



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-95-14-PT
Date: 3 April 1996
Original: FRENCH &
ENGLISH

Before: Judge Antonio Cassese, President of the Tribunal
Registrar: Mr. Dominique Marro, Deputy-Registrar
Decision of: 3 April 1996

THE PROSECUTOR

v.

Tihofil also known as Tihomir **BLAŠKIĆ**

**DECISION ON THE MOTION OF THE DEFENCE
FILED PURSUANT TO RULE 64
OF THE RULES OF PROCEDURE AND EVIDENCE**

The Office of the Prosecutor:

Mr. Eric Ostberg
Mr. Gregory Kehoe

Counsel for the Accused

Mr. Zvonimir Hodak
Mrs. Nela Pedišić

1. On 1 April 1996, as President of the Tribunal, pursuant to Rules 64 and 65 of the Rules of Procedure and Evidence a motion was submitted to me by the Defence Counsel of General Tihomir Blaškić. The defence motion requested a modification in the General's detention conditions and his possible provisional release. The Prosecutor responded in writing on 2 April 1996.

A

SUBMISSIONS OF THE PARTIES

2. When requested to specify the grounds on which his motion was filed, the Defence Counsel indicated at the hearing that his application, at this stage, was limited to Rule 64 which gives the President power to modify the detention conditions of his client. Nevertheless he added that he was in no manner waiving the right of General Blaškić to file another motion at a later stage before a Trial Chamber pursuant to Rule 65 of the Rules.

3. The Defence Counsel argued that convincing reasons supported the motion and that General Blaškić deserved special conditions of detention. The Defence Counsel and General Blaškić placed great emphasis on the fact that the presence of the General before the Tribunal was not due to the execution by the Republic of Croatia of the arrest warrant issued against him but merely to his voluntary surrender. The Defence Counsel explained that for the time being the Croatian authorities do not possess the legal means necessary to apprehend indictees and surrender them to the Tribunal. It was therefore impossible for these authorities to execute such an arrest warrant since by so doing they would violate the provisions of Article 10 of the Constitution of the Republic of Croatia as well as relevant national legislation. The Defence Counsel considered that the appropriate national

legislative or constitutional provisions for ensuring co-operation between Croatia and the Tribunal will be set into force by the Croatian Parliament in the near future.

In addition, the Defence Counsel insisted on the position of General Blaškić as Chief-of-Staff of the Croatian Defence Council in Bosnia-Herzegovina, on his high moral principles and on the fact that he is a highly qualified professional soldier. He deduced from these elements that General Blaškić deserves special conditions of detention. Finally, the Defence Counsel stressed that there exists no evidence establishing that General Blaškić has committed the crimes for which he has been indicted.

For these reasons, the Defence Counsel argued that General Blaškić deserves "some sort of restricted liberty", which supposes that the General would not be able to move about freely in the Netherlands, that he would be confined to a specific residence and that he would be under the constant surveillance of competent authorities. The Defence Counsel emphasised the fact that his client would abide by all conditions imposed by the President and that the General agreed neither to seek political asylum in the Netherlands nor to have contact with the media or the press.

4. In response to the motion filed by the Defence, as well as in oral submission during the hearing, the Prosecutor agreed to the relief sought only if the President were to be satisfied that General Blaškić had voluntarily appeared before him and that all costs related to the special conditions of detention would be covered by or on behalf of General Blaškić.

B

DECISION

I. The Background: the Status of Croatian Legislation

5. As pointed out by Defence Counsel at the hearing, the reason behind this motion by General Blaškić is that the Republic of Croatia has failed to execute the arrest warrant issued by the Tribunal against the General. The Croatian authorities are no doubt aware that both Security Council resolution 827 (1993) and Article 29 of the Tribunal's Statute oblige States to take all internal measures necessary to comply with orders and requests issued by the Tribunal. However, it has been argued by Defence Counsel that the Croatian authorities cannot execute the arrest warrants referred to above because no law has yet been passed in Croatia for the purpose of implementing the Tribunal's Statute; under the present Croatian legislation - so the argument goes - the Croatian authorities do not possess the legal means necessary to apprehend the indictees and surrender them to the Tribunal. This argument by Defence Counsel is borne out by a letter to me from the Minister of Justice of Croatia of 27 March 1996, where he informed me that "after the first reading in the Parliament, the working group is making the final version of the Constitutional Act on the co-operation with International Tribunal. We expect this final version to be discussed and eventually accepted in the Parliament during some of next sessions. The laws in Croatia enter into force 8 days after publishing in the official papers (*Narodne novine*)".

