



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-04-74-T
Date: 2 December 2008
Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, presiding
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr Hans Holthuis

Decision of: 2 December 2008

THE PROSECUTOR

v.

Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ

PUBLIC

**DECISION ON THE ACCUSED PRALJAK'S MOTION
FOR PROVISIONAL RELEASE**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim A. A. Khan for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

I. INTRODUCTION

1. Trial Chamber III ("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 a motion for provisional release by the Accused Slobodan Praljak ("Accused Praljak") filed confidentially with confidential annexes by Counsel for the Accused Praljak ("Praljak Defence") on 28 October 2008.

II. PROCEDURAL BACKGROUND

2. On 28 October 2008, the Praljak Defence confidentially filed "The Accused Praljak's Motion for Provisional Release During the Period of the 2008-2009 Winter Judicial Recess" ("Motion"), in which it requests for humanitarian reasons provisional release of the Accused Praljak to the Republic of Croatia during a part of the 2008-2009 winter judicial recess.¹

3. On 29 October 2008, the Chamber rendered an oral decision wherein it fixed the deadline for the Prosecution's response to the Motion for 14 November 2008.²

4. The Ministry of Foreign Affairs of the Kingdom of the Netherlands informed the Tribunal in a letter dated 30 October 2008 that it did not have any objections to the provisional release of Slobodan Praljak.³

5. On 11 November 2008, the Chamber rendered an oral decision wherein it authorised the Prosecution to file a joint consolidated response up to 12,000 words to the motions for provisional release of the Accused Jadranko Prlić, Slobodan Praljak, Bruno Stojić, Milivoj Petković and Valentin Ćorić.⁴

6. On 14 November 2008, the Prosecution confidentially filed a joint response ("Prosecution Consolidated Response to Prlić, Stojić, Petković, Praljak and Ćorić Applications for Provisional Release During the Winter Recess 2008-2009")

¹ Motion, paras. 1 and 38.

² Court Transcript in French ("T(F)"), 29 October 2008, p. 33893, private session.

³ Letter by the Ministry of Foreign Affairs of the Kingdom of the Netherlands, 30 October 2008.

⁴ T(F), 11 November 2008, p. 34462, private session.

("Response") wherein, *inter alia*, the Prosecution objects to the provisional release of the Accused Praljak and respectfully requests that the Chamber grant a stay of its decision if it were to grant the provisional release of Slobodan Praljak, until the Appeals Chamber rules on the appeal the Prosecution intends to file against the decision.⁵

7. On 17 November 2008, the Chamber rendered an oral decision authorising Defence Counsel for the Accused Jadranko Prlić, Slobodan Praljak, Bruno Stojić, Milivoj Petković and Valentin Ćorić to file a reply by 19 November 2008⁶ to the Prosecution's Response.

8. The Praljak Defence did not file a reply to the Prosecution's response.

III. APPLICABLE LAW

5. Under Rule 65 (A) of the Rules of Procedure and Evidence ("Rules"), once detained, an accused may not be released except by order of a Chamber. According to Rule 65 (B), release may be ordered by the Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

6. According to Tribunal jurisprudence, the Chamber has discretionary power over the decision to grant or deny provisional release pursuant to Rule 65 of the Rules.⁷ To assess whether the conditions set forth in Rule 65 (B) of the Rules have

⁵ Response, paras. 1, 37, 38, 60 and 61.

⁶ T(F), 17 November 2008, pp. 34632 and 34633, private session.

⁷ *The Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008 ("*Jovica Stanišić* Decision"), para. 3; *The Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 ("*Milutinović* Decision"), para. 3; *The Prosecutor v. Popović et al.*, Case No. IT-65-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006, para. 5; *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Petković* Dated 31 March 2008, 21 April 2008 ("*Petković* Decision"), para. 5; *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.8, Decision on Prosecution's Appeal from *Décision relative à la demande de mise en liberté provisoire de l'Accusé Prlić* Dated 7 April 2008, 25 April 2008 ("*Prlić* Decision of 25 April 2008"), para. 7.

been met, the Chamber must take into account all the relevant factors that a reasonable Trial Chamber would take in order to make its decision.⁸ The Chamber must then give reasons for its decision on these points.⁹ The relevance of the factors referred to and the weight to be ascribed to them is decided on a case-by-case basis.¹⁰ Because they rely primarily on the facts of the case in question, all requests for provisional release are examined in the light of the particular situation of the accused.¹¹ The Chamber must examine this situation when deciding on provisional release, but, as far as it is able, must foresee what this situation will be like when the accused is to return to the Tribunal.¹²

