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SCSL - 2004 - 14 - PT
(22 — 101)

SPECIAL COURT FOR SIERRA LEONE

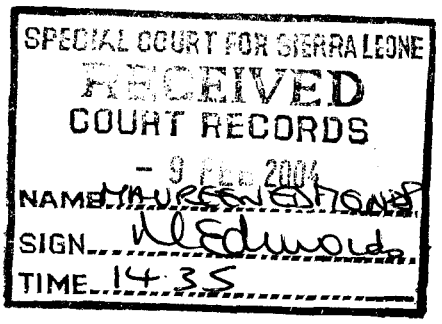
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson, Presiding Judge
Judge Itoe
Judge Boutet

Registrar: Mr. Robin Vincent

Date filed: 9 February 2004



THE PROSECUTOR

Against

MOININA FOFANA *(et al)*

CASE NO. SCSL – 2003 – 14 – PT

PROSECUTION RESPONSE TO DEFENCE "APPLICATION FOR BAIL PURSUANT TO RULE 65"

Office of the Prosecutor:

Luc Côté, Chief of Prosecutions
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Charles A. Caruso, Trial Attorney

Defence Counsel:

Mr. Michiel Pestman
Mr. Victor Koppe
Mr. Arrow John Bockarie
Dr. Liesbeth Zegveld
Prof. Dr. P. Andre Nollkaemper

SPECIAL COURT FOR SIERRA LEONE

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FREETOWN-SIERRA LEONE

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PROSECUTION RESPONSE TO DEFENCE "APPLICATION FOR BAIL PURSUANT TO RULE 65"

I. INTRODUCTION

1. The Prosecution submits this response in reference to the "Application for Bail Pursuant to Rule 65" (the "**Application**"), filed on 27 January, 2004, on behalf of Moinina Fofana (the "**Accused**"), pursuant to Rule 65(B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "**Rules**").

2. The Accused predicates his Application on various grounds none of which, cumulatively or individually, is sufficient to satisfy his burden, in law or fact, of meeting the preconditions necessary to the granting of bail. Accordingly, the Prosecution respectfully submits that the Application should be denied.

3. Rule 65(B) provides in relevant part 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". Inasmuch as this rule is similar in all material respects to its analogue at the International Criminal Tribunal for the former

Yugoslavia ("**ICTY**"),[1] the jurisprudence developed in that forum relative to bail applications provides guidance before this Court.[2]

II. THE LAW

4. The jurisprudence of the ICTY developed around Rule 65(B) is clear and consistent in holding that "(t)he wording of the Rule squarely places the onus at all times on the applicant to establish his entitlement to provisional release."[3] That is to say, "release may be ordered only if the Trial Chamber is satisfied that the Accused will both appear for trial and if released, pose no risk to any victim, witness or other person."[4] In that regard, in a case decided as recently as 2002, it was reiterated that: "(a)s to the question of the burden of proof in satisfying the Trial Chamber that provisional release should be ordered, it is the case that in an application under Rule 65, this rests on the accused."[5] However, notwithstanding the Accused' ability to satisfy the Trial Chamber that he will return for trial and will pose no risk to any victim, witness or other person, the right to order provisional release nonetheless remains within the sound discretion of the Trial Chamber:

> It is not in dispute that Rule 65(B), by the use of the word "may", gives to the Trial Chamber a 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. It is *not*, in general, a discretion to *grant* the order notwithstanding that the applicant has failed to establish one or [the] other of those two matters [Emphasis in the original].[6]

5. That this is a reasonable and proper application of the Rule is justified by the unique nature of international criminal tribunals such as the SCSL and the ICTY. Thus, as explained by the Trial Chamber of the ICTY, "(t)he absence of any power in the

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[1] Rules of Procedure and Evidence for the International Criminal Tribunal for the former Yugoslavia, 24 June 2003.
[2] Statute of the Special Court for Sierra Leone, Article 20.
[3] *Prosecutor v Radoslav Brdanin & Momir Talic*, IT-99-36-PT, "Decision on Motion by Radoslov Brdanin for Provisional Release", 25 July 2000 (*Brdanin*), para. 13
[4] *Prosecutor v Rahim Ademi*, IT-01- 46-PT, "Order on Motion for Provisional Release", 20 February 2002 (*Ademi*), para. 18
[5] *Id.* at para. 19.
[6] *Brdanin*, *supra* note 5, at para 22.

Tribunal to execute its own arrest warrant upon an applicant... in the event that [the Accused] 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" [Emphasis added].[7] With this background in mind, a review of the Accused' position is in order.

III. ARGUMENT OF THE ACCUSED

6. Without citing convincing authority, the Accused articulates a procedural regimen for the conduct of bail inquiries not previously described in the jurisprudence of the extant international criminal tribunals. Relying in part on an erroneous reading of Judge Itoe's recent decision which considered Rule 65(B),[8] the Accused posits the conclusion that the "first" obligation in determining eligibility for provisional release is to be found with the Prosecutor.[9] Thereafter, he submits that "the first duty lies upon the prosecutor to demonstrate to the satisfaction of the Judge or Trial Chamber that there are good reasons to continue the detention of the accused."[10] The Accused then defines a standard to be met by the Prosecutor in meeting the described burden of demonstration; i.e. "... the prosecutor has to demonstrate that a *reasonable suspicion* still exists that the accused committed the crime or crimes charged" [Emphasis added].[11] Having assigned definition to the standard required to be met by the Prosecutor, the Accused ultimately contends that a successful demonstration to this end is a *sine qua non* to continued detention.[12]

7. The authority cited for this regimen finds provenance in a European Court of Human Rights tort case[13] dealing with the Army's right to question terrorist suspects for a period of two or more hours pursuant to the Northern Ireland Act of 1978; a case which, for obvious reasons, has no occasion to impact the issue of provisional release.

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[7] *Id.* at para. 18.
[8] *Prosecutor v Tamba Alex Brima*, SCSL-03-06-PT, "Ruling on Motion Applying for Bail or for Provisional Release Filed by the Applicant", 22 July 2003 (*Brima*).
[9] Application para. 4.
[10] *Id.*
[11] *Supra* note 9.
[12] *Supra* note 9.
[13] *Murray v United Kingdom*, ECHR, 18 October 1994, found at Annex 3 of the Application.

Upon review, this case simply does not provide the authority for the assertions made in the Accused' argument. While it is true that Judge Itoe does opine, contrary to the weight of the authority cited above by the Respondent, that the Prosecution bears a commensurate burden of persuasion, he nonetheless reiterates, in accord with current authority that "the onus is on the Applicant, as the eventual beneficiary of the measure solicited, to satisfy the Judge or the Chamber factually and legally, that he fulfils the conditions necessary for the exercise of this discretion in his favour..."[14] Nowhere in his opinion does Judge Itoe provide any support whatsoever for the assertion that: "Only after the prosecutor has demonstrated that good reasons exist to continue the detention does the burden shift to the defence to satisfy the Trial Chamber that he will fulfill the conditions mentioned in Rule 65 (B)."[15]

8. In an effort to establish that "...pre-trial detention should remain an exception",[16] the Accused relies upon two sources: First, the language of Article 9 §3 of the International Covenant on Civil and Political Rights ("**ICCPR**") ("It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...") and Second, the fact that prior to an amendment in 1999, Rule 65 (B), of the ICTY allowed access to bail only in those instances where the accused was able to demonstrate 'exceptional circumstances'. It is respectfully suggested that insofar as his premise is incorrect, the Accused' conclusion is likewise inaccurate.

9. It is, at the very least, the case that there is no presumption in favour of bail before the SCSL given the very serious nature of the crimes charged before that body[17] and thus it is difficult to conceive of a situation in which detention can be characterized as an 'exception'. Rather, it is submitted that access to bail is not a matter which can be characterized in a general fashion as either an exception nor the rule but that each case must be determined on its own merits. As discussed by the Trial Chamber in *Ademi*:

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[14] *Brima, supra* note 10, at p. 9.
[15] Application para. 5.
[16] Application para. 8.
[17] *Prosecutor v Sam Hinga Norman*, SCSL-2003-08-PT, "Decision on Motion for Modification of the Conditions of Detention", 26 November 2003, para. 8.

> Rule 65 previously stipulated that notwithstanding satisfaction of these two criteria, provisional release was only to be granted in "exceptional circumstances." Detention was therefore in reality the rule. This Trial Chamber believes that removal of this requirement has had the following effect. It has neither made detention the exception and release the rule, nor resulted in the situation that despite amendment, detention remains the rule and release the exception. On the contrary, this Trial Chamber believes that the focus must be on the particular circumstances of each individual case, without considering that the outcome it will reach is either the rule or the exception.[18]

Given this interpretation, and recognizing the significance of the strictures of the ICCPR as well as the European Convention on Human Rights, it seems clear that the provisions of the Rule do not permit the characterization which the Accused seeks.[19]

IV. ARGUMENT OF THE RESPONDENT

10. As noted above, the Accused, in seeking relief pursuant to Rule 65 (B), bears the burden of satisfying the Court that he does not present a risk of flight nor pose a danger to a victim, witness or any other person. Further, as above noted, it has been held that the Trial Chamber retains discretionary power to deny provisional release, notwithstanding satisfaction of the previous two conditions by the Accused.[20] Thus, amongst the factors which have been taken into consideration in evaluating applications of this nature are considerations respecting "... the imperatives of security and order ..."[21] With these concerns in mind, the issues of risk of flight, danger to persons and the Court's discretionary powers are discussed hereinafter *seriatim*.

RISK OF FLIGHT

11. In considering the Accused' application for bail the Court must take into consideration factors beyond the assertions of the Accused and those who offer support to his Application. Amongst these factors is the reality that this Court lacks its own means

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[18] *Ademi, supra* note 6, at para. 18; See also *Prosecutor v Darko Mrda*, IT-02-59-PT, "Decision on Darko Mrda's Request for Provisional Release", 15 April 2002 (*Mrda*), para. 29.
[19] *Mrda, id*
[20] *Supra* note 8.
[21] *Prosecutor v Bla[ki]*, IT-95-14-T, "Decision on Motion of the Defense Seeking Modification of the Conditions of Detention of General Bla[ki]", 9 January 1997 p.2.

to execute a warrant of arrest by which to re-arrest an accused and therefore must rely upon the resources of the state of Sierra Leone to assist it in such endeavours.[22] 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. The Prosecution submits that in the assessment of the officials presently in charge of the Office of the Inspector General of the Sierra Leone Police, those forces do not possess sufficient resources or the capability, in light of current conditions, to re-arrest the Accused should he choose to flee the jurisdiction of the Court and seek refuge in parts of Sierra Leone where those loyal to his cause still maintain sway.[23]

12. There can be no denying that others indicted before this Court have successfully evaded being brought before the Court by seeking refuge with former colleagues in arms. Should the eventuality occur wherein the Accused attempts to avoid discovery or apprehension in certain rural areas of Sierra Leone where effective police presence is not fully established at this point, the authorities would be ill-equipped to affect his re-arrest.

