

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-05-88-AR65.10

Date: 19 November 2009

Original: English

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision of: 19 November 2009

PROSECUTOR
v.
VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVIČANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

**DECISION ON RADIVOJE MILETIĆ'S APPEAL AGAINST
DECISION ON MILETIĆ'S MOTION FOR PROVISIONAL
RELEASE**

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Mr. Zoran Živanović and Ms. Mira Tapušević for Vujadin Popović
Mr. John Ostojić and Mr. Predrag Nikolić for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Vinko Pandurević

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 seized of an appeal filed by Counsel for the Accused Radivoje Miletić (“Accused”) on 15 October 2009¹ against a decision rendered by Trial Chamber II (“Trial Chamber”) on 15 October 2009, denying provisional release to the Accused (“Impugned Decision”).² The Office of the Prosecutor (“Prosecution”) responded on 29 October 2009.³

I. BACKGROUND

2. On 14 September 2009, the Accused requested provisional release on humanitarian grounds for 10 days in the month of October 2009.⁴ He submitted that [REDACTED]. The Accused also submitted that, if provisionally released, he would be able [REDACTED].⁵ On 25 September 2009, the Prosecution filed its response to the Motion.⁶ On 28 September 2009, the Accused filed a reply to that response.⁷ On 12 October 2009, he filed an addendum to his Motion.⁸

3. On 15 October 2009, the Trial Chamber issued the Impugned Decision, whereby it denied the Motion. The Trial Chamber was persuaded that the Accused would appear for trial and that he was not a threat to witnesses, victims or any other person associated with the case. However, it found that the humanitarian reasons advanced by the Accused did not tip the balance in favour of granting him provisional release at this late stage of the proceedings.⁹

¹ *Appel contre la décision relative à la requête du Général Miletic aux fins de la mise en liberté provisoire*, Confidential, 19 October 2009 (“Appeal”). An English translation was filed on 27 October 2009.

² *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Miletic’s Motion for Provisional Release, Confidential, 15 October 2009.

³ Prosecution’s Response to Miletic’s “Appeal Against the Decision on General Miletic’s Motion for Provisional Release”, Confidential, 29 October 2009 (“Response”).

⁴ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, *Requête du Général Miletic [sic] aux fins de mise en liberte [sic] provisoire pour des raisons humanitaires*, 14 September 2009 (“Motion”). An English translation was filed on 16 September 2009.

⁵ Motion, paras 12-14.

⁶ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Prosecution’s Response to Miletic’s 14 September 2009 Motion for Provisional Release, Confidential, 25 September 2009.

⁷ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, *Demande d’autorisation de réplique et la réplique du Général Miletic à la réponse du Procureur relative à la requête aux fins de mise en liberté provisoire*, Confidential, 28 September 2009. An English translation was filed on 1 October 2009.

⁸ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, *Addendum à la requête du Général Miletic aux fins de mise en liberté provisoire déposée le 25 septembre 2009*, Confidential, 12 October 2009. An English translation was filed on 29 October 2009.

⁹ Impugned Decision, para. 19.

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 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 (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁴ 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.¹⁵

III. APPLICABLE LAW

6. 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,

¹⁰ See e.g., *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 ("Prlić Decision"), para. 5; *Prosecutor v. Vujadin 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. 5; *Prosecutor v. Ramush 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. 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.

¹¹ See e.g., Prlić Decision, para. 5; *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, 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, para. 5.

¹² Prlić Decision, para. 5.

¹³ Prlić Decision, para. 6; *Prosecutor v. Jadranko 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 of 17 December 2008"), para. 5.

¹⁴ Prlić Decision, para. 6; Praljak Decision of 17 December 2008, para. 5. See also *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR65, Decision on Appeal Concerning Provisional Release, 20 May 2009, para. 6; *Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ndirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release, 7 April 2009, para. 4.

