SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

APPEALS CHAMBER

Before: Justice Ayoola, President
Justice A. Raja N. Fernando
Justice Renate Winter
Justice Geoffrey Robertson
Justice Gelaga King

Registrar: Robin Vincent

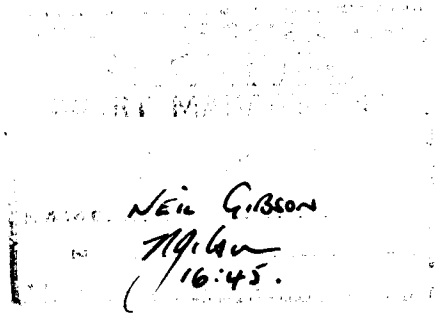
Date filed: 18 November 2004

PROSECUTOR **Against** **SAMUEL HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA

Case No. SCSL-2004-14-T

PROSECUTION RESPONSE TO FOFANA NOTICE OF APPEAL AND SUBMISSIONS AGAINST THE "DECISION ON APPLICATION FOR BAIL PURSUANT TO RULE 65"

Office of the Prosecutor:
Luc Côté
James C. Johnson



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PROSECUTION RESPONSE TO FOFANA NOTICE OF APPEAL AND SUBMISSIONS AGAINST THE "DECISION ON APPLICATION FOR BAIL PURSUANT TO RULE 65"

I. INTRODUCTION

1. The Prosecution files this response to the Fofana "Defence Notice of Appeal and its Submission against the 'Decision on Application for Bail Pursuant to Rule 65'" ("the Appeal"), dated 12 November 2004.

II. PROCEDURAL BACKGROUND

2. On 27 January 2004, the Accused Fofana ("the Accused") filed an "Application for Bail pursuant to Rule 65" ("the Bail Application"). On 17 March 2004, the Learned Judge Itoe of the Trial Chamber heard oral submissions of the parties. At this hearing, the Defence attempted to file an unsigned and unauthenticated Declaration by Ms. Francis Fortune ("the Defence Declaration").

3. On 5 August 2004, Learned Judge Itoe issued "Fofana – Decision on Application for Bail pursuant to Rule 65" ("the Decision")[1], denying the Bail Application pursuant to Rule 65 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("the Rules"). In the Decision, referring to the Defence Declaration and an unsigned document containing the submissions of the Government of Sierra Leone, the Learned Judge "excluded them from impacting on the substantive determination of the matter".[2]

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[1] Registry Page 8904 – 8923.
[2] Decision, para. 58, Registry Page 8915.

4. On 27 August 2004, the Accused filed "Moinina Fofana Application for Leave to Appeal against Refusal of Bail." On 5 November 2004, the Appeals Chamber of the Special Court issued "Fofana – Decision on Application for Leave to Appeal Bail Decision," granting the Accused leave to appeal the Trial Chamber's Decision.

5. On 12 November 2004, the Accused filed the Appeal presently before the Appeals Chamber. Appended to the Appeal was the "Affirmation of Ms. Frances Fortune", dated 11 November 2004 ("the Defence Affirmation").

III. ARGUMENT

6. The Prosecution respectfully requests that the Appeals Chamber dismiss the Appeal and uphold the Trial Chamber Decision because the Defence have failed to establish that the Trial Chamber made an error of law or fact in its decision to refuse bail. In particular, the Prosecution submits that the Trial Chamber:

   a) correctly held that the burden of proof in establishing the conditions for Rule 65(B) rests with the Accused;

   b) properly admitted the "Confidential Declaration of the Chief Investigator" ("the Confidential Declaration") under Rule 89(C), while refusing to admit, or in any event rely upon the Defence Declaration of Ms. Frances Fortune; and

   c) made no error of fact or law by rejecting the Accused' guarantees for reason of being insufficient to satisfy the Trial Chamber that the Accused would appear for trial and that if released, he would not pose a danger to victims, witnesses or other persons.

A. Burden of proof does not violate the right of the Accused to a fair trial

7. The Prosecution rejects the Defence argument that Trial Chamber erred in law by finding that the burden of establishing that the Accused has fulfilled the conditions in Rule 65 (B) of the Rules rests with the Accused. The Prosecution submits that the burden of establishing that an accused has met the conditions in Rule 65(B) clearly rests with the accused.

8. Rule 65(B) provides 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.

9. The International Tribunal for the Former Yugoslavia (ICTY) has consistently held that the burden of establishing the conditions on a Rule 65(B) bail application unequivocally rests with the Accused.[3] As stated by the ICTY Trial Chamber in *Prosecutor v. Brdanin & Talic*: "(t)he wording of the Rule squarely places the onus at all times on the Accused to establish his entitlement to provisional release."[4]

10. The Prosecution rejects the Defence submission that such an allocation of the burden of proof results in establishing a regime wherein detention is the rule and bail the exception. Indeed, the Prosecution notes that it is not helpful to conceptualize the issue of bail as necessarily resolving into a rule and an exception that is either for or against detention. The jurisprudence of the ICTY clearly posits that the Judge or Trial Chamber should avoid such an approach in its interpretation of Rule 65(B), and proceed instead on a case by case basis, accounting for the particular facts and circumstances surrounding each accused.[5]

11. The Prosecution further submits that the burden on the Accused to establish that he has met the requisite conditions for bail does not violate the statutory or customary principle that an accused shall be presumed innocent until proven

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[3] *Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu*, ICTY Appeals Chamber, IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003 ("*Limaj Appeal*"), para. 38; *Prosecutor v. Rahim Ademi*, ICTY Trial Chamber, IT-01-46-PT, Order on Motion For Provisional Release, 20 February 2002 ("*Ademi*") para. 19; *Prosecutor v. Radoslav Brdjanin and Momir Talic*, ICTY Trial Chamber, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002 ("*Talic Decision 20 September 2002*"); *Radoslav Brdanin and Momir Talic*, ICTY Trial Chamber, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000 ("*Brdanin Decision 25 July 2000*"), para. 13; *Prosecutor v. Krajisnik*, ICTY Trial Chamber, IT-00-39 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001("*Krajisnik*"), para. 11.

[4] *Prosecutor v. Radoslav Brdanin & Momir Talic*, ICTY Trial Chamber, IT-99-36, Decision on Motion by Radoslav Brdanin for Provisional release, 25 July 2003, para. 13 (leave to appeal denied); *Prosecutor v. Radoslav Brdanin & Momir Talic,* ICTY Appeals Chamber, IT-99-36, Decision on Application for Leave to Appeal, 7 September 2000).

[5] *Talic Decision 20 September 2002*; *Ademi*, paras. 18 and 19.

guilty.[6] As held by the ICTY Trial Chamber in *Krajisnik*, "there is nothing in customary international law to prevent the placing of such a burden in circumstances where an accused is charged with very serious crimes, where an International Tribunal has no power to execute its own arrest warrants, and where the release of an accused carries with it the potential for putting the lives of victims and witnesses at risk. These factors lend further weight to placing the burden of proof upon the accused."

12. The presumption of innocence is a procedural safeguard of the right of an accused to a fair trial. The Prosecution submits that the issue of whether or not bail conditions are met does not go to the ultimate finding of the guilt or innocence of the Accused; and therefore, resting this particular burden with an accused can not in any way infringe on the right of the accused to a fair trial.

B. No error committed in refusing to admit the unsigned Defence Declaration

13. The Prosecution submits that the Trial Chamber made no error in law by refusing to admit the Defence Declaration under Rule 89(C). As was held in the Decision, the Defence Declaration was both unreliable and of limited probative value.

