaric Appeal Decision, p 3; Simic Decision, p 6. Provisional release was refused in one case, despite the applicant's surrender, in part because there was a dispute as to the circumstances in which the applicant had surrendered: Kordic Decision, p 5.
46- Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("Protective Measures Decision"), par 65.2.
47- Response, pars 15-16.
48- The Decision of the Trial Chamber in Prosecutor v Blaškic, Case IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 Apr 1996 (English version filed 1 May 1996), p 5, upon which the prosecution relies does not state anything to the contrary.
49- Prosecutor v Delalic, Case IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalic, 25 Sept 1996 (filed 1 Oct 1996), par 34.
50- Response, par 16.
51- Protective Measures Decision, pars 29-30.
52- Paragraph 18, supra.
53- cf Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 18.
54- Protective Measures Decision, par 34.
55- See, for example, the Kordic Decision (p 4), where the Trial Chamber took into account in part in refusing the application the fact that it had been made during the trial, and if successful would have disrupted the remaining course of the hearing.
56- In Prosecutor v Djukic, Case IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, 24 Apr 1996, at p 4, the Trial Chamber granted to the accused provisional release solely upon humanitarian grounds in the light of the extreme gravity of the accused's medical condition, in that he was suffering from an incurable illness in its terminal phase.
57- Motion, pars 12-13; and see Section 3 of this Decision.
58- Motion, par 11.
59- Motion, par 10.
60- Paragraph 18, supra.
61- In Prosecutor v Aleksovski, Case IT-95-14/1-A, Judgment, 24 Mar 2000, at par 185, the Appeals Chamber stated that sentences of the Tribunal should make it plain that the international community is not ready to tolerate serious violations of international humanitarian law and human rights. The Tribunal was established in order to prosecute persons responsible for such serious violations: Statute of the Tribunal, Article 1.
62- Response, par 9. The decision of the Commission referred to is Ventura v Italy, report of European Commission of Human Rights of 15 Dec 1980, Application 7438/76, Decisions and Reports, Vol 23, p 5, in which a period of five years, seven months and twentyseven days was considered (at par 194). The decision of the Court referred to is the "Neumeister" Case, judgment of 27 June 1968, Series A, Judgments and Decisions, Vol 8. The prosecution asserts that, in this case, the Court found a period of three years pre-trial detention "to be in conformity with the ECHR": Response, par 9. That is not so. The relevant period considered by the Court was two years, two months and four days, and the finding of the Court was that Article 5(3) had been breached, as the length of the applicant's pre-trial detention had ceased to be reasonable once it became evident that appropriate guarantees for the applicant's return, if provisionally released, would meet the risk of absconding (pars 4, 6, 12, 15).
63- This degree of deference is explicitly recognised in the jurisprudence of the European Court of Human Rights, as the "margin of appreciation": Handyside Case, Series A, No 24, Judgment of 7 Dec 1976, at pars 48-49.

PROSECUTION INDEX OF AUTHORITIES

5. Prosecutor v. Brdanin, IT-99-36-PT, Decision on Application for Leave to Appeal, 7 September 2000

815

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:
Judge Lal Chand Vohrah, Presiding
Judge Mohamed Shahabuddeen
Judge Rafael Nieto-Navia

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
7 September 2000

PROSECUTOR

v.

RADOSLAV BRDANIN
MOMIR TALIC

DECISION ON APPLICATION FOR LEAVE TO APPEAL

Counsel for the Prosecutor:

Ms. Joanna Korner

Counsel for the Defence:

Mr. John Ackerman for Radoslav Brdjanin
Mr. Xavier de Roux, Maître Michel Pitron for Momir Talic

THIS BENCH of the Appeals 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 ("the International Tribunal"),

BEING SEIZED of the "Application for Leave to Appeal from Decision on Motion by Radoslav Brdanin for Provisional Release", filed by Radoslav Brdjanin ("the Applicant") on 1 August 2000 ("the Application for Leave to Appeal"),

816

NOTING that the Application for Leave to Appeal is made pursuant to sub-Rule 65(D) of the Rules of Procedure and Evidence of the International Tribunal ("the Rules"),

NOTING Trial Chamber II's "Decision on Motion by Radoslav Brdjanin for Provisional Release" issued 25 July 2000 denying the motion,

