



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

IT-04-74-AR65-9  
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Case No.: IT-04-74-AR65.9

Date: 29 April 2008

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**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Andrésia Vaz  
Judge Theodor Meron

**Registrar:** Mr. Hans Holthuis

**Decision of:** 29 April 2008

**PROSECUTOR**

**v.**

**JADRANKO PRLIĆ  
BRUNO STOJIĆ  
SLOBODAN PRALJAK  
MILIVOJ PETKOVIĆ  
VALENTIN ĆORIĆ  
and BERISLAV PUŠIĆ**

***PUBLIC***

**DECISION ON “PROSECUTION’S APPEAL FROM *DÉCISION RELATIVE  
À LA DEMANDE DE MISE EN LIBERTÉ PROVISOIRE DE L’ACCUSÉ  
STOJIĆ* DATED 8 APRIL 2008”**

**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 Khan for Bruno Stojić  
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak  
Ms. Vesna Alaburić and Mr. Nicolas 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

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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 ("Appeals Chamber" and "International Tribunal," respectively) is seized of an appeal by the Office of the Prosecutor ("Prosecution")<sup>1</sup> against a decision rendered by Trial Chamber III ("Trial Chamber") on 8 April 2008, granting provisional release to Bruno Stojić ("Accused").<sup>2</sup>

## I. BACKGROUND

2. On 30 January 2008, Counsel for Bruno Stojić ("Defence") filed a motion requesting the provisional release of the Accused until the beginning of the Defence case.<sup>3</sup> On 19 February 2008, the Trial Chamber granted provisional release to the Accused.<sup>4</sup> On 21 February 2008, the Prosecution appealed the 19 February 2008 Decision and related decisions granting provisional release to the co-Accused in the present case.<sup>5</sup> On 11 March 2008, the Appeals Chamber granted the Prosecution's Consolidated Appeal and overturned the Trial Chamber's prior grant of provisional release to all of the Accused.<sup>6</sup> As regards the Accused in the present case, the Appeals Chamber found that the Trial Chamber committed a discernible error in failing to explicitly discuss the impact of its 98bis Ruling<sup>7</sup> when granting provisional release and considering the request for provisional release to be based on humanitarian grounds without offering any indication of how much weight it ascribed thereto.<sup>8</sup> The Appeals Chamber further found that the justification for release offered by the Accused was not sufficiently compelling, particularly in light of the 98bis Ruling, to warrant the exercise of the Trial Chamber's discretion in favour of granting the Accused provisional release.<sup>9</sup>

3. On 27 March 2008, the Defence filed the "Motion of Bruno Stojić for Provisional Release During the Remainder of the Period Between Close of Prosecution Case and Beginning of Defence

<sup>1</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.9, Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Stojić* Dated 8 April 2008, 9 April 2008 ("Appeal").

<sup>2</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Stojić*, with Confidential Annex, 8 April 2008 ("Impugned Decision").

<sup>3</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Confidential Motion of Bruno Stojić for Provisional Release on Humanitarian Grounds, 30 January 2008 ("30 January 2008 Motion"), para. 1.

<sup>4</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Stojić*, with Confidential Annex, 19 February 2008 ("19 February 2008 Decision").

<sup>5</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, Prosecution's Consolidated Appeal from Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić Prior to the Defence Case, 21 February 2008 ("Consolidated Appeal").

<sup>6</sup> *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 ("Appeals Chamber Decision of 11 March 2008").

<sup>7</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Oral Decision Delivered Under Rule 98bis, T. 20 February 2008 ("98bis Ruling"), pp. 27200-27238.

<sup>8</sup> Appeals Chamber Decision of 11 March 2008, paras 19-21.

<sup>9</sup> Appeals Chamber Decision of 11 March 2008, para. 21.

Case” (“Motion for Provisional Release”), whereby, *inter alia*, it asserted that new circumstances justified provisional release – namely, the deteriorating health of the Accused’s mother along with the physical and mental toll that the failing health of the Accused’s close family members and long days of trial have taken on the Accused.<sup>10</sup> Additionally, it asserted that the 98bis Ruling did not increase the flight risk of the Accused.<sup>11</sup> The Defence filed a Corrigendum the following day, in which it submitted two new documents in support of the Motion for Provisional Release.<sup>12</sup> On 2 April 2008, the Defence filed an Addendum to the Motion for Provisional Release, informing the Chamber that the Accused’s elderly mother-in-law had been diagnosed with a relapse of a cancerous tumour that required immediate hospitalization and asserting that this development was an additional, “sufficiently compelling” humanitarian concern in support of the Motion for Provisional Release.<sup>13</sup>

