**UNITED NATIONS**

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| | 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 | Case No. | IT-04-84-AR65.1 |
| | | Date: | 10 March 2006 |
| | | Original: | English |

**IN THE APPEALS CHAMBER**

**Before:** **Judge Fausto Pocar, Presiding**
**Judge Mohamed Shahabuddeen**
**Judge Mehmet Güney**
**Judge Theodor Meron**
**Judge Wolfgang Schomburg**

**Registrar:** **Mr. Hans Holthuis**

**Decision:** **10 March 2006**

**PROSECUTOR**

**v.**

**Ramush HARADINAJ**
**Idriz BALAJ**
**Lahi BRAHIMAJ**

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# DECISION ON RAMUSH HARADINAJ'S MODIFIED PROVISIONAL RELEASE

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1. The Appeals 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 "Prosecution's Appeal Against 'Decision on Defence Motion of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005'" ("Appeal"), filed on 19 October 2005 by the Office of the Prosecutor ("Prosecution").

## I. PROCEDURAL BACKGROUND

2. On 6 June 2005, Trial Chamber II granted the motion of counsel for Ramush Haradinaj ("Defence") under Rule 65 of the Rules of Procedure and Evidence ("Rules")[1] seeking provisional release for the accused, Ramush Haradinaj ("Accused").[2] The Trial Chamber ruled, *inter alia*, that Haradinaj would "not be allowed to make any public appearance or in any way get involved in any public political activity" for the next 90 days.[3] After the 90-day period, if the Defence so requested, the Trial Chamber would re-assess this condition, "on the basis of the experience gained and after hearing the Prosecution and [the United Nations Interim Administration Mission in Kosovo ("UNMIK")]."[4] Significantly, the Prosecution did not appeal this decision.

3. On August 15, three weeks before the 90-day period ended, the Defence filed a motion to re-assess the conditions of Haradinaj's release, asking the Trial Chamber to allow him to participate in political activity.[5] The Prosecution filed a confidential response with annexes on 12 September ("Re-assessment Response").[6] On 12 October, the Trial Chamber by majority granted Haradinaj the limited right to appear in public and engage in political activities under the supervision of UNMIK, and required UNMIK to assume responsibility over his activities ("Re-assessment Decision").[7]

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[1] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Defence Motion on Behalf of Ramush Haradinaj for Provisional Release, 21 April 2005 ("Original Defence Motion").
[2] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005 ("Original Provisional Release Decision").
[3] *Ibid.*, para. 53.5.
[4] *Ibid.*
[5] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Defence Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted on 6 June 2005, 15 August 2005 ("Re-assessment Motion").
[6] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Prosecution Response to the Motion for Re-assessment of Conditions of Provisional Release Granted to Mr Haradinaj on 6 June 2005, 12 September 2005 ("Re-assessment Response").
[7] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005, 12 October 2005 ("Re-assessment Decision").

4. Following the Re-assessment Decision, on 13 October, the Prosecution filed a motion to stay the decision ahead of appeal ("Motion to Stay").[8] On 14 October, the Trial Chamber stayed the Re-assessment Decision and ordered the Defence to file a response to the Motion to Stay.[9] The Defence responded to the Motion to Stay on 17 October,[10] and the Trial Chamber asked the Appeals Chamber on 21 October to determine whether the Re-assessment Decision should remain stayed.[11] On 28 October, this Chamber ruled that it was not seized of the Motion to Stay and ordered the Trial Chamber to rule thereon.[12] Accordingly, on 31 October, the Trial Chamber extended its stay until 21 November.[13] On 21 November, it extended the stay until 6 December.[14] On 6 December, it extended the stay until 21 December.[15] On 16 December, the Appeals Chamber *proprio motu* stayed the Re-assessment Decision until the Appeal was disposed of.[16] Consequently, the Re-assessment Decision has remained stayed pending a decision by this Chamber on the Prosecution's Appeal.[17]

5. On 19 October the Prosecution filed its Appeal. The Defence filed its response on 31 October[18] and the Prosecution filed its reply on 7 November. [19]

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[8] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Prosecution Motion to Stay the Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005, October 13 2005 ("Motion to Stay").

[9] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Order Relating to the Prosecution Motion to Stay the Decision on Defence Motion of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005, 14 October 2005.

[10] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Defence Response on Behalf of Ramush Haradinaj to Prosecution Motion to Stay the Decision on Defence Motion of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005, 17 October 2005.

[11] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Interim Decision on Prosecution Motion to Stay the Trial Chamber's Decision of 12 October 2005 Regarding Conditions of Provisional Release of Ramush Haradinaj, 21 October 2005.

[12] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, Decision on Whether the Appeals Chamber is Seized of the Prosecution Motion to Stay, 28 October 2005.

[13] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Extension of Order Relating to Prosecution Motion to Stay the Trial Chamber's Decision of 12 October 2005 Regarding Conditions of Provisional Release of Ramush Haradinaj, 31 October 2005.

[14] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Further Extension of Order Relating to Prosecution Motion to Stay the Trial Chamber's Decision of 12 October 2005 Regarding Conditions of Provisional Release of Ramush Haradinaj, 21 November 2005.

[15] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Third Extension of Order Relating to Prosecution Motion to Stay the Trial Chamber's Decision of 12 October 2005 Regarding Conditions of Provisional Release of Ramush Haradinaj, 6 December 2005.

[16] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, Stay of "Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005", 16 December 2005.

[17] Separately, on 8 November, the Prosecution filed an "Application under Rule 115 to Present Additional Evidence in its Appeal Against 'Decision on Defence Motion of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005'" ("Rule 115 Motion"). Today, the Appeals Chamber denies the Prosecution's Motion *in toto*. *See Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.1, Decision on Prosecution's Application to Present Additional Evidence in its Appeal Against the Re-assessment Decision, 10 March 2006 ("Rule 115 Decision").

[18] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, Defence's Response on Behalf of Ramush Haradinaj to the Prosecution's Appeal Against "Decision on Defence Motion of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005", 31 October 2005 ("Response").

6. Separately, on 9 December, the Prosecution filed a confidential "Motion for Additional Details to be Included in UNMIK's Reports on Compliance of Ramush Haradinaj with the Conditions of his Provisional Release" ("Motion for Details"). On 14 December, the Trial Chamber, in a confidential "Request to UNMIK", asked UNMIK to provide comments on the matters raised in the Prosecution's Motion for Details. On 6 January 2006, UNMIK filed its confidential "Response to the Motion" ("UNMIK Submissions") with the Trial Chamber. On 11 January, the Accused filed the "Confidential Defence Response on Behalf of Ramush Haradinaj to Prosecution's Motion for Additional Details to be Included in UNMIK's Reports on Compliance of Ramush Haradinaj with the Conditions of his Provisional Release" ("Response to Motion for Details") with the Trial Chamber. On the same day, the Defence sent a letter to the Appeals Chamber attaching the Motion for Details, the UNMIK Submissions and the Response to Motion for Details "so that [the UNMIK Submissions are] before the Appeals Chamber as [they] could be relevant to matters that have been raised in the pending appellate proceedings".[20] On 13 January, the Prosecution filed the "Prosecution's Motion to Strike the Filing of the Defence Dated 11 January 2006" ("Motion to Strike"). The Defence filed its confidential response to the Motion to Strike on 16 January;[21] the Prosecution filed its confidential reply on 17 January.[22]

7. The Prosecution makes two principal arguments in support of the claim that the letter and submissions should be stricken from the record. First, it argues that the matter currently before the Appeals Chamber, the Prosecution's Appeal of the Re-assessment Decision, is a "distinct issue[]" from the UNMIK reporting regime discussed in the letter and submissions.[23] Second, it argues that new evidence can only be presented to the Appeals Chamber through a motion pursuant to Rule 115 of the Rules of Procedure and Evidence ("Rules"), and the Defence has not followed this procedure.[24]

8. In response, the Defence contends that its filings are not additional evidence and thus are not governed by Rule 115; rather, "they are official court filings already before the ICTY in the same case".[25] It claims that it presented the materials to the Appeals Chamber "in the event that the

[19] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, Prosecution's Reply to the Defence Response on Behalf of Ramush Haradinaj to the Prosecution's Appeal Against "Decision on Defence Motion of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005", 7 November 2005 ("Reply").
[20] Letter from the Defence to the Appeals Chamber, 11 January 2006 ("Defence Letter").
[21] *See Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, Confidential Defence Response on Behalf of Ramush Haradinaj to the Prosecution Motion to Strike the Filing of the Defence Dated 11 January 2006, 16 January 2006 ("Response to Motion to Strike").
[22] *See Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, Prosecution Reply to Confidential Defence Response on Behalf of Ramush Haradinaj to the Prosecution Motion to Strike the Filing of the Defence Dated 11 January 2006, 17 January 2006.
[23] Motion to Strike, para. 8.
[24] *Ibid.*, paras 9-12.
[25] Response to Motion to Strike, para. 2.

Chamber may wish to take them into consideration as filings in the present case that may be relevant to any of the issues in the pending appellate proceedings".[26]

9. The Appeals Chamber does not find it necessary to discuss the parties' contentions because these materials are not relevant to this proceeding and therefore cannot be considered.[27] The UNMIK Submission concerns the Accused's behaviour while on provisional release, and does not touch on the matters raised by the Prosecution in the Appeal, to wit, the effect of the Accused's political participation on victims and witnesses, delegation of judicial powers, and equality of arms.[28]

10. Therefore, the Appeals Chamber grants the Motion to Strike and strikes the Defence Letter and UNMIK Submissions from the Appeals Record.

## II. FACTUAL BACKGROUND

### A. Ramush Haradinaj

11. The Accused, an alleged former commander of the Kosovo Liberation Army ("KLA"), is charged under Article 7(1) of the Statute of the Tribunal ("Statute") with 17 counts of crimes against humanity and under Articles 3 and 5 of the Statute with 20 counts of violations of the laws or customs of war.[29] In recent years, he has become one of Kosovo's leading politicians. He is president of the Alliance for the Future of Kosovo, one of the country's main political parties. On 3 December 2004, he was elected Prime Minister of Kosovo by the Kosovo Assembly.[30]

12. The Accused discovered the existence of the Tribunal indictment against him on 8 March 2005. That day, he resigned as Prime Minister and announced that he would surrender himself to the Tribunal.[31] While claiming his innocence, calling the Tribunal "a great mistake" and saying he was offended with the "process" and considered international justice to be "unjust [...] at the moment", he also said he trusted that the Tribunal would verify that he did not commit the crimes accused of, and called on his countrymen to "accept" the process.[32] The next day, the Accused left Kosovo and surrendered to the Tribunal.[33]

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[26] *Ibid.*
[27] *See* Rule 89(C) of the Rules ("A Chamber may admit any relevant evidence [...].").
[28] *See* Appeal, para. 2.
[29] *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-I, Indictment, 4 March 2005, *passim*.
[30] Original Provisional Release Decision, para. 30.
[31] *Ibid.*, para. 31.
[32] Prime Minister Haradinaj's Press Conference Statement, 8 March 2005, attached to Original Defence Motion.
[33] Original Provisional Release Decision, para. 32.