NOTING the "Prosecution's Response to 'Application for Leave to Appeal from Decision on Motion by Radoslav Brdanin (sic) for Provisional Release'", filed on 11 August 2000,

CONSIDERING that sub-Rules 65(A) and (B) provide that once detained, an accused may not be released except upon an order of a Trial Chamber and that such order may only be made after hearing the host country and only if satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person,

CONSIDERING that sub-Rule 65(D) provides that decisions on provisional release by Trial Chambers are subject to appeal in cases where leave to appeal is granted upon good cause being shown,

CONSIDERING that the Applicant argues that "good cause" under sub-Rule 65(D) of the Rules exists for granting the Application for Leave to Appeal on the grounds that: i) the Trial Chamber erred by placing the burden at all times on the accused to establish his entitlement to provisional release and that, on the contrary, once a prima facie case is made out by the accused the burden shifts to the Prosecutor; ii) the Trial Chamber erred by interpreting Rule 65 to provide detention as the norm and provisional release as the exception in violation of the International Covenant on Civil and Political Rights of 16 December 1966; and iii) the issue raised is one of general importance to both the International Tribunal and to international law generally,

CONSIDERING that "good cause" within the meaning of sub-Rule 65(D) requires that the party seeking leave to appeal under that provision satisfy the Bench of the Appeals Chamber that the Trial Chamber may have erred in making its decision,

CONSIDERING that under sub-Rule 65(B) of the Rules, the burden of proof is on an applicant to satisfy a Trial Chamber that provisional release should be ordered,

CONSIDERING FURTHER that internationally recognised standards relating to release of persons awaiting trial are applicable to proceedings before the International Tribunal, that in applying them account has to be taken of the different circumstances and situations envisaged by those standards which did not visualise the nature and character of the International Tribunal, and that the International Tribunal does not have the same facilities as are available to national courts to enforce appearance,

817

FINDING that the Applicant has 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 in this case and, therefore, the Applicant has failed to satisfy the requirement of "good cause" within the meaning of sub-Rule 65(D) of the Rules,

PURSUANT to Rule 65 of the Rules,

HEREBY REJECTS the Application for Leave to Appeal.

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

_____

Judge Lal Chand Vohrah
Presiding

Dated this seventh day of September 2000
At The Hague,
The Netherlands.

[Seal of the Tribunal]

6. Prosecutor v. Brdanin, IT-99-36-PT, Decision on Motion by Momir Talic for Provisional Release, 28 March 2001

819

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mr Hans Holthuis

Decision of:
28 March 2001

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIC

DECISION ON MOTION BY MOMIR TALIC FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Ms Joanna Korner
Mr Nicolas Koumjian
Mr Andrew Cayley
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 Introduction

1. Pursuant to Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rules "), the accused Momir Talic ("Talic") seeks provisional release pending his trial .[1] The application is opposed by the prosecution.[2] Talic has relied upon a witness in support of his application, and he requested an oral hearing.[3] An oral hearing took place as requested.[4]

2. Talic is charged jointly with Radoslav Brdanin ("Brdanin") with a number of crimes alleged to have

been committed in the area of Bosnia and Herzegovina now known as Republika Srpska. Those crimes may be grouped as follows:

(i) genocide[5] and complicity in genocide ;[6]

(ii) persecutions,[7] extermination,[8] deportation[9] and forcible transfer (amounting to inhumane acts),[10] as crimes against humanity;

(iii) torture, as both a crime against humanity[11] and a grave breach of the Geneva Conventions;[12]

(iv) wilful killing[13] and unlawful and wanton extensive destruction and appropriation of property not justified by military necessity,[14] as grave breaches of the Geneva Conventions; and

(v) wanton destruction of cities, towns or villages or devastation not justified by military necessity[15] and destruction or wilful damage done to institutions dedicated to religion,[16] as violations of the laws or customs of war.

Each accused is alleged to be responsible both individually and as a superior for these crimes.

