



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-T

Date: 17 December 2008

Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Carmel Agius, Presiding  
Judge O-Gon Kwon  
Judge Kimberly Prost  
Judge Ole Bjørn Støle – Reserve Judge

**Registrar:** Mr. Hans Holthuis

**Decision of:** 17 December 2008

**PROSECUTOR**

v.

**VUJADIN POPOVIĆ  
LJUBIŠA BEARA  
DRAGO NIKOLIĆ  
LJUBOMIR BOROVCANIN  
RADIVOJE MILETIĆ  
MILAN GVERO  
VINKO PANDUREVIĆ**

**PUBLIC**

**DECISION ON BOROVCANIN'S MOTION FOR CUSTODIAL VISIT**

**Office of the Prosecutor**

Mr. Peter McCloskey

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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. Đorđe Sarapa for Vinko Pandurević

**THIS TRIAL 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”), is seized of the “Borovčanin Motion for Custodial Visit, with Annexes I to V”, filed confidentially on 3 December 2008 (“Motion”), and hereby renders its decision thereon.

## I. PROCEDURAL BACKGROUND

1. Borovčanin has applied for provisional release several times,<sup>1</sup> and has been granted provisional release on two occasions,<sup>2</sup> the last of which was in May 2008.<sup>3</sup>

2. In the Motion, Borovčanin requests provisional release under custodial conditions during the forthcoming recess in the proceedings.<sup>4</sup> On 5 December 2008, the Prosecution confidentially filed the “Prosecution’s Response to Borovčanin Motion for Custodial Visit” (“Response”) and on 9 December 2008, Borovčanin confidentially filed his “Borovčanin Reply to Prosecution Response to Borovčanin Motion for Custodial Visit” (“Reply”).

## II. SUBMISSIONS OF THE PARTIES

### A. Motion

3. Borovčanin requests a custodial visit to the Municipality of Bijeljina, Republika Srpska, Bosnia and Herzegovina (“BiH”), from 4 to 14 January 2009.<sup>5</sup> Borovčanin also requests that he be permitted to travel via Belgrade for two reasons: (1) Belgrade is much closer to Bijeljina than Sarajevo, and (2) he wishes to obtain a Serbian national identity card in Belgrade.<sup>6</sup>

<sup>1</sup> See Defence Application for Provisional Release of the Accused Ljubomir Borovčanin with Annexes I, II, III and V, and Confidential Annex IV, filed partially confidentially on 2 March 2006; Defence Application for Provisional Release of the Accused Ljubomir Borovčanin for a Short Fixed Period Based on Humanitarian Grounds, with Annexes I to IV”, filed confidentially and *ex parte* on 1 December 2006; Borovčanin Defence Motion for Leave to Withdraw 20 July 2007 ‘Defence Application for Provisional Release of the Accused Ljubomir Borovčanin for a Short Fixed Period Based on Humanitarian Grounds, With Annexes I to III’ and to File ‘Defence Application for Ljubomir Borovčanin’s Custodial Visit to His Father for a Short Fixed Period Based on Humanitarian Grounds, With Annexes I to III’, filed confidentially on 23 July 2007; Defence Application for Ljubomir Borovčanin’s Custodial Visit to Republika Srpska (BiH) for a Short Fixed Period, With Annexes I to IV, filed confidentially on 29 February 2008.

<sup>2</sup> See Decision on Borovčanin’s Motion for Leave to Withdraw Application for Provisional Release and to File Application for “Custodial Visit to his Father for a Short Fixed Period Based on Humanitarian Grounds”, 24 July 2007 (“Decision of 24 July 2007”); Decision on Borovčanin’s Motion for Custodial Visit, 9 April 2008 (“Decision of 9 April 2008”) and Further Decision on Decision on Borovčanin’s Motion for Custodial Visit, 22 May 2008 (“Further Decision of 22 May 2008”).

