

**BEFORE THE PRE-TRIAL CHAMBER OF THE EXTRAORDINARY
CHAMBERS IN THE COURTS OF CAMBODIA**

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**Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Thirith
against the Provisional Detention Order**

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ECCC Documents

1. Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, 12 June 2007
- not included- ECCC Legal Compendium
2. Law of the Extraordinary Chambers in the Courts of Cambodia, 27 October 2004
- not included- ECCC Legal Compendium

Cambodian Law

3. Cambodian Criminal Procedure Code 2007, -French and Khmer version. -not included-
Exceeds 30 pages

International Law

Treaties

4. European Convention for the Protection of Human Rights and Fundamental Freedom.- not included- ECCC Legal Compendium

Statutes and Rules of International Criminal Tribunal

5. International Criminal Court for Yugoslavia, Rules of Procedure and Evidence, 6 July 2006
Rule 65- not included- ERN 00153750-153752
6. Special Court for Sierra Leone, Rules of Procedure and Evidence, 14 May 2007, Adopted
on 16 January 2002, Rule 65 -not included – ERN 00153754-00153759

Case Law

Extraordinary Chambers in the Courts of Cambodia

7. *Case of Nuon Chea*, Decision on Appeal against Provisional Detention Order of Nuon Chea, Case No. 02/19-09-2007-ECCC/OCIJ (PTC01), 20 March 2008, Court Document C11/54, ERN 00172902-00172934

International Criminal Tribunal for the Former Yugoslavia (ICTY)

8. *Prosecutor v. Milosevic*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Case No. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, 18 April 2002 –not included- already disclosed in the Case File, Case No. 002/14-08-2006, Court Document C11/11-Annex C: ERN 00153714-00153718, Authority 33

9. *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004: not included- already disclosed in the Case File, Case No. 002/14-08-2006, Court Document C11/11-Annex C: ERN 00153714-00153718, Authority 32

10. *Prosecutor v. Boskoski and Tarculovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release, 28 September 2005 -not included- already Case File 002/19-09-2007-ECCC-OCIJ (PTC04), ERN 00178245-178252 Authority 11

11. *Prosecutor v. Stanisic*, Case No. IT-04-79-AR65.I, Decision on Prosecution's Interlocutory Appeal of Mico Stanisic's Provisional Release, 17 October 2005 -not included- already in Case File 002/19-09-2007-ECCC-OCIJ (PTC04), ERN 00178235-178244 Authority 12

12. *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005. *Attached- Authority B-12*

13. *Prosecutor v. Nikola Sainovic and Dragoljub Ojdanic*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002. *Attached – Authority B-13*

14. *Prosecutor v. Radoslav Brdanin and Momir Talic*, Case No. IT-99-36, Decision on Application for Leave to Appeal, 7 September 2000- *Attached - Authority B-14*

Special Court for Sierra Leone (SCSL)

15. *Prosecutor v. Moinina Fofana*, Case No. SCSL-04-14-AR65, Appeal against Decision refusing bail, 1 March 2005 2005 -not included-already in Case File 002/19-09-2007-ECCC-OCIJ (PTC04), ERN 00178216-00178233, Authority 13

Others

16. U.S. Survey in Cambodian Daily, 14 March 2008, page 27, "The Gov'ment Rejects US Human Rights Assessment" by Douglas Gillison- *Attached- Authority B-15*

Annex B - Authority B-12

IN THE APPEALS CHAMBER**Before:**

Judge Mohamed Shahabuddeen, Presiding
Judge Florence Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Andréia Vaz

Registrar:

Mr. Hans Holthuis

Decision of:

19 October 2005

PROSECUTOR

v.

Zdravko TOLIMIR
Radivoje MILETIC
Milan GVERO

**DECISION ON INTERLOCUTORY APPEAL AGAINST TRIAL CHAMBER'S DECISIONS
GRANTING PROVISIONAL RELEASE**

Counsel for the Prosecution

Mr. Peter McCloskey

Counsel for the Accused:

Ms. Natacha Fauveau Ivanovic for Radivoje Miletic
Mr. Dragan Krgovic for Milan Gvero

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("International Tribunal") is seised of the Prosecution's Consolidated Appeal from the Trial Chamber's Decision Granting Provisional Release to Radivoje Miletic and Milan Gvero ("Prosecution's Appeal"), filed on 22 August 2005.

I. PROCEDURAL BACKGROUND

2. On 19 July 2005, Trial Chamber II ("Trial Chamber") granted the motions for provisional release filed by Radivoje Miletic and Milan Gvero ("Accused") pursuant to Rule 65 of the Rules of Procedure and Evidence ("Rules").¹ The Trial Chamber relied on various factors including, *inter alia*, the personal guarantees submitted by the Accused as well as the

guarantees submitted by the Government of the Republic Serbia and Montenegro and the Council of Ministers of Serbia and Montenegro² that they would arrest the Accused if necessary.

3. The Prosecution sought leave to appeal those decisions.³ On 22 July 2005, the Appeals Chamber dismissed an urgent motion to stay the Impugned Decisions filed by the Prosecution on that same day.⁴ On 26 and 29 July 2005, the Accused filed their responses to the Prosecution's application for leave to appeal.⁵ On 8 August 2005, an amendment to Rule 65 of the Rules came into effect, establishing an appeal as of right from Trial Chamber's decisions on provisional release and thus obviating the need to apply for leave to appeal. Therefore, on 15 August 2005, a bench of five judges of the Appeals Chamber was appointed and the parties were directed to brief the appeal on the merits.⁶ Following the filing of the Prosecution's Appeal, Radivoje Miletić filed a response on 29 August 2005,⁷ and Milan Gvero filed his response on 1 September 2005.⁸ No reply was filed by the Prosecution.

II. STANDARD OF REVIEW

The Appeals Chamber recalls that an interlocutory appeal from a decision of a Trial Chamber is not an appeal *de novo*.⁹ A decision on whether or not provisional release is granted is a discretionary one.¹⁰ Thus, when an appeal is brought from a discretionary decision, the issue "is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."¹¹ The burden rests upon the party challenging a provisional release decision to demonstrate that the Trial Chamber has committed a "discernible error."¹² The party challenging a provisional release decision must show that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, or made an error as to the facts upon which it has exercised its discretion, or that its decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.¹³

III. SUBMISSIONS OF THE PARTIES AND DISCUSSION

5. The Prosecution submits that the Trial Chamber: (i) erred in its consideration of the guarantees provided;¹⁴ (ii) erred by giving insufficient weight to the serious nature of the charges against the Accused;¹⁵ (iii) erred by failing to consider the position held by the Accused within the Bosnian Serb Army;¹⁶ and (iv) erred by failing to consider the possibility of undermining the confidence of the international community in the administration of international justice.¹⁷ The Appeals Chamber will consider each alleged error in turn.

