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UNITED NATIONS

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

Case Nos.: IT-05-88-AR65.4
IT-05-88-AR65.5
IT-05-88-AR65.6

Date: 15 May 2008

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz

Registrar: **Mr. Hans Holthuis**

Decision of: **15 May 2008**

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

PUBLIC

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

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Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolič
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

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991 ("Appeals Chamber" and "International Tribunal", respectively) is seized of a consolidated appeal by the Office of the Prosecutor ("Prosecution")[1] against three separate decisions rendered by Trial Chamber II ("Trial Chamber") confidentially filed on 9 April 2008 (collectively, "Impugned Decisions")[2] in which Trial Chamber II granted a custodial visit to Ljubomir Borovčanin and provisional release to Milan Gvero and Radivoje Miletić (collectively, "Accused"). The Trial Chamber ordered the Impugned Decisions to be stayed in accordance with Rule 65(F) of the Rules of Procedure and Evidence ("Rules"), following the Prosecution's submission that it intended to file an appeal should the Trial Chamber grant provisional release to the Accused.[3]

I. BACKGROUND

2. On 14 April 2008, Ljubomir Borovčanin ("Borovčanin") filed a response to the Appeal.[4] Milan Gvero ("Gvero") and Radivoje Miletić ("Miletić") filed responses to the Appeal on 15 April 2008 and 17 April 2008, respectively.[5] The Prosecution did not file a reply to any of the Responses.

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[1] *Prosecutor v. Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5, and IT-05-88-AR65.6, *Confidential* Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletic's Motions for Provisional Release During the Break in the Proceedings, 10 April 2008 ("Appeal").

[2] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, *Confidential* Decision on Borovčanin's Motion for Custodial Visit, 9 April 2008 ("Impugned *Borovčanin* Decision"); *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Gvero's Motion for Provisional Release During the Break in the Proceedings, 9 April 2008 ("Impugned *Gvero* Decision"); *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Miletić Request for Provisional Release During the Break in the Proceedings, 9 April 2008 ("Impugned *Miletić* Decision").

[3] Impugned *Borovčanin* Decision, paras 14, 32(5); Impugned *Gvero* Decision, paras 5, 19(g); Impugned *Miletić* Decision, paras 9, 40(i).

[4] *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.4, *Confidential* Borovčanin Defence Response to Prosecution "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," 14 April 2008 ("*Borovčanin* Response"). The Appeals Chamber notes that in his Response, Borovčanin requests that the Appeal and Borovčanin Response be made public, asserting that there was no justification for filing the Appeal confidentially. *See* Borovčanin Response, para. 14. The Appeals Chamber further notes that on 15 April 2008, the Prosecution filed a public redacted version of the Appeal. *See Prosecutor v. Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5, and IT-05-88-AR65.6, *Public Redacted Version*, Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletic's Motions for Provisional Release During the Break in the Proceedings, 15 April 2008. Additionally, on 21 April 2008, Borovčanin filed a notice requesting to change the confidential status of his Response along with a letter from the Republika Srpska indicating its acceptance of the custodial visit conditions set forth in the Impugned *Borovčanin* Decision. *See Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.4, Borovčanin Defence Notice on Changing the Filing Status of Its Response to Prosecution's Appeal Against Decision on Borovčanin's Motion for a Custodial Visit, and Notice of Filing the Republika Srpska Letter Accepting the Custodial Visit Conditions from the 9 April 2008 Decision, 21 April 2008.

[5] *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.5, Response on Behalf of Milan Gvero to Prosecution's Appeal Against Decision on Provisional Release, 15 April 2008 ("*Gvero* Response"); *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.6, General Miletić's Response to Prosecution Appeal Against the Decision on Provisional Release, filed 17 April 2008 ("*Miletić* Response").

II. STANDARD OF REVIEW

3. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.[6] The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.[7] Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision but whether the Trial Chamber has correctly exercised its discretion in reaching that decision.[8]

4. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".[9] The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (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.[10] The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[11]

III. APPLICABLE LAW

5. 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 not

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[6] *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 and Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5.

[7] *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.