13. After the Original Provisional Release Decision on 6 June, the Accused was released. Between then and the time of the Re-assessment Decision, the Accused was in full substantive compliance with the conditions of the original decision. Between the Re-assessment Decision and the Stay, the Accused issued a press release and had one conversation with Ibrahim Rugova, the late President of Kosovo and a member of the Accused's political party; the contents were inoffensive.[34]

### B. UNMIK

14. UNMIK was established pursuant to Security Council Resolution 1244 of 10 June 1999.[35] The Security Council authorized the Secretary-General to "establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo [to] provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions".[36] UNMIK "is entrusted with ensuring public safety, and conducting border monitoring, and is given the necessary means to enforce such duties".[37] It is required by its founding Resolution to cooperate fully with the Tribunal.[38]

15. On previous occasions where indictees have sought to be released to Kosovo, the Tribunal has looked to UNMIK to provide the necessary guarantees that the accused will be arrested if he or she tries to flee.[39]

### C. The two provisional release decisions

16. In the Original Provisional Release Decision of 6 June, the Trial Chamber unanimously ordered the release of the Accused under a number of conditions.[40] Most of the conditions were standard conditions of the type that feature in many other provisional release decisions: for example, the Accused had to remain within a fixed geographical area, he could not discuss his case with anyone, and he could not hold government position. But some of the conditions were unique to this case. First was the involvement of UNMIK: the Trial Chamber ordered the Accused to report regularly to UNMIK, to inform UNMIK whenever he intended to travel, and to comply strictly with

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[34] *See* Response, Annex A (Statements by Ramush Haradinaj of 13 October 2005 and 14 October 2005).
[35] S.C. Res. 1244, UN SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (1999).
[36] *Ibid.*, para. 10.
[37] *Prosecutor v. Limaj et al.*, case No. IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003 ("*Limaj* Decision"), para. 25.
[38] *See* S.C. Res. 1244, UN SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (1999), para. 14.
[39] *See, e.g.*, *Limaj* Decision, para. 25.(recognizing that UNMIK is the appropriate authority to look to in Kosovo); *Prosecutor v. Šešelj*, Case No. IT-03-67-PT, Decision on Defence Motion for Provisional Release, 23 July 2004, para. 7 ("[T]he Tribunal has not got its own law enforcement mechanisms and is dependant (*sic*) on the effective cooperation and support of governments and agencies of States.").
[40] See Original Provisional Release Decision, para. 53, for a full list of the conditions.

any instructions emanating from UNMIK.[41] Conversely, the Chamber ordered UNMIK to monitor the Accused and report biweekly to the Chamber on his compliance.[42]

17. Second, it forbade the Accused from "mak[ing] any public appearance or in any way get[ting] involved in any public political activity" for 90 days.[43] He would however be allowed to "take up administrative or organisational activities in his capacity as President of the Alliance for the Future of Kosovo".[44] After 90 days, if the Defence requested, the Trial Chamber would re-assess this condition "on the basis of experience gained and after hearing the Prosecution and UNMIK".[45] The Prosecution never appealed this ruling.

18. On August 15, as noted above, the Defence moved to re-assess the conditions, and on October 12, about a month after the 90-day period ended, the Trial Chamber delivered the Re-assessment Decision.

19. By majority, over the dissent of Presiding Judge Agius, the Trial Chamber made a significant change to its original decision. It allowed the Accused to "appear in public and engage in public political activities to the extent which UNMIK finds would be important for a positive development of the political and security situation in Kosovo, subject to the prior approval by UNMIK".[46] In parallel, it charged UNMIK with even more responsibility than the mission had received under the first decision, though the Trial Chamber continued to require only biweekly reports.[47]

## III. THE LAW OF PROVISIONAL RELEASE

20. Under Rule 65(B) of the Rules, a Trial Chamber may order the provisional release of an accused "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".[48]

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[41] *Ibid.*, para 53.6.
[42] *Ibid.*, para. 54.
[43] *Ibid.*, para. 53.5.
[44] *Ibid.*
[45] *Ibid.*
[46] Re-assessment Decision, p.6.
[47] *Ibid.* The Trial Chamber also ruled unanimously that the Accused would have to remain limited to the geographical area set out in the original decision. *Ibid.*
[48] Rule 65(B).

### A. Standard of Review

21. The Trial Chamber's decision on provisional release is a discretionary one, so the Appeals Chamber, on review, must ask not whether it agrees with the decision but whether the Trial Chamber "correctly exercised its discretion in reaching that opinion".[49]

22. The party challenging a provisional release decision bears the burden of showing that the Trial Chamber committed a "discernible error".[50] In order to do so, it must show either that the Trial Chamber (1) "misdirected itself [...] as to the principle to be applied"; (2) misdirected itself "as to the law which is relevant to the exercise of discretion"; (3) "gave weight to extraneous or irrelevant considerations"; (4) "failed to give weight or sufficient weight to relevant considerations"; (5) "made an error as to the facts upon which it has exercised its discretion";[51] or (6) rendered a decision "so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly".[52]

23. The Appeals Chamber has also ruled that a Trial Chamber must provide a reasoned opinion in rendering a decision on provisional release.[53] The Trial Chamber must therefore "indicate all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision", in light of circumstances obtaining both at the time of the provisional release decision and "at the time the case is due for trial and the accused is expected to return to the International Tribunal".[54]

### B. Modified Conditions

24. This Decision deals with a modified provisional release. Trial chambers have considered requests to modify the terms of provisional release on a number of occasions. Most of these requests have been for minimal changes; the Trial Chambers have approved some[55] but not all[56] of

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[49] *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Rule 65 Decision"), para. 6, quoting *Prosecutor v. Milošević*, Case Nos IT-99-37-AR73, IT-01-50-AR73 and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Decision on Joinder"), paras 3-4.

[50] *Ibid.*

[51] To warrant reversal, such an error of fact must be "patently incorrect". *Ibid.*, quoting *Milošević* Decision on Joinder, para. 10.

[52] *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005 ("*Tolimir* Decision"), para. 4.

[53] *See, e.g.*, *Stanišić* Rule 65 Decision, para. 8.

[54] *Ibid.*

[55] *See, e.g.*, *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision Granting Momčilo Perišić's Motion to Modify Conditions of Provisional Release, 19 October 2005 ("*Perišić* Modification Decision"), para. 5 (granting accused permission to visit family and family graves, and assist his sick brother); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision to Grant Accused Slobodan Praljak's Supplemental Application for Variation of Conditions of Provisional Release, 14 October 2005, p. 3 (granting accused permission to visit dental clinic).

them. These decisions hold no precedential value, but it is worth noting that Trial Chambers tend to allow modification for humanitarian grounds[57] and tend to refuse them where the accused presents no new evidence to show that circumstances have changed.[58] The Appeals Chamber has only ever ruled on one application to modify a provisional release: it turned down the request because the accused had not made a Rule 115 Motion to admit new evidence, without reaching the merits.[59] This Appeal is thus, in some respects, an issue of first impression before the Appeals Chamber. The Trial Chamber's action was itself unusual: in the Original Provisional Release Decision, it explicitly said it would reassess its decision after 90 days, if so requested by the Defence.[60] As far as the Appeals Chamber is aware—and neither party has adduced any applicable precedent showing otherwise—this is the first time a Trial Chamber has expressly contemplated modifying its decision.[61]

25. In this case, the fact that there have been two decisions granting provisional release creates an additional point of subtlety. The Prosecution never appealed against the original decision, only the decision modifying the terms of release. Therefore, this review is limited to the second decision and to deciding whether or not the Trial Chamber erred in allowing the Accused to "appear in public and engage in public political activities to the extent which UNMIK finds would be important for a positive development of the political and security situation in Kosovo", and in requiring "UNMIK to assume responsibility to authorise or deny the Accused's above-referred activities on a case-by-case basis, [to] include any such activities in the bi-weekly reports submitted to the Trial Chamber [and to] indicate any [...] future activity of the Accused".[62] Regardless of the decision today, the Accused will remain on provisional release, at the very least according to the terms of the Original Provisional Release Decision.

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[56] *See, e.g., Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Decision on Slobodan Praljak's Urgent Application for Variation of Conditions of Provisional Release, 3 August 2005, p.3 (refusing accused permission to attend ceremony marking tenth anniversary of liberation of Knin); *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT, Decision on Defendant Dušan Fuštar's Emergency Motion to Modify the Trial Chamber's Decision of 11 July 2003 Pertaining to the Terms of his Temporary Provisional Release, 16 July 2003, p. 2 (refusing accused permission to increase the length of his release in order to rest and accommodate the schedule of another person); *Prosecutor v. Gruban*, Case No. IT-02-65-PT, Decision on Second Defence Application for Variation of Conditions on Provisional Release, 22 May 2003 ("*Gruban* Variation Decision"), p. 3 (refusing accused permission to change residence from Serbia to Republika Srpska because the Trial Chamber already knew about his family situation, and the accused had not demonstrated that his presence in the area where crimes had been committed would not pose a danger to victims and witnesses).

[57] *See, e.g., Perišić* Modification Decision.

[58] *See, e.g., Gruban* Variation Decision.

[59] *See Prosecutor v. Šainović & Ojdanić*, Case No. IT-99-37-AR65, Decision on Motion for Modification of Decision on Provisional Release and Motion to Admit Additional Evidence, 12 December 2002, pp. 3-4.

[60] Original Provisional Release Decision, para. 53.5.

