



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-06-90-AR65.3
Date: 4 August 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. John Hocking

Order of: 4 August 2009

PROSECUTOR

v.

**ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ**

PUBLIC

**ORDER ISSUING A PUBLIC REDACTED VERSION OF THE "DECISION ON IVAN
ČERMAK'S APPEAL AGAINST DECISION ON HIS MOTION FOR PROVISIONAL
RELEASE" ISSUED 3 AUGUST 2009**

Office of the Prosecutor

Mr. Alan Tieger
Mr. Stefan Waespi

Counsel for the Defence

Mr. Luka S. Mišetić, Mr. Gregory W. Kehoe, and Mr. Payam Akhavan for Mr. Ante Gotovina
Mr. Steven Kay QC, Mr. Andrew T. Cayley, and Ms. Gillian Higgins for Mr. Ivan Čermak
Mr. Goran Mikuličić and Mr. Tomislav Kuzmanović for Mr. Mladen Markač

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 (“Tribunal”);

NOTING the “Decision on Ivan Čermak’s Appeal Against Decision on His Motion for Provisional Release”, issued confidentially on 3 August 2009 (“Decision”);

CONSIDERING that some of the information contained in the Decision is to remain confidential;

HEREBY ISSUES a public redacted version of the Decision.

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



Judge Patrick Robinson
Presiding

Dated this fourth day of August 2009
At The Hague
The Netherlands

[Seal of the Tribunal]



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PUBLIC REDACTED VERSION

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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 “Tribunal”, respectively) is seised of “Ivan Čermak’s Interlocutory Appeal Against Decision on Motion for Provisional Release of 14 July 2009”, filed confidentially on 20 July 2009 (“Appeal”) against the “Decision on Motion for Provisional Release of Ivan Čermak”, issued confidentially on 14 July 2009 (“Impugned Decision”), denying provisional release to Ivan Čermak (“Čermak”).

I. BACKGROUND

2. On 9 June 2009, Čermak filed confidentially a motion requesting provisional release “in order to [REDACTED]” for a period that the Trial Chamber deemed proportionate (“Motion”), including confidential annex A and confidential and *ex parte* annexes B and C.¹ On 14 July 2009, the Trial Chamber issued the Impugned Decision, finding that Čermak, if released, would not pose a flight risk and would not endanger victims, witnesses, or other persons.² However, the Trial Chamber did not find that the humanitarian grounds advanced by Čermak were sufficiently compelling to justify the provisional release.³ The Chamber therefore denied the Motion.⁴ On 20 July 2009, Čermak filed this Appeal. The Prosecution filed a response on 21 July 2009.⁵ Čermak indicated to the Appeals Chamber and the Prosecution that he did not intend to file a reply.

II. STANDARD OF REVIEW

3. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of a Trial Chamber’s decision.⁶ The Appeals Chamber has previously held that a decision on

¹ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Ivan Čermak’s Motion for Provisional Release Pursuant to Rules 54 and 65, filed confidentially on 9 June 2009, para. 2; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Confidential and Ex-parte Annex B to Ivan Čermak’s Motion for Provisional Release Pursuant to Rules 54 and 65, 9 June 2009 (“Motion, Annex B”); *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Confidential and Ex-parte Annex C to Ivan Čermak’s Motion for Provisional Release Pursuant to Rules 54 and 65, 9 June 2009 (“Motion, Annex C”).

² Impugned Decision, paras 9–10.

³ Impugned Decision, para. 11.

⁴ Impugned Decision, para. 12.

⁵ Prosecution Response to Ivan Čermak’s Interlocutory Appeal Against Decision on Motion for Provisional Release of 14 July 2009, filed confidentially on 21 July 2009 (“Response”).

