Commentary

1. Introductory remarks

Individuals who are in the custody of the International Criminal Tribunal for the Former Yugoslavia (ICTY) may apply for provisional release at any time before or during their trial. Most applications for provisional release were filed at the pre-trial stage and, in some cases, provisional release was granted between the initial appearance of the accused and the beginning of the trial, since the pre-trial phase can be quite prolonged at the ICTY. However, a number of applications were filed during trial and also after a conviction, pending an appeal, as provided by Rule 65, paragraph I of the ICTY Rules of Procedure and Evidence (RPE),[1] as in two of the cases under discussion.

The law and jurisprudence of the ICTY (and also of the International Criminal tribunal for Rwanda (ICTR)) have significantly changed over the years, shifting from a very strict interpretation of the criteria provided in Rule 65 of the ICTY RPE to a less stringent approach, resulting both from a number of amendments to Rule 65 itself, as well as from an evolving construction of the requirements that must be fulfilled in order to render provisional release possible. These developments occurred mainly to take into account international human rights norms and standards, with a view to striking a proper balance between the risks posed by the potential release of an individual tried for the most serious international offences and his or her right to a fair trial.

2. State of health and fitness to stand trial

Although the state of health of the defendant is not explicitly enumerated in Rule 65 of the ICTY RPE as a condition to be taken into consideration when deciding on the provisional release of an accused, the ICTY has consistently considered this factor in determining whether or not to grant an order for provisional release. Indeed, on the very first occasion that the ICTY decided to grant provisional release to an accused, the decision was taken on medical grounds. By that time, before the 1999 amendment to Rule 65, which deleted the reference to "exceptional circumstances" from paragraph B, the state of health of the accused could be evaluated as an exceptional circumstance justifying provisional release.[2] In this respect, notwithstanding the amendment of the rule, the practice of the ICTY has not significantly changed and the medical condition of the defendant has been taken into consideration on a case by case basis and continues to be accepted as a valid ground to grant provisional release only in exceptional cases, in particular where adequate treatment for the accused could not be provided at the United Nation Detention Unit (UNDU).

The situation was quite complex in the Kovačević case,[3] where the decision to grant provisional release was taken together with the decision to suspend the proceedings against the accused for an initial period of six months, subject to a number of terms and conditions. In this case, the difficult task of the judges was not limited to ascertaining the medical condition of the defendant and its compatibility with detention, but it implied an assessment of the accused's fitness to stand trial, since the defence raised the question of the ability of the accused to enter a plea and to stand trial due to a serious mental disorder.

Since the initial appearance of Kovačević, the Trial Chamber was unable to conclude whether the accused had the mental capacity to enter a plea and to stand trial. After the reports of the medical experts appointed by the Trial Chamber and the defence, as well as the assessment provided by the UNDU psychiatrist, the judges came to the conclusion that the mental disorder suffered by the defendant rendered him temporarily unfit to stand trial. As a consequence, the Trial Chamber granted provisional release to the accused, on the condition that he was to receive medical treatment in a specialized institution in Serbia and Montenegro as well as a number of other conditions.

It is worth noting that a few days prior to this order, Trial Chamber II delivered a decision (in the Strugar case) in which the conditions of fitness to stand trial were discussed at length, with particular reference to

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1 Rule 65, paragraph I was adopted in 2000, at the 22nd Plenary Session of the Judges of the ICTY.

2 ICTY, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, *Prosecutor v. Djukić*, Case No. IT-96-20-T, T. Ch. I, 24 April 1996.