¹⁵ See e.g., Popović Decision, para. 6; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, para. 6; Brahimaj Decision, para. 5; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005, para. 4; Stanišić Decision, para. 6, fn. 10; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on

witness or other person; and after having given both the host country and the State to which the accused seeks to be released the opportunity to be heard.¹⁶

7. In deciding whether the requirements of Rule 65(B) of the Rules are 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 opinion indicating its view on those relevant factors.¹⁷ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁸ 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.¹⁹ 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.²⁰ Finally, an application for provisional release brought at a late stage of proceedings, and in particular after the closing of the Prosecution case, should only be granted when serious and sufficiently compelling humanitarian reasons exist, Judges Güney and Liu dissenting.²¹

IV. SUBMISSIONS

8. The Accused submits that the Trial Chamber correctly found that the requirements of Rule 65(B) of the Rules are met in his case.²² He submits, however, that the Trial Chamber failed to consider the relevant facts and incorrectly interpreted applicable law. The Accused argues that the Trial Chamber incorrectly evaluated the humanitarian grounds he put forth. He also states that the Trial Chamber merely recalled humanitarian reasons generally considered to be sufficiently

Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense [*sic*] Counsel, 1 November 2004, para. 10.

¹⁶ *Prlić* Decision, para. 7; *Praljak* Decision of 17 December 2008, para. 6; *Brahimaj* Decision, para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.15, Decision on Prosecution's Appeal against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release, 8 July 2009 ("*Praljak* Decision of 8 July 2009"), para. 6.

¹⁷ *Prlić* Decision, para. 8; *Praljak* Decision of 17 December 2008, para. 7; *Brahimaj* Decision, para. 10; *Praljak* Decision of 8 July 2009, para. 7.

¹⁸ *Prlić* Decision, para. 8; *Praljak* Decision of 17 December 2008, para. 7; *Stanišić* Decision, para. 8; *Praljak* Decision of 8 July 2009, para. 7.

¹⁹ *Prlić* Decision, para. 8; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.1; *Praljak* Decision of 8 July 2009, para. 7.

²⁰ *Prlić* Decision, para. 8; *Praljak* Decision of 17 December 2008, para. 7; *Stanišić* Decision, para. 8; *Praljak* Decision of 8 July 2009, para. 7.

²¹ *The Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.3, Decision on Ivan Čermak's Appeal against Decision on His Motion for Provisional Release, 3 August 2009, para. 6; *Prlić* Decision, para. 8; *Praljak* Decision of 17 December 2008, para. 7; *Praljak* Decision of 8 July 2009, para. 7.

²² Appeal, para. 6.

compelling to grant provisional release, instead of examining the particular circumstances of his case, as required by the jurisprudence of the Appeals Chamber.²³

9. The Accused argues that the Trial Chamber did not evaluate the humanitarian reasons advanced by him in the context of the requirements of Rule 65(B) of the Rules.²⁴ He further contends that the Trial Chamber accepted as a general principle the Appeals Chamber's decision in the case of *Prlić et al.*, despite the fact that the decision dealt with an issue specific to the applicant in that case.²⁵ The Accused submits that the Trial Chamber's conclusion [REDACTED] is unfair, unreasonable and erroneous.²⁶ He contends that [REDACTED].²⁷ The Accused requests that the Appeals Chamber grant his Appeal and reverse the Impugned Decision by granting him provisional release as requested in his Motion, or that the Impugned Decision be remanded for a *de novo* adjudication of the significance of the humanitarian reasons advanced by the Accused.²⁸

10. The Prosecution responds that the Accused has failed to demonstrate that the Trial Chamber committed any discernible error.²⁹ It submits that the Trial Chamber took into consideration the advanced stage of the proceedings in this case.³⁰ The Prosecution argues that the Trial Chamber's reference to the Appeals Chamber's decision in the *Prlić et al.* case did not cause it to err in the exercise of its discretion.³¹ It further submits that the Trial Chamber did not carry out its assessment of the humanitarian reasons advanced by him in isolation.³² Finally, the Prosecution contends that the Trial Chamber's consideration of the fact that [REDACTED] does not constitute an abuse of discretion, but rather demonstrates that the Trial Chamber carefully considered the situation as a whole.³³ The Prosecution requests that the Appeal be dismissed.³⁴

V. DISCUSSION

11. The Appeals Chamber notes that, contrary to the argument of the Accused, the Trial Chamber did evaluate the humanitarian grounds put forth in his Motion in the context of his

²³ Appeal, paras 9-10.