⁶ See, e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak’s Appeal of the Trial Chamber’s 2 December 2008 Decision on Provisional Release, 17 December 2008, para. 4 (“*Praljak* Decision”) (citing *Prosecutor v. Haradinaj et al.*, 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 and Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski’s Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5).

provisional release by the Trial Chamber under Rule 65 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) is a discretionary one.⁷ 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 the decision.⁸

4. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a discernible error.⁹ The Appeals Chamber will only overturn a Trial Chamber’s decision on provisional release where it is found to be (a) based on an incorrect interpretation of governing law; (b) based on a patently incorrect conclusion of fact; or (c) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.¹⁰ The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹¹

III. APPLICABLE LAW

5. 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.¹²

6. 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.¹³ It must then provide a reasoned 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

⁷ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Accused Praljak’s Motion for Provisional Release, 25 July 2008, para. 6.

⁸ See, e.g., *Praljak* Decision, para. 4; *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, 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, para. 5.

⁹ *Praljak* Decision, para. 5 (internal citation omitted).

¹⁰ *Ibid.*

¹¹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović’s Interlocutory Appeal Against the Decision on Popović’s Motion for Provisional Release, 1 July 2008 (“*Popović* Decision”), para. 6.

¹² *Praljak* Decision, para. 6; *Brahimaj* Decision, para. 6.

¹³ *Praljak* Decision, para. 7; *Brahimaj* Decision, para. 10.

¹⁴ *Praljak* Decision, para. 7; see also *Brahimaj* Decision, para. 10.

¹⁵ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

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 Tribunal.¹⁷ If the Trial Chamber is satisfied that the requirements of Rule 65(B) have been met, it has the discretion as to whether or not to grant provisional release to an accused. An application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, should only be granted when sufficiently compelling humanitarian reasons exist, Judges Güney and Liu dissenting.¹⁸

IV. DISCUSSION

7. Čermak argues that the Trial Chamber made two discernible errors in the Impugned Decision. First, he submits that the Trial Chamber abused its discretion when considering the sufficiency of the humanitarian grounds submitted in support of the Motion, namely, [REDACTED]¹⁹ by failing to give any or sufficient weight to established facts concerning his personal circumstances. Second, he argues that the Trial Chamber erred in fact by concluding that [REDACTED].²⁰ Čermak requests that the Appeals Chamber reverse the Impugned Decision or, in the alternative, remand the Impugned Decision to the Trial Chamber “for a *de novo* adjudication of whether ... the humanitarian ground advanced by [Čermak] is sufficiently compelling to justify his provisional release for a period deemed appropriate and proportionate”.²¹

Ground 1: Whether the Trial Chamber abused its discretion by failing to properly consider the humanitarian grounds in the context of its findings under Rule 65(B)

8. Čermak first argues that the assessment of the sufficiency of humanitarian grounds is a matter to be considered in light of the findings of the Trial Chamber under Rule 65(B) of the Rules.²² According to Čermak, the Trial Chamber abused its discretion by considering the humanitarian grounds in isolation and by failing to accord any or sufficient weight to the “established facts” that Čermak (a) is not and has never been a flight risk; (b) has never posed a risk to victims or witnesses; (c) surrendered voluntarily to the Tribunal; (d) has cooperated with the Prosecution throughout its investigation; and (e) exhibits proper and cooperative behaviour in

¹⁶ *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7.

¹⁷ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

¹⁸ See *Praljak* Decision, para. 15.

¹⁹ Appeal, para. 6.

²⁰ Appeal, para. 7.

²¹ Appeal, para. 16.

²² Appeal, para. 11.

court.²³ Čermak submits that the “Trial Chamber correctly weighed these individual circumstances in its evaluation of the Rule 65(B) requirements”,²⁴ but then abused its discretion when it failed to give them appropriate weight in its analysis of the humanitarian grounds because “the relevance of such facts extends to the consideration of humanitarian grounds submitted in support of an application for provisional release”.²⁵

9. The Prosecution disputes Čermak’s reliance upon two provisional release decisions of the Appeals Chamber and responds that:

