



Tribunal Pénal International pour le Rwanda ICTR-98-44-AR65  
 International Criminal Tribunal for Rwanda 8<sup>th</sup> December 2009  
 3249/H-3238/H

**IN THE APPEALS CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
 Judge Fausto Pocar  
 Judge Liu Daqun  
 Judge Theodor Meron  
 Judge Carmel Agius

**Registrar:** Mr. Adama Dieng

**Decision of:** 8 December 2009

ICTR Appeals Chamber

Date: 08 December 09

Action:

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Concerned Judges,  
 Parties, Judicial Archives,

ÉDOUARD KAREMERA  
 MATTHIEU NGIRUMPATSE  
 JOSEPH NZIRORERA

v.

THE PROSECUTOR

Case No. ICTR-98-44-AR65

**DECISION ON MATTHIEU NGIRUMPATSE'S APPEAL AGAINST DECISION ON  
 REMAND ON PROVISIONAL RELEASE**

**Office of the Prosecutor:**

Mr. Hassan Bubacar Jallow  
 Mr. Don Webster  
 Mr. Saidou N'Dow  
 Mr. Arif Virani  
 Mr. Eric Husketh  
 Ms. Sunkarie Ballah-Conteh  
 Mr. Takeh Sendze

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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**Counsel for the Defence:**

Ms. Dior Diagne Mbaye and Mr. Félix Sow for Mr. Édouard Karemera  
 Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mr. Matthieu Ngirumpatse  
 Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Mr. Joseph Nzirorera

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively), is seized of an appeal filed by Matthieu Ngirumpatse (“Ngirumpatse”) on 25 September 2009,<sup>1</sup> against the “Decision on Remand in Respect of Matthieu Ngirumpatse’s Motion for Provisional Release”, issued on 10 September 2009.<sup>2</sup> The Prosecution responded on 5 October 2009.<sup>3</sup> No reply was filed.

#### A. Background

2. On 6 February 2009, Trial Chamber III of the Tribunal (“Trial Chamber”) rejected Ngirumpatse’s request for provisional release.<sup>4</sup> Ngirumpatse appealed this decision on 13 February 2009.<sup>5</sup> On 7 April 2009, the Appeals Chamber quashed the Decision on Provisional Release and remanded the matter to the Trial Chamber for reconsideration.<sup>6</sup> Ngirumpatse’s medical condition also gave rise to the issue of the continuation of the *Karemera et al.* trial and on 3 March 2009, the Trial Chamber severed Ngirumpatse from the *Karemera et al.* case.<sup>7</sup> However, on 19 June 2009, the Appeals Chamber reversed the Decision on Continuation of Trial and remanded the matter to the Trial Chamber for further consideration.<sup>8</sup>

3. On 14 April 2009, Ngirumpatse filed a new motion before the Trial Chamber requesting provisional release.<sup>9</sup> On 29 May 2009, the President of the Tribunal issued an order varying

<sup>1</sup> *Mémoire d’Appel de M. Ngirumpatse contre la Décision en renvoi sur la Requête de Matthieu Ngirumpatse en demande de mise en liberté provisoire*, 25 September 2009 (“Appeal”). See also Decision on Matthieu Ngirumpatse’s Motion for Extension of Time to File Appeal Submissions Against Trial Chamber’s Decisions of 10 September 2009, 17 September 2009.

<sup>2</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Remand in Respect of Matthieu Ngirumpatse’s Motion for Provisional Release, filed in French on 10 September 2009, English version filed on 22 October 2009 (“Impugned Decision”).

<sup>3</sup> Prosecutor’s Brief: Response to Matthieu Ngirumpatse’s Appeal against *Décision en renvoi ... en demande de mise en liberté provisoire*, 5 October 2009 (“Response”).

<sup>4</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Various Motions Relating to Matthieu Ngirumpatse’s Health, filed in French on 6 February 2009, English version filed on 11 March 2009 (“Decision on Provisional Release”), paras. 14-23, p. 10.

<sup>5</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR65, Ngirumpatse’s Appeal from the Decision on Various Motions on Matthieu Ngirumpatse’s Health Rendered on 6 February 2009, 13 February 2009.

<sup>6</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ngirumpatse’s Appeal Against Trial Chamber’s Decision Denying Provisional Release, 7 April 2009 (“Appeal Decision on Provisional Release”), para. 17.