14. Rule 89(C) provides that any relevant evidence is admissible. Accordingly, Rule 89(C) affords the Judge or Trial Chamber broad discretion to take into account any reasonable consideration in deciding whether certain evidence is relevant and consequently admissible. In deciding what constitutes relevant evidence, the Trial Chamber may consider the reliability of the evidence, its probative value and any other reasonably related factor.[7]

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[6] *Krajisnik*, para. 13.

[7] See for example in *Prosecutor v. Bagosora et al.*, ICTR Trial Chamber, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003 ("*Bagosora Evidence Decision, 18 September 2003*"), para. 18: "Relevance, probative value and even prejudice are all relational concepts. The content of the putative facts must be defined and then evaluated in relation to their possible value as proof of the existence of a crime as described in the indictment. The nature of this evaluation explains the discretion conferred on the Trial Chamber by Rule 89(C)."

15. Corresponding jurisprudence of the ICTY is clear that reliability is an implicit component of admissibility.[8] Indeed, it has been held that evidence ought to be excluded on the grounds of being unreliable since reliability is the "invisible golden thread which runs through all the components of admissibility".[9]

16. Rule 89(C) of the Rules of Procedure and Evidence of the ICTY and the International Criminal Tribunal for Rwanda explicitly requires a finding that the proposed evidence is probative as the threshold for admissibility. While Rule 89(C) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone has no such explicit requirement; the Trial Chambers of the ICTY in *Celebici* and the ICTR in *Bagosora* have held that the requirement that the proffered evidence be relevant and the requirement that it carry probative value are essentially the same.[10] In *Celebici*, it was specifically held that "[o]ne fact is not relevant to another if it does not have real probative value with respect to the latter."[11]

17. The Prosecution submits that the probative value and the corresponding relevancy of the Defence Declaration are limited because the guarantees made within do not further the likelihood that the Accused will appear for trial. Even considering its contents, the Defence Declaration had not demonstrated that Ms. Fortune has any influence over the Accused whatsoever, let alone that she would be able to ensure that he appears for trial as per her guarantees.[12]

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[8] *Prosecutor v. Delalic, Mucic, Delic and Landzo*, Decision on the Motion of the Prosecutor for the Admissibility of Evidence, Case No. IT-96-21-T, 19 January 1998 ("*Celebici Evidence Decision*"), para. 29, quoted by the ICTR in *Bagosora Evidence Decision*, para 15. Also see *Prosecutor v. Musema*, Judgement and Sentence, ICTR-96-13-A, 27 January 2000 ("*Musema Judgement*"), paras. 37-38.

[9] *Celebici Evidence Decision*, para. 32. *Musema Judgement*, 27 January 2000, para. 37.

[10] *Bagosora Evidence Decision*, 18 Sept 2003, para. 15; *Celebici Evidence Decision*, para. 29.

[11] *Celebici Evidence Decision*, para. 29. This phrase was quoted by the ICTR in *Bagosora Evidence Decision*, para. 15.

[12] See *Brdanin Decision 25 July 2000*, para. 10: "Tribojevic 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 Nrdanin would appear whenever asked to do so and that he would comply with any reporting conditions imposed upon him. **Trbojevic agreed, however, that he is in no position himself to ensure that Brdanin did so.**" (Emphasis added).

18. Thus, even if the evidence of Ms. Fortune was relevant and the Defence Declaration been admitted, the Prosecution submits that her guarantees lack substance and would certainly have proved inadequate to satisfy the Learned Judge that the Accused had met the requirements of Rule 65(B).

19. The Accused submits that the guarantees of this single person, Ms. Frances Fortune, provide support for his contention that he will appear for trial and not pose a danger to any witness, victim or person. The Prosecution notes that the Accused has produced only one person to vouch for his credibility, despite his claims of substantial ties to his family and Chiefdom.

20. The Prosecution notes that Ms. Fortune has not demonstrated that she has any influence over the Accused such that she could ensure that he actually appear for trial, nor pose any danger to witnesses, victims or other persons. At best, she has offered the Accused a place to live, from which she is frequently absent, and made a commitment to report the Accused to the Special Court should he breach any bail conditions. The Prosecution submits that Ms. Fortune is clearly incapable of monitoring the Accused in her absence and thus is not in a position to make an unequivocal commitment to the Special Court to report the Accused should he breach his bail conditions.

21. In conceding that she travels frequently, Ms. Fortune volunteered the "the family of [her] husband and [their] two children, amongst others" to take up her responsibilities in her absence. Ms. Fortune has not identified the names of these other individuals, their competence to execute the responsibilities she purports to assume, or if they are even aware that she has volunteered them for this purpose. In effect, the Prosecution submits that the Accused has not actually produced a *single* person who can commit to even a purely *reporting* role should the Accused fail to meet his bail conditions.

22. For the foregoing reasons, the Prosecution submits that no error of law was committed by the Learned Judge in excluding the Defence Declaration "from impacting on the substantive determination of the matter".

C. No error committed in admitting the Confidential Declaration submitted by the Prosecution

23. With respect to the Confidential Declaration proffered by the Prosecution, the Accused alleges that the Learned Judge erred in admitting the statement on the basis that it is biased and contains hearsay evidence. The Prosecution notes that there is no rule prohibiting the admission of hearsay evidence[13], or prohibiting evidence proffered by a party in support of its own position.[14]

24. Furthermore, the Confidential Declaration, unlike the Defence Declaration, was a relevant document proffered by the Prosecution that was highly probative of the issues on the Bail Application and produced by a reliable source. Thus, the Prosecution submits that the Confidential Declaration was in fact properly admitted into evidence under Rule 89(C) by the Learned Judge.

D. The Inadequacy of the Accused' Guarantees

25. In the Appeal, the Defence argue that the Trial Chamber gave inadequate consideration to the guarantees made by the Accused, which are submitted as satisfying both requirements of Rule 65(B). Specifically, that the Judge or Trial Chamber be satisfied that the Accused will appear for trial; and that if released, the Accused will not pose any danger to any victim, witness or other person.

26. The Prosecution submits that the Trial Chamber, having provided a reasoned opinion in its decision to deny the Bail Application, was not required to articulate every step of the reasoning that was undertaken for each particular finding made.[15] The Prosecution suggests that adequate consideration to the guarantees supplied by the Accused was made by the Trial Chamber in relation to both aspects of Rule 65(B). Moreover, the Prosecution submits that these guarantees were rightly found to be unsatisfactory for the reasons outlined above.

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[13] *Prosecutor v. Aleksovski,* IT-95-14/1-AR73, Decision on Prosecutor's Appeal on the Admissibility of Evidence, 16 Feb.1999, para. 15.

[14] *Musema Judgement,* paras. 61 - 62.