[61] The Appeals Chamber expresses this as an observation, not as a criticism of the Trial Chamber. The Trial Chamber is supposed to remain apprised of the behaviour of the accused when on provisional release, and be prepared to modify conditions if necessary. *See, e.g.*, Rule 65(H) (allowing the Trial Chamber to issue a warrant of arrest for an accused who has been released under Rule 65). In practice, trial chambers have on numerous occasions modified conditions of

# IV. PARTY SUBMISSIONS AND DISCUSSION

26. As noted above, Rule 65(B) sets out three conditions that must be met before an accused may be provisionally released: the host country and receiving state must receive the opportunity to be heard; there must be a convincing showing that the Accused will appear at trial; and there must be a convincing showing that the Accused, if released, "will not pose a danger to any victim, witness or other person".[63]

27. The Prosecution challenges the Trial Chamber's assessment of the third plank, claiming that there has not been a convincing showing that the Accused will pose no danger, because, it claims, the Chamber gave too much weight to UNMIK and too little weight to the concerns of victims and witnesses.[64]

28. It also challenges the ruling on two other grounds: the conditions of the Re-assessment Decision constitute an impermissible delegation to UNMIK;[65] and the conditions deny the Prosecution equality of arms.[66]

## A. Improper balancing

### 1. Party submissions

29. The Prosecution contends that the Trial Chamber improperly balanced "the political rights of the Accused against the concerns of victims and witnesses" by giving too much weight to UNMIK's views and too little to the concerns of victims and witnesses.[67] It argues that the Trial Chamber "paid little or no regard to the very real likelihood that the Accused's public appearances and engagement in political activities will have a very intimidating effect on victims and witnesses [and did not properly consider] the actual and likely effects on the victims and witnesses".[68] It claims the Trial Chamber, while referring to UNMIK's views, "simply did not refer to or discuss the effect on victims and witnesses despite the Prosecution's detailed and compelling submission".[69]

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provisional release. If a Trial Chamber wishes to formalise its ability and intent to do so if conditions warrant, so much the better.

[62] Re-assessment Decision, p. 6.
[63] Rule 65(B).
[64] Appeal, paras 11 *et seq.*
[65] *Ibid.*, paras 33 *et seq.*
[66] *Ibid.*, paras 49 *et seq.*
[67] *Ibid.*, para. 11.
[68] *Ibid.*, para. 17.
[69] *Ibid.*, para. 18.

30. The Prosecution sees three negative effects from this alleged improper weighing. First, "[c]onstantly seeing the Accused appear in the media will no doubt have a chilling effect on victims and witnesses, [who] could well gain the following impression: that power still resides in the hands of the Accused".[70] Victims and witnesses will feel "that their interests have [not] been taken into account when they [...] see that Accused (*sic*) has re-appeared at the forefront to (*sic*) the political scene".[71] Further, "the Accused's supporters will feel emboldened by the re-appearance of their leader and [...] this might encourage them to threaten or intimidate the victims and witnesses".[72] Even though UNMIK must authorise public statements, the Prosecution contends that "[t]here will always be a risk that the interests of victims and witnesses are harmed during one of the Accused's public appearances and political speeches and [...] it will be too late for the Trial Chamber to react".[73] As to concrete examples, it refers to details provided in its responses to the Defence's motions for provisional release and for re-assessment of the conditions,[74] and to its Rule 115 Motion.

31. Second, the Prosecution argues that the Decision will dissuade some witnesses from testifying before the Tribunal or aiding the Prosecution in its investigations.[75]

32. Third, the Prosecution argues that the "*carte blanche*" granted the Accused to engage in politics will "greatly undermine the authority of the Tribunal and its function to assist in the restoration and maintenance of peace in the region".[76] There is a clear pattern "that political activity and public appearances are inconsistent with being a war crime indictee".[77] It fears that other parties in the region could demand the same conditions for their leaders,[78] and that the Decision "creates an impression of unfairness to citizens" in the rest of the region.[79] Indeed, it argues that the Decision "has been perceived as constituting a preferential treatment to an Accused from one specific ethnic group and not to others".[80] In short, according to the Prosecution, the Tribunal appears to be applying double standards.[81]

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[70] *Ibid.*, paras 22-23.
[71] Reply, para. 10.
[72] *Ibid.*
[73] *Ibid.*, paras 12-13.
[74] *See ibid.*, fn. 37 (referring ultimately to Re-assessment Response, paras 23-29); *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Prosecution's Response to Defence Motion on Behalf of Ramush Haradinaj for Provisional Release, 5 May 2005 ("Original Response"), paras 23-36, 39. Because the Appeals Chamber rejected the Rule 115 Motion, *see* Rule 115 Decision, para. 102, none of that evidence will be considered in this Decision.
[75] Appeal, para. 23.
[76] *Ibid.*, para. 25.
[77] Reply, para. 7.
[78] Appeal, para. 27.
[79] *Ibid.*, para. 28.
[80] Reply, para. 4.
[81] Appeal, para. 29.

33. The Defence responds that the Chamber indeed took account of and weighed the interests of witnesses through receiving UNMIK's views, assessing the Accused's conduct and granting protective measures to some witnesses.[82] It says the Trial Chamber considered all the Prosecution's evidence in the Original Provisional Release Decision and found then that there was no evidence linking the Accused to any incident of witness interference; the Prosecution, the Defence argues, has raised no new evidence since then.

34. The Defence submits that the Chamber did not give too much weight to UNMIK, but that it was correct to seek the views of UNMIK, which is responsible "for maintaining peace, stability, and public order in Kosovo".[83] It contends that the Prosecution's problem is that it "does not agree with the views expressed by UNMIK",[84] which is not a proper basis for reversal.

35. As to the purported negative effects, the Defence argues that the Prosecution has not shown that the Accused "poses any concrete danger to any victim or witness in this case on account of his provisional release or future participation in certain political activities".[85] It says that the Appeals Chamber's decision in *Prosecutor v. Stanišić* establishes that the Prosecution, to prevent provisional release on the ground of danger to witnesses, must present evidence showing "a concrete risk of harm [by showing that the Accused] has influenced or threatened [witnesses] in the past or intends to do so in the future".[86] It contends that the Prosecution has "been unable to demonstrate that [the Accused] has or will endanger witnesses", relying only on "generalized statements about its concerns for witnesses".[87] Therefore, the Trial Chamber "cannot be criticized for not giving sufficient weight to the interests of victims and witnesses" because it has received "no evidence of any concrete danger to them" from the Prosecution.[88] Mere generalized concern, it says, is not enough.[89]

36. Furthermore, the Defence says it is illogical to argue that the Accused's participation in politics endangers witnesses when his actual release and remaining as president of his party does not do so.[90]

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[82] Response, para. 41.
[83] *Ibid.*, para. 51.
[84] *Ibid.*, para. 52.
[85] *Ibid.*, para. 18.
[86] *Ibid.*, quoting *Stanišić* Rule 65 Decision, para. 27.
[87] *Ibid.*, para. 43.
[88] *Ibid.*, para. 44.
[89] *Ibid.*, para. 45.
[90] *Ibid.*, para. 47.

37. As to the potential failure of witnesses to come forward, the Defence says it is equally illogical to argue that the Accused's participation in politics would make them unwilling to testify when his actual release and remaining as president of his party does not do so.[91]

38. With regards to the purported double standards and undermining of authority, the Defence argues that the Prosecution has not identified a case in which a provisionally released indictee "has sought to participate in political activities and been denied".[92] Furthermore, it argues that "each case must be judged on its own merits and particular facts; the fact that one accused may not have been permitted to participate in political activities does not mean the same should apply for all other accused".[93]

39. Finally, it argues that the Accused has not received "*carte blanche*", and there are significant restrictions on his ability to participate in politics, including the control of UNMIK and the supervision of the Trial Chamber.[94]

## 2. Discussion

### (a) Separating the decisions

40. It should be noted once again that today's decision deals only with the Re-assessment Decision, not the Original Provisional Release Decision. Therefore, the Appeals Chamber must ask only whether the Trial Chamber erred with regards to the evidence presented in allowing the Accused greater participation in political activity.[95] The question facing the Appeals Chamber is thus: did the Trial Chamber correctly exercise its discretion in concluding that the evidence justified greater political freedom for the Accused?

### (b) Legal standards to apply

41. In applications for provisional release, the burden is on the Defence to show that the Accused will not pose a danger.[96] However, in the past the Appeals Chamber has demanded that the Prosecution present at least *some* evidence that the Accused poses a danger, at which stage the burden is on the Defence to refute it.[97] Here, the Trial Chamber found that the Prosecution presented no credible evidence showing that either the Accused's provisional release or his

[91] *Ibid.*
[92] Response, para. 12.
[93] *Ibid.*
[94] *Ibid.*, paras 21-25.
[95] However, the Appeals Chamber also feels that the Trial Chamber did not abuse its discretion in ordering the release in the Original Provisional Release Decision.
[96] *See Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, 1 November 2005, paras 3, 11.

involvement in politics would cause a danger, so there was little the Defence could do except present "character references", which it did amply.[98]

(c) The Trial Chamber's weighing in the Re-assessment Decision

42. It should be noted that, as the Prosecution did not appeal the Original Provisional Release Decision, it waived its rights to challenge its provisions before the Appeals Chamber. What the Appeals Chamber must assess is whether the Trial Chamber failed to give enough weight to evidence about witness concerns in the Re-assessment Decision. The Prosecution correctly submits that the Trial Chamber said nothing in the Re-assessment Decision about the effects on witnesses. Therefore, the question arises whether the Prosecution presented any new evidence that the Trial Chamber should have discussed.

43. The Defence contends that the Prosecution presented no new relevant evidence between the two decisions. The Appeals Chamber agrees. Before making the Re-assessment Decision, the Chamber had only one new Prosecution submission to work with: the Re-assessment Response. Much of that recapitulated what the Prosecution had said before. The only new evidence was an UNMIK Report detailing the Accused's minor violation of his conditions of release;[99] a short news item where the head of the so-called "Ethnic Relations Forum" called the Accused's request to take part in politics "the most radical negative assessment of the situation in the province";[100] and an article from a Kosovar newspaper presenting the facts of the case fairly neutrally.[101] None of that amounts to evidence that allowing greater political participation would constitute harm or a concrete threat to witnesses or victims. Therefore, the Trial Chamber did not err in not discussing what the new evidence showed about the effect on victims, as the evidence showed nothing.

