



IT-04-82-PT
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17 January 2007

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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-04-82-PT

Date: 17 January 2007

Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Kevin Parker, Pre-Trial Judge
Judge Kimberly Prost
Registrar: Mr. Hans Holthuis
Decision of: 17 January 2007

PROSECUTOR

v.

Ljube BOŠKOSKI
Johan TARČULOVSKI

**DECISION CONCERNING RENEWED MOTION FOR
PROVISIONAL RELEASE OF JOHAN TARČULOVSKI**

The Office of the Prosecutor:

Dan Saxon
William Smith
Anees Ahmed

Counsel for the Accused:

Edina Residović for Ljube Boškoski
Antonio Apostolski for Johan Tarčulovski

1. Background

1. This Trial Chamber (“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 seised of “Johan Tarčulovski Second Motion for Provisional Release” (“Motion”) filed confidentially on 1 December 2006 by Johan Tarčulovski (“Accused”). On 15 December 2006 the Prosecution filed confidentially a “Prosecution’s Response to Accused Tarčulovski’s Second Motion for Provisional Release with Confidential Annex A” (“Response”). The Prosecution objects to the Motion. It also requests permission to exceed the standard word limit in its Response. On 22 December 2006 the Accused filed a “Johan Tarčulovski Motion Seeking to Reply and Reply to the Prosecution’s Response to the Second Motion for Provisional Release with Annexes from 1 to 4” (“Reply”).

2. The Indictment against Ljube Boškoski and the Accused was confirmed on 9 March 2005. On 2 November 2005 the Prosecution filed an “Amended Indictment”. It charges the Accused with the crimes of murder, wanton destruction and cruel treatment committed in the course of an attack on the village of Ljuboten, in which the Accused is alleged to have been involved. On 14 March 2005 the Accused was arrested by the FYROM¹ authorities and subsequently transferred to the United Nations Detention Unit in The Hague.

3. On 18 July 2005 the previous Trial Chamber seised of the case gave a “Decision on Johan Tarčulovski’s Motion for Provisional Release” (“Previous Decision”), in which it denied the Accused’s motion. Even though the FYROM government had exhibited a cooperative attitude towards the Tribunal and it was in the process of implementing a witness protection law, the Chamber remained concerned about the ability of the FYROM authorities to actively protect witnesses. The Chamber found that the Accused had disclosed a will to obstruct the judicial process by, *inter alia*, failing to register a valid address and to attend scheduled meetings for investigative questioning. The Chamber regarded the presence of active supporters of the Accused in close proximity to victims and witnesses as presenting a concrete danger of interference with the administration of justice. It referred to an incident of the supporters successfully keeping police and the public from entering the village of Ljubanci, located nearby the place where the crimes charged in the Indictment had allegedly been committed. On 4 October 2005 the Appeals Chamber

¹ The Tribunal recognises that by resolution A/RES/47/225 of 8 April 1993, the General Assembly decided to admit as a Member of the United Nations the State being provisionally referred to for all purposes within the United Nations as “The former Yugoslav Republic of Macedonia” pending settlement of the difference that had arisen over its name; Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005 (“Appeals Decision”), footnote 34.

dismissed an appeal lodged by the Accused against the Previous Decision ("Appeals Decision").² The Appeals Chamber found no error in the Trial Chamber's findings and it held, in relation to the Accused's conduct at the time of the Prosecution investigation, that it is certainly relevant to the question of provisional release whether an accused has shown a proclivity to take affirmative steps to evade detection by Tribunal authorities.³

4. On 12 December 2006 at a status conference the Parties were informed that it was anticipated that it might be possible to commence the trial at the end of March or in the first half of April 2007.⁴

2. Submissions

5. The Accused requests provisional release and submits that since the time of the Previous Decision there has been a material change in circumstances relevant to his application. He submits that the Government of FYROM issued a new guarantee whereby it undertakes to ensure the Accused's return from provisional release with a 48-hour notice and to arrange for his surveillance by police. The Accused further submits that the FYROM has recently obtained the status of a state-candidate for accession to the European Union. He states that a law on witness protection has become fully operational and is used by FYROM courts. The Accused points out that after the filing of the Previous Decision there have been no attempts to influence witnesses and that only less than 5 per cent of the Prosecution witnesses have requested protective measures. He submits that he and his wife are expecting a baby. The Accused also refers to the fact that the trial is not likely to commence before 2008. He requests the Chamber to hold a hearing on the issue of his provisional release.