[15] See, for example *Prosecutor v. Musema,* ICTR Appeals Chamber, ICTR-96-13-A, Judgement, 16 November 2001, para. 18: "the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. But the Trial Chamber's discretion in weighing and assessing evidence is always limited by its duty to provide a "reasoned opinion in writing," although **it is not required to articulate every step of its reasoning for each particular finding it makes.**"(emphasis added)

Appearance at Trial

27. The outset of the Decision notes the Defence submissions on the Accused' ties to his community, which include his substantial family in Sierra Leone, his various roles in his Chiefdom and his claims to neither possess travel documents or to have ever travelled outside Sierra Leone.[16] The Trial Chamber was cognisant of evidence that the Accused has travelled to Guinea and Liberia and has associations with individuals in both of these countries.[17] Moreover, the Trial Chamber realistically noted that the Accused would not require travel documents in order to cross most neighbouring countries' borders and thus could do so at will. In addition to these considerations, the Trial Chamber added that the Accused had not adduced any proof of property ownership in Sierra Leone and had conceded that he did not have a domestic bank account.[18]

28. The Trial Chamber also expressed the legitimate and realistic concern that the seriousness of the charges present a formidable incentive for an accused to abscond. The Prosecution submits that the seriousness of the charges against the Accused was a relevant and material fact that was properly considered by the Learned Judge in assessing whether the Accused would appear for trial.[19] As the ICTY Trial Chamber noted in *Brdanin*, even an innocent accused may choose not to appear for trial, given the very serious nature of the charges and the potentially grave sentence on conviction.[20]

Danger to Victims and Witnesses

29. On the second requirement of Rule 65(B), that the Accused not pose any danger to the victims and witnesses, the Prosecution submits that the Trial Chamber properly assessed the Accused' guarantees against the evidence that was accepted on the Accused' issuance of threats. In particular, it was noted that the Accused had threatened members of the Civil Defence Forces to not cooperate with the Special Court. Furthermore, that these threats implicitly included threats that

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[16] Decision, para. 9, Registry Page 8906.
[17] Decision, para. 79, Registry Page 8919.
[18] Decision, para. 67, Registry Page 8917.
[19] *Prosecutor v. Brdanin*, IT-99-36-PT, Decision on Motion by Momir Talic for Provisional Release, 28 March 2001, para. 30 and footnote 84; *Ademi*, para. 25; *Krajisnik*; *Limaj Appeal*, para. 30.
[20] *Brdanin Decision 25 July 2000*, para. 16.

emphasise the possibility of reprisals against witnesses or victims who cooperate with the Special Court. The Prosecution submits that it was properly concluded by the Trial Chamber that on this basis alone, the Accused was not entitled to bail.

Failure of the Accused to Attend Trial

30. Finally, the Prosecution suggests that the current absence of the Accused during trial proceedings strongly impacts upon the credibility of his assertion that he respects the process of the Special Court and would be inclined to comply with any bail conditions placed upon him, and in particular, that he will appear for trial.

IV. CONCLUSION

31. The Prosecution emphasizes that a decision of whether or not to grant bail is discretionary. Thus, even in instances where a Judge or Trial Chamber is satisfied of that the conditions in Rule 65(B) are met, it is not obliged to grant bail.[21] The Prosecution accordingly rejects the Defence assertion that by removing the stipulation that bail may only be ordered in "exceptional circumstances" from ICTY Rule 65(B), the jurisprudence of the ICTY has proceeded on the basis that where an accused succeeds in establishing these conditions, he is entitled to bail. In fact, to the contrary, the jurisprudence of the ICTY has explicitly and repeatedly held that even in the absence of the "exceptional circumstances" stipulation, a Judge or Trial Chamber has the discretion to refuse bail to an accused that satisfies the conditions of Rule 65(C)[22] .

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[21] *Brdanin Decision 25 July 2000*, para. 22; *Krajisnik*, para 14; *Talic Decision 20 September 2002*; *Ademi*, para. 22.
[22] *Ibid.*

32. For the foregoing reasons, the Prosecution respectfully requests that the Appeals Chamber dismiss the Appeal and uphold the Decision since the Defence Application has failed to establish that the Trial Chamber committed an error of law or fact in its decision to refuse bail.

Filed in Freetown, 18 November 2004

For the Prosecution,

for Luc Côté
Chief of Prosecutions

James C. Johnson
Senior Trial Attorney

PROSECUTION INDEX OF AUTHORITIES

1. Prosecutor v. Radoslav Brdanin & Momir Talic, ICTY Trial Chamber, IT-99-36, Decision on Motion by Radoslav Brdanin for Provisional release, 25 July 2000. [http://www.un.org/icty/brdjanin/trialc/decision-e/00725PR213239.htm]

2. Prosecutor v. Radoslav Brdanin & Momir Talic, ICTY Appeals Chamber, IT-99-36, Decision on Application for Leave to Appeal, 7 September 2000. [http://www.un.org/icty/brdjanin/appeal/decision-e/00907PR313520.htm]

3. Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu, ICTY Appeals Chamber, IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003. [http://www.un.org/icty/limaj/appeal/decision-e/031031-3.htm]

4. Prosecutor v. Rahim Ademi, ICTY Trial Chamber, IT-01-46-PT, Order on Motion For Provisional Release, 20 February 2002.[http://www.un.org/icty/ademi/trialc/order-e/20220PR117236.htm]

5. Prosecutor v. Radoslav Brdjanin and Momir Talic, ICTY Trial Chamber, IT-99-36-T, Decision on the Motion for Provisional Release of the Accused Momir Talic, 20 September 2002. [http://www.un.org/icty/brdjanin/trialc/decision-e/20155759.htm]

6. Prosecutor v. Krajisnik, ICTY Trial Chamber, IT-00-39 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001.

7. Prosecutor v. Bagosora et al., ICTR-98-41-T, Trial Chamber, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003. [http://www.ictr.org/ENGLISH/cases/Bagosora/decisions/180903.htm]

8. Prosecutor v. Delalic, Mucic, Delic and Landzo, Decision on the Motion of the Prosecutor for the Admissibility of Evidence, Case No. IT-96-21-T, 19 January 1998. [http://www.un.org/icty/celebici/trialc2/decision-e/80119EV21.htm]

9. Prosecutor v. Musema, Judgement and Sentence, ICTR-96-13-A, 27 January 2000. [http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm]

10. Prosecutor v. Aleksovski, IT-95-14/1-AR73, ICTY Appeals Chamber, Decision on Prosecutor's Appeal on the Admissibility of Evidence, 16 Feb.1999. [http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm]

11. Prosecutor v. Musema, ICTR Appeals Chamber, ICTR-96-13-A, Judgement, 16 November 2001.[http://www.ictr.org/ENGLISH/cases/Musema/judgement/Arret/index.htm]

12. Prosecutor v. Brdanin, IT-99-36-PT, ICTY Trial Chamber, Decision on Motion by Momir Talic for Provisional Release, 28 March 2001. [http://www.un.org/icty/brdjanin/trialc/decision-e/10328PR215226.htm]

PROSECUTION ANNEX OF AUTHORITIES

Annex 1

Prosecutor v. Krajisnik, ICTY Trial Chamber, IT-00-39 & 40 PT, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001

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-00-39 & 40-PT

Date: 8 October 2001

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Patrick Robinson
Judge Mohamed Fassi Fihri

Registrar: **Mr. Hans Holthuis**

Decision of: **8 October 2001**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK
&
BILJANA PLAVŠIĆ

DECISION ON MOMČILO KRAJIŠNIK'S NOTICE OF MOTION FOR PROVISIONAL RELEASE

Office of the Prosecutor:

Mr. Mark Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Deyan Brashich, for Momčilo Krajišnik
Mr. Robert. J. Pavich and Mr. Eugene O'Sullivan, for Biljana Plavšić

I. BACKGROUND

1. The accused, Momčilo Krajišnik, was arrested and transferred to the United Nations Detention Unit on 3 April 2000: he is detained there under an Order for Detention on Remand dated 7 April 2000.