13. Additionally, this Court's mandate is "... to try those who bear the greatest responsibility for serious violations of international humanitarian law..."[24] As such, those who appear before the Court "...may expect to receive, if convicted, a sentence that may be of considerable length. This very fact could mean that an accused may be more likely to abscond or obstruct the course of justice in other ways.[25] Thus, while the Accused may at present give assurances that provisional release would not lead to his flight, that assurance must be measured against the realities of a possible lengthy prison sentence.

14. The Prosecution likewise notes that while the Application avers that the Accused "...has never travelled outside Sierra Leone"[26] this statement is contradicted by information in the possession of the Prosecutor. According to facts elicited during the

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[22] *Brdanin supra* note 5, at para.18.
[23] See Declaration of Oliver Somansa, Office of the Inspector General attached hereto as Appendix I.
[24] Statute of the Special Court for Sierra Leone, Article I.
[25] *Ademi supra* note 6, at para.25.
[26] Application at para. 20.

course of this investigation, the Accused has travelled to both Liberia and Guinea[27] in the past and has thus had a previous association with individuals who are situated across two very porous borders. This fact in and of itself would complicate the re-arrest of the Accused should he choose to avail himself of his previous contacts. It goes without saying that an equally troubling aspect of the emergence of this fact is that it is discrepant with the Accused' submissions to this Court.

15. The Accused asserts that, inasmuch as the indictment in this case was sealed, he was unable to surrender himself to the Court prior to his arrest. Because the Respondent has no evidence to the contrary, no counter-assertion is offered here. It is however important to note that, in cases where a sealed indictment is employed, no conclusion can be drawn, one way or another, relative to the Accused' failure to voluntarily surrender.[28]

16. Finally, the Accused offers evidence of his family and personal situation, including reference to the hardships being suffered by his family, along with the assurances that these factors would offer sufficient guarantee of his appearance at trial. While these are very real considerations to any accused, they cannot be permitted to contribute to the release of a person if the Trial Chamber is not otherwise satisfied that he will appear for trial.[29] In short, the Accused offers nothing that is unique to his situation or that would offer anything in the way of independent assurances that he will in fact not flee.[30]

DANGER TO PERSONS

17. The Prosecution has attached to this Response the Declaration of the Chief of Investigations of the Office of the Prosecutor[31] in which it is asserted that the Office of the Prosecutor is in possession of witness information to the following effect: that on December 13, 2002, in two separate meetings, at which the Accused was present, Sam Hinga Norman, a Co-Accused, did address the attendees of the meetings and

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[27] See Declaration of Alan White, Office of the Prosecutor attached hereto as Appendix II at para. 2.
[28] *Brdanin supra* note 5, at para. 17.
[29] *Id* at para. 23.
[30] See generally *Mrada supra* note 20, at para. 38.
[31] See Declaration of Alan White, *supra* at note 29.

informed them that he was aware that there were individuals with whom he had formerly been associated in the Civil Defence Force who were providing information to agents of the SCSL as well as to the Truth and Reconciliation Commission ("**TRC**"); that Norman, at these meetings, warned those present not to provide information to the SCSL or the TRC; that in attendance at one of these meetings was a group of individuals who are known to be loyal to Norman formerly known as the Death Squad or "Norman Boys"; that members of this group threatened to "exterminate" those they found to be betraying Norman; that Norman threatened that when those who betrayed him were found out, they would be dealt with according to "Kamajor laws"; and that a committee was formed to travel around Sierra Leone for the express purpose of spreading this threat and of advising potential witnesses that they would be dealt with severely if they were found to have cooperated with the authorities. The Accused was selected to participate in the mission of this committee.[32]

18. At this point the Accused has been provided with sufficient discovery information to possibly enable him to further identify those who may be called to testify against him. Despite the measures taken by the Court and Prosecutor to protect the identity of these individuals and the Accused' protestations to the contrary,[33] the contents of the previously identified attachments indicate that these measures have not been altogether adequate. It would belabour the point unnecessarily to offer citation to demonstrate that the Accused cannot, under the circumstances, meet the substantial burden that he must meet in order to satisfy the Court that his release would not endanger victims, witnesses or other persons.

RELEASE AS A MATTER OF DISCRETION

19. As previously noted the Accused, notwithstanding proof he has demonstrated to the satisfaction of the Court that he will return for trial and will not endanger any victim, witness or other person, may nonetheless be denied bail at the discretion of the court. This consideration results from the reality that "... as a general rule, a decision to

[32] *Id* at paras. 9-12.
[33] Application at paras. 22 and 25(e).

release an accused should be based on an assessment of whether public interest requirements, notwithstanding the presumption of innocence, outweigh the need to ensure, for an accused, respect for the right to liberty of person."[34] Thus "...even if these requirements are met [no risk of flight or danger to person], this Trial Chamber ... retain[s] a discretion not to grant provisional release even if it is satisfied that the accused will appear for trial and will not pose a danger to any victim, witness or other person.... Consequently, the express requirements within Rule 65(B) should not be construed as intending to exhaustively list the reasons why release should be refused in a given case."[35] Therefore, in dealing with the issue of release, albeit it in a different context, it has been noted that amongst the matters to be considered in evaluating such a request are the imperatives of public security and order.[36]

20. In the present case it cannot be denied, after reference to the attached Declarations, that issues of public security and order would be impacted by the provisional release of the Accused. The fomentation of public unrest, the threats to national security posed by members of the organization in which the Accused formerly held a leadership position, as well as the current attitude of members of that organization towards the SCSL, clearly demonstrate the efficacy of Judge Itoe's holding that "(a)nother factor to be addressed and considered in granting or refusing bail in a case of this nature is the need and imperatives to preserve public order."[37]

21. Given the parameters of the threat the Accused' provisional release would have on public order and security, it is respectfully submitted that the Court's exercise of its discretionary power to refuse bail on grounds other than risk of flight and danger to victims, witnesses or other persons would likewise be appropriate in this case.

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[34] *Ademi supra* note 6, at para. 21.
[35] *Id.* at para. 22; See also *Brdanin supra* note 5, at para. 22.
[36] *Prosecutor v Bla[ki]*, IT-95-14-T, "Decision on Motion of the Defence Seeking Modification of the Conditions of Detention of General Bla[ki]", 9 January 1997.
[37] *Brima supra* note 9, at pg. 11.

V. CONCLUSION

22. For all of the reasons discussed above, and in light of his submissions, it is respectfully submitted that the Accused has failed to meet his burden to satisfy the Court that provisional release should be granted and that his Application for Bail Pursuant to Rule 65 should be denied.

Freetown, 9 February 2004

For the Prosecution,

Luc Côté
Chief of Prosecutions

James C. Johnson
Senior Trial Attorney

Charles A. Caruso
Trial Attorney

PROSECUTION INDEX OF ATTACHMENTS

I. Declaration of Oliver Somansa, Office of the Inspector General

II. Declaration of Alan White, Office of the Prosecutor

PROSECUTION INDEX OF ATTACHMENTS

I. Declaration of Oliver Somansa, Office of the Inspector General

I, Oliver Somansa, Deputy Inspector General of the Sierra Leone Police, of Freetown, Sierra Leone declare:

1. That I am writing this declaration on behalf of the Inspector General, who was attending to official business outside Freetown at the time of the signing of this declaration. He has deputized me to perform his duties in his absence, and I am therefore declaring the following in his name and on his behalf.

2. That in my position as Deputy 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.

3. The CDF, with whom Mr. Fofana is associated, continue to exist, in many areas holding regular planning meetings. Mr. Fofana could easily seek refuge among them, particularly in more remote areas where an effective police presence is not yet fully established. He alone or though these sympathizers 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.

4. In my view, speaking as Deputy Inspector General, and on behalf of the Inspector General, the police would be unable to provide adequate supervision of Mr. Fofana, ensure his presence at trial and 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. Fofana's release 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 February 2004

Oliver Somansa
Deputy Inspector-General of the Sierra Leone Police

PROSECUTION INDEX OF ATTACHMENTS

II. Declaration of Alan White, Office of the Prosecutor

SPECIAL COURT FOR SIERRA LEONE

JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

Pursuant to article _____ of the Directive for the Registry, Court Management Section, this certificate replaces the following confidential document which has been filed in the *Confidential File*.

Case Name: The Prosecutor vs. MORINA FOFANA
Case Number: SCSL- 2004-14-PT-004
Document Index Number: 004

Document's Date: 9-02-04
Filing Date: 9-02-04
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Document Type:

- ☐ Affidavit
- ☐ Decision
- ☐ Order
- ☐ Indictment
- ☐ Motion
- ☐ Correspondence: To:
  From:
- ☑ Other

Document Particulars: DECLARATION OF ALLAN WHITE

Name of Officer: Eustace Thompson
Signature:

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v Radoslav Brdanin & Momir Talic*, Case No. IT-99-36-PT, Decision on Motion by Radoslov Brdanin for Provisional Release, 25 July 2000.

2. *The Prosecutor v Rahim Ademi*, Case No. IT-01- 46-PT, Order on Motion for Provisional Release, 20 February 2002.

3. *The Prosecutor v Tamba Alex Brima*, Case No. SCSL-03-06-PT, Ruling on Motion Applying for Bail or for Provisional Release Filed by the Applicant, 22 July 2003.

4. *Prosecutor v Sam Hinga Norman*, Case No. SCSL-2003-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003.

5. *Prosecutor v Darko Mrda*, Case No. IT-02-59-PT, Decision on Darko Mrda's Request for Provisional Release, 15 April 2002.

6. *Prosecutor v Bla[ki]*, Case No. IT-95-14-T, Decision on Motion of the Defense Seeking Modification of the Conditions of Detention of General Bla[ki], 9 January 1997.

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v Radoslav Brdanin & Momir Talic*, Case No. IT-99-36-PT, Decision on Motion by Radoslov Brdanin for Provisional Release, 25 July 2000.

46

IN TRIAL CHAMBER II

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.