44. Furthermore, the Prosecution did not tender any evidence to show that the Accused's provisional release *plus his political participation* would cause a danger to victims and witnesses. Consequently, the Trial Chamber did not fail to give enough weight to evidence about witness concerns in the Re-assessment Decision.

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[97] *See, e.g., Stanišić* Rule 65 Decision, para. 27 (demanding that the Prosecution provide evidence of "concrete risk").
[98] *See* Provisional Release Motion, Re-assessment Motion.
[99] Re-assessment Response, Annex A.
[100] *Ibid.*, Annex B.
[101] *Ibid.*, Annex D. The main body of the Re-assessment Response contains only four paragraphs addressing the effect on victims and witnesses. *See ibid.*, paras 23-26. The Appeals Chamber notes also that despite the Prosecution's protestations, before it submitted the Rule 115 Motion, which is inadmissible in any event, it had not given a single concrete example of witness intimidation in this case. Even the examples adduced with the Rule 115 motion, while they do discuss intimidation of witnesses in this case, show only a tenuous link to the Accused. *Cf.* Rule 115 Decision, paras 70-79. A showing that a witness in a case has been intimidated does not equate to a showing that the Accused in that case did the intimidating.

(d) Were there patently incorrect errors of fact?

45. As shown, there was no incorrect weighing. Now the Appeals Chamber inquires whether the Trial Chamber committed a discernible error by making a "patently incorrect" error of fact.[102] As will be shown below, all the errors of fact alleged by the Prosecution[103] involve predictions of likely effects.

(i) Psychological effect on witnesses

46. The Prosecution contends that the Accused's return to politics will make witnesses feel that he remains powerful and that they are not cared about by the Tribunal. The Prosecution did not actually produce any evidence showing such an effect. And even if it had, that would not be enough to invalidate the Re-assessment Decision. Subjective witness fear and concern is not *per se* a reason to refuse provisional release.[104] If it were, it is doubtful that provisional release would ever be granted. The Accused is being judged here: his conduct, past and future, is at issue, not other people's perceptions of that conduct.

47. The better way to alleviate witness fear is through protective measures. The Prosecution can seek such measures for witnesses, and the Trial Chamber has indeed granted such measures in this case.[105]

(ii) Harm to witnesses through political activities

48. The Prosecution argues that the Accused's pre-approved public statements will pose harm to witnesses. Certainly, the Accused could get up in public and offer a public reward for anyone who silences a potential witness against him. But such a statement does not square with the Accused's conduct up to this point.

49. The Prosecution claims also that the Tribunal is "the only institution that can protect [victims and witnesses]".[106] The Appeals Chamber disagrees. UNMIK and KFOR also protect witnesses and they have the physical and legal power to ensure that the Tribunal's decisions, such as arrest warrants, are implemented.

(iii) Witness refusal to testify

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[102] *See supra* para. 22 & fn. 52.
[103] *See infra* paras 46-52.
[104] Appeals Chamber jurisprudence makes clear that there needs to be some evidence of concrete interference with witnesses or victims by the Accused. *See, e.g., Stanišić* Rule 65 Decision, para. 27.
[105] *See Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Prosecutor's Application for Pre-trial Protective Measures for Witnesses, 20 May 2005.
[106] Appeal, para. 27.

50. The Prosecution further contends that the Accused's participation in political activity will actually prevent people from coming forward or testifying. The Prosecution has not presented evidence supporting such an allegation. If witnesses are in fact not testifying, the Prosecution can ask the Trial Chamber to reconsider its decision, grant more protective measures, or use the coercive powers of the Tribunal to force them to testify. But the Appeals Chamber cannot overturn the Trial Chamber on the basis of some vague unarticulated suspicion for the future. When deciding on provisional release the Accused's conduct, past and likely, is the key issue, not the possible, unproven effects of a decision.

(iv) Reputation and double standards

51. As to the Prosecution's arguments about the reputation of the Tribunal and the perception of double standards, the Appeals Chamber agrees that all should act on a basis that is worthy of respect; the best way to do that, though, is by applying the law in a reasoned and just fashion. The Appeals Chamber needs to ensure that trial chambers analyse the facts correctly and apply the proper law. The Prosecution has not demonstrated that concerns about the reputation of the Tribunal rendered the analysis of the facts by the Trial Chamber erroneous.

52. Further, and despite the Prosecution's contentions, the fact that other political indictees have not been allowed to take part in politics means very little for the case of the Accused. The Prosecution itself agrees that cases involving those indictees were factually different.[107] And the Appeals Chamber agrees with the Defence's contention that each case must "be judged on its own merits and particular facts".[108] That is a basic principle of justice and international law, one that the Appeals Chamber applies with regularity.[109]

(v) Restricted involvement in politics

53. As to the nature of the restrictions on the Accused's role in politics, the Appeals Chamber notes that neither Prosecution nor Defence arguments backed by evidence raise the issue whether the Accused's political involvement should be restricted at all. The Appeals Chamber will not address this issue.

3. Conclusion

54. Therefore, the Appeals Chamber finds that the Trial Chamber neither gave too much weight to the wrong factors nor neglected to weigh the right factors when making its decision under Rule

[107] Reply, para. 7.
[108] Response, para. 12.
[109] *See Stanišić* Rule 65 Decision, para. 8.

65(B). Furthermore, after considering the factors, the Trial Chamber made no patently incorrect errors of fact, and no errors of law have been brought to the Appeals Chamber's attention. Therefore, the first ground of the Appeal is dismissed.

## B. Delegation to UNMIK

55. The previous head dealt with whether the Trial Chamber erred in allowing the Accused to participate in limited public political activity. This head questions whether the intimate involvement of UNMIK in the Accused's provisional release regime is proper, that is, whether the Trial Chamber had the power to thus involve UNMIK or whether the involvement constitutes an impermissible delegation of judicial powers.

56. Because only the Re-assessment Decision is being appealed, the Prosecution cannot challenge the provisions involving UNMIK imposed in the Original Provisional Release Decision. Under that Decision, the Accused was to report to UNMIK 24 hours before he intended moving; he had to surrender his passport to UNMIK; he had to report once a week to UNMIK; he had to comply strictly with any instructions from UNMIK; UNMIK had to provide for the Accused's safety and security; it had to facilitate communication between the Trial Chamber and the Accused; it had to monitor his presence and submit a biweekly report on his compliance with the Decision; it had to arrest and detain him if he broke any conditions; and it had to immediately inform the Chamber of any changes to its mandate.[110]

### 1. Party submissions

57. The Prosecution contends that in involving UNMIK so intimately, the Trial Chamber impermissibly abdicated its role. It believes UNMIK is the wrong body to interpret the scope of the Accused's right to be politically active. Only "an organ offering guarantees of impartiality and independence" can interpret that scope and "adjudicate on a case-by-case basis on the requests of the Accused to interpret the conditions of his political release".[111] The Tribunal, it says, is such a body, but UNMIK, "as Kosovo's governing authority[,] has a political agenda and therefore cannot claim to be completely independent and impartial".[112] It argues that a decision on the Accused's requests to appear in public or participate in political activities is a judicial function, not an

[110] Original Provisional Release Decision, paras 53-54.
[111] Appeal, para. 38.
[112] *Ibid.*

administrative one.[113] Because of the close relationship UNMIK has with the Accused, the Prosecution does not think that UNMIK will be fair and impartial.[114]

58. Second, it claims that the delegation lacks sound criteria. It states that the International Convention on Civil and Political Rights says the right to freedom of expression can be circumscribed by "certain restrictions as provided by law".[115] However, claims the Prosecution, in allowing UNMIK to decide whether or not to authorize political activities to the extent it considers them important for Kosovo's development, the Trial Chamber has delegated power to UNMIK "on the basis of a criterion that does not accord with the precise standards established in international human rights conventions".[116] Also, because of the fluidity of political activity, it will be impossible, even with the best will, for the Accused to specify in his requests to UNMIK exactly what he will do and what will eventuate.[117]

59. Finally, the Prosecution contends that the Trial Chamber has acted *ultra vires* in delegating judicial functions and powers to a body not authorized by the Security Council to exert those functions.[118] Those functions, argues the Prosecution, include authorizing or denying requests by the Accused to appear in public without seeking prior approval from the Trial Chamber.[119] It argues that the requirement that UNMIK report regularly to the Trial Chamber does not retain power within the Chamber, because it will only be able to review past actions, at which stage "irreparable damage may already have been done".[120]

60. Consequently, the Prosecution argues that the Trial Chamber made an error of law by delegating to UNMIK the power to make decision on the Accused's requests.

61. The Defence responds that the involvement of UNMIK is not a delegation of judicial authority. First, the Defence argues, Article 29 of the Statute empowers the Tribunal to require States and international organisations comprised of states to "take steps to implement its orders and decisions".[121] UNMIK, as the authority entrusted with charge of Kosovo by the Security Council, is

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[113] Reply, paras 14, 16.
[114] *Ibid.*, para. 15.
[115] Appeal, para. 39.
[116] *Ibid.*, para. 40.
[117] Reply, paras 12, 38.
[118] *Ibid.*, para. 41.
[119] *Ibid.*, para. 43.
[120] *Ibid.*, paras 44, 46. UNMIK also has to report on any requests relating to the future from the Accused, but the Prosecution thinks this is meaningless as the Accused could "easily time his requests so as to thwart the Trial Chamber's monitoring". *Ibid.*, para. 45
[121] Response, para. 28. It is not clear where the reference to international organisations comes from: it does not appear in the Statute, and the Defence provides no other source.

the equivalent of a State, so should be treated as one.[122] Also, under the UN Security Council mandate in Resolution 1244, UNMIK has to do what the Tribunal tells it to.[123] Second, it argues that the Tribunal has decided "the judicial question" of whether to allow the Accused to participate in politics while on release; UNMIK will merely act "to ensure that this judicial decision is given practical effect and that all of the Trial Chamber's conditions are complied with".[124] It argues that the Accused and UNMIK set up an "elaborate and thorough reporting and monitoring system" after the first decision; UNMIK has submitted its biweekly reports regularly and there have been no problems or incidents.[125] Third, it argues that UNMIK already has responsibility to ensure compliance with the (unchallenged) Original Provisional Release Decision, which includes ensuring that the Accused has no contact and does not interfere with victims and witnesses; there is little difference between that and overseeing the Accused's political activities.[126] UNMIK, it argues, has shown its trustworthiness and "will not permit the Accused to make speeches designed to inspire persons to harm witnesses".[127] Finally, it says the Trial Chamber is still in charge and can intervene at any point to change the conditions of the Accused's release.[128]

62. On the grounds of criteria, the Defence argues first that deciding whether a particular political activity would be important to Kosovo's development is a viable criterion.[129] Second, it says the reference to international human rights conventions is wrongheaded, because those are concerned with putting overly great restrictions on freedom of expression and individual liberty, whereas here the Prosecution uses those precedents to say that the restrictions are too lax.[130] Third, it says UNMIK is the right party to determine this criterion, given its superior knowledge of the Kosovar situation.[131]

63. Therefore, the Defence contends that the Trial Chamber did not err at law in allowing UNMIK to grant or refuse the Accused's requests.

