

Mr. Goran Mikulicic
Mr. Srdan Joka

Counsel for the Accused:

Mr. Grant Niemann
Mr. Anura Meddegoda
Mr. Michele Marchesello

The Office of the Prosecutor:

PROSECUTION RESPONSE TO THE DEFENCE MOTION
FOR PROVISIONAL RELEASE

ZLATKO ALEKSOVSKI

v.

THE PROSECUTOR

Date Filed: 14 January 1998

Registrar : Mrs. Dorothee de Sampayo Garrido-Nijgh

Before: Judge Almiro Simoes Rodrigues, Presiding
Judge Lal Chand Vohrah
Judge Rafael Nieto Navia

IN THE TRIAL CHAMBER

Case No. IT-95-14/1-T

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

THE PROSECUTOR

v.

ZLATKO ALEKSOVSKI
Case No. IT-95-14/1-T

PROSECUTION RESPONSE TO THE DEFENCE MOTION
FOR PROVISIONAL RELEASE

1. INTRODUCTION

1.1. The Prosecution hereby responds to the defence application seeking provisional release made on 06 January 1997.

1.2. It is submitted by the Prosecution that the defence in its application made under the provisions of Rule 65 of the Rules of Procedure and Evidence, has asserted the following criteria in support of the application for provisional release:

- a) "...Zlatko Aleksovski was arrested on 08 June 1996 by the Croatian police" and has been "in the custody of the International Criminal Tribunal since 28 April 1997".
- b) that exceptional circumstances exist,
- c) "the certainty that the accused will appear for trial",
- d) "that the accused will not pose a danger to any victim, witness or other person",
- e) "the position of the host country".

2.4. It is the respectful submission of the Prosecution that Rule 65(B) has no application to the present case. It is submitted that the provisions of Rule 65 deal with pre trial procedure and the proper stage to have

2.3. Thus, the Defence must establish that there are exceptional circumstances, that the accused will appear for trial, and that if released the accused will not pose a danger to any victim, witness or other person. Additionally, the host country must be heard before an order for release is made by the Trial Chamber.

2.2. Specifically, Rule 65(B) provides that, "Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person." It is the submission of the Prosecution that these criteria are conjunctive in nature, and that the burden of proof of the existence of such criteria rests with the Defence.

2.1. The Rules of Procedure and Evidence, adopted pursuant to Article 15 of the Statute of the Tribunal provide for the provisional release of an accused in exceptional circumstances.

2. LEGAL AUTHORITY

1.3. It is the respectful submission of the Prosecution that the defence has failed to demonstrate the existence of exceptional circumstances, and additionally, that the accused will appear for trial and not pose a danger to the victims and witnesses. In the circumstances, the Prosecution opposes the defence application for provisional release.

made an application of that nature, would have been prior to the commencement of trial. This is clearly the case, as this provision appears under Part Five of the Rules of Procedure and Evidence which deals with Pre-Trial Proceedings. If such option to apply for provisional release were intended to be available to the defence after the commencement of trial, such provision would have necessarily been included in Part Six of the Rules, dealing with Proceedings before Trial Chambers.

2.5. However, if the Trial Chamber were of the view that the provisions of Rule 65 would apply at this stage of the proceedings, it is submitted that the defence has failed to meet the requirements laid down therein. The issue of provisional release has been addressed on numerous occasions by the International Tribunal, and on each occasion the test outlined in Rule 65(B) has been applied strictly. It is only in one case, *Prosecutor v. Đukić*, that a request for provisional release has been granted. The Trial Chamber held that the accused was suffering from an incurable illness which was in its terminal phase, and ordered provisional release "solely for humanitarian reasons" (*Prosecutor v. Djordje Đukić*, Tr. Ch. I, 24 April, 1996, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, (Case No. IT-96-20-T)).

2.6. In the case of *Prosecutor v. Tihomir Blaškić*, the Trial Chamber has twice denied motions for provisional release upon failing to find proof of the existence of exceptional circumstances *Prosecutor v. Tihomir Blaškić*, Trial Chamber I, 25 April 1996, Decision Rejecting a Request for Provisional Release, Case No. IT-95-14-T; *Prosecutor v. Tihomir Blaškić*, Tr. Ch. I, 20 December 1996, Order Denying a

3.1.1. In the indictment filed on 10 November, 1995, the accused is charged with committing Grave Breaches of the Geneva Conventions and Violations of the Laws and Customs of War. The Prosecution alleges that the accused, in his role as Commander of the Kaonik detention facilities, was responsible for the inhumane treatment of Bosnian Muslim detainees, both individually and as a superior, for the acts of his subordinates.