47

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

48

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

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

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

51

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)[45] 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

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

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).

54

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.

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

2. *The Prosecutor v Rahim Ademi*, Case No. IT-01- 46-PT, Order on Motion for Provisional Release, 20 February 2002.

57

Case No. IT-01-46-PT

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

578

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 Croat

PROSECUTION INDEX OF AUTHORITIES

3. *The Prosecutor v Tamba Alex Brima*, Case No. SCSL-03-06-PT, Ruling on Motion Applying for Bail or for Provisional Release Filed by the Applicant, 22 July 2003.

SPECIAL COURT FOR SIERRA LEONE
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IN THE TRIAL CHAMBER

Before: His Lordship, The Rt. Hon. Judge Benjamin Mutanga Itoe

Registrar: Robin Vincent

Date: 22nd day of July 2003.

The Prosecutor against

Tamba Alex Brima

SCSL-03-06-PT

RULING ON THE APPLICATION FOR THE ISSUE OF A WRIT OF HABEAS CORPUS FILED BY THE APPLICANT

Office of the Prosecutor:
Mr. James Johnson
Mr. Nicolas Browne-Marke

Attorney General:
Mr. Joseph G Kobba

Applicant Counsel:
Mr Terrence Michael Terry

Registry:
Mrs. Musu Kamara
Ms. Mariana Goetz

HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE:

JUDGE: This is my Ruling on this Application.

The Applicant in these proceedings, Tamba Alex Brima, stands indicted by the Prosecutor of the Special Court of Sierra Leone and is currently remanded in custody on a 17 count indictment dated 3rd of March 2003, preferred against him, and charging him with diverse crimes he committed against humanity and international humanitarian law in the territory of Sierra Leone, crimes which come within the context of the provisions of Article 1 of the Agreement between the United Nations and the Government of Sierra Leone, creating the Special Court for Sierra Leone on the one hand, and also those of Articles 1,2,3,4,5,6,7 of the Statute of the said Court on the other.

Since the Applicant considers his detention illegal, his counsel, Mr Terence Michael Terry, on the 28th of May, 2003, filed a motion in the Registry of the Special Court for leave for the issue of a Writ of "Habeas Corpus" as well as for an Order for a Writ of "Habeas Corpus ad subjiciendum" releasing the Applicant from his present detention which he argues, is unlawful and illegal, and this, pursuant to Rules 54 of the Rules of Procedure and Evidence of the Special Court of Sierra Leone, and under the "Habeas Corpus" Act of 1640 and1816.

This motion is brought against the following Respondents: The Director of Prisons of the Republic of Sierra Leone, The Officer in charge of the Special Detention Facility in Bonthe, and Any other Official who might at the time, have been holding the Applicant in custody.

Having been designated pursuant to Rule 28 of the Rules of Procedure and Evidence to adjudicate on this matter, and considering the urgency of the application, I issued an Order on the 18th of June 2003, granting leave for the Writ of "Habeas Corpus"

to be filed, but no immediate date was fixed for the hearing of the substantive matter for two reasons; the first being the prolonged but justified absence of Learned Counsel for the Applicant, Mr. Terence Michael Terry, who was out of the jurisdiction and secondly, the necessity in my opinion, for the submissions so filed to be served on the Honourable and Learned Attorney General and Minister of Justice of the Republic of Sierra Leone, the State to which the accused seeks to be released if the application were granted.

I accordingly made an Order to this effect, and this, in execution of the inherent discretion of the Court to make certain Orders which are in consonance with the overall objectives of fostering good practices aimed at enhancing and reinforcing the supremacy of the Rule of Law and of the Due Process.

In so doing, I have taken cognisance of the fact that Rule 65(B) of the Rules on 'Bail' contains these provisions and that since applications touching on either Bail or on " Habeas Corpus" if granted, produce the same effects of releasing the accused to the State of Sierra Leone, it was equitable, fair, in conformity with legal norms, and acceptable, to order that the Attorney General be associated to these proceedings, served with the submissions of the Parties, and heard on the application for " Habeas Corpus', a procedure which I agree and appreciate, is not provided for by the Rules of Procedure and Evidence of the Special Court.

Following the Order, the submissions of all the Parties were served on the Learned and Honourable Attorney General for him to submit on issues raised therein, and eventually to appear personally or to be represented at the hearing of the application, and this, following my decision to hold such a hearing in open Court pursuant to the provisions of Rule 73, in addition to the submissions which have been filed by the parties.

At the hearing on the 15th of July, 2003, Counsel representing the parties including the Honourable Attorney General's representative, Mr. Joseph. G. Kobba, made oral submissions and arguments to sustain their respective cases.

For the Applicant, his counsel, Mr. Terry, based his arguments on the illegality of the detention of his client on the following grounds:

-That the name of the person detained is not the same as the person mentioned in the indictment, and further that his identity was mistaken as he did not, as alleged in the indictment, join the Sierra Leonean Army in 1985, and never rose and could not of course have risen to the rank of a Staff Sergeant. The Applicant contends that to that extent, the indictment so approved was, and continues to be fundamentally flawed, invalid and tantamount to a miscarriage of Justice.

-That the warrant of arrest was not served on the Applicant on the date of his arrest by any competent authority.

-That the indictment is defective in that no prima-facie case was established against the Applicant before it was approved and signed by the Judge and that this was in violation of the provisions of Article 47 of the Rules of Procedure and Evidence of the Special Court.

The Respondents in reply to the arguments in support of the application for the issue of a Writ of "Habeas Corpus" have, on their part, canvassed the following arguments:

-That the Application should be rejected on the grounds that neither the Statute nor the Rules of Procedure and Evidence of the Special Court, make provisions for the Writ of "Habeas Corpus" and that it is unknown to the Rules of the Special Court.

- That if the Court were to decide that the Defence motion would be dealt with as the motion under Rule 72 or 73 challenging the lawfulness of the Applicant's detention, such a motion should be rejected on its merits for the following reasons:

-That the contention that the Provisions of Rule 47 of the Rules have been violated is unfounded as all what is required to conform with these provisions had been done by the Respondents who filed the indictment for approval by the designated Judge. The Respondents in any event further contend that the Applicant failed to demonstrate in what sense and it what way the provisions of Rule 47 had been violated.

-On the argument that the indictment is flawed ex-facie because it erroneously contained information to the effect that the Applicant joined the Sierra Leonean Army in 1985 and rose to the rank of a Sergeant, the Respondent in reply, argued in effect that the issue of the veracity of a fact pleaded in an indictment relates to and in fact touches and borders on examining the merits of the case and that this issue can only be determined by the Trial Chamber after hearing the totality of the evidence.

-On the said warrant of arrest which the Applicant contends is flawed for reasons advanced by his counsel, Mr. Terry, in open Court in that it did not, nor did the Judge specifically order the arrest of the Applicant whose identity is contested, the Respondent has canvassed the arguments that the said warrant dated the 7th of March, 2003, is clearly and unambiguously entitled 'Warrant of Arrest and Order for Transfer and Detention.

-On the Applicant's argument that his arrest was flawed because the said warrant of arrest was not served on him, the Respondents contend and seek to rely on the Declaration dated the 31st of May, 2003, of "Moris Lengor" a Police investigator in the Prosecutor's Office, who solemnly declared that the warrant was duly served on the Applicant before he was arrested.

On the allegation that the rights of the Applicant have been grossly violated, the Respondent argue that his rights as guaranteed under Article 17 of the Statute have been properly respected.

On the argument by the Respondent that the Special Court cannot apply the procedure of "Habeas Corpus" because it does not form part of the Judiciary of the Republic of Sierra Leone nor is it a Sierra Leonean Court, Counsel for the Applicant, Mr. Terence Michael Terry, submits on the contrary, that the Special Court for Sierra Leone is clearly part of the Courts of Sierra Leone and that to that extent, as an Adjudicating Body, it falls under the supervisory jurisdiction of the Supreme Court of the Republic of Sierra Leone to which applications for "Habeas Corpus", as provided for by Section 125 of the 1991 Constitution of the Republic of Sierra Leone, can be brought. This Section provides as follows:

'The Supreme Court shall have supervisory jurisdiction over all other Courts in Sierra Leone and over any adjudicating authority, and in the exercise of its supervisory jurisdiction shall have power to issue such directions, orders or writs including writ of "Habeas Corpus", orders of certiorari, mandamus and prohibition, as it may consider appropriate for purposes of enforcing or securing the enforcement of its supervisory powers.'

This argument, the Respondent submits, should be rejected. In making this submission, the Respondent relies on the provisions of Sections 10 and 11 of the Special Court Agreement 2002 Ratification Act, 2002.

Section 10 of this Act reads and I quote:

"The Special Court shall exercise the jurisdiction and the powers conferred upon it by the agreement in the manner provided in the Rules of Procedure and Evidence of

the International Criminal Tribunal for Rwanda in force at the time of the establishment of the Special Court as adapted for purposes of the Special Court by the Judges of the Special Court as a whole".

Section 11 (2) of the same Ratification Act provides as follows and I quote: "The Special Court shall not form part of the judiciary of Sierra Leone".

In his oral arguments in Court, Mr. Terry, Counsel for the Applicant, urged me to hold and to declare that the Provisions of Section 11 (2) of the 2002 Ratification Act, in so far as they are contrary to or inconsistent with the provisions of Sections 125 of the Constitution of Sierra Leone, should, to the extent of that inconsistency, be declared unconstitutional and to quote him, "ex facie" null and void.

Mr. Terry went further and urged me to stay these proceedings and to state a case to the Supreme Court of Sierra Leone for a directive on what he called 'this important constitutional question'. It is in the background of these arguments that I will now proceed to examine the merits and demerits of the application before me.

On the preliminary issue of the propriety of the Special Court entertaining an application for "Habeas Corpus", a fact which surfaces in the proceedings, albeit subtly, as a preliminary objection by the Respondents to this application, I will like to observe that this historic Common Law Writ is founded basically on the principle that no individual should be subjected to an illegal detention.

Indeed, one of the most regularly and too-often deplored breaches of human rights today is the violation of individual liberties which are guaranteed not only by the provisions of Article 3 of the Universal Declaration of Human Rights but also, by practically all democratically inspired Constitutions of Countries of the world, and particularly, those of Member States of the United Nations Organisation.

It is my opinion that because the right to liberty is too sacred to be violated by whoever, any Court faced with or called upon to rule on applications of this nature, in whatever form they may be brought, should, for reasons based on the universal resolve and determination to uphold by all lawful means, respect by all and sundry and in all circumstances, of this entrenched fundamental human right, should entertain such applications and refrain from dismissing them merely on technical pretexts or niceties, geared at and designed to prevent them from being entertained and examined.