6. The Prosecution opposes the Motion arguing that the new guarantee by the Government of FYROM does not explain how it will fulfil its undertakings. The Prosecution points out that, in view of the Accused's allegedly ongoing influence over his supporters who live and operate in close proximity to the places of residence of witnesses and his demonstrated determination to avoid contact with representatives of the FYROM judiciary and members of the Prosecution during the pre-Indictment period, the new State guarantee provides no sufficient assurance that he will not interfere with potential witnesses and will not abscond. The Prosecution, relying on a statement by an investigator, submits that many FYROM Government officials are openly hostile to the Tribunal and that there has been a change of government of FYROM by which the VMRO-DPMNE political party, to which the Accused belongs, has assumed to power. The Prosecution contends that this

² *Ibid.*

³ *Ibid.* para 15.

may well adversely affect the readiness of the present Government to render assistance to the Tribunal as stipulated in the State guarantee. As regards the new law on witness protection, the Prosecution refers to a decision of 29 June 2006 on provisional release concerning the Accused Boškoski ("Boškoski Decision"), in which the Trial Chamber held that the introduction of the new law did not constitute a material change in circumstances sufficient to justify a reconsideration of the relevant findings in its previous decision.⁵ The Prosecution reiterates that the Accused has a propensity to indulge in violent and criminal conduct and refers to an attack in which he allegedly participated on 14 March 2005.⁶ The Prosecution submits that a witness working in the FYROM Government recently refused to maintain any contact with the Prosecution after having received threats from members of the FYROM police and members of the VMRO-DPMNE party.⁷ The Prosecution states that many witnesses sought to defer their decision regarding protective measures until the results of the FYROM national elections of July 2006, as they allegedly feared that the assumption of power by the VMRO-DPMNE would give rise to serious concerns regarding their safety should they testify in these proceedings. The Prosecution argues that the pregnancy of the Accused's wife is a factor which mitigates against the likelihood of his return from provisional release, if granted. The Prosecution submits that the Accused has received copies of the statements of all witnesses who will testify against him and it contends that he now has an even greater incentive not to return from provisional release and that the likelihood of witness intimidation has increased. Finally, the Prosecution opposes to the Accused's request for an oral hearing.

7. In the Reply the Accused submits that neither he, nor any of his colleagues, has ever attempted to influence witnesses. He states that he has no supporters among former colleagues in the FYROM police and he did not hold any significant post in the police. As regards the VMRO-DPMNE party, the Accused submits that the leaders of the party have changed. The Accused contends that the Prosecution has not provided evidence that the witness it referred to in its Response ceased to co-operate with the Prosecution because of alleged intimidation. He further submits that there is no basis for the Prosecution's contention that more witnesses are likely to seek protective measures because the VMRO-DPMNE has returned to power. The Accused points out that that party has been in power since July 2006 and yet there have been no cases of witnesses requesting protective measures. With reference to the recent information that the trial is to commence in April 2007, the Accused contends that this is not yet certain.

⁴ Status conference, 12 December 2006, Transcript page 211.

⁵ Reference is made to: Decision on Second Motion for Provisional Release, para 49.

⁶ Annex A to the Response, pp 3-4.

⁷ Response, para 27.

