



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: 11 April 2008
Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: Mr Hans Holthuis

Opinion of: Friday, 11 April 2008

THE PROSECUTOR

v.

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

PUBLIC

**SEPARATE CONCURRING OPINION OF JUDGE STEFAN TRECHSEL
REGARDING THE DECISION ON THE REQUEST FOR PROVISIONAL
RELEASE OF THE ACCUSED ĆORIĆ**

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

1. The Chamber rendered by a majority a decision on 8 April 2008 denying the request for provisional release filed by the Accused Ćorić.

2. Having voted against the provisional release of the Accused Ćorić, I feel the need to explain my vote. What I will set out also holds, *mutatis mutandis*, for the analogous decision concerning the Accused Praljak. Indeed, my vote springs from considerations of judicial discipline rather than judicial argument. Like the Presiding Judge of the Chamber, I still think that the decision taken by the Chamber on 19 February 2008, which was then set aside by the Appeals Chamber Decision of 11 March 2008, was appropriate. In particular, the delicate state of health of the Accused's five-year-old daughter seems to me to take on considerable humanitarian weight. I will first discuss the question of international human rights law regarding detention on remand; the second point will consider the question of discretionary power and the extent of control exercised by the Appeals Chamber; and finally, I will recall the structure of our Tribunal.

3. The Accused refers to international human rights law, in particular Articles 9 of ICCPR and 5 of the ECHR. Indeed, it ensues clearly from these texts and particularly from the jurisprudence of the Court of Strasbourg that preventive detention should be limited to cases of strict necessity. I recall for example the *Letellier v. France* Decision of 26 June 1991, Series A no. 207. It is true that our Tribunal often refers to the Conventions and international jurisprudence regarding international human rights law; this is justified in particular by the fact that the texts of the Conventions and of the Statute regarding the rights of the accused are practically identical. It must be noted, however, that this is not the case with regard to personal freedom. While human rights consider detention to be an exception that requires convincing justification throughout its duration, the Statute remains silent on the issue of the personal freedom of the Accused. Rule 64 of the Rules of Procedure and Evidence says very clearly: "... the accused shall be detained...". Rule 65 sets out very clearly that provisional release must be the exception. One could indeed discuss the merits of this rule, but it was certainly adopted in full knowledge of international human rights law. If the interpretation of the Rules must, in my opinion, be inspired by values that are almost universally accepted, the Trial Chamber is certainly bound by the law of the Statute and the Rules.

4. In its Decision of 11 March 2008, the Appeals Chamber rightly recalls that the Trial Chamber has discretionary power regarding decisions on provisional release. The Appeals Chamber will not set aside a decision taken by the Trial Chamber unless it is based on an incorrect interpretation of the law or on an obviously erroneous evaluation of the facts or if it violates the principle of equality to such an extent or is unreasonable to such an extent that it constitutes an abuse of the Trial Chamber's margin of discretion. It is true that the Appeals Chamber concluded that the 98 *bis* Decision justified a re-examination of the issue of flight risk. This, however, is an entirely procedural criterion. The Trial Chamber has regularly observed the Accused in person over the last two years. It knows from its own experience that they would be little impressed by the fact that their motions for acquittal had failed and that far from wanting to escape justice, they were anxious to prove their innocence. In the meantime they have presented long lists of witnesses and documents to this effect. With all due respect, it seems to me that in the present case the Appeals Chamber exercised its own discretionary power. I would recall that the European Court of Human Rights has regularly said that a trial and appeal court with an immediate knowledge of the facts is better placed to take this type of decision, see in particular the above-cited Letellier Decision, para. 52. In my opinion, both an evaluation of the seriousness of the risk of non-appearance (flight risk) and the weight attributed to humanitarian considerations come from the power to freely evaluate the facts.

5. The decisive element ensues, however, from the very structure of our Tribunal. In addition to Trial Chambers, Article 14 of the Statute provides for the establishment of an Appeals Chamber. The Rules provide a means of recourse against decisions made on all motions, interlocutory appeal, Rule 72 (B). It is incumbent upon the Appeals Chamber to decide on these appeals. The decision of the Appeals Chamber is necessarily inconvenient for the Trial Chamber involved. I bow before this authority, which leads me to deny the motion. I note that the Accused Ćorić has not presented additional humanitarian considerations compared to his previous motion for provisional release and must therefore vote against the renewed motion.

6. In addition, I would recall that the Appeals Chamber is free to develop its own jurisprudence.

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

/signed/

Stefan Trechsel

Done this eleventh day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]