[...] once a Trial Chamber has concluded that the Accused’s release does not pose a risk of flight or a risk to victims, witnesses, or other persons under Rule 65(B) – as the Trial Chamber did in this case – there is no basis, either in the provisional release jurisprudence, or in logic, for a Trial Chamber to refer back to that Rule 65(B) assessment in considering the sufficiency of the Accused’s humanitarian grounds in the post-Rule 98*bis* stage of the proceedings.²⁶

10. The Appeals Chamber recalls that, in order to grant provisional release to an accused, the requirements of Rule 65(B) have to be satisfied, after which a Chamber has discretion as to whether or not to grant provisional release. However, there is no legal requirement for a Trial Chamber to weigh the information regarding humanitarian grounds against the information regarding the question of whether there is a flight risk or a danger to victims, witnesses, and other persons.

11. For the foregoing reasons, the Appeals Chamber finds that Čermak has failed to demonstrate that the Trial Chamber committed a discernible error.

Ground 2: Whether the Trial Chamber erred by concluding that [REDACTED] that were relevant to the evaluation of the proffered humanitarian grounds

12. Čermak argues that the Trial Chamber committed a discernible error by concluding that [REDACTED] that were relevant to the evaluation of the proffered humanitarian grounds. According to Čermak, [REDACTED].²⁷ Specifically, Čermak argues that [REDACTED].²⁸ According to Čermak, the Trial Chamber should have concluded that [REDACTED].²⁹

²³ Appeal, para. 12.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Response, para. 4.

²⁷ Appeal, para. 13.

²⁸ Appeal, para. 14.

²⁹ Appeal, para. 15.

13. The Prosecution responds that the “Trial Chamber did not reach a patently incorrect conclusion of fact by determining that [REDACTED] that were relevant to the evaluation of the sufficiency of the humanitarian grounds”.³⁰ The Prosecution points out that [REDACTED].³¹ The Prosecution contends that there is information on record to support the Trial Chamber’s assessment that [REDACTED].³² The Prosecution thus contends that the Trial Chamber properly exercised its discretion in determining that the humanitarian grounds advanced were not sufficiently compelling.³³

14. The Appeals Chamber notes the relevant findings of the Trial Chamber:

[REDACTED]³⁴

15. The Appeals Chamber has analysed the [REDACTED].³⁵ The [REDACTED].³⁶ The [REDACTED].³⁷

16. The [REDACTED].³⁸ The [REDACTED].³⁹

17. The Appeals Chamber considers that the Trial Chamber did not make a patently incorrect conclusion of fact when it found that [REDACTED].⁴⁰ However, the Trial Chamber also found that [REDACTED].⁴¹ The Trial Chamber also noted [REDACTED].⁴²

18. The Trial Chamber correctly observed that [REDACTED]⁴³ and that [REDACTED]. However, the [REDACTED]. The Appeals Chamber considers that [REDACTED]. The Appeals Chamber considers that, in the specific circumstances of this case, the Trial Chamber erred when it found that [REDACTED]. The Trial Chamber therefore committed a discernible error.

19. Since this matter falls within the Tribunal’s recess period, the Appeals Chamber finds that it is in the interests of justice to order the provisional release of Čermak for a limited period

³⁰ Response, para. 5.

³¹ Response, paras 5–7.

³² Response, paras 5, 7.

³³ Response, para. 9.

³⁴ Impugned Decision, para. 11 (internal citation omitted).

³⁵ Motion, Annex B.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Motion, Annex C.

³⁹ *Ibid.*

⁴⁰ Impugned Decision, para. 11.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

that is proportionate to all the present circumstances of this case. In doing so, the Appeals Chamber emphasises that the Trial Chamber, in the Impugned Decision, found that if released, Čermak would not pose a flight risk and would not endanger victims, witnesses, or other persons.⁴⁴

V. DISPOSITION

20. For the foregoing reasons and pursuant to Article 29 of the Statute of the Tribunal and Rules 54, 65, and 107 of the Rules, the Appeals Chamber, Judge Pocar and Judge Meron dissenting, **GRANTS** the Appeal in part, **REVERSES** the Impugned Decision, and **ORDERS** as follows:

- a. On **Wednesday, 5 August 2009**, Čermak shall be transported to the appropriate airport in the Netherlands by the appropriate Dutch authorities.
- b. At the appropriate airport, Čermak shall be provisionally released by the Dutch authorities into the custody of an official of the Government of the Republic of Croatia to be designated prior to his release in accordance with subparagraph (e)(iv) below, who shall accompany Čermak for the remainder of his travel to and from the address detailed in Confidential Annex A of the Motion.
- c. On **Thursday, 13 August 2009**, Čermak shall be accompanied by the designated official of Croatia, who shall deliver him to the custody of the Dutch authorities at the appropriate airport in the Netherlands, and the Dutch authorities shall then transport him back to the UNDU in The Hague.
- d. During the provisional release, Čermak shall:
 - i. surrender his passport and any other relevant travel documents to the Ministry of Interior of the Republic of Croatia;
 - ii. remain within the confines of his private residence in Croatia, at the address detailed in Confidential Annex A of the Motion;
 - iii. consent to have his presence checked, including checking by occasional and unannounced visits by the Ministry of Interior, officials of the Government of the Republic of Croatia, the local police, or by a person designated by the Registrar of the Tribunal;

⁴⁴ Impugned Decision, paras 9–10.

- iv. not have any contact or in any way interfere with victims or potential witnesses or otherwise interfere with the proceedings or the administration of justice;
 - v. not seek direct access to documents or archives nor destroy evidence;
 - vi. not discuss or speak about the case with anyone, including the media, other than his counsel;
 - vii. not engage in any activity that is not in accordance with the private nature of the provisional release, including any contact with public officials or public figures not relating to the administration of the provisional release;
 - viii. comply strictly with any requirements of the Croatian authorities necessary to enable such authorities to comply with their obligations pursuant to the present decision;
 - ix. return to the custody of the Tribunal at any such time and date as the Trial Chamber seized of the case may order; and
 - x. comply strictly with any order issued by the Trial Chamber seized of the case varying the terms of, or terminating, the provisional release.
- e. The Government of the Republic of Croatia shall assume the following responsibilities:
- i. the personal security and safety of Čermak while on provisional release;
 - ii. ensuring compliance with the conditions imposed on Čermak under the present decision;
 - iii. all expenses concerning the transport of Čermak from the airport in the Netherlands to his place of residence in Croatia, and back to the Netherlands;
 - iv. ensuring that, upon release of Čermak at the airport in the Netherlands, designated officials of the Government of the Republic of Croatia (whose names shall be provided in advance to the Registry and the Trial Chamber seized of the case) take custody of Čermak from the Dutch authorities and accompany him as detailed in subparagraph (b) and (c), above;

- v. not issuing any new passports or other travel documents which would enable Čermak to travel;
- vi. monitoring on a regular basis the presence of Čermak at the address detailed in Confidential Annex A of the Motion, and maintaining a log of such reports;
- vii. reporting immediately to the Registrar of the Tribunal the substance of any threats to the security of Čermak, including full reports of investigations related to such threats; and
- viii. immediately detaining Čermak should he breach any of the terms and conditions of his provisional release and reporting immediately any such breach to the Registry and the Trial Chamber seised of the case.

21. The Appeals Chamber hereby **REQUESTS** the Registrar of the Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for the provisional release of Čermak, and to continue to detain Čermak at the UNDU in The Hague until such time as the Registrar and the Trial Chamber seised of the case have been notified of the name of the designated official of the Government of the Republic of Croatia into whose custody Čermak is to be provisionally released.

22. The Appeals Chamber **REQUESTS** the authorities of all states through which Čermak will travel:

- a. to hold him in custody for any time that he will spend in transit at an airport in their territories; and
- b. to arrest and detain him pending his return to the UNDU in The Hague, should he attempt to escape.