7. According to recent rulings by the Appeals Chamber, the close of the Prosecution case constitutes an important change of situation that requires a new and detailed evaluation of an accused's risk of flight.¹³ Under these conditions, even if the Trial Chamber is convinced that sufficient guarantees have been given, it may not exercise its discretionary power to grant provisional release unless sufficiently compelling humanitarian reasons cause the scales to tip in this direction.¹⁴ Consequently, provisional release may only be granted "at a late stage of the proceedings, and in particular after the close of the Prosecution case, when sufficiently compelling humanitarian reasons exist to justify the release and, even when provisional release is found to be justified in light of the nature of the

⁸ *The Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Miće Stanišić Decision*"), para. 8; *Jovica Stanišić Decision*, para. 35; *Petković Decision*, para. 8; *Prlić Decision* of 25 April 2008, para. 10.

⁹ *Jovica Stanišić Decision*, para. 35; *Petković Decision*, para. 8; *Prlić Decision* of 25 April 2008, para. 10; *Miće Stanišić Decision*, para. 8.

¹⁰ *Jovica Stanišić Decision*, para. 35; *Petković Decision*, para. 8; *Prlić Decision* of 25 April 2008, para. 10.

¹¹ *The Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 4 October 2005 ("*Tarčulovski Decision*"), para. 7; *Jovica Stanišić Decision*, para. 35; *Petković Decision*, para. 8; *Prlić Decision* of 25 April 2008, para. 10; *Miće Stanišić Decision*, para. 8.

¹² *Jovica Stanišić Decision*, para. 35; *Petković Decision*, para. 8; *Prlić Decision* of 25 April 2008, para. 10; *Miće Stanišić Decision*, para. 8.

¹³ *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008 ("*Prlić Decision of 11 March 2008*"), para. 20.

¹⁴ *Prlić Decision* of 11 March 2008, para. 21; *Prlić Decision* of 25 April 2008, para. 16; *Petković Decision*, para. 17; *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.8, Decision on Prosecution's Appeal of the Trial Chamber's Decision to Provisionally Release the Accused Praljak During the 2008 Summer Recess, 28 July 2008, confidential ("*Decision of 28 July 2008*"), para. 14.

circumstances, the length of the release should nonetheless be proportional to these circumstances.”¹⁵

8. Nonetheless, according to Appeals Chamber precedents, the Trial Chamber can best assess whether procedural circumstances, such as the close of the Prosecution case, increase the accused’s risk of flight during provisional release.¹⁶

IV. ARGUMENTS OF THE PARTIES

9. In support of the Motion, the Praljak Defence submits that the Accused Praljak fulfils the conditions set out under Rule 65 (B) of the Rules,¹⁷ that is, that the Accused will appear and, if released, that he will not pose a danger to any witness, victim or other person.¹⁸ In this regard the Praljak Defense notes: (1) that the Accused Praljak voluntarily surrendered to the Tribunal;¹⁹ (2) that the Trial Chamber determined on five occasions that the Accused Praljak would reappear and consequently granted him provisional release;²⁰ (3) that the Accused Praljak always complied strictly with the conditions imposed on him;²¹ (4) that the authorities of the Republic of Croatia always fulfilled their obligations and are committed to taking all the necessary measures imposed by the Chamber to guarantee the reappearance of the Accused Praljak if provisionally released;²² (5) that the Accused Praljak appeared for trial after every provisional release;²³ (6) that the Accused Praljak pledges unconditionally to return to the United Nations Detention Unit (“Detention Unit”) on the date fixed by the Chamber;²⁴ (7) that the Accused’s personal situation, his firm desire to present his case and his state of health reduce the risk of flight,²⁵ and that, even if there were

¹⁵ *Petković* Decision, para. 17; *Prlić* Decision of 25 April 2008, para. 16.

¹⁶ *Milutinović* Decision, para. 15.

¹⁷ Motion, paras. 17-22.

¹⁸ Motion, paras. 17-22.

¹⁹ Motion, para. 19.

²⁰ Motion, paras. 18 and 19.