2. A co-accused, Biljana Plavšić, voluntarily surrendered to the custody of the International Tribunal on 10 January 2001 and was granted provisional release by order of the Trial Chamber dated 5 September 2001.[1]

3. On 28 August 2001 the Trial Chamber (by a majority, Judge Robinson dissenting) refused a motion that the accused be granted provisional release to attend a memorial service for his late father in Pale on 8 September 2001.[2]

4. The present Decision concerns a Motion filed by the accused on 9 August 2001, together with various addenda and supporting material, in which he seeks provisional release.[3] The Prosecution filed a response on 23 August 2001 objecting to the Motion. An oral hearing was held on 20 September 2001 when the Trial Chamber heard submissions from the parties and representations from a representative of the Government of Republika Srpska.[4]

5. The accused submits that he may be released since he would not pose any danger to victims or witnesses or others and would appear for trial. In support of this submission he refers to his undertaking to comply with the terms and conditions of any order for provisional release, to remain in Pale under the surveillance of the IPTF, to surrender his passport and to return to the Tribunal when required.[5] Furthermore, he and his family are willing to offer their real property as security for his release.[6]

6. The accused relies on guarantees from the Governments of Republika Srpska[7] and the Federal Republic of Yugoslavia[8] with respect to compliance by the accused

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[1] Decision on Biljana Plavšić's Application for Provisional Release, 5 Sept. 2001.
[2] Oral Decision, 28 Aug. 2001, T. pp. 105-107.
[3] Notice of Motion for Provisional Release filed by the Defence for Momčilo Krajišnik on 9 Aug. 2001; Addendum, filed 20 Sept. 2001; Second Addendum, filed 20 Sept. 2001.
[4] Sinisa Djordjević, Adviser to the Prime Minister.
[5] Annex D to Motion for Provisional Release, 8 Aug. 2001.
[6] Addendum, 20 Sept. 2001.
[7] Guarantees dated 1 Nov. 2000, 31 Jan. 2001 and 27 Aug. 2001.

with any terms of provisional release, and undertakes to obtain similar guarantees from the Republic of Serbia, if required. The accused also relies on letters in support of his application from the Patriarch of the Serbian Orthodox Church and the President of the Federal Republic of Yugoslavia.[9]

7. The accused submits that in the light of the above guarantees and undertakings he should be released. He also submits that he should be released in light of the release of his co-accused and of the length of his own pre-trial detention (18 months already and with no guarantee that the trial will start in February 2002 as currently planned).[10] He further submits that since he was arrested on a sealed indictment he was not given the opportunity to surrender and would have done so had he been given that opportunity.[11]

8. In response, the Prosecution submits that the accused has failed to discharge the burden upon him satisfying the court that, if released, he would appear for trial and would not pose a danger to any victim, witness or other person; that burden being a substantial one due to the fact that the International Tribunal has no power to execute its arrest warrants and is forced to rely on others to do so.[12]

9. The Prosecution further submits that little weight can be attached to the guarantees and undertakings on which the accused relies in order to discharge this substantial burden, in particular, the guarantee of Republika Srpska is of little value, as Trial Chamber II and this Trial Chamber have held;[13] the Federal Republic has yet to pass legislation on co-operation with the Tribunal which would allow it to offer assurances that arrests would be made;[14] and the undertaking from the accused himself is unconvincing in the light of the substantial sentence he faces if convicted, and the hostile comments he has made about the International Tribunal[15] (as have the Patriarch and President).[16] Furthermore, the only support for the accused's contention

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[8] Guarantee dated 19 Sept. 2001.
[9] Letters dated 16 and 17 Aug. 2001 respectively, filed 24 Aug. 2001.
[10] Notice of Motion for Provisional Release ('Motion'), paras. 8-9, 12-14; Motion hearing, 20 Sept., T. pp. 144; 160.
[11] Motion, para. 10; Motion hearing, T. pp. 143-144.
[12] Prosecution Response to Krajisnik Defence's Motions for Provisional Release ('Response'), 23 Aug. 2001, paras. 1, 5-6.
[13] Response paras. 8-19, Motions hearing, p. 152.
[14] Motions hearing, T. p. 157.
[15] Response, paras. 21-27.
[16] Motions hearing, pp. 152-154.

that he would pose no threat to victims and witnesses is his own undertaking which cannot be relied on.[17]

10. The Prosecution also submits that discretionary factors are against a grant of provisional release. The length of detention is not a relevant factor until the accused has discharged his burden and, if it were, the ECHR have found periods of detention of up to five years reasonable.[18] The length of sentence which the accused would receive on conviction provides an incentive for him to escape and it would be unreasonable to expect SFOR to put its personnel at risk again in order to arrest him if he should do so.[19]

II. THE LAW

11. Rule 65 (B) sets out the basis upon which a Trial Chamber may order the provisional release of an accused:

> (B) Release may be ordered by a Trial Chamber only after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

The burden of proof rests on the accused to satisfy the Trial Chamber that the accused will appear for trial and will not pose a danger to any victim, witness or other person.[20]

12. Prior to December 1999, an accused was also obliged to establish the existence of "exceptional circumstances" before a Trial Chamber could consider provisional release. This requirement was abolished by a rule amendment.[21] However, subsequent jurisprudence shows that the removal of the requirement does not in any way alter the accused's burden of proving that he or she will appear for trial and will not pose a danger to any victim, witness or other person. In *Simić*, the Trial Chamber reiterated that release "may be granted only if the Trial Chamber is satisfied" that the accused

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[17] Response, paras. 28-31.
[18] Response, paras. 35-37.
[19] Response, para. 38.
[20] *See*, for example, *Prosecutor v. Kovačević*, Decision on Defence Motion for Provisional Release, [hereafter '*Kovačević* Decision'] 21 January 1998, para. 6; *Prosecutor v. Brđanin & Talić*, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000 (hereafter "*Brđanin* Decision"), para. 13 ("The wording of the Rule squarely places the onus at all times on the applicant to establish his entitlement to provisional release"); *Prosecutor v. Brđanin & Talić*, Decision on Motion by Momir Talić for Provisional Release, 28 March 2001(hereafter "*Talić* Decision"), para. 18. Numerous other decisions on provisional release before the International Tribunal reinforce this position.
[21] This amendment, made at the twenty-first session of the plenary, entered into force on 6 December 1999 (*see* IT/161).

has met the requirements set out in the Rule[22] and in *Talić*, the Trial Chamber stated that "[p]lacing a substantial burden of proof on the applicant for provisional release to prove these two matters [in Rule 65 (B)] is justified".[23] Furthermore, the change in the Rule does not alter the position that provisional release continues to be the exception and not the rule, a position justified by the absence of any power in the International Tribunal to execute its own arrest warrants.[24] Thus, only one accused is currently on provisional release, whilst 49 accused remain in custody.[25]

13. It has not been submitted by the parties in this case, quite rightly, that there is any breach of the norms of customary international law in placing the burden of proof upon the accused in these circumstances. Indeed, there is nothing in customary international law to prevent the placing of such a burden in circumstances where an accused is charged with very serious crimes, where an International Tribunal has no power to execute its own arrest warrants, and where the release of an accused carries with it the potential for putting the lives of victims and witnesses at risk. These factors lend further weight to the placing of the burden of proof upon the accused.

