UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-97-25/1-PT
		Date:	22 July 2005
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Jean Claude Antonetti
Judge Kevin Parker

Registrar: **Mr. Hans Holthuis**

Decision: **22 July 2005**

PROSECUTOR

v.

MITAR RAŠEVIĆ
SAVO TODOVIĆ

DECISION ON SAVO TODOVIĆ'S APPLICATION FOR PROVISIONAL RELEASE

The Office of the Prosecutor:

Ms. Hildegard Uertz-Retzlaff
Ms. Christina Moeller

Counsel for the Accused:

Mr. Vladimir Domazet for Mitar Rašević
Mr. Aleksandar Lazarević for Savo Todović

I. INTRODUCTION

1. This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Tribunal") is seized of the "Defence Application for Provisional Release of the Accused Savo Todović with Annexes I to IV" ("Motion") filed confidentially on 30 June 2005 by counsel for Savo Todović ("Defence"), whereby the Defence requests the Trial Chamber to order the provisional release of Savo Todović ("Accused"), pursuant to Rule 65 of the Rules of Procedure and Evidence ("Rules"). On 4 July 2005, the "Defence Submission of Corrected Serbia and Montenegro Guarantee in Support of Savo Todović's Application for Provisional Release" ("Corrected Guarantee") was filed confidentially by the Defence. The Office of the Prosecutor ("Prosecution") on 8 July 2005 confidentially filed the "Prosecution's Response to 'Confidential Defence Application for Provisional Release of the Accused Savo Todović with Annexes I to IV' with Annex A and *confidential* Annex B" ("Response"), opposing the Motion. The Defence filed confidentially "Savo Todovic's Defence Application for Leave to Reply and the Defence Reply to Confidential 'Prosecution's Response to 'Confidential Defence Application for Provisional Release of the Accused Savo Todovic with Annexes I to IV' with Annex A and <u>*Confidential*</u> Annex B'" on 15 July 2005 ("Reply").

2. As a preliminary issue, the Motion, Corrected Guarantee, Response and Reply were all filed confidentially. In its Response, the Prosecution stated that it did not deem the filings in these provisional release proceedings to warrant confidentiality and requested the Trial Chamber to decide that both the Motion and Response be made public, apart from *confidential* Annex B to the Response.[1] The Trial Chamber notes that the Defence provided no reason whatsoever for filing the Motion, Corrected Guarantee or Reply on a confidential basis and agrees with the Prosecution's submission on this point. Therefore, the Trial Chamber orders that the Motion, Corrected Guarantee, Reply and Response, with the exception of *confidential* Annex B to the Response, be made public. The Trial Chamber also grants the application for leave to reply and takes note of the Reply.

3. As a further preliminary issue, the Trial Chamber notes that the Defence requested an oral hearing be held in relation to the Motion.[2] The Defence submitted that at such a hearing, the Accused would be "prepared to reiterate and, if necessary, expand his assurances that he will appear for trial or any other proceedings at the first notice of the Trial Chamber and adhere to any other

[1] Response, para. 1.
[2] Motion, p. 11.

and further terms and conditions the Trial Chamber may deem necessary".[3] In the light of the full submissions made by the parties, the Trial Chamber considers it is in a position to decide the Motion on the written materials provided, and considers there is no need for an oral hearing.

4. The Accused and two co-accused, Milorad Krnojelac and Mitar Rašević, were included in the same indictment which was confirmed on 17 June 1997 and initially placed under seal ("Original Indictment").[4] At the present time, this Original Indictment formally remains the operative indictment against the Accused.[5] Milorad Krnojelac was tried separately while the Accused remained at large.[6] On 15 January 2005, the Accused was transferred to the United Nations Detention Unit ("UNDU") and is detained there currently.[7] At the initial appearance held on 19 January 2005, the Accused chose not to enter a plea for 30 days.[8] At the further initial appearance held on 17 February 2005, the Accused failed to enter a plea and a plea of "not guilty" was entered on his behalf on each of the counts in the Original Indictment, pursuant to Rule 62(A)(iv) of the Rules.[9] Already prior to the transfer of the Accused to the UNDU, the Prosecution had filed a Motion pursuant to Rule 11 *bis* of the Rules, in order to have the case against this Accused referred to the authorities of Bosnia and Herzegovina.[10] On 8 July 2005, the Referral Bench decided to refer this case to the authorities of Bosnia and Herzegovina for prosecution in their courts.[11] The circumstances of this case are unique in the jurisprudence of the Tribunal. The Accused was transferred to the UNDU after the Motion for a referral of the case to the authorities of Bosnia and Herzegovina was already filed. Although he subsequently filed his motion seeking provisional release within one State (i.e. Serbia and Montenegro)[12] before a decision on the Prosecution's motion pursuant to Rule 11 *bis* was taken by the Referral Bench, the present Chamber needs to decide upon his motion for provisional release after the Referral Bench has taken the decision that the case of the Accused should be referred to another State (i.e. Bosnia and Herzegovina).

