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: 21 April 2011

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Decision of: **21 April 2011**

THE PROSECUTOR

v.

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

PUBLIC

DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI REGARDING THE DECISION ON JADRANKO PRLIĆ'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
Ms Nika Pinter and Mr Božidar Kovačić for Slobodan Praljak
Ms Vesna Alaburić and Mr Zoran Ivanišević for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

The majority in the Chamber has decided to deny the motion for provisional release brought by the Accused Jadranko Prlić.

The reasons for the denial are set forth in the majority decision. As a matter of principle, I find that any accused presumed innocent while awaiting his or her Judgement may be placed on provisional release on condition that certain restrictions are imposed by the Chamber.

The Prosecution, as a matter of principle, opposes the Motion and as this has been a **traditional** posture, I need not encumber myself with the arguments of the Office of the Prosecutor, which are well known by all.

The Prlić Defence, in its submissions, contends that, **according to Rule 65 of the Rules**, the Accused Prlić may be released and that the case-law of the Appeals Chamber concerning sufficient humanitarian reasons is without legal foundation.

Moreover, the Prlić Defence adds that this Accused has been detained for almost 7 years and that provisional detention violates the presumption of innocence.

Before addressing the merits of the motion, I am compelled, by way of preliminary remarks, to raise the matter of a separate opinion, whether concurring or dissenting, in connection with the decision-making process of a Chamber.

The Prlić Defence had the opportunity to raise objections when the President of the Tribunal was seized. When it comes to matters of principle, it can happen that a Judge does not agree with the other Judges, and that, as important issues are concerned, it is entirely normal that opinions be freely expressed.

In this Tribunal, several Judges, such as Judges Shahabuddeen, Schomburg, Hunt and many others, have had the opportunity to express their personal points of view on various topics. This was, moreover, the case for a request for provisional release cited in the footnotes of the Motion.[1] The perspective supplied by a Judge, whether in support of a unanimous opinion or a majority opinion, may prove helpful, thereby enlivening the debate concerning international criminal law.

[1] *The Prosecutor v. Blagojević et al.*, Cases IT-02-60-AR65 and IT-02-060-AR65.2, "Decision on Provisional Release of Vidoje Blagojević and Dragan Obrenović", 3 October 2002, Separate Opinion by Judge Hunt, § 5, public.

The issue raised in this case by the Motion is whether an Accused, when the trial has nearly ended, may be granted provisional release while waiting for an anticipated Judgement whose time is still far off.

This is therefore an issue of special import that cannot be dismissed by a wave of the hand. The issue is all the more important in that the International Covenant on Civil and Political Rights, in Article 9 § 3, permits release. Moreover, as we shall observe below, the case-law of the European Court of Human Rights (ECHR) tends to favour release.

For this reason, I thought it necessary to set forth my point of view in some depth in order that any reader of the decision would have available all of the tools needed for him or her to understand why one or more of the Judges reached the conclusion they did.

In this case, the issue raised also presents another dimension which is the result of a request brought by an accused after 7 years of restraint upon his freedom to come and go, for the Accused Prlić has been deprived of his freedom since the warrant of arrest on 31 March 2004.

Thus, this Motion must be evaluated using several parameters I intend to set forth below, just as I have previously done for the motions filed by the other Accused.

To discover a satisfactory solution for this issue, I am compelled to examine in turn the following points:

I. Provisional Detention: an Exceptional Measure
II. The Circumstances of the Case
III. The New Situation
IV. The *Sefer Halilović* Precedent
V. The Necessary Measures to be Taken for Provisional Release
VI. The Rule of Precedent (*Stare Decisis*)

I) Provisional Detention: an Exceptional Measure

The presumption of innocence, pertaining to the situation of an accused, entails respect for individual liberties. Thus, "the accused shall be presumed innocent until proved guilty".[2]

The Statute of the International Criminal Tribunal for the former Yugoslavia (respectively, the "Statute" and the "Tribunal"), which is the product of Security Council Resolution 827, does not explicitly raise the possibility of releasing an accused. In the language of Rule 65 of the Rules of Procedure and Evidence ("Rules") an accused, once detained, may not be released except upon an order of a Chamber.

