

**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-AR65.5
Date: 11 March 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 11 March 2008

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

PUBLIC

**DECISION ON PROSECUTION'S CONSOLIDATED APPEAL AGAINST
DECISIONS TO PROVISIONALLY RELEASE THE ACCUSED PRLIĆ,
STOJIĆ, PRALJAK, PETKOVIĆ AND ĆORIĆ**

Office of the Prosecutor

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Ms. Vesna Alaburić and Mr. Nicolas Stewart for Milivoj Petković
Ms. Dijana Tomašegović-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

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 five separate decisions rendered by Trial Chamber III on 19 February 2008 (collectively, “Impugned Decisions”)² in which Trial Chamber III granted provisional release to Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković and Valentin Ćorić (collectively, “Accused”).

I. BACKGROUND

2. The Prosecution’s urgent request for an immediate stay of the Impugned Decisions was granted by the Appeals Chamber on 22 February 2008³ in order to preserve the objective of the Prosecution’s Appeal.⁴

3. On 25 February 2008, Bruno Stojić (“Stojić”), Slobodan Praljak (“Praljak”) and Valentin Ćorić (“Ćorić”) filed a joint response to the Prosecution’s Appeal.⁵ Responses were also filed on the same day by Jadranko Prlić (“Prlić”)⁶ and by Milivoj Petković (“Petković”).⁷ The latter also filed a confidential request for reconsideration of the Appeals Chamber’s Decision to Stay.⁸ The Appeals Chamber does not find any reason to justify the confidentiality of the Petković Motion for Reconsideration and will therefore order that it be considered a public filing. The Prosecution filed its reply on 27 February 2008.⁹

¹ Prosecution’s Consolidated Appeal from Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić Prior to the Defence Case” (“Appeal”). This motion was filed by the Prosecution after office hours on 21 February 2008 and was distributed early in the morning of 22 February 2008.

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 Prlić*, 19 February 2008 (“Impugned Prlić Decision”); *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 Stojić*, 19 February (“Impugned Stojić Decision”); *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 Praljak*, 19 February 2008 (“Impugned Praljak Decision”); *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 Petković*, 19 February 2008 (“Impugned Petković Decision”); *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 Ćorić*, 19 February 2008 (“Impugned Ćorić Decision”).

³ Decision on Prosecution’s Request to Stay the Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, 22 February 2008 (“Decision to Stay”).

⁴ *Ibid.*, para. 3.

⁵ Stojić, Praljak and Ćorić Response to Prosecution’s Consolidated Appeal from Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić Prior to the Defence Case, 25 February 2008 (“Stojić *et al.* Response”).

⁶ Jadranko Prlić’s Response to Prosecution’s Consolidated Appeal from Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić Prior to the Defence Case, 25 February 2008 (“Prlić Response”).

⁷ Milivoj Petković Response to the Prosecution’s Consolidated Appeal from Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić Prior to the Defence Case, 25 February 2008 (“Petković Response”).

⁸ Petković Defence Request for Reconsideration of the Appeals Chamber Decision on Prosecution’s Request to Stay the Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, of 22 February 2008 (Confidential), 25 February 2008 (“Petković Motion for Reconsideration”).

⁹ Prosecution’s Consolidated Reply to Defence Responses Concerning the Prosecution Appeal from Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić Prior to the Defence Case, 27 February 2008 (“Reply”).

II. STANDARD OF REVIEW

4. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.¹⁰ The Appeals Chamber has 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.¹¹ Accordingly, the relevant inquiry is not whether or not the Appeals Chamber agrees with that discretionary decision, but rather "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."¹²

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".¹³ 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."¹⁴

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.¹⁵

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

¹⁰ See e.g., *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006 ("*Brahimaj Decision*"), para. 5; *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić Decision*"), para. 6; *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005 ("*Boškoski Decision of 28 September 2005*"), para. 5.

¹¹ See e.g., *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 ("*Milutinović Decision*"), para. 3; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006 ("*Borovčanin Decision of 30 June 2006*"), para. 5.

¹² *Ibid.* (internal citations omitted).