<sup>3</sup> See Decision of 9 April 2008; Further Decision of 22 May 2008.

<sup>4</sup> Motion, para. 1.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

4. Borovčanin submits that current Appeals Chamber jurisprudence should not be interpreted so as to impose a fixed higher standard for provisional release after a decision has been rendered pursuant to Rule 98 *bis* (a “Rule 98 *bis* Decision”).<sup>7</sup> According to Borovčanin, the better view is that the Trial Chamber should not be bound by this higher standard, and should simply be required to consider all relevant factors in light of the particular circumstances of each case.<sup>8</sup>

5. In the Motion, Borovčanin argues that the two objective requirements of Rule 65(B) are fully satisfied.<sup>9</sup> Borovčanin highlights that he faithfully complied with the conditions set by the Trial Chamber on the previous two occasions that he was provisionally released, and argues—noting that the last time he was provisionally released was after the Rule 98 *bis* Decision had been rendered—that no material change has intervened in the progress of the trial since he was last provisionally released.<sup>10</sup> Accordingly, Borovčanin argues that the Trial Chamber should continue to feel confident that he will return for trial and that he does not pose a threat to any victim or witness.<sup>11</sup>

6. Borovčanin proposes that he be provisionally released on the same stringent conditions as before; namely, that he be guarded by armed members of the Republika Srpska Ministry of the Interior (“RS MUP”) at all times, and that he will spend his nights in the detention facility in Bijeljina.<sup>12</sup> Borovčanin tenders a guarantee from the Government of Republika Srpska<sup>13</sup> as well as a personal guarantee in which he states his willingness to fully and strictly comply with these conditions.<sup>14</sup> Borovčanin also tenders a guarantee from the Government of the Republic of Serbia.<sup>15</sup>

7. Borovčanin seeks provisional release on several humanitarian grounds. First, Borovčanin wishes to visit his ailing and aging parents at this important time of year in the Eastern Orthodox tradition.<sup>16</sup> Although Borovčanin’s father is no longer in a critical state of health, his health does remain fragile, and Borovčanin submits that any visit to an aging parent is an “important and valuable human event”.<sup>17</sup> Borovčanin requests that the Trial Chamber authorize a travel itinerary

<sup>7</sup> *Ibid.*, para. 7. *See also*, paras. 4–5, referring mainly to Appeals Chamber Decision of 15 May 2008, para. 24.

<sup>8</sup> *Ibid.*, para. 7.

<sup>9</sup> *Ibid.*, para. 8.

<sup>10</sup> *Ibid.*, para. 9.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, paras. 8, 2.

<sup>13</sup> Confidential Annex I.

<sup>14</sup> Confidential Annex II.

<sup>15</sup> Confidential Annex III.

<sup>16</sup> Motion, para. 10.

<sup>17</sup> *Ibid.*, paras. 10–11.

through Belgrade, rather than Sarajevo, because Belgrade is much closer to Bijeljina and direct air routes to Belgrade from Amsterdam obviate the need for a stopover.<sup>18</sup>

8. The second humanitarian ground advanced by Borovčanin is his wish to obtain a national identity card in Belgrade.<sup>19</sup> Although Borovčanin is a citizen of Serbia, and therefore entitled to vote in Serbian elections as well as other rights and privileges, he is deprived of those rights because he does not have a national identity card.<sup>20</sup> Citing European Court of Human Rights jurisprudence, Borovčanin argues that the right to vote is a fundamental civil and human right which Borovčanin is entitled to exercise.<sup>21</sup> Borovčanin has attempted, with the help of the Registry, to obtain an identity card remotely, but the Serbian government insists that Borovčanin must personally appear at the relevant office in Belgrade to receive the card.<sup>22</sup> Borovčanin accordingly requests that his itinerary permit a visit to the offices of the Serbian Ministry of the Interior in Belgrade on the afternoon of 13 January 2009, when the relevant offices will be open, in order to obtain the card.<sup>23</sup> Borovčanin would then spend the night in Belgrade before boarding his flight on 14 January 2009.<sup>24</sup> If deemed necessary by the Trial Chamber, Borovčanin ensures that he will arrange for overnight custodial detention with the Serbian authorities.<sup>25</sup>