[8] *Ibid.*

[9] *Ibid.*

[10] *Ibid.*

[11] *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 ("*Tolimir* Decision"), para. 4; *Brahimaj* Decision, para. 5; *Prosecutor v. Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, para. 6.

pose a danger to any victim, witness or other person, and after having given the host country and the State to which the accused seeks to be released the opportunity to be heard.[12]

6. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all relevant factors that 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.[13] What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.[14] 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.[15] 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.[16]

IV. DISCUSSION

7. The Prosecution asserts that the Trial Chamber committed two discernible errors in granting Borovčanin a custodial visit for a period not exceeding seven days and both Gvero and Miletić provisional release for a period not exceeding fourteen days.[17] Specifically, it argues that the Trial Chamber erred in: (i) failing to give due weight to the advanced stage of the post-98*bis* stage of the proceedings, which increased the flight risk of the Accused; and (ii) finding that the various justifications advanced by the Accused for the custodial visit and provisional release were sufficiently compelling to justify the Trial Chamber's granting of the Accused's request for any period, or alternatively, for such long periods.[18]

8. The Prosecution submits that a Trial Chamber must explicitly discuss the impact of a Rule 98*bis* decision when assessing whether an accused has met the requirements for provisional release pursuant to Rule 65(B).[19] The Prosecution asserts that the Trial Chamber would not have granted a

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[12] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.8, Decision on "Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Petković* Dated 31 March 2008", 21 April 2008 ("*Petković* Decision"), para. 7.
[13] *Ibid.*, para. 10.
[14] *Stanišić* Decision, para. 8.
[15] *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.
[16] *Stanišić* Decision, para. 8.
[17] Appeal, para. 2.
[18] Appeal, para. 2.
[19] Appeal, para. 21.

custodial visit or provisional release to any of the Accused had it properly considered the impact of its 98*bis* Decision,[20] which dismissed all Defence motions for acquittal.[21]

9. The Prosecution further submits that the Trial Chamber erred in finding that the Accused provided sufficient justifications for a custodial visit and provisional release.[22] The Prosecution asserts that none of the reasons advanced by the Accused constitute sufficiently compelling humanitarian grounds.[23] The Prosecution argues that the justifications given by the Accused are no more compelling than those rejected by the Appeals Chamber in the *Prlić* Decision of 11 March 2008[24] and that ailing close family members and important personal administrative matters do not constitute sufficiently compelling reasons.[25] Alternatively, the Prosecution asserts that the durations granted by the Trial Chamber for the custodial visit and provisional release are excessive in light of the justifications given and should instead be strictly limited to the minimum periods necessary to fulfill the humanitarian purposes of the visit.[26]

10. In response, the Accused submit that the Prosecution has failed to demonstrate any error on the part of the Trial Chamber in the Impugned Decisions and request the Appeals Chamber to dismiss the Appeal.[27]

(1) Impugned *Borovčanin* Decision

11. The Prosecution submits that the Trial Chamber only briefly referred to the 98*bis* Decision in the Impugned *Borovčanin* Decision.[28] The Prosecution notes that Borovčanin was a fugitive for two-and-a-half years prior to his detention at the United Nations Detention Unit ("UNDU"), did not voluntarily surrender to the International Tribunal, and that his 98*bis* motion for acquittal was dismissed.[29] The Prosecution argues that in light of these factors, Borovčanin's flight risk is sufficiently high to militate against the granting of a custodial visit and that the Trial Chamber's finding to the contrary amounts to a discernible error.[30]

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[20] Appeal, para. 7.
[21] Appeal, para. 7.
[22] Appeal, pp. 7-8.
[23] Appeal, paras 20-22.
[24] Appeal, para. 20, citing *Prlić* Decision of 11 March 2008, para. 21.
[25] Appeal, para. 20.
[26] Appeal, para. 27.
[27] *Borovčanin* Response, paras 3 and 12; *Gvero* Response para. 18; *Miletić* Response, paras 10 and 27.
[28] Appeal, para. 8. Specifically, the Prosecution notes that the Trial Chamber observed that it must reconsider Borovčanin's risk of flight in light of the 98*bis* Decision and that, after considering all factors, including the 98*bis* Decision, it continued to have concerns regarding Borovčanin's flight risk.
[29] Appeal, para. 9.

12. The Prosecution further asserts that the Trial Chamber committed a discernible error in concluding that the medical condition of Borovčanin's father constituted a sufficiently compelling ground for a custodial visit.[31] The Prosecution argues that Borovčanin was granted a custodial visit on the same grounds in the summer of 2007 and submits that because his father's diagnosis has not changed since that time, the current circumstances do not justify another visit.[32] The Prosecution also points out that Borovčanin requests release in order to undergo a medical evaluation and obtain identification documents from Republika Srpska in order to qualify and apply for a national disability pension.[33]

13. Borovčanin responds that the Trial Chamber properly addressed the effect and content of the 98*bis* Decision and found that it did not constitute a material change in the circumstances of the case.[34] Borovčanin submits that a Trial Chamber's assessment of flight risk is entitled to deference absent a clear indication that the impact of a 98*bis* decision was addressed insufficiently or not addressed and that the Impugned Decision contains no such defect.[35] Borovčanin notes that the Trial Chamber imposed strict conditions on his custodial visit, which it considered to fully address any flight risk.[36]