<sup>7</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Continuation of Trial, 3 March 2009 (“Decision on Continuation of Trial”), p. 16.

<sup>8</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.16, Decision on Appeal Concerning the Severance of Matthieu Ngirumpatse, 19 June 2009, para. 25.

<sup>9</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Mémoire en extrême urgence pour Matthieu Ngirumpatse suite à la décision de la Chambre d’Appel du 7 avril 2009 sur la demande de mise en liberté provisoire*, 14 April 2009 (“Motion”). See also *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Mémoire*

Ngirumpatse's conditions of detention, as a result of which Ngirumpatse was transferred from his place of hospitalization to Arusha.<sup>10</sup> Subsequently, the Trial Chamber ordered an expert medical examination of Ngirumpatse to assess both his ability to participate in the proceedings and whether his treatment required transferring him to other facilities.<sup>11</sup> The independent medical expert designated by the Trial Chamber ("Independent Medical Expert") submitted his confidential and *ex parte* report on 11 August 2009.<sup>12</sup> The Independent Medical Expert's Report was disclosed to the parties in redacted form on 24 August 2009<sup>13</sup> and in unredacted form on 28 August 2009.<sup>14</sup>

4. On 10 September 2009, the Trial Chamber issued its decision on remand regarding the continuation of the trial.<sup>15</sup> On the basis of the report of the Tribunal's Chief Medical Officer and the Independent Medical Expert's Report, it found that there was no basis at this time to sever Ngirumpatse from the proceedings and accordingly vacated its initial Decision on Continuation of Trial.<sup>16</sup> The Trial Chamber ordered that the trial proceedings recommence on 19 October 2009 and requested the Tribunal's Chief Medical Officer to provide the Trial Chamber and the parties with updated reports on the state of Ngirumpatse's health.<sup>17</sup> On the same day, the Trial Chamber issued the Impugned Decision rejecting his application for provisional release. It found that based on the information of Ngirumpatse's medical condition provided by the Independent Medical Expert, and

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*complémentaire en extrême urgence pour Matthieu Ngirumpatse suite à la décision de la Chambre d'appel du 7 avril 2009 sur la demande de mise en liberté provisoire*, 16 April 2009; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Observations du Greffier en vertu de l'article 33 (B) du Règlement de procédure et de preuve au sujet du Mémoire en extrême urgence pour M. Matthieu Ngirumpatse suite à la décision de la Chambre d'appel du 7 avril 2009 sur la demande de mise en liberté provisoire*, 20 April 2009; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Prosecutor's Response to Matthieu Ngirumpatse's Supplemental Submission for Provisional Release in Light of the Appeal[s] Chamber Decision of 7 April 2009*, 20 April 2009; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Réplique pour Matthieu Ngirumpatse aux réponses du Greffier et du Procureur à son mémoire consécutif à la décision de la Chambre d'appel du 7 avril 2009 sur la demande de mise en liberté provisoire*, 22 April 2009; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Mémoire additionnel pour Matthieu Ngirumpatse consécutif à la décision de la Chambre d'appel du 7 avril 2009 sur la demande de mise en liberté provisoire*, 28 April 2009; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Demande de mesures urgentes pour Matthieu Ngirumpatse*, 28 April 2009.

<sup>10</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Decision Varying Matthieu Ngirumpatse's Conditions of Detention*, filed confidentially on 29 May 2009.

<sup>11</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Order Concerning Medical Examination of Matthieu Ngirumpatse*, 23 June 2009, p. 4; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Ordonnance concernant la désignation d'un expert médical*, 3 July 2009, p. 4.

<sup>12</sup> See *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Decision on Motion for Disclosure of Medical Information and for Extension of Time*, 28 August 2009, Confidential and *Ex-Parte* Annex B ("Independent Medical Expert's Report").

<sup>13</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Ordonnance concernant la reprise du procès*, 24 August 2009.

<sup>14</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Decision on Motion for Disclosure of Medical Information and for Extension of Time*, 28 August 2009.

<sup>15</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Decision on Remand Regarding Continuation of Trial*, 10 September 2009 ("Decision on Remand on Continuation of Trial").

<sup>16</sup> *Decision on Remand on Continuation of Trial*, para. 19, p. 7.