Government Guarantees

(1) Disproportionate weight given to the guarantees provided

6. Under this ground of appeal the Prosecution submits that the Trial Chamber attached disproportionate weight to the guarantees provided and erred in concluding that it was satisfied that the authorities of the Republic Serbia and Montenegro and the Council of Ministers of Serbia and Montenegro would ensure the return of the Accused to the International Tribunal for trial.¹⁸ According to the Prosecution, the Trial Chamber thereby failed to properly take into

account the fact that “the authorities in Serbia and Montenegro have failed to *fully* cooperate with the International Tribunal”¹⁹ as attested in the Declarations of Robert William Reid, Chief of Investigations, proffered as Annex A to the Prosecution’s responses to the requests for the provisional release of the Accused.²⁰

7. The Prosecution argues that the Trial Chamber erred by giving no weight to the assertions contained in the Declarations,²¹ and submits that the fact that Generals Mladic and Tolimir have not been arrested supports these assertions.²² The Prosecution claims that the Trial Chamber accorded value to the government guarantees without having properly assessed the following assertions made in the Declarations :

Over the past few months the Governments of Serbia and Montenegro and the Republic of Serbia have facilitated the surrender of a number of persons indicted by this Tribunal and have publicly acknowledged this fact. However, they have always been reluctant to acknowledge that they have carried out an arrest or detention of any person who the Tribunal has indicted. They have also indicated that they would not feel comfortable publicising the arrest of an indicted individual to the general public in Serbia and/or Montenegro.²³

8. In response, Radivoje Miletic submits that in assessing the cooperation of the authorities of Serbia and Montenegro the Trial Chamber properly weighed Declaration B.²⁴ Relying upon statements made by the Prosecutor and the President of the International Tribunal, Radivoje Miletic further states that recent information “points to an improvement in the cooperation of Serbia and Montenegro.”²⁵ Milan Gvero submits that the Prosecution’s allegation concerning the weight attached to Declaration B in Radivoje Miletic’s Decision “does not apply to General Gvero and should not be considered by the Appeals Chamber in deciding the appeal in his case.”²⁶

9. Rule 65 of the Rules places no obligation upon an accused applying for provisional release to provide guarantees from a State as a prerequisite to obtaining provisional release.²⁷ Nonetheless, such a guarantee, if deemed credible, may carry considerable weight in support of such an application.²⁸ Rule 65(C) permits a Chamber to impose conditions upon the release of an accused “to ensure the presence of the accused for trial and the protection of others,” and frequently the production of a guarantee from the relevant governmental body is imposed as such a condition.²⁹ In the instant case, the Accused provided guarantees by the Government of the Republic of Serbia and the Council of Ministers of Serbia and Montenegro.³⁰

10. The Appeals Chamber in the *Mrksic* case held that the reliability of a government guarantee must be determined in relation to the circumstances which arise in the particular case.³¹ Following that precedent, the Trial Chamber properly considered that the reliability of the guarantees provided was to be assessed “in relation to the circumstances of the present case, including any governmental position which the Accused may have held prior to [their] arrest and, as far as foreseeable, anticipating the circumstances when the case is due for trial and the Accused [are] called on to return.”³² The Trial Chamber considered the positions held by the Accused during the time period relevant to the events described in the Indictment and the effect of those positions on the willingness of the government authorities to arrest them. The Trial Chamber further noted that none of the Accused held positions in the Federal Government.³³ In view of the fact that both Accused are retired, the Trial Chamber found no evidence that the Accused might possess any information of such importance as to make the authorities of Serbia and Montenegro reluctant to hand them over to the International Tribunal, should they fail to comply with the conditions of their provisional release.³⁴ In addition, the Trial Chamber also considered that “current indicators of future co-operation by the Federal Government, as manifested *inter alia* within the framework of negotiations on the Stabilisation

and Association Agreement with the European Union” provided a basis for anticipating that the authorities of Serbia and Montenegro would ensure the return of the Accused to the International Tribunal for trial.³⁵

11. The Appeals Chamber notes that the Declarations explicitly acknowledge the cooperation provided by the authorities of Serbia and Montenegro by means of facilitating the surrender of a number of indictees. The Prosecution has not shown that the Trial Chamber erred in its assessment of the reliability of the guarantees provided. The Trial Chamber properly considered the reliability of the guarantees in light of the individual circumstances of the Accused. Based on this, it was reasonable for the Trial Chamber to conclude that the authorities of Serbia and Montenegro are willing to cooperate with the International Tribunal in the present case.

(2) Insufficient weight given to the failure of the Government of Serbia and Montenegro to arrest Zdravko Tolimir

12. The Prosecution alleges that the Trial Chamber failed to give any weight to its “well-founded allegations based on reliable evidence that Serbia and Montenegro [is aware] of the whereabouts of Zdravko Tolimir.”³⁶ The evidence relied upon in support of these allegations is the following statement made by Mr. Reid in Declaration B:

*I also believe that the Government of Serbia and Montenegro is aware of the whereabouts of General Tolimir, who has been indicted by the ICTY. The Government is not currently cooperating with the Tribunal to effect his arrest and transfer to the Hague.*³⁷

Relying upon Australian and Canadian case law, the Prosecution submits that a “solemn declaration” by a police officer should be accepted as a fact,³⁸ and states that the Trial Chamber in the *Pandurevic* case “accepted such a ‘belief’ as a statement of fact.”³⁹ The Prosecution contends that if the Trial Chamber had doubts as to the veracity of the statement made in Declaration B, “it could as a minimum have granted the Prosecution an opportunity to provide the Chamber with evidence as a basis for the statement of fact [...] and not simply have disregarded it.”⁴⁰

13. Milan Gvero responds that the failure of the Government of Serbia and Montenegro to arrest Zdravko Tolimir should not be a decisive factor in determining whether to rely on the guarantees, and submits that the argument advanced by the Prosecution in this respect has been rejected on at least three occasions.⁴¹ Radivoje Miletic submits that the Trial Chamber correctly assessed Declaration B : (i) in accordance with the Rule 89 of the Rules, which provides that a Trial Chamber is not bound by national rules of evidence, and (ii) by interpreting it literally.⁴² Furthermore, he points out that the statement in Declaration B regarding General Tolimir concerns only the Federal Government of Serbia and Montenegro, while he submitted guarantees from both the Federal Government and the Government of the Republic of Serbia.⁴³

14. The Appeals Chamber has held that even though the reliability of a governmental guarantee must not be exclusively determined by reference to any assessment of the level of cooperation by the authority providing it, the general level of cooperation by that authority with the International Tribunal does have some relevance in determining whether it would arrest the accused in question.⁴⁴ Accordingly, the Trial Chamber noted the “parties’ concordant view that the level of cooperation given by the authorities of Serbia and Montenegro has recently increased.”⁴⁵ Considering the date of the Indictment against Zdravko Tolimir as well as the evidence presented, it concluded that it had not been established that the

Federal Government is aware of the whereabouts of Zdravko Tolimir. Thus, the Trial Chamber was unwilling to draw any conclusions about the Serbian authorities' cooperation on the basis of their failure to arrest Mr. Tolimir.⁴⁶

15. The Appeals Chamber considers that, while having due regard to any "solemn declaration" by a police officer, it is for the Trial Chamber to consider the credibility of all evidence presented. As noted by Radivoje Miletic, Declaration B does not state unambiguously that the Government of Serbia and Montenegro knew the whereabouts of Zdravko Tolimir.⁴⁷ Apart from this Declaration, the Prosecution presented no evidence in support of this assertion. It was thus reasonable for the Trial Chamber to conclude that the assertion was insufficiently supported by the evidence. The Appeals Chamber is not satisfied that the Prosecution has shown that the Trial Chamber erred in its consideration of the guarantees provided by placing insufficient weight on the Declarations. The Trial Chamber did not disregard Declaration B; it was entitled to reach a conclusion contrary to that urged by the Prosecution after having taken into account the information which had been presented to it.