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[3] *Ibid.*, para. 8.
[4] *Prosecutor v. Milorad Krnojelac, Savo Todović, Mitar Rašević*, Case No. IT-97-25-I, Review of the Indictment, 17 June 1997.
[5] Partly Confidential, Decision on Referral of Case Under Rule 11 *bis* with Confidential Annexes I and II, 8 July 2005, para. 8 ("Rule 11 *bis* Decision"). *See* "Order on the Partly Confidential Prosecution's Motion for Leave to Amend the Original Indictment" dated 17 May 2005 and "Order" dated 23 March 2005. The Chamber has not yet issued its decision on the "Prosecution's Motion for Leave to Amend the Operative Indictments with Attached Annexes A and B and *confidential* Annexes C and D" filed partly confidentially on 25 May 2005.
[6] *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac Appeals Judgement*").
[7] Order for Detention on Remand, 18 January 2005.
[8] T. 58.
[9] T. 67-73.
[10] Motion by the Prosecutor under Rule 11 *bis* with Annexes I, II, III and Confidential Annexes IV, V, and VI, 1 November 2004.
[11] Rule 11 *bis* Decision, para. 113.
[12] Motion, para. 10.

II. SUBMISSIONS

5. In support of the Motion, the Defence submitted, *inter alia*, that the following factors militate in favour of the provisional release of the Accused: (i) there is no evidence that the Accused will not appear for trial if released or that he will pose a threat to any victim, witness or other person; (ii) the Accused voluntarily surrendered to the Tribunal; (iii) governmental guarantees and his personal guarantee support his application for provisional release; (iv) the geographic distance between the proposed location of provisional release of the Accused and any potential Prosecution witnesses; and (v) the Accused is not aware of the names or whereabouts of all the proposed Prosecution witnesses.

6. The Prosecution opposed the Motion and argued in the Response that the Accused has not met the requirements for provisional release. The Prosecution submitted, *inter alia*, that: (i) the transfer of the Accused was "far from being 'voluntary'" given that it took place after he had "been in hiding for nearly eight years";[13] (ii) the Accused has a proven ability to live in hiding for considerable periods of time and under difficult circumstances; (iii) the Accused strongly opposed referral of his case under Rule 11 *bis* of the Rules to the authorities of Bosnia and Herzegovina, and "he would not hesitate to go back into hiding in order to avoid his transfer to [these] authorities";[14] (iv) the governmental guarantees are entitled to little weight in the circumstances of this case; (v) both the governmental and personal guarantees are problematic for failing to explicitly state that the Accused would be transferred to the relevant national authorities if his case were referred under Rule 11 *bis* of the Rules; (vi) the Accused has engaged in evidence tampering and, if released, could attempt to threaten or intimidate witnesses; and (vii) the Accused is not likely to face a long period of pre-trial detention if denied provisional release.

III. THE LAW

7. Rule 65 of the Rules governs provisional release and reads, in the relevant parts:

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

8. Rule 65 of the Rules must be interpreted in light of Article 21(3) of the Statute. In order for provisional release to be granted by the Trial Chamber, pursuant to Rule 65(B), it must be satisfied,

[13] Response, para. 15.

inter alia, of the pre-conditions (1) that the accused will appear for trial, and (2) that if released, he will not pose a danger to any victim, witness or other person. It is the accused that must satisfy the Trial Chamber that these pre-conditions are met.[15] These pre-conditions must be established on a balance of probabilities,[16] and the task of doing so may well prove to be "a substantial one in light of the jurisdictional and enforcement limitations of the Tribunal".[17] If the accused discharges his burden in relation to these pre-conditions, the Trial Chamber must then exercise its discretion whether to order provisional release having regard to all the circumstances of the case. It should be noted that by the terms of Rule 65(B) it is a discretion to order provisional release, i.e. it is not a discretion to refuse to order provisional release. The accused must persuade the Trial Chamber that having regard to all the circumstances of the case, it is appropriate to order provisional release. If the Chamber is not so persuaded, then provisional release is not ordered. An individualized assessment of the particular circumstances of the request of each accused for provisional release is necessary, always bearing in mind that the accused has not been convicted of the offences which are charged in the Indictment.

