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

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French

IN TRIAL CHAMBER III

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

Registrar: **Mr 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 CONCERNING THE DECISION ON REQUEST FOR PROVISIONAL RELEASE OF THE ACCUSED SLOBODAN PRALJAK

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

On 7 April 2011, the Praljak Defence filed a request for provisional release.

The majority of the Trial Chamber decided to deny this request for the reasons set forth in the decision.

As far as I am concerned, as a **matter of principle**, I deem that an accused may be provisionally released pending Judgement, all the more so since decisions to this effect have been rendered before, particularly by the Appeals Chamber.

In view of the fact that the Prosecution's arguments are identical to those it has presented on various occasions, particularly in the requests for the provisional release of the other accused, I deem it unnecessary to comment on them.

The date of the Judgement has yet to be set because it depends entirely upon headway in its drafting, which will in turn be the product of the upcoming deliberations. At this stage, I would like to point out that the date mentioned in paragraph 2 of the Praljak Defence submission, based on the footnote on page 3, will certainly be exceeded unless some miracle occurs.

As regards the time the Chamber will take to deliberate and to render its Judgement, this will be very lengthy indeed, in view of the number of charges, the nearly 10,000 documents admitted and requiring examination, as well as the tens of thousands of pages of transcripts.

Therefore, under these conditions, must the Accused Praljak wait in prison for the Judgement that is still far off, or, as one presumed innocent, may he enjoy provisional release until the date that Judgement is pronounced, taking into account that, faced with the same situation during the pre-trial stage, the Appeals Chamber held that the Accused could be released pending trial?

In order to find a satisfactory response to this question, I am bound to examine the following points in turn:

I. Provisional detention: an exceptional measure

II. The circumstances of the case

III. The new situation

IV. The Halilović decision as a precedent

V. The necessary measures to be taken for provisional release

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".[1]

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

By contrast, international instruments such as the European Convention on Human Rights lay down the principle of respect for individual liberties and set forth the circumstances in which, as an exception, detention may occur.[2] Article 5 of the European Convention on Human Rights states the following:

> "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

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

[2] *See* also Article 9 § 3 of the International Covenant on Civil and Political Rights which stipulates that "[…] **[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".

> 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 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 when strictly necessary.[3]

According to the established 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".[4] Therefore, release must be granted once continued detention is no longer reasonable. In this light, the Court has held that provisional detention must be viewed as the last solution warranted only when all other available options prove to be inadequate.[5] 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.[6]

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

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[3] *See* particularly ECHR, 27 August 1992, *Tomasi v. France*, Application No. 12850/87, § 84; ECHR, 14 January 1997, *Contrada v. Italy*, § 54; ECHR, 31 May 2005, *Dinler v. Turkey*, Application No. 61443/00, § 51; ECHR, 28 October 2010, *Knebl v. Czech Republic*, Application No. 20157/05, § 62. On this point, in its Judgment of 8 November 2007, *Lelievre v. Belgium*, Application No. 11287/03, § 89, the European Court of Human Rights emphasized that the very substance of Article 5 § 3 of the European Convention on Human Rights establishes "the right to remain free while awaiting criminal proceedings".

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

[5] ECHR, 21 December 2000, *Jablonski v. Poland*, Application No. 33492/96, § 83; ECHR, 8 November 2007, *Lelievre v. Belgium*, Application No. 11287/03, § 97 (The Court states 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 if there are any alternative measures to continuing detention).

[6] *See* particularly ECHR, 27 June 1968, *Neumeister v. Austria*, Application No. 1936/63, A.5; ECHR, 26 January 1993, *W. v. Switzerland*, Application No. 14379/88, § 30; ECHR, 9 November 1999, *Debboub v. France*, Application No. 37786/97, § 39; ECHR, 14 January 1997, *Contrada v. Italy*, § 54;

lawfulness of the continued detention, but after a certain lapse of time it no longer suffices".[7] For this reason, "the Court must establish whether the other grounds given by the judicial authorities continue to justify the deprivation of liberty".[8] Finally, the Court likewise seeks to establish whether these grounds are "relevant" and "sufficient" and then ascertains whether the competent national authorities have displayed "special diligence" in the conduct of the proceedings.[9] In this regard, the Court states that the complexity and any special features of the investigation are important factors to be taken into account.[10]

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.[11] Therefore, the legitimacy of the continuing detention of an accused must be weighed in each case according to the special features of the case.[12] 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[13] and ends when his or her guilt is decided on.[14] No period longer than five years seems to have ever been found reasonable.[15]

ECHR, 26 October 2000, *Kudla v. Poland*, Application No. 30210/96, § 110; ECHR, 28 October 2010, *Knebl v. Czech Republic*, Application No. 20157/05, § 62.

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

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

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

[10] *See* particularly ECHR, 18 December 1996, *Scott v. Spain*, § 74, ECHR, 28 November 2002, *Lavents v. Latvia*, Application No. 58442/00, § 71; ECHR, 26 June 1991, *Lettelier v. France*, § 35.

[11] ECHR, 14 January 1997, *Contrada v. Italy*, § 54; ECHR, 26 January 1993, *W. v. Switzerland*, Application No. 14379/88, § 30.

[12] ECHR, 26 January 1993, *W. v. Switzerland*, Application No. 14379/88, § 30; ECHR, 14 January 1997, *Contrada v. Italy*, § 54.

[13] ECHR, 17 March 1997, *Muller v. France* 35.

[14] ECHR, 27 June 1968, *Wemhoff v. Austria*, Application No. 2122/64, A.9; ECHR, 6 April 2000, *Labita v. Italy*, Application No. 26772/9, §§ 171-173.

[15] *See* particularly ECHR, 31 July 2001, *Zannouti v. France*, Application No. 42211/98, § 44 (which demonstrates that a provisional detention lasting seven years and ten months appears *prima facie* unreasonable and thus inadmissible. It can only be justified under exceptional circumstances); ECHR, 8 October 2009, *Maloum v. France*, Application No. 35471/06 (The Court found that a provisional detention lasting six years must have particularly sound justification. In this case, the Court held that the preparation of a trial as complex as that one was not sufficient to justify such a long detention); in this regard, *see* also ECHR, 8 October 2009, *Naudo v. France*, Application No. 35469/06, § 41; ECHR, 21 December 2010, *Fetis et al. v. Turkey*, Application Nos 34759/04, 28588/05, 1016/06 and 19280/06, §§ 12-13 (in this case, the Court concluded that the spans of eight years and three months of

With respect to "relevant" and "sufficient" grounds justifying continued provisional detention, the Court has particularly noted the specific context and the complexity of the case;[16] the exceptional, persistent disturbance of public order; the need to ensure that the applicant 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 State prosecuting him, as well as his international contacts;[17] prevention of a repeat offence;[18] the risk of collusion;[19] and pressure exerted against witnesses.[20]

The Judges of the Tribunal have over time developed a jurisprudence allowing provisional release pursuant to Rule 65 of the Rules, a rule amended many times.[21] **Moreover, Trial Chamber I has recalled 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.**[22]

It is also necessary to underscore that the Statute requires that the Judges ensure an expeditious trial.[23] The letter and the spirit of the Statute are particularly clear on this point: once an Accused is indicted, he must be tried promptly.

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

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Application 34759/04, thirteen years and four months of Application No. 28588/05 and four years and four months of Application No. 1016/06 were all excessive).

[16] *See* particularly ECHR, 9 November 1999, *Debboub v. France*, Application No. 37786/97, § 46, but *see* by contrast, ECHR, 26 October 2006, *Chraidi v. Germany*,, Application No. 65655/01, § 43.

[17] *See* particularly ECHR, 28 October 2010, *Knebl v. Czech Republic*, Application No. 20157/05, § 65.

[18] *See* particularly ECHR, 29 October 2009, *Paradysz v. France*, Application No. 17020/05, § 70.

[19] *See* particularly ECHR, *Szepesi v. Hungary*, Application No. 7983/06, 21 December 2010, § 26.

[20] *See* particularly ECHR, 10 March 2009, *Bykov v. Russia*, Application No. 4378/02, § 65.

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

[22] *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 Pušić". All bear the signature date of 30 July 2004 and the Registry filing date of 2 August 2004, and are public documents.

[23] In fact, pursuant to Article 20 of the Statute, regarding the opening and conduct of a trial, "[t]he Trial Chambers shall ensure that a trial is fair and expeditious [...]".

Prosecution which, for its own reasons, 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 has presented its closing arguments 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, who are presumed innocent, wait – in prison – for the delivery of Judgement or should they – as persons enjoying the presumption of innocence – be released, especially in view of the fact that not granting this provisional release could be construed as a pre-Judgement?

B) Previously ordered provisional releases

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

"[...] *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 Rule is perfectly clear: an accused may be released as long as the Trial Chamber is certain that he will appear if released or that he will not pose a danger to a victim, witness or other person.

In this regard, it is appropriate to recall the reasoning of the Trial Chamber that on 30 July 2004 rendered six decisions,[24] ordering the release of the Accused after their incarceration and before the commencement of the trial. Thus, the Trial Chamber recalled that "*Rules 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 case, the Trial Chamber held that these two conditions were met and thus granted the requests for release of the six accused, after reviewing the following points:

1) Declaration by the Accused

The Trial Chamber noted and took due account of the solemn declarations and written undertakings filed by all of the Accused, as well as their oral submissions during the hearing. They had *inter alia* pledged to duly respond to any summons of the Tribunal, they had indicated that they were ready to commit personal resources in order to prove their good faith and they had stated that they had never intended to abscond and would not leave the municipality in which they had chosen to reside.

2) Power and influence of the Accused

The Trial Chamber found that even if the Accused retained the power to influence victims or witnesses and to destroy evidence or cause it to disappear, it did not necessarily follow that they would use it unlawfully. Moreover, the Chamber stated that nothing led to the conclusion that the Accused had interfered with the administration of justice. Finally, the Chamber held that the evidence was insufficient to conclude that, if released, the Accused might pose a danger to witnesses and victims.

3) Likelihood of receiving heavy sentences not a determining factor in assessment of release

[24] *Supra* 22.

The Chamber stated that the fact that the Accused, if 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 receive heavy sentences".

4) Risk of absconding

The Trial Chamber noted that since the Accused never tried to abscond prior to their arrest, it was more than likely that they would appear when so ordered by the Trial Chamber. Furthermore, the Chamber added that this "is true particularly because the Accused knew in advance that he was likely to be indicted by the Tribunal". Finally, the Trial Chamber noted 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 Tribunal's jurisdiction and could face a severe sentence if convicted.

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 appear.

On 5 August 2004, the Prosecution filed an application for leave to lodge an appeal[25] against the Trial Chamber decisions 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;

[25] "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 Ćorić and Berislav Pušić", 5 August 2004.

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) Failure on the part of the Trial Chamber to have imposed more stringent conditions for provisional release, such as home confinement.

Having been seized of the contested matters, the Appeals Chamber, in the Decision of 8 September 2004[26], upheld 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.*"

It must be noted that throughout this period the charges alleged in the Indictment remained in force against the Accused.

Throughout the trial, from 26 April 2006 to 2 March 2011, that is, almost five years, the Accused were granted provisional release on several occasions.[27] These releases

[26] "Decision on Motions for Reconsideration, Clarification, Request for Release and Applications for Leave to Appeal", 8 September 2004, public.

proceeded without any 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 is almost over and will be completely finished once the Judgement is read.

The Prosecution, for its part, has asked for the Accused to be convicted and heavy sentences imposed on them; **all of the Accused** have asked to be acquitted.

At any rate, this "new situation" was clear from the outset and there is not, properly speaking, a new situation that would lead the Judges to adopt a different approach regarding these requests for provisional release.

For this reason, from where I stand, I see nothing new to justify a "hardening of our position" regarding the requests of the Accused and, in the present case, 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 Halilović decision as a precedent

In paragraph 31 of its submission, the Praljak Defence refers to the decision rendered on 1 September 2005 by Trial Chamber I, which comprised the Judges Liu, Mumba and El Mahdi. Let me note in passing that two of the three aforementioned judges were or are members of the ICTY Appeals Chamber.

I am bound to cite in its entirety the reasoning behind the decision rendered on 1 September 2005:

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[27] *See*, e.g., "Decision on the Motion for Provisional Release of the Accused Praljak", 11 June 2007, public with confidential annex; "Decision on the Motion for Provisional Release of the Accused Praljak", 9 December 2010, confidential with confidential annex.

"(...) **HAVING CONSIDERED** all of the arguments of the parties;

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 there is an **explicit reminder** that an accused is presumed innocent until the delivery of a Judgement and, furthermore, that the presence of the accused at the seat of the Tribunal is not necessary. In addition, it is of interest to note that the functions exercised by the Accused **Halilović** were almost identical to those exercised by the Accused Praljak.

The Halilović decision as a precedent should normally lead to granting the provisional release to all the Accused in the present case since they need not be present at the seat

of the Tribunal pending Judgement and since they have hitherto been presumed innocent.

V) Necessary measures to be taken for provisional release

A) The Safety of the Accused

I hold that this release must be accompanied by certain basic precautions in order to avoid many problems connected to the risk of an assault on the Accused. Likewise, it is important to stress the risk that 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 inmates.[28]

Likewise, an accused who has been released might be attacked in the country of residency that has provided guarantees and, for this reason, he must be the object of police surveillance so as to be protected against this risk, should it arise.

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 pronouncement of Judgement (*see*, for example, the United States of America, Australia, New Zealand and also Israel).[29] The payment of a bail bond secures in an effective manner the Accused's re-appearance.

On the other hand, within the civil law system, an accused may be released during the investigative phase, during trial and even after the trial, if there is an appeal (*see* for example France, Italy or Germany).

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[28] *See* the example of Radislav Krstić, who was convicted by the Tribunal on 19 April 2004 to 35 years in prison for war crimes and crimes against humanity; on 20 December 2004, he was transferred to the United Kingdom to serve the rest of his sentence and on 9 May 2010, three Muslim inmates at Wakefield Prison in Yorkshire cut his throat. It is remarkable that he survived this attack.

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

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 Praljak ought to be granted this release.

At the same time, I am aware that close monitoring may subject the Croatian police forces to substantial constraints at a time when Croatian public funds could not afford it. Indeed, if all of the Accused were freed, such monitoring would require the mobilisation of a substantial number of police officers.

For this reason, several alternative approaches may be envisaged. The first is an electronic bracelet[30] – 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 the moment. Finally, bail also offers a complementary and effective guarantee.

The amount in question would be proportionate to the individual's financial means and in the case before us, the Accused Praljak might contribute **500,000 euro**. This amount has been calculated on the basis of an approximate empirical assessment of documents showing the exact financial means of the Accused and takes into account the level of the functions he exercised during the events that led to the Indictment.

Bail is a measure that has hitherto produced positive effects throughout the world, without there being escapes after the funds were deposited. The risk of flight of the Accused would thus be obviated by the said guarantees.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

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

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

[Seal of the Tribunal]