16. Even though the failure to arrest Zdravko Tolimir is still a matter of grave concern,⁴⁸ this cannot be the decisive factor in the determination as to whether the guarantees offered are sufficiently reliable to satisfy the International Tribunal that the Accused will appear for trial. The Appeals Chamber recalls that the circumstances of each accused must be evaluated individually as they weigh upon the likelihood that he will appear for trial. The weight to be attributed to guarantees by a government may depend upon the personal circumstances of the applicant.⁴⁹

(3) Discrepancies in the decisions rendered by the two panels in Trial Chamber II

17. The Prosecution alleges that the two panels in Trial Chamber II have reached contradictory decisions concerning the statement made in Declaration B to the effect that the Government of Serbia and Montenegro is aware of the whereabouts of Zdravko Tolimir.⁵⁰ The Prosecution refers to the *Pandurevic* case, in which the Trial Chamber expressed concern about the same allegations made in the declaration of investigator Bruce Bursik dated 14 June 2005, and concluded that there was only some likelihood that the authorities in question would be willing to arrest Vinko Pandurevic if required.⁵¹ The Prosecution stresses that the Trial Chamber in this case treated Declaration B as a mere statement of the officer's belief, in contrast with the Trial Chamber in the *Pandurevic* case, which "accepted such a 'belief' as a statement of fact."⁵²

18. Relying upon the jurisprudence of the International Tribunal, the Accused submit that the two Trial Chamber decisions are not contradictory. Rather, the weight to be attached to the guarantees by a government may depend upon the personal circumstances of each accused.⁵³ The Accused point out the differences between the case at hand and the *Pandurevic* case, emphasizing that Vinko Pandurevic was a fugitive from December 2001 until March 2005, and that his surrender was conditional.⁵⁴ Consequently, the Accused conclude that there are no discrepancies or inconsistencies between the two decisions as they were rendered on the basis of different facts.⁵⁵

19. The Appeals Chamber considers that the Prosecution's reliance on the *Pandurevic* Decision is of limited value. The *Pandurevic* Decision was the subject of an appeal in which the Appeals Chamber said with regard to that particular finding :

The Trial Chamber acted within its discretion when it took note of this trend [the improvement in the cooperation of Serbia and Montenegro with the International Tribunal] yet did not conclude that authorities in Serbia and Montenegro have cooperated with the Tribunal to the "utmost."

*Though the Trial Chamber should not have relied on a mere "allegation... that the Government of Serbia and Montenegro" is aware of one fugitive's whereabouts, yet has failed to arrest him, this did not prejudice the Appellant.*⁵⁶

Thus, the Appeals Chamber considers that, even if it were to rely on the approach adopted in the *Pandurevic* case, it would not advance the Prosecution's argument since it is consistent with the approach taken by the Trial Chamber in the Impugned Decisions.

20. The Appeals Chamber emphasizes that the reliability of a guarantee given by the relevant authority must be determined in relation to the circumstances which arise in the particular case. In the instant case, the Trial Chamber correctly appraised the personal circumstances of the Accused and undertook to ascertain what would occur if the relevant authorities were obliged under the guarantees they have provided to arrest the Accused. As personal circumstances differ, a Trial Chamber may be justified in accepting a government guarantee as reliable in relation to one accused while rejecting it in relation to another accused.⁵⁷

21. In order to ascertain that the guarantees provided were likely to be fulfilled by the authorities of Serbia and Montenegro, the Trial Chamber took into account the fact that the Accused held no positions of authority within the government as well as the indicators of Serbia and Montenegro's preparedness to negotiate an agreement with the European Union.⁵⁸

22. Accordingly, the Appeals Chamber rejects this ground of appeal.

B. Seriousness of the charges

23. The Prosecution submits that the Trial Chamber erred by giving insufficient weight to the gravity of the crimes with which the Accused are charged.⁵⁹ It argues that these charges include the forced removal and deportation of thousands of individuals from the populations of Srebrenica and Zepa, and states that "the ultimate consequence of their actions [...] consisted of mass killings of thousands of able-bodied Muslim men, which must be taken into account even if the Accused are not specifically charged with the mass killings themselves."⁶⁰

24. Radivoje Miletic responds that the mass killings cannot constitute evidence of the seriousness of the crimes with which he has been charged, since no criminal charges have been brought against him in connection with those killings.⁶¹ He further submits that under the jurisprudence of the International Tribunal and the European Court of Human Rights, the seriousness of a crime and the potential length of the sentences incurred are not factors which, by themselves, justify detention.⁶² He contends that the Trial Chamber correctly took into consideration not only the seriousness of the crimes he is charged with, and the long sentence to be expected if convicted, but also all the other factors relevant to a determination as to whether he might abscond.⁶³ Milan Gvero responds that the Trial Chamber expressly noted the lengthy sentences which had been imposed on other accused in related cases, as well as Mr. Gvero's advanced age, but that nonetheless, it correctly balanced the seriousness of the offences he is charged with against his timely voluntary surrender, the assurances by the Government of Serbia and Montenegro, and his personal undertakings.⁶⁴

25. The Appeals Chamber has held that the seriousness of the charges against an accused cannot be the sole factor determining the outcome of an application for provisional release,⁶⁵ and emphasized that a Trial Chamber must take into account the seriousness of the charges in addition to several other factors.⁶⁶ The Impugned Decisions are consistent with these findings of the Appeals Chamber. Thus, the Trial Chamber held:

[I]n the present context, the seriousness of offences is not to be assessed in the abstract and having regard only to the nature of the offences charged, but rather in the light of the actual circumstances in which the alleged offences occurred and in the light of the requirements imposed by Rule 65 (B). The gravity of the offences charged is of particular relevance, in this context, to whether the prospect of a lengthy sentence is so real that it would constitute an incentive for an accused to flee.⁶⁷

The Impugned Decisions expressly state that the Accused are charged with serious offences and that if convicted, they will likely face a long prison sentence. Thus, the Trial Chamber said:

[I]t is to be anticipated that even if the Defence argument that the alleged role of the Accused was "peripheral" is valid, he may face a long sentence if the offences charged in the Indictment are proven. In addition, the age of the [Milan Gvero] is, as noted by the Prosecution, a factor that, combined with the risk of a long prison term, could affect his readiness to return for trial. It follows that the seriousness of the offences charged and the likelihood of a long sentence militate to some extent against the provisional release of [Milan Gvero].⁶⁸

... [I]t is to be anticipated that, regardless of the role [Radivoje Miletic] played in the perpetration of the crimes, he may face a long sentence if the offences charged in the Indictment are proven. It follows that the seriousness of the offences charged and the likelihood of a long sentence militate to some extent against the provisional release of [Radivoje Miletic].⁶⁹

26. In light of the foregoing, the Appeals Chamber is not satisfied that the Prosecution has shown that the Trial Chamber erred by failing to attach sufficient weight to the seriousness of the offences charged against the Accused. The Appeals Chamber does not accept that the Trial Chamber was compelled or even entitled to consider the seriousness of other crimes not covered by the Indictment against the Accused in reaching a determination concerning their provisional release. In this context, the Appeals Chamber notes the Prosecution's submission to the effect that: "a Trial Chamber must look to the severity of a *likely* sentence *in the context of the crimes charged*."⁷⁰ The Trial Chamber's concern was to ensure that the Accused had satisfied the burden placed upon them to show that they would appear for trial if released and would not interfere with the administration of justice. The seriousness of the crimes charged was one factor considered by the Trial Chamber when assessing the evidence adduced by the Accused in satisfaction of this burden, including evidence of their voluntary surrender, the guarantees provided by the Government of the Republic of Serbia and the Council of Ministers of Serbia and Montenegro, and the personal guarantees offered by the Accused. In this context, the Prosecution has not shown that the Trial Chamber gave the seriousness of the crimes too little weight.