²⁴ Appeal, para. 11.

²⁵ Appeal, para. 12.

²⁶ Appeal, para. 13.

²⁷ Appeal, para. 14.

²⁸ Appeal, para. 16.

²⁹ Response, para. 2.

³⁰ Response, para. 3.

³¹ Response, para. 4.

³² Response, para. 5.

³³ Response, para. 6.

³⁴ Response, paras 1, 7.

personal situation.³⁵ It found that a [REDACTED].³⁶ The Accused did not identify any specific facts which, in his submissions, were not considered by the Trial Chamber.

12. The Accused further argues that the Trial Chamber failed to evaluate the humanitarian reasons advanced in his application in the context of the requirements of Rule 65(B) of the Rules.³⁷

13. The Appeals Chamber recalls that the existence of compelling humanitarian reasons will only become relevant if the accused has met the prerequisite requirements of Rule 65(B), which must be satisfied for the Trial Chamber to have the discretion to consider granting provisional release.³⁸ The Trial Chamber correctly applied this principle and examined the humanitarian reasons advanced by the Accused only after determining that the requirements of Rule 65(B) were met in that case.³⁹ The Accused has not explained why the Trial Chamber's alleged failure to examine those humanitarian reasons in the context of the requirements of Rule 65(B) was an error and, in particular, he has not demonstrated that the Trial Chamber incorrectly interpreted governing law.⁴⁰

14. Further, the Trial Chamber reviewed the humanitarian reasons that had been considered by other Trial Chambers and the Appeals Chamber to be sufficiently compelling to grant provisional release at a late stage of trial.⁴¹ The Trial Chamber did not merely recall these reasons, as the Accused submits.⁴² It also compared them to the reasons advanced by the Accused. The Trial Chamber then concluded that his reasons lacked the gravity or the urgency necessary to make them sufficiently compelling to justify provisional release.⁴³ There is nothing to suggest that the Trial Chamber reached its conclusion solely on the basis that the reasons advanced by the Accused differed from the reasons recognised and accepted in the Tribunal's jurisprudence.⁴⁴ These arguments of the Accused thus fail.

15. With respect to the Trial Chamber's conclusion that the [REDACTED],⁴⁵ the Appeals Chamber notes that the Trial Chamber did not suggest [REDACTED]. Rather, it referred to

³⁵ Appeal, para. 9.

³⁶ Impugned Decision, paras 15, 18.

³⁷ Appeal, para. 11.

³⁸ *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 ("*Petković* Decision"), para. 17; see also *Prosecutor v. Vujadin Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5, IT-05-88-AR65.6, 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, para. 24.

³⁹ Impugned Decision, paras 14, 19.

⁴⁰ See *supra* para. 5.

⁴¹ Impugned Decision, paras 17-18.

⁴² Appeal, para. 9.

⁴³ Impugned Decision, paras 17-18.

⁴⁴ See Appeal, paras 9-10.

⁴⁵ Appeal, para. 13.

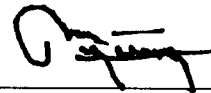
[REDACTED].⁴⁶ The Trial Chamber found that there was no evidence that [REDACTED]⁴⁷ It also referred to the evidence that [REDACTED].⁴⁸ The Appeals Chamber finds that the Accused has not demonstrated that the conclusion at issue is “patently incorrect”, as is required to successfully challenge a decision on provisional release.⁴⁹

16. As regards to the Trial Chamber’s reliance on the Appeals Chamber’s ruling in the case of *Prlić et al.*,⁵⁰ the Appeals Chamber notes that the passage quoted by the Trial Chamber relates to the specific circumstances of that case and, in particular, to the difference between the humanitarian reasons previously advanced by the Accused and the reasons advanced in a renewed application for provisional release.⁵¹ However, the Accused has not explained why the Trial Chamber’s reliance on this ruling constitutes an error and he has failed to demonstrate that the Trial Chamber’s decision denying provisional release is based on an incorrect interpretation of governing law.⁵²

VI. DISPOSITION

17. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in its entirety.

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



Judge Mehmet Güney
Presiding

Dated this 19th day of November 2009,
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴⁶ Impugned Decision, para. 18.