3 ICTY, Decision on Provisional Release, *Prosecutor v. Kovačević*, Case No. IT-01-42/2, T. Ch. I, 2 June 2004, in this volume, p. 53.

mental capacity.[4] In that decision, the judges affirmed that "fitness to stand trial is a matter which, although undoubtedly connected with the physical and mental condition of an accused person, is not confined to establishing whether a given disorder is present" and, more specifically, it held that "the issue is not whether the accused suffers from particular disorders, but rather is better approached by determining whether he is able to exercise effectively his rights in the proceedings against him".[5]

The Trial Chamber also listed, on a non-exhaustive basis, a number of capacities that the accused must possess in order to stand trial and which the judges should weigh up in an overall assessment. In conclusion, it maintained that the consequences of finding an accused unfit to stand trial are likely to vary according to the specific circumstances of each case. Amongst the various possibilities, according to this decision; "in cases where the unfitness to stand trial is a temporary condition, it may prove appropriate to merely adjourn the trial and to continue when the accused has sufficiently recovered".[6]

This seems to be exactly the situation that inspired the decision of Trial Chamber I in the Kovačević case. The Trial Chamber made it clear that the suspension and the order for provisional release were necessary not only to provide relief to someone in need of treatment, but also in order to ascertain whether the accused, after adequate treatment, would be capable to stand trial in the future.[7]

In sum, the deletion of the exceptional circumstances requirement did not impede the ICTY from tackling the delicate question of the mental condition of a defendant. Despite the lack of clear indications in the ICTY Statute or ICTY RPE, the decision of the ICTY Trial Chambers made a significant contribution to the practice of international criminal tribunals in setting clear standards and criteria to establish competency to stand trial, and in proceeding to the concrete application of such standards when deciding about the issuance of an order of provisional release, as was the case in the Kovačević decision.

3. Provisional release pending an appeal: length of detention and proportionality

In its decisions in the Čerkez[8] and Kvočka *et al*. cases,[9] the Appeals Chamber dealt with the application of Rule 65, paragraph I of the ICTY RPE, concerning provisional release pending an appeal. The rule sets three conditions that must be verified before granting provisional release.[10] Being cumulative, if a Chamber is not satisfied with any one of the three conditions, it may decide not to examine the others, as was the case, for instance, in the Čerkez case.

In that case, the Appeals Chamber only addressed the first requirement, that is whether the appellant, if released, would either appear for the hearing of the appeal or would surrender into detention at the end of the period fixed by the Chamber. In striking the balance between the previous cooperative behaviour of the

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4 ICTY, Decision *re* the Defence Motion to Terminate Proceedings, *Prosecutor v. Strugar*, Case No. IT-01-42-T, T. Ch. II, 26 May 2004, in this volume, p. 187.

5 *Ibid*., par. 35.

6 *Ibid*., par. 39.

7 It is worth recalling that also the ICTR Trial Chamber in the Nahimana *et al*. case ordered that one of the accused be submitted to a medical, psychiatric and psychological examination to determine whether he was fit to stand trial, but did not dwell on the elements of such capability. See ICTR, Judgement and Sentence, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T, T. Ch. I, 3 December 2003, Klip/ Sluiter, ALC-XVII-221, par. 52 ("Pursuant to a motion filed by the Defence for Ngeze for a medical, psychiatric and psychological examination of Ngeze, and after having heard the parties in a closed session on 19 February 2001, the Chamber granted the motion in a closed session on 20 February 2001. The resulting medical report verified that Ngeze was competent to stand trial. Subsequent to the report's findings, counsel for Ngeze did not pursue the matter any further.") It is also worth mentioning that Rule 135 of the International Criminal Court (ICC) RPE envisages, following a medical examination of the accused, that a trial may be adjourned where an accused is incompetent to stand trial, but it does not elaborate on the elements of the incompetence of the defendant. These deficiencies in previous documents and case law render the decision of the ICTY in the Strugar case very important.

8 ICTY, Decision on Marion Čerkez's Request for Provisional Release, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, A. Ch., 12 December 2003, in this volume, p. 45.

9 ICTY, Decision on the Request for Provisional Release of Miroslav Kvočka, *Prosecutor v. Kvočka, Radić, Žigić and Prcać*, Case No. IT-98-30/1-A, A. Ch., 17 December 2003, in this volume, p. 49.