9. Alternatively, if such request is not granted, Borovčanin requests that the Trial Chamber issue an order to the Government of the Republic of Serbia under Article 29 of the Statute of the Tribunal (“Statute”), requiring it to issue a national identity card to Borovčanin without his personal appearance at the relevant office in Belgrade.<sup>26</sup>

10. Finally, Borovčanin wishes to attend a disability pension hearing in Bijeljina.<sup>27</sup> Borovčanin is in the process of applying for a disability pension on the basis of injuries suffered during his service in the RS MUP.<sup>28</sup> As part of the process, he is required to appear before a panel to be evaluated and interviewed.<sup>29</sup> The relevant authorities of the Republika Srpska have indicated their readiness to constitute a panel in Bijeljina and to hold this hearing on 5 January 2009.<sup>30</sup> Borovčanin

<sup>18</sup> Motion, para. 12. As noted in *supra* para. 6, Borovčanin tenders a guarantee from the Government of the Republic of Serbia.

<sup>19</sup> *Ibid.*, paras. 13–16.

<sup>20</sup> *Ibid.*, para. 13.

<sup>21</sup> *Ibid.*, para. 14.

<sup>22</sup> *Ibid.*, para. 13. *See also* Confidential Annex IV.

<sup>23</sup> *Ibid.*, para. 15.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, para. 16.

<sup>27</sup> *Ibid.*, paras. 17–18.

<sup>28</sup> *Ibid.*, para. 17.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* *See also* Confidential Annex V.

argues that receipt of state benefits is a fundamental right, with personal consequences for Borovčanin and his family.<sup>31</sup> Borovčanin submits that establishing eligibility for disability pension is a compelling humanitarian factor that weighs in favour of granting provisional release.<sup>32</sup>

11. Finally, Borovčanin notes that the final judgement in this case could still be 12 to 18 months away, and submits that this is a long time to hold a person in custody who has not been convicted, who has a credible defence, and who does not pose a flight risk or a threat to witnesses or victims.<sup>33</sup>

## **B. Response**

12. The Prosecution opposes the Motion on the basis that at this late stage of trial, there are no sufficiently compelling circumstances to justify Borovčanin's provisional release for any period of time.<sup>34</sup> If the Trial Chamber grants the Motion, the Prosecution seeks a stay of such decision pursuant to Rule 65(E).<sup>35</sup>

13. The Prosecution notes that although Borovčanin appeared to be cooperating with the Tribunal following the filing of the indictment against him on 4 September 2002, he ceased to cooperate days before the appointed surrender date and became a fugitive.<sup>36</sup> Borovčanin was detained and transferred to The Hague on 1 April 2005.<sup>37</sup>

14. The Prosecution further notes that the Trial Chamber has twice denied Borovčanin's requests for provisional release, with both decisions upheld on appeal.<sup>38</sup> In its 24 July 2007 Decision, the Trial Chamber granted Borovčanin's 23 July 2007 motion for a custodial visit, noting that the Prosecution had not taken a position on the motion.<sup>39</sup> The Prosecution took no position with respect to that motion because Borovčanin had represented his father's health as "critical", which the Prosecution understood to mean that "he was near death".<sup>40</sup> The Prosecution understands that

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<sup>31</sup> *Ibid.*, para. 18.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, para. 19.

<sup>34</sup> Response, para. 1.

<sup>35</sup> *Ibid.*, para. 1.

<sup>36</sup> *Ibid.*, para. 2.

<sup>37</sup> *Ibid.*, para. 2.