⁴⁷ Impugned Decision, para. 18.

⁴⁸ Impugned Decision, para. 18, fn. 51.

⁴⁹ See *supra* para. 5.

⁵⁰ Appeal, para. 12.

⁵¹ *Petković* Decision, para. 20, cited in Impugned Decision, para. 16.

⁵² See *supra* para. 5.

JOINT 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 serious and sufficiently compelling humanitarian reasons exist.”¹ In our view, the majority decision to impose an additional requirement of “serious and sufficiently compelling humanitarian reasons” to the two criteria listed under Rule 65(B) of the Rules² undermines the continuing presumption of innocence and effectively fetters the discretion of the Trial Chamber, we therefore respectfully dissent.³

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”.⁴ 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.⁵ 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

¹ Majority Decision, para. 7 (internal citations omitted). This approach follows the interpretation of Rule 65(B) of the Rules in *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.3, Decision on Ivan Čermak’s Appeal Against Decision on his Motion for Provisional Release, 3 August 2009, para. 6. See also *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, para. 8 ; *Prosecutor v. Jadranko 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. 7; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.15, Decision on Prosecution’s Appeal against the Trial Chamber’s Decision on Slobodan Praljak’s Motion for Provisional Release, 8 July 2009, para. 7.

² Rules of Procedure and Evidence, as amended on 4 November 2008.

³ This dissenting opinion is consistent with those expressed in previous decisions relating to Rule 65(B) of the Rules. See *Prosecutor v. Ante Gotovina et al.*, Case No IT-06-90-AR65.3, Decision on Ivan Čermak’s Appeal against Decision on His Motion for Provisional Release, 3 August 2009, Partly Dissenting Opinion of Judges Güney and Liu; *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 Opinion 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.

⁴ *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.

⁵ See Majority Decision, paras 6-7.

assessed in the context of the two requirements of Rule 65(B),⁶ and the “weight attached to [them] as justification for provisional release will differ from one defendant to another depending upon all of the circumstances of a particular case”.⁷

3. Because there is no requirement for humanitarian reasons, much less “serious and 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 prerequisite to grant provisional release which is neither provided for 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 1999.⁸ Such a requirement undermines the important distinction between convicted persons⁹ 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. Indeed, it specifically considered these requirements in the context of recent developments in the proceedings, including the fact that the Trial Chamber is effectively in the process of assessing the evidence that is before it.¹⁰ 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.

5. In this respect, the Trial Chamber considered the [REDACTED].¹¹ Furthermore, it entirely accepted that “the reasons advanced by [the Appellant] for his provisional release are humanitarian in nature.”¹² However, the Trial Chamber considered that “in light of the Appeals Chamber’s recent decisions, [the humanitarian reasons advanced by the Appellant] lack the gravity or the urgency

⁶ *Tarčulovski* Decision, para. 14.

⁷ 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.

⁸ 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.

⁹ In case 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.

¹⁰ *Impugned* Decision, paras 13, 19.

¹¹ *Impugned* Decision, para. 15.

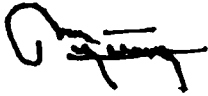
¹² *Ibid.*

necessary to make them sufficiently compelling to justify provisional release.”¹³ The Trial Chamber further considered that “[REDACTED]”.¹⁴ It concluded that the Appellant “has not advanced sufficiently compelling humanitarian reasons to justify provisional release” and denied provisional release on that basis.¹⁵

6. Mindful of the broad margin of discretion afforded to Trial Chambers in assessing factors regarding provisional release,¹⁶ we nevertheless consider that the Trial Chamber committed a discernible error in requiring “sufficiently serious and compelling humanitarian reasons” for the grant of provisional release. We therefore consider that the Trial Chamber’s discretion was fettered by this extraneous consideration. In these circumstances, we believe that this matter should be remanded to the Trial Chamber in order for it to exercise its discretion in accordance with Rule 65(B) of the Rules.

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

Dated this 19th day of November 2009
At The Hague,
The Netherlands



Judge Mehmet Güney



Judge Liu Daqun

[Seal of the International Tribunal]

¹³ *Id.*, at para. 18.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletic’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.