14. It should also be noted that (as Rule 65(B) makes clear) the Trial Chamber retains a discretion not to grant provisional release even if the accused satisfies it of both requirements in the rule. So, even if satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, etc. the Trial Chamber may still refuse provisional release.[26] For instance, in a decision in the *Kordić* case, the Trial Chamber stated that generally it would be inappropriate to grant provisional release during trial because, *inter alia*, release could disrupt the remaining course of the trial.[27]

15. In relation to the length of detention, the relevant international treaties express the proposition that provisional release should be granted where the accused cannot be

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[22] *Prosecutor v. Simić & Ors.*, Decision on Milan Simić's Application for Provisional Release, 29 May 2000, p. 5 (emphasis supplied). See the *Talić* and *Brđanin* Decisions that the placing of a substantial burden of proof upon the accused is justified (above note 20).
[23] *Talić* Decision, para. 18. See also, *Brđanin* Decision, para. 13.
[24] *Talić* Decision, para. 18. In the *Talić* Decision, the Trial Chamber said that it cannot be said that provisional release is now the rule rather than the exception (para. 17), a sentiment with which the Trial Chamber agrees.
[25] To date 55 applications for provisional release have been made before the International Tribunal, and of those eight have been granted (including short-term release granted on humanitarian grounds). Of those 55 applications, 20 were made after the entry into force of the amendments removing the requirement for "exceptional circumstances", of which only four have been granted. There has, therefore, been no increase in the number of applications granted since the December 1999 amendment.
[26] *Kovačević*, Decision, para. 7; *Brđanin* Decision, para. 22.
[27] *Prosecutor v. Kordić and Čerkez*, Order on Application by Dario Kordić for Provisional Release Pursuant to Rule 65, 17 December 1999, p. 4.

brought to trial within a reasonable period of time.[28] It is noted, however, that the European Court of Human Rights has found that extensive periods of pre-trial detention may be reasonable.[29]

III. DISCUSSION

16. The crucial issue in this Decision is to determine whether the accused has satisfied the Trial Chamber that, if released, he would appear for trial and would not pose a danger to any victim, witness or other person. In this connection, the Trial Chamber accepts that the burden on the accused of satisfying the Trial Chamber cannot be light because of the problems associated with the execution of arrest warrants if the accused were to abscond or threaten witnesses.

17. The evidence which the accused adduces in support of his application consists of various guarantees and undertakings. As to the undertaking given by the accused himself, the Trial Chamber cannot but note that it is given by a person who faces a substantial sentence if convicted and has, therefore, a considerable incentive to abscond.

18. In relation to the guarantee given by the Government of Republika Srpska, this Trial Chamber noted, in giving its reasons for the dismissal of the earlier provisional release application by the accused, that the government has not so far arrested anyone and therefore the guarantee does not have the force which it would have if the government had done so: thus, the majority of the Chamber concluded that it could

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[28] International Covenant, Article 9(3):

> "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..."

European Convention, Article 5(3):

> "Everyone arrested or detained...shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

American Convention, Article 7(5):

> "Any person detained...shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

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

> "[A] person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial subject to the conditions that may be imposed in accordance with the law."

[29] See, for example, *W. v. Switzerland*, ECHR, 26 November 1992, Case No. 91/1991/344/417, and *Ferrari-Bravo v. Italy*, App. No. 9627/81, Comm. Report 14.3.84 (4 years and 11 months pre-trial detention).

not, with confidence, say that the prospect of the arrest of the accused was likely.[30] The Trial Chamber has now heard the representations of Mr. Djordjević, representing the government, about its changing attitude towards the Tribunal, the establishment of a bureau for relations with the Tribunal and the enactment of legislation to secure co-operation with it.[31] However, this is no more than an indication of good intentions and the Trial Chamber's earlier comment holds true: until there is evidence of arrests, any guarantee from the government must be treated with caution. Furthermore, it is noteworthy that the Federal Government of the Federal Republic of Yugoslavia has not to date co-operated with the International Tribunal by arresting indicted persons.

19. The Trial Chamber accepts the Prosecution submission (above) that any guarantee from the Government of the Federal Republic of Yugoslavia must also be treated with caution since it has no legislation in place with respect to co-operation with the Tribunal and is, therefore, not in a position to offer assurances that arrests would be made.

20. The Trial Chamber has considered what weight should be given to the submission of the accused that since he was arrested on a sealed indictment he was not given the opportunity to surrender and would have done so had he been given that opportunity. The Trial Chamber considers this to be a neutral factor which does not lend support to the contentions of either side. It does not permit the accused to rely in support of his application on the fact that he has surrendered. On the other hand, it does not permit the Prosecution to claim that he was evading arrest.

21. The Trial Chamber has also considered the submission that the accused should be treated in the same way as his co-accused, Biljana Plavšić. In fact, the two cases are not alike. First, there is the factor of age. Mrs. Plavšić is aged 71 and the accused is 56. Mrs. Plavšić's age is clearly a relevant factor in favour of her release. Secondly, Mrs. Plavšić surrendered voluntarily to the Tribunal: the accused did not. Whilst, as noted above, in the case of the accused this is a neutral factor, in the case of Mrs. Plavšić this is a positive factor. Thirdly, Mrs. Plavšić has co-operated with the Prosecution: the accused has only done so in a limited way, and the particular co-operation provided is not, in the Trial Chamber's view, relevant to this application.[32]

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[30] Oral ruling, 28 Aug. 2001, T. p. 105.
[31] Motion hearing, T. pp. 145-149.
[32] The extent of the accused's co-operation was to agree to an interview with the Prosecution in 1998, prior to his indictment. He has subsequently refused to co-operate with the Prosecution, a position which it is stated is at Defence Counsel's direction. *See* Addendum to Motion for Provisional Release,

For these reasons the two cases are readily distinguishable and, therefore, do not have to be treated alike. In any event, applications for provisional release must be treated on an individual basis.

22. The Trial Chamber considers the length of pre-trial detention to be an important factor in the exercise of discretion in determining an application for provisional release. In the instant case the length of detention, although long, does not exceed the periods which the European Court of Human Rights has found reasonable. However, a further factor is the date when the trial of an accused is likely to commence. At the moment the date anticipated is not many months hence; therefore, the Prosecution should proceed expeditiously with its preparations so as to ensure that the trial commences within a reasonable period of time.

23. In its ruling on the earlier application by the accused for provisional release, the majority of the Trial Chamber said:

> "In the earlier cases in which provisional release was granted, the accused in both cases had surrendered voluntarily, and their cases, it should be noted, were not as serious and as complex as the present case. In this case, this accused did not surrender voluntarily. He was arrested, and his case is a grave one.
>
> Given the seriousness of this case. . .the majority of the Trial Chamber, is therefore not satisfied that he would return and appear for trial if he were released."[33]

The Trial Chamber can see no reason now to depart from this recent conclusion. The accused has not discharged the burden upon him and satisfied the Trial Chamber that, if provisionally released, he would appear for trial and would not pose a danger to any victim, witness or other person.[34] Accordingly, his application must be dismissed.

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10 August 2001; Prosecution Response, para. 34; Defence Reply, para. 3, and Motion Hearing, 20 September 2001, p. 144.

[33] Oral ruling, 28 Aug. 2001, T. pp. 106-107.

[34] The Trial Chamber notes the undertaking of the accused to obtain guarantees from the Republic of Serbia. The Trial Chamber has, therefore, asked itself whether in the circumstances of this particular case such guarantees, even if obtained, could make any difference to the outcome. Given the weight of the factors outlined above, against granting provisional release, the Trial Chamber is satisfied that they would not.