<sup>38</sup> *Ibid.*, para 3 (citing Decision on Defence Application for Provisional Release of the Accused Ljubomir Borovčanin, 10 May 2006 ("Decision of 10 May 2006"); Decision on Defence Motion for Provisional Release of Ljubomir Borovčanin, confidential and *ex parte*, 15 December 2006 ("Decision of 15 December 2006"); Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006 ("Appeals Decision of 30 June 2006"); Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin's Provisional Release, 1 March 2007 ("Appeals Decision of 1 March 2007")).

<sup>39</sup> *Ibid.*, para. 4 (citing Borovčanin's Motion for Leave to Withdraw Application for Provisional Release and to File Application for "Custodial Visit to his Father for a Short Fixed Period Based on Humanitarian Grounds", 23 July 2007 ("Borovčanin Motion of 23 July 2007"); Decision of 24 July 2007).

<sup>40</sup> *Ibid.*, para. 5.

this is no longer the case, and for this reason, rejects the grounds offered by Borovčanin in support of the Motion.<sup>41</sup>

15. The Prosecution submits that Borovčanin has failed to advance any sufficiently compelling humanitarian basis to justify provisional release.<sup>42</sup> The Motion states that Borovčanin's father is no longer in critical condition, and Borovčanin has previously been granted two periods of provisional release to visit his father when he was unwell; therefore, it is submitted there is no compelling humanitarian reason for a third visit now that his father has recovered, and certainly not for a visit of the length proposed.<sup>43</sup> Regarding the additional two humanitarian grounds set forth in the Motion, the Prosecution argues that the desire to obtain a Serbian national identity card and attend a disability pension hearing in Bijeljina are very similar to the grounds advanced by Borovčanin in support of his most recent application for provisional release.<sup>44</sup> The Prosecution submits that these grounds were held by the Appeals Chamber to be an insufficient basis upon which to grant any period of provisional release.<sup>45</sup> The Prosecution argues that the Motion's reliance on the European Court of Human Rights decision regarding voting rights is inapposite and should be given minimal weight.<sup>46</sup>

16. The Prosecution argues that since the Trial Chamber last assessed Borovčanin's circumstances according to Rule 65(B), the proceedings have advanced considerably.<sup>47</sup> The posture of the case has changed because four co-Accused, including Borovčanin, have already completed their Defence cases and the fifth defence case is currently underway.<sup>48</sup> The Prosecution further submits that during the course of the Defence cases, the Prosecution's case against all members of the alleged Joint Criminal Enterprise, of which Borovčanin is alleged to be a member, "has – if anything – been strengthened through the introduction of favourable documentary and testimonial evidence".<sup>49</sup> The Prosecution argues that for these reasons, there is an increased risk of flight which must be carefully balanced in respect of the humanitarian reasons offered in the Motion.<sup>50</sup> Further, the Prosecution argues that the material changes in the posture of the case and the strength of the

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, paras. 10–11.

<sup>43</sup> *Ibid.*, para. 10.

<sup>44</sup> *Ibid.*, para. 11.

<sup>45</sup> *Ibid.*, paras. 7, 11 (citing Appeals Decision of 15 May 2008, para. 18).

<sup>46</sup> *Ibid.*, para. 11.

<sup>47</sup> *Ibid.*, para. 12.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

case against Borovčanin warrant the Trial Chamber's fresh assessment of Borovčanin's circumstances in relation to the requirements for provisional release.<sup>51</sup>

17. The Prosecution further argues that Borovčanin continues to pose a serious flight risk.<sup>52</sup> The Prosecution argues that the Motion ignores the fact that Borovčanin was a fugitive from the Tribunal for two-and-a-half years, and notes that the Appeals Chamber has upheld the conclusion that he poses a serious flight risk.<sup>53</sup> The Prosecution submits that this factor weighs heavily against any justification Borovčanin may offer in support of his request for provisional release.<sup>54</sup>

