



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia Since 1991

Case No.: IT-04-74-AR65.8

Date: 25 April 2008

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IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 25 April 2008

PROSECUTOR

v.

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

PUBLIC

**DECISION ON “PROSECUTION’S APPEAL FROM *DÉCISION RELATIVE
À LA DEMANDE DE MISE EN LIBERTÉ PROVISOIRE DE L’ACCUSÉ
PRLIĆ DATED 7 APRIL 2008*”**

Office of the Prosecutor

Mr. Kenneth Scott
Mr. Douglas Stringer

Counsel for the Accused

Mr. Michael Karnavas and Ms. Suzana Tomanović for Jadranko Prlić
Ms. Senka Nožica and Mr. Karim Khan for Bruno Stojić
Mr. Božidar Kovačić and Ms. Nika Pinter for Slobodan Praljak
Ms. Vesna Alaburić and Mr. Nicolas Stewart for Milivoj Petković
Ms. Dijana Tomašegović-Tomić and Mr. Dražen Plavec for Valentin Ćorić
Mr. Fahrudin Ibrišimović and Mr. Roger Sahota for Berislav Pušić

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1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (“Tribunal”) is seized of an appeal by the Office of the Prosecutor (“Prosecution”)¹ against a decision rendered by Trial Chamber III (“Trial Chamber”) on 7 April 2008, granting provisional release to the Accused Jadranko Prlić (“Accused”).²

I. BACKGROUND

2. On 29 January 2008, Counsel for Jadranko Prlić (“Defence”) filed a motion requesting the provisional release of the Accused during the period between the close of the Prosecution’s case and the beginning of the Defence case.³ On 19 February 2008, the Trial Chamber granted provisional release to the Accused.⁴ On 21 February 2008, the Prosecution appealed the 19 February 2008 Decision and related decisions granting provisional release to other co-Accused in the present case.⁵ On 11 March 2008, the Appeals Chamber granted the Prosecution’s Consolidated Appeal and overturned the Trial Chamber’s grant of provisional release to all of the Accused.⁶ The Appeals Chamber found, in particular, that the Trial Chamber had committed discernible errors in failing to explicitly discuss the impact of its 98bis Ruling⁷ when granting provisional release⁸ and in considering that the arguments put forth by the Accused might be regarded as humanitarian grounds capable of justifying the granting of provisional release.⁹

3. On 12 March 2008, the Defence filed a Motion for Reconsideration of its 29 January Motion.¹⁰ On 17 March 2008, the Defence filed supplemental material in support of its Motion for Reconsideration, including medical documentation regarding the health condition of the father and

¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.8, Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prlić* Dated 7 April 2008, 8 April 2008, Confidential (“Appeal”).

² *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prlić*, Public with a Confidential Annex, 7 April 2008, (“Impugned Decision”).

³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for Provisional Release, Confidential, with three Annexes, 29 January 2008 (“29 January 2008 Motion”). See also, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Corrigendum - Jadranko Prlić’s Motion for Provisional Release, Confidential, 29 January 2008 (“Corrigendum”).

⁴ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prlić*, with a Confidential Annex, 19 February 2008 (“19 February 2008 Decision”).

⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.5, Prosecution’s Consolidated Appeal from Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić Prior to the Defence Case, 21 February 2008 (“Consolidated Appeal”).

⁶ *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 (“Appeals Chamber Decision of 11 March 2008”).

⁷ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Oral Decision Delivered Under Rule 98bis, T. 27200-27238, 20 February 2008 (“98bis Ruling”).

⁸ Appeals Chamber Decision of 11 March 2008, paras 19-20.

⁹ Appeals Chamber Decision of 11 March 2008, para. 21.

