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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-AR65.6

Date: 23 April 2008

Original: English

IN THE APPEALS CHAMBER

Before:
Judge Mehmet Güney, Presiding
Judge Theodor Meron
Judge Wolfgang Schomburg
Judge O-Gon Kwon
Judge Bakone Justice Moloto

Registrar: **Mr. Hans Holthuis**

Decision of: **23 April 2008**

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

PUBLIC REDACTED VERSION

REASONS FOR DECISION ON PROSECUTION'S URGENT APPEAL AGAINST "DÉCISION RELATIVE À LA DEMANDE DE MISE EN LIBERTÉ PROVISOIRE DE L'ACCUSÉ PUŠIĆ" ISSUED ON 14 APRIL 2008

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Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("Appeals Chamber" and "International Tribunal", respectively) is seized of an appeal by the Office of the Prosecutor ("Prosecution")[1] against a decision rendered by Trial Chamber III on 19 February 2008 ("Impugned Decision")[2] in which Trial Chamber III ("Trial Chamber") granted provisional release to Berislav Pušić ("Pušić") in Zagreb for three weeks.[3]

I. PROCEDURAL BACKGROUND

2. In its Appeal, the Prosecution requests, as a matter of urgency, that the Appeals Chamber immediately order a stay of the Impugned Decision and allow the Appeal by revoking the Impugned Decision.[4] The Prosecution's urgent request for an immediate stay of the Impugned Decision was granted by the Appeals Chamber on 26 March 2008 in order to preserve the objective of the Appeal.[5] On 28 March 2008, Pušić filed his Response opposing the Appeal.[6] The Prosecution has not replied.

3. On 14 April 2008, the Appeals Chamber, by majority, Judge Schomburg dissenting, issued a decision dismissing the Appeal, and stating that both the reasoned opinion and Judge Schomburg's dissenting opinion would be provided in due course. It ordered Pušić to be provisionally released on the first date practicable, and, in any event, by 17 April 2008, until 2 May 2008, with the conditions set out in the Confidential Annex to the Impugned Decision remaining unchanged, save for the dates of release and return.[7]

II. STANDARD OF REVIEW

4. The Appeals Chamber recalls that an interlocutory appeal of a decision granting provisional release is not a *de novo* review of the Trial Chamber's decision.[8] The Appeals Chamber has

[1] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Prosecution's Urgent Appeal From Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić and Request for Stay, filed confidentially and *ex parte* on 25 March 2008 ("Appeal").
[2] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić (with Confidential Annex), 19 March 2008.
[3] Impugned Decision, Confidential Annex, p. 12.
[4] Appeal, p. 10.
[5] Order on Prosecution's Request to Stay the Decision to Provisionally Release the Accused Berislav Pušić, 26 March 2008.
[6] Response on Behalf of Berislav Pušić to the Prosecution's Appeal of the Trial Chamber's "Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić", filed confidentially on 27 March 2008 ("Response").
[7] Decision on Prosecution's Urgent Appeal Against "Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić", 14 April 2008 ("Decision of 14 April 2008"), p. 2. Pušić was released on 16 April 2008.
[8] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, 11 March 2008 (*Prlić* Decision of 11 March 2008), para. 4; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on

previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules of Procedure and Evidence ("Rules") is a discretionary one.[9] Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."[10]

5. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".[11] The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[12]

III. APPLICABLE LAW

6. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness or other person; and after having given the host country and the State to which the accused seeks to be released the opportunity to be heard.[13]

7. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned

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Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006 ("*Brahimaj* Decision"), para. 5; *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Decision"), para. 6; *Prosecutor v. Ljube Boškoski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5.

[9] *Prlić* Decision of 11 March 2008, para. 4; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, 14 December 2006 ("*Milutinović* Decision"), para. 3; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006 (*Borovčanin* Decision), para. 5. "Deference is afforded to the Trial Chamber's discretion in [...] decisions [of provisional release] because they 'draw[] on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and require[] a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.'" (*Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal against Decision on Joinder of Accused, 27 January 2006, para. 4; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 9.)