C. Positions occupied by the Accused within the Bosnian Serb Army

27. The Prosecution argues that the Trial Chamber failed to consider "the seniority of the Accused [...] in assessing whether the prospect of a lengthy sentence would be an incentive [...] to flee."⁷¹ In support of this argument, the Prosecution asserts that instead of "look[ing] to the severity of a likely sentence in the context of the crimes charged", the Trial Chamber merely compared the sentence imposed on other accused convicted of the same crimes as those charged against the Accused, but who did not have the same rank.⁷² Milan Gvero responds that this ground of appeal is without merit since the Trial Chamber explicitly took into account his position within the Bosnian Serb Army when deciding his provisional release.⁷³ Radivoje Miletic argues that "the likely length of a sentence depends primarily on the nature of the crime and the accused's responsibility."⁷⁴

28. The Trial Chamber considered the positions held by the Accused during the time period relevant to the events described in the Indictment and the effect of those positions on the

willingness of the government authorities to arrest them. The Impugned Decisions thus state:

The Trial Chamber notes that during the time period relevant to the events described in the Indictment [Milan Gvero] was allegedly an Assistant Commander of the Main Staff of the Bosnian Serb Army and held no position in the Federal Government. In view of the fact that he retired 9 years ago, it is unlikely that he might possess any information of such importance as to make the Government concerned reluctant to hand him over to the Tribunal, should he fail to comply with the conditions of his provisional release.⁷⁵

The Trial Chamber notes that during the time period relevant to the events described in the Indictment the Accused was allegedly a Chief of Operations and Training and Deputy Chief of Staff, or was Standing in for the Chief of Staff, of the Main Staff of the Bosnian Serb Army. It is not alleged that he held any position in the Federal Government. He is retired and there is nothing to suggest that he might possess any information of such importance as to make the Government concerned reluctant to hand him over to the Tribunal, should he fail to comply with the conditions of his provisional release.⁷⁶

29. In light of the foregoing, the Appeals Chamber is not satisfied that the Prosecution has shown that the Trial Chamber erred by failing to consider the positions held by the Accused within the Bosnian Serb Army. Moreover, the reference in the Impugned Decisions to the fact that the Accused may face "long sentences" if convicted may be understood to incorporate consideration of the positions occupied by the Accused at the time the alleged crimes were committed, which would likely have an impact on the sentences they would face. It is clear from the Impugned Decisions that the Trial Chamber took into account all the considerations relevant to its taking an informed and reasonable decision as to whether the Accused would appear for trial if provisionally released, including the positions held by the Accused within the Bosnian Serb Army insofar as they were relevant to the weight to be attached to the guarantees.

D. International Community's Confidence in the International Tribunal

30. The Prosecution submits that the Trial Chamber failed to "take into account the possible effects of undermining public confidence in the administration of international justice."⁷⁷ Under this ground of appeal the Prosecution also states that the Trial Chamber compares the crimes charged against the Accused with other cases which concern the crime of genocide and submits that "the absence of a charge of genocide does not diminish the severity of the acts alleged to have been committed by the Accused as members of a joint criminal enterprise."⁷⁸

31. Milan Gvero responds that (i) public confidence in the administration of justice has never been a factor a Trial Chamber should consider when deciding issues on provisional release; (ii) the Prosecution did not ask the Trial Chamber to consider this factor; and (iii) no public outcry followed the decision to grant his provisional release.⁷⁹ Radivoje Miletic points out that the circumstances in the *Sainovic and Ojdanic* case and those in the instant case, differ completely. For instance, in the *Sainovic and Ojdanic* case, the accused had made public statements to the media to the effect that they would not surrender voluntarily, and they only surrendered three years after having learned of the indictments against them. Radivoje Miletic adds that the fact that many accused have been granted provisional release since the *Sainovic and Ojdanic* Decision was rendered in 2002 has had no negative effect on the International Tribunal's standing in the international community.⁸⁰

32. The Appeals Chamber notes that the Prosecution did not advance this argument in its responses to the applications for provisional release; it has raised this argument for the first time on appeal. A Trial Chamber is generally not required to deal with matters which the parties have not raised before it, unless it considers those matters to be vital to the issues it has to decide upon. The Appeals Chamber emphasizes that the appeal's process is not meant to

offer the parties a remedy to their previous failings at trial.⁸¹ Therefore, the Appeals Chamber will not deal with the Prosecution's complaint. However, *obiter dictum*, the Appeals Chamber notes that the Prosecution has not sufficiently demonstrated that the Trial Chamber's decision would affect the confidence of the international community in the administration of justice by the International Tribunal.

IV. DISPOSITION

On the basis of the foregoing, the Prosecution's Appeal is **DISMISSED**.

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

Done this nineteenth day of October 2005
At The Hague,
The Netherlands.

Judge Mohamed Shahabuddeen
Presiding Judge

[Seal of the International Tribunal]

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- 1 - *Prosecutor v. Zdravko Tolimir, Radivoje Miletic and Milan Gvero*, Case No.: IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, 19 July 2005 ("Milan Gvero's Decision"); Decision Concerning Motion for Provisional Release of Radivoje Miletic, 19 July 2005 ("Radivoje Miletic's Decision"). (If reference is made to both: "Impugned Decisions").
- 2 - When reference is made to the authorities of the Government of the Republic Serbia and Montenegro and the Council of Ministers of Serbia and Montenegro: "authorities of Serbia and Montenegro." When reference is made to the guarantees offered by these authorities: "guarantees."
- 3 - *Prosecutor v. Zdravko Tolimir, Radivoje Miletic and Milan Gvero*, Case No.: IT-04-80-AR65.1, Prosecution's Consolidated Application for Leave to Appeal Decisions Concerning Provisional Release of Radivoje Miletic and Milan Gvero, 22 July 2005.
- 4 - *Prosecutor v. Zdravko Tolimir, Radivoje Miletic and Milan Gvero*, Case No.: IT-04-80-AR65.1, Decision on Prosecution's Consolidated Urgent Motion to Stay Orders on Provisional Release Concerning the Accused Radivoje Miletic and Milan Gvero, 22 July 2005.
- 5 - *Prosecutor v. Zdravko Tolimir, Radivoje Miletic and Milan Gvero*, Case No.: IT-04-80-AR65.1, Defence Response to the Prosecution's Application for Leave to Appeal the Decision Concerning Motion for Provisional Release of General Miletic, 26 July 2005; General Gvero's Response to the Prosecution's Application for Leave to Appeal Decision Concerning Provisional Release, 29 July 2005.
- 6 - *Prosecutor v. Zdravko Tolimir, Radivoje Miletic and Milan Gvero*, Case No.: IT-04-80-AR65.1, Order Assigning Judges to a Case Before the Appeals Chamber, 15 August 2005.
- 7 - *Prosecutor v. Zdravko Tolimir, Radivoje Miletic and Milan Gvero*, Case No.: IT-04-80-AR65.1, Réponse de la Défense à l'appel du Procureur contre la Décision relative à la mise en liberté provisoire du Général Miletic, 29 August 2005 ("Radivoje Miletic's Response"). Official English Translation filed on 16 September 2005.
- 8 - *Prosecutor v. Zdravko Tolimir, Radivoje Miletic and Milan Gvero*, Case No.: IT-04-80-AR65.1, General Gvero's Response to Prosecution's Consolidated Appeal of Decision Granting Provisional Release, 1 September 2005 ("Milan Gvero's Response").
- 9 - *Prosecutor v. Ljube Boskoski and Johan Tarculovski*, Case No.: IT-04-82-AR65.2, Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5; Case No.: IT-04-82-AR65.1, Decision on Johan Tarculovski's Interlocutory Appeal on Provisional Release, 4 October 2005, para. 2.
- 10 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-PT, Decision on Motion by Radoslav Brdjanin for Provisional Release, 25 July 2000, para. 22; *Prosecutor v. Momcilo Krajisnik and Biljana Plavsic*, Case No.: IT-00-39&40-AR73.2, 26 February 2002, paras 16, 22; *Prosecutor v. Slobodan Milosevic*, Cases Nos.: IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 3.
- 11 - *Prosecutor v. Slobodan Milosevic*, Cases Nos.: IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 4.
- 12 - *Ibid.*, para. 5.