¹⁰ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for Expedited Renewed and Explicit Consideration of His Previously Granted Request for Provisional Release, 12 March 2008 (“Motion for Reconsideration”).

brother of the Accused.¹¹ On 25 March 2008, the Trial Chamber denied the Motion for Reconsideration, noting that it lacked the authority to re-examine its 19 February 2008 Decision.¹²

4. On 26 March 2008, the Defence filed another Motion for Provisional Release¹³ whereby, *inter alia*, it provided information on the humanitarian factors which it claimed justified a grant of provisional release.¹⁴ In particular, it reiterated that the Accused's father is gradually going blind and would like to see his son while he has some eyesight left. It advised further that the Accused's father recently underwent surgery for cancer.¹⁵ It also reiterated that the health condition of the Accused's mother does not permit her to travel to The Hague to visit her son.¹⁶ The Defence further addressed the claim that the Accused's brother had undergone a liver transplant, advising further that his postoperative recovery has been complicated due to heart and kidney complications.¹⁷

5. In its Response,¹⁸ the Prosecution argued that the Motion for Provisional Release did not establish any material change of circumstances from those considered in the Appeals Chamber Decision of 11 March 2008 and accordingly, the humanitarian reasons were insufficient to justify granting provisional release.¹⁹

6. On 7 April 2008, the Trial Chamber issued the Impugned Decision, granting provisional release to the Accused, which it ordered to be stayed in accordance with Rule 65(F) following the Prosecution's submission that, should provisional release be granted, it intended to appeal that decision before the Appeals Chamber.²⁰ On 8 April 2008, the Prosecution filed this Appeal. On 9 April 2008, the Defence notified the Appeals Chamber that it would not file any response.

¹¹ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Supplemental Material in Support of Jadranko Prlić's Motion for Expedited Renewed and Explicit Consideration of His Previously Granted Request for Provisional Release, Confidential, 17 March 2008 ("Addendum to the Motion for Reconsideration").

¹² *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision Portent sur une Demande de Réexamen*, 25 March 2008 ("Decision on Reconsideration").

¹³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić's Motion for Provisional Release, Confidential, 26 March 2008 ("Motion for Provisional Release").

¹⁴ Motion for Provisional Release, paras 14-15.

¹⁵ Motion for Provisional Release, para. 14(a), referring to Annex 2 to the Motion for Provisional Release. The Appeals Chamber notes that all the information on the health of the Accused's family members contained in the present decision were made public by the Impugned Decision, p. 3.

¹⁶ Motion for Provisional Release, para. 14(b).

¹⁷ Motion for Provisional Release, para. 14(c), referring to Annex 3 to the Motion for Provisional Release.

¹⁸ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Prosecution Consolidated Response to 1) Jadranko Prlić's Motion for Provisional Release, filed 26 March 2008; 2) Motion of Bruno Stojić for Provisional Release During the Remainder of the Period Between Close of the Prosecution Case and Beginning of Defence Case, filed 27 March 2008 and 3) Valentin Ćorić's Request for Provisional Release, filed March 25 2008, Confidential, 4 April 2008 ("Prosecution Response to the Motion for Provisional Release").

¹⁹ Prosecution Response to the Motion for Provisional Release, paras. 15-19.

²⁰ Impugned Decision, p. 6 and p. 4, referring to Prosecution Response to the Motion for Provisional Release, para. 35.

II. STANDARD OF REVIEW

7. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.²¹ 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.²² 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.²³

8. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".²⁴ The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.²⁵ 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.²⁶

III. APPLICABLE LAW

9. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will

²¹ See e.g., *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006 ("*Brahimaj Decision*"), para. 5; *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić Decision*"), para. 6; *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005 ("*Boškoski Decision of 28 September 2005*"), para. 5.

²² See e.g., *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 ("*Milutinović Decision*"), para. 3; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006 (*Borovčanin Decision of 30 June 2006*), para. 5.

²³ *Ibid.* (internal citations omitted).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ See e.g., *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5; *Prosecutor v. Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10; *Stanišić Decision*, para. 6, fn. 10; *Prosecutor v. 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; *Brahimaj Decision*, para. 5; *Prosecutor v. Delić*, Case No. IT-04-83-

not pose a danger to any victim, witness or other person; and after having given the host country and the State to which the accused seeks to be released the opportunity to be heard.²⁷

10. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.²⁸ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²⁹ 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.³⁰ The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the International Tribunal.³¹

IV. SUBMISSIONS

11. The Prosecution raises two errors allegedly committed by the Trial Chamber, both of which would amount to an abuse of discretion in granting provisional release.³² It contends that the Trial Chamber erred (i) in concluding that the circumstances justify granting provisional release on humanitarian grounds,³³ and (ii) in taking into account its own *98bis* Ruling in this case.³⁴ On these grounds, the Prosecution requests the Appeals Chamber to overturn the Impugned Decision.³⁵

12. With respect to the alleged errors in the exercise of the discretion identified above, the Prosecution argues that the Trial Chamber abused its discretion in finding that the circumstances concerning the health situation of the Accused's relatives, justify provisional release on humanitarian grounds.³⁶ The Prosecution submits, in particular, that these circumstances were already addressed by the Trial Chamber in its 19 February 2008 Decision, and that the Appeals Chamber already concluded that the Trial Chamber committed a discernible error in considering

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.