By contrast, international instruments such as the European Convention on Human Rights lay down the principle of respect for individual liberties and spell out the circumstances in which, as an exception, detention may occur.[3] Article 5 of the European Convention on Human Rights contains the following language:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]
>
> c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; [...]
>
> 3) Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The Court has recalled on countless occasions that provisional detention is an **exceptional** measure to be used only where strictly necessary.[4]

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[2] See Article 21(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia; Article 6 of the European Convention of Human Rights; Article 2 of the International Covenant on Civil and Political Rights.

[3] See also Article 9 § 3 of the International Covenant on Civil and Political Rights, by virtue of which "[…] **[i]t shall not be the general rule that persons awaiting trial shall be detained in custody**, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".

[4] See particularly E.C.H.R., 27 August 1992, *Tomasi v. France*, Application No. 12850/87, § 84; E.C.H.R., 14 January 1997, *Contrada v. Italy*, § 54; E.C.H.R., 31 May 2005, *Dinler v. Turkey*, Application No. 61443/00, § 51; E.C.H.R., 28 October 2010, *Knebl v. Czech Republic*, Application No. 20157/05, § 62. On this point, the European Court of Human Rights emphasized in its Judgment of 8

According to the settled case-law of the European Court of Human Rights, "[i]t falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time".[5] As such, release must be granted once continuing detention ceases to be reasonable. The Court has in this light considered that provisional detention must be viewed as the definitive solution warranted only when all other available options prove to be inadequate.[6] The Court adds that "a genuine requirement of public interest" may, when considering the presumption of innocence, justify an exception to the rule of respect for individual liberties.[7]

Furthermore, the Court asserts that "the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices".[8] For this reason, "the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty".[9] Finally, the Court will likewise seek out whether the said grounds reveal themselves to be "relevant" and "sufficient" and then will ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings.[10]

November 2007, *Lelievre v. Belgium*, Application No. 11287/03, § 89, that the very heart of Article 5 § 3 of the European Convention on Human Rights establishes "the right to remain free while awaiting criminal proceedings".

[5] See particularly E.C.H.R., 27 June 1968, *Neumeister v. Austria*, Application No. 1936/63, A.5; E.C.H.R., 9 November 1999, *Debboub v. France*, Application No. 37786/97, § 39.

[6] E.C.H.R., 21 December 2000, *Jablonski v. Poland*, Application No. 33492/96, § 83; E.C.H.R., 8 November 2007, *Lelievre v. Belgium*, Application No. 11287/03, § 97, (the Court adds that the competent authorities, once they have been called upon to rule on the reasonableness of a detention pursuant to Article 5 § 1 (c), have the duty to try to discover whether there are not alternative measures to continuing detention).

[7] See particularly E.C.H.R., 27 June 1968, *Neumeister v. Austria*, Application No. 1936/63, A.5; E.C.H.R., 26 January 1993, *W. v. Switzerland*, Application No. 14379/88, § 30; E.C.H.R., 9 November 1999, *Debboub v. France*, Application No. 37786/97, § 39; E.C.H.R., 14 January 1997, *Contrada v. Italy*, § 54; E.C.H.R., 26 October 2000, *Kudla v. Poland*, Application No. 30210/96, § 110; E.C.H.R., 28 October 2010, *Knebl v. Czech Republic*, Application No. 20157/05, § 62.

[8] See particularly E.C.H.R., 6 April 2000, *Labita v. Italy*, Application No. 26772/9, § 153; E.C.H.R., 8 October 2009, *Maloum v. France*, Application No. 35471/06, § 37.

[9] E.C.H.R., 6 April 2000, *Labita v. Italy*, Application No. 26772/9, § 153; E.C.H.R., 8 November 2007, *Lelievre v. Belgium*, Application No. 11287/03, § 90.