- 13 - *Ibid.*, para. 6; *Prosecutor v. Slobodan Milosevic*, Case No.: IT-00-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, paras. 9-10.
- 14 - Prosecution's Appeal, paras 11-26.
- 15 - *Ibid.*, para. 27.
- 16 - *Ibid.*, para. 28.
- 17 - Prosecution's Appeal, para. 8.
- 18 - Prosecution's Appeal, para. 18 referring to Radivoje Miletic's Decision para. 14; *see also* Milan Gvero's Decision, para. 14.
- 19 - Prosecution's Appeal, paras 8, 12.
- 20 - *Prosecutor v. Zdravko Tolimir, Radivoje Miletic and Milan Gvero*, Case No.: IT-04-80-PT, Prosecution Response to Request for Provisional Release for Accused Milan Gvero, Annex A, 19 April 2005 ("Declaration A"); Prosecution Response to Request for Provisional Release for Accused Radivoje Miletic, Annex A, 6 May 2005 ("Declaration B"). (If reference is made to both: "Declarations").
- 21 - Prosecution's Appeal, paras 12-13, 17.
- 22 - *Ibid.*, para. 17.
- 23 - Declarations, para. 4.
- 24 - Radivoje Miletic's Response, para. 8.
- 25 - *Ibid.*, para. 9.
- 26 - Milan Gvero's Response, para. 22.
- 27 - *Prosecutor v. Vidoje Blagojevic et al.*, Case No.: IT-02-53-AR65, Decision on Application by Dragan Jokic for Leave to Appeal, 18 April 2002, para. 8.
- 28 - *Ibid.*, paras 7, 8; *Prosecutor v. Vidoje Blagojevic et al.*, Case No.: IT-02-53-AR65, Decision on Application by Dragan Jokic for Provisional Release, 28 May 2002, p. 2.
- 29 - *Prosecutor v. Vidoje Blagojevic et al.*, Case No.: IT-02-53-AR65, Decision on Application by Dragan Jokic for Leave to Appeal, 18 April 2002, para. 8.
- 30 - Radivoje Miletic's Decision, para. 13; Milan Gvero's Decision, para. 13.
- 31 - *Prosecutor v. Mile Mrksic*, Case No.: IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, para. 9. ("*Mrksic* Decision").
- 32 - Milan Gvero's Decision, para. 13; Radivoje Miletic's Decision, para. 13 (footnotes omitted).
- 33 - *Ibid.*
- 34 - *Ibid.*
- 35 - Milan Gvero's Decision, para. 14; Radivoje Miletic's Decision, para. 14.
- 36 - Prosecution's Appeal, para. 13.
- 37 - Declaration B, para. 5 (emphasis added).
- 38 - Prosecution's Appeal, paras 20-22, 24-25.
- 39 - *Ibid.*, para. 23; *see also* para. 20. "An expression of 'belief' in an affidavit or declaration constitutes a term of art which should be relied upon as fact, as, indeed was done by Judge Agius."
- 40 - *Ibid.*, para. 26.
- 41 - Milan Gvero's Response, paras 16-19 referring to the Cermak & Markac, Stanisic & Simatovic and Milutinovic cases.
- 42 - Radivoje Miletic's Response, paras 12, 13.
- 43 - *Ibid.*, para. 15.
- 44 - *Mrksic* Decision, para. 11. *See also* *Prosecutor v. Vidoje Blagojevic et al.*, Case No.: IT-02-60-AR65.4, Decision on Provisional Release Application by Blagojevic, 17 February 2003.
- 45 - Radivoje Miletic's Decision, para. 12; Milan Gvero's Decision, para. 12.
- 46 - Radivoje Miletic's Decision, para. 12.
- 47 - Radivoje Miletic's Response, para. 13.
- 48 - "Another seven fugitives are within reach of the Serbian authorities, alone or in cooperation with Montenegro and Republika Srpska within Bosnia and Herzegovina: [...] Tolimir. [...] Karadzic, Mladic and Tolimir are the three accused most responsible for Srebrenica. Prime Minister Kostunica gave me assurances that his government will deliver on these remaining fugitives, and I expect him to fulfil his commitment. However, as I understand he is not willing to carry out arrest operations." Address by Carla del Ponte to the Security Council, The Hague, 13 June 2005, CDP/MOW/977-e. "The Serbian Government has been successful in the reporting period in its policy to encourage the voluntary surrender of the accused. 14 accused were brought to the Tribunal thanks to the Serbian Government's efforts, alone or in conjunction with the Minister of Interior of Republika Srpska within Bosnia and Herzegovina. However [...] Tolimir and [...] remain within the reach of the Serbian and Bosnian authorities. Still, these authorities are reluctant to use coercive methods to arrest and transfer these fugitives." Letter dated 25 May 2005 from the President of the International Tribunal, addressed to the President of the Security Council, United Nations, Security Council, S/2005/343, para. 24.
- 49 - *Prosecutor v. Nikola Sainovic and Dragoljub Ojdanic*, Case No.: IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 ("*Sainovic and Ojdanic* Decision"), para. 7.
- 50 - Prosecution's Appeal, para. 16.
- 51 - *Ibid.*, referring to *Prosecutor v. Vinko Pandurevic and Milorad Trbic*, Case No.: IT-05-86-PT, Decision on Vinko Pandurevic's Application for Provisional Release, 18 July 2005 ("*Pandurevic* Decision") para. 19.
- 52 - Prosecution's Appeal, para. 23.
- 53 - Milan Gvero's Response, paras 16-21; Radivoje Miletic's Response, paras 16-19.
- 54 - Milan Gvero's Response, para. 21; Radivoje Miletic's Response, para. 17.

- 55 - Milan Gvero's Response, para. 21; Radivoje Miletic's Response, para. 19.
- 56 - *Prosecutor v. Vinko Pandurevic and Milorad Trbic*, Case No.: IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurevic's Application for Provisional Release, 3 October 2005, para 13 (emphasis added).
- 57 - *Mrksic* Decision, para. 9.
- 58 - Milan Gvero's Decision, paras 13, 14; Radivoje Miletic's Decision, paras 13, 14.
- 59 - *Ibid.*, para. 27.
- 60 - *Ibid.*
- 61 - Radivoje Miletic's Response, para. 20.
- 62 - *Ibid.*, para. 22.
- 63 - *Ibid.*, para. 25.
- 64 - Milan Gvero's Response, paras 24, 26.
- 65 - Sainovic and Ojdanic Decision, para. 6; *Prosecutor v. Blagoje Simic*, Case No.: IT-95-9-A, Decision on Motion of Blagoje Simic pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Service for his Father, 21 October 2004, para. 15.
- 66 - *See* Sainovic and Ojdanic Decision, para. 6.
- 67 - Milan Gvero's Decision, para. 10 (footnote omitted); Radivoje Miletic's Decision, para. 10 (footnote omitted).
- 68 - Milan Gvero's Decision, para.10 (footnotes omitted).
- 69 - Radivoje Miletic's Decision, para. 10.
- 70 - Prosecution's Appeal, para. 28.
- 71 - *Ibid.*
- 72 - *Ibid.*
- 73 - Milan Gvero's Response, paras 27-28.
- 74 - Radivoje Miletic's Response, para. 21.
- 75 - Milan Gvero's Decision, para. 13 (footnotes omitted).
- 76 - Radivoje Miletic's Decision, para. 13 (footnotes omitted).
- 77 - Prosecution's Appeal, para. 8.
- 78 - *Ibid.*, para. 31.
- 79 - Milan Gvero's Response, paras 29-31.
- 80 - Radivoje Miletic's Response, paras 27-28.
- 81 - *Prosecutor v. Drazen Erdemovic*, Case No.: IT-96-22-A, Appeal Judgement, 7 October 1997, para. 15; *Prosecutor v. Dusko Tadic*, Case No.: IT-94-1-A, Appeal Judgement, 15 July 1999, para. 55; *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para. 20; *Prosecutor v. Zejnil Delalic, Zdravko Mucic, a.k.a. "Pavo", Hazim Delic and Esad Landzo, a.k.a. "Zenga"*, Case No.: IT-96-21-A, Appeal Judgement, 20 February 2001, para. 724; *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic and Vladimir Santic*, Case No.: IT-95-16-A, Appeal Judgement, 23 October 2001, para. 408; Sainovic and Ojdanic Decision, Dissenting Opinion of Judge David Hunt, para. 91.