<sup>17</sup> *Decision on Remand on Continuation of Trial*, para. 19, pp. 7, 8. Ngirumpatse sought certification to appeal the Decision on Remand on Continuation of Trial; however, certification was denied: *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Décision sur la demande de certification en appel contre la « Decision on Remand Regarding Continuation of Trial »*, 16 October 2009.

considering the scheduled resumption of the trial, there were no grounds for his provisional release.<sup>18</sup> The trial recommenced on 19 October 2009 as scheduled.

### B. Standard of Review

5. A decision on provisional release by a Trial Chamber under Rule 65 of the Rules of Procedure and Evidence ("Rules") is discretionary. Accordingly, the relevant inquiry is whether the Trial Chamber correctly exercised its discretion in reaching that decision, not whether the Appeals Chamber agrees with it. 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.<sup>19</sup> 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.<sup>20</sup>

### C. Applicable Law

6. Under Rule 65(B) of the Rules, a Trial Chamber may order 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 giving the host State and the State to which the accused seeks to be released the opportunity to be heard.

7. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.<sup>21</sup> It must then provide a reasoned opinion

<sup>18</sup> Impugned Decision, para. 13, p. 6.

<sup>19</sup> See, e.g., *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR65, Decision on Appeal Concerning Provisional Release, 20 May 2009 ("*Muvunyi Appeal Decision*"), para. 6; Appeal Decision on Provisional Release, para. 4; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Prljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 16 December 2008 ("*Prlić et al. Appeal Decision of 16 December 2008*"), para. 4.

<sup>20</sup> See, e.g., *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.10, Decision on Radivoje Miletić's Appeal Against Decision on Miletić's Motion for Provisional Release, 19 November 2009, para. 5; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.17, Decision on Prosecution's Appeal Against Decision on Prlić's Motion for Provisional Release, 23 July 2009 ("*Prlić et al. Appeal Decision of 23 July 2009*"), para. 4; *Prosecutor v. Vujadin Popović et al.*, Case No. IT05-08-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 1 July 2008, para. 6.

<sup>21</sup> See, e.g., *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, filed confidentially on 3 August 2009, public redacted version filed on 4 August 2009 ("*Gotovina et al. Appeal Decision*"), para. 6; Appeal Decision on Provisional Release, para. 13; *Prlić et al. Appeal Decision*, para. 7; *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, para. 10.

indicating its view on those relevant factors.<sup>22</sup> What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case; 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>23</sup> 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.<sup>24</sup> If the Trial Chamber is satisfied that the requirements of Rule 65(B) of the Rules have been met, it has the discretion to grant provisional release to an accused.<sup>25</sup> Finally, 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, Judge Liu dissenting.<sup>26</sup>

#### D. Submissions

8. Ngirumpatse asks the Appeals Chamber to reverse the Impugned Decision, order consultation with proposed host States, request their cooperation, and order his provisional release.<sup>27</sup> Alternatively, he asks that his request for provisional release be considered and ruled upon by a different Chamber, which would take into account all the relevant factors before reaching its decision.<sup>28</sup>

9. As a preliminary matter, Ngirumpatse submits that the Trial Chamber did not render the Impugned Decision in a timely manner and that the process was not fair and impartial.<sup>29</sup> In this respect, he claims that the Trial Chamber was seized with the matter since 7 April 2009 and that it could not have properly considered the medical reports, as they were provided in French and the

<sup>22</sup> See, e.g., *Gotovina et al.* Appeal Decision, para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.8, Decision on Prosecution's Appeal Against Decision on Gvero's Motion for Provisional Release, 20 July 2009 ("*Prlić et al.* Appeal Decision on Gvero's Motion for Provisional Release of 20 July 2009"), para. 6; *Prlić et al.* Appeal Decision of 16 December 2008, para. 7.

<sup>23</sup> *Gotovina et al.* Appeal Decision, para. 6; *Prlić et al.* Appeal Decision of 16 December 2008, para. 7; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7.

<sup>24</sup> *Gotovina et al.* Appeal Decision, para. 6; *Prlić et al.* Appeal Decision of 16 December 2008, para. 7.

<sup>25</sup> *Gotovina et al.* Appeal Decision, para. 6; *Prlić et al.* Appeal Decision of 23 July 2009, para. 6; *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, para. 6; *Prlić et al.* Appeal Decision on Gvero's Motion for Provisional Release of 20 July 2009, para. 6.