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[122] *Ibid.*, para. 30. The Defence also argues, echoing the Trial Chamber in the Original Provisional Release Decision, that UNMIK is actually more trustworthy than the state of Kosovo would be because the Accused was Kosovo's prime minister, and so could influence that government strongly, whereas UNMIK, as a UN body, is not beholden to him. *Ibid.*, para. 64.
[123] *Ibid.*, para. 58.
[124] *Ibid.*, para. 31. The Defence also notes that UNMIK has provided full guarantees in respect to the Accused, the first time it has done so. *Ibid.*, para. 36.
[125] *Ibid.*, para. 36; *see also ibid.*, para. 59.
[126] *Ibid.*, para. 60.
[127] *Ibid.*, para. 69.
[128] *Ibid.*, para. 31.
[129] *Ibid.*, para. 61.
[130] *Ibid.*, para. 62.
[131] *Ibid.*, para. 63

2. Discussion

(a) The precedent and essentiality of delegation

64. There do not seem to be any cases before the international courts where one party has challenged a court's direction or grant of power to a nonjudicial body. However, the situation does occasionally arise under municipal law. In the United States, for example, the Supreme Court has held that only courts can exercise essential judicial functions,[132] but those cases generally involve Congress giving judicial power to an agency, not the courts' handing over power themselves. When the Tribunal wants somebody held in prison, it gives the Dutch or other national authorities the power to implement that decision. This type of delegation is a necessary consequence of most judicial systems, municipal and international. Few courts employ executive officers to perform such vital ancillary functions as arrest people, hold them in jail, monitor their movements, and so forth. As the Defence points out, the Tribunal has no forces on the ground, so must rely on others to do work essential to its mission.[133] But the Tribunal is only a particular example of the general case.

65. Therefore, without some delegation, courts could not function. The next section inquires what law and what principles specifically allow the Tribunal to delegate functions, require other bodies to comply with that delegation, and limit the exercise of delegation.

(b) Principles allowing delegation

(i) Security Council Resolutions

66. Tribunal-related United Nations Security Council Resolutions provide some indication that delegation is permitted. On at least two occasions, the Security Council has told other bodies to "cooperate fully" with the Tribunal: in Resolution 827, which established the Tribunal and adopted the Statute, it commanded "all States" to do so;[134] and in Resolution 1244, which established UNMIK, it demanded the same from UNMIK (and "all concerned", which presumably includes all member States of the United Nations).[135] These resolutions, with their implicit emphasis on meeting obligations to the Tribunal, suggest that the Security Council thought the Tribunal might let States and UNMIK perform certain important functions on its behalf.

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[132] *See, e.g*, Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982) (holding that bankruptcy laws cannot be adjudicated by those not holding the full attributes of judges); CTFC v. Schor, 478 U.S. 833 (1986).
[133] Response, para. 29. *See also Prosecutor v. Milutinović et al*, Case No. IT-05-87-PT, Decision on Sreten Lukić's Provisional Release, 3 October 2005, pp. 10-11 (ordering an accused to be released into the custody and supervision of a "designated official of the government of Serbia and Montenegro", and ordering the government to designate such an official).
[134] S.C. Res. 827, UN SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993). That command was repeated in Article 29 of the Statute.
[135] S.C. Res. 1244, UN SCOR, 4011th mtg., U.N. Doc. S/RES/1244 (1999).

(ii) Inherent Power of the Tribunal

67. The Appeals Chamber also considers that the Tribunal's inherent power allows it to delegate certain functions. The Tribunal has broad inherent power to take the steps necessary to carry out its mission; the breadth of this power can be seen from the fact that it provides the sole basis for contempt prosecutions.[136] If the inherent power is broad enough to allow contempt prosecutions even though contempt is never mentioned in the Statute, then this power must also be broad enough to allow some delegation, though delegation is not explicitly mentioned in the Statute. Indeed, some amount of delegation is as crucial to the Tribunal's ability to carry out its mission as is its ability to punish contempt; delegation is in fact probably more crucial. Hence, the Tribunal's inherent power provides a basis for it to delegate certain functions where necessary.

(iii) Statute of the Tribunal

68. The Statute of the Tribunal and the Rules of Procedure and Evidence do not explicitly mention delegation, but they discuss the responsibilities and functions of the Tribunal, and allow delegation of certain functions under certain circumstances.

69. The Prosecution discusses only one Article of the Statute, Article 20(2), identifying it as a brake on delegation. The Article says a person who has been indicted shall "be taken into custody [...] and transferred to the International Tribunal" once the Tribunal has issued an order or arrest warrant.[137] The Prosecution interprets that to mean that once an accused has been taken into the custody of the Tribunal, "from that point onwards the question of his release or continued detention falls within the judicial powers of [the] Tribunal".[138] But the Appeals Chamber considers that Article does not lend itself to such expansive interpretation as the Prosecution may wish. The Tribunal unquestionably has power over an indictee in custody, but nothing in the Article suggests that power is exclusive. Indeed, other parts of the Statute and the Rules lead to the opposite conclusion.

70. Article 9, for example, says the Tribunal and national courts "shall have concurrent jurisdiction to prosecute persons" for violations of international law in the former Yugoslavia.[139] The Tribunal has primacy over national courts, and "at any stage of the procedure the [...] Tribunal may formally request national courts to defer to [its] competence".[140] That suggests that the

[136] *See* Rule 77 of the Rules ("The Tribunal *in the exercise of its inherent power* may hold in contempt those who knowingly and willfully interfere with its administration of justice [...].") (emphasis added).
[137] Article 20(2).
[138] Appeal, para. 35.
[139] Article 9(1).
[140] Article 9(2).

Tribunal *can* take over a case from another State, but does not *have to*. "Procedure" is not defined in the Statute, giving rise to two possibilities: the Tribunal can take a case over from a domestic court; or, if the Tribunal has already started judicial action, it can stop States from initiating their own proceedings. However, the Article does not say the Tribunal needs to do this. The Article does seem to indicate that the Tribunal may step aside for a domestic court under certain circumstances.

71. There are also indications that, despite the Prosecution's contention, *arrest* does not vest exclusive power in the Tribunal either. Rule 11*bis* of the Rules of Procedure and Evidence[141] allows the Tribunal to refer a case to another country, even after arrest.[142] The Tribunal does retain some responsibility over the indictee and can, at the request of the Prosecution, demand that the State prosecuting him halt the trial and return the accused to the Tribunal for trial.[143] However, once that State has concluded the trial, as long as the trial was fair, the principle of *ne bis in idem* may prevent the Tribunal from reasserting jurisdiction over the accused.

72. The Appeals Chamber notes that where the Tribunal decides to let a domestic court prosecute a potential or actual indictee, it is not granting such authority to the domestic court; that court will have jurisdiction pursuant to the law of the country in which it is located. However, it can be seen that the Prosecution's contention that the Tribunal has exclusive power over a detainee is incorrect.

73. A clearer example of delegation to States by the Tribunal is found in the rules regarding sentencing, imprisonment and release.

74. Under Article 27 of the Statute and Rule 103 of the Rules, persons convicted of crimes by the Tribunal serve their sentences in States that have agreed to accept Tribunal prisoners. Though the Tribunal "supervise[s]" these sentences,[144] the States determine the conditions under which prisoners are kept. That is a clear delegation of Tribunal power. Similarly, the Tribunal delegates to States the determination about when prisoners will become eligible for early release, as this

[141] Though the Rules are "subject to the Statute" and cannot be inconsistent with it, *see Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Assigned Counsel's Motion for Withdrawal, 7 December 2004, para. 13 & fn. 47, they have no less status as law than the Statute; they were promulgated in accordance with Article 15 of the Statute. *Cf. Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on Miroslav Tadić's Application for Provisional Release, 4 April 2000, p. 8 (finding the 1999 amendment to Rule 65(B) not *ultra vires* and consequently applicable because "it is [*inter alia*] not inconsistent with any provision in the Statute").
[142] Rule 11*bis* of the Rules. The transfer must take place before trial commences. *Ibid.*
[143] Rule 11*bis*(E), (F) of the Rules.
[144] Article 27; Rule 104 of the Rules.

determination is made in accordance with the law of the imprisoning State.[145] Imprisoning States would have no authority at all over Tribunal prisoners absent such a delegation.

75. Further, Article 29 clearly envisions that States will carry out important functions for the Tribunal, including taking testimony, producing evidence, serving documents, arresting and detaining persons, and surrendering them to the Tribunal.[146] Some of these functions entail at least some minimal amount of decision-making by the State providing the assistance. This constitutes further evidence that the Tribunal can let States make less important decisions in the process of implementing the Tribunal's more important decisions.

76. These examples aside, nothing in the Statute or the Rules explicitly puts an absolute brake on what can be delegated. But just because there are no absolute prohibitions on *what* can be delegated, that does not mean there are no absolute prohibitions on *whom* can be delegated to. The Statute and Rules only discuss States and authorities thereof in this regard. UNMIK, though the authority in Kosovo, is not a State, and should be regarded differently from States. Thus, though the Tribunal could, as shown above, give States the power to vary conditions of provisional release, it may not be able to give UNMIK the same power. To determine whether it could or not, the Appeals Chamber thinks two questions need to be answered: how does UNMIK differ from a State?; and given the difference, how should delegation be limited?