Annex B - Authority B-13

Decision on Provisional Release

Case No.: IT-99-37-AR65

IN THE APPEALS CHAMBER**Before:****Judge Mohamed Shahabuddeen, Presiding**
Judge David Hunt
Judge Mehmet Güney
Judge Fausto Pocar
Judge Theodor Meron**Registrar:****Mr. Hans Holthuis****Decision of:****30 October 2002****PROSECUTOR****v.****NIKOLA SAINOVIC**
DRAGOLJUB OJDANIC

DECISION ON PROVISIONAL RELEASE

Counsel for the Prosecutor**Mrs. Carla Del Ponte**
Mr. Geoffrey Nice**Counsel for the Accused****Mr. Toma Fila and Mr. Zoran Jovanovic for Nikola Sainovic**
Mr. Tomislav Visnjic, Mr. Vojislav Selezan and Mr. Peter Robinson for Dragoljub Ojdanic

1. Pursuant to leave granted by a Bench of the Appeals Chamber,¹ the Prosecution appealed against Trial Chamber III's "Decision on Application of Nikola Sainovic and Dragoljub Ojdanic for Provisional Release" ("Impugned Decision") whereby the Trial Chamber granted provisional release to co-accused Nikola Sainovic and Dragoljub Ojdanic ("Sainovic" and "Ojdanic", the "Applicants").² On 2 August 2002, Sainovic filed his "Defence Response to the Prosecution's Appeal Against the Trial Chamber's Decision to Grant Provisional Release" and Ojdanic his "General Dragoljub Ojdanic's Brief on Appeal". On 7 August 2002, the Appellant filed its "Prosecution's Joint Reply" (the "Reply").
2. In its Appellant's Brief, the Prosecution submits that the Trial Chamber committed an error of fact when it concluded that the two requirements of Rule 65(B) of the Rules of Procedure and Evidence ("Rules") had been met, and that it abused its discretion when deciding whether or not to release the accused. In relation to its first contention, the Prosecution submits that the

Decision on Provisional Release

Trial Chamber erred by omitting to consider the failure of the authorities of the Federal Republic of Yugoslavia ("FRY") to arrest co-accused Milan Milutinovic ("Milutinovic"), insisting instead on the FRY's "general level of co-operation". The Prosecution also submits that the Trial Chamber erred by giving unreasonable weight to the guarantees provided by the Applicants and by not giving sufficient weight to the fact that they could have surrendered earlier. In relation to the second contention, the Prosecution claims that the Trial Chamber abused its discretion when suggesting that the foreseeable length of pre-trial detention militated in favour of provisional release, because that delay was due only to the Defence and also because, in any case, the delay would not have been "exceptionally long" or "unreasonable". The Prosecution further submits that the Defence's estimate as to pre-trial delay should not have been accepted by the Trial Chamber at face value, but should instead have been properly assessed by the Trial Chamber. The Prosecution finally submits that the Trial Chamber abused its discretion when it failed to address other relevant factors inherent to a proper exercise of discretion such as the senior position of the accused, the serious nature of the crimes, the likelihood of a long sentence if convicted, as well as the absence of co-operation on the part of the relevant authorities.

3. In his Response, Sainovic submits that the Prosecution is incorrect to claim that the FRY's and Serbia's guarantees are unreliable and points to the fact that, as soon as the Law on Co-operation with the Tribunal was passed, he surrendered to the Tribunal. Concerning the Trial Chamber's exercise of discretion, Sainovic says that the Prosecution failed to establish that the Chamber acted beyond the realm of its discretionary power. He finally submits that the factors which the Trial Chamber allegedly failed to consider would not in any case have prevented his release. Ojdanic submits that the Prosecution failed to demonstrate that there was a miscarriage of justice resulting from an error of fact or that the Trial Chamber abused its discretion. According to him, the failure of the FRY to transfer co-accused Milutinovic does not amount to a lack of co-operation on the FRY's part which would bear consequences upon the weight of the guarantees which it provided concerning the present accused's provisional release. The Trial Chamber also properly took into account the likelihood of a lengthy sentence when coming to its decision. In relation to its exercise of discretion, Ojdanic points out that the Prosecution did not dispute at trial the Defence's estimate of the time needed before the trial may start and that the Trial Chamber did not abuse its discretion by taking the period of pre-trial detention into account to decide whether to release him. Finally, Ojdanic argues that the Trial Chamber took into account all the factors relevant to a proper exercise of its discretion.
4. In Reply, the Prosecution submitted, *inter alia*, that the reliability of the guarantees given by the FRY and Serbia is not an independent matter, and that the true issue should be whether the Trial Chamber is satisfied that the accused will appear at trial. The Prosecution suggests that provisional release is premised upon the assumption that the Tribunal will not need to have resort to Article 29 of the Statute and Rule 56 of the Rules for the arrest and transfer of accused persons and that, in case of doubt as to whether, if released, an accused will need to be re-arrested to appear for trial, provisional release should be rejected. The Prosecution contends that such a guarantee is a "secondary consideration" and that its absence would merely constitute an additional "negative factor" whereas its existence could not be regarded as a "positive factor" speaking in favour of provisional release. The same may be said, the Prosecution argues, of the Law on Co-operation with the Tribunal. Further, the Prosecution claims that, in view of the circumstances, the surrender of the co-accused may not legitimately be regarded as "voluntary" and that the Trial Chamber gave "no real consideration, or insufficient consideration" to the likely length of the sentence if they were convicted. Concerning the length of pre-trial detention, the Prosecution submits that it is for the Trial Chamber, not the parties, to set out the basis for its conclusion that there would be "considerable time" before the trial begins. It also points out that the Defence's assessment in that respect was grossly inflated. In addition, in the exercise of its discretion, the Trial Chamber should have once again taken into account those factors which it assessed to decide

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whether or not the conditions had been met pursuant to Rule 65(B). Finally, the Prosecution submits that public interest considerations weighed heavily against exercising its discretion in favour of provisional release.