[10] See particularly the following instances of violations: E.C.H.R., 26 June 1991, *Letellier v. France*, Application No. 12369/86, § 54; E.C.H.R., 27 August 1992, *Tomasi v. France*, Application No. 12850/87, § 102; E.C.H.R., 23 September 1998, *I.A. v. France*, § 111; E.C.H.R., 13 February 2001, *Richet v. France*, Application No. 34947/97, § 69; E.C.H.R., 26 October 2000, *Kudla v. Poland*, §§ 141-116; E.C.H.R., 5 October 2004, *Blondet v. France*, Application No. 49451/99, § 41; E.C.H.R., 17 March 1997, *Muller v. France*, §§ 45-48.

In this regard, the Court stresses that the complexity and any special features of the investigation are important factors to be taken into account.[11]

Finally, the Court has recalled on numerous occasions that the reasonableness of a period of detention does not lend itself to assessment in the abstract.[12] Therefore, the legitimacy of the continuing detention of an accused must be weighed in each case according to the special features of the case.[13] According to the Court, the period to take into consideration pursuant to Article 5 § 3 begins on the date the person was arrested or detained[14] and ends when there has been a ruling on his or her guilt.[15] No period greater than five years seems to have ever been found reasonable.[16]

When it comes to "relevant" and "sufficient" grounds justifying continued provisional detention, the Court has noted the specific context and the complexity of the case;[17] the exceptional, persistent disturbance of public order; the need to ensure that the movant remains within the reach of the judicial authorities, in light of the sentence at issue, in the absence of credible guarantees of returning to appear, the character of the suspect, his propensity to endanger others, his means, his ties to the government prosecuting him as well as his international connections;[18] preventing a repeat offence;[19] the risk of collusion;[20] and pressure exerted against witnesses.[21]

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[11] See particularly E.C.H.R., 18 December 1996, *Scott v. Spain*, § 74, E.C.H.R., 28 November 2002, *Lavents v. Latvia*, Application No. 58442/00, § 71; E.C.H.R., 26 June 1991, *Letellier v. France*, § 35.
[12] E.C.H.R., 14 January 1997, *Contrada v. Italy*, § 54; E.C.H.R., 26 January 1993, *W. v. Switzerland*, Application No. 14379/88, § 30.
[13] E.C.H.R., 26 January 1993, *W. v. Switzerland*, Application No. 14379/88, § 30; E.C.H.R., 14 January 1997, *Contrada v. Italy*, § 54.
[14] E.C.H.R., 17 March 1997, *Muller v. France* 35.
[15] E.C.H.R., 27 June 1968, *Wemhoff v. Austria*, Application No. 2122/64, A.9; E.C.H.R., 6 April 2000, *Labita v. Italy*, Application No. 26772/9, §§ 171-173.
[16] See particularly E.C.H.R., 31 July 2001, *Zannouti v. France*, Application No. 42211/98, § 44; (which teaches that a span of seven years and ten months appears *prima facie* unreasonable hence impermissible. It can only be justified under exceptional circumstances); E.C.H.R., 8 October 2009, *Maloum v. France*, Application No. 35471/06 (the Court found that a span of provisional detention of six years must have particularly sound justification. In this instance, the Court held that the preparation of a trial as complex as this one was not sufficient to justify a long detention); in this regard, see also E.C.H.R., 8 October 2009, *Naudo v. France*, Application No. 35469/06, § 41; E.C.H.R., 21 December 2010, *Fetis et al. v. Turkey*, Application Nos 34759/04, 28588/05, 1016/06 and 19280/06, §§ 12-13 (in this instance, the Court concluded that the spans of eight years and three months (Application No. 34759/04), thirteen years and four months (Application No. 28588/05) and four years and four months (Application No. 1016/06) were excessive).
[17] See particularly E.C.H.R., 9 November 1999, *Debboub v. France*, Application No. 37786/97, § 46, but see by contrast, E.C.H.R., 26 October 2006, *Chraidi v. Germany*, Application No. 65655/01, § 43.
[18] See particularly E.C.H.R., 28 October 2010, *Knebl v. Czech Republic*, Application No. 20157/05, § 65.
[19] See particularly E.C.H.R., 29 October 2009, *Paradysz v. France*, Application No. 17020/05, § 70.
[20] See particularly E.C.H.R., *Szepesi v. Hungary*, Application No. 7983/06, 21 December 2010, § 26.
[21] See particularly E.C.H.R., 10 March 2009, *Bykov v. Russia*, Application No. 4378/02, § 65.