IV. DISPOSITION

24. For the foregoing reasons, by a majority, Judge Robinson dissenting, the Trial Chamber rejects the Defence Motion for Provisional Release pursuant to Rule 65 of the Rules of Procedure and Evidence.

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

Richard May

Presiding

Dated this eighth day of October 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE PATRICK ROBINSON

1. I have dissented in this matter both on a question of law as well as on issues relating to an assessment of the evidence relevant to the application for provisional release.

1. The question of law

2. Rule 65(B) of the Rules of Procedure and Evidence[1] provided:

> [r]elease 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.

In November 1999 that Rule was changed because the Tribunal concluded that in providing for provisional release "only in exceptional circumstances", it conflicted with customary international law as reflected in the main international human rights instruments.[2]

3. That provision was interpreted as establishing that the legal principle is detention and that release is the exception, and that, generally, provisional release could only be granted in very rare cases.[3]

4. Paragraph 106 of the Report of the Secretary General[4] (to which the Tribunal's Statute is attached) states that the Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings, particularly those in Article 14 of the International Covenant on Civil and Political Rights[5] ("ICCPR").

5. Article 9(3) of the ICCPR provides, *inter alia,* "anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial . . . ".[6] An important part of the rationale for the underlined provision is that an accused, prior to conviction, has the benefit of the presumption of innocence, and thus there can be no general rule of detention prior to trial. Generally, in domestic jurisdictions, bail is not granted

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[1] As it stood in Rev. 16 of the Rules of Procedure and Evidence (2 July 1999), prior to its amendment in November 1999.
[2] The amendment to Rule 65(B), which was adopted at the twenty-first session of the plenary in November 1999, entered into force on 6 December 1999 (*see* IT/161).
[3] *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Order Denying a Motion for Provisional Release, 20 Dec. 1996, para. 4; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Decision Rejecting a Request for Provisional Release, 25 Apr. 1996, para. 4.
[4] Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution 808 (1992) S/25704.
[5] The International Covenant on Civil and Political Rights was adopted by the General Assembly of the United Nations on 16 December 1966 and entered into force on 23 March 1976.
[6] Emphasis added.

after conviction, unless there are exceptional circumstances for such a grant.[7] The Statute entrenches the principle of the presumption of innocence in Article 21, paragraph 3.

6. The customary rule, from which Rule 65(B) in its original form derogated, is the principle established in Article 9(3) of the ICCPR that it shall not be the general rule that persons awaiting trial shall be detained in custody. This customary rule is also reflected in Article 5(3) of the European Convention on Human Rights[8] and Article 7 of the American Convention on Human Rights[9]. There can be little doubt that the effect of this customary norm is to make pre-trial detention an exception, which is only permissible in special circumstances. Again, the foundation for this customary norm is the presumption of innocence. This is the way the European Court of Human Rights ("European Court"), in considering the question of bail, puts it:

> Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.[10]

7. The customary norm that detention must not be the general rule, when read with the right to trial within a reasonable time or to release, establishes a principle that detention is the exception. However, that does not mean that it is impermissible to impose a burden on an accused person awaiting trial to justify his release. Nor, obviously, does it mean that pre-trial detention cannot take place. However, there must be cogent reasons for that detention. The European Court expressed it in this way:

> The Court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Any system of mandatory detention on remand is *per se* incompatible with Article 5(3) of the Convention.[11]

8. That principle is equally applicable to the Tribunal. Any system of mandatory detention is *per se* incompatible with Article 9(3) of the ICCPR. And it is because the original Rule, in imposing a burden on the accused to establish exceptional circumstances to justify his release, came close to a system of mandatory detention that it was changed in 1999 by eliminating that requirement. Note the similarity between the original Rule and the situation that the European

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[7] *See e.g. Chamberlain v. The Queen* (1983) 153 CLR 514.

[8] The European Convention on Human Rights was signed in Rome on 4 November 1950 and entered into force on 3 September 1953. The relevant provision states: "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

[9] The American Convention on Human Rights entered into force on 18 July 1978. The relevant provisions states: "Any person detained [...] shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

[10] *Ilijkov v. Bulgaria*, ECHR, Judgement of 26 July 2001 (*"Ilijkov v. Bulgaria"*), para. 85 (emphasis added).

[11] *Ilijkov v. Bulgaria*, para. 84.

Court dealt with in the case of *Ilijkov v. Bulgaria.* In that case, under the Bulgarian law that was being considered, charging a person with a crime punishable by 10 or more years' imprisonment gave rise to a presumption that there existed a danger of his absconding, re-offending or obstructing the investigation; that presumption was only rebuttable in very exceptional circumstances and the burden was on the accused to prove the existence of such exceptional circumstances. That is exactly similar to the pre-1999 Rule, which imposed a burden on the accused to demonstrate exceptional circumstances. In *Ilijkov v. Bulgaria*, the European Court found that there was a breach of Article 5(3) of the European Convention on Human Rights.

9. The presumption of innocence is an important, though not necessarily conclusive element in determining the burden of proof in bail applications. However, the significance of this element in bail applications has not been consistently acknowledged by judicial bodies. The United States Supreme Court in *Bell v. Wolfish,* held that "the presumption innocence is a doctrine that allocates the burden of proof in criminal trials [. . .] but it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[12] However, that dictum has been criticised,[13] and the better view is that the presumption of innocence applies at all stages of a trial, including the pre-trial period. The Secretary General has stressed that the rights of the accused are to be respected at all stages of the proceedings.[14] Steytler, in his *Constitutional Criminal Procedure* (1998) states: "The right to be released on bail and the right to be presumed innocent are thus to be viewed as 'parallel rights' giving effect to the same principle at different stages of the proceedings and in different forms".[15] For another statement affirming the application of the presumption of innocence throughout the entire trial process, see *R. v. Pearson*, where it was said that "the presumption of innocence is an animating principle throughout the criminal justice process".[16]

10. The Tribunal's jurisprudence is that the lack of a police force, and its dependence on domestic enforcement mechanisms to enforce its arrest warrants, justify a stricter approach to applications for provisional release than is the case with applications for bail in domestic jurisdictions.[17] It is to be expected that adjustments may have to be made at the international level in the application of norms which are more usually applied at the municipal level. Thus, it is generally accepted that the international context in which the Tribunal operates will warrant certain

[12] *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).
[13] Jett, 22 *American Criminal Law Review* 805, 832 (1985).
[14] *Supra*, n 4.
[15] Steytler, *Constitutional Criminal Procedure* (1998), p. 134.
[16] *R. v. Pearson* (1992) 3 S.C.R. 665 at 683.
[17] *See e.g. Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Provisional Release, 28 Mar. 2001, para. 18.

modifications. For these modifications or adjustments to be valid, they must result from the application of the general rule of interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties; where they do not, they constitute breaches of relevant conventional or customary norms, such as those contained in the ICCPR. In other words, it is the interpretative function that must yield these modifications; otherwise the modifications are arbitrary and unlawful. In most cases they will result from an appropriate use of the teleological and contextual methods of interpretation. But care must be taken lest these adjustments go so far that their effect is to nullify the rights of an accused person under customary international law. There is no legal basis for interpreting the ICCPR as though it provided for one set of rights applicable at the municipal level, and another set applicable at the international level. Derogations from customary international law must be authorised by the Statute, e.g. Article 21, paragraph 2, authorises a derogation from the accused's right to a public hearing in the interest of the protection of victims and witnesses.