5. On 12 August 2002, Sainovic filed his "Defence Response to Prosecution's Joint Reply" ("response to the reply"). On 19 August 2002, the Appellant filed his "Prosecution's objection to 'Defence Response to Prosecution's Joint Reply'", in which the Prosecution argues that Sainovic was not entitled to file such a response. Neither the Rules nor the practice of the Tribunal provide a party with a right to respond to a reply, although leave will usually be granted to file a further response where the reply raises a new issue. That is not the case here. Sainovic did not seek leave with the Appeals Chamber to respond to the reply. His response to the reply is therefore disregarded for the purpose of the present appeal.
6. A Trial Chamber is not obliged to deal with all possible factors which a Trial Chamber can take into account when deciding whether it is satisfied that, if released, an accused will appear for trial. It must, however, render a reasoned opinion.³ This obliges it to indicate all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. In relation to the present application for provisional release, a reasonable Trial Chamber would have been expected to consider, and thus to list, *inter alia*, the following factors: the fact that the applicants are charged with serious criminal offences; the fact that, if convicted, they are likely to face long prison terms; the circumstances in which they surrendered; the degree of co-operation given by the authorities of the FRY and Serbia; the fact that the government of the FRY and the government of the Republic of Serbia gave guarantees that they would ensure the presence of the accused for trial and guaranteed the observance of the conditions set by the Trial Chamber upon their provisional release;⁴ the fact that both accused held very senior positions, so far as it is relevant to the weight of governmental guarantees; the fact that the FRY recently passed a Law on Co-operation with the International Tribunal; the fact that the Applicants gave personal guarantees in which they undertook to abide by the conditions set by the Trial Chamber should they be released; the likelihood that, in light of the circumstances prevailing at the time of the decision and, as far as foreseeable, the circumstances as they may turn out to be at the time when the accused will be expected to return for trial, the relevant authorities will re-arrest the accused should he decline to surrender; and the fact that the accused provisionally accepted to be interviewed by the Office of the Prosecutor, thereby showing some degree of co-operation with the Prosecution.
7. The circumstances of each accused who applies for provisional release must be evaluated individually as they weigh upon the likelihood that he will appear for trial. The weight to be attributed to guarantees given by a government may depend a great deal upon the personal circumstances of the applicant, notably because of the position which he held prior to his arrest. The Trial Chamber must assess these circumstances at the time when the decision on provisional release is being taken, but must also, as far as foreseeable, make an assessment as at the time when the case is due for trial and when the accused will be expected to return.
8. The Appeals Chamber is of the view that the Prosecution's argument that, as a matter of discretion, an accused person should not be released until the Prosecution has been able to interview him fully is misconceived.⁵ An accused person is not, while in the custody of the International Tribunal, at the disposal of the Prosecution. An accused person may, if he decides to do so, co-operate with the Office of the Prosecutor, *inter alia*, by accepting to be interviewed by the Prosecution, but he does not have to do so and his provisional release is not conditioned, all other conditions being met, upon his giving such an interview while still in custody.
9. The Impugned Decision does not demonstrate that the Trial Chamber took into account all the factors which were relevant to its taking a fully informed and reasonable decision as to

Decision on Provisional Release

whether, pursuant to Rule 65(B), the accused will appear for trial if provisionally released. In particular, the Trial Chamber failed to consider the effect of the senior position of the two co-accused so far as it relied upon the guarantees. The position of an accused in the hierarchy and the consequence thereof upon the weight of governmental guarantees are indeed significant factors which the Trial Chamber is expected to address as they could have an important bearing upon a State's willingness and readiness to arrest that person if he refuses to surrender himself; those factors therefore reduce the likelihood of his appearing at trial. In failing to address these factors, the Trial Chamber committed an error of law.

10. The Appeals Chamber notes that the Trial Chamber emphasised the fact that the applicants surrendered voluntarily. It seems, however, that a question was raised as to whether their surrender was truly voluntary. The applicants' case was that, prior to the adoption on 11 April 2002 of the Law on Co-operation with the Tribunal, it would not have been possible for them to surrender, but that, thereafter, it was.⁶ The Prosecution submitted that, for approximately three years prior to the adoption of the Law on Co-operation, the applicants did not surrender and that the true interpretation of the facts is that they eventually surrendered only after it became clear from the Law on Co-operation that they would no longer find a reliable refuge in the FRY.⁷ It also pointed out in its submissions to the Trial Chamber that both accused made public statements to the media earlier this year to the effect that they would not surrender voluntarily.⁸ In the Trial Chamber, the Defence did not dispute those statements.

At the appellate level, the Prosecution elaborated its position by citing particular statements that the accused or their counsel made. These statements were set out both in footnote 19 to the Prosecution's Response to Applications for Provisional Release and at p.79 of the Prosecution's Book of Authorities. The accused did not react to these statements. However, in respect of these statements, the Prosecution did not observe the usual procedure for the admission of additional evidence. Consequently, the Appeals Chamber would disregard these statements and the accused's lack of reaction to them.

In respect of the public statements made by the accused to the media and which were mentioned to the Trial Chamber, the Trial Chamber did not refer to them or to the Prosecution's submission concerning the voluntariness of the surrender. On appeal, the Prosecution did not complain about the failure of the Trial Chamber to refer to these statements. The Appeals Chamber gives no weight to this lack of complaint. The Prosecution continues to rely on those statements. These statements were highly relevant. In view of the Appeals Chamber, the Trial Chamber committed an error of law in not referring to them. Further, the Appeals Chamber notes that, although they were publicly indicted in May 1999, both accused "surrendered" only in April 2002, and then only in the circumstances mentioned above. As a result, the Appeals Chamber disagrees with the finding of the Trial Chamber that the surrenders were voluntary.

11. The Trial Chamber thus erred in fact and in law, and misdirected itself. The Impugned Decision must therefore be quashed.
12. When it comes to decide upon the provisional release of both accused, the Appeals Chamber is in the circumstances of this case in the same position as the Trial Chamber. In the exercise of its power to revise the Impugned Decision, it may decide upon the matter itself rather than sending it back to the Trial Chamber for reconsideration. Having taken into account all the relevant factors mentioned by the Trial Chamber as well as the additional factors mentioned in its decision, the Appeals Chamber is not satisfied that, if released, the two co-accused would appear for trial as required by Rule 65(B). The remaining arguments of the Prosecution need not be addressed in the present appeal.
13. Accordingly, the Appeals Chamber [Judge Shahabuddeen appending a separate opinion and

Decision on Provisional Release

Judge Hunt dissenting]

- a) Allows the Prosecution's appeal and quashes the Impugned Decision; and
- b) Revises the Impugned Decision by denying the provisional releases of Sainovic and Ojdanic.

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

Mohamed Shahabuddeen
Presiding

Dated 30 October 2002
At The Hague,
The Netherlands.

Judge Shahabuddeen appends a separate opinion to this decision.

Judge Hunt appends a dissenting opinion to this decision.

[Seal of the Tribunal]

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- 1 - Decision Granting Leave to Appeal, 16 July 2002.
 - 2 - Prosecution's Appeal Against the Trial Chamber's Decision to Grant Provisional Release, 26 July 2002 ("Appellant's Brief").
 - 3 - This point is conceded by the Prosecution (pars 37-38 of the Appellant's Brief).
 - 4 - Pursuant to Rule 65(C) of the Rules, the production of a guarantee from the relevant governmental body is advisable but not a prerequisite for provisional release. See *Prosecutor v Jokic*, Decision on Application by Dragan Jokic for Provisional Release, 28 May 2002 and *Prosecutor v Jokic*, Decision on Application by Dragan Jokic for Leave to Appeal, 18 April 2002, pars 7-8.
 - 5 - See hearing on application for provisional release, 24 June 2002, T 424-425.
 - 6 - Sainovic respondent's brief, par 5 and Ojdanic respondent's brief, par 49.
 - 7 - Prosecution's Joint Reply, 7 August 2002, par 14.
 - 8 - See paragraphs 15 ("The Prosecution notes also that the accused told the media earlier this year that he would not surrender voluntarily") and 24 ("As with the accused Sainovic, the accused Ojdanic stated to the media earlier this year that he would not surrender voluntarily, explaining that domestic courts should have jurisdiction over him") of the "Prosecution's Response to Applications for Provisional Release", 19 June 2002. See also Trial Chamber Transcript pages 429-430 of 24 June 2002: "[...] Mr Ojdanic had indicated sometime fairly recently, as indicated in our pleadings, that he believed he would best be tried by domestic courts, in particular military courts. The Prosecution would just point out that in the Talic decision on provisional release, it was also found important in the context of that hearing that Talic had declared prior to the provisional release argument that he felt justice could only be done in the case – in his case before a military court, not allowing for – but however – sorry, however, allowing for the possibility of an international military court trying him. The Prosecution merely notes here that Mr. Ojdanic does not even allow for the possibility of international justice."