3. Law

8. Rule 65 of the Rules reads, in so far as relevant:

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

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

9. The Appeals Chamber has indicated a non-exhaustive set of factors to be considered when assessing whether an accused will appear for trial: that the applicant is charged with serious criminal offences and, if convicted, is likely to face a long prison term; the circumstances in which he surrendered; the degree of co-operation given by the authorities concerned; that the relevant government has given guarantees that the accused will appear for trial and observe the conditions set for his provisional release; whether the accused held very senior positions, so far as it is relevant to the weight of governmental guarantees; that the applicant has given a personal guarantee to abide by the conditions set for his provisional release; the likelihood that the relevant authorities will re-arrest the accused should he decline to surrender at the time the Accused will be tried – so far as that can be predicted in the present circumstances; and whether the accused has agreed to be interviewed by the Office of the Prosecutor.⁸ The Tribunal's jurisprudence indicates that there should be a "material change in circumstances" which would justify reconsideration of a renewed motion for provisional release.⁹ The burden of proof remains on the Accused to satisfy the Chamber that he will appear for trial and, while released, will not pose a danger to any victim, witness or other person.¹⁰ Indeed, the absence of any power in the Tribunal to execute its own arrest warrants and its need to rely on local or international authorities to effect arrests on its behalf has the practical consequence that an applicant for provisional release must have a clear and strong case to satisfy the Trial Chamber that he will appear for trial if released.¹¹

⁸ *Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, Case No.: IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para 6.

⁹ *Prosecutor v. Fatmir Limaj et al.*, Case No.: IT-03-66-T, Decision on Defence Renewed Motion for Provisional Release of Fatmir Limaj, 26 October 2005 ("Limaj Decision"), para 8, referring to *Prosecutor v. Milan Martić*, Case No.: IT-95-11-PT, Decision on Second Motion for Provisional Release, 12 September 2005, para 16.

¹⁰ *Limaj Decision*, para 8; see *Prosecutor v. Milan Martić*, Case No.: IT-95-11-AR65, Decision on Application for Leave to Appeal, 18 November 2002, and *Prosecutor v. Prlić et al.*, Case No.: IT-04-74-AR65.1, 65.2, 65.3, Decision on Motions for Re-consideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para 28.

¹¹ *Prosecutor v. Zdravko Tolimir et al.*, Case No.: IT-04-80-PT, Decision Concerning Motion for Provisional Release of Milan Gvero, 19 July 2005, para 8; see *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No.: IT-99-36-PT, Decision on Motion by Radoslav Brdanin for Provisional Release, 25 July 2000, para 18.

4. Discussion

10. The Accused requested that a hearing be held in relation to the Motion. The Trial Chamber notes that the Parties' submissions are accompanied by an abundance of documents. They exhaustively cover issues relevant to the examination of the Motion. Therefore, the Chamber finds it unnecessary to hear additional oral submissions.

11. On 7 December 2006 the authorities of the host country informed the Tribunal that they had no objections in respect of the provisional release of the Accused. On 30 November 2006 the Government of the FYROM provided "Guarantees for the provisional release of the accused Johan Tarčulovski", which are attached as Annex 1 to the Motion. The Trial Chamber therefore considers that the requirement of giving the host country and 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.

12. The seriousness of the offences charged was assessed in the Previous Decision. The Trial Chamber reaffirms the previous Chamber's position that the Accused, if convicted, may face a lengthy prison sentence.¹² This factor is of relevance to the assessment of the Accused's incentive to flee. The amendments to the Indictment that were made after the date of the Previous Decision were not such as to affect the conclusion as to seriousness.¹³ Further, there is no need for revisiting the previous Chamber's finding on the pre-Indictment behaviour of the Accused.¹⁴ The Accused's evasive conduct at the time when attempts were made by the Prosecution to contact him gives rise to concerns about his preparedness to voluntarily return for trial, if released.¹⁵ The Accused has not submitted his personal guarantee. He appears to reiterate the declaration he offered in his previous motion for provisional release,¹⁶ that he would return for trial and not in any way interfere with any victims and witnesses, and that he would fully abide by all conditions ordered by the Trial Chamber.¹⁷ The Trial Chamber dealing with the previous motion held that the other evidence presented before it diminished the value of the guarantee.¹⁸

13. The Accused relied in the Motion on the argument that the trial was unlikely to commence before 2008.¹⁹ After the Motion was filed, the Parties were informed about the "expectation that it

¹² Previous Decision, para 20.