3.1. Factual Background

3. ARGUMENT

2.7. In both the *Prosecutor v Zejnil Delalic et al.*, and *Prosecutor v Delic* the Trial Chamber again rejected motions for provisional release based on grounds including, *inter alia*, the severe difficulties, both financial and personal, caused by the accused's continuing detention. *Prosecutor v Zejnil Delalic et al.*, Trial Chamber II, 25 September, 1996, Decision on Motion for Provisional Release filed by the accused Zejnil Delalic, (Case No. IT-96-21-T); *Prosecutor v. Hazim Delic*, Trial Chamber II, 24 October 1997, Decision on Motion for Provisional Release, (Case No. IT-96-21-T).

Motion for Provisional Release, (Case No. IT-95-14-T). On both occasions the Trial Chamber, having considered the reasons adduced by the defence in support of its application, including, *inter alia*, his family situation, and assertions that the Croatian Government would guarantee the appearance of the accused for trial, rejected the requests for provisional release.

3.1.5. Pursuant to the provisions of Article 20 and Rule 62 of the Rules of Procedure and Evidence, the accused made his initial appearance before the Tribunal on 29 April 1997, after which the Trial Chamber issued an Order for Detention on Remand.

3.1.4. Immediately upon the arrest of the accused, the Tribunal sought his transfer to The Hague, on 9 June, 1996. The Tribunal had no influence or control over the period of time spent by the accused in custody in Croatia. According to the Croatian authorities the accused was unfit for transfer due to medical reasons. Repeated requests were made; however, it was not until the Office of the Prosecutor dispatched a team of qualified medical personnel to examine the accused, that the transfer to The Hague eventually took place on 28 April 1997. He has remained in custody from that date until the present. Up until the date of the defence application made on 6 January 1998, he had spent 253 days in The Hague, being a total period in custody of 577 days, not 582 as was suggested by his counsel.

3.1.3. On the basis of the constitutional provision on the co-operation of the Republic of Croatia with the ICTY of 19 April 1996, and pursuant to a request by this Tribunal, the accused was arrested by Croatian authorities on 8 June 1996. He remained in custody in Croatia for ten months and twenty-four days (a total of 324 days).

3.1.2. On 10 November, 1995, Judge Gabrielle Kirk McDonald, as she then was, reviewed and confirmed this indictment and signed the warrant of arrest against the accused.

3.1.6. It is submitted that the Tribunal made every possible effort to secure the custody of the accused in order that he could be brought to trial as soon as possible. However, the period of custody spent in the Republic of Croatia became extended due to his own conduct. Accordingly, the Tribunal had no influence or control over the period of time spent by the accused in custody in Croatia. The Trial Chamber should therefore, in consideration of the defence motion, take into account only the period of eight months spent by the accused in the custody of the UN Detention Unit.

3.1.7. In addition, the Prosecutor would wish to point out to the Trial Chamber that, at a status conference of 6 June, 1997, the Prosecution indicated its readiness to proceed to trial at any time after August 1997.

3.2. Defence Submissions

3.2.1. As stated above, the Prosecutor submits that Rule 65 is not applicable in the present case, since the trial has already commenced. However, should the Trial Chamber find that the Rule does apply, the Prosecutor, nevertheless, submits that the defence has failed to meet the requirements therein. As found by Trial Chamber I in the case of *Prosecutor v. Blaskic*,

“the Rules have incorporated the principle of preventive detention of accused persons because of the extreme gravity of the crimes for which they are being prosecuted by the International Tribunal and, for this reason, subordinate any measure for provisional release to the existence of exceptional circumstances; Considering that, for this reason, the Trial Chamber considers that it may order provisional release only in very rare cases in which the condition of the accused, notably the accused’s state of health, is not compatible with any form of detention.”