<sup>26</sup> *Gotovina et al.* Appeal Decision, para. 6; *Prlić et al.* Appeal Decision of 16 December 2008, paras. 7, 15; *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, paras. 15, 17. See also *Muvunyi* Appeal Decision, para. 8, fn. 28.

<sup>27</sup> Appeal, para. 77.

<sup>28</sup> Appeal, para. 77.

<sup>29</sup> Appeal, paras. 35-43.

Trial Chamber is primarily English speaking.<sup>30</sup> Further, he questions the impartiality of the Judges given their differential treatment of the application for provisional release and the continuation of trial.<sup>31</sup> In this regard, he argues that the Trial Chamber failed to request submissions from the parties on the medical reports in relation to provisional release whereas it did so in respect of the continuation of trial.<sup>32</sup>

10. With respect to the merits of the Impugned Decision, Ngirumpatse submits that the Trial Chamber erred in relying on the fact that none of the States to which he seeks to be released had agreed to host him. He claims that this factor is irrelevant as it is for the Registrar, not the accused, to coordinate with potential host States.<sup>33</sup> In addition, he argues that the Trial Chamber erred in relying on the medical reports of the Chief Medical Officer of the Tribunal and the Independent Medical Expert.<sup>34</sup> In this respect, he asserts that the Chief Medical Officer of the Tribunal had a conflict of interest and the Independent Medical Expert's opinion was based upon a review of an incomplete dossier and was therefore speculative.<sup>35</sup> He further asserts that the Independent Medical Expert's Report did not effectively or professionally answer the questions posed, particularly with regard to the issue of provisional release as his mandate was first and foremost to report on Ngirumpatse's ability to participate in his trial.<sup>36</sup> He points to an independent medical opinion solicited by his Counsel, dated 10 September 2009, which finds that the Independent Medical Expert's Report underestimated the gravity of his actual health.<sup>37</sup> He submits that there are compelling humanitarian reasons for allowing his provisional release.<sup>38</sup> He recalls that he is a 70 year old man who has been in detention for 11 years, during one year of which he was gravely ill.<sup>39</sup> He further contends that he only became so ill because his condition had not been treated since 2003.<sup>40</sup> Finally, he submits that the fact that the trial is set to recommence on 19 October 2009 should not be a reason to refuse his provisional release.<sup>41</sup>

11. The Prosecution responds that the Appeal is without merit and should be dismissed in its entirety.<sup>42</sup> It argues that Ngirumpatse has failed to meet the standard of appellate review as he has failed to identify any discernible error in the Trial Chamber's exercise of its discretion warranting

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<sup>30</sup> Appeal, para. 38.

<sup>31</sup> Appeal, para. 39.

<sup>32</sup> Appeal, para. 40.

<sup>33</sup> Appeal, paras. 44-46.

<sup>34</sup> Appeal, paras. 47-60.

<sup>35</sup> Appeal, paras. 48-57. *See also ibid.*, paras. 72-74.

<sup>36</sup> Appeal, para. 42.

<sup>37</sup> Appeal, paras. 58, 59, *citing* letter of opinion of Dr. Pierre Cornier on the Independent Medical Expert's Report, 10 September 2009, annexed to the Appeal.

<sup>38</sup> Appeal, paras. 61-74.

<sup>39</sup> Appeal, para. 62.

<sup>40</sup> Appeal, paras. 64-71.

<sup>41</sup> Appeal, para. 75.

the Appeals Chamber's intervention.<sup>43</sup> The Prosecution submits that Ngirumpatse failed to articulate an error with respect to the production of a host State guarantee.<sup>44</sup> It also asserts that the Trial Chamber sufficiently considered the humanitarian and medical grounds and other relevant factors in reaching its decision.<sup>45</sup> Finally, it asserts that Ngirumpatse's attempt to challenge the credibility of the Independent Medical Expert's Report and the Tribunal's Chief Medical Officer is "misplaced".<sup>46</sup> It contends that the medical reports Ngirumpatse filed before the Appeals Chamber should be disregarded because they were not part of the record before the Trial Chamber and Ngirumpatse failed to seek to have them admitted as additional evidence on appeal pursuant to Rule 115 of the Rules.<sup>47</sup>

#### E. Discussion

12. At the outset, the Appeals Chamber rejects Ngirumpatse's argument that the Impugned Decision was not rendered in a timely manner. The Appeals Chamber is not convinced that there was an undue delay in the rendering of the Impugned Decision. While the Motion was filed before the Trial Chamber on 14 April 2009, the Independent Medical Expert's Report was not made available to the Trial Chamber until 11 August 2009.<sup>48</sup> In this circumstance, and considering that the information contained in the Independent Medical Expert's Report was a relevant factor for the Trial Chamber to consider,<sup>49</sup> the Appeals Chamber is not persuaded that the Impugned Decision was untimely.