4. In its Response, the Prosecution argued that the Accused failed to submit new or sufficient reasons for release on humanitarian grounds and that the 98bis Ruling significantly increased the flight risk of the Accused, necessitating a greater showing on the part of the Accused to justify provisional release.<sup>14</sup> On 7 April 2008, the Defence filed a Second Corrigendum, clarifying that the health of the Accused’s 26-year old daughter, rather than mother, had seriously deteriorated, that this situation was erroneously indicated in the Motion for Provisional Release, and that it constituted a new and compelling humanitarian circumstance in support of the Motion for Provisional Release.<sup>15</sup>

5. On 8 April 2008, the Trial Chamber issued the Impugned Decision, granting provisional release to the Accused, which it ordered to be stayed in accordance with Rule 65(F) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), following the Prosecution’s submission that it

<sup>10</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Confidential* Motion of Bruno Stojić for Provisional Release During the Remainder of the Period Between Close of Prosecution Case and Beginning of Defence Case, 27 March 2008 (“Motion for Provisional Release”), paras 4-8. The Appeals Chamber notes that all of the information on the health of the Accused and his family members contained in the present decision was made public in the Impugned Decision.

<sup>11</sup> *Id.*, paras 10-13.

<sup>12</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Confidential* Corrigendum to Motion of Bruno Stojić for Provisional Release During the Remainder of the Period Between Close of Prosecution Case and Beginning of Defence Case Including Confidential Annexes A and B, 28 March 2008 (“Corrigendum”).

<sup>13</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Confidential* Addendum to Motion of Bruno Stojić for Provisional Release During the Remainder of the Period Between Close of Prosecution Case and Beginning of Defence Case Filed 27 March 2008 With Confidential Annexes A and B, 2 April 2008 (“Addendum”), paras 1-3.

<sup>14</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Prosecution Consolidated Response to 1) Jadranko Prlić’s Motion for Provisional Release, Filed 26 March 2008; 2) Motion of Bruno Stojić for Provisional Release During the Remainder of the Period Between Close of Prosecution Case and Beginning of Defence Case, Filed 27 March 2008; and 3) Valentin Ćorić’s Request for Provisional Release, Filed March 25 2008 (“Prosecution Response to Motion for Provisional Release”), paras 20 and 22.

<sup>15</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Second Corrigendum to Motion of Bruno Stojić for Provisional Release During the Remainder of the Period Between Close of Prosecution Case and Beginning of Defence Case, Filed 27 March 2008, With Confidential Annexes 1 and 2, 7 April 2008 (“Second Corrigendum”), paras 3-4.

intended to appeal should provisional release be granted.<sup>16</sup> On 9 April 2008, the Prosecution filed this Appeal. The Defence responded on 11 April 2008.<sup>17</sup> The Prosecution did not file a reply.

## II. STANDARD OF REVIEW

6. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.<sup>18</sup> The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.<sup>19</sup> Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.<sup>20</sup>

7. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".<sup>21</sup> The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>22</sup> The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>23</sup>

<sup>16</sup> Impugned Decision, pp. 6 and 9.

<sup>17</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.9, Bruno Stojić Response to the Prosecution's Appeal from Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Stojić Dated 8 April 2008, 11 April 2008 ("Response").

<sup>18</sup> See e.g., *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006 ("Brahimaj Decision"), para. 5; *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 Decision"), para. 6; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005 ("Boškoski Decision of 28 September 2005"), para. 5.

<sup>19</sup> See e.g., *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; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006 ("Borovčanin Decision of 30 June 2006"), para. 5.

<sup>20</sup> *Ibid* (internal citations omitted).

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid*.

<sup>23</sup> See e.g., *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, para. 5; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10; *Stanišić Decision*, para. 6, fn. 10; *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, para. 4; *Brahimaj Decision*, para. 5; *Prosecutor v. Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, para. 6.