²¹ Motion, para. 19.

²² Motion, paras. 19 and 21; Letter of guarantee from the Croatian Authorities of 15 October 2008 in Confidential Annex B annexed to the Motion.

²³ Motion, para. 19.

²⁴ Motion, paras. 19 and 20.

²⁵ Motion, paras. 19 and 20.

concerns as to the risk of flight, they would be eliminated by the guarantees provided by the authorities of the Republic of Croatia.²⁶

10. Regarding the compelling humanitarian reasons it regards as sufficient to justify the provisional release of the Accused Praljak, the Praljak Defence draws attention to the Accused's state of health and need to consult his medical practitioner in Croatia.²⁷ The Praljak Defence further argues that the family members of the Accused Praljak, more specifically his grandchildren, would be subjected to stress if they were to travel to the Detention Unit in The Hague to visit their grandfather, the Accused Praljak, during the Christmas holidays, should the Chamber decide to deny his Motion.²⁸ Moreover, the Praljak Defence puts forward that the prolonged detention of the Accused Praljak in the Detention Unit and the long duration of the trial constitute a source of strain on the family members of the Accused Praljak.²⁹ In addition, the prolonged separation of the Accused Praljak from his family members has a negative impact on the mental health of the Accused Praljak.³⁰ Regarding this, the Praljak Defence argues that it is in the interest of the Chamber to ensure that the Accused Praljak maintains his physical and mental form in order for him to be able to prepare and present his case.³¹

11. Furthermore, the Praljak Defence submits, in support of the grounds presented above, that the provisional release of the Accused Praljak for a part of the 2008-2009 winter judicial recess, when his presence is not required in the courtroom, is proportional to the humanitarian grounds raised in the Motion.³² The Praljak Defence adds, *inter alia*, that it leaves it entirely to the Chamber to establish the duration of his provisional release should the Chamber grant his Motion.³³

12. Finally, the Praljak Defence refers to the Report of the United Nations Secretary General established pursuant to paragraph 2 of Security Council Resolution 808 to argue that international tribunals must respect the fundamental rights of the

²⁶ Motion, para. 21; Letter from the Presiding Judge of the Chamber addressed to the Republic of Croatia, 2 September 2008, in Confidential Annex A annexed to the Motion of 2 September 2008.

²⁷ Motion, paras. 23 and 26.

²⁸ Motion, paras. 24-26.

²⁹ Motion, para. 27.

³⁰ Motion, para. 28.

³¹ Motion, para. 28.

³² Motion, para. 30.

³³ Motion, paras. 30 and 31.

accused such as the right to the presumption of innocence and the right to liberty.³⁴ Relying on the jurisprudence of international tribunals, the Praljak Defence stresses that restrictions of fundamental rights are regulated by strict standards and are authorised if the restrictions are suitable, necessary and proportionate to the envisaged target.³⁵ In this respect, the Praljak Defence holds that a denial of the request for the provisional release of the accused who fulfils the terms under Article 65 (B) of the Rules constitutes a violation of the fundamental rights of the Accused such as the right to the presumption of innocence and the right to liberty.³⁶ Furthermore, the Praljak Defence adds that the Accused does not contest the fact that the Trial Chamber has to abide by the decisions of the Appeals Chamber.³⁷ Nevertheless, it stresses that the issue of criteria required in support of a request for provisional release at an advanced stage of the proceedings remains controversial.³⁸ In this regard, the Praljak Defence holds that the Statute of the Tribunal and the instruments on human rights protection contain equally compelling provisions which require the Trial Chamber to examine every request for provisional release with utmost independence.³⁹

13. In its Response, the Prosecution objects to the provisional release of the Accused Praljak because, *inter alia*, the period requested by the Accused Praljak is excessive, that there is an increased risk of flight and that none of the reasons offered by the Accused Praljak in support of his Motion constitute a humanitarian ground to justify his provisional release during the 2008-2009 winter judicial recess.⁴⁰

14. The Prosecution holds that the grounds presented by the Praljak Defence fail to attain the level of sufficiently compelling humanitarian reasons.⁴¹ In the opinion of the Prosecution, the Accused has failed both to provide any specifications or documents in support of the claims regarding his current health problems.⁴² In addition, the Prosecution argues that one of the grounds submitted by the Accused Praljak in support of his Motion, in particular his wish to spend Christmas with his

³⁴ Motion, para. 32.