On this matter three observations are called for.

6. First, it is not for an international judge to satisfy himself that such a claim by a State is correct, namely, that the legal condition within the national system is such that the State cannot comply with its international obligations. True, municipal law can be looked

at by international courts and tribunals *qua* a set of legal standards and consequently applied by those courts and tribunals – in this respect the old and rather artificial doctrine whereby “from the standpoint of international law and the Court which is its organ, municipal laws are merely facts” (PCIJ, *German Interests in Polish Upper Silesia*, Ser.A, n.7, 1926 at 19) can no longer be adhered to because, for the international judge as well, national laws may be material both in normative scope and binding force. Nevertheless, it remains true that, unless expressly or implicitly authorized to the contrary by an international legal rule, international judges cannot interpret national laws in lieu of national courts or administrative authorities. International judges might easily misapprehend or misconstrue national laws, because normally they lack the necessary legal tools for placing a correct interpretation on them.

It follows that I shall proceed on the assumption that the interpretation put forward by the Defence Counsel is the correct one.

7. I shall now move on to my second remark concerning the legal condition of Croatian law. On this score I am duty bound to point out that the Republic of Croatia is undisputedly in breach of an international legal obligation incumbent upon it, as much as on any other State or even any *de facto* Government. There exists in international law a universally recognized principle whereby a gap or deficiency in municipal law, or any lack of the necessary national legislation, does not relieve States and other international subjects from their international obligations; consequently, no international legal subject can plead provisions of national legislation, or lacunae in that legislation, to be absolved of its obligations; when they do so, they are in breach of those obligations. This proposition is supported by copious international case law. Suffice it to mention here only a few cases. In the *Polish Nationals in Danzig* case, the Permanent Court of International Justice stated that:

“It should [...] be observed that [...] according to generally accepted principles [...] a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force” (PCIJ, Ser.A/B, no.44, 1931 at 24).

Mention can also be made of the *Georges Pinson* case brought before the France-Mexico Claims Commission. In his award, the umpire dismissed the view that in case of conflict between the Constitution of a State and international law, the former should prevail. He pointed out that this view was "absolutely contrary to the very axioms of international law" (*absolument contraire aux axiomes mêmes du droit international*) (decision of 18 October 1928, in U.N. *Reports of International Arbitral Awards*, vol.V, at 393-394).

8. Thirdly, attention should be drawn to the inherent nature and content of the obligation for States to comply with the Tribunal's orders and requests. This obligation is such that States are in breach of it not only when they are confronted with a specific situation whereby they cannot execute arrest warrants or orders of the Tribunal, but even before this possible occurrence, by failing to pass implementing legislation (if such legislation was needed under national law). This is a matter that deserves some attention on account of its importance, and I shall therefore dwell on it, if only briefly.

In paragraph 4 of resolution 827 (1993) the Security Council *decided* that all States "[...] shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance and orders issued by a Trial Chamber under Article 29 of the Statute"(emphasis added). It follows that, since 1993, all States have been under an unquestionable obligation to enact any implementing legislation necessary to permit them to execute warrants and requests of the Tribunal (unless of course, no amendment to internal law is needed for them to do so, a state of affairs that has materialised for such countries as the Republic of Korea, Venezuela, Singapore and Russia).

It should be emphasised that this is not a generic obligation, but a very specific one. More precisely, this is an "obligation of conduct" (*obligation de conduite*) or "obligation of means" (*obligation de moyens*) namely, an obligation requiring States to perform a specifically determined action, unlike "obligations of result" (*obligations de résultat*) which require States to bring about a certain situation or result, leaving them free to do so by whatever means they choose (this distinction has authoritatively been made by the United

Nations International Law Commission; see Yearbook of the International Law Commission, 1977, vol. II, part II, p. 12, para. 1). While the latter category comprises such obligations as protecting foreigners with due diligence, or the obligation to take all appropriate steps to protect the premises of diplomatic missions against intrusion or damage, "obligations of conduct" specifically determine the kind of action required, although they may leave States some latitude (for instance, when requiring legislative action, States may be able to choose whether to enact primary legislation or adopt some other legislative measure proper to their own legal system: cf. Yearbook of International Law Commission cit., at 14, para. 8).