### III. APPLICABLE LAW

8. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Chamber may grant provisional release 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, if released, the accused will appear for trial and will not pose a danger to any victim, witness or other person.<sup>24</sup>

9. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.<sup>25</sup> What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.<sup>26</sup> This is because decisions on motions for provisional release are fact intensive, and cases are considered on an individual basis in light of the particular circumstances of the individual accused.<sup>27</sup> The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the International Tribunal.<sup>28</sup>

### IV. DISCUSSION

10. The Prosecution asserts that the Trial Chamber committed two discernible errors that amount to an abuse of discretion in granting provisional release to the Accused and requests the Appeals Chamber to reverse the Impugned Decision on these grounds.<sup>29</sup> Specifically, it contends that the Trial Chamber erred (i) in concluding that the circumstances justified the granting of a two-week period of provisional release on humanitarian grounds, and (ii) in applying its 98*bis* Ruling in this case.<sup>30</sup> In its Response, the Defence argues that the Prosecution has failed to identify any discernible error on the part of the Trial Chamber in granting provisional release to the Accused and requests the Appeals Chamber to summarily reject the stay of the Impugned Decision or, in the alternative, to dismiss the Appeal.<sup>31</sup>

<sup>24</sup> *Brahimaj* Decision, para. 6.

<sup>25</sup> *Ibid.*, para. 8.

<sup>26</sup> *Stanišić* Decision, para. 8.

<sup>27</sup> *Prosecutor v. Boškoski 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.

<sup>28</sup> *Stanišić* Decision, para. 8.

<sup>29</sup> Appeal, paras 2-3, 18, 21, and p. 9.

<sup>30</sup> Appeal, para. 2.

<sup>31</sup> Response, para. 18.

### (A) Rule 98bis Ruling

11. The Prosecution submits that the Trial Chamber committed a discernible error by failing to explicitly address the impact of the 98bis Ruling when granting provisional release.<sup>32</sup> The Prosecution argues that, in light of the 98bis Ruling, there is a significantly greater risk of flight, necessitating a greater showing on the part of the Accused to justify provisional release, and that the Trial Chamber did not sufficiently consider this factor when granting provisional release at this stage of the case.<sup>33</sup> The Prosecution notes that in the Impugned Decision, the Trial Chamber added a supplemental condition of provisional release; namely, that the Accused remain in Zagreb, Croatia under 24-hour surveillance of the Croatian authorities and that he report on a daily basis to the police authorities.<sup>34</sup> However, the Prosecution claims that this condition “does not sufficiently address the changed circumstance of the Trial Chamber’s Rule 98bis [Ruling], particularly in light of the insufficient humanitarian basis for provisional release.”<sup>35</sup>

12. In response, the Defence claims that the Trial Chamber did not fail to consider the impact of the 98bis Ruling when granting provisional release to the Accused.<sup>36</sup> The Defence submits that, to the contrary, the Trial Chamber carefully considered the Appeals Chamber’s holding that the 98bis Ruling increased the flight risk of the Accused; however, it was ultimately persuaded that any flight risk was offset by the condition of 24-hour surveillance of the Accused by the Croatian authorities during his provisional release.<sup>37</sup>

13. The Appeals Chamber notes that in the Impugned Decision, the Trial Chamber explicitly addressed the impact of its 98bis Ruling in granting the Accused provisional release. The Trial Chamber recalled the holding of the Appeals Chamber Decision of 11 March 2008 that the 98bis Ruling constituted a significant change in circumstances, which warranted a renewed and thorough evaluation of the risk of flight of each of the co-Accused in this case.<sup>38</sup> The Trial Chamber accordingly considered that in light of the 98bis Ruling, it should not exercise its discretion in favour of a grant of provisional release unless additional guarantees were implemented to offset the risk of flight and the Accused established more compelling humanitarian grounds in support of the Motion for Provisional Release.<sup>39</sup>

<sup>32</sup> Appeal, para. 21.

<sup>33</sup> Appeal, paras 24-25.

<sup>34</sup> Appeal, para. 26.

<sup>35</sup> *Ibid.*

<sup>36</sup> Response, para. 10.

<sup>37</sup> Response, para. 11.

<sup>38</sup> Impugned Decision, p. 7.

14. With regard to the issue of additional guarantees, the Trial Chamber specifically recalled the holding of the Appeals Chamber Decision of 11 March 2008 that the guarantees put forth by the Trial Chamber in the 19 February 2008 Decision were insufficient in light of the 98*bis* Ruling.<sup>40</sup> Consistent with this finding, the Trial Chamber imposed additional conditions on the provisional release of the Accused, which it considered would offset the risk of flight; namely, that he check-in with the police authorities each day at a set time and that the Croatian authorities submit a situation report every three days.<sup>41</sup> Furthermore, as discussed above, the Trial Chamber found that the Accused established new and sufficiently compelling humanitarian grounds that militated in favour of granting the Motion for Provisional Release.