¹³ Amended Indictment, 2 November 2005.

¹⁴ Previous Decision, para 21.

¹⁵ See Appeals Decision, para 15.

¹⁶ Motion, para 20.

¹⁷ Motion Filed by the Defence of Johan Tarčulovski Requesting Provisional Release of Accused Tarčulovski, 20 May 2005, paras 2-4; Previous Decision, para 5.

¹⁸ Previous Decision, para 23.

¹⁹ Motion, paras 21, 22 and 24.

might be possible to commence the trial at the end of March or in the first half of April".²⁰ In the Reply, the Accused acknowledges that it is highly probable that the trial will start in April 2007, but observes that it is not certain.²¹ The Trial Chamber notes that the exact date of commencement of trial has not yet been determined, but that procedural orders made in December 2006 in the present Mrkšić et al trial provide for the final submissions of the parties in that case to be completed at the beginning of March 2007. The expectation is that the trial of the Accused will follow the Mrkšić et al trial. There is no appearance of circumstances that might significantly delay the expected time of commencement of trial. The Trial Chamber reiterates that, as discussed in the Previous Decision, before his transfer to the Tribunal, the Accused actively tried to make it impossible for the Prosecution and FYROM authorities to contact him, including through steps like selling his mobile phone number and failing to register a valid address.²² The previous Trial Chamber specifically referred to this conduct of the Accused and its relevance to the analysis of a risk of delay of the judicial process.²³ In view of the prospect of an imminent commencement of trial, the Accused's demonstrated proclivity to take such steps is of particular significance to the assessment of the risk of delay of the judicial process. Should the Accused make similar attempts to avoid contact with the relevant authorities, if released, there is a clear prospect that it may become impossible for those authorities to ensure his return within the limited time that would remain once the trial date is fixed. In the circumstances, this risk militates strongly against granting provisional release in this instance.

14. The Accused argues that the new guarantee by the FYROM Government constitutes a "material change in circumstances", as required in the jurisprudence of the Tribunal. It is the understanding of the Chamber that the new guarantee contains provisions that were not included in the guarantee provided for the purposes of the previous motion for provisional release. The new assurances by the FYROM Government include an undertaking to ensure the return of the Accused for trial within 48 hours from notification and police surveillance. The Chamber also takes note of the guarantee to prevent the Accused from contacting or otherwise interfering with witnesses.²⁴ The Accused appears to suggest that the Government's preparedness to observe its undertakings is strengthened by a recent decision to award the FYROM the status of a candidate for accession to the European Union. The Trial Chamber is satisfied that the guarantee provided by the Government of the FYROM addresses some of the concerns expressed in the Previous Decision. It notes, however, that the additional assurances made by the Government in this instance do not materially

²⁰ Status conference, 12 December 2006, Transcript page 211.

²¹ Reply, para 31.

²² Appeals Decision, para 15; Previous Decision, para 27; Annex A to the Response, pp 2-3.

²³ Previous Decision, para 27.

²⁴ Annex 1 to the Motion.

differ from those already made before the previous Chamber.²⁵ The newly acquired candidate status of the FYROM is a factor that may increase the readiness of that state to co-operate with the Tribunal, but that has yet to be demonstrated. In any event, it does not constitute a material change in circumstances when compared with those prevailing at the time of the Previous Decision. The award of the candidate status was announced on 17 December 2005²⁶ and thus only five months after the Previous Decision was given. That status is a step in a long-term process, a process which was a matter of public knowledge at the time of the Previous Decision. The report on which the Defence relies in this connection refers to the implementation by the FYROM of the relevant Stabilisation and Association Agreement "since 2001".²⁷ It is thus apparent that at the time of the Previous Decision the FYROM was publicly pursuing a policy which involved an avowed willingness to comply with its international obligations, including co-operation with the Tribunal. Nonetheless, the Trial Chamber takes note of this development, by which the candidate status has been awarded to the FYROM as it constitutes a formal recognition of the relevant position of the FYROM and because, necessarily, that matter was not known or considered at the time of the Previous Decision.