14. Borovčanin further argues that the Trial Chamber acted within the proper scope of its discretion when it determined that the medical reports concerning his father submitted in support of his request were reliable and concluded that the humanitarian grounds he provided were sufficiently compelling to justify the visit.[37]

15. The Appeals Chamber observes that the Trial Chamber considered Borovčanin's motion for a custodial visit to be a request for a limited provisional release under stringent conditions and that Borovčanin is accordingly required to fulfil the requirements for provisional release as set forth in the Rules and jurisprudence of the International Tribunal.[38] The Appeals Chamber further observes that in his motion, Borovčanin proposed conditions for his custodial visit including the requirement that he remain within the municipality of Bijeljina, be held in full custody from the time he leaves the UNDU

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[30] Appeal, para. 9.
[31] Appeal, para. 23.
[32] Appeal, para. 23.
[33] Appeal, para. 21.
[34] *Borovčanin* Response, paras 6 and 8.
[35] *Borovčanin* Response, para. 8.
[36] *Borovčanin* Response, para. 9. Borovčanin notes specifically that the Trial Chamber ordered Borovčanin to be kept under surveillance and in the custody of armed guards at all times, that the visit was limited to seven days, and that he was ordered to spend every night in the Bijeljina prison facility.
[37] *Borovčanin* Response, para. 11.
[38] Impugned *Borovčanin* Decision, para. 21.

until his return, and his 24-hour surveillance by armed members of the Republika Srpska Ministry of the Interior while he is in the Republika Srpska.[39]

16. The Appeals Chamber notes that in granting Borovčanin a custodial visit, the Trial Chamber properly considered that the change of circumstances presented by the 98*bis* Decision required it to reconsider Borovčanin's flight risk.[40] Accordingly, the Trial Chamber observed that although it continued to be concerned about his flight risk, it was satisfied that the restrictions it imposed on the visit fully addressed these concerns.[41] Specifically, the Trial Chamber limited the visit to a period of seven days and required Borovčanin's round-the-clock surveillance and custody by armed guards.[42] In addition, the Trial Chamber denied Borovčanin's request to stay at his father's house during the visit and ordered him to spend each night in the local detention facility, while allowing him to visit his father and take care of his personal matters during the day-time.[43] The Trial Chamber also concluded that Borovčanin posed no threat to witnesses, victims or any other person in the case and that the stringent conditions it ordered provided additional guarantees against any potential threat.[44] In light of the above, the Appeals Chamber is not satisfied that the Prosecution has demonstrated that the Trial Chamber committed a discernible error in its consideration of the impact of the 98*bis* Decision on Borovčanin's flight risk and its conclusion that the strict custodial conditions imposed on his visit removed any such risk.

17. Turning to the sufficiency of the humanitarian grounds provided in support of Borovčanin's motion, the Trial Chamber observed that Borovčanin requested both to see his ailing father and to address other personal matters.[45] In granting the visit, the Trial Chamber considered that Borovčanin's father is elderly, has been sick for an extended period of time, and according to the medical report accompanying Borovčanin's motion, is in critical condition.[46] The Trial Chamber surmised that under the circumstances, there could be few opportunities left for Borovčanin to see his father.[47] The Trial Chamber concluded that "the humanitarian grounds are sufficiently compelling" to justify "some form of provisional release."[48] The Appeals Chamber, having considered the evidence before the Trial

[39] *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, *Confidential* Defence Application for Ljubomir Borovčanin's Custodial Visit to Republika Srpska (BIH) for a Short Fixed Period, With Annexes I to IV, 29 February 2008 ("*Borovčanin* Motion"), para. 21.
[40] Impugned *Borovčanin* Decision, para. 28.
[41] Impugned *Borovčanin* Decision, para. 29.
[42] Impugned *Borovčanin* Decision, para. 31.
[43] Impugned *Borovčanin* Decision, paras 9 and 31.
[44] Impugned *Borovčanin* Decision, para. 30.
[45] Impugned *Borovčanin* Decision, para. 29.
[46] Impugned Borovčanin Decision, para. 29.
[47] Impugned *Borovčanin* Decision, para. 29.
[48] Impugned *Borovčanin* Decision, para. 29.

Chamber, finds that the Trial Chamber did not commit a discernible error in considering that the serious health condition of Borovčanin's father justified his provisional release for a short duration.