(iv) UNMIK vs. States

77. UNMIK is not a State. It has responsibility for civilian administration in Kosovo, but it was set up by the Security Council and is supposed to last only until Kosovo's final status has been determined.[147] The Prosecution contends that UNMIK is too political to act impartially, and intimates that it is biased in favour of the Accused.[148] Against that, the Defence puts up UNMIK's many responsibilities to comply with Tribunal demands. The Defence has the better argument. UNMIK has been scrupulous about its responsibilities under the Original Provisional Release Decision and has shown the Accused no special favours that the Appeals Chamber is aware of.[149]

78. Further, the Defence's point that UNMIK is not a State and therefore is less susceptible to political pressure than might otherwise be the case, is a fair one. It is also worth emphasizing that

[145] Article 28; Rule 123 of the Rules. In addition, where a Trial Chamber is unable to determine the rightful ownership of property that is the subject of a restitution claim, it will ask the competent national authorities to make such a determination. Rule 105(E) of the Rules.
[146] *See* Article 29.
[147] See also Rule 2 of the Rules. The Rule defines "State" for the purposes of the Rules as, *inter alia*, "a self-proclaimed entity *de facto* exercising governmental functions, whether recognized as a State or not". UNMIK exercises most governmental functions, but it is not self-proclaimed, nor does it hold itself out as a State.
[148] *See* Appeal, paras 38-39.

UNMIK, like the Tribunal, is a creature of the Security Council, a sister organisation, so to speak. The Prosecutor and UNMIK may have had their differences, but the Tribunal has no reason to trust UNMIK less than it would a State. Indeed, UNMIK is the administering authority in Kosovo and acts akin to the government in the province.

79. Set against those considerations, as noted above, the Tribunal has not been explicitly authorized to give as much responsibility to UNMIK as it has to States[150] (though it has not been forbidden from doing so either).

80. In sum, there is nothing in UNMIK's make-up or character that would prevent the Tribunal from delegating power to it, but the lack of explicit authorization suggests that the Tribunal should be cautious in such delegation and look at each case on the merits.

(c) Permissibility of the Trial Chamber's Delegation

81. Though delegation is permissible in the abstract, and though UNMIK is similar to a State, that does not mean that every delegation to UNMIK is permissible. However, there are several aspects to the delegation proposed by the Trial Chamber in this instance that render it permissible, when looked at together. First, the decision-making entrusted to UNMIK is not central to the judicial process. Second, UNMIK does not have absolute discretion; the Trial Chamber has established certain criteria that it must follow in making its decision. Third, the Trial Chamber retains supervisory authority over UNMIK and the Accused. Fourth, there are significant practical advantages to letting UNMIK take day-to-day decisions about the Accused's political activities.

82. First, certain decisions are central to the determination of guilt or innocence, or the way a trial is conducted. These decisions should be made by Judges, as they are the people entrusted by the United Nations with conducting trials and making decisions in matters related to an accused's guilt or innocence. Such decisions would include matters relating to the admission of evidence or the acceptance of guilty pleas, for example. However, the decision-making that the Trial Chamber has delegated here is far from central to the judicial process. Indeed, the decisions at issue have no bearing on the Accused's guilt or innocence, or on the manner in which his guilt or innocence will be determined. Such lack of centrality speaks to allowing the delegation.

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[149] *See* Response, paras 26, 59.

[150] There have been times where the Appeals Chamber has refused to let a State be in charge of even the most administrative aspects of provisional release for fear it would not carry out the task properly (through lack of ability, lack of will, or undue influence). *See, e.g., Prosecutor v. Rašević & Todović*, Case No. IT-97-25/1-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todović's Application for Provisional Release, 7 October 2005, paras 11-13; *Prosecutor v. Pandurević & Trbić*, Case No. IT-05-86-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurević's Application for Provisional Release, 3 October 2005, paras 11-13.

83. Second, the Trial Chamber has not given UNMIK unfettered discretion to decide whether the Accused can participate in political activities, but has put certain criteria in place.

84. As a preliminary matter, the Appeals Chamber agrees with the Defence that the Prosecution's use of international human rights treaties and cases is misplaced. As the Defence says, these instruments provide that freedom of expression *can only be curtailed* by restrictions properly codified in law: when restricting a person's freedom of expression, a decision maker cannot assert untrammelled discretion, but must be guided by law. Here, the opposite situation obtains: the question is, how much expression will UNMIK *allow* the Accused?[151] The human rights instruments have nothing to say about the correct criteria to apply in this case, because they start from the position that all expression is allowed unless other circumstances are present; here, the Trial Chamber correctly started from the position that no expression (of the political type, in any event) is allowed, unless other circumstances are present. Therefore, this Prosecution argument is dismissed.

85. Beyond that, the Prosecution appears to believe UNMIK has no criteria at all to guide it. The Defence contends that the Re-assessment Decision does provide a clear criterion: UNMIK can only allow political activity that it finds "would be important for a positive development of the political and security situation in Kosovo".[152] The Appeals Chamber agrees with the Defence that this is not an empty criterion: it would not be difficult to imagine activities that fit squarely on one side of the line or the other. On the other hand, the Appeals Chamber shares the Prosecution's concerns that it is not a very precise criterion: it would be just as easy to imagine activities that straddle the line.[153]

86. Nevertheless, the existence of explicit criteria in the Re-assessment Decision tends slightly towards allowing this delegation. At the very least, it would allow the Prosecution to argue that UNMIK has not based a particular decision on the correct criteria, and for the Trial Chamber to rule on such an argument.

87. Third, the more control the Trial Chamber retains, the more likely it is that the delegation is permissible: if the Chamber is constantly aware of what is happening, and if it is able to assert itself

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[151] It should be noted that before the Re-assessment Decision (and as long as the Stay remains in force), the Accused was and is denied all political expression.
[152] Response, p. 6.
[153] The Defence is correct that UNMIK is better placed than the Tribunal to determine what would be good for Kosovo's development: it has the authority and the experience. But that does not mean it is best placed to decide on particular conditions of provisional release. The Appeals Chamber is minded of Rule 65(C) of the Rules, which says the Trial Chamber may impose such conditions as it considers appropriate, including conditions "to ensure the presence of

or overturn UNMIK, then it has retained most of its judicial power. Two issues need to be explored: the effectiveness of the reporting requirement and the ability of the Trial Chamber to change the conditions if necessary.

88. As far as reporting is concerned, UNMIK has to report to the Trial Chamber every two weeks on the Accused's requests, past and future, and UNMIK's decision about them. The Prosecution thinks irreparable harm can be done in two weeks; the Defence seems unconcerned. Mindful of the fact that a week is a long time in politics, the Appeals Chamber recognizes that it is possible that the Accused can do or say something that endangers others or does not add to progress in Kosovo, and the Trial Chamber will not be made aware of that for 13 days, during which time much indeed can happen.

89. On the other hand, the Accused and UNMIK will be aware that the Trial Chamber will be looking at reports every two weeks, so any attempt to thwart the Tribunal's aims will last at best those two weeks. In other words, the Accused will be aware that a misstep could mean the end of his political career (and liberty) within 14 days, which is *not* a long time in this context. These considerations seem to make the Trial Chamber's control quite real and effective. Further, UNMIK will not be the only set of eyes on the Accused every day: the Prosecution will also be watching. Evidence adduced in its Rule 115 motion demonstrates that the Prosecution has an active, able group of investigators working in Kosovo.[154] The Appeals Chamber has no doubt that those investigators keep themselves very aware of what all those on provisional release are doing, whether UNMIK is involved or not. If they see anything untowards, they surely will let the Trial Chamber know post haste. *That* will also keep the Trial Chamber in charge.

90. The Defence also argues that the Trial Chamber remains in charge and can intervene at any point. This is correct. Though the Re-assessment Decision may be silent on this point, there is absolutely nothing to stop the Trial Chamber from temporarily suspending UNMIK's responsibility, or overturning a grant of permission it has made. The Trial Chamber is free, on the urging of Prosecution or Defence *or acting proprio motu*, to change any or all of the conditions of either decision if it reasonably feels that conditions warrant it. The Trial Chamber has not ceded power; it has merely loaned it, and can take it back at any time. UNMIK's power is thus constrained.

91. Finally, if a result in the interests of justice can only be implemented practically through an external body, that speaks to allowing delegation to achieve that. Section IV(A) demonstrates that the Trial Chamber was not wrong, by the terms of Rule 65 and Appeals Chamber jurisprudence, to

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the accused for trial and the protection of others". Rule 65(C). The Trial Chamber is best able to decide what conditions would lead to that result, given its expertise, experience and commitment to uphold justice.

allow the Accused to take part in some political activity.[155] The Chamber then had to ask how to achieve that result. Without the involvement of UNMIK, it would clearly be impractical: the Trial Chamber has a great many responsibilities and, diligent as it is, would often not be able to respond to the Accused's requests in a timely fashion, nor indeed would the Trial Chamber want to hold a detailed hearing with, the Appeals Chamber is certain, lengthy submission from Prosecution and Defence every two weeks.[156]

92. But it would be patently unfair to the Accused to agree that his request would serve the ends of justice only to deny it on the grounds of impracticality, especially when there are Security Council resolutions explicitly telling UNMIK to cooperate with the Tribunal. Rigid nondelegation would have been impractical; delegation was driven by necessity. Therefore, this factor weighs towards allowing the delegation.

(d) *Ultra Vires*

93. As to the Prosecution's *ultra vires* argument, the Appeals Chamber thinks there is little force to it. Resolution 1244 establishes an extremely broad mandate for UNMIK, including almost all the functions a State normally carries out. Also, the argument of *ultra vires* is properly aimed at the body making the decision, not the body benefiting thereby.[157] And with regard to the Tribunal's powers, while the Statute limits them, the Prosecution has not explained how setting up innovative conditions of provisional release and granting responsibility to a body which can legally exercise that power,[158] exceeds the Tribunal's power.

(e) Reinstatement in politics

94. Both the Prosecution and Judge Agius are concerned that the Re-assessment Decision appears to effect a "*de facto* re-instatement of the Accused in the political scenario and state of affairs of Kosovo".[159] The majority in the Trial Chamber claimed it did not.[160] The Appeals Chamber need not determine whether allowing political activities will effect this re-instatement. So long as these activities pose no danger to victims and witnesses, and do not create a risk that the

[154] *See* Rule 115 Motion, Annexes B-1 to B-3, D-1 to D-3.
[155] *Cf.* Re-assessment Decision, pp. 5, 6 (finding that neither *unrestricted* political activity nor a loosening of travel restrictions would be "in the interest of justice").
[156] Judge Agius's proposed alternative, that the Trial Chamber hears all requests (with submissions from three parties) and then decides, will be an extreme burden on the Chamber and, given the certainty of delays in answering requests, will defeat the purpose of the holding and reduce the Accused's participation in politics to a mere quiddity.
[157] *See* Bryan A. Garner, ed. in chief, *Black's Law Dictionary* (Eagan: West Group, 1999) ("*Black's*"), (defining *ultra vires* as "Unauthorized; beyond the scope of power allowed or granted [...] by law").
[158] According to its own mandate.
[159] Re-assessment Decision, Dissenting Opinion of Judge Carmel Agius, p. 9; Appeal, paras 21-22.
[160] Re-assessment Decision, p. 6.