[10] *Ibid.* (internal citations omitted).

[11] *Prlić* Decision of 11 March 2008, para. 5; *Milutinović* Decision, para. 3; *Borovčanin* Decision, para. 5.

[12] *Ibid.*

[13] *Brahimaj* Decision, para. 6; *Prlić* Decision of 11 March 2008, para. 6.

opinion indicating its view on those relevant factors.[14] What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.[15] This is because decisions on motions for provisional release are fact-intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.[16] The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the International Tribunal.[17]

IV. DISCUSSION

8. The Prosecution submits that the Trial Chamber abused its discretion in granting Pušić provisional release.[18] The Prosecution first avers that the Impugned Decision is based on an unreasonable and inaccurate reading of the recommendations of the report by a panel of experts.[19] It claims that the Trial Chamber erroneously concluded that treatment in Zagreb was necessary based on the experts' recommendation that Pušić should [REDACTED] undergo therapy in [REDACTED].[20] In this respect, it argues that although "treatment in 'close vicinity of his social system' would be 'ideal'", it is not necessary for it to be effective.[21] The Prosecution further contends that [REDACTED],[22] and may disrupt any therapy Pušić is presently undergoing.[23]

9. Second, referring to the International Tribunal's case-law, the Prosecution submits that the circumstances related to the poor health of Pušić's relatives are not "sufficiently exceptional or compelling to warrant release on humanitarian grounds".[24]

10. In addition to the alleged two faulty bases for release, the Prosecution claims that the Trial Chamber did not properly consider the effect of its 98*bis* Decision[25] and the impact it may have on risk of flight or "danger to the community".[26] Finally, the Prosecution submits that the discussion of humanitarian concerns is premature given that Pušić did not satisfy the bare minimum requirements

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[14] *Brahimaj* Decision, para. 8; *Prlić* Decision of 11 March 2008, para. 7.
[15] *Stanišić* Decision, para. 8; *Prlić* Decision of 11 March 2008, para. 7.
[16] *Prosecutor v. Ljube Boškoski et al.*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Decision Denying Johan Tarčulovski's Motion for Provisional Release, 4 October 2005, para. 7; *Prlić* Decision of 11 March 2008, para. 7.
[17] *Stanišić* Decision, para. 8; *Prlić* Decision of 11 March 2008, para. 7.
[18] Appeal, para. 2.
[19] Appeal, para. 16.
[20] Appeal, para. 13, quoting Impugned Decision, p. 9, and Annex 1 of the Appeal: [REDACTED] ("Preliminary Report").
[21] Appeal, paras 14, 15.
[22] Appeal, para. 26.
[23] Appeal, para. 27.
[24] Appeal, paras. 17, 19.
[25] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Oral Decision Delivered Under Rule 98*bis*, T. 27200-27238, 20 February 2008 ("98*bis* Decision").

for provisional release, namely that he is not a flight risk and that he will not pose a danger to any victim, witness, or other person.[27] The Prosecution notes that Pušić contacted two witnesses in 2006 when he was provisionally released, but acknowledges the Appeals Chamber's earlier ruling that it was within the Trial Chamber's discretion to find that Pušić met the conditions for release after hearing evidence regarding the contacts.[28]

11. Pušić responds that the Prosecution failed to demonstrate that the Impugned Decision is so unfair or so unreasonable as to constitute an abuse of the Trial Chamber's discretion.[29] In regard to the first basis for release, Pušić submits that the Trial Chamber was privy to medical records not disclosed to the Prosecution, which put the Trial Chamber in a better position to assess the importance of undergoing treatment in close proximity to his social system,[30] and that none of the Prosecution's submissions regarding Pušić's treatment establishes an abuse of discretion by the Trial Chamber.[31] Regarding the second basis for his release, Pušić avers that it is the ill-health of his family members "in tandem" with his own ill-health that constitutes sufficient humanitarian grounds, as opposed to the ill-health of his relatives alone.[32] In this respect, he highlights that the Prosecution has never appealed any of the earlier decisions ordering his provisional release on this basis.[33] Pušić also submits that the Trial Chamber properly considered the effect of the 98*bis* Decision as evidenced by the reasoning in the Impugned Decision[34] and the additional precautionary measures stipulated for the provisional release, such as around-the-clock surveillance and a weekly situation report.[35]