The Judges of the Tribunal have over time developed a jurisprudence affording provisional releases pursuant to Rule 65 of the Rules, a rule many times amended.[22] **Trial Chamber I has recalled, moreover, that Rule 65 of the Rules must be interpreted in light of the International Covenant on Civil and Political Rights, the European Convention on Human Rights and applicable case-law.**[23]

It is also necessary to underscore that the Statute mandates that the Judges ensure the expeditiousness of the trial.[24] The letter and the spirit of the Statute are particularly clear on this point: once an Accused is indicted, he must be tried expeditiously.

Unfortunately, the obligation weighing upon the Judges could not be met in this instance, due to many circumstances linked principally to the position of the Prosecution which, for reasons of its own, did not proceed very rapidly in the court hearings.

II) The Circumstances of the Case

A) End of Closing Arguments and Pendency of Judgement

The Prosecution's closing arguments are done and the Defences have pleaded their cases. The Judgement will be rendered several months hence, although at this stage it cannot be said when, given the very high number of documents admitted (10,000) – which must be assessed one by one – the number of crimes alleged, the number of municipalities cited in the Indictment and the number of Accused.

That being so, must the Accused, being presumed innocent, wait – in prison – for the delivery of Judgement or should they – as persons enjoying the presumption of innocence – be released again, especially as not granting this provisional release could be construed as a pre-Judgement?

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[22] Certain paragraphs of Article 65 of the Rules of Procedure and Evidence, adopted on 11 February 1994, were in fact revised on 30 January 1995, amended on 25 July 1997, on 12 November 1998, on 10 July 1998, on 17 November 1999, on 14 July 2000, on 1 December 2000 and on 21 July 2005.

[23] See "Order on Provisional Release of Slobodan Praljak", "Order on Provisional Release of Bruno Stojić", "Order on Provisional Release of Jadranko Prlić", "Order on Provisional Release of Valentin Ćorić", "Order on Provisional Release of Milivoj Petković", "Order on Provisional Release of Berislav Pusić". All bear the signature date of 30 July 2004 and the Registry filing date of 2 August 2004, and are public.

B) Previously Ordered Provisional Releases

I wish to point out that the provisional release of an accused is provided for in Rule 65 of the Rules which sets out in paragraph (B) the conditions under which provisional release may be considered:

"*Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.*"

The text of the Rules is perfectly clear: an accused may be released if the Trial Chamber is satisfied that he will appear for trial, if released, and will not pose a danger to any victim, witness or other person.

In this respect, it is appropriate to recall the reasoning of the Trial Chamber, which rendered the six decisions[25] on 30 July 2004 ordering the release of the Accused after their incarceration and before the commencement of the trial. Thus, the Trial Chamber recalled that "*[r]ules 65 (A) and (B) of the Rules set out the basis upon which a Trial Chamber may order the provisional release of an accused*". In that instance, the Trial Chamber considered that the two conditions were met and thus granted the requests for release of the six accused after reviewing the following points:

1) Declaration by the Various Accused

The Trial Chamber duly noted and took into account the Solemn Declaration and written statements filed by all of the Accused, as well as their spoken statements during the Hearing. The latter had *inter alia* pledged to duly respond to any summons to the Tribunal, having signalled that they were ready to commit personal resources in order to give evidence of their good faith and had stated that they had never had the intent to avoid justice and that they would not leave the municipality in which they had decided to stay.