IV. DISCUSSION

A. Opportunity to be heard

9. The Accused seeks provisional release to Belgrade in Serbia and Montenegro.[18] The Council of Ministers of Serbia and Montenegro, and the Government of the Republic of Serbia offered guarantees in relation to the provisional release of the Accused on 25 and 26 May 2005, respectively ("Governmental Guarantees").[19] The Trial Chamber therefore considers that the requirement of giving "the State to which the accused seeks to be released" the opportunity to be heard, set forth in Rule 65(B) of the Rules, is satisfied.

10. The Trial Chamber notes that the Government of The Netherlands, the host country, has not considered it necessary to file any submission in this matter, although the Motion was, of course, communicated to The Netherlands and sufficient time has now elapsed for a response. The Trial

[14] *Ibid.*, para. 17.
[15] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 28 ("*Prlić*"); *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 21 ("*Haradinaj*").
[16] See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence Request for Provisional Release of Stanislav Galić, 23 March 2005, para. 5.
[17] *Prlić*, para. 25.
[18] Motion, p. 10.
[19] *Ibid.*, Annex II-IV, and Corrected Guarantee. For the purposes of this application, the Trial Chamber considers the Corrected Guarantee to be the operative guarantee of the Council of Ministers of Serbia and Montenegro but observes that it is undated.

Chamber deems the requirement that the host country be given the opportunity to be heard, set forth in Rule 65(B) of the Rules, has been satisfied.

B. Whether the Accused, if released, will appear for trial

11. The Trial Chamber is required to identify all relevant factors that it has taken into account in reaching its decision as to whether it is satisfied that, if released, an accused will appear for trial. The Appeals Chamber has indicated a non-exhaustive set of factors which a Trial Chamber should take into consideration while assessing whether an accused will appear for trial, in particular:

a. Whether the accused is charged with serious criminal offences;

b. Whether the accused is likely to face a long prison term, if convicted;

c. The circumstances of the accused's surrender;

d. The degree of co-operation given by the authorities of the State to which the accused seeks to be released;

e. The guarantees offered by those authorities, and any personal guarantees offered by the accused; in particular, the weight given to the governmental guarantees must be assessed in light of the position held by the accused prior to his being brought to the Tribunal;

f. The likelihood that, in case of breach of the conditions of provisional release, the relevant authorities will re-arrest the accused if he declines to surrender; and

g. The accused's degree of co-operation with the Prosecution.[20]

1. Gravity of the crimes charged

12. The Defence submitted that while the alleged offences and position of the Accused are not "minor or insignificant", other accused charged with more serious criminal offences have been granted provisional release.[21] The Prosecution has not made any submissions regarding this factor in its Response.

13. The Trial Chamber does not consider that the recent decision to refer this case under Rule 11 *bis* of the Rules pre-determines the assessment of the gravity of the offences or the position of the Accused as charged. In its recent decision in *Dragomir Milošević*, the Trial Chamber "reject[ed] the claim of th[at] Accused that the crimes alleged in the Indictment against him are any

[20] See *Prosecutor v. Nikola Šainović, Dragoljub Ojdanić,* Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 6 ("*Šainović and Ojdanić Appeals Decision*"); see also *Prosecutor v. Vladimir Lazarević*, Case No. IT-03-70-PT, Decision on Defence Request for Provisional Release, 14 April 2005, p. 2 ("*Lazarević*").
[21] Motion, para. 18.

less serious simply because of the Rule 11*bis* proceedings."[22] This is consistent with the Appeals Chamber decision in *Mrkšić* which stated:

> it does not follow that the effect of a request pursuant to Rule 11*bis* of the Rules is that the cumulative requirements set out in Rule 65(B) of the Rules would be automatically satisfied […] it cannot be inferred from the wording of the Request for Referral that the charges against the Applicant are not of a grave nature[.][23]

14. The Accused is charged in relation to events alleged to have taken place in Bosnia and Herzegovina at the Kazneno-Popravni Dom detention centre at Foča ("KP Dom") between April 1992 and October 1994, where it is alleged that "[m]ost, if not all, detainees were civilians, who had not been charged with any crime, mostly Muslim men from 16 to 80 years of age, including mentally handicapped, physically disabled and seriously ill persons".[24] It is alleged that the Accused was the deputy commander of KP Dom from April 1992 until at least August 1993, and that from April 1992 until October 1994, he "was the person in charge of selecting detainees for killings, beatings, interrogations, forced labour, solitary confinement and exchanges."[25] The Original Indictment alleges that the Accused bears individual criminal responsibility pursuant to Article 7(1) of the Statute and also, or alternatively, criminal responsibility as a superior for the acts of his subordinates pursuant to Article 7(3) of the Statute.[26] The Accused is charged, *inter alia*, with five counts of violations of the laws or customs of war under Article 3 of the Statute (torture; murder; slavery; and two counts of cruel treatment) and seven counts of crimes against humanity under Article 5 of the Statute (persecutions on political, racial and/or religious grounds; torture; murder; imprisonment; enslavement; and two counts of inhumane acts).[27] It is alleged that detainees "lived in constant fear […] and still bear the physical and psychological wounds resulting from their confinement at KP Dom".[28]