12. The Appeals Chamber finds that, contrary to the Prosecution's contention,[36] the Trial Chamber did explicitly examine the impact of its 98*bis* Decision in analysing whether to grant Pušić provisional release,[37] in accordance with the *Prlić* Decision of 11 March 2008.[38] The Trial Chamber recalled that though its 98*bis* Decision found sufficient evidence for "all the counts of the indictment under JCE 1 and 3" it "was careful to note that it was dismissing the motions for acquittal based on the Prosecution evidence alone and that this decision was valid solely for the

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[26] Appeal, paras 20-21.
[27] Appeal, paras 22-25.
[28] Appeal, para. 25, fn. 37, referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.4, Decision on the Prosecution Appeal of the Trial Chamber's "Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić", 20 July 2007 (*Prlić* Decision of 20 July 2007), paras. 21, 23.
[29] Response, paras 2, 14.
[30] Response, para. 6.
[31] Response, para. 7.
[32] Response, para. 8.
[33] Response, para. 9.
[34] Response, paras 11, 12
[35] Response, para. 11.
[36] Appeal, paras 20, 21.
[37] Impugned Decision, pp. 3, 5-8.
[38] *Prlić* Decision of 11 March 2008, paras 19, 20.

purposes of the procedure under Rule 98*bis*".[39] The Trial Chamber explained it only considered the inculpatory evidence and not the "exculpatory evidence", and left assessment of the probative value of the evidence to the end of trial, when it could enter a judgement of acquittal notwithstanding the 98*bis* Decision.[40] The Trial Chamber reasoned that its 98*bis* Decision therefore "may not be considered as a 'pre-judgement' increasing the flight risk of the Accused".[41] The Trial Chamber further analysed Pušić's risk of flight and danger to victims, witnesses or other persons, following the 98*bis* Decision, in light of Pušić's compliance with the terms imposed in prior decisions on provisional release.[42]

13. Moreover, construing the *Prlić* Decision of 11 March 2008 to express "the Appeals Chamber's concern for obtaining additional guarantees against the risk of flight", the Trial Chamber imposed strict additional measures of around-the-clock surveillance and a weekly report from the authorities of the Republic of Croatia to the Trial Chamber.[43] The Trial Chamber also limited the period of provisional release to three weeks to "enable police authorities of the Republic of Croatia to carry out effective surveillance" of Pušić.[44] Therefore, the Appeals Chamber finds, Judge Schomburg dissenting, that the Prosecution failed to demonstrate any discernible error in the Trial Chamber's evaluation of the impact of its Rule 98*bis* Decision on the risk of flight or danger to any victim, witness or any other person.

14. Concerning the assessment of the humanitarian justifications Pušić presented, the Appeals Chamber recalls that "any humanitarian grounds have to be assessed" in the "context" of the two requirements expressly listed in Rule 65(B) of the Rules.[45] Rule 65(B) of the Rules does not mandate humanitarian justification for provisional release. Unlike for convicted persons seeking provisional release under Rule 65(I), there is no requirement of additional "special circumstances"[46]