13. The Appeals Chamber is also not persuaded that Ngirumpatse has established his claim that the decision-making process was not fair and impartial. The Appeals Chamber recalls that the official languages of the Tribunal are English and French<sup>50</sup> and it can be assumed that the Trial Chamber is able to work in both languages, especially as the Impugned Decision was written in French. Thus, the Appeals Chamber considers that Ngirumpatse's argument that the Trial Chamber could not have properly considered the Independent Medical Expert's Report because it was filed in French is speculative and without merit. In relation to Ngirumpatse's argument that the Independent Medical Expert's Report did not properly address the issue of provisional release, the Appeals Chamber observes that the Independent Medical Expert's Report explicitly concluded that

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<sup>42</sup> Response, paras. 2, 4, 12.

<sup>43</sup> Response, paras. 4, 6, 11.

<sup>44</sup> Response, para. 8.

<sup>45</sup> Response, paras. 9, 10.

<sup>46</sup> Response, para. 12.

<sup>47</sup> Response, para. 12.

<sup>48</sup> Impugned Decision para. 3, *citing* Independent Medical Expert's Report.

<sup>49</sup> Appeal Decision on Provisional Release, para. 14. The Appeals Chamber specifically found that the Trial Chamber should have considered the medical and humanitarian grounds advanced by Ngirumpatse in deciding on his request for provisional release.

Ngirumpatse's detention was not impeding his recovery and that it was not necessary to transfer him.<sup>51</sup> Ngirumpatse's contention that he was not given the opportunity to make submissions on the Independent Medical Expert's Report in relation to his request for provisional release is also unfounded given that the Trial Chamber explicitly invited the parties to do so in its order of 26 June 2009.<sup>52</sup> Additionally, Ngirumpatse made submissions on the Independent Medical Expert's Report in relation to the continuation of trial on 26 August 2009,<sup>53</sup> and the Appeals Chamber considers that he could also have addressed the Independent Medical Expert's Report in relation to his request for provisional release at that time.

14. Turning to the merits of the Impugned Decision, the Appeals Chamber observes that, in considering whether the requirements for granting provisional release pursuant to Rule 65(B) of the Rules had been met, the Trial Chamber first noted that Ngirumpatse had appended to his Motion correspondence with the governments of states to which he sought to be released.<sup>54</sup> Having considered this material, the Trial Chamber concluded that the first requirement of Rule 65(B) of the Rules, that the state to which the accused seeks to be released have the opportunity to be heard, had been fulfilled.<sup>55</sup> Accordingly, the Appeals Chamber finds no merit in Ngirumpatse's submission that the Trial Chamber erred in relying on the fact that no state had agreed to host him to dismiss his request.<sup>56</sup>

15. Having recalled that a request for provisional release brought at a late stage of proceedings should only be granted when sufficiently compelling humanitarian reasons exist,<sup>57</sup> the Trial Chamber next turned to consider Ngirumpatse's medical condition.<sup>58</sup> In this respect, it noted the reports of the Tribunal's Chief Medical Officer and the Independent Medical Expert.<sup>59</sup> It considered the Independent Medical Expert's conclusions that Ngirumpatse's treatment was having an effect on his illness, that the quality of medical care he was receiving conformed to the most exacting standards of care, that no negative consequences on Ngirumpatse's illness resulting from his detention were observed, and that there was no reason to transfer him to another facility as the risk

<sup>50</sup> Article 31 of the Statute of the International Criminal Tribunal for Rwanda.

<sup>51</sup> Independent Medical Expert's Report, pp. 7, 8.

<sup>52</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Ordonnance concernant certaines requêtes pendantes*, 26 June 2009 ("Order of 26 June 2009"), p. 5 ("**ORDONNE à Matthieu Ngirumpatse, au Procureur et au Greffier de présenter à la Chambre leurs arguments ou observations concernant la demande de mise en liberté provisoire de Ngirumpatse à la suite du dépôt des versions caviardées des rapports médicaux concernant l'état de sa santé.**").