Annex B - Authority B-14

Decision on Application for Leave to appeal

BEFORE A BENCH OF THE APPEALS CHAMBER

Before:

Judge Lal Chand Vohrah, Presiding

Judge Mohamed Shahabuddeen

Judge Rafael Nieto-Navia

Registrar:

Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:

7 September 2000

PROSECUTOR

v.

RADOSLAV BRDANIN

MOMIR TALIC

DECISION ON APPLICATION FOR LEAVE TO APPEAL

Counsel for the Prosecutor:

Ms. Joanna Korner

Counsel for the Defence:

Mr. John Ackerman for Radoslav Brdjanin

Mr. Xavier de Roux, Maître Michel Pitron for Momir Talic

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

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

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

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

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

Decision on Application for Leave to appeal

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

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

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

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

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

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

FINDING that the Applicant has failed to demonstrate that the Trial Chamber may have erred in its application of Rule 65 in holding that the Applicant failed to discharge the burden in this case and, therefore, the Applicant has failed to satisfy the requirement of "good cause" within the meaning of sub-Rule 65(D) of the Rules,

PURSUANT to Rule 65 of the Rules,

HEREBY REJECTS the Application for Leave to Appeal.

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

Judge Lal Chand Vohrah
Presiding

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

[Seal of the Tribunal]

Annex B - Authority B-15

NATIONAL

Gov't Rejects US Human Rights Assessment

BY DOUGLAS GILLISON
THE CAMBODIA DAILY

Cambodia dismissed a US report on the country's human rights record Thursday, saying that the annual report to the US Congress "entirely contradicts the true reality in the country."

The annual survey, released by the US State Department on Wednesday, said an array of human rights guarantees, such as freedom from unlawful deprivation of life, fair public trials and freedom of speech, were lacking and that Cambodia's human rights record "remained poor."

On Wednesday, the Cambodian Ministry of Foreign Affairs issued a statement in response, saying: "[W]e have found that many of the accusations contained in this report do not even exist or are sim-

ply over exaggerated."

"We certainly recognize that human rights in Cambodia are not perfect. But is there any perfect human rights situation anywhere in the world?" the statement said, adding that the report relied too heavily on the views of anti-government NGOs and appeared timed to coincide with the national elections.

"Cambodia fully does not believe that the country report...will ever receive a good mark unless a Cambodian government has 'affectionate' relations with the United States of America," the statement said.

US Ambassador Joseph Musomeli said Thursday that bilateral relations remained healthy.

"We have a warm and friendly relationship with the Government

of Cambodia and welcome our open dialogue," he said in an e-mail.

Human rights is one of a bevy of issues, including counterterrorism, narcotics control and religious freedom, about which the US diplomatic corps is required to report annually to the US legislature.

Though viewed by many as authoritative, the report, which surveyed 196 countries in 2007, often provokes irritation among countries such as Russia, Venezuela and China, the latter of which has since 1998 produced a counter-report, "The Human Rights Record of the United States."

SRP Deputy Secretary-General Mu Sochua said Thursday she felt the report was balanced and had no political motivations.

"This report is mild compared to what is happening," she said.

Hun Sen To Create 200 Gov't Posts For Women

BY YUN SAMBAN
AND FERGAL QUINN
THE CAMBODIA DAILY

Prime Minister Hun Sen said Thursday he would be creating 200 new posts for women in deputy provincial and district governor positions.

Speaking at the Interior Ministry's national conference, he ordered Interior Minister Sar Kheng to select women candidates for the new posts.

Hun Sen said no women currently serve as deputy governors, so an extra position for a woman is to be added to each province and district office.

"I believe women's affairs are important," he said. "Now you, Sar Kheng, can elect, and I will sign, and we will add more women if it is not enough."

Forum Offers Link to World's Medical Specialists

BY FERGAL QUINN
THE CAMBODIA DAILY

An innovative new system that connects doctors in poorer countries to medical specialists from around the world via the Internet is to be put into place nationwide, according to the Ministry of Health and the NGO Medicorps.

Telemedicine allows practitioners in Cambodia to send a full report with pictures on complex cases to volunteer specialists abroad, who then advise them on treatment plans without having to see the patient in person.

A seminar being run by Medicorps in conjunction with the Ministry of Health in Siem Reap town is giving a foundation on the technology to 22 doctors, an initial

step in a long-term plan to provide 82 hospitals in the country with a telemedicine center.

According to Medicorps Director Dr Gunther Hintz, the nationwide use of telemedicine could radically improve the quality and range of treatment patients get here.

"In less developed countries, the lack of basic medical attention means the problems which present are often complex and require specialist care, which there is a complete lack of in Cambodia," he said.

"With this, the physician on the other end can have the exact same information as the doctor on the ground," Hintz added.

National Director of Healthcare at the Ministry for Health Tep Lun said the government was fully

will think his party was not organized by Hun Sen."

Kem Sokha denied Hun Sen had helped him set up the HRP.

"I never discussed my political party plans with him," Kem Sokha said by telephone.

Hun Sen also warned against public demonstrations of "people power" following the July election.

"Do not use people power like in the Ukraine or the Philippines, because you cannot do that in Cambodia," he said. "The people power is only through the election and they must respect the result."

SRP leader Sam Rainsy said Thursday that popular demonstrations could still be brought to bear if election fraud was perpetrated.

"There will be people power if the government abuses the people's will," he said.

behind the project but needed partners to fund its implementation.

"This can be an important part of the government strategy to improve the quality of health care in Cambodia," he added.

Medicorps Country Director Laurent Lek said at least 30 top experts on pediatrics, cancer, lung disease and trauma care from the University of California Los Angeles and the University of Hawaii would be available to Cambodian doctors initially, and other facilities would be added later to give access to a larger pool of specialists.

He estimated that an initial three-year program in 30 hospitals throughout the country could cost about \$1 million.

Briefing

Police Arrest Two in Alleged Jewelry Theft

Phnom Penh municipal police on Wednesday arrested an RCAF soldier and a brothel owner over the alleged theft of a gold ring and necklace in Russel Keo district's Toek Thla commune, said district police chief Chey Soseila. RCAF soldier Chan Sinath, 26, was arrested after five men beat him and accused him of stealing the jewelry from Kong Horn, 27, during a visit to her brothel, Chey Soseila said. Chan Sinath then claimed that the jewelry was his and accused Kong Horn of instructing the five men to rob him, he said. Because it was uncertain who was telling the truth, he said, police arrested them both and sent them to the municipal court Thursday. (The Sambath)

Two Charged in Alleged S'ville Robbery Attempt

The Sihanoukville Municipal Court charged two men with robbery Wednesday for attempting to rob four female tourists in broad daylight with a knife and a screwdriver outside a bank in Mittapheap district's commune 4, police said Thursday. Mom Vanny, 19, and So Chanthy, 25, were arrested at noon Tuesday after police disrupted the mugging, chased the suspects and knocked them down with their motorcycles, said district police chief Mann Tour. "Our forces saw them in the fight and crashed into the men," he said, adding that the tourists, whose nationality was unknown, escaped uninjured. Court officials could not be reached for comment Thursday. (Prak Chan Thul)

Teenager Dies Climbing B'bang Electricity Pole

A 17-year-old boy died in Battambang's Thma Koul district on Tuesday after winning a race to the top of an electricity pole, district penal police chief Heang Buntha said Thursday. According to Heang Buntha, Yoeup Moeun raced a friend to the top of a 20-meter high electricity pole alongside National Road 5 in Boeng Pring commune. Yoeup Moeun reached the top first, grabbed the electricity cable and then lost his balance because of the electric shock, falling to his death, Heang Buntha said. Local authorities had previously warned villagers not to go near the power lines, he said. "They should not play this dangerous game," he said. (Chhorn Chansy)