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[39] Impugned Decision, pp. 5-6.
[40] Impugned Decision, p. 6.
[41] Impugned Decision, p. 6.
[42] Impugned Decision, pp. 7, 8. Concerning the Prosecution's allegation regarding Pušić's contact with two witnesses while provisionally released in 2006, the Appeals Chamber already found that "it was within the discretion of the Trial Chamber to conclude that Berislav Pušić has always respected the conditions imposed upon him during his various provisional releases" (*Prlić* Decision of 20 July 2007, para. 21). It is further worth noting that the Prosecution does not allege that Pušić has tried to contact any witness or has posed any danger to any victim, witness or other person, while on provisional release, after the 2006 incidents.
[43] Impugned Decision, pp. 7-8, referring to *Prlić* Decision of 11 March 2008, paras 20, 21. The Appeals Chamber notes that, although not specifically acknowledged by the Trial Chamber, these measures are also significant as a deterrent to any potential danger to victims, witnesses and other persons.
[44] Impugned Decision, p. 10.
[45] *Prosecutor v. Ljube Boškoški and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 27 July 2007, para. 14.
[46] Rule 65(I)(iii) of the Rules. *See* also *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008, paras 11, 12, in which the Appeals Chamber stated that "[t]he specificity of the appeal stage is reflected by Rule 65(I)(iii) of the Rules, which provide for an additional criterion, *i.e.* that 'special circumstances exist warranting such release' [and that] the notion of acute justification [is] inextricably linked to the scope of special circumstances for the purposes of Rule 65(I)(iii) of the Rules". The Appeals Chamber further recalls that the criterion of "exceptional circumstances" that used to be required

justifying release under Rule 65(B) because the burden borne by a duly convicted person after full evaluation and adjudication is necessarily distinct from the burden borne by an individual who is still presumed innocent. Of course, if the two requirements of Rule 65(B) are met, the existence of humanitarian reasons warranting release can be a salient and relevant factor in assessing whether to exercise discretion to grant provisional release. In this respect, "the weight attached to humanitarian reasons as justification for provisional release will differ from one defendant to another depending upon all the circumstances of a particular case".[47]

15. Because Rule 65(B) of the Rules does not require "sufficiently compelling" humanitarian reasons for provisional release, this Bench understands the *Prlić* Decision of 11 March 2008[48] to have ruled that it is only when a Trial Chamber, having considered all the circumstances of the case and the impact of the significant change of circumstances constituted by the 98*bis* decision, cannot exclude the existence of flight risk or danger, that "sufficiently compelling" humanitarian reasons, coupled with necessary and sufficient measures to alleviate any flight risk or danger, can constitute a basis for resolving uncertainty and doubt in favour of provisional release. Indeed, in the *Prlić* Decision of 11 March 2008, the Appeals Chamber asked for the existence of sufficiently compelling humanitarian reasons after having found that the Trial Chamber did not evaluate the impact of its 98*bis* Decision pursuant to the two requirements of Rule 65(B) of the Rules, thus amounting to a lack of clarity as to the existence of a flight risk or danger. Only then did the Appeals Chamber, faced with a situation in which such a risk or danger could not be excluded, require sufficiently compelling humanitarian reasons. This is not the situation in the present instance. As mentioned above, the Trial Chamber stated that its 98*bis* Decision "may not be considered as a 'pre-judgement' increasing the flight risk of the Accused"[49] and seriously tightened the conditions of Pušić's provisional release,[50] thus alleviating any risk of flight or danger to victims, witnesses or other persons. "Sufficiently compelling" humanitarian reasons are thus not required here. Judge Schomburg dissents from the foregoing reasoning.

16. With regard to Pušič's mental health condition, the Appeals Chamber observes that the language in the Impugned Decision is not altogether clear. However, the Appeals Chamber finds,

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by the Rules for provisional release of an accused pending trial has been abrogated by amendment of 17 November 1999 (IT/32/REV.17). Before this amendment of the Rules, Rule 65(B) stated (IT/32/REV.16, 2 July 1999 (emphasis added)):

> (B) Release may be ordered by a Trial Chamber **only in exceptional circumstances**, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

[47] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, para. 20.
[48] *Prlić* Decision of 11 March 2008, para. 21.
[49] Impugned Decision, p. 6.