3. The allegations against the two accused assert their involvement in a plan to effect the "ethnic cleansing" of the proposed new Serbian Territory in Bosnia and Herzegovina (the area now known as Republika Srpska) by removing nearly all of the Bosnian Muslim and Bosnian Croat populations from the areas claimed for that territory .[17] They are alleged to have been responsible for the death of a significant number of Bosnian Muslims and Bosnian Croats within the Autonomous Region of Krajina ("ARK"), and for the forced departure of a large proportion of the Bosnian Muslim and Bosnian Croat populations from that region, between 1 April and 31 December 1992.[18] Talic is alleged to have been the Commander of the 5th Corps/1st Krajina Corps, with responsibility for implementing the policy of incorporating the ARK into a Serb state.[19]

4. Despite the repetition in the current indictment of the allegation that Talic "committed" the crimes charged within the meaning of Article 7.1 of the Tribunal's Statute, it is conceded by the prosecution that it has no evidence that he physically perpetrated the crimes himself.[20] The bases asserted for his individual criminal liability[21] are that, in various ways, he aided and abetted those who did physically perpetrate them,[22] or participated with them in their criminal enterprise with the common purpose of removing the majority of the Bosnian Muslim and Bosnian Croat inhabitants from the planned Serbian state.[23] The basis asserted for his criminal responsibility as a superior[24] is that he knew or had reason to know either that the forces under his control were about to commit those crimes and failed to prevent them doing so, or that they had committed those crimes and he failed to punish them for having done so.[25] Previous decisions in these proceedings give greater detail of these allegations .[26]

5. Talic was arrested on 25 August 1999. He has made two previous applications for release, each of them unsuccessfully based upon an assertion that his detention was unlawful.[27] Neither application was for provisional release pursuant to Rule 65(B), and the rejection of those motions has therefore been ignored for present purposes.

821

2 The relevant provision

6. Rule 65(A) states that an accused may not be released except upon an order of a Chamber. Rule 65(B) provides:

> 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, witness or other person.

The host country has been heard.

3 The material put forward by the parties

7. Talic has filed with his Motion a signed document entitled "Promise and Guarantee ", by which he undertakes (so far as is presently relevant) that, in the event of being provisionally released, he will remain within the Municipality of Banja Luka , he will surrender his passport to the International Police Task Force ("IPTF") in Banja Luka, he will report once a day to the Public Security Centre there, he will permit the IPTF to monitor his presence at the local police station and by making random visits (to check upon his whereabouts), and that he will not contact any other person charged in the indictment, he will not disturb or contact in an

PROSECUTION INDEX OF AUTHORITIES

7. Prosecutor v. Ademi, IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002

Case No. IT-01-46-PT

823

IN THE TRIAL CHAMBER

Before: Judge Daquin Liu, Presiding

Judge Amin El Mahdi

Judge Alphons Orie

Registrar:
Mr. Hans Holthuis

Order of:
20 February 2002

THE PROSECUTOR

v.

RAHIM ADEMI

ORDER ON MOTION FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Mark Ierace

Defence Counsel:

Mr. Cedo Prodanovic

I. Background

This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (the "Tribunal") is seised of the "Motion for Provisional Release" filed on behalf of the accused Rahim Ademi (the "Accused") on 14 December 2001 (the "Motion") pursuant to Rule 65 of the Rules of Procedure and Evidence of the International Tribunal (the "Rules").[1]

The Accused requests that he be provisionally released and the Prosecution opposes his application.

3. Although the arguments raised by the Accused are considered in greater detail below, in general, he argues that "there are sufficient grounds to reasonably believe that, if provisionally released, [he] will appear for trial and will pose no danger to victims, witnesses or any other person."[2] The Accused

824

supports the Motion with three attached documents: his own personal undertakings (Exhibit A); written guarantees provided by the Government of the Republic of Croatia (Exhibit B); and a supporting letter from the President of the Republic of Croatia (Exhibit C). The Trial Chamber has also received a letter, dated 28 December 2001, from the Mayor of Split to the President of the Tribunal, sent on behalf of the citizens of the city of Split requesting that the Accused "be freed from detention and provide his testimony liberally." Finally, at the hearing held on 1 February 2002, a delegation from the Republic of Croatia including Vice-President Granic, attended. Further information was provided by the latter in support of the Motion to the Trial Chamber.