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

Judge Patrick Robinson
Presiding

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Dated this 3rd day of August 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

PARTLY DISSENTING OPINION OF JUDGES GÜNEY AND LIU

1. According to the majority in this case, any application for provisional release made after a Rule 98 *bis* decision “should only be granted when sufficiently compelling humanitarian reasons exist”.⁴⁵ Because the majority decision to impose an additional requirement of “sufficiently compelling humanitarian reasons” to the two criteria listed under Rule 65(B) of the Rules⁴⁶ undermines the continuing presumption of innocence and effectively fetters the discretion of the Trial Chamber, we respectfully dissent.⁴⁷

2. Pursuant to Rule 65(B) of the Rules, 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”.⁴⁸ When satisfied that these two requirements are met, a Trial Chamber may exercise its discretion to grant provisional release. In doing so, it must consider all relevant factors.⁴⁹ The existence of humanitarian reasons may be a salient and relevant factor in assessing whether to exercise discretion to grant provisional release. These humanitarian grounds will have to be assessed in the context of the two requirements of Rule 65(B),⁵⁰ and the “weight attached to

⁴⁵ Majority Decision, para. 6 (internal footnote omitted). We note that this approach follows the interpretation of Rule 65(B) of the Rules of Procedure and Evidence (“Rules”) in *Prosecutor v. Jadranko Prlić et al.* Case No. IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal Against Decisions to Provisionally Released the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008.

⁴⁶ Rules as amended on 4 November 2008.

⁴⁷ This joint dissenting opinion is consistent with those expressed in previous decisions relating to Rule 65(B) of the Rules. See *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.16, Decision on Prosecution’s Appeal Against Decision on Pušić’s Motion for Provisional Release, 20 July 2009, Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Vujadin Popović et al.*, Case No IT-05-88-AR65.8, Decision on Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 20 July 2009, Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.14, Decision on Jadranko Prlić’s Appeal Against the *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prlić*, 9 April 2009, 5 June 2009, Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Vujadin Popović et al.*, Case No IT-05-88-AR65.4, Decision on Consolidated Appeal Against Decision on Borovčanin’s Motion for a Custodial Visit and Decisions on Gvero’s and Miletić’s Motions for Provisional Release During the Break in the Proceedings, 15 May 2008 (“Popović Decision”), Partly Dissenting Opinions of Judges Liu and Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.8, Decision on “Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prlić* dated 7 April 2008”, 25 April 2008, Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.6, 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, 23 April 2008; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.7, Decision on “Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković* dated 31 March 2008”, 21 April 2008, Partly Dissenting Opinion of Judge Güney.

⁴⁸ *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 (“*Tarčulovski* Decision”), para. 14.

⁴⁹ See Majority Decision, para. 6.

⁵⁰ *Tarčulovski* Decision, para. 14.

[them] as justification for provisional release will differ from one defendant to another depending upon all of the circumstances of a particular case”.⁵¹

3. Because there is no requirement for humanitarian reasons, much less “sufficiently compelling” humanitarian reasons, under Rule 65(B) of the Rules, we consider that the majority’s decision represents an *ultra vires* extension of the Rules by requiring a further pre-requisite to provisional release which is neither provided nor implied by the Rules. The above requirement amounts to reinstating, for post Rule 98bis proceedings, the criterion of “exceptional circumstances” which was previously required by the Rules for the provisional release of an accused pending trial, and which was abrogated by the amendment of 17 November 1999.⁵² Such a requirement undermines the important distinctions between convicted persons⁵³ and those who still enjoy the presumption of innocence under Article 21(3) of the Statute, and we cannot subscribe to it.

4. In the present instance, the Trial Chamber considered that the criteria of Rule 65(B) of the Rules were met.⁵⁴ In our view, the Trial Chamber was thus not in the situation where it had to be satisfied of the existence of compelling humanitarian grounds to exercise its discretion in favour of provisional release. It had only to consider all the circumstances of the case and exercise its discretion in determining whether there were factors in favour of provisional release. In this respect, it considered [REDACTED].⁵⁵ However, the Trial Chamber was “not satisfied that [REDACTED] presents a sufficiently compelling humanitarian ground to tip the balance in favour of provisional release”⁵⁶ and denied provisional release on that basis.