Judge Schomburg dissenting, that a reading of the Impugned Decision in full context indicates that the Trial Chamber did not erroneously find that provisional release was necessary for Pušić's treatment in contradiction to its recounting of the Preliminary Report just two paragraphs before.[51] Rather, the Trial Chamber noted the experts' view about the benefits of treatment as close as possible to Pušić's social environment and used the construction "the Chamber therefore deems it necessary" to stress its concern and view that Pušić should receive "the most appropriate care" in the interest of the progress of the proceedings and in light of his repeated absence because of health problems.[52] The Appeals Chamber notes also that the Trial Chamber did not order [REDACTED]. The Appeals Chamber finds further that the Prosecution did not demonstrate that treatment for three weeks in Zagreb is in contradiction to any ongoing therapy [REDACTED] or that it may adversely affect it.

17. Finally, it was well within the discretion of the Trial Chamber to consider the health problems of Pušić's relatives in combination with Pušič's mental health condition and treatment considerations. Therefore, the Appeals Chamber concludes, Judge Schomburg dissenting, that the Prosecution has failed to show an abuse of the Trial Chamber's discretion in evaluating whether to grant provisional release.

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[50] Impugned Decision, pp. 7-8, 10.

[51] Referring to the Preliminary Report, the Trial Chamber found that "the experts consider it preferable that the Accused Pušić have recourse to treatment that is as close as possible to his social environment, which should allow for his state of health to improve and, thereafter, for him to resume participation in the hearings" (Impugned Decision, p. 9).

[52] Impugned Decision, p. 9.

V. DISPOSITION

18. The Appeals Chamber **DECLARES** that the Decision of 14 April 2008 dismissed the Appeal for the foregoing reasons, from which Judge Schomburg dissents.

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

Done this 23rd day of April 2008,
At The Hague,
The Netherlands.

Judge Mehmet Güney
Presiding Judge

Judge Schomburg appends a Dissenting Opinion.

[Seal of the International Tribunal]

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DISSENTING OPINION OF JUDGE SCHOMBURG

A. Introduction

1. Principles of criminal procedural law compel me to dissent from the decision of the Appeals Chamber. The Trial Chamber failed to discuss the specific impact of its 98 *bis* Ruling vis-à-vis the individual accused Berislav Pušić when assessing his risk of flight. Moreover, the humanitarian reasons considered by the Trial Chamber neither in isolation nor in conjunction rise to a level that would have allowed a reasonable Trial Chamber to grant Mr. Pušić *de facto* "temporary release" in the pre-judgement phase – an artefact in principle not foreseen in criminal proceedings[1] – to the territory of the former Yugoslavia. The Rules of Procedure and Evidence of the International Tribunal allow the Appeals Chamber to grant provisional release for a fixed period of time (*i.e.* "temporary release") only to a person already convicted. The Trial Chamber thus committed a discernible error. Therefore, the appeal by the Prosecution should have been granted. The Trial Chamber's decision should have been reversed.

B. The need for expeditious proceedings

2. As a preliminary remark, I would like to express my regret and discomfort that the internal workings of the Appeals Chamber in this case prevented a speedy disposal of the appeal in the interests of all parties. Considering in particular that the Appeals Chamber stayed the existing decision of the Trial Chamber granting release on 26 March 2008, it was under the strict obligation to issue a decision on the merits much sooner. This obligation emanates, *mutatis mutandis*, from Rule 65(F) of the Rules which in case of a stay requires the Prosecution to file an appeal within one day. This even more so, when the decision was finally in Mr. Pušić's favour. It was especially unfair that Mr. Pušić was left in uncertainty for two and a half weeks about his fate while he expected a "temporary release" which had already been granted. It has to be recalled that any decision concerning the deprivation of liberty of an accused must always be decided forthwith, preferably by way of *immediate* oral deliberations or consultations.

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[1] This is opposed to allowing a convicted person to attend a certain event, such as a funeral, for extraordinary humanitarian reasons. (*See* Rule 65(I) of the Rules). However, it is contradictory to grant "temporary release" before a judgement is rendered. There is only one uniform assessment of the risk of flight and/or the risk of intimidation of witnesses. I regret that I can only, *pars pro toto*, refer in this footnote to the legal situation in Germany as time is of essence: *Cf.* LUTZ MEYER-GOSSNER, STRAFPROZESSORDNUNG (50th ed. 2007), § 116, margin number 2, p. 470 with further references to the settled jurisprudence.