4. In the "Prosecutor's Response to the Defence Motion for Provisional Release," filed 21 December 2001 (the "Prosecution Response"), the Prosecution objects to the Motion on the basis of the Accused's "failure to demonstrate to the satisfaction of the Trial Chamber that if released provisionally, he will 'appear for trial' and 'will not pose a danger to any victim, witness or other person."[3] It maintains that:

in view of the seriousness of the charges against the Accused, and consequently, the likelihood of a heavy sentence if they are proved, it is likely that the Accused will fail to appear for trial;

the strength of the evidence against the Accused (which is now known to him) is an important factor which may motivate him to abscond;

there "remains potential" for the Accused to influence victims, witnesses and other persons, while the Accused's high military rank will enable him to easily influence others to do so[4];

the guarantees offered by the Government of the Republic of Croatia are insufficient , since they have been made in general terms, while the lack of co-operation by the Government of the Republic of Croatia is well known (citing as an example the recent failure to arrest the accused Ante Gotovina);

should the Accused manage to re-locate himself outside Croatia, the Government of Croatia would be unable to secure his appearance before the International Tribunal ;

although voluntary co-operation, should an accused choose to offer it, is a factor that should be taken into account in assessing an accused's attitude, the extent of the Accused's co-operation with the Prosecution has been minimal.

5. The Prosecution further submits that should its arguments be rejected by the Trial Chamber, alternative more detailed guarantees (set out in the Prosecution Response), should be requested from either or both the Government of the Republic of Croatia and the Accused.

6. The Host Country does not object to the Motion, on the understanding that the Accused, if released, will be leaving the Netherlands.[5]

7. As mentioned above, oral argument on the Motion was held on 1 February 2002 and both parties together with Vice-President Granic put forward submissions.[6]

II. Applicable law

8. Rule 64 of the Rules provides in relevant part: "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."

825

9. Rule 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 Trial 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.

10. The Prosecution contends that although Rule 65(B) was amended in December 1999 , removing the requirement for an accused to show exceptional circumstances before provisional release could be granted,[7] the burden of proof remains on the accused to establish that he or she will not pose a danger to any victim, witness or other person and that he or she will appear for trial. It maintains that this burden is a substantial one.

11. The amendment of Rule 65 has resulted in various interpretations by Trial Chambers as to what the requirements of the Rule now are and how they should be satisfied . Consequently, this Trial Chamber feels it should set out how in its view, the question of detention and Rule 65(B) should be construed.

A. Amendment of Rule 65(B) of the Rules

12. In addition to those that are still included, Rule 65(B) originally included a requirement that provisional release could be ordered by a Trial Chamber "only in exceptional circumstances." Under this rule it seemed that detention was considered to be the rule and not the exception. However, some decisions issued by Trial Chambers concluded that the fact that the burden was on the accused and that he or she had to show that exceptional circumstances existed before release could be granted, was justified given the gravity of the crimes charged and the unique circumstances in which the Tribunal operated.[8]

13. The requirement to show "exceptional circumstances" meant that in reality Trial Chambers granted provisional release in very rare cases. These were limited to those where for example, very precise and specific reasons presented themselves which leant strongly in favour of release. Thus, for example, Trial Chambers, before the amendment was adopted, accepted that a life-threatening illness or serious illness of the accused or immediate family members constituted exceptional circumstances justifying release, while illnesses of a less severe nature did not.[9] As stated, the burden remained on an accused at all times to demonstrate to the satisfaction of the Trial Chamber that such circumstances existed. Should the Trial Chamber conclude that they did not, release would not be ordered.

14. After amendment of the rule, an accused no longer needed to demonstrate that such "exceptional circumstances" existed. Trial Chambers seem to have taken two approaches to the new provision. Most Trial Chambers have continued to find that the amendment did not change the other requirements in the Rule and that provisional release was not now the norm. They considered that the particular circumstances of each case should be assessed in light of Rule 65(B) as it now stood.[10] The burden still remained on the accused to satisfy the Trial Chamber that the requirements of Rule 65(B) had been met.[11] This was justified by some given the specific functioning of the Tribunal and absence of power to execute arrest warrants.[12] The second approach seems to have been the following. It has been concluded that based on international human rights standards, "*de jure* pre-trial detention should be the exception and not the rule as regards prosecution before an international court."[13] The Trial Chamber in question