Prosecutor v. Tihomir Blaškić, Trial Chamber I, 25 April 1996, Decision Rejecting a Request for Provisional Release, (Case No. IT-95-14-T), at p.4 (“*Blaškić Decision*”);

3.2.2. The defence seeks to rely upon four factors to establish the "exceptional circumstances" requirement: the length of the detention, the health of the accused under his present conditions of detention, the family circumstances of the accused and the good behaviour of the accused in detention to date.

3.2.3. The burden of proving the existence of exceptional circumstances to justify provisional release rests with the defence, and that burden is not discharged by merely making assertions from the Bar table. Evidence in proof of such exceptional circumstances would be a minimum requirement, and the defence has failed to present any evidence in support thereof.

3.2.4. The first factor relied upon by the defence as an “exceptional circumstance” is the length of detention, and passing reference is made to the European Convention on Human Rights (Trial Transcript, *Prosecutor v. Aleksovski*, 6 January 1998, at p. 95.). Both the European Convention and the International Covenant on Civil and Political Rights guarantee the right of an accused to be brought promptly before a Judge and the right to trial within a reasonable time or to release pending trial. (ICCPR Arts. 9(1) and (3); ECHR Arts. 5(3) and 6(1)). Again, like Rule 65 of the Rules, both Articles 9(1) and 5(3) only address themselves to the period of pre-trial detention.

3.2.5. In any event, the jurisprudence in relation these Articles does not support the proposition that a period of eight months pre-trial detention is

in any way a breach of these international standards. In interpreting the relevant provisions of the ICCPR, the UN Human Rights Committee in Communication No. 253/1987 Against Jamaica, 8 April 1991, found that an 18 month delay between arrest and the opening of trial was not an “undue delay.” The European Commission of Human Rights has decided the issue of the “reasonableness” of the length of pre-trial detention in numerous cases. In Ventura v. Italy, App. No. 7438/76, Comm. Report 15.12.80., the Commission held that pre-trial detention of 5 years, seven months, 27 days was in conformity with the provisions of Article 5(3). Similarly, in Neumeister v. Austria (8 Eu.Ct.H.R.(ser.A) (1968)) the European Court found a period of 3 years pre-trial detention to be in conformity with the ECHR.

3.2.6. Another ground relied upon by the defence in seeking to establish exceptional circumstances is the fact of the accused’s separation from his family, and the family’s financial dependence on his aged mother’s pension in his absence. It is the submission of the Prosecution that that this is in no way exceptional: in fact these are personal and family circumstances that do not differ from the problems any person could encounter while being in detention, and are common to very many accused persons.

3.2.7. The defence also contends that the accused has various health conditions which should be regarded as an exceptional circumstance justifying his release. The Prosecution submits that no evidence has been presented by way of medical reports or otherwise, which would be a minimal requirement to permit assessment of this claim.

3.3.1. The defence application includes a general assertion that "the indictment against Aleksovski . . . is peripheral to the events in Central Bosnia in early 1993" (Trial Transcript, *The Prosecutor v. Aleksovski*, 6 January 1998, p. 90.) and that the role of the accused in the events forming the basis of the charges was "marginal" (supra. at p. 93).

3.3. Role of the Accused

3.2.9. The final factor relied upon by the defence to demonstrate "exceptional circumstances" is the good behaviour of the accused during his detention. In view of the seriousness of the offences with which the accused is charged, the Prosecutor asserts that this is neither a substantial, nor a relevant factor, for consideration by the Trial Chamber.

3.2.8. Health conditions have been relied upon in numerous motions for provisional release pursuant to Rule 65, where Trial Chambers have applied a very strict test. It is respectfully submitted that the standard established in previous cases should be followed. As noted above, the decision of Trial Chamber I in the case of *Prosecutor v. Dukić* represents the single prior instance of the granting of provisional release, that being a case of exceptional circumstances relating to health wherein the accused was suffering from an incurable illness which was in its terminal phase. In that case, the accused died shortly after his provisional release. This standard was then applied in the case of *Prosecutor v. Blaškić*, where the Trial Chamber noted that it could only order provisional release "in very rare cases in which the condition of the accused, notably the accused's state of health, is not compatible with any form of detention." (*Blaškić Decision*, at p.4).