10 Rule 65, paragraph I of the ICTY RPE provides: "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 (C) and (H) shall apply *mutatis mutandis*."

convicted and other relevant factors, the Appeals Chamber gave precedence to considerations concerning the envisaged length of detention and its proportionality, which was assessed both in a large and in a narrow sense.

The length of detention and its proportionality have often been weighed up by the judges when deciding about granting an order of provisional release, both at the ICTY and the ICTR. The judges of both tribunals have consistently recalled the right of the accused to be tried without undue delay – often referring to the jurisprudence of the European Court of Human Rights (ECHR).[11] However, the length of detention and its proportionality have always been assessed on a case by case basis, depending on the particular circumstances of the case.[12]

Therefore, not surprisingly, in these two decisions under discussion, the ICTY reached opposite conclusions. In the Čerkez case, the Appeals Chamber deemed the length of detention proportionate and rejected the motion for provisional release. The judges took into account the fact that Čerkez had voluntarily surrendered to the ICTY[13] and that he came back before trial after the granting of an order for provisional release, but the weight of these factors was not enough to counterbalance other elements and risks.

In the first place, the length of detention was checked against the seriousness of the crimes committed by the accused; a factor which in many cases renders detention as the rule and provisional release an exception, as both the ICTY and the ICTR have held in other circumstances.[14] The gravity of the crimes is one of the factors that differentiates the regime of provisional release in the international context from the domestic systems and both the *ad hoc* tribunals relied on this element to reverse the ordinary presumption in favour of release and to justify the presumption of detention.[15]

The length of detention was also balanced against the envisaged length of imprisonment – 15 years, of which only six already passed – the remaining period of detention, being quite extensive, was deemed as creating a strong incentive for the appellant to flee. Summing up, the Appeals Chamber was not satisfied that Mario Čerkez, if released, would either appear at the hearing of the appeal or surrender into detention at the end of

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[11] In the Čerkez case, the Appeals Chamber referred to European Commission of Human Rights, *Bottazzi v. Italy*, Application No. 7975/77, 13 December 1978; and to the subsequent decision in the same case, European Court of Human Rights, *Bottazzi v. Italy*, Application No. 7975/77, 28 July 1999. (see Decision on Marion Čerkez's Request for Provisional Release, *Prosecutor v. Kordić and Čerkez*, *supra* note 8, footnote 4). However, as has been observed by Frank, "the outer limits of 'reasonable pretrial detention' embodied within the European Court of Human Rights or the jurisprudence of other international human rights organs are not necessarily the outer limits of the acceptable length of pretrial detention". See M. de Frank, ICTY Provisional Release: Current Practice, A Dissenting Voice, and the Case for a Rule Change, 80 Texas Law Review 2002, p. 1439.

[12] In the Drljača and Kovačević case, the ICTY Trial Chamber held that "the length of an accused's detention is a factor to be considered in determining whether the accused has shown exceptional circumstances sufficient to justify his provisional release." (see ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Drljača and Kovačević,* Case No. IT-97-24, T. Ch. II, 20 January 1998, par. 22). This statement was reaffirmed several times. In the Kanyabashi case, the ICTR Trial Chamber clarified that "it however remains that, consistent with international standards, the right to be tried without undue delay and its possible violation has to be assessed on a case by case basis and in the light of several factors that may account for the length of one's proceedings and, hence, the length of one's detention" (See ICTR, Decision on the Defence Motion for Provisional Release of the Accused, *Prosecutor v. Kanyabashi*, Case No. ICTR-97-24, T. Ch. II, 21 February 2001, par. 11 (referring to European Court of Human Rights, *Zimmermann and Steiner v. Switzerland*, Application No. 8737/79 ,13 July 1983, par. 24)).