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[22] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Defence Motion for Provisional Release, 13 July 2005, para. 9 ("*Dragomir Milošević*").
[23] *Prosecution v. Mile Mrkšić et al.*, Case No. IT-95-13/1-AR65.2, Decision on Application for Leave to Appeal, 19 April 2005, p. 5; emphasis added ("*Mrkšić Appeals Decision*").
[24] Original Indictment, para. 1.3.
[25] *Ibid.*, para. 3.2.
[26] *Ibid.*, paras. 4.9-4.10.
[27] In assessing the gravity of the crimes charged, the Trial Chamber refers to the Original Indictment which remains the operative indictment against the Accused at the moment, while taking into account the fact that the Prosecution's Proposed Joint Amended Indictment dated 25 May 2005 aim at removing charges related to grave breaches of the Geneva Conventions of 12 August 1949 under Article 2 of the Statute: *see* Annex B, Guide to Charges in the Proposed Joint Amended Indictment, 25 May 2005.
[28] Original Indictment, para. 5.33.

15. If convicted of these serious charges, the Accused is likely to face a relatively significant term of imprisonment.[29] The Accused will, therefore, have a strong incentive to flee if released. However, this factor alone cannot determine the outcome of the Motion.[30]

2. Circumstances of surrender

16. The Trial Chamber considers the voluntary surrender of an accused to be an important factor to be considered in determining whether he or she will appear at trial if provisionally released. First, the Trial Chamber must determine whether, as a matter of fact, the Accused voluntarily surrendered. Secondly, the Trial Chamber must evaluate whether the circumstances of the particular case afford more or less weight to this factor.[31]

17. The Defence claimed that the Accused voluntarily surrendered on 15 January 2005[32] while conceding that this was "a result of a joint effort of Serbia and Montenegro and Republika Srpska".[33] The Prosecution alleged in broad terms that the surrender of the Accused cannot be characterized as truly voluntarily, stating that it "was a consequence of internal and international pressure on the authorities of Serbia and Montenegro to arrest the war criminals at large".[34] Later in the Motion, the Prosecution argued that "the policy of the Government of Serbia and Montenegro is one of persuasion, not of arrest."[35] However, the Corrected Guarantee of the Council of Ministers of Serbia and Montenegro recognized the surrender of the Accused as being voluntary.[36] The Defence and Prosecution are in apparent agreement on two points. First, neither claimed that the Accused was arrested. Secondly, both suggest that the surrender of the Accused was effected after involvement by government authorities. These circumstances indicate that while the Accused surrendered himself to authorities, he did not do so *solely* of his own volition, but was able to be persuaded to do so.

[29] The Trial Chamber has made only passing reference to the sentence handed down by the Appeals Chamber against Milorad Krnojelac, originally indicted along with the Accused for substantially similar offences, which was fifteen years of imprisonment: *Krnojelac Appeals Judgement*, para. 264. The Trial Chamber has been cautious to respect the principle that "when the Trial Chamber is evaluating the request for provisional release of an accused person, it would generally be improper to consider the outcome of the case against a co-accused *unless* their circumstances are distinguished so that any such comparison is reasonable": *Dragomir Milošević*, para. 10; emphasis in original.
[30] *Prosecutor v. Ivan Čermak, Mladen Markač*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para. 26.
[31] *Dragomir Milošević*, para. 14.
[32] Motion, para. 2.
[33] *Ibid.*, para. 9.
[34] Response, para. 15.
[35] *Ibid.*, para. 19.
[36] Corrected Guarantee, p. 6.

18. The Indictment against the Accused was kept confidential until it was unsealed on 29 November 2001,[37] hence there was a delay of "three years" between the time at which the Indictment was made public and the Accused's surrender.[38] In this case, "the Accused acknowledges that he should have surrendered earlier"[39] and offers the following reasons why he failed to do so:

> The international forces' attempts to arrest two of the Foca [sic] indictees resulted in their deaths which, coupled with the security issues to this Accused's family, brought about serious misgivings on the part of the Accused regarding his voluntary surrender.[40]

19. The Prosecution did claim that the indictment against the Accused "was unsealed on 15 October 2001".[41] The Prosecution further argued:

> that the publication of the indictment against his co-accused Krnojelac in June 1998 and the public proceedings conducted against that Accused at the Tribunal must have been known to the Accused and put him on notice of the likelihood of the existence of an indictment against him long before the unsealing of the indictment against him in 2001.[42]