11. While the Tribunal's lack of a police force, its inability to execute its arrest warrants in States and its corresponding reliance on States for such execution may be relevant in considering an application for provisional release, on no account can that feature of the Tribunal's regime justify either imposing a burden on the accused in respect of an application under Rule 65[18] or rendering more substantial such a burden,[19] or warranting a detention of the accused for a period longer than would be justified having regard to the requirement of public interest, the presumption of innocence and the rule of respect for individual liberty. Regrettably, that factor has been given undue prominence in the Chamber's reasoning, both in relation to its view that the burden is on the accused, as well as for its rejection of the application for provisional release.

12. A judicial body cannot rely on peculiarities in its system to justify derogations from the rule of respect for individual liberty. As has been explained, Article 9(3) of the ICCPR reflects a customary norm that detention shall not be the general rule. In interpreting that provision in the context of the Tribunal it is, in my view, wholly wrong to employ a peculiarity in the Tribunal system, namely its lack of a police force and its inability to execute its warrants in other countries, as a justification for derogating from that customary norm. Nothing in the rule of interpretation as set out in the Vienna Convention warrants such a construction. There may be public interest considerations for imposing a burden on an accused. But the peculiarities in the Tribunal's regime would not constitute such a consideration. The Tribunal cannot say: because I cannot arrest you if you are granted bail and breach the conditions of bail, you must stay in detention. To do that is to

[18] *See* paragraph 12 of the Decision where it is said that the accused bears the "burden of proving that he or she will appear for trial and will not pose a danger to any victim, witness or other person".

give pre-trial detention a penal character, which would clearly be wrong in light of the fact that the accused has not been convicted. The purpose of pre-trial detention is simply to ensure that the accused will be present for his trial; it is not to punish him.

13. The issue of law, to which the first part of this Opinion is devoted, is the location of the burden of proof in an application under Rule 65.

14. The view has been advanced that bail applications are *sui generis*, and that in such applications there is no question of a burden of proof.[20] This approach is not without its own attractiveness, particularly in relation to the Tribunal where Rule 65(B) makes the grant of provisional release conditional on the Chamber being satisfied as to certain matters, without indicating which party must satisfy the Chamber as to those matters. However, in my view, a question of a burden of proof does arise in an application for bail or provisional release, because, if at the end of the day there is a balance in the evidence, for and against bail or provisional release, the only way the issue can be settled is on the basis of an appreciation as to whether the burden is on the Prosecution or the Defence.

15. What must be done now is to examine the current Rule, using the accepted methods of interpretation, to determine the location of the burden of proof. It has to be stressed that the resolution of this issue brings into play the interpretative function. The Rule must, following Article 31(1) of the Vienna Convention on the Law of Treaties, be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Of special significance is the obligation to interpret the Rule in light of its purpose.

16. It would seem that, following the removal from Rule 65(B) of the requirement that release may be granted only in exceptional circumstances, the present position ought to be that there is no burden on the accused to prove the matters set out therein; rather, the position under the current Rule should be that the burden is on the Prosecution to establish that the conditions that the Rule sets for release are not met. This conclusion is supported by a consideration of the purpose of the amendment, which was to bring the Rule in line with modern international human rights law that detention shall not be the general rule.

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[19] *See* paragraph 16 of the Decision where it is said that "the burden on the accused of satisfying the Trial Chamber cannot be light because of the problems associated with the execution of arrest warrants if the accused were to abscond or threaten witnesses."

[20] *See* dicta of Van Schalkwyk J and Mynhardt J in *Ellish en andere v. Prokureur – Generaal*, WPA 1994 (2) SACR 579 (W).

17. The history of the amendment does not support an interpretation of the Rule as imposing a burden on the accused to prove the matters set out therein, because that would reflect the exceptional character of provisional release, which, as we have seen, was changed in November 1999. While, prior to the amendment, there was a basis to construe Rule 65 as imposing a burden on the accused to prove the matters set out therein, that basis has now disappeared.

18. When the regime of provisional release was exceptional, as it was prior to the amendment, it would have been perfectly reasonable to conclude that the accused was required to prove the exceptional circumstances justifying provisional release. But the logic of the amendment must be that, consequent on the removal of the element of exceptional circumstances, the Tribunal's regime of bail was brought into line with the customary norm that detention shall not be the general rule for persons awaiting trial, with the result that there is no burden on the accused to prove the matters set out in Rule 65(B). I must not be understood to be saying that in such a situation, that is, where detention is not the general rule, the burden can never be on the accused to prove that he satisfies the criteria for bail. There are instances in which the legislation of many countries impose such a burden on an accused when he is charged with very serious offences. Rather, my contention is much narrower: it is that in the specific context of the history of the amendment to Rule 65(B), it is difficult not to conclude that the proper interpretation of the Rule following the amendment is that there is no general rule of detention and hence no burden on the accused; rather, the onus is on the Prosecution to establish that the accused has not satisfied the criteria for provisional release set out in the Rule.

19. It is against that background that I comment on several passages from the Decision.

20. The first is in paragraph 12, where, after referring to the amendment of 1999, it is said that, "[h]owever, subsequent jurisprudence shows that the removal of the requirement does not in any way alter the accused's burden of proving that he or she will appear for trial and will not pose a danger to any victim, witness or other person". I regret to say that one of the cases cited – *Prosecutor v. Simić et al.* – does not support that proposition. The matter is of importance to me, as I was a member of the Trial Chamber in that case. In effect, all that that decision says is that the removal of the requirement for the accused to prove exceptional circumstances leaves untouched the other requirements that the Chamber must be satisfied that the accused will appear for trial, and if released, will not pose a danger to any victim, witness or other persons.[21] That is fair enough, since it is an accurate description of the present Rule. However, the *Simić* decision does not address

[21] The decision in the *Simić* case provides in relevant part: "Considering that, while Rule 65(B), as amended, no longer requires an accused to demonstrate exceptional circumstances before release may be ordered, this amendment does not

the question of which party, following the amendment, has the onus to satisfy the Chamber as to the criteria set out in Rule 65(B). In any event, if *Simić*, or any other decision in which I have participated, either states, or is open to the interpretation that there is a burden on the accused to establish that he meets the criteria set out in the Rule, I have to say that, on further reflection, for the reasons set out in this Opinion, I have reconsidered that aspect of those decisions.

21. The second passage, which is also from paragraph 12, states: "Furthermore, the change in the Rule does not alter the position that provisional release continues to be the exception and not the rule, a position justified by the absence of any power in the International Tribunal to execute its own arrest warrants. Thus, only one accused is currently on provisional release, whilst 49 accused remain in custody." This passage flies directly in the face of the amendment of 1999, and, in my opinion, reflects a wrong appreciation of the law. For, if the purpose of removing the requirement to show exceptional circumstances was to bring the Tribunal's regime of bail in line with the customary position, as reflected in the ICCPR, that detention shall not be the general rule, how can it be right to conclude that after the amendment, provisional release remains the exception and not the rule? What then would have been the purpose of the amendment? If that be the case, then the interpretation of the Rule after the amendment would be exactly the same as its interpretation prior to the amendment, and to which I have referred in paragraph 3 of this Opinion; the Rule now would be as violative of international human rights law as it was in the past, and it would be so, not because the amendment was inherently incapable of resolving the conflict, but rather, because its interpretation and application set up the violation. The case law is, therefore, at odds with the amendment. It is not as though under the old Rule there was a dichotomy between the element of exceptional circumstances and the other condition that the Chamber must be satisfied that the accused "will appear for trial and, if released, will not pose a danger to any victim, witness or other person." The regime prior to the amendment was an integrated one in which proof of exceptional circumstances was the overarching requirement, and the other conditions a subset of that requirement. By removing the requirement of exceptional circumstances, the overarching, underpinning element has been eliminated, and what is left is a transformed regime in which it would no longer be appropriate to characterise provisional release as the exception and not the rule.