5. Mindful of the broad margin of discretion afforded to Trial Chambers in assessing factors regarding provisional release,⁵⁷ we nevertheless consider that the Trial Chamber committed a discernible error in requiring “sufficiently compelling humanitarian reasons” for the grant of

⁵¹ See Popović Decision, Partly Dissenting Opinion of Judge Güney, para. 4; *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.

⁵² IT/32/REV.17. Prior to this amendment of the Rules, Rule 65(B) stated: “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.” (IT/32/REV.16) Emphasis added.

⁵³ In cases of a request for provisional release of a convicted person, Rule 65(I) (iii) of the Rules indeed does require the applicant to prove that special circumstances exist warranting provisional release.

⁵⁴ Impugned Decision, paras 9-10.

⁵⁵ Impugned Decision, para. 11.

⁵⁶ *Ibid.*

⁵⁷ *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal against the Trial Chamber’s 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 Defense Counsel [sic], 1 November 2004, para. 9.

provisional release. We therefore consider that the Trial Chamber's discretion was fettered by this extraneous consideration and consequently, while we respectfully dissent from the majority's reasoning, we concur with the conclusion in the grant of provisional release.⁵⁸

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

Dated this 3rd day of August 2009
At The Hague,
The Netherlands

Judge Mehmet Güney

Judge Liu Daqun

[Seal of the Tribunal]

⁵⁸ Majority Decision, para. 19.

JOINT DISSENTING OPINION OF JUDGE POCAR AND JUDGE MERON

1. We respectfully dissent from the Majority's Decision⁵⁹ to reverse the Impugned Decision⁶⁰ and grant Čermak provisional release. It is well-established in the Tribunal's jurisprudence that under Rule 65(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), a Trial Chamber's decision to grant or deny provisional release is a discretionary one.⁶¹ Moreover, an interlocutory appeal is not a *de novo* review of a Trial Chamber's decision.⁶² Thus, as the Majority's Decision recognises,⁶³ this discretionary decision should be upheld unless it was erroneously based on an incorrect interpretation of governing law or a patently incorrect factual conclusion, or was so unreasonable or unfair as to constitute an abuse of discretion.⁶⁴

2. Given the discretion of the Trial Chamber to assess the humanitarian reasons for provisional release following a Rule 98*bis* ruling,⁶⁵ we would not conclude, as the Majority's Decision has, that the Trial Chamber "committed a discernible error" in its evaluation of the humanitarian grounds for release presented by Čermak.⁶⁶ In our view, and in light of previous jurisprudence of the Appeals Chamber, the Trial Chamber did not reach any patently incorrect factual conclusion or abuse its discretion. We therefore believe, in accordance with the aforementioned standard of review, that there is no basis to overturn the Impugned Decision in denying Čermak provisional release.

⁵⁹ Decision on Ivan Čermak's Appeal Against Decision on His Motion for Provisional Release ("Majority's Decision").

⁶⁰ *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Motion for Provisional Release of Ivan Čermak, 14 July 2009 ("Impugned Decision") (confidential).

⁶¹ See, e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 17 December 2008 ("Praljak Decision"), para. 4.

⁶² See, e.g., *Praljak Decision*, para. 4 (citing *Prosecutor v. Haradinaj et al.*, 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 Mičo Stanišić's Provisional Release, 17 October 2005 ("Stanišić Decision"), para. 6; *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Bošković's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5).

⁶³ See Majority's Decision, para. 4.

⁶⁴ See *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on Popović's Motion for Provisional Release, 1 July 2008 ("Popović Decision"), para. 6.

⁶⁵ See *Praljak Decision*, paras 7, 15; see also Majority's Decision, para. 6.

⁶⁶ See Majority's Decision, para. 18.

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

Judge Fausto Pocar

Judge Theodor Meron

Dated this 3rd day of August 2009

[Seal of the Tribunal]