On this basis, the Prosecution submitted that the Accused "could have voluntarily surrendered […] for nearly four years before he was taken into the custody of the Tribunal"[43] and that he was "in hiding for nearly 8 years".[44]

20. The Trial Chamber notes that the order for non-disclosure of the Original Indictment in relation to the Accused, while varied on several occasions to allow limited disclosure to certain authorities, was not vacated until 29 November 2001.[45] Both parties agree that the Accused was transferred to the Tribunal on 15 January 2005.[46] Therefore, for a period of over three years and one month, the Accused failed to surrender himself to the Tribunal when he was required to do so by law. The Trial Chamber, however, is not prepared to act on the basis suggested by the

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[37] Motion, para. 1.
[38] *Ibid.*, para. 20.
[39] *Ibid.*
[40] *Ibid.*, footnotes in original omitted.
[41] Response, paras. 3 and 13.
[42] *Ibid.*, para. 13.
[43] *Ibid.*
[44] *Ibid.*, para. 15.
[45] The Original Indictment was subject to an order for non-disclosure: *Prosecutor v. Milorad Krnojelac, Savo Todović, Mitar Rašević*, Case No. IT-97-25-I, Review of the Indictment, 17 June 1997. This order for non-disclosure was lifted with respect to the accused Milorad Krnojelac on 15 June 1998 but remained in force against the Accused: *Prosecutor v. Milorad Krnojelac, Savo Todović, Mitar Rašević*, Case No. IT-97-25-I, Confidential, Order on the Application of the Prosecutor Requesting the Variation of a Public Non-Disclosure Order, 15 June 1998. On 15 October 2001, the non-disclosure order in relation to the Accused was modified but remained in force: *Prosecutor v. Milorad Krnojelac, Savo Todović, Mitar Rašević*, Case No. IT-97-25-I, Confidential and *Ex parte* Under Seal, Decision on Application to Modify an Order for Non-Disclosure, 15 October 2001. On 29 November 2001, an order was made that the non-disclosure order in relation to the Accused be vacated: *Prosecutor v. Milorad Krnojelac, Savo Todović, Mitar Rašević*, Case No. IT-97-25-I, *Ex Parte* and Confidential, Decision on Application to Vacate Order of Non-Disclosure, 29 November 2001.
[46] Motion, para. 2; Response, para. 6.

Prosecution that the period of delayed surrender in this case exceeded four or eight years. The case law of this Tribunal indicates that where an accused is arrested on a sealed indictment, this factor should not be counted against him in a request for provisional release.[47] Similarly, the public indictment and prosecution of a person on charges related to charges under a sealed indictment against another accused cannot be said to have put the latter on notice of that fact, or impose a duty on him to surrender to the Tribunal.

21. The Trial Chamber is not satisfied with the validity of the reasons offered by the Accused to explain this period of non-compliance with his legal obligation to surrender to the Tribunal. First, the claim that the Accused was concerned that other indictees had allegedly been killed during arrests by "international forces" should rather have brought the Accused to the conclusion that it would be safer for him to voluntarily surrender rather than to remaining at-large. Secondly, the Accused's unspecified and unsubstantiated concerns for the security of his family afford no acceptable excuse for his failure to voluntarily surrender during this period of time.[48]

22. For the reasons above, the circumstances surrounding the surrender of the Accused are of little weight. The Trial Chamber observes that the Accused has demonstrated an ability to successfully avoid compliance with his obligation to surrender for substantial periods of time.

3. Referral of case under Rule 11 *bis*

23. As noted earlier, on 8 July 2005, the Referral Bench decided to refer the case against the Accused under Rule 11 *bis* of the Rules to the authorities of Bosnia and Herzegovina for trial.[49] Both the Motion and the Response contemplated that this possibility could materialize. The ordering of this referral is a particularly relevant factor to be weighed in determining this Motion.

24. The Defence in its Motion stated that "regardless of whether the referral will take place or not, it would be months before the trial in this case begins".[50] The Prosecution noted in its Response that the "Accused strongly opposed the Referral Motion, in particular, the potential referral of his case to the authorities of Bosnia and Herzegovina",[51] and "the Prosecution fears that

[47] *Prosecutor v. Radoslav Brdanin, Momir Talić,* Case No. IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000, para. 17.
[48] *Prosecutor v. Milan Milutinović*, Case No. IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003, paras. 6-7 ("*Milutinović Appeals Decision*").
[49] Rule 11 *bis* Decision, para. 113.
[50] Motion, para. 23.
[51] Response, para. 7.

he would not hesitate to go back into hiding in order to avoid his transfer to the authorities of Bosnia and Herzegovina".[52]

25. The case law of the Tribunal recognizes that a pending Rule 11 *bis* motion (i.e. one that has not yet been decided by the Referral Bench) may well "aggravate the risk that the Accused will not appear for trial".[53] It is now clear to the Accused that his trial will be conducted in Bosnia and Herzegovina despite his opposition to that venue, subject of course to any appeal against the referral of the case.