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Brahimaj Decision*, para. 6.

opinion indicating its view on those relevant factors.¹⁶ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁷ 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.¹⁸ 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.¹⁹

IV. DISCUSSION

(A) The Petković Motion for Reconsideration

8. Petković asks that the Appeals Chamber reconsider its Decision to Stay. He argues that there was no legal basis for the Appeals Chamber's decision to stay the Impugned Decisions in this case.²⁰ Specifically, Petković argues that the only procedural avenue for seeking a stay is that set out in Rule 65(E) of the Rules, which clearly required the Prosecution to file its application for a stay of the Impugned Decisions at the time of its consolidated response to the initial applications for provisional release.²¹ Failing this, Petković allows that the Prosecution was entitled to seek a stay from the Trial Chamber upon a showing of good cause under Rule 127 of the Rules.²²

9. Petković contests the basis upon which the Prosecution brings an application for a stay directly to the Appeals Chamber.²³ He further contests the Prosecution's failure, despite having recognized its oversight in not requesting a stay pursuant to Rule 65(E) of the Rules before the Trial Chamber, to "even request or suggest the Appeals Chamber to possibly recognize [its application for a stay] as validly done, pursuant to Rule 127(A)(ii) and (B)".²⁴

¹⁶ *Ibid.*, para. 8.

¹⁷ *Stanišić* Decision, para. 8.

¹⁸ *Prosecutor v. Boškoski and Tarčulovski*, 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 ("*Tarčulovski* Decision"), para. 7.

¹⁹ *Stanišić* Decision, para. 8.

²⁰ Petković Motion for Reconsideration, para. 11.

²¹ *Ibid.*, paras. 12-13.

²² *Ibid.*, para. 21. The Trial Chamber dismissed the "Prosecution Consolidated Request Pursuant to Rule 65(E) for a Stay of Provisional Release Regarding the Accused Prlić, Stojić, Praljak, Petković and Čorić Prior to the Defence Case and Variation of Time Limit Pursuant to Rule 127(A)(i)" in its « *Décision sur la demande de l'Accusation de surseoir à l'exécution des décisions relatives aux demandes de mise en liberté* » rendered on 21 February 2008.

²³ *Ibid.*, para. 17.

²⁴ *Ibid.*, para. 16.

10. Petković submits that the Appeals Chamber's disregard for Rule 127 of the Rules was erroneous.²⁵ Moreover, Petković argues that the Appeals Chamber's reliance on the purported need to preserve the objective of the Prosecution's Appeal is not a legally valid reason for granting a stay or for allowing an extension of time pursuant to Rule 127 of the Rules.²⁶ Petković claims that the burden of preserving the objective of a possible appeal lies with the Prosecution²⁷ and its failure to do so should not be rewarded by the Appeals Chamber.²⁸

11. Contrary to Petković's arguments, the caselaw of the International Tribunal supports the competence of the Appeals Chamber to consider the Prosecution's request for a stay, despite its failure to comply with Rule 65(E) of the Rules.²⁹ Furthermore, the Appeals Chamber has also recognized in other cases that the preservation of the object of an appeal by the Prosecution against the provisional release of the accused constitutes "good cause" within the meaning of Rule 127(A)(ii) and (B) of the Rules.³⁰ In this case, the Appeals Chamber – by staying the Impugned Decisions – considered the need to preserve the object of the Appeal to be justified and accordingly used its inherent power to render what was an ancillary order in aid of the exercise of its appellate function.³¹

12. The Appeals Chamber notes Petković's claim that he was not given an opportunity to respond to the Prosecution's stay request.³² However, the Appeals Chamber finds that Petković has failed to demonstrate that this denial caused him prejudice.

13. In light of the above, the Appeals Chamber dismisses the Petković Motion for Reconsideration.

²⁵ *Ibid.*, para. 19.

²⁶ *Ibid.*, para. 20.

²⁷ *Ibid.*, para. 20.

²⁸ *Ibid.*, paras. 24-25.

²⁹ *See Prosecutor v. Jadranko Prlić et al.*, Case Nos. IT-04-74-AR65.1, IT-04-74-AR65.2, IT-04-74-AR65.3, Decision on Motions for Reconsideration, Clarification, Request for Release and Applications for Leave to Appeal, 8 September 2004, para. 15 ("Prlić Decision of 8 September 2004"); *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.1, Stay of "Decision on Defence Motion of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005, 16 December 2005 (Considering that pursuant to Rule 54 of the Rules, in conjunction with Rule 107 of the Rules, the Appeals Chamber has the power to stay the Trial Chamber's Re-assessment Decision *proprio motu* in order to preserve the status quo of the Appeal). Cf. *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Motion to Stay Decision on Provisional Release Concerning the Accused Mićo Stanišić, 22 July 2005, p. 2 (Recognizing *e contrario* that the Prosecution motion for stay could have been granted had exceptional circumstances capable of justifying the waiving of the Rule 65(E) requirement been shown to be in the interests of justice).