It follows that any time a State fails to take the necessary legislative measures to enable it to comply with orders or requests of the Tribunal, it is in breach of an international obligation even before the practical need arises to execute an arrest warrant or an order of the Tribunal.

9. It is apparent from the above that, by not enacting implementing legislation, since 1993 the Republic of Croatia has undisputedly violated its obligation to implement the Statute, stemming from the relevant Security Council resolutions as well as Article 29 of the Tribunal's Statute.

10. I should add that non-compliance by the Republic of Croatia with this international legal obligation is all the more serious and regrettable because on four different occasions (on 14 March and 20 June 1994 and on 15 February and 30 November 1995), I reminded, in writing, the Croatian Ministers of Foreign Affairs and Justice of the aforementioned obligation. I subsequently insisted on compliance with this obligation in a meeting with the Croatian Ministers of Foreign Affairs and Justice on 15 January 1996.

11. Although, as I have set out above, the Republic of Croatia infringed its international obligation to implement the Tribunal's Statute, the fact remains that by failing to pass such legislation, it has been unable to execute the arrest warrant issued against General Blaškić, with the consequence that, under the Croatian legal system, this indictee can legally enjoy full freedom in that State.

II. The Relief Sought

12. Neither in his motion nor during the hearing did Defence Counsel set out in detail what specific relief he was seeking. As pointed out above, he confined himself to asking for "some sort of restricted liberty", adding that the accused was ready to submit to a number of restrictions.

In this connection, it must be emphasised that any form of "liberty", i.e., provisional release, whether or not accompanied by strict conditions, must be ruled out at the outset, as it is for the relevant Trial Chamber to order such a release under Rule 65. Rule 64, pursuant to which I was seized of this matter, merely provides for a "modification of the conditions of detention of the accused". I shall, therefore, limit myself to deciding whether or not to modify detention and, if so, to what extent. It follows that I shall not have to pronounce upon the possibility of imposing on General Blaškić compulsory residence (*assignation à résidence*), a measure provided for in many legal systems including France and, in particular, Croatia (it should be noted that Article 176 of the Croatian Law on Criminal Procedure of 21 April 1993 was mentioned in the hearing¹). Indeed, compulsory residence is not a form of detention, but rather a precautionary measure taken against persons who (i) have allegedly committed offences which do not automatically entail remand in custody and (ii) are not likely to engage in behaviour (such as interference with investigations, repetition of crime, danger to public order) requiring that a custodial measure be taken. Compulsory residence is destined to ensure that an indictee shall not abscond before the initiation of trial thereby evading justice.

13. I shall now consider whether General Blaškić is entitled to that form of detention other than incarceration that is normally called house arrest (*arrêt domiciliaire*).

¹Article 176 states: "(1) If there is reason to fear that, during the proceedings, the accused might go into hiding, depart for an unknown destination, or leave the country, the court may request from the accused a formal undertaking that he will not go into hiding or leave his place of residence without the permission of the court. The undertaking will be placed on record; (2) the passport of the accused may be temporarily retained. An appeal against a decision to this effect shall not delay the execution of the decision; (3) when undertaking not to leave his place of residence, the accused shall be warned that he may be detained should he breach this undertaking".

It should be pointed out that house arrest is not provided for either in the Tribunal's Statute or in the Rules of Procedure and Evidence. However, it is also true that nothing in the Statute or the Rules prevents or prohibits such house arrest as an alternative to pre-trial incarceration (or for that matter, to imprisonment to serve a sentence). If this concept is upheld by the Tribunal, it would constitute a middle-of-the road measure between what is regarded by the Rules as the norm, namely detention on remand (Rule 64) and the exception, i.e., provisional release (Rule 65). It would be an intermediate measure only because it would be milder than incarceration, whilst it would be harsher than provisional release, for house arrest is a form of detention.

(i) International and national standards on house arrest.

14. Since house arrest is not excluded by the Statute or the Rules, it is fitting briefly to consider international standards and national legislation on the matter.

15. It should be stressed that as early as 1965 the Council of Europe strongly recommended that Governments should regard remand in custody as an exceptional measure while favouring other measures "such as surveillance in the home [or] injunction against leaving a particular place or district without the permission of the judge" (Resolution (65)11 adopted on 9 April 1965 by the Committee of Ministers, Articles 1 (b) and 1 (g)).