26. The Trial Chamber also notes that in the Defence Response to the Prosecution's Rule 11 *bis* Motion filed on 28 April 2005, it was stated that the Accused had "rather serious concerns" about his potential detention during trial, and if convicted in prison, in Bosnia and Herzegovina.[54] That prospect is now to become a reality.

27. The Trial Chamber is persuaded that the decision to refer this case to the authorities of Bosnia and Herzegovina provides reason to conclude, as the Trial Chamber does, that as a consequence there is a significantly increased risk that the Accused will not appear for trial if granted provisional release.

4. Governmental Guarantees

28. The Defence submitted that similar Governmental Guarantees from the relevant authorities have been relied upon in past requests for provisional release by the Tribunal and that there has been a significant improvement in the level of cooperation between Serbia and Montenegro and the Tribunal, including the surrender of some thirteen individuals in 2005 to the Tribunal.[55]

29. The Prosecution argued that the Governmental Guarantees should be given less weight in this particular case. First, the Prosecution maintains that Serbia and Montenegro have been reluctant to arrest any of the accused at large.[56] In support of this claim, the Prosecution referred to Annex A to its Response. The Trial Chamber notes that these materials consist of almost a dozen news articles printed from an electronic format, most without the proper citation necessary to

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[52] *Ibid.*, para. 17.
[53] *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision on Defence Motion for Provisional Release, 9 March 2005, para. 15; *Mrkšić Appeals Decision*, p. 5.
[54] Savo Todović's Defence Response to Prosecution's 11*bis* Motion and Defence's Submission of Further Information in Accordance with the Referral Bench's Decision of 14 April 2005 and in the Context of the Prosecutor's Motion Under Rule 11*bis*, 28 April 2005, paras. 94-96 ("Defence Response to the Prosecution's Rule 11 *bis* Motion"); *see also* Rule 11 *bis* Decision, para. 63.
[55] Motion, paras. 11-12. The Trial Chamber has considered *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT, Transcripts, 10 March 2005, as relied upon by the Defence for this submission.
[56] Response, para. 19.

enable the Trial Chamber to assess their credibility, one that was reproduced twice, and others that are of questionable relevance. The Trial Chamber accordingly finds that the content of Annex A to the Response is of little assistance. Secondly, the Prosecution argued that the Governmental Guarantees must be assessed in light of the Rule 11 *bis* proceedings. Thirdly, the Prosecution submitted that the Governmental Guarantees are problematic in their actual content because they may not include a commitment to arrest and surrender the Accused to national authorities as may be required.[57]

30. There is no doubt that under Article 29(2) of the Statute, all States have a legal obligation to comply with orders issued by the Trial Chamber, including, but not limited to, the arrest or detention of persons. Therefore, the Trial Chamber considers that its evaluation of governmental guarantees for the provisional release of an accused deals *primarily* with an assessment of the *willingness* of the guarantor to comply promptly with its legal obligations, thereby enhancing the likelihood that they will comply with the obligation to arrest and transfer the accused if required to do so.[58]

31. The Appeals Chamber in *Šainović and Ojdanić* held that a Trial Chamber must assess governmental guarantees "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."[59] The Trial Chamber adopts this approach to evaluate the Governmental Guarantees offered in the particular circumstances of this case.[60]

32. The Trial Chamber observes that the guarantee of the Council of Ministers of Serbia and Montenegro refers throughout to the transfer of the Accused to and from the host country (i.e. The Netherlands) and an obligation to arrest him if required "for his surrender back to the Tribunal".[61] This guarantee further states that Serbia and Montenegro "will respect all Trial Chamber's orders so that the named could at any time appear *before the International Criminal Tribunal*."[62] The guarantee of the Republic of Serbia states, in a substantively identical manner, that "it will respect all Trial Chamber's orders so that the named could, at any time and upon the Tribunal's order,

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[57] *Ibid.*, paras. 20-21.
[58] The Trial Chamber notes that governmental guarantees also create binding, and specific, legal obligations on the guarantor which are fully operative without the need for any further order of the Tribunal.
[59] *Šainović and Ojdanić Appeals Decision*, para. 7.
[60] The Trial Chamber notes that the Republika Srpska also provided a guarantee in relation to the provisional release of the Accused, dated 31 March 2005. However, the Trial Chamber finds it unnecessary to evaluate this guarantee in light of the fact that (i) the Accused seeks release to Belgrade in Serbia and Montenegro, and not to Republika Srpska in Bosnia and Herzegovina; and (ii) the Defence has "relied primarily" on the Governmental Guarantees of Serbia and Montenegro and the Republic of Serbia, mentioning the Republika Srpska guarantee only "by way of reference since they had already been submitted to the Tribunal on 19 April 2005": Motion, para. 10.
[61] See *e.g.*, Corrected Guarantee, p. 5 at para. (e) [translation].
[62] *Ibid.*, p. 5 [translation]; emphasis added.