15. In light of the above, the Appeals Chamber considers that the Prosecution has failed to show any discernible error by the Trial Chamber in its consideration of the impact of the 98*bis* Ruling in granting the Accused provisional release.

### (B) Humanitarian Grounds for Provisional Release

16. The Prosecution argues that the Appeals Chamber already addressed the health of the Accused's family members in the Appeals Chamber Decision of 11 March 2008 and found that it was not a sufficiently compelling humanitarian basis for release.<sup>42</sup> The Prosecution submits that the grounds asserted by the Accused remain insufficient despite the updated information submitted in the Motion for Provisional Release.<sup>43</sup> Additionally, the Prosecution asserts that the length of provisional release ordered by the Trial Chamber, namely, two weeks, is unreasonably long and bears no relation to the condition of the Accused's family members.<sup>44</sup> In support of this position, the Prosecution notes that the Trial Chamber in the case of *Prosecutor v. Milutinović et al.* granted the accused Nikola Šainović provisional release for a period of five days, including travel time, to permit the accused to attend his mother's funeral.<sup>45</sup>

17. In response, the Defence claims that the Trial Chamber granted the Motion for Provisional Release on the basis of new humanitarian circumstances; namely, the hospitalization of the Accused's daughter and mother-in-law.<sup>46</sup> The Defence asserts that these new humanitarian grounds

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<sup>39</sup> *Ibid.*

<sup>40</sup> Impugned Decision, p. 8.

<sup>41</sup> *Ibid.*

<sup>42</sup> Appeal, para. 17.

<sup>43</sup> Appeal, para. 19.

<sup>44</sup> Appeal, para. 20. See *Prosecutor v. Milutinović et al.*, Case No. IT-05-87, Order Modifying Decision on Šainović Motion for Temporary Provisional Release, 7 April 2008, p.2.

<sup>45</sup> *Ibid.*

<sup>46</sup> Response, paras 7 and 9.

were not before the Appeals Chamber when it rendered the Appeals Chamber Decision of 11 March 2008; thus, it did not have the opportunity to decide whether they constituted a sufficiently compelling humanitarian basis for provisional release.<sup>47</sup> The Defence notes that the Trial Chamber found that the Motion for Provisional Release set forth new humanitarian circumstances, which were of such severity that they militated in favour of a grant of provisional release.<sup>48</sup> The Defence submits that the Trial Chamber's grant of provisional release was accordingly appropriate.<sup>49</sup> As regards the length of provisional release, the Defence claims that the Trial Chamber's grant of a two-week period is proper and proportionate.<sup>50</sup> The Defence asserts that the comparison of his case to the case of Nikola Šainović is misplaced because the cases are distinguishable in that Šainović requested provisional release for only a five-day period, and the Defence in *Prosecutor v. Milutinović et al.* is currently presenting its case, such that a shorter grant of provisional release is to be expected.<sup>51</sup>

18. In the Impugned Decision, the Trial Chamber considered that some of the humanitarian circumstances asserted by the Defence in the Motion for Provisional Release were already considered and dismissed by the Appeals Chamber in the Appeals Chamber Decision of 11 March 2008.<sup>52</sup> However, the Trial Chamber correctly observed that the Motion for Provisional Release also raised new circumstances that had never been considered previously by either the Trial or Appeals Chamber.<sup>53</sup> The Trial Chamber noted, in particular, medical certificates submitted by the Accused indicating that his daughter is currently undergoing hospital treatment due to recent medical complications and that his 83-year-old mother-in-law has been diagnosed with a relapse of a cancerous tumour that requires immediate hospitalization.<sup>54</sup> These circumstances are not merely repetitive of information already addressed but constitute evidence of additional humanitarian grounds in support of the application for provisional release.

19. The Trial Chamber found that this new information regarding the extremely fragile state of health of the Accused's daughter and mother-in-law represented sufficiently compelling humanitarian reasons for granting provisional release to the Accused for a two-week period.<sup>55</sup> The Appeals Chamber, having considered the evidence before the Trial Chamber, finds that the Trial

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<sup>47</sup> Response, para. 7.

<sup>48</sup> Response, para. 8.

<sup>49</sup> Response, para. 9.

<sup>50</sup> Response, paras 13-15.

<sup>51</sup> Response, para. 14.

<sup>52</sup> Impugned Decision, p. 7.

<sup>53</sup> *Ibid.*

<sup>54</sup> Impugned Decision, pp. 7-8.

<sup>55</sup> Impugned Decision, pp. 8-9.

Chamber did not commit a discernible error in considering that the serious health condition of the Accused's close family members justified his provisional release for a short duration.