16. A survey of national legislation shows that numerous national legal systems provide for house arrest either as an alternative to detention on remand or as a means for a convict to serve a sentence. Leaving aside the latter category, which is not material to this case (and which is provided for in such States as Spain and the United States), it should be pointed out that the former category is contemplated in the legislation or case law of such European States as Belgium, Germany, Greece, Italy and Portugal as well as in such non-European States as Japan.

(ii) The notion of house arrest, its preconditions and the requirements for its use.

17. Close scrutiny of the various national legislations shows that States tend to uphold the same basic concept of house arrest and, in addition, lay down similar preconditions for the imposition of such measure. By contrast, the requirements to be fulfilled by the person detained under house arrest vary greatly, all the more so because they are normally set out by individual judges for specific cases and in the light of the specific circumstances of each case. I shall briefly survey the various elements of house arrest just mentioned.

18. As for the basic concept of house arrest, there is broad agreement that it covers detention in one's home or within the confines of a house or place outside a prison. It is widely specified in national legislation and held by courts that house arrest is a form or class of *detention*, for all purposes including the right to impugn the legality of detention and the right to have the period spent under house arrest taken into account for determining the penalty. (It would follow, in the case of the Tribunal, that Rule 101 (E), whereby "Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal" should also apply to such form of pre-trial detention).

19. As regards the preconditions for the imposition of house arrest, they are both negative and positive in nature. The former class embraces requirements that should not be present. These include: the risk that the detainee might escape; the likelihood that he might tamper with or destroy evidence or endanger possible witnesses; the likelihood that he might continue his criminal behaviour; potential danger to public order and peace.

Normally the positive preconditions required for house arrest are not spelt out in national legislation or in case law. However, it is apparent from the practice of national judges and courts that house arrest may be used when the accused is seriously mentally or physically ill, when he is aged, or else when prison conditions are likely seriously to jeopardize his life or mental health; or when there are special circumstances warranting house arrest as a measure rewarding particular behaviour of the accused (e.g., he has

voluntarily offered evidence going beyond what had been requested by the prosecutor or investigating judge).

20. The requirements to be fulfilled by the detainee vary from case to case, and they are normally decided by the individual judge. A survey of national practice shows that, depending on the particular circumstances of each case, the detainee (a) may be allowed to live in a flat or house with his family without being permitted to receive or meet with anybody other than his legal counsel or medical doctor, or (b) he may be allowed to leave his place of residence at fixed hours per day, and for a short period of time, to engage in a working activity, or (c) may leave his place of residence for short and pre-established periods of time for specified purposes other than a working activity, on condition that he should report regularly to police before and after leaving his residence.

While these requirements vary in each specific case, what seems to constitute a common feature of house arrest is the right of the detainee to live with his family and to see his counsel in his place of detention.

It is with regard to the last-mentioned conditions that house arrest can be regarded as a privileged or preferential form of detention.

III. Decision on the relief sought.

(i) Grounds for not granting house arrest

21. I am now in a position to pronounce upon the motion by General Blaškić's Defence Counsel.

It is apparent from the arguments of Defence Counsel in the hearing that some of the negative preconditions are met in the case at issue. If assigned to house arrest under close police surveillance, General Blaškić is not likely to escape, or to destroy evidence or imperil the life of witnesses, nor will he be able to engage in any activity similar to those contemplated in the charges preferred against him by the Prosecutor. By contrast, his presence on Dutch territory is likely to pose a danger to public order and peace, if only because of the presence in the Netherlands of thousands of refugees from the former Yugoslavia. As for the positive preconditions, it must be noted that the accused is not ill or aged.

It follows that some basic preconditions for granting house arrest are lacking.

(ii) Detention in premises outside the Detention Unit.

22. Counsel for the accused has emphasised, however, that although under Croatian legislation he was under no obligation to surrender himself to the Tribunal nor *a fortiori* was he arrested by the Croatian authorities, he *sua sponte* decided to appear before the Tribunal to stand trial in order to clear his name. The Prosecutor agreed that this behaviour should be taken into account on condition however that I be satisfied that the accused appeared voluntarily before the Tribunal. The explanations given in court, at my request, by Defence Counsel, seem to indicate that he surrendered himself voluntarily. In particular, Defence Counsel stressed that General Blaškić, who had decided to come to The Hague on 29 March, could not do so because of severe emotional problems encountered by

his wife; when the problems were over he took a commercial flight from Zagreb to Amsterdam; he had arrived at the airport in Zagreb without any police escort, being accompanied only by his wife and his lawyers. Defence Counsel added that "if the Croatian Government wanted to act forcibly, they would have waited for this law [on co-operation with the Tribunal] to be passed by Parliament, and in that case they would have all the legal means available at their disposal to hand over General Blaškić to the Tribunal" (Transcript, p. 10).