<sup>53</sup> *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, *Mémoire pour Matthieu Ngirumpatse suite à l'ordonnance du 24 août 2008 concernant la reprise du procès*, 26 August 2009.

<sup>54</sup> Impugned Decision, para. 9.

<sup>55</sup> Impugned Decision, para. 9.

<sup>56</sup> Appeal, paras. 45, 46.

<sup>57</sup> Impugned Decision, para. 7.

<sup>58</sup> Impugned Decision, para. 10.

<sup>59</sup> Impugned Decision, para. 10.



of a complication arising from his current mode of detention was not significantly higher than in the regular population.<sup>60</sup> In light of this, it concluded that there was no justification for the provisional release of Ngirumpatse.<sup>61</sup>

16. Ngirumpatse advances a number of challenges to the Trial Chamber's conclusions regarding his medical condition and its reliance on the reports of the Tribunal's Chief Medical Officer and the Independent Medical Expert. However, the Appeals Chamber considers that Ngirumpatse has failed to demonstrate that the Trial Chamber abused its discretion in relying on the Independent Medical Expert's Report in rendering its decision. While Ngirumpatse argues that the Independent Medical Expert relied on an incomplete medical record, the Independent Medical Expert undertook a physical examination of Ngirumpatse, relied on up-to-date laboratory tests dated 20 and 31 July 2009, and was clearly familiar with Ngirumpatse's medical history.<sup>62</sup> In addition, Ngirumpatse did not challenge the Independent Medical Expert's Report prior to the rendering of the Impugned Decision, despite having been invited to submit his views on it in the Order of 26 June 2009.<sup>63</sup> In view of these factors, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber to have relied on the Independent Medical Expert's Report in reaching its conclusion. Furthermore, the Appeals Chamber dismisses Ngirumpatse's argument that the Tribunal's Medical Officer has a "manifest conflict of interest" as Ngirumpatse has failed to substantiate this claim in any way.<sup>64</sup>

17. The Appeals Chamber observes that Ngirumpatse appended to his Appeal a medical report of his own, from Dr. Pierre Cornier, commenting on the Independent Medical Expert's Report, as well as medical records going back a number of years.<sup>65</sup> However, this material was not before the Trial Chamber and Ngirumpatse did not seek to have it admitted as additional evidence on appeal pursuant to Rule 115 of the Rules. Consequently, this material is not part of the record and the Appeals Chamber will not consider it.<sup>66</sup>

18. The Appeals Chamber further finds that, given the medical information before it, it was not unreasonable of the Trial Chamber to have concluded that Ngirumpatse's medical condition did not constitute compelling humanitarian reasons to grant provisional release. In relation to Ngirumpatse's age, length of detention, and the fact that his condition was undiagnosed for a period of time, the Appeals Chamber notes that the Independent Medical Expert was clearly aware of these

<sup>60</sup> Impugned Decision, para. 10.

<sup>61</sup> Impugned Decision, para. 13.

<sup>62</sup> Independent Medical Expert's Report, pp. 4, 5.

<sup>63</sup> Order of 26 June 2009, p. 5.

<sup>64</sup> Appeal, para. 48.

<sup>65</sup> Appeal, paras. 58, 59, Annex.

<sup>66</sup> *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69-AR65.1, IT-03-69-AR65.2, Decision on Prosecution's Application Under Rule 115 to Present Additional Evidence in Its Appeal Against Provisional Release, 11 November 2004, para. 7.

elements in his consideration of whether Ngirumpatse's detention was detrimental to his health condition.<sup>67</sup> As such, although the Trial Chamber did not consider these factors independently, given that the Trial Chamber accepted the findings of the Independent Medical Expert and they were factors taken into account by the Independent Medical Expert, the Appeals Chamber considers that they formed part of the basis for the Impugned Decision. Furthermore, Ngirumpatse has failed to demonstrate that the Trial Chamber erred in taking into account the fact that trial was set to resume.<sup>68</sup>

19. Consequently, the Appeals Chamber finds that Ngirumpatse has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion in denying his request for provisional release.

#### F. Disposition

20. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal in its entirety, Judge Liu dissenting.

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

Done this eighth day of December 2009,  
at The Hague,  
The Netherlands.



[Seal of the Tribunal]

A handwritten signature in black ink, appearing to read "Patrick Robinson".