20. The Appeals Chamber recalls, however, that even when provisional release is found to be justified on compelling humanitarian grounds, the length of the release should nonetheless be proportional to the circumstances<sup>56</sup> — for example, the need to visit a seriously ill family member in the hospital would justify provisional release for a sufficient time to visit the family member. Accordingly, a Trial Chamber must address the proportionality between the nature and weight of the circumstances of a particular case and the duration of provisional release requested.<sup>57</sup> The Appeals Chamber notes that the Trial Chamber did not engage in such an evaluation. Absent such an evaluation, the Appeals Chamber is not satisfied that the justifications offered by the Accused warrant the length of provisional release granted by the Trial Chamber. Rather, a Trial Chamber properly exercising its discretion should grant provisional release for a period no longer than the time necessary for the Accused to visit his ailing family members.

<sup>56</sup> See *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"), para. 16. See also *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. 17; *Prosecutor v. Hadžihasanović and Kubura*, Case No IT-01-47-T, Decision on Motions by Enver Hadžihasanović and Amir Kubura for Provisional Release, 19 July 2005, pp. 7-9. In this decision, which was rendered between the close of the Defence case and the delivery of the judgement, Trial Chamber II considered that: "at this stage of the trial there is an increased risk of flight, particularly after the Prosecution requested a finding of guilt on all charges"; "the Prosecution's final arguments and the sentences requested therein [...] may exert considerable psychological pressure on the Accused"; "other Chambers of the Tribunal held that the proximity of a prospective judgement date may weigh against a decision to release"; "the Chamber shares this view and holds that release for the entire period preceding the entry of judgement would be inappropriate and would create too great a risk of flight"; and "a period of 12 days for each of the Accused significantly reduces the risk of flight as opposed to a longer period"; *Prosecutor v. Milutinović et al.*, Case No. IT-07-85-T, Decision on Lazarević Motion for Temporary Provisional Release, 15 April 2008, paras 16 and 18, in which Trial Chamber II considered that "based upon the compelling humanitarian considerations set forth in the Motion [...] it would be appropriate for the Accused to be provisionally released for a limited duration," specifically, seven days.

<sup>57</sup> See *Prlić Decision*, para. 18. See also *Petković Decision*, para. 17.


## V. DISPOSITION

21. On the basis of the foregoing, the Appeals Chamber, Judge Güney partly dissenting, **GRANTS** the Appeal in part and **REMANDS** the Impugned Decision to the Trial Chamber for a *de novo* adjudication of the duration of the provisional release granted to the Accused and all consequent arrangements.

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

Judge Güney appends a Partly Dissenting Opinion.

Done this 29th day of April 2008,  
At The Hague,  
The Netherlands.

  
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Judge Fausto Pocar  
Presiding Judge

[Seal of the International Tribunal]

## PARTLY DISSENTING OPINION OF JUDGE GÜNEY

1. In my Partly Dissenting Opinions appended to the *Petković* Decision<sup>1</sup> and the *Prlić* Decision,<sup>2</sup> I expressed my disagreement with the majority's interpretation of the Appeals Chamber Decision of 11 March 2008<sup>3</sup> which results in imposing an additional requirement of "sufficiently compelling humanitarian reasons" to the two criteria listed in Rule 65(B) of the Rules, contrary to both the Rules and the continuing presumption of innocence, and effectively suspending the grant of discretion to the Trial Chamber by the Rules. While, in the present instance, I agree with the finding that "the Trial Chamber did not commit a discernable error in considering the serious health condition of the Accused's close family members justified his provisional release for a short duration",<sup>4</sup> I respectfully disagree with the majority's reliance on the newly-built standard of "sufficiently compelling humanitarian grounds".<sup>5</sup> Additionally, as in the *Prlić* Decision,<sup>6</sup> because of the anomalously strict standard of explicitness required by the majority for decisions on provisional release in post-Rule 98bis proceedings, and the majority's undue interference in the Trial Chamber's exercise of discretion, I cannot join the majority's finding regarding the length of Bruno Stojić's provisional release.

2. Since the new hurdle elaborated on by the majority in the *Petković* Decision<sup>7</sup>, and endorsed in the *Prlić* Decision<sup>8</sup> and in the Majority Decision,<sup>9</sup> overrides the important distinctions in burdens and liberty interests between convicted persons and persons who still enjoy the presumption of innocence under Article 21(3) of the Statute, I feel compelled to reiterate here the arguments developed in my Partly Dissenting Opinions.