²⁷ *Brahimaj* Decision, para. 6.

²⁸ *Ibid.*, para. 8.

²⁹ *Stanišić* Decision, para. 8.

³⁰ *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Decision Denying Johan Tarčulovski's Motion for Provisional Release, 4 October 2005 ("*Tarčulovski* Decision"), para. 7.

³¹ *Stanišić* Decision, para. 8.

³² Appeal, paras 2 and 29.

³³ Appeal, paras 18-21.

³⁴ Appeal, paras. 22-27.

³⁵ Appeal, p. 9.

such justifications as humanitarian grounds capable of justifying the granting of provisional release.³⁷ The Prosecution submits that, in light of the ruling provided in the Appeals Chamber Decision of 11 March 2008, and despite the updated information submitted by the Accused in his Motion for Provisional Release, there are no sufficient reasons to justify his provisional release on humanitarian grounds.³⁸ In addition, the Prosecution claims that the duration of the period of provisional release granted by the Trial Chamber is unreasonably long and bears no relation to the condition of the Accused's family members.³⁹

13. The Prosecution further submits that the Trial Chamber erred in law by failing to "explicitly address the impact of its *98bis* Ruling when granting provisional release, despite the express instruction of the Appeals Chamber to do so".⁴⁰ The Prosecution argues that, in light of the *98bis* Ruling, there is a significantly greater risk of flight on the part of the Accused.⁴¹ The Prosecution concedes that the Trial Chamber, in the Impugned Decision, elected to add a supplemental condition of provisional release, namely that the Accused remain in the town of Makarska, Croatia, under surveillance of the Croatian authorities, and that he report on a daily basis to the police authorities. However, the Prosecution claims that this condition "does not sufficiently address the changed circumstance of the Trial Chamber's *98bis* Ruling, particularly in light of the insufficient humanitarian basis for provisional release".⁴²

V. DISCUSSION

14. The Appeals Chamber notes that the Trial Chamber did explicitly address the impact of its *98bis* Ruling in granting the Accused provisional release. The Trial Chamber recalled the holding of the Appeals Chamber Decision of 11 March 2008 that the *98bis* Ruling constituted a significant change in circumstances, which warranted a renewed and thorough evaluation of the risk of flight of each of the co-Accused in this case. The Trial Chamber expressly considered that, in order to satisfy itself that the Accused still met the requirements of Rule 65, namely that if released they would appear for trial and not intervene with any victims and witnesses, it was required to consider whether the Accused had offered sufficient guarantees to offset that risk of flight. In such circumstances, even if the Trial Chamber was satisfied that sufficient guarantees were offered, it should not exercise its discretion in favour of a grant of provisional release unless sufficiently

³⁶ Appeal, para 18.

³⁷ Appeal, para. 18, referring to Appeals Chamber Decision of 11 March 2008, para. 21.

³⁸ Appeal, paras. 19-20.

³⁹ Appeal, para. 21.

⁴⁰ Appeal, para. 22.

⁴¹ Appeal, paras 22-26.

⁴² Appeal, para. 25.

compelling humanitarian grounds were present which tipped the balance in favour of allowing provisional release.⁴³

15. In the Impugned Decision, the Trial Chamber specifically recalled that the guarantees put forward to satisfy the burden of establishing that the Accused would return for trial if released in its 19 February 2008 Decision were considered by the Appeals Chamber to be insufficient in light of the 98bis Ruling.⁴⁴ Accordingly, the Trial Chamber imposed additional conditions to the provisional release of the Accused, which it considered would offset the risk of flight identified by the Appeals Chamber. Namely, the Trial Chamber determined that provisional release would be granted to the Accused on the condition that, *inter alia*, he be under 24-hour surveillance by the Croatian authorities and that he report on a daily basis to the local police.⁴⁵ The Appeals Chamber considers that the Prosecution has failed to show any discernible error by the Trial Chamber in its consideration of the impact of the 98bis Ruling on the risk of flight and in its determination to remove any such risk by the conditions it imposed on the provisional release of the Accused.