3.3.2. The accused is charged with war crimes and violations of the laws and customs of war, which are internationally recognised as among the most notorious criminal offences. More specifically, as Commander of the Kaonik detention facility at the relevant time, the accused is charged with being individually responsible, and in his capacity as a superior for the acts of his subordinates, for the inhumane treatment of Bosnian Muslim detainees. While subject to the direct control of the accused, many of the detainees suffered inhumane treatment, including, but not limited to, excessive and cruel interrogation, physical and psychological harm, forced labour in hazardous circumstances, being used as human shields and, being murdered or otherwise killed.

3.3.3. The Geneva Conventions give specific recognition to the very significant position of responsibility occupied by those exercising authority over detention facilities. As the Commander of the detention facility where these acts took place, the alleged role of the accused in relation to those acts is of primary significance; his direct authority over the conditions and treatment of inmates rendered his role in relation to the offences charged far from "marginal" or "peripheral", as the defence asserts.

3.4. Risk of Flight

3.4.1 With respect to the issue of whether the accused presents a risk of flight, the defence has not presented any specific proposals to guarantee his appearance at trial, beyond "his personal promise to do so" (Trial Transcript, *The Prosecutor v. Aleksovski*, 6 January 1998, p.92).

3.4.2. The accused appears to propose that he will live in Croatia and refers only to his "possible" surrender of his Croatian passport (*Ibid*).

3.5. Protection of Victims and Witnesses

3.5.1. The Prosecution has very serious concerns about the potential of the accused to interfere with victims and witnesses in this case and persons who may be prepared to co-operate with the Tribunal in the future.

3.5.2. The Prosecution does not accept the defence assertion that the witnesses and victims are located in places inaccessible to the accused. The mere fact that the accused may be free to contact the witnesses directly or indirectly could easily affect their willingness to testify in this and other cases.

3.5.3. In this regard, the Prosecution would also emphasise, as did the Trial Chamber in the case of *Prosecutor v. Blaškić*, the heightened ability of the accused to exert pressure on victims and witnesses, given his knowledge of the prosecution case (*Blaškić Decision*, at p.5). This is particularly so in view of the timing of the application, after commencement of the trial and after full narration of the prosecution case in the opening statement.

3.5.4. In this regard, the Prosecutor would wish to bring to the attention of the Trial Chamber the fact that the wife of a witness who has already testified in the course of last week's hearing has received threatening telephone calls, since that testimony was given. This highlights the very

real danger that may be faced by victims and witnesses, from which the Tribunal must endeavour to give every protection.

3.6. Host Country

3.6.1. It is submitted that the defence has failed to meet the final requirement that the host country should be heard. The defendant seeks to rely on a letter of the Dutch authorities received by the Tribunal in relation to the *Blaškić* case, referred to in the transcript as Case No. IT-95-14-T (Trial Transcript, *The Prosecutor v. Aleksovski*, 6 January 1998, p.93). The Prosecutor asserts that this is in no way sufficient to satisfy this requirement of Rule 65.

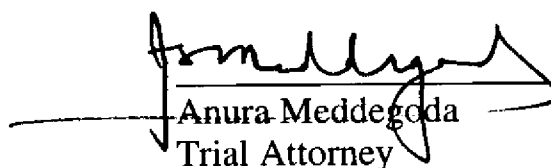
4. CONCLUSION

4.1. In relation to each of the grounds urged by the defence in support of the present motion, the defence bears the burden of proof. The defence has relied upon counsel's assertions to justify the provisional release of the accused, reciting the length of the detention, the health of the accused under his present conditions of detention, the family circumstances of the accused and the good behaviour of the accused in detention to date. Counsel also asserts the certainty that the accused will appear for trial, that the accused will not pose a danger to any victim, witness or other person, and the position of The Netherlands as host country, but in no circumstances, has the defence sought to adduce evidence in support of these assertions.

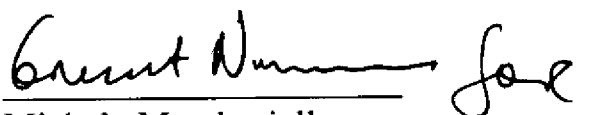
4.2. It is the submission of the Prosecutor that the defence has failed to discharge its burden of proof, and accordingly, the Prosecutor respectfully moves the Trial Chamber to dismiss the motion.



Grant Niemann
Senior Trial Attorney



Anura Meddegoda
Trial Attorney



Michele Marchesiello
Trial Attorney

Dated this 14th day of January 1998
At The Hague
The Netherlands