3. Pursuant to Rule 65(B) of the Rules, a "Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person".<sup>10</sup> When satisfied that these two requirements are met, a Trial Chamber may exercise its discretion to grant provisional release. In doing so, it must consider all relevant

<sup>1</sup> *Prosecutor v. Jadranko 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"), Partly Dissenting Opinion of Judge Güney ("*Petković* Partly Dissenting Opinion").

<sup>2</sup> *Prosecutor v. Jadranko 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"), Partly Dissenting Opinion of Judge Güney ("*Prlić* Partly Dissenting Opinion").

<sup>3</sup> *Prosecutor v. Jadranko 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 (Appeals Chamber Decision of 11 March 2008), para. 21. I wish to specify that I was not part of the Bench that ruled on this decision.

<sup>4</sup> Majority Decision, para. 19.

<sup>5</sup> Majority Decision, paras 13, 14, 19, 20, and fn. 56. The composition of the Bench in this instance is identical to that in the *Petković* and the *Prlić* Decisions.

<sup>6</sup> *Prlić* Partly Dissenting Opinion, paras 1, 8-10; See also *Prlić* Decision, paras 18-19.

<sup>7</sup> *Petković* Decision, paras 15, 17, 19-20, and Disposition.

<sup>8</sup> *Prlić* Decision, paras 14, 16.

<sup>9</sup> Majority Decision, paras 13, 14, 19, 20, and fn. 56.

<sup>10</sup> *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 27 July 2007 ("*Tarčulovski* Decision"), para. 14.



factors.<sup>11</sup> The existence of humanitarian reasons can be a salient and relevant factor in assessing whether to exercise discretion to grant provisional release. These humanitarian grounds will “have to be assessed” in the “context” of the two requirements of Rule 65(B),<sup>12</sup> and the “weight attached to [them] as justification for provisional release will differ from one defendant to another depending upon all of the circumstances of a particular case”.<sup>13</sup>

4. The Majority Decision relies on the majority’s reading of the Appeals Chamber Decision of 11 March 2008 in the *Petković* Decision<sup>14</sup> as setting up a higher standard for a Trial Chamber to meet when exercising its discretion to grant provisional release to an accused after a Rule 98bis decision. According to the majority, even when the two requirements of Rule 65(B) of the Rules are met, after a Rule 98bis decision, the Trial Chamber must still identify the existence of sufficiently compelling humanitarian grounds before being able to exercise its discretion in favour of provisional release.<sup>15</sup>

5. However, nowhere does Rule 65(B) require humanitarian justifications for the provisional release of a person who has not been convicted. Unlike for convicted persons, there is no requirement of additional “special circumstances”<sup>16</sup> since the burden borne by a duly convicted person after full evaluation and adjudication is necessarily distinct from the burden borne by an individual who is still presumed innocent. Therefore, by imposing a new, higher standard of “sufficiently compelling humanitarian reasons” following a Rule 98bis decision, the majority imposes in fact a form of the “special circumstances” requirement applicable to convicted persons upon individuals who have not been found guilty following the full process and evaluation of trial. It amounts to reinstating, for post-Rule 98bis proceedings, the criterion of “exceptional circumstances” which used to be required by the Rules for the provisional release of an accused pending trial, and which was abrogated by amendment of 17 November 1999.<sup>17</sup> Consequently, the

<sup>11</sup> See Majority Decision, para. 9.

<sup>12</sup> *Tarčulovski* Decision, para. 14.

<sup>13</sup> *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, para. 20.

<sup>14</sup> *Petković* Decision, paras 15, 17, 19-20, and Disposition; Appeals Chamber Decision of 11 March 2008, para. 21; See also *Prlić* Decision, paras 14, 16.

<sup>15</sup> Majority Decision, paras 13, 14, 19, 20, and fn. 56.

<sup>16</sup> Rules 65(I)(iii) of the Rules. See also *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008 (Public Redacted Version), paras 11-12, in which the Appeals Chamber stated that “[t]he specificity of the appeal stage is reflected by Rule 65(I)(iii) of the Rules, which provide for an additional criterion, i.e. that ‘special circumstances exist warranting such release’” and that “the notion of acute justification [is] inextricably linked to the scope of special circumstances which could justify provisional release on compassionate grounds at the appellate stage of the proceedings before the Tribunal” for the purposes of Rule 65(I)(iii) of the Rules.