16. Concerning whether the humanitarian reasons identified by the Accused were sufficient to justify provisional release, the Appeals Chamber reiterates that provisional release should only be granted at a late stage of the proceedings, and in particular after the close of the Prosecution case, when sufficiently compelling humanitarian reasons exist to justify the release and, even when provisional release is found to be justified in light of the nature of the circumstances, the length of the release should nonetheless be proportional to these circumstances- for example, the need to visit a seriously ill family member in the hospital would justify provisional release of a sufficient time to visit the family member.⁴⁶

17. Turning to the humanitarian grounds alleged by the Defence for justifying provisional release, the Trial Chamber correctly observed that the Appeals Chamber already considered some of these circumstances in its Appeals Chamber Decision of 11 March 2008, concluding that they did not represent sufficient humanitarian reasons justifying provisional release to the Accused.⁴⁷ However, the Trial Chamber further emphasised that, in granting provisional release to the Accused, it also took into consideration new relevant information concerning the medical situation of both the Accused's father and brother.⁴⁸ The Trial Chamber noted, in particular, that medical

⁴³ Impugned Decision, p. 5.

⁴⁴ Impugned Decision, p. 6.

⁴⁵ Impugned Decision, p. 6. See also the Confidential Annex to the Impugned Decision.

⁴⁶ *Prosecutor v. 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; Appeals Chamber Decision of 11 March 2008, para. 21.

⁴⁷ Impugned Decision, pp. 4-5.

⁴⁸ Impugned Decision, p. 5.

certification attested that the Accused's father, who is aged 80 and almost blind, recently underwent surgery for cancer.⁴⁹ The Trial Chamber further noted that several medical certifications attested that the health condition of the Accused's brother, who underwent a liver transplant, recently deteriorated.⁵⁰ The Trial Chamber assessed that the additional circumstance of the recently deteriorated health condition of both the Accused's father and brother represented sufficiently compelling humanitarian reasons for granting provisional release to the Accused for a period of time of two weeks. The Appeals Chamber, having considered the new evidence before the Trial Chamber, finds that the Trial Chamber did not abuse its discretion in considering that the gravity of the illness suffered by the Accused's family members justify the provisional release of the Accused for a short period of time.

18. However, the Appeals Chamber reiterates that decisions on motions for provisional release are fact intensive; cases are considered on an individual basis in light of the particular circumstances of the individual accused. The number of factors that a Trial Chamber is to consider does not only influence the decision of whether to grant or deny a motion for provisional release, but also impacts on the assessment of the duration of the period of provisional release, if any. Thus, *inter alia*, a Trial Chamber is to address the proportionality between the nature and weight of the circumstances justifying provisional release on humanitarian grounds, and the duration of provisional release.⁵¹

19. The Appeals Chamber notes that the Trial Chamber did not engage in such an evaluation. Absent such an evaluation, the Appeals Chamber is not satisfied that the justifications offered by the Accused warrant the length of provisional release granted by the Trial Chamber. Rather, a Trial Chamber properly exercising its discretion would have granted provisional release for a period no longer than the time necessary for the Accused to visit his ailing family members.

⁴⁹ Impugned Decision, p. 5.

⁵⁰ Impugned Decision, p. 5.

⁵¹ *Petković* Decision, para. 17.

V. DISPOSITION

20. On the basis of the foregoing, the Appeals Chamber **GRANTS** the Prosecution Appeal in part and **REMANDS** the Impugned Decision to the Trial Chamber for a *de novo* adjudication of the duration of the provisional release granted to the Accused and all consequent arrangements.

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



Judge Fausto Pocar
Presiding Judge

Judge Güney appends a Partly Dissenting Opinion.

Done this 25th day of April 2008,
At The Hague,
The Netherlands.