Accused will not appear for trial, it is irrelevant whether the decision to permit restricted political activity effects a "*de facto* re-instatement" or not.

### C. Equality of arms

#### 1. Party submissions

95. The Prosecution contends that the Re-assessment Decision violates the principle of equality of arms because only the Accused's views will be heard by UNMIK before it decides whether to grant his requests.[161] The Prosecution argues that each request granted is equivalent to a variation of the conditions of provisional release. It claims that its inability to tender its views to UNMIK before the mission decides whether to grant a request violates *audi alteram partem*, the legal principle which "[p]rohibits a judicial decision which impacts upon individual rights without giving all parties in the dispute a right to be heard".[162] The Prosecution believes it should be able to make a submission to the Trial Chamber before any decision is rendered.[163] Further, the Prosecution argues that it will not receive all relevant information, since UNMIK "does not have to provide a reasoned opinion for its decisions, and nor is the Accused required to disclose anything to the Prosecution in relation to its requests".[164]

96. The Prosecution argues that equality of arms is applicable to it in this case not only as a general matter,[165] but also for the following specific reasons: (1) the Accused's renewed participation in politics could make witnesses feel intimidated;[166] (2) the public may perceive UNMIK decisions negatively, and the Prosecution has a duty to represent the public;[167] (3) the Prosecution will not be able to give UNMIK any information about actual or potential dangers to witnesses before the mission makes its decision.[168] In sum, the Prosecution argues that UNMIK "will decide upon the Accused's requests even if these conflict with the interests of the victims and witnesses and the realization of the mandate of the Tribunal, *without the benefit of arguments* from the Prosecution".[169] It argues that preventing the Prosecution from representing the interests of witnesses, victims and the public means that nobody will represent them.

97. The Defence responds that equality of arms is not undermined because the Prosecution can still make submissions and present new evidence to the Trial Chamber "concerning the effect of the

[161] Appeal, para. 49.
[162] *Ibid.*, para. 50 & fn. 62.
[163] Reply, para. 40.
[164] *Ibid.*
[165] *See* Appeal, fns 63 & 64.
[166] *Ibid.*, para. 51.
[167] *Ibid.*, para. 52.
[168] *Ibid.*, para. 53.

variation Decision on victims and witnesses" at any time.[170] It argues that the Prosecution was heard by the Trial Chamber before it issued all its decisions, and cannot now argue that it has no say over how UNMIK implements the rulings.[171]

2. Discussion

98. Equality of arms, particularly the principle of *audi alteram partem*, is generally thought to apply just before courts.[172] However, the Appeals Chamber believes that here, where the Trial Chamber is allowing UNMIK to approve or disapprove of the Accused's proposed political activities, the principle has some applicability outside the walls of the Tribunal. In other words, while it is true that the Prosecution is free to make submissions to the Trial Chamber, that may not be enough to preserve fairness. Some of the Prosecution's arguments thus warrant modifications to the Re-assessment Decision.

99. The Appeals Chamber notes first that the Prosecution may indeed make submissions to the Trial Chamber at any time. *If the Trial Chamber considers* that the submission warrants a temporary[173] or permanent change to the conditions, it can so order it. The Trial Chamber could for example require UNMIK to suspend its permission or explain why it had granted permission. However, the Prosecution is correct that, under the present regime, most of the time it would not be able to argue to the Trial Chamber that a request should not be granted, as UNMIK has no responsibility to inform the Prosecution of its decisions and the Accused has no responsibility to inform the Prosecution of his desires. The only reporting requirement is a biweekly report to the Trial Chamber (though it appears UNMIK has been giving the report to the Prosecution as well[174]). The Prosecution is correct that this regime leaves it short of relevant information about the Accused's actions.

100. Second, that the Accused may make people "feel intimidated" or that the public may not like UNMIK's decisions are not good reasons for challenging the regime. As noted above, if actual dangers to witnesses appear, the correct course by the Prosecution would be to go to the Trial Chamber and explain that the conditions need to be changed.[175]

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[169] *Ibid.*, para. 54.
[170] Response, paras 72, 74.
[171] *Ibid.*, para. 74.
[172] *See, e.g.*, *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001, para. 25.
[173] Such as removing UNMIK's authority to decide in a particular instance.
[174] *See* Response, paras 39-42.
[175] *See supra* paras 46-47.

101. Third, the Appeals Chamber is unclear about the Prosecution's argument regarding the perception of UNMIK.[176] UNMIK, however, has not suggested that the authority granted to it will damage its reputation. The Appeals Chamber therefore declines to consider the Prosecution's argument about UNMIK's reputation.

102. Fourth, though the Trial Chamber did not find any reason to conclude that the Accused's political participation might endanger victims and witnesses, the Prosecution's argument that it will not be able to relay information about potential danger to witnesses to UNMIK is a good one. The Appeals Chamber acknowledges the Prosecution's commitment to witnesses' safety and its ability and will to gather information about them. The Prosecution could give UNMIK valuable information that would be helpful to it in deciding on the Accused's requests, especially inasmuch as UNMIK would be better informed about the situation of victims and witnesses.

103. Therefore, the Appeals Chamber accepts the Prosecution's equality-of-arms argument. The Appeals Chamber thus amends the Re-assessment Decision to change the provisional release regime slightly. First, any request from the Accused to UNMIK must also be sent to the Prosecution. Second, any such requests must be made at least 48 hours before the proposed activity, so the prosecution can have some time to respond.[177] Third, for each request of the Accused, the Prosecution will have the right to deliver to UNMIK a submission of no more than 400 words, [178] and UNMIK may not grant the request in question without taking the submission into account. Fourth, any grant of permission from UNMIK to the Accused must (1) contain a reasoned explanation of why it has been granted, (2) be sent to the Prosecution as well, and (3) be transmitted to both parties at least four hours before the contemplated activity is to take place.[179] Finally, though it may be implicit in the terms of the Re-assessment Decision, UNMIK's reports to the Trial Chamber must contain a reasoned explanation of the grounds on which UNMIK based any decision to grant a request made by the Accused.

## V. DISPOSITION

104. For the foregoing reasons, the Appeals Chamber DENIES by majority, Judges Shahabuddeen and Schomburg dissenting, the Prosecution's request to set aside the Decision and

[176] *See* Appeal, para. 52.
[177] Such time intervals are not uncommon: under the terms of the Original Provisional Release Decision, the Accused had to inform UNMIK at least 24 hours before he intended moving between the two areas he was allowed to reside in. *See* Original Provisional Release Decision, para 53.6
[178] This should be long enough for the Prosecution to explain the danger posed by any particular request, but not so long that UNMIK is prevented from doing its job by mountains of paper.
[179] This will allow the Prosecution time to make an urgent application to the Trial Chamber to have the permission overturned.

order that all requests be presented to the Trial Chamber first, and AMENDS by majority, Judges Shahabuddeen and Schomburg dissenting, the Re-assessment Decision by adding these terms:

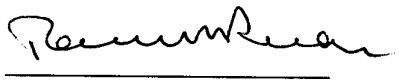
- First, any request from the Accused to UNMIK must also be sent to the Prosecution.
- Second, any such requests must be made at least 48 hours before the proposed activity, so the prosecution can have some time to respond.
- Third, for each request of the Accused, the Prosecution will have the right to deliver to UNMIK a submission of no more than 400 words, and UNMIK may not grant the request in question without taking the submission into account.
- Fourth, any grant of permission from UNMIK to the Accused must (1) contain a reasoned explanation of why it has been granted, (2) be sent to the Prosecution as well, and (3) be transmitted to both parties at least four hours before the contemplated activity is to take place.
- Fifth, UNMIK's reports to the Trial Chamber must contain a reasoned explanation of the grounds on which UNMIK based any decision to grant a request made by the Accused.

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

Dated 10 March 2006,

At The Hague,

The Netherlands.



Judge Fausto Pocar
Presiding

Judge Shahabuddeen and Judge Schomburg append a joint dissenting opinion to the present decision.

# JOINT DISSENTING OPINION OF JUDGE SHAHABUDDEEN AND JUDGE SCHOMBURG

1. We regret that we are not able to support today's decision. These are our reasons.

2. Under Rule 65(C) of the Rules of Procedure and Evidence, a Trial Chamber may impose such conditions upon the provisional release of an accused who was under detention as it deems appropriate. What conditions are "appropriate" must, in our view, be limited to the objectives set forth in Rule 65(B), which permits the provisional release of an accused if and only if the Trial Chamber is satisfied that the accused will appear for trial and will not pose a danger to any victim, witness, or other person.

3. Trial Chambers typically do not, in the course of their written decisions granting provisional release, expressly discuss the consistency of each condition of release with the Rule 65(B) criteria. But it is to be assumed that, when a Trial Chamber decides to provisionally release an accused pursuant to certain conditions, its determination as to lack of danger and flight risk is made on the basis of the conditions it has imposed. When it decides to vary these conditions, the Trial Chamber must thus establish that it remains satisfied, notwithstanding the change in conditions, that the Rule 65(B) criteria are met—that is, that the change in conditions creates no risk of flight or danger to witnesses, victims or other persons. Thus, we believe the Trial Chamber majority was correct to state that "in exercising its discretion to *vary* the conditions imposed on the Accused during his provisional release, the Trial Chamber [should be] guided by the same two prongs of Rule 65(B) of the Rules when determining whether to *grant* provisional release or not".

4. However, notwithstanding its statement quoted above, the Trial Chamber engaged in no apparent consideration of the Rule 65(B) criteria in making its Re-Assessment Decision. Without further explanation beyond a reference to the "interest of justice", it denied the accused's request to have the restrictions on his political liberty lifted. Instead, it chose to delegate to UNMIK the authority to determine, on a "case-by-case basis", whether the restrictions should be lifted, "to the extent which UNMIK finds would be important for a positive development of the political and security situation in Kosovo".