18. The Prosecution notes that the guarantee provided by the Republic of Serbia contains no commitment for Borovčanin to be kept in custodial conditions while in Serbia, and is predicated on the assertion that Borovčanin voluntarily surrendered to the Tribunal, while making no mention of his flight risk based on his past history as a fugitive.<sup>55</sup>

19. In conclusion, the Prosecution submits that the Trial Chamber should deny Borovčanin's request because at this stage of the proceedings, given Borovčanin's previous fugitive status and the evidence before the Trial Chamber probative of his guilt, there is an increased risk of flight, and Borovčanin has presented no sufficiently compelling humanitarian grounds.<sup>56</sup>

### C. Reply

20. Borovčanin first requests leave to file a reply.<sup>57</sup> In the Reply, Borovčanin makes the following arguments:

(a) that humanitarian grounds can exist notwithstanding the absence of a medical prognosis of imminent death, and Borovčanin's father's fragile health continues to be a strong humanitarian justification for a custodial visit;<sup>58</sup>

(b) that exercising one's fundamental rights is a humanitarian justification for a custodial visit, and although a majority of the Appeals Chamber has held that attending to "personal matters" does not constitute a humanitarian justification for provisional release, the Appeals Chamber did not

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, paras. 13–14

<sup>53</sup> *Ibid.*, para. 13 (citing Appeals Decision of 1 March 2007).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, para 14 (citing confidential Annex III).

<sup>56</sup> *Ibid.*, para. 15.

<sup>57</sup> Reply, para. 1.

<sup>58</sup> *Ibid.*, paras. 2–4.

consider whether this reasoning would also apply when a person's fundamental rights would be violated but for the provisional release;<sup>59</sup>

(c) that the Prosecution case has not been materially strengthened since the last period of provisional release was granted;<sup>60</sup> and

(d) that Borovčanin does not pose a flight risk and there has been no material changes since he was last found not to be a flight risk,<sup>61</sup> that the Serbian government agrees to comply with any orders issued by the Trial Chamber,<sup>62</sup> and Borovčanin will procure whatever additional guarantees may be necessary to satisfy the Trial Chamber that the custodial arrangement in Serbia will be properly executed.<sup>63</sup>

### III. LAW

21. Pursuant to Rule 65(A), once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B), a Trial Chamber may order the provisional release of an accused 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 giving the host country and the state to which the accused seeks to be released the opportunity to be heard.<sup>64</sup> Rule 65(C) provides that “[t]he Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others”.

22. A decision on a request for provisional release must address all relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision and include a reasoned opinion indicating its view on those relevant factors.<sup>65</sup> What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular

<sup>59</sup> *Ibid.*, para. 5 (citing Appeals Decision of 15 May 2008, para. 18).

<sup>60</sup> *Ibid.*, paras. 7–9.

<sup>61</sup> *Ibid.*, paras. 10–11.

<sup>62</sup> *Ibid.*, para. 12.

<sup>63</sup> *Ibid.*

<sup>64</sup> *See, inter alia, Prosecutor v. Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5 and 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 (“Appeals Chamber Decision of 15 May 2008”), para. 5; Appeals Chamber Decision of 15 May 2008, para. 6; *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 (“Appeals Chamber Decision of 1 July 2008”), para. 7.

<sup>65</sup> *See, inter alia, Appeals Chamber Decision of 15 May 2008, para. 6; Appeals Chamber Decision of 1 July 2008, para. 8.*



circumstances of each case,<sup>66</sup> since “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.”<sup>67</sup>

23. Furthermore the Appeals Chamber held that a Rule 98 *bis* Decision declining to enter a judgement of acquittal after the close of the Prosecution case is “a significant enough change in circumstance to warrant the renewed and explicit consideration by the Trial Chamber of the risk of flight by the Accused.”<sup>68</sup> In relation to humanitarian grounds raised by an accused, these must be assessed in the context of the two requirements of Rule 65(B),<sup>69</sup> and the Trial Chamber must be satisfied that the conditions of provisional release are sufficient to address any concerns in relation to the requirements of Rule 65(B).<sup>70</sup>