³⁵ Motion, paras. 33-35.

³⁶ Motion, paras. 33-35.

³⁷ Motion, para. 36.

³⁸ Motion, para. 36.

³⁹ Motion, paras. 36 and 37.

⁴⁰ Response, paras. 1, 3, 6, 17-23, 37-38, 56-57 and 61.

⁴¹ Response, paras. 3 and 38.

⁴² Response, para. 37.

family, does not constitute a right guaranteed to the Accused by the Tribunal's jurisprudence or rules.⁴³ Furthermore, the Prosecution alleges that the Praljak Defence failed to substantiate the claim regarding the stress to which the family members of the Accused Praljak are subject as a result of the duration of the Accused Praljak's detention and their prolonged separation from the latter.⁴⁴ With regard to this, the Prosecution holds that this allegation does not constitute a sufficiently compelling humanitarian ground to justify the provisional release of the Accused Praljak.⁴⁵

15. Furthermore, the Prosecution alleges, *inter alia*, that given the advanced stage of the proceedings and the imminent completion of the initial defence case, there is an increased risk of flight of the Accused and, second, that the alleged contacts between two of the co-accused and a witness during the previous period of provisional release demonstrate deficiencies in the monitoring system of the Croatian Authorities.⁴⁶

16. Furthermore, the Prosecution maintains that the period requested for the provisional release of the Accused Praljak is excessive.⁴⁷ However, should the Chamber grant the Motion of the Accused Praljak, the Prosecution holds that any period of provisional release should be limited to the minimum period necessary for the Accused to fulfil the compelling humanitarian grounds submitted in support of his Motion,⁴⁸ and recalls that the provisional release must include strict terms, similar to those requested in its previous submissions.⁴⁹ In particular, the Prosecution requests that the 24-hour surveillance of the Accused by the relevant authorities be substantively addressed.⁵⁰ The Prosecution maintains that in the absence of assurances on the availability of a fool-proof surveillance system in keeping with the terms of the Chamber's order, the Chamber should dismiss the Motion of the Accused Praljak.⁵¹

⁴³ Response, para. 38.

⁴⁴ Response, para. 38.

⁴⁵ Response, para. 38.

⁴⁶ Response, paras. 4, 5 and 17-23.

⁴⁷ Response, para. 6.

⁴⁸ Response, paras. 6, 56 and 57.

⁴⁹ Response, paras. 58 and 59.

⁵⁰ Response, para. 59.

⁵¹ Response, paras. 58 and 59.

17. Finally, should the Chamber grant the Motion, the Prosecution respectfully requests a stay of the Chamber's decision until a decision has been taken on the appeal it intends to lodge.⁵²

V. DISCUSSION

18. Firstly, the Chamber finds that, pursuant to Rule 65 (B) of the Rules, the Government of the Kingdom of the Netherlands, the host country, informed the Chamber in its letter dated 30 October 2008 that it did not have any objections to the procedure for possible provisional release of the Accused Praljak.⁵³

19. In its letter dated 15 October 2008, the Government of the Republic of Croatia provided guarantees that the Accused Praljak, if a motion for provisional release were to be granted by the Chamber, would not influence or pose a danger during his provisional release, to any victim, witness or any other person and would return to The Hague on the date ordered by the Chamber.⁵⁴

20. The Chamber recalls that in order to establish whether the requirements of Rule 65 (B) of the Rules have been met, the Chamber must consider all the relevant factors which a reasonable Trial Chamber would be expected to consider in order to come to a decision.⁵⁵ In this case, the Chamber must also consider that the Accused Praljak surrendered voluntarily to the Tribunal and his exemplary conduct before and during the proceedings, even after the close of the Prosecution case. Furthermore, the Chamber will suspend hearings during the winter judicial recess. Consequently, during this period, there will be no court activity which would require the presence of the Accused Praljak.

21. The Chamber finds that the Accused Praljak has complied with all the conditions of his earlier provisional releases in keeping with the orders and decisions

⁵² Response, para. 60.

⁵³ Letter from the Ministry of Foreign Affairs of the Netherlands dated 30 October 2008.

⁵⁴ Letter from the Ministry of Justice of the Republic of Croatia dated 15 October 2008 attached in Confidential Annex B to the Motion.