<sup>17</sup> IT/32/REV.17. Before this amendment of the Rules, Rule 65(B) stated (IT/32/REV.16, 2 July 1999 (emphasis added)):

(B) Release may be ordered by a Trial Chamber **only in exceptional circumstances**, after hearing the host country 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.

newly-built standard of “sufficiently compelling humanitarian reasons” breaches both the Rules and the continuing presumption of innocence guaranteed to accused pending trial.

6. Because there is no requirement for humanitarian reasons, much less “sufficiently compelling” humanitarian reasons, under Rule 65(B) of the Rules, there is, in my humble opinion, only one acceptable reading of the Appeals Chamber Decision of 11 March 2008.<sup>18</sup> If, after having considered all the circumstances of the case and the impact of the significant change of circumstances constituted by the Rule 98bis decision, a Trial Chamber cannot exclude the existence of flight risk or danger, then sufficiently compelling humanitarian reasons, coupled with necessary and sufficient measures to alleviate any flight risk or danger, can be a basis for resolving uncertainty and doubt in favour of provisional release. This would be the case, for example, of a Trial Chamber finding, subsequent to a Rule 98bis decision, a persistent risk of flight or danger, but deciding nonetheless to grant a limited period of provisional release in order for an accused to attend the funeral of his child, considering that the humanitarian reasons are so compelling that, coupled with strict measures, the risk of flight or danger can be alleviated. Indeed, in the Appeals Chamber Decision of 11 March 2008, the Appeals Chamber required the existence of sufficiently compelling humanitarian reasons after having found that the Trial Chamber did not evaluate the impact of its Rule 98bis decision pursuant to the two requirements of Rule 65(B) of the Rules, thus amounting to a lack of clarity as to the existence of a flight risk or danger. Only then did the Appeals Chamber, faced with a situation in which such a risk or danger could not be excluded, require sufficiently compelling humanitarian reasons.<sup>19</sup>

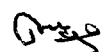
7. In the present instance, the Trial Chamber considered that the criteria of Rule 65(B) of the Rules were met.<sup>20</sup> The Trial Chamber was thus not in the situation where it had to be satisfied of the existence of compelling humanitarian grounds to exercise its discretion in favour of provisional release. It had only to discretionally consider all the circumstances of the case and determine whether there were factors in favour of provisional release, which it did.

8. The Majority Decision further states that “even when provisional release is found to be justified on compelling humanitarian grounds, the length of the release should nonetheless be proportional to these circumstances”.<sup>21</sup> I believe that provisional release should indeed be proportional to the circumstances of the case – including, but not limited to, humanitarian reasons. I further agree with the majority that the Trial Chamber did not specifically “address the proportionality between the nature and weight of the circumstances of [this] particular case and the

<sup>18</sup> Appeals Chamber Decision of 11 March 2008, para. 21. For an illustration of this position, see, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal against “Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Pušić” Issued on 14 April 2008, 23 April 2008 (Public Redacted Version), paras 14-15.

<sup>19</sup> Appeals Chamber Decision of 11 March 2008, paras 19-21.

<sup>20</sup> Impugned Decision, pp. 8-9.




duration of provisional release requested”.<sup>22</sup> However, I find that it is implicit in the Impugned Decision that the Trial Chamber did consider the impact of all the circumstances in the case when it determined the duration of the period of provisional release. Nonetheless, the Majority Decision states that “[a]bsent such an evaluation, the Appeals Chamber is not satisfied that the justifications offered by the Accused warrant the length of provisional release granted by the Trial Chamber”.<sup>23</sup> While I acknowledge that such a reasoned opinion can be useful, and even required on occasions, I am of the opinion that, by requiring here an express reasoning, the majority imposes an unreasonably strict standard of explicitness in the post-Rule 98bis provisional release context that is not generally required for the reasoning of decisions.<sup>24</sup>

9. Furthermore, by ruling that “a Trial Chamber properly exercising its discretion should grant provisional release for a period no longer than the time necessary for the Accused to visit his ailing family members”,<sup>25</sup> the majority clearly suggests that the two-week period of provisional release granted to Bruno Stojić is excessive. In this respect, I believe it necessary to recall that the burden to demonstrate a discernable error or an abuse of discretion by a Trial Chamber rests with the challenging party.<sup>26</sup> In the present instance, the Prosecution limits itself to claiming that “the length of the release ordered by the Trial Chamber (two weeks) is unreasonably long and bears no relation to the condition of Stojić’s family members”, and to drawing the Appeals Chamber’s attention to a decision issued in another case without even discussing the similarities or differences between the two cases.<sup>27</sup> As recalled by the Majority Decision, “decisions on motions for provisional release are fact intensive, and cases are considered on an individual basis in light of the particular circumstances of the individual accused”.<sup>28</sup> Therefore, a comparison of different decisions granting provisional release in different cases has very little relevance, if any. Furthermore, the Prosecution

<sup>21</sup> Majority Decision, para. 20 (footnote omitted).