appear *before the International Criminal Tribunal*."[63] The Trial Chamber notes that there is no explicit acceptance in the Governmental Guarantees of a preparedness or commitment to transfer the Accused to a State to which his case may be referred (i.e. Bosnia and Herzegovina). This is a significant omission from the Governmental Guarantees given that the Referral Motion was known at the time the guarantees were provided, the Accused is a national of Serbia and Montenegro, and the Government was represented at the hearing of the Rule 11 *bis* Motion.[64] Therefore, the Trial Chamber is not satisfied that in the present circumstances, the Governmental Guarantees are a sufficient recognition of a commitment to arrest the Accused, if required, so that he could (a) be transferred directly to the authorities of Bosnia and Herzegovina to stand trial, or (b) be transferred to the Tribunal so that he could be subsequently transferred to the authorities of Bosnia and Herzegovina to stand trial. Although the Trial Chamber is mindful of the general trend toward increased co-operation given by the authorities of Serbia and Montenegro and the Republic of Serbia to the Tribunal in recent months,[65] it is not satisfied that this current level of cooperation is sufficient to demonstrate that Serbia and Montenegro would be likely to promptly arrest and transfer one of its nationals, at the order of the Tribunal, to face trial in Bosnia and Herzegovina, or for that purpose.[66] The terms of the present Guarantees do not overcome this difficulty. The offer by the Defence in its Reply to contact the authorities in Serbia and Montenegro in order to get additional guarantees in the situation that the case against the accused would in reality be referred to Bosnia and Herzegovina really comes too late for the purposes of this Motion.

33. Therefore, the Trial Chamber concludes that the Governmental Guarantees are not entitled to significant weight in the particular circumstances of this case, and that in any event, it has not been shown that there is an adequate likelihood that the governmental authorities would arrest the Accused, if required, in order for him to face trial in Bosnia and Herzegovina.

5. Personal Guarantee

34. The Accused has signed a personal guarantee dated 20 June 2005 which is appended to the Motion ("Personal Guarantee") in which he undertakes and agrees to fully comply with enumerated terms and conditions including, *inter alia*:

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[63] Motion, Annex IV.
[64] The Referral Bench considered the Accused was a national of both Serbia and Montenegro and Bosnia and Herzegovina: Rule 11 *bis* Decision, para. 14. Serbia and Montenegro sought referral of this case to its authorities: *ibid.*, para. 10.
[65] *Lazarević*, p. 3; see also *Prosecutor v. Nikola Šainović*, Case No. IT-99-37-PT, Decision on Third Defence Request for Provisional Release, 14 April 2005, para. 27.
[66] In arriving at this conclusion, the Trial Chamber has taken into account that the Accused cannot be said to currently hold, or have held, a senior position that would, on its own, reduce the likelihood that authorities in Serbia and Montenegro would apprehend him if he absconded.

> xii) to be immediately arrested and detained pending my return to the United Nations Detention Unit, should I attempt to escape;
>
> xiii) to comply strictly with any order of the Trial Chamber varying the terms and conditions of or terminating my provisional release; and
>
> xiv) to return to the United Nations Detention Unit at the day to be determined by the Trial Chamber.[67]

35. As with the Governmental Guarantees, the Prosecution submitted that the Personal Guarantee fails to explicitly undertake that the Accused comply with an order for referral of the case to national authorities rather than an order to return to the Tribunal for trial.[68]

36. The Trial Chamber has taken into account the Personal Guarantee as well as the offer of the Accused to expand upon it if required.[69] However, the Trial Chamber observes that the Personal Guarantee contemplates the eventual return of the Accused to the UNDU in The Hague, and only makes a general commitment to comply with orders of the Trial Chamber. The Trial Chamber is concerned that there is no explicit commitment on the part of the Accused in the Personal Guarantee, as offered, to return into custody for transfer to the authorities of Bosnia and Herzegovina if ordered by the Tribunal, especially given that the Personal Guarantee was made at a moment when the Rule 11 *bis* Decision was imminent. In light of the observations made on behalf of the Accused during the 11 *bis* proceedings, mentioned above, the Trial Chamber finds it is not satisfied of the Accused's commitment to comply with an order of the Tribunal which would lead to his surrender and transfer to the authorities of Bosnia and Herzegovina to stand trial. Here again, the offer by the Accused in the Reply to adapt his personal guarantees to include guarantees in case of a referral to Bosnia and Herzegovina does not change this Trial Chamber's assessment. Therefore, the Trial Chamber finds that the Personal Guarantee is not entitled to significant weight.