15. The Prosecution contends that the new guarantee by the FYROM Government should not be accepted as reliable in view of the hostility allegedly displayed towards the Tribunal by many officials from that government and the return to power of the political party to which the Accused belongs. The Accused claims that the party has changed, but has neither sufficiently substantiated this contention, nor demonstrated the relevance of the alleged change. In the view of the Trial Chamber the presence of the Accused's party fellows in the FYROM Government may well affect the Government's preparedness to co-operate with the Tribunal in matters relating to the release of this particular Accused, if the Motion is granted. The Chamber cannot conclude on the material before it that this is necessarily so, but the facts identified leave the Chamber unable to be satisfied by the Accused (who carries the burden of proof) that the Chamber can be confident that the Tribunal can expect effective and timely co-operation by the Government in respect of the return for trial of this particular Accused should the Motion be granted. As regards the allegedly hostile officials, the Prosecution refers to a statement by its investigator. According to the statement, a number of requests for assistance submitted by the Prosecution to the competent body of the FYROM Government have not been dealt with. The investigator further stated that the President of a local court denied the Prosecution's request for access to certain court files, despite a prior approval to that request by the Government. The statement also describes an incident where an

²⁵ Previous Decision, paras 24 and 32.

²⁶ Annex 3 to the Motion.

²⁷ Annex 3 to the Motion.

official in the Ministry of Interior attempted to obstruct the Prosecution's access to the government archives. The Prosecution was able to access the relevant material only after an intervention by the Ministers of Justice and of Interior.²⁸ The Prosecution has not demonstrated that "many officials" of the FYROM Government disclose hostility towards the Tribunal. The statement relied on by the Prosecution refers particularly only to a President of a court and a government official. In both of these cases, high-level officials clearly demonstrated a co-operative attitude towards the Tribunal by either approving a request of the Prosecution, or intervening when its request was refused. The Chamber is not able to reach satisfactory conclusions about other requests for assistance which it is said have not been dealt with. All in all these matters are of little relevance to a general assessment of the FYROM Government's ability and readiness to fulfil its obligations relating to this particular Accused, should provisional release be granted. The Chamber also notes that the practical ability of the FYROM Government to control "what actually happens on the ground" was considered by the previous Trial Chamber.²⁹

16. The Accused argues that the new law on witness protection is now being applied by FYROM courts and it appears to be his position that the new law will prevent interference with witnesses. However, the Motion does not sufficiently demonstrate how the application of the new law could effectively avert the risk of interference in the present case. It is not clear from the Accused's submissions whether, and if so how, the new law would guarantee protection to Tribunal witnesses. In addition, the Prosecution contends that the implementation of the new law is to be effected by a ministry in which former colleagues of the Accused are employed.³⁰ The Accused denies any current connections with that ministry and contends that none of his colleagues has attempted to influence or intimidate witnesses or victims.³¹ The Accused does not, however, deny that former colleagues are employed by that ministry. That being so, it cannot be ruled out that, for this reason, witnesses may not be prepared in this case to seek protection from that ministry. The Trial Chamber subscribes to the assessment of the efficiency of the new protection mechanism made in the *Boškoski Decision*,³² while noting that as the Accused did not hold a post comparable in seniority with that of Ljube Boškoski,³³ the potential influence of his colleagues with respect to witness protection may be less significant. In any event, while the introduction of the new law on witness protection and the steps so far taken to implement it are factors that are capable of giving at least some additional support for reliance on the Guarantee of the FYROM Government, and which may reduce, at least to some extent, the risk of interference with witnesses in this case, in the

²⁸ Annex A to the Response, pp 8-9.