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[24] Thus, pursuant to Article 20 of the Statute regarding the opening and conduct of the trial, "[t]he Trial Chambers shall ensure that a trial is fair and expeditious [...]".
[25] FN 23, *supra*.

2) Power and Influence of the Accused

The Trial Chamber found that even if the Accused retained the ability to influence victims and witnesses or to destroy or cause evidence to disappear, it did not necessarily follow that they would use this ability unlawfully. Additionally, the Chamber stressed that nothing led them to the conclusion that the Accused had obstructed justice. Finally, the Chamber found that the evidence was inadequate for finding that, if they were set at liberty, the Accused might pose a danger to witnesses and to victims.

3) Likelihood of Receiving Heavy Sentences Not Determinative in Assessment of Release

The Chamber declared that the likelihood the Accused, if they were found guilty of serious crimes, would receive heavy sentences "cannot be used against the Accused. All accused before this Tribunal, if convicted, are likely to face heavy sentences".

4) Risk of Absconding

The Trial Chamber pointed out that, because the various Accused never attempted to abscond prior to their arrest, it was all the more likely that they would again appear when the Trial Chamber ordered them to do so. The Chamber added, furthermore, that this "is true particularly because the Accused knew in advance that he was likely to be indicted by the Tribunal". The Trial Chamber observed, finally, that the Accused never attempted to abscond, even though they had reason to think that they were suspected of having committed crimes falling within the jurisdiction of the Tribunal and that, if convicted, they would face a severe sentence.

5) Guarantees Provided by the Croatian Authorities

The Trial Chamber recalled that "guarantees are not a requirement [*sine qua non*] for a grant of provisional release". However, they do provide the Chamber with assurance that the Accused will return to appear.

On 5 August 2004, the Prosecution filed an application for leave to lodge an appeal[26] in respect of the decisions of the Trial Chamber granting provisional release to the Accused, on the following grounds:

a) weak evidence and shifting the burden of proof;
b) failure by the Trial Chamber to take into account the severity of the crimes charged;
c) failure to take into account the absence of coercive measures and surveillance from the Tribunal;
d) excessive weight assigned to the fact that it was never previously established that the Accused had attempted to exert pressure on victims or witnesses;
e) the Trial Chamber's error in not taking into account – as it ought to have – the guarantees of the Croatian government;
f) the Trial Chamber not taking into account the cumulative effect of the various exhibits and statements put forward by the Prosecution; and
g) a failure on the part of the Trial Chamber not to have imposed more stringent conditions for provisional release, such as home confinement.

As it was then seized of the proceedings, the Appeals Chamber, in the Decision of 8 September 2004,[27] validated the Trial Chamber's approach, stating in paragraph 26:

"*In relation to each of the accused, the Trial Chamber carried out a detailed examination of the evidence placed before it in the context of the enforcement limitations of the Tribunal. Before being satisfied that each accused would appear for trial if released, the Trial Chamber considered evidence of voluntary surrender, earlier co-operation with the Tribunal, each accused's family and economic situation, guarantees provided by the accused's home state, and evidence of the effectiveness of those guarantees with respect to other accused previously released by the Tribunal, the past and present position of the accused and his political influence. Before concluding that the accused, if released, would not pose a danger to any victim, witness or other person, the Trial Chamber considered the length of time the accused was aware of an investigation against him without having posed any such threat, the area in which he would reside if released, the available supervision by the authorities, and his links to the area to which he would be released. It was only after considering this evidence that the Trial Chamber turned to consider the undertakings given by each of the accused in support of his application for provisional release.*"

[26] "Prosecutor's Application for Leave to File an Interlocutory Appeal in Respect of the Orders on Provisional Release Concerning the Accused Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Corić and Berislav Pušić", 5 August 2004.
[27] "Decision on Motions for Reconsideration, Clarification, Request for Release and Applications for Leave to Appeal", 8 September 2004, public.

One is compelled to observe that the charges alleged in the Indictment remained in force against the various Accused throughout the entire period.