C. The Trial Chamber failed to properly assess Mr. Pušić's risk of flight

3. I do not agree with the majority that the Trial Chamber properly assessed the risk of flight, as it was permanently and dynamically required to do pursuant to Rule 65(B) of the Rules.[2] A Trial Chamber has to base such an assessment on the specific stage of the proceedings. Indeed, it is a rule common to all criminal proceedings that the more an accused is aware of the evidence against him, the higher becomes the incentive for him to flee. Such flight risk depends furthermore on the concrete sentence to be expected if the charges will be proven beyond reasonable doubt. Given the Indictment in this case, which charges Mr. Pušić with 26 counts of war crimes and crimes against humanity,[3] a heavy sentence of XX years must be anticipated if Mr. Pušić is convicted. Such a sentence has to be seen against a credit of X years for time already spent in detention, pursuant to Rule 101(C) of the Rules. No such details were discussed by the Trial Chamber.

4. I note that on 20 February 2008 the Trial Chamber rendered a decision pursuant to Rule 98 *bis* of the Rules in which it dismissed motions by Mr. Pušić and one other co-accused to enter a judgement of acquittal.[4] I recall that in its decision of 11 March 2008, the Appeals Chamber held that a ruling pursuant to Rule 98 *bis* of the Rules ("98 *bis* Ruling") "constitute[d] a significant enough change in circumstance to warrant the renewed and explicit consideration by the Trial Chamber of the risk of flight posed by the accused pursuant to Rule 65(B) of the Rules."[5] It is true that the Trial Chamber explicitly referred to its 98 *bis* Ruling of 20 February 2008. In particular, it recalled its significant finding that "the evidence led by the Prosecution allows for the purpose of Rule 98 *bis*, the finding that any reasonable trier of fact could make a finding of guilt [...] beyond reasonable doubt, with regard to all the counts of the indictment under [Joint Criminal Enterprise] 1 and 3."[6]

5. However, the Trial Chamber then failed to assess the impact of its 98 *bis* Ruling on Mr. Pušić in relation to the factors of risk of flight and danger to victims and witnesses as prescribed in Rule 65(B) of the Rules. I concur with the Trial Chamber's general statement that a 98 *bis* Ruling is not a "pre-judgement"[7] of the guilt or innocence of an accused, but this is not the point in question. Rather, the Trial Chamber was required to assess whether this *specific* 98 *bis* Ruling, which

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[2] Rule 65(B) of the Rules reads as follows: "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."
[3] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-PT, 16 November 2005, paras 229-230.
[4] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Oral Decision Delivered Under Rule 98 *bis*, T. 27200-27238, 20 February 2008.
[5] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, 11 March 2008, ("*Prlić et al.* Decision of 11 March 2008"), para. 20.
[6] Impugned Decision, p. 5.
[7] Impugned Decision, p. 6.

dismissed Mr. Pušić's motion to enter a judgement for acquittal, had an effect on *Mr. Pušić's* readiness and willingness to appear again for trial. In other words, the Trial Chamber's general instead of individual considerations as to the nature of a 98 *bis* Ruling and its reference to provisional release decisions of other Chambers are not sufficient to show that it had assessed any individual potential change in motivation on the part of Mr. Pušić.

6. Furthermore, the fact that the Trial Chamber instituted additional measures in order to guarantee the return of Pušić[8] does not make up for this lack of reasoning. Whether these additional measures indicate that the Trial Chamber indeed considered that the risk of flight had changed in the wake of its 98 *bis* Ruling is open to interpretation. I note that the Trial Chamber mentioned "the Appeals Chamber's desire to obtain additional guarantees for future appearance to offset the flight risk."[9] Nowhere in the Appeals Chamber's decision of 11 March 2008, to which the Trial Chamber refers, is made mention of required "additional guarantees." What the Appeals Chamber correctly pointed out in that decision is the need to explain in each and every individual case how the Trial Chamber has come to the conclusion that there is no risk of flight. By merely restating the law without making a properly reasoned assessment, the Trial Chamber in this case has failed to do that.