²⁹ Previous Decision, para 24.

³⁰ Response, para 21; Annex A to the Response.

³¹ Reply, para 26.

³² *Boškoski Decision*, para 49.

circumstances neither of these matters can be regarded as constituting a material change in circumstances, whether taken separately or considered together.

17. The Prosecution also submits that a witness ceased to co-operate with it after having received threats. However, from the statement of an investigator, on which the Prosecution relies, it appears that the alleged threats concerned a statement that witness had given in respect of Ljube Boškoski.³⁴ While the Accused and Ljube Boškoski are co-accused, there is no evidence that the Accused or persons acting on his behalf were involved in this incident. Indeed it is the contention of the Accused that neither he, nor any of his colleagues, has attempted to interfere with witnesses. The contrary is not established. The Prosecution further submits that the Accused continues to have influence on his supporters and that they live in proximity to places where witnesses reside. In this connection the Prosecution relies on a press article published in October 2005 dealing with the conduct of a group of supporters of a football team, who, at matches, hoisted banners expressing their support for the Accused. The article indicated that the members of this group were "constantly mobilised" to obtain funds for the Accused and his wife. The article describes the dissatisfaction of the group members with the Previous Decision and, in particular, with the finding that they might attempt to influence witnesses. The leader of the group is quoted as stating in the article that they would not interfere with witnesses, nor would they do anything that might be harmful to the interests of the Accused.³⁵ Therefore, even though the article does show that the members of the group were actively supporting the Accused in October 2005, and there is nothing to suggest that their attitude towards him has changed since that time, the statement of the club leader is uncontradicted. There is no evidence that group members have approached witnesses that are expected to testify in this case, or victims of the crimes charged in the Indictment. The Trial Chamber takes note of the findings regarding this issue made in the Previous Decision. Evidence was then adduced concerning, *inter alia*, a blockade of the FYROM authorities and calls to arms on behalf of the Accused.³⁶ On the basis of this evidence, the previous Trial Chamber found that the presence of active supporters of the Accused in close proximity to victims and witnesses was regarded as a concrete danger of harm to victims and witnesses, and of interference with the administration of justice. There is no evidence of further occurrences of similar conduct. Nonetheless, given the occurrence of such acts at that time, the possibility of interference with the administration of justice by supporters of the Accused cannot be discounted. It is not shown,

³³ Reply, para 22.

³⁴ Annex A to the Response, pp 6-7.

³⁵ Annex 7 to Annex A to the Response.

³⁶ Previous Decision, paras 30-31.

however, that this risk can be expected to increase if the Accused is released.³⁷ The Chamber is left with the view, therefore, that the issue of whether supporters of the Accused are likely to engage in acts aimed at interference with witnesses or victims in the present case is little changed from the situation at the time of the Previous Decision and is not of high relevance for the present application for provisional release.

18. The Prosecution also contends that the Accused has a propensity for involvement in violent conduct. In particular, reliance is placed on an incident said to have taken place in March 2005 which involved a physical assault of an ethnic Albanian. It is not suggested that the alleged victim was a potential witness in the present case, or that he was a victim of any of the crimes charged in the Indictment. The Prosecution has provided copies of statements given to a Tribunal investigator by the victim of the alleged assault and his brother. The victim stated that several days after the incident, he heard from other people that Johan Tarčulovski had been among the attackers. He also stated that he recognised Johan Tarčulovski as one of his attackers from a photo in a newspaper and on television.³⁸ The other statement provided by the Prosecution is one given by a brother of the victim. The brother did not see the incident, but heard from a friend that it was Johan Tarčulovski and his group who had been involved in the attack.³⁹ There is a mention of the incident in the police records. However, the alleged perpetrators are recorded as "unknown" and "unidentified".⁴⁰ There is no reference to the Accused. The Accused contends that the statement given by the alleged victim is untrue.⁴¹ The Trial Chamber is in no position to draw conclusions on the available material as to the Accused's alleged predisposition towards violence and, accordingly, it is not persuaded on the alleged basis of a predisposition to violence that the Accused may pose a danger to any person, within the meaning of the Rule, if released.