Judge Patrick Robinson  
Presiding

<sup>67</sup> Independent Medical Expert's Report, pp. 1, 2, 4, 7, 8.

<sup>68</sup> Cf. *Prosecution 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. 46 ("The Appeals Chamber finds that the Defence has failed to demonstrate that the Trial Chamber erred in taking into consideration the trial start date in reaching its decision on provisional release.").

## DISSENTING OPINION OF JUDGE LIU DAQUN

1. I respectfully disagree that any application for provisional release made after the close of the Prosecution case “should only be granted when sufficiently compelling humanitarian reasons exist”.<sup>1</sup> In my view, the Majority decision to impose an additional requirement of “sufficiently compelling humanitarian reasons” to the criteria listed under Rule 65(B) of the Rules<sup>2</sup> undermines the continuing presumption of innocence and represents an *ultra vires* extension of the Rules.<sup>3</sup>

2. In accordance with 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, if released, will not pose a danger to any victim, witness or other person”. When satisfied that these two requirements are met, a Trial Chamber may exercise its discretion to grant provisional release. In so doing, it must consider all relevant factors,<sup>4</sup> including the existence of humanitarian reasons. Thus, humanitarian reasons *may* be a salient factor in assessing whether provisional release should be granted but should be considered in the context of the two requirements of Rule 65(B) of the Rules.<sup>5</sup> The “weight attached to [humanitarian reasons] as justification for provisional release will differ from one defendant to another depending upon all of the circumstances of a particular case”.<sup>6</sup>

<sup>1</sup> Majority Decision, para. 7. This approach follows the interpretation of Rule 65(B) of the Rules in *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.10, Decision on Radivoje Miletić’s Appeal Against Decision on Miletić’s Motion for Provisional Release, 19 November 2009 (“Miletić Decision”), para. 7. See also *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 (“Čermak 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, para. 7; *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. 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.

<sup>2</sup> Rules of Procedure and Evidence, as amended on 14 March 2008.

<sup>3</sup> This dissenting opinion is consistent with those expressed in previous decisions relating to Rule 65(B) of the Rules. See *Miletić Decision*, Joint Dissenting Opinion of Judges Güney and Liu; *Čermak Decision*, 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, 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, Dissenting Opinion of Judge Güney; *Prlić Decision*, Partly Dissenting Opinion of Judge Güney; *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 (“Popović Decision”), Partly Dissenting Opinions of Judge Güney and Judge Liu; *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.

<sup>4</sup> See Majority Decision, paras 6-7.

<sup>5</sup> *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 27 July 2007, para. 14.

<sup>6</sup> See *Popović Decision*, Partly Dissenting Opinion of Judge Güney, para. 4, citing *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.

3. Because there is no requirement for humanitarian reasons, much less “sufficiently compelling” humanitarian reasons, under Rule 65(B) of the Rules, I consider that the Majority’s decision represents an *ultra vires* extension of 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 27 May 2003.<sup>7</sup> Such a requirement undermines the important distinctions between convicted persons<sup>8</sup> and those who still enjoy the presumption of innocence under Article 20(3) of the Statute, and I cannot subscribe to it.

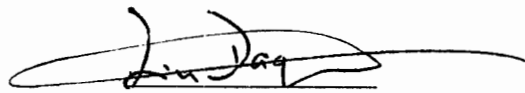
4. In the present instance, the Trial Chamber failed to consider the criteria of Rule 65(B) of the Rules beyond noting that the host country and the country to which the accused seeks to be released have been given the opportunity to be heard.<sup>9</sup> By focusing exclusively on the existence of “compelling humanitarian reasons” the Trial Chamber dispensed with the formal requirements set out in Rule 65(B) of the Rules and, consequently, committed a discernable error. In these circumstances, I believe that this matter should be remanded to the Trial Chamber to determine in accordance with Rule 65(B) of the Rules.

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

Dated this eighth day of December 2009  
At The Hague,  
The Netherlands



[Seal of the Tribunal]



Judge Liu Daqun

<sup>7</sup> Prior to this amendment, Rule 65(B) of the Rules stated: “Provisional 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.” (Emphasis added.)

<sup>8</sup> Pursuant to Rule 65(I)(iii) of the Rules, a convicted person is required to demonstrate that special circumstances exist to warrant provisional release.

<sup>9</sup> Impugned Decision, para. 9.