6. Cooperation of the Accused

37. The Trial Chamber notes that the Accused does not claim to have cooperated with the Prosecution. In any event this fact plays no role in the determination of the Motion. This is consistent with the *Milutinović* case in which the Appeals Chamber stated:

> It is wrong to suggest, however, that an accused should be penalised because he declines to cooperate with the Prosecution. As was pointed out by the Appeals Chamber, an accused person is not, while in custody of the International Tribunal, at the disposal of the Prosecution.[70]

[67] Motion, Annex I, paras. xii) – xiv) [translation]; emphasis added.
[68] Response, para. 21.
[69] Motion, para. 8.
[70] *Milutinović Appeals Decision*, para. 12; footnotes in original omitted.

C. Whether the Accused, if released, will pose a danger to victims, witnesses or other persons

38. The Defence makes several submissions that the Accused will not pose a danger to victims, witnesses or any other persons if released. First, it is argued that it is unlikely that any of the Prosecution's witnesses are residing in the locality where he proposes to live if released.[71] Secondly, the Accused indicates he is unaware of the names or addresses of all the proposed Prosecution witnesses.[72] Thirdly, the Accused has undertaken in his Personal Guarantee, *inter alia*, "not to have any contact whatsoever nor to in any way interfere with any persons who may testify at my trial […and] not to discuss my case with anyone other than my counsel".[73]

39. In its Response, the Prosecution submitted evidence in *confidential* Annex B that the Accused may have engaged in tampering with evidence in the past, arguing that there are particularly sensitive and vulnerable witnesses in this case and allege that the "attempts to threaten or intimidate witnesses, cannot be reasonably excluded".[74]

40. The Trial Chamber deems it necessary to identify some of the relevant legal principles in order to resolve the competing claims of the parties with respect to whether there is a risk to victims, witnesses or any other person, if the Accused is released. In *Haradinaj*, the Trial Chamber stated "[t]he assessment whether the accused would pose a danger cannot be made only in *abstracto*; a concrete danger has to be identified."[75] On the other hand, the Trial Chamber in *Delić* considered that conduct by an accused since the confirmation of the indictment against him or her (e.g. "by attempting to influence or intimidate victims or potential witnesses") is relevant to whether the accused would pose any risk to victims or potential witnesses if provisionally released.[76] It is also notable that in that case, the defence submitted, *inter alia*, that "the remote distance between the Accused and the victims of the alleged crimes in the indictment against the Accused"[77] was a factor supporting provisional release. In that case, the Trial Chamber granted the request.

41. The Trial Chamber finds that while there is some evidence that the Accused may have tampered with certain forms of documentary evidence, the contention that this prior conduct could extend to interfering with or intimidating victims or witnesses is not particularly convincing. It is noted that the proposed place of residence of the Accused if released is some geographic distance

[71] Motion, para. 14.
[72] *Ibid.*, para. 15.
[73] *Ibid.*, Annex I, para. vii)–viii) [translation].
[74] Response, para. 24.
[75] *Haradinaj*, para. 22.
[76] *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Defence Request for Provisional Release, 6 May 2005, p. 5.

across an international border from the most significant witnesses in this case. None of the concerns regarding the Governmental Guarantees or Personal Guarantees, discussed earlier in this decision, diminish their commitment to measures that would provide a degree of protection for witnesses and victims. Therefore, on close balance, the Trial Chamber is satisfied that the Accused, if released, would not pose a danger to victims, witnesses or any other person.

V. CONCLUSION

42. In view of the foregoing, the Trial Chamber is not satisfied in the present circumstances that the Accused would appear for trial if released. Given that the Trial Chamber is not satisfied that the Accused, if released, would appear for trial, it is compelled under Rule 65(B) to deny provisional release to the Accused on this ground alone. The Trial Chamber recognizes that the jurisdictional and enforcement limitations of the Tribunal are acute in this case, given that the Accused seeks provisional release to Belgrade in Serbia and Montenegro after a decision has already been made by the Referral Bench to refer his case for trial to the authorities of Bosnia and Herzegovina.

VI. DISPOSITION

43. For these reasons, pursuant to Rule 65 of the Rules, the Trial Chamber **DENIES** the Motion for provisional release of Savo Todović.

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

Dated this twenty-second day of July 2005,

At The Hague

The Netherlands

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Judge Carmel Agius

Presiding Judge

[Seal of the Tribunal]

[77] *Ibid.*, p. 2.