

**The Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura -  
Case No. IT-01-47-PT**

**"Decisions granting Provisional Release to Enver  
Hadzihasanovic, Mehmed Alagic and Amir Kubura"**

□ **19 December 2001**

□ **Trial Chamber II (Judges Wolfgang Schomburg [Presiding], Florence Mumba  
and Carmel A. Agius)**

**Rule 65 of the Rules of Procedure and Evidence - Interpretation -  
International Covenant on Civil and Political Rights - European Convention  
for the Protection of Human Rights and Fundamental Freedoms - Principle  
of proportionality.**

(1) Rule 65 of the Rules of Procedure and Evidence must be read in the light of the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(2) *De jure* pre-trial detention should be the exception and not the rule as regards prosecution before an international court.

(3) The general principle of proportionality must be taken into account when interpreting Rule 65 of the Rules.

**Procedural Background**

- On 15 and 16 November 2001, Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura filed Motions for Provisional Release pursuant to Rule 65 of the Rules of Procedure and Evidence<sup>1</sup>.
- On 28 and 29 November 1999, the Prosecutor responded and objected to the provisional release without applying for a stay of the decision under Rule 65(E) of the Rules. The Prosecutor submitted that the use of the word "may" in Rule 65(C) suggests that the Trial Chamber retains a degree of discretion when the other prerequisites explicitly mentioned are met<sup>2</sup>.
- Heard under Rule 65(B), the host country did not object to the possible provisional release.
- On 12 and 13 December 2001, the Trial Chamber heard the parties and the representatives of the Government of Bosnia and Herzegovina. At the end of the hearing, it granted the Motions and ordered the provisional release of the three

co-accused under certain terms and conditions. The Prosecution stated that it would not apply for a stay of the proceedings<sup>3</sup>.

## The Reasoning

The Trial Chamber underscored that justice means *inter alia* "respect for the alleged perpetrators' fundamental rights." Therefore, it considered that "no distinction can be drawn between persons facing criminal procedures in their home country or on an international level."<sup>4</sup> The Trial Chamber concluded that Rule 65 must be read in the light of the International Covenant on Civil and Political Rights (hereinafter the "ICCPR") and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "ECPHRFF"). It found that the application of these principles "stipulates that *de jure* pre-trial detention should be the exception and not the rule as regards prosecution before an international court."<sup>5</sup> Since, unlike national courts, the Tribunal does not have its own coercive powers to enforce its decisions, the Trial Chamber stated that at the Tribunal "pre-trial detention *de facto* seems to be rather the rule"<sup>6</sup>.

It found that "Rule 65 allows for provisional release, leaving the aforementioned human rights unchanged but applying them specifically for the purposes of an international criminal court." The Trial Chamber referred to the Judgement rendered by the European Court of Human Rights on 26 July 2001 in the case *Ilijkov v. Bulgaria*<sup>7</sup> and held that "[a]ny system of mandatory detention on remand is *per se* incompatible" with Article 5(3) of the ECPHRFF<sup>8</sup>. Considering this, it held that it "must interpret Rule 65 with regard to the factual basis of the single case and with respect to the concrete situation of the individual human being and not *in abstracto*."

The Trial Chamber added that "[w]hen interpreting Rule 65, the general principle of proportionality must be taken into account." It reiterated that "[a] measure in public international law is proportional only when (1) suitable (2) necessary and (3) when its degree and scope remain in a reasonable relationship to the envisaged target." The Trial Chamber stressed that "[p]rocedural measures should never be capricious or excessive" and that "[i]f it is sufficient to use a more lenient measure, it must be applied."

In its application of these criteria, the Trial Chamber found "it no longer necessary to execute the order for detention on remand pending trial." It was satisfied that the 17 guarantees offered by each of the three co-accused and "the 7 guarantees offered by the Government of Bosnia and Herzegovina reasonably safeguard the proper conduct of the procedure." The Trial Chamber pointed out that it was aware that "there will never be a total guarantee that an accused will appear for trial and, if released, will not pose a danger to sources of evidence." It considered that it must take into account that the three co-accused had "surrendered voluntarily" to the Tribunal. Lastly, the Trial Chamber found that the fact that Enver Hadzihasanovic had used his right to remain silent could not be held against him.

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1. "(A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) Release may be ordered by a Trial Chamber only after 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.

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

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

- (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
- (ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

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

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

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

- (i) the time-limit for the filing of an application for leave to appeal by the Prosecutor has expired, and no such application is filed;
- (ii) a bench of three Judges of the Appeals Chamber rejects the application for leave to appeal;
- (iii) the Appeals Chamber dismisses the appeal; or
- (iv) a bench of three Judges of the Appeals Chamber or the Appeals Chamber otherwise orders.

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

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

- (i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;
- (ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and

(iii) special circumstances exist warranting such release.

The provisions of paragraphs 65 (C) and 65 (H) shall apply *mutatis mutandis*."

2. See *The Prosecutor v. Radoslav Brdjanin & Momir Talic* ("Krajina"), Case No. IT-99-36-PT, Trial Chamber II, Decision on Motion by Radoslav Brdjanin for Provisional Release, 25 July 2000 (summarised in [Judicial Supplement No. 18](#)).

3. See [Press Release No. XT/P.I.S./649e](#) of 13 December 2001.

4. See *The Prosecutor v. Momcilo Krajisnik & Biljana Plavsic* ("Bosnia and Herzegovina"), Case No. IT-00-39 & 40-PT, Trial Chamber III, Decision on Momcilo Krajisnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson, in which the Judge deemed that "[w]hile the Tribunal's lack of a police force, its inability to execute its arrest warrants in States and its corresponding reliance on States for such execution may be relevant in considering an application for provisional release, on no account can that feature of the Tribunal's regime justify either imposing a burden on the accused in respect of an application under Rule 65 or rendering more substantial such a burden, or warranting a detention of the accused for a period longer than would be justified having regard to the requirement of public interest, the presumption of innocence and the rule of respect for individual liberty" (para. 11) Judge Robinson expressed the view that in interpreting Article 9(3) of the International Covenant on Civil and Political Rights, which "reflects a customary norm that detention shall not be the general rule", in the context of the Tribunal was "wholly wrong to employ a peculiarity in the Tribunal system, namely its lack of a police force and its inability to execute its warrants in other countries, as a justification for derogating from that customary norm" (para. 12).

5. *Ibidem*. Judge Robinson noted that there could be no doubt that the effect of this customary norm, based on the presumption of innocence, "is to make pre-trial detention an exception, which is only permissible in special circumstances" (para. 6). The Judge added that "there must be cogent reasons" for pre-trial detention (para. 7), the purpose of which "is simply to ensure that the accused will be present for his trial" (para. 12).

6. *Ibidem*. Judge Robinson considered that the Tribunal practice established "a culture of detention that is wholly at variance with the customary norm that detention shall not be the general rule" and stated that it was wrong "to justify a principle that provisional release is the exception and not the rule on the basis of the absence within the Tribunal of a police force to execute its own warrants" (para. 22)

7. European Court of Human Rights, *Ilijkov v. Bulgaria*, Judgement, 26 July 2001, paras. 84 and 85.

8. "Everyone arrested or detained [...] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

See also the Dissenting Opinion of Judge Robinson in the above mentioned case, in which the Judge considered that "[a]ny system of mandatory detention is *per se* incompatible with Article 9(3) of the ICCPR" which provides *inter alia* that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial".