UNITED
NATIONS

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-A

Date: 1 December 2016

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Carmel Agius, Presiding**
Judge Liu Daqun
Judge Fausto Pocar
Judge Theodor Meron
Judge Bakone Justice Moloto

Registrar: **Mr. John Hocking**

Decision of: **1 December 2016**

PROSECUTOR

v.

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

PUBLIC

PUBLIC REDACTED VERSION OF THE "DECISION ON VALENTIN ĆORIĆ'S REQUEST FOR PROVISIONAL RELEASE" ISSUED ON 15 AUGUST 2016

The Office of the Prosecutor:

Mr. Douglas Stringer
Ms. Barbara Goy
Ms. Laurel Baig

Counsel for the Accused:

Ms. Dijana Tomašegović-Tomić and Mr. Dražen Plavec for Mr. Valentin Ćorić

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 "Tribunal", respectively);

RECALLING that, on 29 May 2013, Trial Chamber III of the Tribunal convicted Ćorić of 22 counts of war crimes and crimes against humanity and sentenced him to 16 years of imprisonment;[1]

BEING SEISED of "Valentin Ćorić's Request for Provisional Release", filed confidentially and *ex parte* with a confidential and *ex parte* annex by Valentin Ćorić ("Ćorić") on 12 May 2016 ("Motion"), in which Ćorić requests to be provisionally released "during the upcoming period, pending the Appeals [*sic*] Judgement";[2]

NOTING that, in support of his request, Ćorić submits that "special circumstances" warrant his provisional release, namely that he has spent a significant amount of time in custody exceeding two-thirds of his sentence and that this determination should include the periods that he spent on provisional release, which qualify as periods of detention;[3]

NOTING that Ćorić further asserts that: (i) the judicial proceedings in his case started in 2006;[4] (ii) the appellate proceedings against him will last for at least another year or longer and, by the time the appeal judgement is rendered, he will have been in custody for a period much longer than two-thirds of his sentence;[5] and (iii) he has always exhibited good behaviour while in detention, has complied with all terms of prior custodial release, and returned voluntarily to the United Nations Detention Unit ("UNDU");[6]

NOTING that Ćorić argues that he is not a flight risk and he will not pose a danger to any victim, witness, or other person if provisionally released;[7]

NOTING the "Prosecution Response to Valentin Ćorić's Request for Provisional Release" filed confidentially and *ex parte* by the Office of the Prosecutor ("Prosecution") on 23 May 2016 ("Response"), in which the Prosecution opposes the Motion on the basis, *inter alia*, that Ćorić fails to establish special circumstances warranting provisional release because he has not served

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[1] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Judgement, 6 June 2014 (French original filed on 29 May 2013), Vol. 4, p. 431.
[2] Motion, p. 2. See also Motion, paras 2-3, 23, 32-34, p. 10.
[3] Motion, paras 23-28. See also Motion, paras 1, 5.
[4] Motion, para. 29.
[5] Motion, para. 30. See also Motion, para. 4.
[6] Motion, para. 31. See also Motion, paras 4, 6, 8.
[7] Motion, paras 11-22. See also Motion, para. 7.

two-thirds but only 52% of his sentence at the time of the filing of his Motion[8] and that the time spent on provisional release cannot be considered as "time served";[9]

[REDACTED],[10] [REDACTED];[11]

NOTING that Ćorić did not file a reply;

NOTING the guarantees provided by the Government of Croatia[12] and the correspondence received from The Netherlands;[13]

RECALLING that, pursuant to Rule 65(I) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period, if it is satisfied that: (i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the appellant, if released, will not pose a danger to any victim, witness, or other person; and (iii) special circumstances exist warranting such release;

RECALLING that the requirements under Rule 65(I) of the Rules must be considered cumulatively and "[w]hether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities";[14]

RECALLING that, while detention for a substantial period of time may amount to a special circumstance within the meaning of Rule 65(I)(iii) of the Rules, a determination must be made on a case-by-case basis;[15]

RECALLING the "Decision on Valentin Ćorić's Motion Seeking Provisional Release" issued confidentially and *ex parte* by the Appeals Chamber on 12 March 2015 ("Decision of 12 March 2015"), in which it dismissed a similar motion filed by Ćorić contending, *inter alia*, that

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[8] Response, paras 1-3, 6.
[9] Response, para. 4. See also Response, para. 1. The Prosecution also contends that Ćorić has failed to establish that, if released, he would surrender into detention at the end of the release period. It further argues that flight risk is greater after a sentence of sixteen years of imprisonment has been imposed than during trial, especially when a prosecution sentencing appeal is pending. See Response, paras 1, 5-6.
[10] [REDACTED].
[11] [REDACTED].
[12] Motion, Annex A.
[13] Correspondence from the Ministry of Foreign Affairs of the Kingdom of the Netherlands, "Protocol Department DKP-2016/462", 23 May 2016 (confidential and *ex parte*).
[14] See, *e.g.*, Decision on Jadranko Prlić's Renewed Request for Provisional Release on Compassionate Grounds, 10 May 2016 (confidential) ("Decision of 10 May 2016"), p. 2; Decision on Jadranko Prlić's Request for Provisional Release on Compassionate Grounds, 6 April 2016 (confidential) ("Decision of 6 April 2016"), p. 2.
[15] See, *e.g.*, Decision on Valentin Ćorić's Motion Seeking Provisional Release Until Translation of the Judgement, 19 December 2013 (confidential and *ex parte*), p. 2 and references cited therein.

the periods he spent on provisional release should be included in the computation of his time served;[16]

CONSIDERING, Judge Pocar partially dissenting, that by renewing his request for provisional release under the present circumstances, Ćorić is in effect seeking a reconsideration of the Decision of 12 March 2015 without showing a clear error of reasoning or that particular circumstances, which can be new facts or new arguments, justify its reconsideration to prevent an injustice in this regard;[17]

CONSIDERING, Judge Pocar partially dissenting, that the passage of 17 months since the issuance of the Decision of 12 March 2015 does not constitute a material change in the factors considered by the Appeals Chamber in the decision thereof because, excluding the time spent on provisional release, Ćorić's period of detention at the UNDU is still shorter than two-thirds of his 16 year sentence,[18] which the Appeals Chamber found in the past to be "sufficiently substantial to constitute a special circumstance warranting" provisional release, under certain conditions;[19]

FINDING, therefore, that Ćorić has failed to demonstrate the existence of special circumstances required by Rule 65(I)(iii) of the Rules;

CONSIDERING that as the requirements of Rule 65(I) of the Rules are cumulative, there is no need to consider whether the requirements of Rules 65(I)(i) and (ii) of the Rules are met;[20]

FOR THE FOREGOING REASONS,

HEREBY DENIES, Judge Pocar partially dissenting, the Motion in its entirety.

Judge Pocar appends a partially dissenting opinion.

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[16] Decision of 12 March 2015, para. 11. See also Decision of 12 March 2015, para. 4.
[17] See Decision on Prosecution Urgent Motion for Reconsideration and Stay of Decision on Petković's Motion for Provisional Release, 21 September 2015 (confidential and *ex parte*), p. 2; *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Decision on Mićo Stanišić's Motion Seeking Reconsideration of Decision on Stanišić's Motion for Declaration of Mistrial and Župljanin's Motion to Vacate Trial Judgement, 24 July 2014, para. 11. *Cf. Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vinko Pandurević's Renewed Motion for Provisional Release, 12 December 2014, p. 2.
[18] See Decision of 12 March 2015, para. 11 and references cited therein.
[19] Decision of 12 March 2015, para. 11; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motion on behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para. 13.
[20] Decision of 10 May 2016, p. 3; Decision of 6 April 2016, p. 3.

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

Done this first day of December 2016,
At The Hague,
The Netherlands.

Judge Carmel Agius
Presiding

[Seal of the Tribunal]

I. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. In this decision ("Decision"), the Appeals Chamber treats "Valentin Ćorić's Request for Provisional Release" filed confidentially and *ex parte* with a confidential and *ex parte* annex by Valentin Ćorić ("Ćorić") on 12 May 2016 ("Motion") as a request for reconsideration of the "Decision on Valentin Ćorić's Motion Seeking Provisional Release" issued confidentially and *ex parte* by the Appeals Chamber on 12 March 2015 ("Decision of 12 March 2015") and denies the Motion on the basis that Ćorić has failed to show "a clear error of reasoning or that particular circumstances, which can be new facts or new arguments, justify its reconsideration to prevent an injustice in this regard".[1] For the reasons mentioned below, while I agree to deny the Motion, I dissent with the majority's decision to the extent that it treats Ćorić's Motion as a request for reconsideration without properly assessing Ćorić's arguments. I also dissent with the majority's decision to re-affirm the general ruling contained in the Decision of 12 March 2015 that any time spent on provisional release should not be included in the computation of time served in detention, despite this issue being raised on appeal by several of the co-appellants in this case.

2. In my view, and contrary to the Decision,[2] the majority follows an incorrect approach in interpreting Ćorić's Motion as a request for reconsideration of the Decision of 12 March 2015 and denying it without properly assessing Ćorić's arguments. In this respect, I first note that 14 months have elapsed between the Decision of 12 March 2015 and the filing of Ćorić's Motion, which in light of the crux of the matter at stake – *i.e.* whether two-thirds of the sentence imposed has been served – is an important element especially given that the Appeals Chamber never clarified the exact number of days Ćorić has spent at the United Nations Detention Unit ("UNDU") thus far.[3]

3. More importantly, the majority brushes aside Ćorić's new arguments, stating that he has not "show[n] a clear error of reasoning or that particular circumstances, which can be new facts or new arguments, justify its reconsideration to prevent an injustice in this regard", but in so doing fails to even mention or assess his new arguments.[4] I find it perplexing that the majority determines that Ćorić fails to present new arguments justifying reconsideration without itself assessing those arguments. In this respect, I note that, in his motion for provision release which led to the Decision

[1] Decision, p. 3.
[2] Decision, p. 3.
[3] With respect to this issue, I note that the Appeals Chamber never established the number of days spent at the UNDU and on provisional release, simply noting that "Ćorić was detained at the UNDU during the periods between 5 April 2004 and 9 September 2004 and between 24 April 2006 and 21 December 2011, except for short periods of provisional release, and that he has also been detained there since 21 May 2013", without clarifying how many days these "short periods of provisional release" amount to. See Decision of 12 March 2015, p. 5. See also Decision on Valentin Ćorić's Motion Seeking Provisional Release Until Translation of the Judgement, 19 December 2013 (confidential and *ex parte*), p. 3.
[4] See Decision, pp. 1-4.

of 12 March 2015, Ćorić simply alleged that "the restricted custodial release periods do not interrupt the computation of time spent in custody, since he was in the custody of the authorities [of the] Republic of Croatia during those periods."[5] However, in his current Motion, Ćorić advances new arguments, including that: (i) "he was in the custody of the Croatian Police during those periods [of provisional release]";[6] (ii) the periods of provisional release were undertaken pursuant to conditions which "were akin to detention, rather than bail or some other form of less restrictive provisional release, insofar as liberties and freedoms were abridged";[7] (iii) jurisprudence from the Tribunal and of the Special Court for Sierra Leone "support the position that provisional release under conditions akin to detention counts the same as time spent in actual detention by a convicted person";[8] (iv) the laws of Croatia similarly support this position;[9] (v) some of his provisional release periods "essentially involved house arrest, where the accused was guarded by police officials while at his home residence";[10] and (vi) he was released for medical treatment for a substantial period of time during which he was subject to police monitoring and surveillance at the hospital, which constitutes detention.[11] None of these arguments are summarised or addressed in the Decision, although the majority surprisingly states that Ćorić has not "show[n] a clear error of reasoning or that particular circumstances, which can be new facts or new arguments, justify its reconsideration to prevent an injustice in this regard". In order to arrive to such a conclusion, the Appeals Chamber has a duty to provide a reasoned opinion as to why these arguments should be dismissed. The majority, unfortunately, fails to do so.

4. For all these reasons, I dissent with the majority's decision to the extent that it treats Ćorić's Motion as a request for reconsideration without properly assessing Ćorić's arguments.

5. In addition, I also dissent with the majority's decision to re-affirm the general ruling contained in the Decision of 12 March 2015 that any time spent on provisional release should not be included in the computation of time served in detention, despite this issue being raised on appeal not only by Ćorić but also by four other co-appellants in this case.[12] By doing so, the majority

[5] Valentin Ćorić's Request for Provisional Release, 5 December 2014, para. 21.
[6] Motion, para. 24.
[7] Motion, para. 25.
[8] Motion, para. 26.
[9] Motion, para. 26.
[10] Motion, para. 26.
[11] Motion, para. 27.
[12] Ćorić: Re-Filed Notice of Appeal Filed on Behalf of Mr. Valentin Ćorić, 23 December 2014, paras 96-98; Corrigendum to Appellant's Brief of Valentin Ćorić, 23 March 2016, paras 333-339; Pušić: Notice of Appeal on Behalf of Berislav Pušić, 13 March 2014, para. 37.3; Notice of Re-Filing of Redacted Appeal Brief of Berislav Pušić, 28 July 2015, paras 253-254; Stojić: Bruno Stojić's Notice of Appeal, 4 August 2014, para. 64; Notice of Filing the Corrigendum to the Public Redacted Version of Bruno Stojić's Appellant Brief, 28 July 2015, paras 434-439; Petković: Milivoj Petković's Notice of Appeal, 5 August 2014, para. 144; Notice of Re-Filing of Redacted Versions of Milivoj Petković Appeal Brief and Book of Authorities, 29 July 2015, paras 459-469; Prlić: Jadranko Prlić's Notice of Appeal, 5 August 2014, para. 21.3.

decides upon an alleged error of law and fact raised by several co-appellants without assessing their arguments.

6. While I recognise that the Appeals Chamber already enounced this general ruling in its Decision of 12 March 2015, I recall that the Appeals Chamber has an inherent discretionary power to reconsider its own non-final decisions if a clear error of reasoning has been demonstrated or if it is necessary to do so in order to prevent an injustice.[13] In my view, Ćorić's Motion provides the Appeals Chamber with the opportunity to reconsider *proprio motu* its Decision of 12 March 2015 and to rule that the issue of whether any time spent on provisional release should be included in the computation of time served in detention will be decided in its appeal judgement, thereby giving due consideration to the submissions of all the co-appellants raising similar arguments. To do so is, in my view, necessary to prevent an injustice and is in line with the Appeals Chamber's previous approach when confronted with a similar request concerning Pušić's time spent in detention[14] as well as with its jurisprudence that "a request for provisional release is not the appropriate forum to argue the substance of the appeal."[15]

7. In light of the above, I dissent with the majority decision. That being said, I would also deny the Motion because, regardless of whether or not Ćorić has already served two-thirds of his sentence, "the ultimate decision of whether or not to grant provisional release is subject to the

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[13] See, *e.g.*, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on "Motion by Momcilo Krajisnik for Reconsideration of the Appellate Chamber's Decision of September 11, 2007", 27 September 2007, p. 1; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 203; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005, p. 2. In this respect, I note that the standard for reconsideration does not require – as erroneously enunciated in the Decision – that the party seeking reconsideration bears the burden of proof, since a decision to reconsider its own non-final decision may also be adopted *proprio motu* by the Appeals Chamber. See also Dissenting Opinion of Judge Pocar, 21 September 2015 ("Dissenting Opinion of 21 September 2015"), para. 2, appended to Decision on Prosecution Urgent Motion for Reconsideration and Stay of Decision on Petković's Motion for Provisional Release, 21 September 2015 (confidential and *ex parte*); *Corrigendum* to Decision on Prosecution Urgent Motion for Reconsideration and Stay of Decision on Petković's Motion for Provisional Release, 22 September 2015 (confidential and *ex parte*).

[14] Decision on Deputy Registrar's Rule 33(B) Submission and Prosecution's Motion for Leave to File a Submission Regarding Calculation of Time Served by Berislav Pušić, 17 April 2014 (confidential), pp. 1-2.

[15] *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File *Corrigendum*, 2 September 2009, para. 22 ("The Appeals Chamber first emphasizes that a request for provisional release is not the appropriate forum to argue the substance of the appeal. The Appeals Chamber will determine the issues raised in the appeal in its judgement at the conclusion of the appeal proceedings. At this stage, the outcome of Ntabakuze's appeal cannot be foreseen and thus the merits of the case cannot amount to factors that could be taken into account in determining whether provisional release should be granted. Ntabakuze's reliance on arguments from his Appeal Brief therefore constitutes an improper basis for his application for provisional release.") (internal references omitted). See also *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Decision on Motion on Behalf of Mićo Stanišić Seeking Provisional Release, 19 December 2013, paras 18-19; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, 31 October 2005 ("*Galić* Decision of 31 October 2005"), para. 16 ("the outcome of the appeal is unforeseeable and thus is not a factor that can be relied upon in determining whether provisional release should be granted."); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Mario Čerkez's Request for Provisional Release, 12 December 2003 ("*Kordić and Čerkez* Decision of 12 December 2003"), para. 8 ("The outcome of the case is unforeseeable, and thus is not a factor that can be relied upon in determining whether provisional release should be granted.").

Appeals Chamber's discretion"[16] and the fact that an appellant has already served two-thirds of a sentence *may*, in certain cases, be "sufficiently substantial to constitute a special circumstance warranting" provisional release but cannot be considered as an entitlement *per se*.[17] In my view, other relevant factors, such as the fact that the Prosecution appealed Ćorić's acquittals and sentence and requested that Ćorić's sentence be increased to 35 years of imprisonment,[18] weigh against granting Ćorić provisional release.[19]

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

Dated this first day of December 2016,
at The Hague,
The Netherlands.

Judge Fausto Pocar

[Seal of the Tribunal]

[16] See, *e.g.*, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vinko Pandurević's Motion for Provisional Release, 14 March 2014 ("*Popović et al.* Decision of 14 March 2014"), para. 19; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Nsabimana's Motion for Provisional Release, 10 September 2014 (confidential) ("*Nyiramasuhuko et al.* Decision of 10 September 2014"), p. 4.

[17] *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motion on behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para. 13. See also Decision of 12 March 2015, para. 11; *Popović et al.* Decision of 14 March 2014, para. 19; *Nyiramasuhuko et al.* Decision of 10 September 2014, pp. 3-4.

[18] Prosecution's Notice of Appeal, 27 August 2013, paras 17-19; Prosecution Revised Public Redacted Appeal Brief, 12 January 2015, paras 338, 401-408, 419, 424 (the Prosecution requests the Appeals Chamber to increase Ćorić's sentence to 35 years of imprisonment).

[19] See, *e.g.*, *Popović et al.* Decision of 14 March 2014, para. 19; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vinko Pandurević's Renewed Motion for Provisional Release, 12 December 2014, pp. 1-2. See also *Galić* Decision of 31 October 2005, para. 16; *Kordić and Čerkez* Decision of 12 December 2003, para. 8.