7. As the Appeals Chamber has held in a previous case, "a Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person. It is only in this context that any humanitarian grounds have to be assessed."[10] Thus, the fact that the Trial Chamber failed to properly discuss the impact of its 98 *bis* Ruling on the risk of flight of Mr. Pušić was itself sufficient for the Impugned Decision to be reversed.

D. The Trial Chamber abused its discretion

8. Only once the prerequisites of Rule 65(B) of the Rules are fulfilled can a Trial Chamber exercise its discretion ("release may be ordered") as to whether provisional release should be granted. I agree with the Prosecution that the Trial Chamber in this case overstepped the limits of its discretion when it found that humanitarian reasons warranted the release of Mr. Pušić.

9. At the outset, I note that a Trial Chamber's discretion as regards provisional release is not unlimited. I recall again the unanimous decision of the Appeals Chamber of 11 March 2008 in which it specified that only sufficiently *compelling* humanitarian reasons allow a Trial Chamber to

[8] Impugned Decision, p. 8.
[9] Impugned Decision, p. 7.
[10] *Prosecutor v. Ljube Boškoški and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 27 July 2007 ("*Boškoški* Decision"), para. 14.

exercise its discretion in favour of "temporary release" of an accused.[11] This is particular true when a trial has advanced as far as this one.

10. Furthermore, I am concerned that it will be difficult for alleged victims and their relatives to comprehend that an alleged war criminal is permitted to be in the region whilst they would expect him to answer his case before the International Tribunal. Conversely, for the accused and his relatives, it will be difficult to understand that on the one hand a Trial Chamber excludes the risk of flight and the risk of suppression of evidence and nevertheless in the same decision exercises its discretion by ordering the ongoing deprivation of liberty in the UNDU after the expiration of release for a "fixed period."[12]

11. I must stress that also Trial Chambers have to conduct the proceedings as expeditiously as possible. Article 21(4)(d) of the Statute of the International Tribunal, reflecting international human rights standards,[13] provides for the right to be tried without undue delay. This was specified by the Appeals Chamber in the *Kvočka et al.* case: "The right to an expeditious trial is an inseparable and constituent element of the right to a fair trial."[14] It follows that periods where a Trial Chamber does not conduct hearings must be as short as possible, taking into account only the parties' needs for preparing their cases but not the wish of the accused for "temporary release."

12. In the specific case at hand, the Trial Chamber failed to provide any persuasive reasons militating for a release of Mr. Pušić. Neither Mr. Pušić's health nor his desire to see his ailing relatives warranted release as they were not sufficiently compelling.

1. Mr. Pušić's health did not warrant release

13. With regard to Mr. Pušić's health, the Trial Chamber referred to the report issued by a panel of three experts ("Preliminary Report") and stated that "the experts consider it preferable that the Accused Pušić have recourse to treatment that is as close as possible to his social environment, which should allow for his state of health to improve and, thereafter, for him to resume participation in the hearings."[15] In the Preliminary Report, the experts explicitly declined to recommend

[11] *Prlić et al.* Decision of 11 March 2008, *supra* note 5, para. 21.
[12] For a resolution of this dilemma, *see* already my Dissenting Opinion in *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.4, Dissenting Opinion of Judge Schomburg Regarding "Decision on the Prosecution Appeal of the Trial Chamber's žDecision relative a la demande de mise en liberte provisoire de l'accuse Pusic,'" 23 July 2007.
[13] *See e.g.* Article 14(3)(c) of the International Covenant on Civil and Political Rights of 16 December 1966, 999 U.N.T.S. 171; Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, CETS 005.
[14] *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-AR73.5, Decision on Interlocutory Appeal by the Accused Zoran Žigić Against the Decision of Trial Chamber I Dated 5 December 2000, 25 May 2001, para. 20.
[15] Impugned Decision, p. 9.

treatment in Zagreb.[16] However, in its findings, the Trial Chamber "deem[ed] it *necessary to follow the advice of the experts* and to provide the Accused Pušić with the most appropriate care [...]."[17] I cannot but agree with the Prosecution that this finding is at odds with both the Preliminary Report and the Trial Chamber's own recounting of the Preliminary Report.