5. We think that this delegation of authority is invalid. We put our reasons in two propositions.

I. The delegation is inconsistent with the objectives of Rules 65(B) and (C)

6. The sole criterion that the Trial Chamber provides to guide UNMIK's determination of whether to permit a particular political activity is whether, in UNMIK's view, the activity "would be important for a positive development of the political and security situation in Kosovo". As the majority acknowledges in today's decision, this is "not a very precise criterion";[1] indeed, in our view it allows UNMIK unreasonably broad discretion.

7. Even more clearly, however, the criterion simply has nothing to do with securing the presence of the accused at trial and the protection of others. UNMIK is free to permit the accused, for example, to engage in political activities that would have the effect of intimidating or endangering witnesses provided that they are nonetheless, in its judgement, on balance "important for a positive development of the political and security situation". Conversely, UNMIK may deny the accused the right to participate in political activities that it deems insufficiently "important" for the political or security situation, even if those activities raise no flight risk and pose no danger to others. Although the accused has not appealed from the Re-Assessment Decision, we think it bears noting that this is a substantial restriction of political liberty imposed with no apparent basis in the objectives of Rule 65.

8. In relation to this latter point, we respectfully suggest that there is need to clarify the statement in paragraph 84 of today's decision that, in the context of provisional release, it is proper that "no expression . . . is allowed unless other circumstances are present". Subject to such restrictions as are necessitated by his lawful detention, the accused retains his fundamental right of freedom of expression. If he is released provisionally, *prima facie* he continues to be entitled to that right. But this is subject to the conditions of provisional release that are adopted solely in order to permit the effective administration of justice and the protection of victims, witnesses or other persons. Restrictions on his fundamental right to freedom of expression must be "provided by law" and "must be justified as being necessary" to secure these objectives.[2]

9. Although it is certainly possible that UNMIK will exercise its authority consistent with the objectives of Rule 65, there is no way to know ahead of time, given the wide discretion conferred by the delegation. The Trial Chamber therefore could not, at the time of the Re-Assessment Decision, be "satisfied" that the change in conditions of provisional release would ensure the protection of others. The Trial Chamber would only learn of UNMIK's decisions as to particular political activities afterwards.

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[1] *See supra*, para. 85.
[2] *Cf.* Article 19 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171; Office of the High Commissioner for Human Rights, General Comment No. 10: Freedom of Expression, 29 June 1983.

10. The delegation therefore exceeds the Trial Chamber's authority under Rule 65; it is *ultra vires.*

II. Judicial power cannot be delegated to a non-judicial body

11. Even if the delegation to UNMIK was otherwise within the scope of the Rule, it would be *ultra vires* for another reason. Rule 65 obligates the Trial Chamber to ensure that the exercise of its power to grant provisional release is consistent with its duty to protect others. That duty – an important one – was entrusted to a judicial body and was meant to be exercised judicially. A judicial body cannot delegate its judicial responsibilities.

12. It is true that the Tribunal has no police force, and must rely on the cooperation of states to enforce its orders and decisions in the territories of those states. Thus, the conditions imposed on provisional release routinely involve action by various agencies—for instance, in monitoring an accused's presence within a particular area. But such actions have been of a ministerial or executive kind. To our knowledge, this is the first time that a condition has been imposed under which wide discretionary functions have been delegated. As noted above, the discretion granted to UNMIK in implementing the Trial Chamber's amorphous criterion is broad indeed; it is to exercise its own judgement as to what is "important" for the "political and security situation in Kosovo".

13. With respect, it is not relevant, as emphasized in paragraph 78 of today's Decision, "that UNMIK, like the Tribunal, is a creature of the Security Council, a sister organisation, so to speak". We do not object to the notion that UNMIK is the sort of body that might be asked to administer certain aspects of the Tribunal's orders. The question is not the nature of UNMIK but the nature of the decision being delegated.

14. Likewise, it is beside the point to argue that the Trial Chamber retains power to review UNMIK's decisions. As rightly pointed out in the dissenting opinion of Judge Agius, that at most involves an *ex post* intervention; the damage might already have been done. An interval of at least two weeks is involved between error and correction. In paragraph 89 of its Decision, the Appeals Chamber argues that "the Accused will be aware that a misstep could mean the end of his political career (and liberty) within 14 days, which is *not* a long time in this context". We prefer the view expressed by the Appeals Chamber in paragraph 88 of its Decision "that a week is a long time in politics". We observe no material distinction in the contexts. In our view, a day's delay would be too much. Regardless of the length of the time, the difference between a clearly foreseeable *ex ante*

restriction of the accused's freedom of expression and a general *ex post* review of his exercise of this freedom is fundamental.

15. Moreover, given the enormous discretion left to UNMIK by the elastic security criterion, it is hard to see what grounds the Trial Chamber would ever have for second-guessing UNMIK's determination even after the fact. Nor is it of any legal significance that the Prosecution's investigators may be keeping an eye out for potential misconduct of the accused.[3] In essence, what the Trial Chamber has retained is not the ability to truly supervise or control UNMIK's decision-making, but rather the ability to deter the accused from engaging in inappropriate activities because of the threat that provisional release would be revoked. But as valuable as this ability may be, it does not minimize the extent to which judicial powers have been delegated to UNMIK.

16. Nor is it pertinent to say that "the decision-making that the Trial Chamber has delegated here is far from being central to the judicial process [because the Appeals Chamber holds that] the decisions at issue have no bearing on the Accused's guilt or innocence, or on the manner in which his guilt or innocence will be determined ".[4] Guilt or innocence on the charges set forth in the indictment is not the only "judicial" decision with which a Trial Chamber is entrusted, and it is not the issue here. The issue is whether, at the time when it imposed the condition in question, the Trial Chamber could be "satisfied" that the condition would "ensure ... the protection of others" within the meaning of Rule 65(C), balancing this condition against the presumption of innocence and the accused's fundamental right to freedom of expression. In our opinion, it could not: whether this criterion was satisfied depended on what UNMIK would or would not do.

III. General considerations

17. We respectfully disagree with the majority's suggestion that delegation was the only practical approach that the Trial Chamber could have taken.[5] It could have, as Trial Chambers do in every provisional release decision, itself considered the risks to victims, witnesses and others as well as the risk of flight and determined whether any such risks would be created by lifting the restriction on the accused's political liberties. If it was satisfied that there was no such risk, it could and should have lifted the restriction itself. If it decided that there was a risk, it should not have lifted it (and should not have delegated to UNMIK the authority to do so). If it decided that it was satisfied that some kinds of political activities posed no risk while it could not be satisfied with respect to

[3] *See supra*, para. 89.
[4] *See supra*, para. 82.
[5] *See supra*, paras. 91-92.

others, it should have modified the restriction to permit only the former kinds, erring on the side of safety in the event of uncertainty, as contemplated by Rule 65. For instance, it could have restricted political activities where they amount to incitement of a crime, potential intimidation of witnesses, campaigning for public office, or discussing his own case, while permitting them otherwise.

18. In choosing among these various approaches, the Trial Chamber was free to consider the views of UNMIK by soliciting submissions from it, and thus take advantage of UNMIK's expertise. Moreover, UNMIK retains its authority to ensure public safety in Kosovo and to employ the necessary means to enforce this authority.[6] The Trial Chamber was also free to entrust UNMIK with the ordinary ministerial responsibilities typically entrusted to the states to which accused are provisionally released, *viz.*, monitoring the whereabouts of the accused and his compliance with the conditions of provisional release.[7] But it was not free to delegate to UNMIK the fundamental judicial obligation to make the ultimate judgement.

19. In paragraph 90 of its decision, the Appeals Chamber, by majority, states that the "Trial Chamber has not ceded power; it has merely loaned it, and can take it back at any time". We are afraid that, if the Trial Chamber cannot cede power, it cannot loan it, regard being had to what we consider to be the judicial nature of the power.

20. We do not agree with the Appeals Chamber "that the Prosecution's use of international human rights treaties and cases is misplaced" as is stated in paragraph 84 of the Decision. The prosecution is only saying that the extent of any restrictions of freedom of expression must be provided by law, that the Trial Chamber cannot know the extent of any restrictions until after UNMIK has acted, and that therefore, at the time when it grants provisional release, the Trial Chamber cannot determine whether any restrictions would exceed what is permitted by law.

21. Finally, we make it clear that we are of the view that a detained accused retains his fundamental right to freedom of expression, but that this is subject to restrictions necessitated by his detention.[8] The law allows for these restrictions, which must be "construed strictly and the need for any restrictions must be established convincingly".[9] On provisional release, these restrictions disappear,

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[6] *Cf. Limaj* Decision, para. 25.

[7] We note, however, that in the Tribunal's primarily party-driven system, the Prosecution may also be given an important role in monitoring the terms of provisional release.

[8] *See* P. van Dijk and G.J.H. van Hoof, *The Theory and Practice of the European Convention on Human Rights* (The Hague, 1998), pp. 578-579 and the cases referred to therein, including *X. v. Federal Republic of Germany, Appln. No. 1860/63,* 1965 Yrbk of the Eur. Con. on H.R., 205 at 216; and *Huber v. Austria, Appln. No. 4517/70,* 1971, Part 2, Yrbk of the Eur. Con. on H.R., 548 at 566-568, both concerning prison restrictions on freedom of expression.

the detention which gave rise to them being no longer in force. However, some of the restrictions are continued by the conditions on which the release is granted.[10]

IV. Conclusion

22. What is in issue is who is to strike the balance between (i) the protection of the accused's freedom of expression and (ii) the objectives of Rule 65, namely, ensuring that the accused will appear to stand trial and protecting witnesses, victims or other persons. Is it the Trial Chamber? Or, can the Trial Chamber pass on the judgement to another? We consider that it is the Trial Chamber, and that it cannot transfer the responsibility to another.

23. We have given respectful thought to the arguments of the majority. But, for the foregoing reasons, we consider that other legitimate considerations prevail.

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

Mohamed Shahabuddeen

Wolfgang Schomburg

Dated 10 March 2006
The Hague
The Netherlands

[Seal of the Tribunal]

9. *Yankov v. Bulgaria,* Judgment of 11 December 2003 (Final as of 11 March 2004), Appln. No. 39084/97, with further references (2005) 40 E.H.R.R. 36, para. 129; *see also* CCPR, article 19(3); ECHR, article 10.
[10] *See* paras. 8 and 17, *supra.*