[13] In the Jokić case, for instance, the ICTY judges held that the voluntary surrender of an accused was to be evaluated in the assessment of the risk that the accused may not appear for trial (see, ICTY, Order on Miodrag Jokić's Motion for Provisional Release*, Prosecutor v. Jokić*, Case No. IT-01-42-T, T Ch. I, 20 February 2002, par. 25). However, the voluntary surrender of an accused is not *per se* sufficient to grant an order for provisional release (see ICTY, Decision on Motion for Provisional Release filed by the Accused Hazim Delić, *Prosecutor v. Delalić*, *Mucić*, *Delić and Landžo*, Case No. IT-96-21-T, T. Ch. II, 24 October 1996, p. 3.

[14] See, for instance, ICTY, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, T. Ch., 20 December 1996; ICTY, Decision on Provisional Release, *Prosecutor v. Šainović and Ojdanić*, Case No: IT-99-37-AR65, A. Ch., 30 October 2002, Klip/ Sluiter, ALC-XI-149; ICTY, Decision Denying a Request for Provisional Release, *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-PT, T. Ch. I, 23 January 1998, p. 4 ("By considering the extreme gravity of crimes against humanity, the Rules thus establish a presumption of detention according to which detention is the rule and provisional release is the exception").

[15] See P. Wald and J. Martinez, Provisional Release at the ICTY: A Work in Progress, in R. May *et al*. (eds.), Essays on ICTY Procedure and Evidence. In Honour of Gabrielle Kirk McDonald, Kluwer Law International, The Hague/Boston/London 2001, p. 234-237. See also D. Rearick, Innocent Until Alleged Guilty: Provisional Release at the ICTR, 44 Harvard International Law Journal 2003, p. 577 *et seq*.

a fixed period of time. In other words, the first condition set up by Rule 65, paragraph I of the ICTY RPE was not fulfilled and the Appeals Chamber did not move on to consider the other two conditions.

On the contrary, in the Kvočka *et al*. case, the length of detention and its proportionality to the overall envisaged duration of detention contributed to render an order for provisional release possible. In that case, the Appeals Chamber applied a line of reasoning that is exactly the opposite of the one it applied in the Čerkez case. In fact, one of the crucial elements that allowed the appellant to be provisionally released was the fact that he already served approximately 81% of his sentence. This factor most likely lead the judges to consider as irrelevant the risk that the accused would not appear at the hearing of the appeal.

In any case, the Appeals Chamber declared itself satisfied with the first two conditions specified in Rule 65, paragraph I of the ICTY RPE, that is to say that 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" and that he "will not pose a danger to any victim, witness or other person". In addition, it affirmed that the fact that the appellant had already served most of the sentence imposed by the Trial Chamber amounted to a "special circumstance warranting his release" as provided by the third condition specified in Rule 65, paragraph I.

4. The setting of conditions for provisional release and the request of governmental guarantees

In both the Kovačević and the Kvočka *et al*. case, the Appeals Chamber decided to grant provisional release to the defendants subject to a number of terms and conditions, as provided by Rule 65, paragraph C of the ICTY RPE. The conditions set out by the Appeals Chambers varied according to the circumstances of every specific case and were intended to fulfil different objectives. In the first place, they are necessary to ensure the return of the defendant and his appearance at trial; secondly, they guarantee that no contact with victims or potential witnesses may in any way interfere with the proceedings and, more generally, that no danger is posed to the community of the country where the defendant is going to reside during his period of provisional release.

It is obvious that the ICTY must rely on governments' cooperation to fulfil the conditions established by Rule 65 of the ICTY RPE: in both the Kovačević and the Kvočka *et al*. case, the Appeals Chamber required local governments (Serbia and Montenegro in the first case and *Republika Srpska* in the second) to comply with a number of commitments and to assume responsibility for tasks that the tribunal is clearly unable to perform. These requests to local governments represent another major difference from the provisional release regime in domestic systems and reflect the lack of enforcement capacities of international criminal tribunals.[16]