⁵⁵ *Mičo Stanišić* Decision, para. 8; *Jovica Stanišić* Decision, para. 35; *Petković* Decision, para. 8; *Prlić* Decision of 25 April 2008, para. 10.

of the Trial Chambers rendered on 30 July 2004,⁵⁶ 1 July 2005,⁵⁷ 14 October 2005,⁵⁸ 26 June 2006,⁵⁹ 8 December 2006,⁶⁰ 11 June 2007⁶¹ and 29 November 2007.⁶² Contrary to the claims made by the Prosecution,⁶³ the Chamber holds that the allegations on the violation of the terms in the orders on the provisional release of Slobodan Praljak's two co-accused would not affect the Accused Praljak's risk of flight or, in this case, the guarantees provided by the Government of the Republic of Croatia. Also, even if according to the Appeals Chamber the closing of the Prosecution's case constitutes an important change in the situation which demands a detailed re-evaluation of the risk of flight of the accused,⁶⁴ the Chamber considers that the guarantees to reappear and against the risk of flight that it could impose on the Accused Praljak neutralise all risk of possible flight. With regard to his respectful conduct during his earlier periods of provisional release, the Chamber is certain that the Accused Praljak, if released, will appear for the continuation of this trial.

22. Further, for these same reasons, it is the opinion of the Chamber that the Accused Praljak, if released to the Republic of Croatia, will not pose a danger to any victim, witness or any other person.⁶⁵

23. Nevertheless, according to the Appeals Chamber, with regard to the stage of the proceedings and the close of the Prosecution case, the Chamber has the duty to determine, in addition, whether the humanitarian grounds put forward by the Praljak Defence are sufficiently compelling to justify the provisional release of the Accused Praljak.⁶⁶

⁵⁶ *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Order on Provisional Release of Slobodan Praljak, 30 July 2004.

⁵⁷ *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Order on Slobodan Praljak's Motion for Variation of Conditions of Provisional Release, 1 July 2005.

⁵⁸ *The 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.

⁵⁹ Decision on Motion for Provisional Release of the Accused Praljak, 26 June 2006. confidential.

⁶⁰ Slobodan Praljak's Motion for Provisional Release, 8 December 2006.

⁶¹ Decision on the Motion for Provisional Release of the Accused Praljak, 11 June 2007, public with Confidential Annex.

⁶² Decision on the Motion for Provisional Release of the Accused Praljak, 29 November 2007, public with Confidential Annex.

⁶³ Response, paras. 17, and 20-23.

⁶⁴ *Prlić* Decision of 11 March, para. 20.

⁶⁵ This danger is not assessed *in abstracto* – it has to be real. *Mičo Stanišić* Decision, para. 27.

⁶⁶ *Petković* Decision, para. 17; *Prlić* Decision of 25 April 2008, para. 16.

24. In support of his Motion, the Praljak Defence raises several humanitarian grounds it considers sufficient to justify the provisional release of the Accused Praljak:

(A) It submits that the Accused Praljak continues having health problems.⁶⁷ The Praljak Defence states in this regard that it incorporates the facts and arguments submitted in support of this claim in its previous requests for the provisional release of the Accused Praljak.⁶⁸ The Accused Praljak regrets the fact that he cannot consult his medical practitioner in Croatia.⁶⁹

(B) The Praljak Defence also puts forward that the provisional release of the Accused Praljak would have a positive impact on the health of the Accused and that of his family members, and that his grandchildren would be spared the stress of visiting their grandfather, the Accused Praljak, in the Detention Unit for the Christmas holidays.⁷⁰ Regarding this, the Praljak Defence claims that the distress of his family members constitutes in and of itself a humanitarian ground which, together with the other compelling humanitarian reasons raised in the Motion, justifies the provisional release of the Accused Praljak.⁷¹

(C) In addition, the Praljak Defence claims that the lengthy duration of the trial and detention of the Accused Praljak in the Detention Unit constitute a source of stress for the family members of the Accused Praljak.⁷² Moreover, the lengthy separation of the Accused Praljak from his family members has a negative impact on the mental health of the Accused Praljak.⁷³ Regarding this, the Praljak Defence argues that it is in the interest of the Chamber to ensure that this threat to the physical health of the Accused does not affect the preparation and presentation of his case.⁷⁴

25. The Prosecution considers that the grounds presented by the Praljak Defence fail to show sufficiently compelling humanitarian grounds.⁷⁵ According to the Prosecution, the Accused has failed to provide any specification or documents in

⁶⁷ Motion, para. 23.