826.

referred to the fact that, at the Tribunal, in view of its lack of enforcement powers , "pre-trial detention *de facto* seems to be...the rule."[14] In addition, it stated that one must take account of the reference to serious crimes . Nevertheless, it found that, "any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention (see *Ilijkov v. Bulgaria* , ECourtHR, Decision of 26 July 2001, para. 84). Considering this, the Trial Chamber must interpret Rule 65 with regard to the factual basis of the single case and with respect to the concrete situation of the individual human being and not *in abstracto*."[15]

B. Effect of the Amendment of Rule 65 of the Rules

15. This Trial Chamber wishes to approach the question from two angles. First, on a point of procedure and second, with regard to interpretation of Rule 65(B) itself and how and when an accused can be provisionally released.

i. Procedural aspect

16. As to the first point, this Trial Chamber wishes to clarify the procedure for consideration by a Trial Chamber of detention and release of an accused. Proceedings with regard to an accused commence with review and confirmation of the indictment pursuant to Article 19 of the Statute and Rule 47 of the Rules. Generally speaking , once an indictment has been confirmed, an arrest warrant will be issued by the same Judge including an order for prompt transfer of the accused to the Tribunal upon arrest.[16] The arrest warrant provides the legal basis for detention of the accused as soon as he or she is arrested [17] and, upon being transferred to the seat of the Tribunal, Rule 64 provides that "the accused shall be detained in facilities provided by the host country, or by another country."

17. Rule 62 of the Rules provides that "?ugpon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber . The accused shall be brought before that Trial Chamber or a permanent Judge thereof without delay, and shall be formally charged." The Rule sets out the issues, which should be raised during this initial appearance. The issue of detention is not specifically included, most probably given the fact that the text of Rule 65(B) as it stood at that time meant that an accused could only be released in "exceptional circumstances ." Rule 65(A) provides that "?ognce detained, an accused may not be released except upon an order of a Chamber." As the accused is already detained as a result of the arrest warrant that has been issued, detention will continue unless further order is made. During the initial appearance, the Trial Chamber generally orders orally that detention will continue until further order and in some cases an order for detention on remand is formally issued.[18] The fact of detention and the reasons for it are rarely, if at all, raised as issues to be discussed at the initial appearance. Nevertheless, this Trial Chamber believes that an accused or indeed the Trial Chamber *proprio motu* is entitled to raise the matter of the accused's detention at this hearing, be

PROSECUTION INDEX OF AUTHORITIES

8. Special Court Rules of Detention, Rules 13, 16, 22

828

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

RULES OF DETENTION

("Rules Governing The Detention Of Persons Awaiting Trial Or Appeal Before The Special Court For Sierra Leone Or Otherwise Detained On The Authority Of The Special Court For Sierra Leone")

(ADOPTED ON 7 MARCH)

(AS AMENDED ON 9 MAY 2003)

Rule 13 - Medical Examination

Each Detainee shall be examined by the Medical Officer or his deputy as soon as is practicable afteron the day of admission and thereafter as necessary, for the purpose of establishing the physical and mental condition of the Detainee and to take all necessary measures for medical treatment and the segregation of those Detainees suspected of infectious or contagious conditions.

Rule 16 - Health & Hygiene

(A) The Detention Facility shall, at all times, meet all requirements of health and hygiene, with due regard being paid to climatic conditions, lighting, heating and ventilation.

(B) Each Detainee shall be permitted unrestricted access to the sanitary, hygiene and drinking water arrangements in his cell unit.

Medical Care

Rule 22 - Medical Services

(A) Medical services shall be available to Detainees to the extent practicably possible. A person capable of providing first-aid shall be available at all times.

(B) The Medical Officer shall have the care of the physical and mental health of the Detainees and shall see, on a daily basis or more often if necessary, all sick Detainees, all Detainees who complain of illness and any Detainee to whom his attention is specially directed.

(C) The Medical Officer shall report to the Chief of Detention whenever he considers that the physical or mental health of a Detainee has been or will be adversely affected by any condition of his detention.

(D) The Chief of Detention shall immediately submit the report to the Registrar who, after consultation with the President, shall take all necessary action.