This is the philosophy that has guided me all along in granting the application "ex-parte" on the 18th of June 2003, for leave to file the substantive application for the issue of the writ of "Habeas Corpus". In so doing, I agree with the submission of the Respondents that the procedure for granting a release through a Writ of "Habeas Corpus" features nowhere in the Rules for Procedure and Evidence which are applicable to the Special Court. However, entertaining this Writ is dictated by the imperatives of universally ensuring the respect of human rights and liberties.

Besides, this application can be assimilated to a motion brought under Section 73 of our Rules of Procedure and Evidence which, like in this case, which, just as a single Judge can handle applications for Writs of "Habeas Corpus", confers on a single Judge of the Trial Chamber designated under Rules 28 of the Rules of Procedure, the right to handle issues of this nature, after hearing the parties.

In the case of the ***Prosecutor vs Radoslav Brdanin***, in the matter of an application for the issue of a writ of "Habeas Corpus" in the favour of the Applicant, the Trial Chamber of The International Criminal Tribunal for Yugoslavia (ICTY), on the 8th of December, 1999, composed of His Lordship, Judge Antonio Cassese, Presiding, and Their Lordships, Florence Ndepele Mwachande Mumba ,and David Hunt, Judges, had this to say:

"This Tribunal has no power to issue Writs in the name of any Sovereign or other Head of State. But the Tribunal certainly does have both the power and the procedure to resolve a challenge to the lawfulness of detainees in detention."

This decision was preceded by that of ***Jean Bosco Barayagwiza vs The Prosecutor***, where the Appeal's Chamber of the International Criminal Tribunal of Rwanda (ICTR) presided over by His Lordship. Judge Gabrielle Kirk Mc Donald, flanked by Their Lordships, Judges Mohamed Shahabuddeen, Lalchand Vorah, Wang Tieya and Rafael Nieto-Navia, made the following remarks, and I quote;

"Although neither the Statute nor the Rules specifically addressed Writs of "Habeas Corpus" as such, the notion that a detained individual shall have recourse to an independent judicial officer for a review of the detaining authorities' act, is well established by Statute and Rules".

In the light of the above analysis, I hold that the Applicant's Writ of "Habeas Corpus" is properly before me, and this, notwithstanding the objection of Learned Counsel for the Respondents, Mr. Browne-Marke, based on the failure of the Applicant to file a proper substantive Writ after he had obtained leave to file same. In this regard, I will like to observe that an examination of the traditional practice in filing Writs of "Habeas Corpus" is, as in this case, and as it is indeed permissible, to couple the application for leave with the substantive application and to file and serve them at the same time since the application for leave to file Writs of this nature is hardly refused at that preliminary level.

Turning now to the merits and substance of this application, one of the very hotly contested and interesting issues in this matter is whether, as Mr Terry, Counsel for the Applicant contends, the Special Court is part of the judicial hierarchy of the Courts of Sierra Leone as provided for under the provisions of the Constitution of the Republic of Sierra Leone.

It should be recalled here that the Special Court was created by Resolution No. 1315, 2000 of the Security Council dated the 14th of August, 2000, and an Agreement dated the 16th of January, 2002, signed between the United Nations and the Government of Sierra Leone to which is annexed, the Statute that forms an integral part of the said Agreement. The Special Court was so created because of the deep concern expressed by the Security Council at the very serious crimes committed within the territory of Sierra Leone, against the People of Sierra Leone and the United Nations and Associated Personnel, and the need to create an independent Special Court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under the Sierra Leonean law.

Article 1(2) of the Agreement setting up the Special Court stipulates as follows and I quote:

"The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof."

Article 14 (1) of the Statute provides as follows and I quote:

"The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of legal proceedings before the Special Court."

Sub-Section 2 of the same Article provides as follows and I quote:

"The Judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not or do not adequately provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone."

This provision underscores the fact that the Sierra Leonean Criminal Procedure Act, 1965 which is an emanation of the Sierra Leonean Parliament, the Municipal Legislative Organ of this Country and which regulates the procedure and conduct of proceedings in all Courts vested with criminal jurisdiction by the 1991 Constitution of the Republic of Sierra Leone, is not applicable to the proceedings in the Special Court, even though it equally, like the Sierra Leonean Criminal Courts, is vested with an essentially criminal jurisdiction, albeit, of an international character.

Pursuant to the provisions of Article 14 sub 1 and sub 2 of the Statute, all Judges of the Special Court of Sierra Leone at a Plenary Meeting held in London, adopted, on the 8th of March, 2003, Rules of Procedure and Evidence which today are applicable in the functioning of the Special Court and very independently of any other Rules of Procedure and Evidence and least still, of those contained in the Sierra Leonean1965 Criminal Procedure Act, or any other which are an emanation of the municipal legislative mechanisms of the Republic of Sierra Leone.

Viewed from another perceptive, the Special Court of Sierra Leone holds its existence, not to the Constitution or to the Parliament of the Republic of Sierra Leone, but solely to the Security Council Resolution No: 1315 2000, of the 14th of August 2000 and the International Agreement between the United Nations and the Government of Sierra Leone which set it up. This Resolution and Agreement are both international instruments which had to come into force as required by international law and practice, following a ratification instrument of the Government of Sierra Leone. It is this formality that warranted the enactment by the Sierra Leonean Parliament, of the Special Court Agreement Ratification Act 2000, and this,

very long after the coming into force of the 1991 Constitution of the Republic of Sierra Leone.

From these dates, it can be deduced that the Sovereign People and the equally Sovereign Parliament of the Republic of Sierra Leone, in enacting the 1991 Constitution in time of peace, never could have enacted or even envisaged constitutional provisions for structures which were supposed to regulate a post civil war stabilizing institution which is what the Special Court of Sierra Leone represents today.

In interpreting therefore the provisions of Sections125 of the Constitution of the Republic of Sierra Leone or of any other provisions, I am guided by the dictum in the case of the ***Bank of England vs Vagliano Brothers*** where His Lordship, The Learned Lord Justice Herschel had this to say:

'I think the proper cause is in the first instance to examine the language of the Statute and to ask what its natural meaning is'. The natural meaning, the natural interpretation of Section 125 and other provisions of the Sierra Leonean Constitution is that these provisions are only meant to apply to the Courts of Sierra Leone and the Courts which come within the judicial hierarchy of the Constitution of the Republic of Sierra Leone.

I therefore hold that application of Section 125 and other sections of the Constitution which had been referred to by Learned Counsel for the Applicant, is only limited to the Courts created by the 1991 Constitution of Sierra Leone and not to a post 1991 International creation that owes it existence to an international instrument of the Security Council and an equally International Agreement between the United Nations and the Government of Sierra Leone.

To crown it all, Section 10 of the Special Court Agreement Ratification Act provides, and I quote:

'The Special Court shall exercise its jurisdiction and powers conferred upon it by the Agreement.' Section 11(2) of the same Ratification Act provides:

"The Special Court shall not form part of the Judiciary of Sierra Leone."

In the course of arguments in Court, Learned Counsel for the Applicant, Mr Terence Terry, urged me to state a case to the Supreme Court of Sierra Leone on the constitutionality of the provisions of Article 11 (2) of the Ratification Act 2002 which he submitted, are unconstitutional in so far as they are inconsistent with the provisions of the 1991 Constitution of the Republic of Sierra Leone.

It is my considered opinion in this regard that the jurisdiction of the Special Court is limited only to matters that fall under the provisions of the Statute and the Agreement. Indeed, nowhere in these two instruments is the Special Court of Sierra Leone subjected to the jurisdiction of the Supreme Court of Sierra Leone, nor is it empowered or authorised to state cases to that Court or even to get into examining issues relating to constitutionality or even arrogating itself with the competence of declaring unconstitutional, a sovereign enactment of the Sovereign Legislature of the Republic of Sierra Leone or Acts of its Executive Organs.

I therefore hold, from the foregoing analysis, that the Special Court, even though created by a special International Agreement between the United Nations and the Government of Sierra Leone, and even though, by that same International Agreement, Distinguished Judges, Counsels and Jurists of Sierra Leonean origin are appointed to serve on it, is not, should not, and cannot be considered as forming an integral part of Courts of the Republic of Sierra Leone. Rather, it is, to all intents and purposes, a Special International Criminal Jurisdiction whose mandate is

defined by Security Council Resolution Number 1315, 2000 of the 14th of August, 2000, and further that all appeals from the Trial Chamber of the Special Court lie, in the last resort, not to the Supreme Court of The Republic of Sierra Leone, but before its Appeal Chamber which is the highest and final jurisdiction in its judicial hierarchy. It therefore has no connection with the Supreme Court of Sierra Leone nor is it subjected to its jurisdiction, supervisory or otherwise.

Having examined the constitutional, procedural, and jurisdictional issues of this matter, I will now address the most important aspect on which the application for "Habeas Corpus" is based, that is, the alleged illegality of the detention of the Applicant.

In this regard, I would like to refer to a very well known principle that was laid down in the case of Zamir vs the United Kingdom 40 DR 42 at page 102 where it was decided that the burden of proving the legality of the detention rests on the State. In contesting the legality of the detention of the Applicant, Learned Counsel, Mr. Terry, contends that the Applicant in his affidavit affirms that his name is Tamba Alex Brima and not Alex Tamba Brima as appears in the indictment filed by the Prosecutor and subsequently approved by His Lordship, Judge Bankole Thompson pursuant to the provisions of Rule 47 of the Rules of Procedure and Evidence.

To buttress this argument, Counsel for the Applicant alleges that the indictment contains erroneous information in that it alleges that his client had joined the Sierra Leonean Army in 1985 and rose to the rank of a Staff Sergeant. He argues and has produced documentary evidence of correspondences his Chambers has had with the Headquarters of the Sierra Leonean Army, showing that the Applicant has never been enrolled in the Sierra Leonean Army. He therefore contends that the said indictment was fundamentally flawed. He also argued that the warrant of arrest was equally flawed for similar reasons.