³⁰ *Prosecutor v. Jovica Stanišić et al.*, Case No. IT-03-69-AR73, Decision on Interlocutory Appeals from Decision of Trial Chamber to Stay Provisional Release, 29 September 2004, paras. 25, 27.

³¹ In this regard see *Prlić Decision of 8 September 2004*, paras. 15-16.

(B) The Consolidated Prosecution Appeal

14. The Prosecution asks that the Appeals Chamber allow its Appeal and revoke the Impugned Decisions to provisionally release the Accused.³³ It does so on the ground that the Trial Chamber erred in failing to “discuss or consider the heightened risk of flight given the stage of the trial and more specifically, the pending oral ruling under Rule 98bis” of the Rules.³⁴ The Prosecution further submits that the Trial Chamber’s 98bis Ruling³⁵ “defined a very real risk of conviction of the Accused as members of the JCE charged in the indictment.”³⁶ In particular, the Prosecution argues that, while of the five Accused only Ćorić moved for a judgement of acquittal, the 98bis Ruling directly covers all the Accused in its statements regarding the sufficiency of the evidence of the JCE.³⁷

15. In response, Stojić, Praljak and Ćorić begin by contesting the Decision to Stay on essentially the same grounds as those presented in the Petković Motion for Reconsideration.³⁸ These are that: (i) the Appeals Chamber is not the proper body under the Rules to issue a stay of the Impugned Decisions;³⁹ (ii) the Prosecution’s request for a stay is inadmissible given that Rule 65(E) of the Rules has not been complied with nor has an extension of time been granted pursuant to Rule 127 of the Rules;⁴⁰ and (iii) the Prosecution’s errors do not provide the Appeal Chamber with grounds or the power to order a stay.⁴¹

16. The Appeals Chamber has already addressed and dismissed these submissions in its discussion of the Petković Motion for Reconsideration. It accordingly dismisses the above arguments brought by Stojić, Praljak and Ćorić on the same basis.⁴² With regard to the claim by Stojić, Praljak and Ćorić, that they are prejudiced by the stay,⁴³ the Appeals Chamber notes that should the Impugned Decisions be upheld, the Accused could still be provisionally released.

³² Petković Motion for Reconsideration, para. 27(x).

³³ Appeal, p. 5.

³⁴ *Ibid.*, para. 1.

³⁵ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Oral Decision Delivered Under Rule 98bis, T. 27200-27238, 20 February 2008 (“98bis Ruling”).

³⁶ Appeal, para. 7.

³⁷ *Ibid.*, paras. 4-6.

³⁸ Stojić *et al.* Response, paras. 2, 12-17. These same arguments have been incorporated in the Prlić Response, p. 1.

³⁹ *Ibid.*, para. 2.

⁴⁰ *Ibid.*, para. 12.

⁴¹ *Ibid.*, paras. 14-17.

⁴² *Supra*, para. 11.

⁴³ Stojić *et al.* Response, para. 18.

17. With regard to the merits of the Appeal, the Accused argue that the Prosecution has failed to demonstrate any discernible error on the part of the Trial Chamber.⁴⁴ The Accused specifically submit that the Trial Chamber necessarily considered the *98bis* Ruling when it issued the Impugned Decisions.⁴⁵ In support of this claim the Accused point to the fact that the *98bis* Ruling was issued only one day after the issuance of the Impugned Decisions⁴⁶ as well as to the fact that the Trial Chamber explicitly considered the Prosecution's request, in the alternative, that the Accused not be released prior to the rendering of the *98bis* Ruling.⁴⁷ Petković adds that it would have been inappropriate for the Trial Chamber to have explicitly referred to its forthcoming *98bis* Ruling in the Impugned Decisions.⁴⁸ He also maintains that the Prosecution's failure to advance its argument that the stage of the trial and specifically the pending *98bis* Ruling created a heightened risk of flight in its consolidated response to the initial applications is fatal to its Appeal.⁴⁹

18. In addition to arguing that the *98bis* Ruling was taken into account by the Trial Chamber, the Accused further contest the Prosecution's assertion that this decision in fact increases their risk of flight.⁵⁰ The Accused maintain in this regard that they do not view the *98bis* Ruling as a negative indicator of their chance to ultimately secure an acquittal.⁵¹

19. The Appeals Chamber finds that the Trial Chamber committed a discernible error in failing to explicitly discuss the impact of its *98bis* Ruling when granting provisional release. In deciding to grant the Accused provisional release the Trial Chamber essentially relied on the compliance by the Accused with the terms imposed by the Trial Chamber in prior decisions on provisional release.⁵² In this regard, the Impugned Decisions fail to assess the requirements of Rule 65(B) of the Rules in the present context of the proceedings, and particularly in light of the Trial Chamber's imminent *98bis* Ruling.