During the entire course of the trial, from 26 April 2006 to 2 March 2011, that is, almost five years, the Accused were granted provisional release on numerous occasions.[28] These releases proceeded without endangerment of witnesses and victims and were accompanied by full guarantees of their return to The Hague, particularly as the Croatian State pledged to ensure continuous monitoring of each of the Accused.

III) The New Situation

In comparison with previous requests, the situation has perhaps changed, as the trial has nearly ended and will be completely over once the Judgement is read.

The Prosecution, for its part, has asked for the Accused to receive heavy sentences; **all** of the latter have requested acquittal.

This "new situation" was anyhow apparent from the outset and there is not, properly speaking, a new situation to lead the Judges to adopt a different approach towards these requests for release.

For this reason, viewed from my level, I see nothing new to justify a "hardening of our attitude" toward the requests of the various Accused and that, in this instance, given that the current situation does not display any new circumstances, I find that the Accused Pušić ought to be granted this release.

IV) The *Sefer Halilović* Precedent

The decision rendered on 1 September 2005 by Chamber I consisting of Judges Liu, Mumba and El Mahdi seems quite **pertinent** in this instance.

It is my duty to cite in full the underlying logic of the decision rendered on 1 September 2005:

"[…] HAVING CONSIDERED all of the arguments of the parties;

[28] See, e.g., "Decision on the Motion for Provisional Release of the Accused Prlić", 11 June 2007, public with confidential annex; "Decision on Motion for Provisional Release of the Accused Prlić", 8 December 2010, confidential with confidential annex.

CONSIDERING that pursuant to Articles 20 and 21 of the Statute of the Tribunal ("Statute") the Trial Chamber has to ensure a fair and expeditious trial and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses ;

NOTING that pursuant to Rule 65 (B) of the Rules a Chamber may order a provisional release of an accused only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the following two requirements are met: (i) the accused will appear for trial and, (ii) if released, will not pose a danger to any victim, witness or other person ";

NOTING further that Rule 65 (C) of the Rules provides that "[t]he Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others";

CONSIDERING that the Trial Chamber's discretion under Rule 65 must be exercised in light of all the circumstances of the case;

CONSIDERING that the Accused voluntarily surrendered to the custody of the Tribunal on 25 September 2001;

CONSIDERING that the Accused complied with all the conditions imposed upon him while provisionally released during the pre-trial and trial proceedings;

CONSIDERING that the Accused has conducted himself with due respect towards the Tribunal during all the proceedings;

NOTING that the Registry provided a certified copy of the Motion to the relevant authorities in the Netherlands who have not opposed the provisional release of the Accused;

NOTING the written guarantee provided by the Government of the Federation of Bosnia and Herzegovina, dated 25 August 2005, and filed by the Defence on 29 August 2005, in which it is stated that "the competent organs of the Federation of Bosnia and Herzegovina will ensure that Sefer Halilovic responds to every call by the Court to The Hague or any other place which the Trial Chamber determines, and will execute all the orders of the Court which the Trial Chamber orders by its decision";

CONSIDERING that the jurisprudence of the Tribunal gives due weight to the personal circumstances of the Accused in deciding whether to grant provisional release, and furthermore the Trial Chamber finds that such considerations should not be limited to the pre-trial stage of the proceedings;

CONSIDERING that until the rendering of a judgement, an accused is presumed to be innocent;

CONSIDERING the circumstances submitted by the Defence in support of the Motion, in particular the impossibility for the Accused's family to pay for a visit to The Hague;

CONSIDERING that the final trial briefs were filed on 25 August 2005 and the closing arguments took place on 30 and 31 August 2005, in the presence of the Accused;

CONSIDERING that the presence of the Accused at the seat of the Tribunal is no longer necessary until the rendering of the judgement;

CONSIDERING that the final trial briefs and the closing arguments do not in any way affect the presumption of innocence of the Accused, as they do not provide an indication of the outcome of the case, which will only materialise at the end of the deliberations;