On the contested identity of the Applicant, I observe from the indictment that it reads as follows: The Prosecutor versus Alex Tamba Brima also known as aka Tamba Alex Brima aka Gullit. Could this not be interpreted as charging the same Applicant before me who admits that his real names are Tamba Alex Brima as is alleged in the indictment? Besides, the indictment alleges and attaches another name to the Applicant's name, that is, 'Gullit'. When the Applicant was called up with all these names and arrainged before me on the 17th of March, 2003, as well as when he was called up and again appeared before me on the 15th of July, 2003, he, also known as (aka) Tamba Alex Brima Aka Gullit, did not contest the fact that he is also called 'Gullit'

Since he took the plea as Alex Tamba Brima, I will like to imagine without concluding, that he could be one and the same person that the Prosecutor is targeting as Alex Tamba Brima. Even if a doubt is created in respect of his having served in the Sierra Leonean Army, I cannot at this stage, as a designated Pre-trial Judge, resolve this issue which I consider properly within the competence and jurisdiction of the Trial Chamber and which, in my judgement, is the rightful venue to examine evidence on those facts which touch on the indictment and on the warrant of arrest in the course of the trial of the Applicant.

Learned Counsel for the Applicant also challenged the legality of the warrant of arrest on the basis that it did not contain an Order by the Judge to specifically arrest Tamba Alex Brima. In this regard, I observe that the relevant provisions of Rules 47 (H) and 55 do not consecrate a format for a warrant of arrest. It would appear to me sufficient, if, as the instant warrant does, the name of the person to be arrested is specified and the said person is identified and arrested accordingly. In any event, having been taken into custody, a mere technical flaw in the warrant of arrest neither renders the said arrest nor the detention based on that arrest, illegal.

On the contention by learned Counsel for the Applicant that the approved indictment was flawed in that it was signed ex-parte by the Judge when a prima-facie case was not established by the Prosecutor, I would like to refer to the relevant portions of the Rules.

Under Rule 47 (A), the Judge is conferred with powers to approve the indictment.

Under Section 47 (C) It is stated that the indictment shall contain and be sufficient if it contains the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged, and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's summary briefly setting out the allegations he proposes to prove in making his case.

Under Section 47 (E), the designated Judge shall review the indictment and the accompanying material to determine whether the indictment should be approved. The Judge shall approve the indictment if he is satisfied that:

(a) "The indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court"; and
(b) "The allegations in the Prosecutor's summary would, if proven, amount to the crime or crimes as particularized in the indictment"

From the foregoing analysis, it is clear that the Application by the Prosecutor for the approval of the indictment is made to the Judge ex-parte and that the Judge, in my opinion, either applying the objective or subjective test, approves it as such. The Prosecutor cannot indeed at that stage, without having called evidence in Court, be expected to establish a prima-facie case nor can the Judge, in such circumstances, without evidence having been so adduced, so find. Indeed, all the indictment needs to satisfy for it to be approved is what is contained in Rule 47 (E) and not that the documents so submitted should establish a prima-facie case against the accused.

Once the Judge at this stage is satisfied that the indictment and the facts accompanying it, if proven, amounts to the crime or crimes particularized in the indictment, he should, without more, like His Lordship, Judge Bankole Thompson did, sign the indictment so submitted by the Prosecutor.

Since this argument, like all others relating to the illegality of the Applicant's detention, fail to justify the case the Applicant set out to establish in order to secure the immediate release by the granting and issuing of a Writ of "Habeas Corpus", I accordingly dismiss it and at the same time, dismiss the application for the issue of the Writ of "Habeas Corpus in his favour because the arguments of Learned Counsel for the Applicant, Mr. Terence Michael Terry, even though very profoundly and ingenuously presented, lack the legal merits to meet the standards required for the issue of a Writ of this nature, and particularly in a situation such as this, where the Prosecution has fully discharged the burden placed on it to justify the legality of the Applicant's detention.

The application for the issue of this Writ is therefore refused and is accordingly dismissed.

The Applicant will continue to remain in custody.

Done at Freetown, this 22nd day of July 2003

HIS LORDSHIP, THE RT. HON. JUDGE BENJAMIN MUTANGA ITOE.

PROSECUTION INDEX OF AUTHORITIES

4. *Prosecutor v Sam Hinga Norman*, Case No. SCSL-2003-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003.

SPECIAL COURT FOR SIERRA LEONE
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Before: Justice Robertson, President

Registrar: Robin Vincent

Date: 26th day of November 2003

The Prosecutor Against:

Sam Hinga Norman
(Case No. SCSL-2003-08-PT)

DECISION ON MOTION FOR MODIFICATION OF THE CONDITIONS OF DETENTION

Office of the Prosecutor:
Luc Côté, Chief of Prosecution
Jim Johnson, Senior Trial Counsel

Defence Office:
Sylvain Roy, Acting Chief of Defence Office
Claire Carlton-Hanciles, Defence Associate
Ibrahim Yillah, Defence Associate
Haddijatu Kah-Jallow, Defence Associate

Defence Counsel:
Timothy Owen
Quincy Whitaker
James Blyden Jenkins-Johnston
Sulaiman Banja Tejan-Sie

THE PRESIDENT OF THE SPECIAL COURT FOR SIERRA LEONE ("the Special Court")

NOTING THE SUBMISSIONS OF THE PARTIES
HEREBY DECIDES AS FOLLOWS:

1. This Motion[1] is brought under Rule 64 (Detention on Remand) of the Rules of Procedure and Evidence ("Rules") on behalf of Chief Sam Hinga Norman, an indictee who has been detained, since his arrest on 10 March 2003, in Special Court detention facilities, initially at Bonthe Detention Facility (where he was incarcerated when the motion was filed on 23 July 2003) but now in the detention unit of the Special Court complex in Freetown, adjacent to the Court itself. It is described as a "motion for modification of the conditions of detention" although it is in fact (and this is frankly acknowledged in the Motion) a request for his release from detention so that he can be placed under what is ambiguously described as "house arrest", under conditions (e.g. to reside at the house at all times, surrender his passport, and to have no contact with witnesses or the media) which are normally associated with a grant of bail. The Prosecution responded very fully, over more than 100 pages, on 31 July 2003[2] and a reply was expeditiously filed on 4 August 2003.[3] The papers were not, however, put before me until 30 October 2003. The Motion struck me immediately as one which is, in effect and in principle, an application for conditional bail, which should have been brought under Rule 65, and I therefore invited counsel for the Applicant and the Prosecutor to address me initially on this issue, which they did at a hearing convened in the Special Court law library on 5 November 2003. I am grateful to them for their assistance.

2. My first anxiety, however, was to understand why the delay occurred. The Motion seems to have been a casualty first of the fact that the Court was in recess during the month of August. Subsequently, there seems to have been confusion (understandably, as will appear) in the Registry as to whether this was a bail application under Rule 65 or a matter for the President's discretionary jurisdiction over the detention facility which was provided by Rule 64, although there had been a change made to Rule 64 on 1 August 2003 at the second London plenary of the judges. (Power to order "special measures of detention" was allocated to the Registrar, subject to

[1] Motion for Modification of the Conditions of Detention, 23 July 2003.
[2] Prosecution Response to Defence "Motion for Modification of the Conditions of Detention", 31 July 2003.
[3] Reply – Motion for Modification of the Conditions of Detention, 4 August 2003.

an appeal within two days to a judge). In these circumstances I can see how the delay occurred and expedition does not appear to have been urged on behalf of the detainee - perhaps because he was over this period moved from Bonthe to a more satisfactory environment. Although no-one is to blame, I do apologise to Chief Hinga Norman and his lawyers for the delay that has occurred in dealing with their Motion. Although I conclude that it should not have been filed in the first place under Rule 64, either as it stood at the time or as amended, this was not clear at the time of filing and no criticism can be attached to the detainee's lawyers for bringing what they described as an "innovative" application.

The Detention Regime

3. All indictees arrested in Sierra Leone or transferred there after arrest abroad must initially be detained in the facilities run by the Special Court administration. Rule 64, inherited from the International Criminal Tribunal for Rwanda ("ICTR") under Article 14 of the Statute, originally provided;

> Upon his transfer to the Special Court, the accused shall be detained in the facilities of the Special Court, or facilities otherwise made available pursuant to Article 22 of the Statute. The President may, on the application of a party or the Registrar, order special measures of detention of an accused.

This was the rule as it existed when the application was made on 23 July this year. It gave the President the power to order "special measures of detention", i.e. special ways of treating a particular prisoner who was detained within the facility. The prisoner himself, for example, might seek an order for solitary confinement or special medical treatment while the Registrar might make a request for CCTV surveillance of a cell for a "suicide watch" or where there was suspicion of a plan of escape. It was, in my view, a rule which envisaged the ordering of a special regime for a prisoner confined within the detention facility or else (e.g. if being treated in a hospital) being guarded by and remaining in the custody of the Special Court. It did not empower the President to order bail, which is a measure of provisional liberty to be dealt with under Rule 65.

4. A distinction, upon which this application will turn, should be simple to understand and apply, once the ambiguity of the phrase "house arrest" is recognised and removed. Some "house arrests"

involve round-the-clock guards from the detaining power, albeit in the more comfortable surrounds of a private house rather than a prison cell. The other form of "house arrest", for example that served in Britain by General Pinochet, requires residence in a private house outside the control of any prison authority, but subject to conditions such as the surrender of passport and reporting to police. It is this second, Pinochet-style form of "house arrest" that the applicant seeks and it is of course (as in Pinochet's case) a form of conditional bail rather than a "special measure of detention". The essential distinction between "house arrest" and conditional bail involving a form of house arrest is the presence or absence of the detaining authority as the power controlling the movements of the detainee. The applicants have not put before me any approval to their desired course from the Head of Detention. His ability to operate a control regime would be essential before I could consider any application under old Rule 64 for a variation in the place and conditions of detention.

5. The actual administration of the conditions of detention must comply with the Rules of Detention,[4] which are designed to provide for a regime of humane treatment for unconvicted prisoners, subject to restrictions and discipline necessary for security, good order, and for the fairness of ongoing trials. They should conform with the provisions of the 1949 Geneva Conventions, suitably updated (the right to smoke cigarettes, for example, regarded as virtually inalienable in 1949, may be qualified because of more recent health concerns about fellow detainees).[5] The Detention Rules give necessary powers to the Head of Detention, subject to direction by the Registrar. Judges have no part in administering or ordering these rules, although in three difficult or urgent situations the President does have a role to order a report into the death in custody of an indictee (Rule 24(c)); to approve any order by the Registrar for cell video surveillance which order lasts longer than 14 days (Rule 26); and to hear appeals by a detainee from any decision to deny him contact with any person (Rule 48). These are serious situations where it is right that the President, as head of the Special Court, should oversee the Registrar. Otherwise, judges are not involved in administrative detention matters unless they impact significantly upon the right under Article 17(4)(b) of the Statute to adequate preparation of the defence, when they may be raised by motion before the Trial Chamber judges who are best placed to make such a determination.