In the early history of the ICTY, the choice of the country where a provisionally released accused would be sent and the question of governmental guarantees represented a dilemma. The Dutch government made clear its opposition to – or at least outlined the practical difficulties of – the release of an accused in The Netherlands.[17] This obliged the ICTY to look to more distant countries, in particular to those belonging to the former Yugoslavia, which were available to receive those provisionally released. These countries, however, did not initially show a very cooperative attitude towards the tribunal and the ICTY often denied provisional release on the assumption that the guarantees provided by these authorities were not trustworthy.[18]

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[16] See ICTY, Order on Motion for Provisional Release, *Prosecutor v. Ademi*, Case No. IT-01-46-PT, T. Ch. I, 20 February 2002, Klip/ Sluiter, ALC-VIII-61, par. 24 ("First the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. It must also rely on the co-operation of States for the surveillance of accused who have been released. This calls for a more cautious approach in assessing the risk that an accused may abscond. It depends on the circumstances whether this lack of enforcement mechanism creates such a barrier that provisional release should be refused. It could alternatively call for the imposition of strict conditions on the accused or a request for detailed guarantees by the government in question").

[17] ICTY, Letter from the Ministry of Foreign Affairs of The Netherlands Addressed to the Registrar, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, 18 July 1996.

[18] See, Order Denying a Motion for Provisional Release, *Prosecutor v. Blaškić*, *supra* note 14, p. 5 where the judges expressed serious doubts about Croatia's attitude: "Considering that, in fact, the Trial Chamber notes that, despite its international obligations, as expressly recognised by its having signed the Peace Agreements in Paris on 14 December 1996 which had been reached in Dayton, Croatia has already failed to satisfy its obligation to co-operate with the Tribunal; that it notes that Trial Chamber II of the Tribunal has taken note of the refusal of this State to co-operate in the Rajić case (Decision pursuant to Rule 61 of the Rules, dated 13 September 1996, IT-95-12-R61); and that in this case, to date, Croatia has not transferred the accused Zlatko Aleksovski whom it is holding in

In this respect, the perception of the ICTY seems to have at least partially changed – due to signs of improved cooperation with the governments of the countries where the crimes were committed – and in the decisions under discussion the judges declared they were satisfied with the guarantees filed by the governments of Serbia and Montenegro and of the *Republika Srpska*. Actually, the shift towards a more cooperative attitude by these countries is one of the main reasons for the gradual increase of orders granting provisional release at the ICTY. Given the fact that these governments complied with court orders, the ICTY began to give greater credibility to their guarantees and to consider them as reliable countries to host accused persons.[19]

On a final note, it is worth recalling, as the decision in the Kvočka *et al*. case clearly shows, that the ICTY requests guarantees from both state and to non-state entities, such as the *Republika Srspka*, which may not be considered a state according to established public international law principles. In this respect, the ICTY continued to follow the directions given by the Dayton Agreements of 1995, which not only restated the obligation of states to cooperate with the tribunal, but also extended this obligation to non-state entities.

Micaela Frulli

detention nor has it co-operated in the transfer of General Blaškić's co-accused whose names appear in the original indictment". See also the previous decision in the Kovačević case, where the Trial Chamber denied provisional release: "We find, having given due consideration to both letters submitted by the Defence, that we are not sufficiently satisfied that that the accused will appear for trial. It is a matter of public record that the Republika Srpska has not arrested any one of the forty-eight persons publicly indicted by the International Tribunal and believed to be resident in that country. We are also alive to the difficulty of implementing any such guarantee or other conditions of release such as daily reporting to police authorities or house arrest." (ICTY, Decision on Defence Motion for Provisional Release, *Prosecutor v. Drljača and Kovačević*, Case No. IT-97-24, T. Ch. II, 20 January 1998, par. 27).

[19] See, for example, ICTY, Decision on the Motion for Provisional Release of the Accused Momir Talić, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, T. Ch. II, 20 September 2002, Klip/ Sluiter, ALC-XI-113, par. 39, where the tribunal attaches great importance to the 'Law of Co-operation' passed in April 2002 by the government of the Federal Republic of Yugoslavia.