CONSIDERING that it is normal to expect the Prosecution's case evolving throughout the presentation of the evidence, and culminating in the final trial briefs and closing arguments; however, the issue of provisional release remains governed by the criteria provided for in Rule 65 of the Rules: the Trial Chamber's discretion, upon a balance of probabilities, to determine whether the Accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person;

CONSIDERING that, in the circumstances of the present case, in particular the personal situation of the Accused, the Trial Chamber is satisfied that the Accused, if released, will appear for the rendering of the judgement, and that the Trial Chamber is further satisfied that he will not pose any danger to any victim, witness or other person;

CONSIDERING that, in relation to the serious threats which have been made against a member of the Accused's close family, the Trial Chamber expressly entrusts the Government of the Federation of Bosnia and Herzegovina to assume responsibility for, and to take the appropriate measures to ensure, the personal security and safety of the Accused while he is on provisional release,

FOR THE FOREGOING REASONS,

HEREBY GRANTS the Motion and **ORDERS** the provisional release of Sefer Halilovic as soon as possible, at the latest from 5 September until 7 November 2005, unless the Trial Chamber notifies a prior date for his return, on the following terms and conditions [...]"

It is particularly important to note that this contains an **explicit reminder** pointing to the fact that an accused is presumed innocent until Judgement is pronounced and that, moreover, the presence of the accused at the seat of the Tribunal is unnecessary.

The *Sefer Halilović* precedent ought ordinarily to result in the provisional release of all of the Accused in this case, as their presence at the seat of the Tribunal is unnecessary while awaiting Judgement and they are still as of this date presumed innocent.

V) Necessary Measures to be Taken for Provisional Release

A) The Safety of the Accused

I consider that this release must be accompanied by certain basic precautions in order to avoid the great number of problems connected to the risk of an assault on the Accused. It is likewise important to stress the risk which the prison system may pose for the security of a detainee, as the Accused may likewise be subjected to pressure, to threats or even assault by other fellow prisoners.[29]

Likewise, an accused on release may be attacked in the country of residence which has provided the guarantees and, due to this, must in any event be the object of police surveillance to protect him or her from this risk.

B) Guarantees

On the one hand, within the *common law* system, it is possible for an accused to be released under certain conditions prior to the reading of Judgement (see, for example, the United States of America, Australia, New Zealand and also Israel).[30] The payment of a bail deposit secures the Accused's return appearance before the courts in a manner which is effective.

On the other hand, within the *civil law* system, it is possible for an accused to be released during the investigative phase, during trial and later still, if an appeal is lodged (see for example France, Italy or Germany).

Insofar as our Tribunal is concerned, Rule 65 of the Rules does not prohibit release so long as the conditions set forth under the said Rule are met.

Consequently, I believe that the Accused Prlić ought to be granted this release.

At the same time, I am aware that, for the Croatian police authorities, close monitoring may subject them to substantial burdens at the very moment when

[29] See the example of Radislav Krstić, who was convicted by the Tribunal on 19 April 2004 to 35 years of prison for war crimes and crimes against humanity, was transferred to the United Kingdom on 20 December 2004 to serve out the rest of his sentence and had his throat slit by three Muslim fellow prisoners at Wakefield Prison in Yorkshire. It is remarkable that he survived the said attack.

Croatian government finances could not afford to do so. Indeed, if all of the Accused were freed, that kind of monitoring would require substantial police mobilisation.

For this reason, several alternative approaches may be envisaged. The first is the electronic bracelet[31] - resulting in lower costs than continuous surveillance – or even permanent home confinement. The first approach must nevertheless be ruled out inasmuch as Croatia does not seem to have such techniques available at this moment. Bail can also offer further effective assurances.

The amount in question would be proportionate to the individual's financial means and in the case before us, the Accused Prlić might, for his share, be able to contribute **300,000 euro**. This amount is the sum of an empirical assessment, in the absence of documents concerning the specific assets of the person concerned and takes into account the grade of the post held during the events giving rise to the Indictment.