⁶⁸ Motion, para. 23.

⁶⁹ Motion, para. 26.

⁷⁰ Motion, paras. 24-26.

⁷¹ Motion, paras. 26 and 29.

⁷² Motion, paras. 27 and 28.

⁷³ Motion, para. 28.

⁷⁴ Motion, para. 28.

⁷⁵ Response, para. 3.

support of the claims regarding the current health problems of the Accused Praljak or on the stress suffered by his family members.⁷⁶ Furthermore, the Prosecution argues that the grounds raised by the Accused Praljak in support of his Motion, that is, the stress suffered by his family members due to the duration of the detention of the Accused Praljak and their lengthy separation, fail to show sufficiently compelling humanitarian reasons to justify the provisional release of the Accused Praljak during the 2008-2008 winter judicial recess.⁷⁷

26. In this case, the Chamber finds that the Praljak Defence has failed to substantiate the claims regarding the health problems of the Accused Praljak and his family members. In addition, the Chamber deplores the fact that the Praljak Defence failed to provide material in support of its claims. Consequently, the Chamber has not been satisfied as to the gravity of the current state of health of the Accused Praljak and the psychological problems of the Accused's family members.

27. Furthermore, the Praljak Defence submits, in addition to the humanitarian grounds raised above, (1) that the length of the provisional release requested in his Motion is proportional,⁷⁸ and (2) that the insistence on humanitarian grounds in support of a request for provisional release constitutes a violation of the fundamental rights of the Accused Praljak such as the right of presumption of innocence and the right to liberty.⁷⁹ The Praljak Defence stresses that it is not questioning the fact that the Trial Chamber is bound by the decisions of the Appeals Chamber.⁸⁰ However, it submits that in spite of its normative value, the compelling humanitarian ground criterion established by the Appeals Chamber is controversial and, in addition, that the Statute of the Tribunal and the human rights protection instruments contain provisions which are equally compelling.⁸¹ The Praljak Defence also stresses that even though the Appeals Chamber may impose restrictions on the Chamber's discretionary power, any request for provisional release must be independently assessed by the Trial Chamber.⁸²

⁷⁶ Response, para. 37.

⁷⁷ Response, para. 38.

⁷⁸ Motion, paras. 30 and 31.

⁷⁹ Motion, paras. 32-35.

⁸⁰ Motion, para. 36.

⁸¹ Motion, para. 36.

⁸² Motion, para. 37.

28. The Chamber holds that the Prosecution has failed to respond to these two arguments put forward by the Praljak Defence in its Response.

29. Firstly, the Chamber considers that given its conclusion that the humanitarian grounds raised by the Praljak Defence do not constitute sufficiently compelling humanitarian reasons in terms of the Tribunal's case-law, to justify the provisional release of the Accused Praljak during the 2008-2009 winter judicial recess, it is not called upon to adjudicate on the issue of proportionality of the length of the Accused's provisional release.

30. Furthermore, the Chamber has considered the argument put forward by the Praljak Defence that the Chamber is to maintain its independence when evaluating each request for provisional release and to guarantee, when carrying out such evaluations, respect for the provisions contained in the Statute of the Tribunal and the instruments on human rights protection as well as the standards set forth by the Appeals Chamber. Nevertheless, the Chamber recalls that in its Decision of 28 July 2008 the Appeals Chamber indicated that it demanded that the Accused show sufficiently compelling humanitarian reasons to justify provisional release. Consequently, in light of the strict criteria imposed by the Appeals Chamber in this case and the Chamber's conclusions as to the absence of sufficiently compelling humanitarian grounds in the Motion, the Chamber holds that it does not have an adequate margin to respond to this argument or to analyse the merits of a comparative assessment of the above-mentioned criteria of the Appeals Chamber and the guarantees foreseen by the different international instruments for the protection of human rights as suggested by the Praljak Defence.

31. Following an in-depth analysis of the arguments put forward by the Praljak Defence and the documents filed by the Accused Praljak in support of his Motion, the Chamber holds that humanitarian grounds raised by the Praljak Defence fail to constitute sufficiently compelling humanitarian reasons in terms of the Tribunal's case-law to justify the provisional release of the Accused Praljak during the 2008-2009 winter judicial recess.