24. The Appeals Chamber has also held that where provisional release is found to be justified on humanitarian grounds, the duration of the provisional release should be proportional to the period of time necessary to carry out the humanitarian purpose of the release.<sup>71</sup> Accordingly, “a Trial Chamber must address the proportionality between the nature and weight of the circumstances of a particular case and the duration of provisional release requested”.<sup>72</sup>

#### IV. DISCUSSION

25. The Trial Chamber notes that Borovčanin has previously filed four requests for provisional release.<sup>73</sup> The two most recent requests were made upon the humanitarian ground that Borovčanin’s father was in a critical state of health, and were both granted under strict custodial conditions.<sup>74</sup> During both of these periods of provisional release, Borovčanin complied with all custodial conditions imposed upon him and returned to custody in the United Nations Detention Unit as scheduled.

<sup>66</sup> See, *inter alia*, Appeals Chamber Decision of 15 May 2008, para. 6; Appeals Chamber Decision of 1 July 2008, para. 8.

<sup>67</sup> Appeals Chamber Decision of 15 May 2008, para. 6 (referring to *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7).

<sup>68</sup> See, *inter alia*, *Prosecutor v. 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 Čorić, 11 March 2008 (“*Prlić Appeals Chamber Decision of 11 March 2008*”), paras. 19–20.

<sup>69</sup> *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 27 July 2007, para. 14.

<sup>70</sup> See, for example, Decision on Borovčanin’s Motion for Custodial Visit, 9 April 2008, para. 24.

<sup>71</sup> Appeals Chamber Decision of 15 May 2008, paras. 18, 32.

<sup>72</sup> *Ibid.*, para. 18.

<sup>73</sup> See *supra*, fn. 1.

<sup>74</sup> Decision of 24 July 2007; Decision of 9 April 2008; Further Decision of 22 May 2008.

26. The last period of provisional release was finally granted by the Trial Chamber in May 2008,<sup>75</sup> after the Trial Chamber orally rendered its Rule 98 *bis* Decision, in which it declined to enter a judgement of acquittal with reference to any of the accused after the conclusion of the Prosecution case.<sup>76</sup> When assessing Borovčanin's motion on this occasion, the Trial Chamber considered a number of factors, including that the Rule 98 *bis* Decision had been rendered. The Trial Chamber ultimately concluded that although concerns regarding Borovčanin's risk of flight remained, considered together with the critical state of health of Borovčanin's father and the custodial conditions imposed, as well as the fact that a previous custodial visit was carried out without incident, a short period of provisional release was justified.<sup>77</sup>

27. The Trial Chamber acknowledges that four of the Accused in the present trial have completed the presentation of their respective defence cases, and that Miletić's defence team is currently presenting its case. Because of this new circumstance, the Trial Chamber must consider the requirements of Rule 65 anew.

28. The Trial Chamber notes the guarantee provided by the Governments of Serbia and Republika Srpska,<sup>78</sup> as well as Borovčanin's personal guarantee to be bound by strict custodial conditions similar to those imposed upon him during previous periods of provisional release.<sup>79</sup> The Trial Chamber, however, also notes that Borovčanin was detained and transferred to the Tribunal after two and a half years as a fugitive,<sup>80</sup> and that the charges against him are extremely serious. Borovčanin is indicted for genocide, conspiracy to commit genocide, crimes against humanity and war crimes in relation to allegations of murder, extermination, persecution, forcible transfer and deportation.<sup>81</sup> Notwithstanding his compliance with the previous conditions of release, in all of the circumstances, the Trial Chamber continues to have serious concerns about the risk of flight posed by Borovčanin.<sup>82</sup> It follows then, that in light of the risk of flight that he presents, only compelling humanitarian grounds may justify provisional release of Borovčanin.