[4] 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, 7 March 2003, as amended 25 September 2003.
[5] See Article 26 of Convention (III) relative to the treatment of prisoners of war, Geneva, 12 August 1949.

6. At the second plenary, Rule 64 was amended so that it would best serve a court where the President, who is an Appeals Chamber judge, would not be in full-time office until after the first trial had ended. Except in these very serious matters for which the Rules of Detention provide for Presidential involvement, "special measures" could be approved by any judge - normally by one of the three full-time and resident Trial Chamber judges. Moreover, in keeping with the policy that detention is a matter for administrative rather than judicial decision, any order for such exceptional measures should be made by the Registrar. In order to protect the detainee, if subjected to them without consent, the Registrar is required to seek judicial endorsement within 48 hours of imposing the measure. Rule 64 (Detention on Remand) now reads:

> Upon his transfer to the Special Court, the accused shall be detained in the facilities of the Special Court, or facilities otherwise made available pursuant to Article 22 of the Statute. The Registrar, in a case where he considers it necessary, may order special measures of detention of an accused. Such special measures shall be put before a judge for endorsement within 48 hours.

Bail - Release from Detention

7. The prisoner remains in detention under Rule 64 and the Rules of Detention when transferred to holding areas prior to entry into court or outside the prison for medical treatment (even if placed for a lengthy period in hospital) and in the courtroom itself while being tried. The alternative situation, where the prisoner can be said to enjoy a state of liberty, however restricted, can only be achieved (other than by his acquittal) through an application for bail which must be made pursuant to Rule 65. This rule provides:

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, upon good cause being shown. Applications for leave to appeal should be filed within 7 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 V shall apply.

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

H. Appeals from bail decision shall be heard by a bench of at least three Appeals Chamber judges.

8. Although the paragraphs of Rule 65 are somewhat jumbled, the procedure is tolerably clear. There is no presumption in favour of bail, which is understandable given the very serious nature of the crimes charged. It may be applied for to a single judge (generally, prior to trial) or to the Trial Chamber once the trial has started and may only be appealed by leave of the pre-hearing judge of the Appeals Chamber, upon good cause being shown. Under Rule 65D any judge or chamber minded to grant liberty has a wide discretion to impose conditions and restrictions. In my judgement, as will appear, this "application for special measures of detention" is in reality an application for conditional bail which should have been made under Rule 65D.

The Application

9. The Defence has found a "safe house" outside the Court and seeks an order (in effect inviting bail conditions) that he should reside at that address at all times; that he should surrender his passport; not interfere with witnesses; conduct no media interviews but admit "occasional unannounced visits" by a designate of the Registrar - presumably to check that he is still there.

There would be no permanent (or even occasional) presence in the house of prison officers, as there is in the first kind of "house arrest" discussed in paragraph 4 above. The proposal is for the accused to be at liberty, and together with his family, subject only to conditions which are commonly regarded as conditions of bail.

10. My classification of this application as one for bail relieves me of any need to detail, let alone determine, the grounds upon which it has been made: most relate to conditions in Bonthe, which are now water under the bridge. I am sorry to hear that the accused still suffers some pain from a condition that has required surgery in the past; if it threatens his preparation for trial then of course, under the Rules of Detention, he is entitled to have medical examination and treatment, but his doctor's letter (undated) gives no cause at this stage for alarm. There is a letter from the Secretary of the President of Sierra Leone, but that was in respect of an approach by the applicant's lawyers who sought an indication of the position of the State in respect to a potential Rule 65 application where paragraph B requires such an indication from the State of proposed residence. This approach to the President envisaged an application under Rule 65 and not Rule 64.

11. The Prosecution opposes the application by way of affidavits from its senior investigator and the Inspector General of Police: these will be for the Trial Chamber to consider in the event that a bail application is made. The Prosecution response invites me at length to dismiss the Motion on its merits. Surprisingly, it does not take the point that it is in reality an application for bail. Had it been made after the amendment to Rule 64, of course, the position would I hope have been much clearer.

The *Blaskic* Case

12. The applicant justified his "innovative" use of the old Rule 64 on the basis of a decision of Judge Cassese, when President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), to use his powers under that Rule to order that General Blaskic be permitted to reside outside the Court and to spend some nights with his wife and children.[6] Having examined the *Blaskic* case, I do not think that it assists. It is briefly reported, and does not fully describe the

[6] *Prosecutor v Tihomir Blaskic*, Case No. IT-95-14-T, Decision of the President on the Defence Motion filed pursuant to Rule 64, 3 April 1996.

regime which is being approved. I am told that it proved impractical in any event. There was some background - the President said that the General's "voluntary surrender deserved some recognition" and that "house arrest is a form of detention"[7] - but as I have pointed out in paragraph 4 above this depends on what is meant by the ambiguous phrase "house arrest". The Pinochet style of house arrest is emphatically not a form of detention; it is a form of conditional bail. The issue turns on whether the indictee remains under the control of the detention unit and that fact is not clear from the *Blaskic* decision. There was a subsequent decision dealing with security arrangements, from which it may be inferred that the accused was in fact to be guarded whilst at home. This fact would eliminate the case as a precedent for this application which as I have indicated is one for bail with a condition (amongst others) of residence at a particular address. That comparable applications have always been made and dealt with as applications for bail (or for 'provisional release" as bail is there described) is apparent from many other ICTY and ICTR cases.[8]

13. In my judgement, this is right both as a matter of rule construction and in principle. It will henceforth be right under amended Rule 64 where the Registrar's power to order "special measures" cannot be interpreted as a power to order conditional release or any measure which places a detainee outside the 24 hour control of the Head of Detention. Applications for conditional freedom must proceed under Rule 65, where they will receive the attention of the Chamber that is actually trying the accused, or of a resident Trial Chamber judge. In its original ICTY incarnation, Rule 65 limited bail to "exceptional circumstances".[9] Now, and in this Court, all circumstances must be taken into account: obviously there would need to be convincing guarantees that the accused will not abscond or tamper with witnesses or victims or pose a threat to others. A Rule 65 application also has the right of an appeal, should leave be granted.

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[7] Ibid, para. 3(d).

[8] See e.g. *Prosecutor v Bagosora*, Case No. ICTR-98-41-T, Decision on Defence Motion for Release, 12 July 2002; *Prosecutor v Brdanin*, Case No. IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000; *Prosecutor v Mrda*, IT-02-59-PT, Decision on Darko Mrda's Request for Provisional Release, 15 April 2002; *Prosecutor v Ademi*, Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 February 2002; *Prosecutor v Jokic*, Case No. IT-01-42-PT, Order on Miodrag Jokic's Motion for Provisional Release, 20 February 2002; *Prosecutor v Brdanin and Talic*, Case No. IT-99-36-PT, Decision on Motion by Momir Talic for Provisional Release, 28 March 2001.

[9] See Rule 65(B) of the ICTY Rules of Procedure and Evidence adopted on 14 March 1994 (as amended 8 January 1996), UN Doc. IT/32/Rev.7 (1996), "Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."

14. In ICTY and ICTR practice, bail has not often been granted. In Sierra Leone, when crimes of murder and treason are charged, the terms of Section 79(1) of the Criminal Procedure Act of 1965 (as amended) require any grant of bail to be made by a judge and not a magistrate. The harshness of a bail refusal is tempered where the Court can provide a relatively speedy trial at which the "presumption of innocence" operates to require the Prosecution to prove its case beyond reasonable doubt. I recognise that continued incarceration is particularly burdensome to this accused who was a minister in the Government both at the time of his arrest and at the time of his alleged crimes. The Prosecution accepts that its charges against him arise out of his leadership of forces which acted in defence of the democratically elected government, sometimes at its request, and that it would fail if it could not prove that the degree of force used was unreasonable in all the circumstances. His counsel refer, rightly and repeatedly, to his right to a fair and speedy trial.

15. The importance of this right in the Special Court has already been emphasized by the Appeals Chamber.[10] That prospective delay is a relevant circumstance to be taken into account in bail applications has been confirmed by ICTY and ICTR jurisprudence which rightly warns prosecutors against reliance on early and aberrant decisions of the European Commission of Human Rights excusing very lengthy pre-trial detentions.[11] The very act of bringing an indictment implies that the Prosecution has a case that is almost ready for trial and can be made ready within 6 to 9 months of the date of arrest, a time that is probably the minimum necessary to allow defence preparation. Arguments that concern delay in trial fixtures considerably beyond that time period will be carefully scrutinised to ensure that both parties are genuinely working towards trial at the earliest practicable time.

Conclusion

16. This application cannot be entertained under Rule 64. It must be made anew and under Rule 65 should the applicant wish to pursue it as an application for conditional bail. I make no comment on the evidence filed by either side, which in any event would need to be updated since it deals

[10] *Prosecutor v Norman*, Case No. SCSL-2003-08, *Prosecutor v Kallon*, Case No. SCSL-2003-07, *Prosecutor v Gbao*, Case No. SCSL-2003-09, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, 4 November 2003.

[11] See *Prosecutor v Brdanin*, Decision on Motion by Brdanin for Provisional Release, in particular at paras 24-28. Note also footnote 62 in which the aberrant European Commission case of *Ventura v Italy* is discussed. Other such cases are distinguished on the basis that they are applications of the "margin of appreciation" doctrine.

with the position in July and to a large extent the conditions in Bonthe. Of paramount importance in the applicant's case is the need for the Court to effectuate his right to an early trial fixture and to consider any further application he may make in the context of his preparation for that trial and as the trial progresses.

Done at Freetown

This twenty-sixth day of November 2003

Justice Robertson

President

[Seal of the Special Court]

PROSECUTION INDEX OF AUTHORITIES

5. *Prosecutor v Darko Mrda*, Case No. IT-02-59-PT, Decision on Darko Mrda's Request for Provisional Release, 15 April 2002.

Case No. IT-02-59-PT

IN TRIAL CHAMBER II

Before:
Judge Wolfgang Schomburg, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar:
Mr. Hans Holthuis

Decision of:
15 April 2002

PROSECUTOR
v.
DARKO MRDA

DECISION ON DARKO MRDA'S REQUEST FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Nicholas Koumjian
Ms. Sureta Chana

Counsel for the Accused:

Mr. Vojislav M. Dimitrijevic

I. INTRODUCTION

A. Procedural history

1. Trial Chamber II of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seised of a motion entitled "Motion for Provisional Release of Darko Mrdja" ("Motion"), filed by the Defence for Darko Mrdja ("Defence") on 14 March 2003 in which the accused Mrdja seeks to be provisionally released to his family home in Prijedor in the Republika Srpska. Already by letter of 26 November, filed on 29 November 2002, the Government of Republika Srpska, Bosnia and Herzegovina, submitted guarantees relating to the request for provisional release of the accused Mrdja to the Tribunal.