[Seal of the International Tribunal]

PARTLY DISSENTING OPINION OF JUDGE GÜNEY

1. In my Partly Dissenting Opinion appended to the *Petković* Decision,¹ I expressed my disagreement with the majority's interpretation of the Appeals Chamber Decision of 11 March 2008² which results in imposing an additional requirement of "sufficiently compelling humanitarian reasons" to the two criteria listed in Rule 65(B) of the Rules, contrary to both the Rules and the continuing presumption of innocence, and effectively suspending the grant of discretion to the Trial Chamber by the Rules. Relying on the *Petković* Decision, the majority in this instance³ reiterates that "provisional release should only be granted at a late stage of the proceedings, and in particular after the close of the Prosecution case, when sufficiently compelling humanitarian reasons exist to justify the release".⁴ While, in the present instance, I agree with the finding that "the Trial Chamber did not abuse its discretion in considering the gravity of the illness suffered by the Accused's family members [to] justify the provisional release of the Accused for a short period of time",⁵ I respectfully disagree with the majority's reliance on the newly-built standard of "sufficiently compelling humanitarian grounds". Additionally, because of the anomalously strict standard of explicitness required by the majority for decisions on provisional release in post-Rule 98bis proceedings, and the majority's undue interference in the Trial Chamber's exercise of discretion, I cannot join the majority's finding regarding the length of Prlić's provisional release.

2. Since the new hurdle elaborated on by the majority in the *Petković* Decision,⁶ endorsed by the Majority Decision,⁷ overrides the important distinctions in burdens and liberty interests between convicted persons and persons who still enjoy the presumption of innocence under Article 21(3) of the Statute, I feel compelled to reiterate here the arguments developed in my Partly Dissenting Opinion.

3. 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,

¹ *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"), Partly Dissenting Opinion of Judge Güney ("*Partly Dissenting Opinion*").

² *Prosecutor v. Jadranko 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 Ćorić, 11 March 2008 (Appeals Chamber Decision of 11 March 2008), para. 21. I wish to specify that I was not part of the Bench that ruled on this decision.

³ The composition of the Bench in this instance is identical to that in the *Petković* Decision.

⁴ Majority Decision, para. 16. See also, para. 14 which states that after a Rule 98bis ruling, "even if the Trial Chamber was satisfied that sufficient guarantees were offered, it should not exercise its discretion in favour of a grant of provisional release unless sufficiently compelling humanitarian grounds were present which tipped the balance of allowing provisional release." (footnote omitted).

⁵ Majority Decision, para. 17.

⁶ *Petković* Decision, paras 15, 17, 19-20, and Disposition.

⁷ Majority Decision, paras 14, 16.

witness or other person”.⁸ 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.⁹ The existence of humanitarian reasons can be a salient and relevant factor in assessing whether to exercise discretion to grant provisional release. These humanitarian grounds will “have to be assessed” in the “context” of the two requirements of Rule 65(B),¹⁰ 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”.¹¹

4. The Majority Decision relies on the majority’s reading of the Appeals Chamber Decision of 11 March 2008 in the *Petković* Decision¹² as setting up a higher standard for a Trial Chamber to meet when exercising its discretion to grant provisional release to an accused after a Rule 98bis decision. According to the majority, even when the two requirements of Rule 65(B) of the Rules are met, after a Rule 98bis decision, the Trial Chamber must still identify the existence of sufficiently compelling humanitarian grounds before being able to exercise its discretion in favour of provisional release.¹³

5. However, nowhere does Rule 65(B) require humanitarian justifications for the provisional release of a person who has not been convicted. Unlike for convicted persons, there is no requirement of additional “special circumstances”¹⁴ since the burden borne by a duly convicted person after full evaluation and adjudication is necessarily distinct from the burden borne by an individual who is still presumed innocent. Therefore, by imposing a new, higher standard of “sufficiently compelling humanitarian reasons” following a Rule 98bis decision, the majority imposes in fact a form of the “special circumstances” requirement applicable to convicted persons upon individuals who have not been found guilty following the full process and evaluation of trial. It amounts to reinstating, for post-Rule 98bis proceedings, the criterion of “exceptional circumstances” which used to be required by the Rules for the provisional release of an accused pending trial, and which was abrogated by amendment of 17 November 1999.¹⁵ Consequently, the

⁸ *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.

⁹ See Majority Decision, para. 10.

¹⁰ *Tarčulovski* Decision, para. 14.

¹¹ *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.

¹² *Petković* Decision, paras 15, 17, 19-20, and Disposition; Appeals Chamber Decision of 11 March 2008, para. 21.