V. CONCLUSION

32. For these reasons, the Chamber holds that the Accused Praljak has failed to show sufficiently compelling humanitarian grounds. Consequently, exercising its discretionary power, the Chamber decides to reject the request for provisional release of the Accused Praljak during the 2008-2009 winter judicial recess.

VI. DISPOSITION

33. **FOR THE FOREGOING REASONS**, the Chamber

PURSUANT TO Rules 65 (B) and 65 (E) of the Rules,

DENIES the Motion of the Accused Praljak, **AND**

FINDS moot the request of the Prosecution to stay the execution of this decision.

The Presiding Judge of the Chamber appends a separate opinion to this decision.

Judge Stefan Trechsel appends a separate opinion to this decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this second day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

**SEPARATE OPINION OF THE PRESIDING JUDGE OF THE
TRIAL CHAMBER JEAN-CLAUDE ANTONETTI ON THE ACCUSED
PRALJAK'S MOTION FOR PROVISIONAL RELEASE**

I have always been favourable regarding all requests for the provisional release of the Accused **Slobodan Praljak**.

The Trial Chamber has **unanimously** decided to deny his request for provisional release.

I find that it is my duty to give a **separate opinion** on this issue given the possible consequences if the Accused has to remain in detention during the winter judicial recess while all the other Accused in this case enjoy provisional release.

The Prosecution's position in its submissions is particularly clear: the Accused has failed to submit any document in support of his claims about health problems.

It is **solely** for this reason that I have joined the point of view of the other Judges of the Trial Chamber. This point of view is provided in paragraph 26 of this Decision.

Regarding the issue of provisional release set forth under Rule 65 of the Rules, I wish to be particularly clear. In my opinion, the **Statute** has never envisaged the possibility of provisional release of an accused.

It is the Judges of this Tribunal who, in drafting the Rules, have provided for provisional release under specific terms.

This need ensued directly from the fact that the Tribunal was not able to try all Accused.

Consequently, it became customary to release all together the Accused in the Tribunal's custody while awaiting their trial. This was the case of the six Accused in this case.

The Statute placed emphasis on the **expediency of the trial**. Unfortunately, this objective has been side-lined and the trials are very long because of how the Parties' are managing the evidence.

In this context, it is also necessary to opt for provisional release during the judicial recesses. However, on 11 March 2008, the Appeals Chamber rendered provisional release more difficult by imposing strict terms following the procedure under Rule 98 *bis*.

In this regard, the Appeals Chamber indicated that the Rule 98 *bis* Ruling constituted a significant enough change in circumstances to justify an in-depth re-assessment of the risk of flight pursuant to Rule 65 (B) of the Rules.⁸³ It found that the different reasons put forward by the Accused were not sufficiently compelling, in particular in the light of the Rule 98 *bis* Ruling to warrant the exercise of the Trial Chamber's discretion in favour of granting their provisional release.⁸⁴

In spite of these conditions, five of the six Accused enjoyed provisional release during the summer recess.

The principle to obtain provisional release is relatively simple: in addition to the terms enumerated in Rule 65 (B), the Accused has to justify a **compelling humanitarian reason**.

Since the **Prosecution** systematically appeals the Trial Chamber's decisions which dismiss the Prosecution's submissions, the requesting party therefore has to ensure that it does not place itself in a disadvantaged position by failing to submit all the necessary justifications. For the forthcoming winter recess, five of the six accused have provided justifications which enabled the Trial Chamber to grant their provisional release.

⁸³ *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008. para. 20.

It appears that, for his part, the Accused **Slobodan Praljak**, who has not been on provisional release for a year, the last one going back to the year 2007, does not wish to comply with the requirements defined by the Appeals Chamber.

Regarding the 2008 summer judicial recess, the decision of the Trial Chamber to grant the Accused his request for provisional release was quashed.