2. The Office of the Prosecutor ("Prosecution") filed its partly confidential "Prosecution Response to Motion for Provisional Release" ("Response") on 25 March 2003, requesting that the Trial

Chamber deny Mr. Mrdja's application for provisional release.

3. Neither of the parties requested an oral hearing on the present Motion.

4. The accused Darko Mrdja is charged with extermination, murder and inhumane acts, as a crime against humanity and a violation of the laws or customs of war, in relation to the killing of approximately 200 non-Serb men on a road over Vlasic Mountain in August 1992. He was arrested on 13 June 2002 and entered an initial appearance on 17 June 2002, at which time he pleaded not guilty to all the charges against him.

B. Arguments of the parties

1. Arguments of the Defence

5. The Defence argues in the first place that, although it is aware of the seriousness of the offences, the accused is not charged on the basis of command responsibility under Article 7 (3) of the Statute, but under Article 7 (1), thus making the case against the accused a less complicated one.

6. The Defence submits that the accused was not aware of the existence of the indictment against him, prior to his arrest, and therefore had no opportunity to surrender voluntarily to the Tribunal.

7. The Defence refers to the guarantees provided by the authorities from the Republika Srpska and argues that, in addition to such guarantees, there is a strong presence of the international community in the Republika Srpska. The Defence further contends that the accused does not have any political influence in the Republika Srpska. All in all, this leads the Defence to the conclusion that the guarantees provided by the authorities from the Republik Srpska "are more credible than in most other cases" and that it "is very unlikely that competent authorities in Republika Srpska will not comply with taken responsibility".

8. The Defence also refers to personal circumstances of the accused which would support his commitment to comply with his obligations, if provisionally released . In the first place, it is argued that his family is faced with a difficult financial situation due to the fact that the accused is in pre-trial detention. In case of a provisional release, he would therefore not be in a material situation to escape from Prijedor. And in the second place, his nearly two year old son is suffering from a serious disease which requires intensive health care and health expenses.

9. The Defence further argues that the accused would not pose any danger to witnesses and victims. The survivors of the crime for which he is charged are publicly known . He has never tried to get in contact with them. And all potential witnesses, as far as their names have been disclosed to the Defence, are according to the Defence all living outside Prijedor municipality and Bosnia and Herzegovina

10. The Defence in addition argues that no date has yet been fixed for the trial to start and that in light of the relevant international human rights provisions , pre-trial detention should be kept to a minimum.

11. According to the Defence, the accused will agree to any conditions the Trial Chamber might consider necessary for the provisional release. Moreover, the accused is willing to cooperate with the Prosecution "under conditions that will be agreed ".

12. Lastly, the Defence submits that the presence of the accused in Prijedor would permit a more effective preparation of the defence case.

2. Arguments of the Prosecution

13. The Prosecution submits that the accused bears the burden of establishing that , if released he (i) will appear for trial and (ii) will not pose a danger to any victim, witness or other person. It further submits that even where the Defence has discharged its burden in this regard, under Rule 65 of the Rules the Trial Chamber has the discretion to refuse to order provisional release.

14. According to the Prosecution, the Chamber cannot be satisfied that the accused will appear for trial. The accused is charged with very serious crimes. He was in command of a police unit which, according to the Prosecution's case, perpetrated a massacre of approximately 200 men. If this case would be proven at trial, it will lead to a substantial sentence.

15. The Prosecution further submits that the Defence provides no evidence whatsoever for the alleged financial and family circumstances of the accused. The Motion does not provide any details about the financial situation of the accused or his family. There is no proof provided of any employment or income record of the accused prior to his arrest. Nor is there any official medical information supporting the alleged poor state of health of the accused's son.

16. As to the reliability of the information relating to the accused, the Prosecution observes that during the initial appearance of the accused, he has provided wrong information about his home address. Investigations into the address he had provided revealed that that address related to that of his father and sister and that he himself had not been living at that address since he got married several years before. Since he had left, he had moved residence four times. The Prosecution concludes that these factors affect the stability of the accused's personal circumstances and lead to fears for absconding if granted provisional release.

17. Finally, in relation to the question as to whether the accused will appear for trial, the Prosecution refers to the circumstances surrounding his arrest. According to the Prosecution, the statement of the accused that he had not been aware of the existence of an indictment against him, needs to be read in context with the fact that, when arrested by SFOR soldiers, the accused tried to resist this arrest and that a loaded pistol was found on him.

18. In relation to the second criterion, included in Rule 65 (B), i.e. that an accused will not pose a danger to any victim, witness or other person, the Prosecution expresses first of all its concern about the fact that the accused would, if released, return to Prijedor. As a former member of the Prijedor police, he can be considered a notorious figure, who has access to a vast amount of information. The return of the accused to Prijedor could have a deterring effect on victims and witnesses, who the Prosecution might want to call during this or other trials. The Prosecution is of the view that the accused would pose a grave danger to such persons and may attempt to intimidate witnesses in order to prevent them from testifying.

19. The Prosecution in addition considers that the guarantees provided by the authorities of the Republika Srpska are insufficient. In particular, it expresses serious concerns about the functioning of the police force, a factor of crucial importance in light of its fears that the accused may try to abscond if provisionally released.

20. All in all, the Prosecution concludes that, given the insufficient guarantees by the relevant

authorities, the lack of an own police force of the Tribunal, the need for the Tribunal to primarily rely upon international bodies to effect arrests on its behalf, the gravity of the crimes with which the accused is charged and the lack of sufficient information about his personal circumstances, the preconditions for provisional release, as laid down in Rule 65 (B) are not met and the Motion should be denied.

II. DISCUSSION

A. Applicable law

21. Rule 65 of the Rules sets out the basis upon which a Trial Chamber may order provisional release of an accused. It provides in relevant part:

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

22. Article 21(3) of the Statute of the Tribunal ("Statute") requires that the accused "be presumed innocent until proved guilty". This provision reflects international standards as enshrined in, *inter alia,* Article 14(2) of the International Covenant on Civil and Political Rights of 19 December 1966 (hereinafter "the ICCPR ") and Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter "the ECHR"),

23. Moreover, Article 9(3) of the ICCPR emphasises, *inter alia*, that: "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial". Article 5(3) of the ECHR provides, *inter alia*, that: "[e]veryone arrested or detained [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial",

24. These human rights instruments form part of public international law.

25. As regards the ICCPR, it should be taken into account that the following parts of the former Yugoslavia are now United Nations Member States: Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Slovenia and Serbia and Montenegro. Amongst 149 States, they are parties to the ICCPR. As a tribunal of the United Nations, the Tribunal is committed to the standards of the ICCPR, and the inhabitants of Member States of the United Nations enjoy the fundamental freedoms within the framework of a United Nations court.

26. As regards the ECHR, Croatia, Bosnia and Herzegovina,[1] Slovenia, the former Yugoslav Republic of Macedonia and Serbia and Montenegro[2] are Member States of the Council of Europe. The Council of Europe represents, at present, 45 pan-European countries. Apart from Serbia and Montenegro, who recently [3] signed the ECHR, all Member States have ratified the Convention.[4]

27. The Tribunal is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and the innocent. Justice, however, also means respect for the alleged offenders' fundamental rights. Therefore, no distinction can be drawn between persons facing criminal procedures in their home country or on an international level. Additionally, a distinction cannot be drawn between the inhabitants of States on the territory of the former Yugoslavia, regardless of whether they are Member States of the Council of Europe.

28. Rule 65 must therefore be read in the light of the ICCPR and ECHR and the relevant jurisprudence.

29. The application of the aforementioned principles stipulates that, as regards prosecution before an international court, *de jure* pre-trial detention should be the exception and not the rule. Unlike national courts the Tribunal does not have its own coercive power to enforce its decisions, and for this reason pre-trial detention seems *de facto* to be rather the rule at the Tribunal. Additionally , one must take into account the fact that the full name of the Tribunal mentions "serious" crimes only. Nevertheless, leaving the aforementioned human rights unchanged but applying them specifically for the purposes of an international criminal court , Rule 65 of the Rules allows for provisional release. Any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention .[5] In view of this, the Trial Chamber must interpret Rule 65 of the Rules not in *abstracto* but with regard to the factual basis of the single case and with respect to the concrete situation of the individual applicant.

30. Pursuant to Rule 65(B) of the Rules, a Trial Chamber may order the provisional release of an accused "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 ."

31. When interpreting Rule 65, the general principle of proportionality must be respected. A measure in public international law is proportional only when (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target (proportionality in its narrowest sense). Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, that measure must be applied.

B. Application of the law to the facts

32. The Trial Chamber will first inquire into the question whether the accused, if released, will appear for trial.

33. In considering this criterion, the following considerations, recently set out in the *Ademi* case, should be recalled:

> First, the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. It must also rely on the cooperation of States for the surveillance of accused who have been released. This calls for a more cautious approach in assessing the risk that an accused may abscond . [...] it goes without saying that prior voluntary surrender of an accused is not without significance in the assessment of the risk that an accused may not appear for trial.[6]

34. In the present case, the Trial Chamber observes that the indictment against the accused was not publicly disclosed and that the accused, at the moment he was arrested on 13 June 2002 by SFOR, was not aware of the fact that an indictment had been issued against him. In his Motion, the accused indicates that he had therefore no opportunity to surrender voluntarily to the ICTY. He indicates furthermore that he fully recognizes the authority of the Tribunal. However, in its

Response, the Prosecution makes it clear that, when he was arrested, he was carrying a loaded weapon and made an effort to resist his arrest. As far as the accused could have cooperated by immediately surrendering while arrested, the accused apparently chose to – unsuccessfully – try to resist his arrest. In the view of the Trial Chamber, this needs to be taken into account when assessing his request for provisional release.