<sup>22</sup> Majority Decision, para. 20 (footnote omitted).

<sup>23</sup> Majority Decision, para. 20.

<sup>24</sup> See, e.g., *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 39 (recalling that “although the Trial Chamber must always provide a reasoned opinion in writing, it is not required to articulate every step of its reasoning for each particular finding”) (internal quotation marks omitted); *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 47 (noting that “the Trial Chamber did not specifically discuss whether the conditions that prevailed in detention camps and deportation convoys constituted evidence of an intent to destroy the population through the infliction of intolerable conditions of life” but reasoning that “a Trial Chamber need not spell out every step of its analysis”); *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber’s Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts, 26 June 2000, para. 14 (noting that though “the Trial Chamber did not specifically state whether Proposed Facts 56 through 181 present any relevance for this case - except for those which go to crimes committed under Galic’s commander - such a finding can be inferred from the Impugned Decision.”); *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 25 (stating that “[c]oncerning the Appellants’ argument relating to the Trial Chamber’s failure to discuss the differences and/or similarities between the situations of Coo and Butler, the Appeals Chamber recalls that it is well established that Trial Chambers are not required to articulate every step of their reasoning in reaching a particular finding.” (footnote omitted)).

<sup>25</sup> Majority Decision, para. 20.

<sup>26</sup> See Majority Decision, para. 7.

<sup>27</sup> Appeal, para. 20 (footnote omitted).

<sup>28</sup> Majority Decision, para. 9 (footnote omitted).

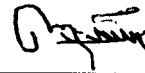



does not even attempt to explain why the two-week period “is unreasonably long and bears no relation to the condition of Stojić’s family members”.<sup>29</sup> Based on the foregoing, I do not think that the Prosecution has met its burden, and this reason alone should suffice to dismiss the Appeal.

10. I note moreover that after having balanced the different circumstances in the case, namely (1) the absence of flight risk or danger despite the significant change of circumstances constituted by the Rule 98bis Ruling, (2) the “extremely fragile state of health” of Bruno Stojić’s daughter and mother-in-law amounting to “serious humanitarian circumstances”, (3) the beneficial effect of Bruno Stojić’s presence at his wife’s side, and (4) the strict additional guarantees of appearance at trial,<sup>30</sup> the Trial Chamber granted a limited period (two weeks including travel time) of provisional release to Bruno Stojić.<sup>31</sup> Given the broad margin of discretion afforded to Trial Chambers,<sup>32</sup> I fail to identify any discernable error or abuse of discretion by the Trial Chamber in its determination of the length of the provisional release. I am of the opinion that the majority unduly interferes with the Trial Chamber’s discretion in requiring “a period [of provisional release] no longer than the time necessary for the Accused to visit his ailing family members”.<sup>33</sup> The standard of appellate review is not whether the Appeals Chamber’s Judges agree with a discretionary decision, but whether the Trial Chamber “correctly exercised its discretion in reaching that decision”.<sup>34</sup> I believe that it is exactly what the Trial Chamber did in the Impugned Decision.

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

Dated this 29th day of April 2008,  
At The Hague, The Netherlands.



Mehmet Güney  
Judge

**[Seal of the International Tribunal]**

<sup>29</sup> Appeal, para. 20 (footnote omitted). In fact, the Prosecution merely repeats the same argument, worded in the exactly same manner as its appeal against the *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Prlić* (Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-T) issued on 7 April 2008 (Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-AR65.8, Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Prlić* Dated 7 April 2008, 8 April 2008, para. 21).

<sup>30</sup> Impugned Decision, pp. 7-9.

<sup>31</sup> Impugned Decision, Confidential Annex.

<sup>32</sup> See Majority Decision, para. 6. “Deference is afforded to the Trial Chamber’s discretion in [...] decisions [of provisional release] because they ‘draw[] on the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and require[] a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.’” (Prosecutor v. Zdravko Tolimir et al., Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal against Decision on Joinder of Accused, 27 January 2006, para. 4; Prosecutor v. Slobodan Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004, para. 9.)

<sup>33</sup> Majority Decision, para. 20.

<sup>34</sup> See Majority Decision, para. 6.