The Prosecutor also made his agreement to the modification of conditions of detention conditional on my being satisfied that all costs related to such modification be covered by, or on behalf of, the accused.

When questioned at the hearing about such condition, Defence Counsel assured that his client would bear all necessary costs for the modification of his detention. Subsequently, I received confirmation to this effect from the Dutch authorities.

23. Before deciding on this issue, let me stress once again that General Blaškić's surrendering himself to the Tribunal leaves unaffected the fact that Croatia's failure to enact implementing legislation is a blatant breach of its international legal obligations. However, it would be injudicious and contrary to widely accepted principles of criminal law not to take account of General Blaškić's aforementioned procedural behaviour. In addition, one should be mindful of the maxim enunciated by Gaius back in the second century A.D., whereby *semper in dubiis benigniora praeferranda sunt*, Digesta, L.17 (in doubtful cases the more liberal treatment must always be preferred). General Blaškić's behaviour merits some consideration, such as detention in a place other than the Detention Unit, subject to fulfilling a number of strict conditions.

24. Pursuant to Rule 64 of the Rules, I hereby decide that General Blaškić will be detained in a place other than the United Nations Detention Unit. The Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, and all related rules, directives or regulations

with regard to detained persons in the custody of the Tribunal (all the above hereafter referred to as "the Rules of Detention") shall apply *mutatis mutandis* unless specifically provided below:

- (a) General Blaškić shall remain within the confines of a residence designated by the Netherlands authorities in consultation with the Registrar (hereafter referred to as "his place of detention");
- (b) he shall not be permitted to leave the Netherlands unless authorised by the President upon written request presented to that effect;
- (c) he shall be authorised to leave his residence only to meet his Counsel, the diplomatic and consular representatives of the Republic of Croatia accredited in the Netherlands, his family and his friends. The meetings and visits will take place in the United Nations Detention Unit in accordance with the Rules of Detention. In the event of such visits and meetings, General Blaškić will be escorted to the United Nations Detention Unit by the personnel responsible for his custody;
- (d) he shall not be permitted to leave his place of detention at any other time;
- (e) he shall ensure payment of all the costs incurred by the special conditions of his detention, such as the costs related to the house where he is confined or related to the security officers required to safeguard his protection;
- (f) he shall have no contact of any sort with the press and the media. He shall refuse any interview or contact with reporters, journalists, photographers or TV cameramen;
- (g) he shall respond promptly to all orders, summonses, subpoenas, warrants or requests issued by the Tribunal;
- (h) he shall deliver his passport and all other identity documents to the Registrar;
- (i) he shall not make or receive telephone calls from his place of detention, all telephone calls being regulated by the Rules of Detention;
- (j) All correspondence to and from General Blaškić shall be addressed to the United Nations Detention Unit and shall be dealt with according to the Rules of Detention;
- (k) General Blaškić shall not communicate the location of his place of detention to anyone.

25. Any serious breach of any of the conditions set out above shall entail immediate imprisonment of General Blaškić in the United Nations Detention Unit. The Registrar shall be responsible for determining whether a serious breach has been committed and whether the transfer of General Blaškić to the Detention Unit is required.
26. General Blaškić has the right to submit requests to, or lodge complaints with, the Registrar who shall decide upon them expeditiously. General Blaškić has the right to appeal to the President of the Tribunal any decision by the Registrar. All requests, complaints and appeals shall be submitted in writing.
27. The conditions of detention of General Blaškić may be changed at any time by a reasoned decision of the President.
28. This decision will cease to have effect upon any order of the Trial Chamber granting provisional release pursuant to Rule 65 of the Rules.

IV. Disposition

29. In light of the above and having considered Rule 64 of the Rules, I hereby order that General Blaškić be transferred as soon as practicable from the Detention Unit to the place referred to above under paragraph 21(a). He shall serve pre-trial detention, under the strict conditions set forth above, until otherwise decided by the President or until the completion of his trial, as well as appeal proceedings, if any, before the Tribunal.

30. The Registrar and her Deputy shall be responsible for constant monitoring of the detention and shall report expeditiously to the President.

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



(Signed) Antonio Cassese
President

Dated this third day of April 1996
The Hague
The Netherlands

[Seal of the Tribunal]