¹³ Majority Decision, paras 14, 16.

¹⁴ Rules 65(I)(iii) of the Rules. See also *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008 (Public Redacted Version), paras 11-12, in which the Appeals Chamber stated that “[t]he specificity of the appeal stage is reflected by Rule 65(I)(iii) of the Rules, which provide for an additional criterion, i.e. that ‘special circumstances exist warranting such release’” and that “the notion of acute justification [is] inextricably linked to the scope of special circumstances for the purposes of Rule 65(I)(iii) of the Rules”.

¹⁵ IT/32/REV.17. Before this amendment of the Rules, Rule 65(B) stated (IT/32/REV.16, 2 July 1999 (emphasis added)):

newly-built standard of “sufficiently compelling humanitarian reasons” breaches both the Rules and the continuing presumption of innocence guaranteed to accused pending trial.

6. Because there is no requirement for humanitarian reasons, much less “sufficiently compelling” humanitarian reasons, under Rule 65(B) of the Rules, there is, in my humble opinion, only one acceptable reading of the Appeals Chamber Decision of 11 March 2008.¹⁶ If, after having considered all the circumstances of the case and the impact of the significant change of circumstances constituted by the Rule 98*bis* decision, a Trial Chamber cannot exclude the existence of flight risk or danger, then sufficiently compelling humanitarian reasons, coupled with necessary and sufficient measures to alleviate any flight risk or danger, can be a basis for resolving uncertainty and doubt in favour of provisional release. This would be the case, for example, of a Trial Chamber finding, subsequent to a Rule 98*bis* decision, a persistent risk of flight or danger, but deciding nonetheless to grant a limited period of provisional release in order for an accused to attend the funeral of his child, considering that the humanitarian reasons are so compelling that, coupled with strict measures, the risk of flight or danger can be alleviated. Indeed, in the Appeals Chamber Decision of 11 March 2008, the Appeals Chamber required the existence of sufficiently compelling humanitarian reasons after having found that the Trial Chamber did not evaluate the impact of its Rule 98*bis* decision pursuant to the two requirements of Rule 65(B) of the Rules, thus amounting to a lack of clarity as to the existence of a flight risk or danger. Only then did the Appeals Chamber, faced with a situation in which such a risk or danger could not be excluded, require sufficiently compelling humanitarian reasons.¹⁷

7. In the present instance, the Trial Chamber considered that the criteria of Rule 65(B) of the Rules were met.¹⁸ 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 discretionally consider all the circumstances of the case and determine whether there were factors in favour of provisional release, which it did.

8. The Majority Decision further states that “even when provisional release is found to be justified in light of the nature of the circumstances, the length of the release should nonetheless be proportional to these circumstances”.¹⁹ I do not necessarily disagree with such a statement. I also

(B) 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.

¹⁶ Appeals Chamber Decision of 11 March 2008, para. 21. For an illustration of this position, see, *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, Public Redacted Version, paras 14-15.

¹⁷ Appeals Chamber Decision of 11 March 2008, paras 19-21.

¹⁸ Impugned Decision, pp. 5-6.

¹⁹ Majority Decision, para. 16. See also, para. 18, which states that “The number of factors that a Trial Chamber is to consider [...] also impacts on the assessment of the duration of the period of provisional release.”

agree with the majority that the Trial Chamber did not specifically “address the proportionality between the nature and weight of the circumstances justifying provisional release on humanitarian grounds, and the duration of the provisional release”.²⁰ However, I believe that it is implicit in the Impugned Decision that the Trial Chamber did consider the impact of all the circumstances in the case – including, but not limited to, humanitarian reasons – when it determined the duration of the period of provisional release. Nonetheless, the Majority Decision states that “[a]bsent such an evaluation, the Appeals Chamber is not satisfied that the justifications offered by the Accused warrant the length of provisional release granted by the Trial Chamber”.²¹ While I acknowledge that such a reasoned opinion can be useful, and even required on occasions, I am of the opinion that, by requiring here an express reasoning, the majority imposes an unreasonably strict standard of explicitness in the post-Rule 98bis provisional release context that is not generally required for the reasoning of decisions.²²