20. The Appeals Chamber considers that the *98bis* Ruling in this case constitutes 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. Significantly, the Trial Chamber held that

⁴⁴ Stojić *et al.* Response, paras. 2, 32; Petković Response, para. 12; Prlić Response, para. 3.

⁴⁵ Stojić *et al.* Response, para. 21; Petković Response, para. 18; Prlić Response, para. 2.

⁴⁶ *Id.*

⁴⁷ Stojić *et al.* Response, para. 21; Impugned Decisions, p. 3.

⁴⁸ Petković Response, para. 17.

⁴⁹ *Ibid.*, paras. 13-16.

⁵⁰ Stojić *et al.* Response, paras. 23-25; Petković Response, paras. 19-20.

⁵¹ Stojić *et al.* Response, para. 24.

⁵² Impugned Decisions, p. 4.

a reasonable Trial Chamber, could make a finding beyond any reasonable doubt that all of these acts were committed to carry out a plan aimed at changing the ethnic balance of the areas that formed Herceg-Bosna and mainly to deport the Muslim population and other non-Croat population out of Herceg-Bosna in a final way in order to create an ethnically pure Croatian territory within Herceg-Bosna. In conclusion and in light of the evidence reviewed by the Trial Chamber both on the existence of a significant and organized displacement of Muslims and other non-Croats, and on the conduct of the accused faced with these events, a reasonable Trial Chamber could conclude that there was a joint criminal enterprise during the periods covered by the indictment.⁵³

21. The Appeals Chamber further finds that the Trial Chamber committed a discernible error in considering that the justifications for release put forth by the Accused might be regarded as humanitarian grounds capable of justifying the granting of a short period of provisional release in the cases of Ćorić,⁵⁴ Praljak⁵⁵ and Petković.⁵⁶ In the cases of Stojić and Prlić the Trial Chamber considered Prlić’s request to visit his ailing father and brother and Stojić’s request to visit his ailing spouse, brother and parents, to be requests based on humanitarian grounds without offering any indication of how much weight it ascribed thereto.⁵⁷ Nonetheless, in all cases, the Appeals Chamber finds that the various justifications for release offered by the Accused are not sufficiently compelling, particularly in light of the 98bis Ruling, to warrant the exercise of the Trial Chamber’s discretion in favour of granting the Accused provisional release. The Appeals Chamber accordingly finds that the circumstances of this case indicate that a Trial Chamber properly exercising its discretion should have denied provisional release.

22. Lastly, the Appeals Chamber rejects Petković’s argument that the Prosecution’s failure to advance its argument regarding the 98bis Ruling in its consolidated response to the initial applications is fatal to its Appeal. While the Prosecution was certainly aware that the 98bis Ruling was forthcoming, without any knowledge of its contents, it could not have been expected to argue about its impact on the Accused’s risk of flight.

⁵³ 98bis Ruling, T. 27224.

⁵⁴ Impugned Ćorić Decision, p. 4 (Considering that the application for provisional release submitted by the Accused Ćorić to visit his ailing daughter and close family may be considered as a request based on humanitarian grounds and may justify the granting of a short period of provisional release).

⁵⁵ Impugned Praljak Decision, p. 4 (Considering that the Accused Praljak’s request to deal with administrative matters and to undergo medical tests may justify the granting of a short period of provisional release).

⁵⁶ Impugned Petković Decision, p. 4 (Considering that the application for provisional release submitted by the Accused Petković to visit both his ailing spouse and his close family may be considered as a request based on humanitarian grounds and may justify the granting of a short period of provisional release).

⁵⁷ See, respectively, Impugned Prlić Decision, p. 4; Impugned Stojić Decision, p. 4.

V. DISPOSITION

23. On the basis of the foregoing, the Appeals Chamber **GRANTS** the Prosecution Appeal and **INSTRUCTS** the Registry of the International Tribunal to lift the confidential status of the Petković Motion for Reconsideration.

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

Done this 11th day of March 2008,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]