14. Mr. Pušić's argument that the Trial Chamber was in possession of additional medical information not disclosed to the Prosecution and that therefore the Trial Chamber was best placed to make any evaluation of the medical evidence also cannot stand up to scrutiny. The Trial Chamber relied in its decision explicitly and solely on the Preliminary Report, which takes no firm position on where treatment should take place, and does not mention any other information on which it based its findings. The Trial Chamber accordingly erred when it concluded that treatment in Zagreb was "necessary" or "compelling" as required by the Appeals Chamber's decision of 11 March 2008.

2. The desire to visit relatives did not warrant release

15. The Trial Chamber further considered that Mr. Pušić "would like to visit his sons, father and spouse, all of whom suffer from ill-health"[18] and found that "a limited visit with [Mr. Pušić's] family must also be taken into consideration."[19] First of all, this finding lacks sufficient specificity. It is not clear whether the Trial Chamber found that a provisional release would be warranted for that reason alone or only in conjunction with its other considerations. In particular, it did not specify how much weight it accorded to this circumstance.[20] Furthermore, and more significantly, the state of health of Mr. Pušić's relatives is not sufficiently compelling to allow a reasonable Trial Chamber to come to the conclusion that provisional release is warranted.[21] I note that the circumstances at hand are not of an exceptional nature that would distinguish this case from others.

3. Two non-compelling reasons do not amount to one compelling reason

16. As mentioned above, the reasoning given by the Trial Chamber based on Mr. Pušić health condition is not sufficient, especially given the ambiguous recommendations of the expert panel in the Preliminary Report. I note in this context that it was also never discussed by the Trial Chamber whether a visit to his ailing relatives could or would have a positive or negative impact on the improvement of Mr. Pušić's health. The two justifications given by the Trial Chamber for

[16] Preliminary Report, 22 February 2008.
[17] Impugned Decision, p. 9, italics added for emphasis.
[18] Impugned Decision, p. 9.
[19] Impugned Decision, p. 10.
[20] *Cf. Prlić* Decision of 11 March 2008, para. 21.
[21] *Cf. Boškoski* Decision, *supra* 10, para. 14. *See also* in the context of appellate proceedings *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008, paras 12-13.

"temporary release" might even be in conflict with each other. In any event, contrary to Mr. Pušić's submission,[22] the two alleged humanitarian reasons do not work "in tandem;" on the contrary, two non-compelling humanitarian reasons do not amount to one compelling reason, warranting "temporary release" when combined.

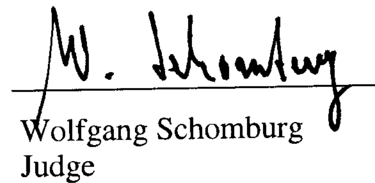
E. Conclusion

17. As this case amply demonstrates, Chambers must be extremely careful when granting provisional release based on alleged special humanitarian needs of the most senior alleged perpetrators of the most serious crimes in the jurisdiction of the International Tribunal.[23] It is in the nature of any detention that conditions are not ideal for a detainee's well-being. This also applies to the fact that a detainee is separated from his relatives. However, under the rules ordinary humanitarian considerations cannot justify the invention of a cogent necessity of a non-existing artefact of "temporary release" of an accused before a judgement has been rendered. To hold otherwise would in practical terms convey the impression, particularly to the people in the States on the territory of the former Yugoslavia that accused before the International Tribunal are let out on holidays.

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

Dated this 23rd day of April 2008,

At The Hague, The Netherlands.



Wolfgang Schomburg
Judge

[Seal of the International Tribunal]

[22] Response, para. 8.
[23] Only in these cases the Tribunal still has jurisdiction, absent any final decision to refer a case rendered by the independent International Tribunal pursuant to Rule 11*bis* of the Rules. *See* Security Council Resolutions 1503 (2003) and 1534 (2004).