22. If the passage from the Decision, cited in paragraph 21 above, is a statement of law, it is erroneous for the reasons that I have given, and it is scarcely helpful to cite in support of that legal proposition the Tribunal practice in which 49 accused remain in custody and only one is on provisional release. For it is precisely that practice which is being challenged as reflecting a wrong

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affect the remaining requirements under that provision." *See Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision

appreciation of the Rule. And I regret to say it is a practice that has established within the Tribunal a culture of detention that is wholly at variance with the customary norm that detention shall not be the general rule. I must also reiterate that it is wrong to justify a principle that provisional release is the exception and not the rule on the basis of the absence within the Tribunal of a police force to execute its own warrants. For, as I have explained before, an accused, whether appearing before the Tribunal or a domestic court, has the benefit of the customary norm that detention shall not be the general rule, and the Tribunal cannot, any more than a domestic court could, rely on the peculiarities in its constitution as a justification for derogating from that norm.

23. While it is correct, as is stated in paragraph 13 of the Decision, that there is nothing in customary international law that prevents placing a burden on an accused in relation to an application for provisional release, it is clear that such an approach is, by reason of the presumption of innocence, exceptional, and I can do no better than to reiterate the significant passage from the judgement of the European Court of Human Rights in *Ilijkov v. Bulgaria*, which dealt with the question of bail:

> Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.[22]

24. The ratio of that case is not that the burden may never be shifted to the detained person, but rather that the effect of such a shift is to "overturn" the norm that detention is the exception rather than the general rule, and that this can only be done in strictly defined cases. Again, although it is correctly stated in paragraph 13 of the Decision that the burden may be imposed on the accused when he is charged with very serious crimes, the jurisprudence of the European Court of Human Rights makes it clear that detention of an accused awaiting trial that is based solely on the gravity of the charges is not justified:

> the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand.[23]

I make this comment in full recognition of the fact that the Decision relies on elements other than the gravity of the offence.

25. Moreover, while it may be appropriate to impose a burden on the accused where his release carries with it "the potential for putting the lives of victims and witnesses at risk"[24], I cannot but

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on Milan Simić's Application for Provisional Release, 29 May 2000, p. 5.
[22] *Ilijkov v. Bulgaria*, para. 85.
[23] *Ilijkov v. Bulgaria*, para. 81.

note that in this case no concrete evidence has been adduced to show that the release of the accused would place the lives of victims and witnesses at risk. It would be wrong, in the absence of any supporting evidence, to deprive the accused of release on the basis that his release would have the potential for putting the lives of victims and witnesses at risk.

26. The present position surely is that if a Chamber is satisfied that the accused will appear for trial and will, if released, not pose a danger to any victim, witness or other person, it must make its decision on an application for provisional release, uninfluenced by a consideration that provisional release is the exception and detention the rule. A Chamber that is so satisfied must grant the application; if it does not, and its refusal is made on the basis of a doctrine that provisional release is the exception and not the rule, it would have acted on a wrong principle of law. For "the real purpose of bail" is to "safeguard the liberty of an applicant who will stand his trial."[25]

27. This last comment brings me to the next passage. In paragraph 14 it is said that "the Trial Chamber retains a discretion not to grant provisional release even if the accused satisfies it of both requirements in the rule. So, even if satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, etc. the Trial Chamber may still refuse provisional release." Again, this passage reflects a wrong appreciation of the law; the word "may" which appears in the provision – "[r]elease may be ordered by a Trial Chamber only after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person" – does not mean that a Chamber is free to refuse an application on bases other than those set out in the Rule. The Chamber is not at liberty to reject an application for reasons other than those set out in the text; if it does so, it would have acted arbitrarily and unlawfully. All that the word "may" means is that the Chamber has the power to, that is, it is competent to grant bail, but its jurisdiction to do so is strictly delimited by the considerations explicitly identified in the Rule. Properly construed, the word "may" indicates that provisional release is grantable by a Chamber, but grantable in the specific circumstances expressly set out in the Rule.

28. The 'grantability' of provisional release comes against the background of the position that domestic courts in most jurisdictions do not have an inherent power to grant bail. The position is the same in the Tribunal: a Chamber has no inherent power to grant provisional release. Express provision for the power to grant provisional release is made in the first paragraph of Rule 65: "once detained an accused may not be released except on an order of a Chamber." Having invested the

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[24] Decision, para. 13.
[25] Du Toit et al., *Commentary on Criminal Procedure Act* (1999), p. 9-3.

Chamber with jurisdiction to grant provisional release, the Rule goes on in paragraph (B) to set out the circumstances in which that jurisdiction is to be exercised. But it is a jurisdiction that must be exercised within the four corners of the Rule. It must be noted that the Rule does not have, as is the case in the legislation of some countries, in addition to certain listed grounds, a catch-all provision allowing a Chamber to reject an application for provisional release for any other reason if it is in the interests of justice to do so. The conclusion that the jurisdictional power to grant provisional release is confined to the circumstances set out in the Rule is supported by the use on two occasions of the limiting word "only" for emphasis. In sum, the word "may" imports not so much discretionary power as jurisdictional competence.

29. The case cited *(Kordić)* as support for the proposition that a Trial Chamber retains a discretion not to grant provisional release even if the accused satisfies it of both requirements in the Rule, does not in fact provide such support. In that case, among the Trial Chamber's reasons for refusing the application, which was filed after the close of the Prosecution's case, was that release could disrupt the remaining course of the trial. However, the ratio of the decision is, firstly, that the risk of potential interference with witnesses was increased because the accused had detailed information about witnesses who had testified and who were yet to testify in the case, and secondly, that the Chamber was not satisfied that, if released, the accused would appear for the continuation of his trial, because of the grave offences with which he was charged and the severity of the sentences that could be imposed. The specific reason that release could disrupt the remaining course of the trial is but an aspect of the overriding consideration reflected in the latter ratio; that is, that the Chamber was not satisfied that the accused would appear for the continuation of his trial. Clearly, release would only have that effect if he would not appear for the continuation of his trial. The *Kordić* case, therefore, is not an example of a Chamber denying provisional release even if it were satisfied that the accused would appear for trial and, if released, would not pose a danger to any victim, witness or other person.

30. No perils to the Tribunal's mandate for the prosecution of persons responsible for serious violations of international humanitarian law result from the conclusion that the burden under Rule 65 is on the prosecution, and not on the defence. In the first place, there would be no necessary increase in the grant of applications for provisional release, since each case would have to be decided on its own merits, and a Trial Chamber would be obliged to take into account all the factors that are traditionally regarded as relevant to bail; for example, the gravity of the offence, the likely sentence if convicted, and generally any other factor that would bear upon the likelihood of the accused appearing for trial. Secondly, in any event, the burden, whether it be on the Prosecution or on the accused, in an application under Rule 65 is discharged not on the standard of proof beyond reasonable doubt, but on the standard of the balance of probabilities.