29. The humanitarian grounds raised by Borovčanin in the Motion fall into two categories. First, his desire to visit his elderly parents, and second, his desire to attend to two civic matters.

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<sup>75</sup> Further Decision of 22 May 2008. *See also* Decision of 9 April 2008.

<sup>76</sup> T. 21460-21473 (3 March 2008).

<sup>77</sup> Decision of 9 April 2008, para. 29–31.

<sup>78</sup> Motion, Annex I and Annex III, filed confidentially.

<sup>79</sup> Motion, Annex II, filed confidentially.

<sup>80</sup> Response, para. 2.

<sup>81</sup> Indictment, counts 1–8.

<sup>82</sup> *See*, Decision of 9 April 2008, para. 29.

30. Borovčanin requests provisional release “primarily for the purpose of visiting his aging and ailing parents”.<sup>83</sup> The Trial Chamber notes that although Borovčanin’s father is “no longer in a critical health condition”<sup>84</sup> and in fact “his health condition has improved”,<sup>85</sup> both of his parents are elderly, and his father’s health remains fragile.<sup>86</sup>

31. In addition to the visit to his parents, there are two civic matters to which Borovčanin would like to attend if he is granted provisional release. The first is a disability pension hearing in Bijeljina, so that Borovčanin may be interviewed and evaluated as to his eligibility for a disability pension on the basis of injuries suffered while serving with the RS MUP.<sup>87</sup> Attendance at such a hearing was also raised as a humanitarian ground by Borovčanin in his request for provisional release earlier this year.<sup>88</sup> The Appeals Chamber held that such a personal matter did not qualify as a humanitarian ground upon which any period of provisional release should be granted.<sup>89</sup> The second matter which Borovčanin would like to attend to is to obtain a national identity card so that he may vote in Serbian elections, among other entitlements.<sup>90</sup> The Trial Chamber notes that despite a request from Borovčanin’s defence team (made with the assistance of the Registry), the Serbian Government insists that Borovčanin appear in person to receive the card.<sup>91</sup>

32. Applying the test in Rule 65(B), as clarified by the Appeals Chamber, considering all the particular circumstances of Borovčanin, the Trial Chamber is not persuaded that the humanitarian grounds advanced by Borovčanin on this occasion are compelling enough to outweigh his risk of flight, which remains significant. Comparing the Motion to Borovčanin’s two most recent applications for provisional release, the Trial Chamber cannot disregard the improvement in Borovčanin’s father’s health, the critical nature of which was a distinguishing factor upon which these previous periods of release were granted.<sup>92</sup>

33. In relation to Borovčanin’s disability pension assessment and identity card, the Trial Chamber encourages the Registry to continue to assist the Accused in his efforts to attend to these matters remotely.

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<sup>83</sup> Motion, para. 1.

<sup>84</sup> *Ibid.*, para. 10.

<sup>85</sup> Reply, para. 4.

<sup>86</sup> Motion, para. 10.

<sup>87</sup> *Ibid.*, para. 17.

<sup>88</sup> See Decision of 9 April 2008, para. 4.

<sup>89</sup> Appeals Chamber Decision of 15 May 2008, para. 18.

<sup>90</sup> Motion, para. 13.

<sup>91</sup> *Ibid.*, para. 13, Confidential Annex IV.

<sup>92</sup> See Decision of 9 April 2008, para. 29; Decision of 24 July 2007, para. 16.

34. In light of this conclusion, the Trial Chamber does not find it necessary to address the second requirement of Rule 65(B).

## V. DISPOSITION

35. For these reasons, pursuant to Article 29 of the Statute and Rules 54 and 65 of the Rules of Procedure and Evidence, the Trial Chamber hereby:

- (a) **GRANTS** leave to Borovčanin to file the Reply; and
- (b) **DENIES** the Motion.

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



Carmel Agius  
Presiding

Dated this seventeenth day of December 2008  
At The Hague  
The Netherlands

[Seal of the Tribunal]