Bail is a measure which has hitherto produced positive effects throughout the world, without there being escapes subsequent to the deposit of funds. The risk of flight of the various Accused would thus be obviated by the said guarantees.

VI) The Rule of Precedent (*Stare Decisis*)

The Prlić Defence, at paragraph 15 of its submission, mentions the principle of *stare decisis*, whereby the Trial Chamber would be obliged to follow the decisions of the Court of Appeals.

This rule of precedent – *stare decisis* – is a rule applied in *common law* countries. Lower courts are required to render decisions in conformity with earlier decisions. It should be noted that the Supreme Court of Louisiana (United States), in the case of *Med. Ctr v. Caddo-Shreveport Sales & Use Tax Comm'n*[32] said that a series of logically consistent decisions was needed to create settled jurisprudence.

It is true that in those countries where the law is a customary law, it is necessary that this rule be applied to judicial protection, due to statutory silence.

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[30] One could also cite the example of the former Israeli President, Moshe Kazav, who, when charged with rape and sexual harassment, was not placed in provisional detention.

[31] On 23 March 2011, the Chamber asked the Registry to inquire with the Croatian authorities concerning the possibility of implementing surveillance using electronic bracelets. They responded in the negative.

In the United States, it is the Supreme Court of the United States which imposes its jurisprudence upon the other Courts, be they federal or state, although one must note in passing that from 1946-1992, the Supreme Court overturned itself in about 130 cases.[33]

However, this rule is not "incorrigible" inasmuch as in Great Britain the House of Lords departed from this obligation for precedents which had become ill-adjusted or unjust.[34]

In the United States, things are more delicate because the Supreme Court bases its rulings on the Constitution and therefore, only an amendment to the Constitution would permit a new decision.

At a European level, it is appropriate to recall the judgment of the ECHR rendered on 18 December 2008, ***Unedic v. France***, in which it is stated: "[t]he requirements of judicial security and of safeguarding the legitimate trust of the parties in the judicial system do not affirm any recognised right to settled jurisprudence."[35] /Registry translation/

At the ICTY, we are in a different situation altogether, where the rules governing provisional release are tightly defined under Rule 65 of the Rules. It must therefore be noted that neither the Statute nor the Rules contain any rule prohibiting the release of an accused while awaiting judgement. The Appeals Chamber, acting by a majority of Judges, decided to make the requirements for release more difficult through the principle of sufficient humanitarian reasons not contemplated under Rule 65 of the Rules.

As we do not find ourselves in a situation of customary law, given the presence of a text (Rule 65 of the Rules), I find that the so-called rule of *stare decisis* cannot automatically apply here, because there is a specific written text which was amended on a number of occasions and which does not suffer from any need to be "completed"

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[32] Supreme Court of Louisiana, (2005) *Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n,* 903 So.2d 1071; Vol. 2004-C-0473; No. 17.

[33] See, e.g., United States Supreme Court, *United States v. Miller*, 471 U.S. 130 (1985). See also E.E. Wilson, "*Stare Decisis, Quo Vadis*?" 33 Geo. L.J. 251 254 FN 17, 265 (1945); William O. Douglas, "*Stare Decisis*," 49 Colum. L. Rev. 735-43, 756-58 (1949); Albert R. Blaustein and Andrew H. Field, "*Overruling Opinions in the Supreme Court*," 57 Mich. L. Rev. 151, 184-94 (1958).

[34] See, e.g., The House of Lords, *Anderton v. Ryan*, 9 May 1985; *R. v. Shivpuri*, 15 May 1986.

by the Appeals Chamber or from any vagueness or ambiguity, because the text makes release contingent exclusively upon very specific criteria which have been more than satisfied by the Accused Prlić.

This opinion may be rendered publicly notwithstanding the fact that the motion was originally confidential. No dimension of this opinion concerns protected witnesses or medical aspects.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-first day of April 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

[35] European Court of Human Rights, 18 December 2008, 5th Section, *Unedic v. France*, Application No. 20153/04, § 38.