19. The Prosecution further submits that a number of witnesses deferred their decisions whether to seek protective measures until the results of the parliamentary elections in the FYROM were known. In response to this submission, the Accused observes that despite the return to power of the VMRO-DPMNE party after the elections in July 2006, which, according to the Prosecution, many witnesses feared, the Prosecution has not shown that any witness has sought protection in relation to these elections. This is all very vague. Even if some witnesses had actually requested protection in connection with the recent political changes, there is nothing to indicate that their fears relate to the Accused himself or that his release, if granted, would be likely to amplify them.

³⁷ The Appeals Chamber noted that the Previous Decision contained no specific finding that the club members presented a greater risk with the Accused released; Appeals Decision, para 18.

³⁸ Annex 1 to Annex A to the Response.

³⁹ Annex 2 to Annex A to the Response.

⁴⁰ Annex A to the Response, p 4.

⁴¹ Reply, para 27.

20. The Prosecution contends that the Accused's incentive to flee and the risk of intimidation of witnesses have increased due to the disclosure of almost all witness statements. The Accused says that he received almost all statements before the time of the Previous Decision.⁴² While the Prosecution refers to observations in decisions of the Tribunal, that the risk of flight may be at its highest right before the pronouncement of judgement, these observations are in the context of particular cases and draw on the likely effect of an accused having heard all the evidence and submissions in those cases.⁴³ If the evidence is strong, the personal evaluation of the accused may well persuade him that the risk of conviction is then high indeed. Every case must be evaluated on its circumstances. Even at the pre-trial stage an accused may well recognise that the chances of conviction are high. In the present case the Chamber is not able to conclude that the disclosure of witness statements is likely to have increased the Accused's incentive to flee at this stage. The Chamber takes note of the Accused's submission that he has been in the possession of most of witness statements for a longer time. Therefore, there is no basis for concluding that the risk of interference with witnesses has materially increased since the time of the Previous Decision. While the Chamber takes note of this argument of the Prosecution, it is not able to place any significant weight on it.

21. The Accused submits that his wife is expecting a baby and that he wishes to be with his family until the trial starts.⁴⁴ The Prosecution contends that this militates against the likelihood that the Accused will return for trial, if released, but there is no specific support for this contention and it is not highly persuasive. The Trial Chamber is mindful of the Accused's personal concern to maintain contact with his family, particularly at this time, but observes that this factor does not strongly support either of the opposing contentions. Hence the arrival of a baby is not of strong weight in the assessment of the likelihood of the Accused attending for trial or of the interests of justice in this case.

22. Having reviewed all the circumstances, and the particular submissions, the Chamber concludes that the Accused has failed to demonstrate that there has been a "material change in circumstances" since the date of the Previous Decision which would justify granting the Motion. Various of the new or changed circumstances relied on by each of the parties tell in opposing directions but do not, separately or together, constitute a material change. In particular, having reviewed the material put before it, the Chamber is not able to be satisfied that the Accused will appear for trial, if released. As discussed earlier, the Accused's evasive conduct in the past

⁴² Reply, para 32.

⁴³ *Limaj* Decision, para 11.

⁴⁴ Reply, para 30.

demonstrates a real risk, should the Motion be granted, of attempts to delay the commencement of trial or to avoid it altogether, especially in view of the probable imminence of its commencement.

5. Disposition

For the foregoing reasons, pursuant to Rules 65 and 126bis of the Rules, the Trial Chamber

- **DENIES** the Accused's request for an oral hearing;
- **GRANTS** the Prosecution's request to exceed the permissible word limit in the Response;
- **GRANTS** the Accused's request to file the Reply to the Response;
- **DENIES** the Motion.

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

Dated this seventeenth day of January 2007,

At The Hague

The Netherlands



Judge Carmel Agius

Presiding Judge

[Seal of the Tribunal]