- The Trial Chamber considered the length of detention and concluded that compelling humanitarian reasons existed given that the Accused had already been in detention at the Detention Unit for almost two years, that the trial was not expected to end for another two years, and that, as a result, he might suffer serious health consequences. The Trial Chamber concluded that detention was stressful for the detainees. It found that a period of provisional release would enable the Accused to regain strength and prevent a possible deterioration of his physical and mental condition.⁸⁵
- The Appeals Chamber's ruling was based on its finding that the humanitarian reasons submitted by the Accused were not sufficiently compelling for release to be granted, that the Trial Chamber could not base itself on the possibility that, in the near or distant future, his health might be affected by the duration of his detention and thus conclude that there are sufficiently compelling humanitarian reasons at the moment when the disputed Decision was being issued. The Appeals Chamber indicated that the Trial Chamber could not rely on the beneficial effect that the release of the Accused might have on his general state of health as a sufficiently compelling humanitarian reason.⁸⁶

The Appeals Chamber explained the reasons.

⁸⁴ *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008, para. 21.

⁸⁵ *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.10, Decision on Prosecution's Appeal of the Trial Chamber's Decision to Provisionally Release the Accused Praljak During the 2008 Summer Recess, 28 July 2008, para. 15.

⁸⁶ *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.10, Decision on Prosecution's Appeal of the Trial Chamber's Decision to Provisionally Release the Accused Praljak During the 2008 Summer Recess, 28 July 2008, para. 16.

The Accused **Slobodan Praljak** was to have undertaken that which was necessary and provide useful documents. The medical state of the Accused **Slobodan Praljak** could justify additional examinations in Zagreb. It would have sufficed that he certify that during that period, he had an appointment with his medical practitioner or surgeon who operated on him.

I could have dissented from the decision that was taken, but what would have been the point if the Appeals Chamber were to quash it?

It is not too late for the interested party to submit a new request for a **review** of this Decision of dismissal under the specific condition that he provide all the justifying documents. It can seem unjust to the Accused Praljak to be the only one of the group of Accused not to enjoy provisional release but, like they, he has to abide by the terms set forth by the Appeals Chamber which, in this case, has the final word.

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this second day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

**SEPARATE OPINION OF JUDGE STEFAN TRECHSEL REGARDING
THE ACCUSED PRALJAK'S MOTION FOR PROVISIONAL RELEASE**

Like my colleagues I have voted in favour of the decision to deny the Accused Slobodan Praljak provisional release during the Tribunal's judicial recess.

I have to clarify that this vote is due to considerations for judicial discipline. The Trial Chamber is bound by the Statute of the Tribunal and the Rules of Procedure and Evidence as interpreted by the Appeals Chamber.

Hence, I have to voice my great discomfort with this legal framework. Articles 20 and 21 of the Statute affirm this Tribunal's strict compliance with international human rights law as codified, for example, in the 1966 United Nations International Covenant on Civil and Political Rights and the 1950 European Convention on Human Rights. With regard to personal liberty, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia moves significantly away from that recommended by the conventions I refer to. It is not necessary to cite from the jurisprudence or the written authorities to show the difference.

In terms of the protection of human rights it is the saying *in dubio pro libertate* that applies. As for detention on remand (*détention préventive*), it should be an exception. The longer it is, the more it has to be justified by compelling reasons such as the risk of flight or the risk of an activity that can interfere with the establishment of truth, in particular tampering with witnesses, also called the risk of collusion.

By contrast, it transpires both from Article 20 (2) of the Statute and from Rule 65 of the Rules that for this Tribunal the role of rule and exception have been inversed: detention is the rule, while specific justification is needed for the granting of provisional release.

One can justify, to an extent, the rule of detention for practical reasons. As a general rule, the accused come from far away and have no roots in the vicinity of ICTY, no residence, family or other social ties. From this point of view, it can be difficult to ensure the regularity of proceedings with all accused if each has to decide on the

morning of every day of hearings to come to the Tribunal. I can hence accept that there are legitimate reasons in support of the rule according to which the accused remain in detention during the period of court hearings.

However, this justification does not hold during judicial recess. Evidently, this does not mean that all the Accused have to be granted provisional release during this period. The danger of risk of flight or collusion could impede such a step. If, however, there is no such danger, the respect for human rights would require that conditional release be granted without the accused being obliged to justify reasons of a humanitarian nature. When, as in this case, detention continues for several years, in my opinion, the pressure an accused is under, due to the simple fact that he is deprived of his liberty, constitutes in itself an important humanitarian reason. I can only regret this estrangement of ICTY jurisprudence from international human rights law.

/signed/

Stefan Trechsel
Judge

Done this second day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]