9. Furthermore, by ruling that “a Trial Chamber properly exercising its discretion should grant provisional release for a period no longer than the time necessary for the Accused to visit his ailing family members”,²³ the majority clearly suggests that the two-week period of provisional release granted to Prlić is too long. In this respect, I believe it necessary to recall that the burden to demonstrate a discernable error or an abuse of discretion by a Trial Chamber rests with the challenging party.²⁴ In the present instance, the Prosecution limits itself to claiming that “the length of the release ordered by the Trial Chamber (two weeks) is unreasonably long and bears no relation to the condition of Prlić’s family members”, and to drawing the Appeals Chamber’s attention to another decision issued in another case without even discussing the similarities or differences between the two cases.²⁵ As recalled by the Majority Decision, “decisions on motions for provisional release are fact intensive and cases are considered on an individual basis in light of the

²⁰ Majority Decision, para. 18 (footnote omitted); See also, para. 19.

²¹ Majority Decision, para. 19.

²² See, e.g., *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 39 (recalling that “although the Trial Chamber must always provide a reasoned opinion in writing, it is not required to articulate every step of its reasoning for each particular finding”) (internal quotation marks omitted); *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 47 (noting that “the Trial Chamber did not specifically discuss whether the conditions that prevailed in detention camps and deportation convoys constituted evidence of an intent to destroy the population through the infliction of intolerable conditions of life” but reasoning “a Trial Chamber need not spell out every step of its analysis”); *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber’s Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts, 26 June 2000, para. 14 (noting that though “the Trial Chamber did not specifically state whether Proposed Facts 56 through 181 present any relevance for this case - except for those which go to crimes committed under Galic’s commander - such a finding can be inferred from the Impugned Decision.”); *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 25 (stating that “[c]oncerning the Appellants’ argument relating to the Trial Chamber’s failure to discuss the differences and/or similarities between the situations of Coo and Butler, the Appeals Chamber recalls that it is well established that Trial Chambers are not required to articulate every step of their reasoning in reaching a particular finding.” (footnote omitted)).

²³ Majority Decision, para. 19.

²⁴ See Majority Decision, para. 8.

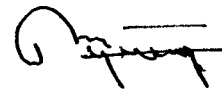
²⁵ Appeal, para. 21.

particular circumstances of the individual accused”.²⁶ Therefore, a comparison of different decisions granting provisional release in different cases has very little relevance, if any. Furthermore, the Prosecution does not even attempt to explain why the two-week period “is unreasonably long and bears no relation to the condition of Prlić’s family members”.²⁷ Based on the foregoing, I do not think that the Prosecution has met its burden, and this reason alone should suffice to dismiss the Appeal.

10. I note moreover that after having balanced the different circumstances in the case, namely (1) the absence of flight risk or danger despite the significant change of circumstances constituted by the Rule 98bis Ruling, (2) the “extremely serious” state of health of Prlić’s father and brother amounting to “serious humanitarian circumstances”, and (3) the strict additional guarantees of appearance at trial,²⁸ the Trial Chamber granted a limited period (two weeks including travel time) of provisional release to Prlić.²⁹ Given the broad margin of discretion afforded to Trial Chambers,³⁰ I fail to identify any discernable error or abuse of discretion by the Trial Chamber in its determination of the length of the provisional release. I am of the opinion that the majority unduly interferes with the Trial Chamber’s discretion in requiring “a period [of provisional release] no longer than the time necessary for the Accused to visit his ailing family members”.³¹ The standard of appellate review is not whether the Appeals Chamber’s Judges agree with a discretionary decision, but whether the Trial Chamber “correctly exercised its discretion in reaching that decision”.³² I believe that is exactly what the Trial Chamber did in the Impugned Decision.

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

Dated this 25th day of April 2008,
At The Hague, The Netherlands.



Mehmet Güney

Judge

[Seal of the International Tribunal]

²⁶ Majority Decision, paras 10, 18.

²⁷ Appeal, para. 21.

²⁸ Impugned Decision, pp. 4-6.

²⁹ Impugned Decision, Confidential Annex.

³⁰ See Majority Decision, para. 7. “Deference is afforded to the Trial Chamber’s discretion in [...] decisions [of provisional release] because they ‘draw[] on the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and require[] a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.’” (*Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal against 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 Defence Counsel, 1 November 2004, para. 9.)

³¹ Majority Decision, para. 19.

³² See Majority Decision, para. 7.