35. In assessing whether an accused will appear for trial, the Trial Chamber also takes into account that the accused is charged with very serious crimes in relation to a massacre of which approximately 200 non-Serb men became victim. If the role of the accused could be proven by the Prosecutor, according to the charges laid down in the indictment, the accused may face a serious sentence. An accused that may face such a sentence could be attracted to attempt to subvert the proceedings by failing to present himself for trial. The Defence submits that the case against the accused is based on article 7 (1) and not on article 7 (3) of the Statute, thus making the present case a less complicated case compared with other cases in which provisional release has been granted. The Trial Chamber observes that the question as to whether a case is a more or less complicated one is not a relevant factor to be taken into account when deciding upon a request for provisional release. As far as this submission could be interpreted as meaning that a case based on article 7 (1) might be considered a less serious case than one based on article 7 (3), the submission fails as well. Whether an accused is considered criminally responsible under one of the modes of responsibility mentioned in article 7 (1) or one of those mentioned under article 7 (3), as such do not impact on the seriousness of the crimes for which the accused is charged.

36. Another aspect that needs to be taken into account is the guarantees provided by the government of the Republika Srpska in Bosnia and Herzegovina in support of this application for provisional release. As the Appeals Chamber has held, "as a matter of law and for the purposes of the Tribunal, an undertaking given by Republika Srpska qualifies for acceptance by the Trial Chamber, whether or not it is a sovereign State as defined in public international law".[7]

37. The Defence itself acknowledges that the guarantees of the Republika Srpska have in the past been treated with caution. However. the Defence refers to the fact that on 26 October 2001, the Law on Co-operation of the Republika Srpska with the Tribunal entered into force. The Trial Chamber has to observe though that the adoption of this law in itself has not led to a recognizable change in the performance of the Republika Srpska and its obligations towards the Tribunal. As the Appeals Chamber recently made clear, "Republika Srspka has so far failed to arrest any persons indicted by the Tribunal, ..."[8] Also the Defence seems to appreciate this factor, as it tries to convince this Chamber of the relevance of the guarantees by referring to the fact that in the Republika Srpska the international community, and in particular the Office of the High Representative (OHR) and the Stabilisation Forces (SFOR) have a broad mandate, which includes the execution of arrest warrants. The Trial Chamber is not convinced. Against the performance, or rather lack of performance, of the Republika Srspka, the guarantees provided can at best only be given a very limited substantive relevance.

38. The Trial Chamber finds itself unable to attach great importance to the Defence's comments on the accused's material and personal circumstances. The Trial Chamber agrees in this respect with the Prosecution, that these comments are entirely unsubstantiated. A mere allegation that the accused's family is faced with a difficult financial situation and that one of the two children needs medical attention does not convince this Chamber. Therefore, this Chamber is unable to follow the conclusion of the Defence that the accused, if provisionally released, would not be in a position to escape from the municipality of Prijedor. In this context, the Trial Chamber also expresses its serious concerns about the fact that the accused has been providing inaccurate

information about his whereabouts prior to his arrest. The fact that the accused has apparently been in a position to change from residence a couple of times over the last few years, leads this Chamber to the conclusion that nothing would stop the accused, if provisionally released, to do the same again in the future .

39. Moreover, the Trial Chamber is not satisfied, in relation to the second criterion set out in Rule 65 (B) that the accused, if released, "will not pose a danger to any victim, witness or other person". Quite to the contrary. If the accused would be provisionally released, he would return to Prijedor, close to where the crime for which he is charged has taken place. The accused has been a former police officer . It can therefore not be excluded that the accused may have, apart from public information about the names of the survivors of this crime, easy access to information about the whereabouts of such survivors or other witnesses or persons. The fear of the Prosecution in this context that the provisional release might have a deterring effect on victims and witnesses seems justified. The Defence argument that the accused has never tried to get in touch with surviving victims of the crime fails to convince the Trial Chamber. It moreover seems to contradict his argument that, prior to his arrest, the accused was not aware of the indictment against him. If the accused would now be provisionally released, with knowledge about the charges against him , it can not be excluded that he would take a different approach towards surviving victims. The Trial Chamber is consequently not convinced that he will not pose a danger to any victim, witness or other person.

40. This being said, the Trial Chamber in addition considers it necessary to decide whether or not an ongoing detention pending trial is proportional in the narrowest sense.

41. The Chamber observes that the accused has until now been detained for just over ten months and that there is, as yet, no date set for trial. Evidently, the length of pre-trial detention is one of the factors that must be considered in any application for provisional release. As was held by Trial Chamber I in the *Ademi* case:

> This issue may need to be given particular attention in view of the provisions of Article 9(3) of the ICCPR and Article 5(3) of the ECHR. This is all the more true , since in the system in the Tribunal, unlike generally in jurisdictions, there is no formal procedure in place providing for periodic review of the necessity for continued pre-trial detention.[9]

42. There is no doubt that an accused before this Tribunal is "entitled to trial within a reasonable time or to release (Article 9(3), sentence 1, of the ICCPR[10]) 'pending trial'" (Article 5(3) of the ECHR[11]), a requirement which is closely linked to the reasonable time requirement under Article 6 of the ECHR. Whether a time limit is appropriate can be evaluated only in light of all the circumstances of a given case, such as the complexity of the case, speed of handling, conduct of the accused, conduct of the authorities, no unjustified inertia[12], and no lack of adequate budgetary appropriations for the administration of criminal justice.[13]

43. Here, the duration of Mr. Mrdja's pre-trial detention to date has not yet exceeded those periods which the European Court of Human Rights or the Human Rights Committee has found to be reasonable for comparable cases of comparable weight in comparable circumstances. The Trial Chamber therefore concludes that the pre-trial detention of the accused is still proportional in its narrowest sense: this measure is suitable , necessary and its degree and scope remain in a reasonable relationship to the envisaged target.[14]

III. DISPOSITION

44. For the foregoing reasons, this Trial Chamber denies Mr. Mrdja's application for provisional release of 14 March 2002.

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

Judge Wolfgang Schomburg

Dated this fifteenth day of April 2003, Presiding
At The Hague
The Netherlands

[Seal of the Tribunal]

1 - Bosnia and Herzegovina acceded to the CoE on 24 April 2002.
2 - Serbia and Montenegro acceded to the CoE on 3 April 2003.
3 - Serbia and Montenegro signed the ECHR on 3 April 2003.
4 - http://conventions.coe.int/Treaty/EN (ETS No. 005). The ECHR entered into force for Bosnia and Herzegovina on 12 July 2002.
5 - See *Ilijkov v. Bulgaria*, Application No. 33977/96, EcourtHR, Decision of 26 July 2001, par. 84. See http://hudoc.echr.coe.int
6 - *Prosecutor v. Ademi*, Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb. 2002.

7 - *Prosecutor v. Vidoje Blagojevic, Dragan Obrenovic, Dragan Jokic and Momir Nikolic*, Case No. IT-02-60-AR65.4, Decision on Provisional Release Application by Blagojevic, 17 February 2003, paragraph 3.
8 - Ibid, paragraph 18.
9 - *Prosecutor v. Ademi*, Case No. IT-01-46-PT, Order on Motion for Provisional Release, 20 Feb. 2002.

10 - See Nowak, CCPR Commentary, p. 177 – 78.
11 - See *Peukert in Frowein & Peukert*, EMRK-Kommentar, 2. Auflage, pp. 125 – 134.
12 - Robert Kolb, The Jurisprudence of the European Court of Human Rights on Detention and Fair Trial in Criminal Matters from 1992 to the end of 1998 in Human Rights Law Journal, Vol. 21 No. 9-12, 31 December 2000, pp. 348, 363 – 65.
13 - *Fillastre and Bizouain v. Bolivia*, Committee No. 336/1998, para. 6.5.
14 - See paragraph 31 supra.

PROSECUTION INDEX OF AUTHORITIES

6. *Prosecutor v Bla[ki]*, Case No. IT-95-14-T, Decision on Motion of the Defense Seeking Modification of the Conditions of Detention of General Bla[ki], 9 January 1997.

UNITED
NATIONS

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

Case No.: IT-95-14-T

Date: 9 January 1997

Original: French / English

BEFORE THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL

Before: **President Antonio Cassese**

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **9 January 1997**

PROSECUTOR

v.

TIHOMIR BLA[KI]

DECISION ON MOTION OF THE DEFENCE SEEKING MODIFICATION OF THE CONDITIONS OF DETENTION OF GENERAL BLA[KI]

The Office of the Prosecutor

Mr. Mark B. Harmon
Mr. Andrew Cayley

Counsel for the Accused

Mr. Anto Nobilo
Mr. Russell Hayman

I, Antonio Cassese, President of the International Criminal Tribunal for the former Yugoslavia,

CONSIDERING Rule 64 of the Rules and Procedure and Evidence,

CONSIDERING my previous Decisions rendered on 3 April 1996, 17 April 1996 and 9 May 1996,

CONSIDERING the Request for Modification of the Conditions of General Tihomir Bla{ki}'s detention filed by Counsel for the Accused on 5 December 1996 (hereinafter "the Request"),

CONSIDERING the Response of the Prosecutor filed on 5 December 1996, which does not oppose the Request insofar as it is "consistent with the security interests of the Tribunal and the host country",

HAVING HEARD the Prosecutor and Counsel for the Accused in closed session on 6 December 1996,

HAVING CONSULTED the Host Country,

CONSIDERING the right of all detainees to be treated in a humane manner in accordance with the fundamental principles of respect for their inherent dignity and of the presumption of innocence,

CONSIDERING also the imperatives of security and order, as set forth by the Host Country and the Registrar,

CONSIDERING that most of the requests made by Counsel for the Accused do not meet the requirements of security, as set out to me by the relevant authorities of the Host Country and the Registrar,

1800

HEREBY DECIDE as follows:

(1) To grant the first request of Counsel for the Accused that the Accused be granted two hours of physical exercise per day, such exercise to be taken in the living room of the Accused's quarters;

(2) With respect to the second request of Counsel for the Accused, to grant the Accused seven hours of fresh air per week, to be taken on the terrace of his quarters, but not in the garden. The distribution of the seven hours over the course of the week will be decided upon by the security officers in light of the requirements of security;

(3) With respect to the third request, to permit the Accused's wife and children to visit him for up to seven consecutive days per month;

(4) To further allow the Accused to use the living room of his quarters from 9 a.m. to 8 p.m., to the extent that such use does not conflict with the requirements of security;

(5) To order that the present regime concerning the use of toilet facilities not be discontinued, at least until such time as technical modifications, if any, are made to the Accused's quarters which would allow him and his family free access to those facilities without jeopardising security and order,

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

Antonio Cassese
President

Dated this 9th day of January 1997
At The Hague
The Netherlands

101

[Seal of the Tribunal]