18. The Appeals Chamber recalls, however, that even when provisional release is found to be justified on humanitarian grounds, the length of the release should be proportional to the circumstances – for example, the need to visit a seriously ill family member in the hospital would justify provisional release for a sufficient time to visit the family member.[49] 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.[50] The Appeals Chamber considers that the Trial Chamber engaged in such an evaluation when it held that "[t]aking into account the relevant factors, the Trial Chamber decides to allow provisional release for a limited duration of seven days only (including travel time)".[51] However, the Appeals Chamber notes that the Trial Chamber's conclusion erroneously included time to allow Borovčanin to "attend to his personal matters".[52] The Trial Chamber thus failed to limit the length of the visit to the humanitarian circumstances justifying the visit. In light of the above, the Appeals Chamber holds, Judge Güney dissenting, that a Trial Chamber properly exercising its discretion would have granted the custodial visit for a shorter period – namely, for a period no longer than the time necessary for Borovčanin to visit his ailing father.

(2) Impugned *Gvero* Decision

19. The Prosecution submits that the Trial Chamber committed a discernible error by concluding that the 98*bis* Decision did not increase Gvero's flight risk without providing reasons specifically

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[49] *See Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.9, Decision on "Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Stojić* Dated 8 April 2008", 29 April 2008 ("*Stojić* Decision"), para. 16. *See also Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.8, Decision on "Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Prlić* Dated 7 April 2008", 25 April 2008 ("*Prlić* Decision"), para. 16; *Petković* Decision, para. 17; *Prosecutor v. Hadžihasanović and Kubura*, Case No IT-01-47-T, Decision on Motions by Enver Hadžihasanović and Amir Kubura for Provisional Release, 19 July 2005, pp. 7-9. In this decision, which was rendered between the close of the Defence case and the delivery of the judgement, Trial Chamber II considered that: "at this stage of the trial there is an increased risk of flight, particularly after the Prosecution requested a finding of guilt on all charges"; "the Prosecution's final arguments and the sentences requested therein [...] may exert considerable psychological pressure on the Accused"; "other Chambers of the Tribunal held that the proximity of a prospective judgement date may weigh against a decision to release"; "the Chamber shares this view and holds that release for the entire period preceding the entry of judgement would be inappropriate and would create too great a risk of flight"; and "a period of 12 days for each of the Accused significantly reduces the risk of flight as opposed to a longer period"; *Prosecutor v. Milutinović* et al., Case No. IT-07-85-T, Decision on Lazarević Motion for Temporary Provisional Release, 15 April 2008, paras 16 and 18, in which Trial Chamber II considered that "[b]ased upon the compelling humanitarian considerations set forth in the Motion [...] it would be appropriate for the Accused to be provisionally released for a limited duration," specifically, seven days.

[50] *See Stojić* Decision, para. 20. *See also Prlić* Decision, para. 18; *Petković* Decision, para. 17.

[51] Impugned *Borovčanin* Decision, para. 31.

[52] Impugned *Borovčanin* Decision, para. 31. Specifically, the Trial Chamber instructed that "during his stay in Republika Srpska he must spend every night in the local detention facility, while being allowed to visit his father or attend to personal matters during the day-time."

related to Gvero's changed perception of the likely outcome of the proceedings.[53] The Prosecution asserts that the factors which the Trial Chamber considered in determining that Gvero did not pose a flight risk led to an incorrect conclusion.[54] Specifically, the Prosecution submits that the Trial Chamber characterized the nature of Gvero's case as a factor mitigating the risk of flight, which amounts to a discernible error given the serious charges against him.[55] The Prosecution notes that the Trial Chamber acknowledged that a 98*bis* ruling can increase the flight risk of an accused but concluded that the risk was not increased in Gvero's case given "his personal circumstances, the nature of the case against him and his behaviour to date ...."[56] The Prosecution further notes that the Trial Chamber concluded that Gvero's flight risk was mitigated by particular procedural steps undertaken by the Trial Chamber and Gvero's Defence counsel during the 98*bis* proceeding[57] and submits that the Trial Chamber failed to address the arguments raised by Gvero in his motion for acquittal in order to assess Gvero's perception of the strength of the Prosecution's case.[58] Additionally, the Prosecution submits that the uncertainty concerning the outcome of the 11 May 2008 general election in Serbia increases Gvero's flight risk.[59]

20. The Prosecution further submits that the Trial Chamber erred in finding that Gvero provided sufficiently compelling justifications for his request for provisional release, emphasizing that Gvero did not offer any justification for release.[60]

21. In response, Gvero asserts that the Trial Chamber specifically addressed the impact of the 98*bis* Decision on his provisional release application and concluded that it was satisfied that it did not increase Gvero's flight risk.[61] Gvero further notes that the Trial Chamber recognized that although Gvero had heard the evidence against him, he did not pose a threat to witnesses, victims or other persons in the case.[62] Gvero submits that the Prosecution has failed to identify a legal basis for its assertion that the Trial Chamber must address the "changed perceptions" of the accused after a 98*bis* ruling and notes that, in any event, the Trial Chamber addressed such perceptions in his case.[63] Gvero submits that the Prosecution's contention that the Trial Chamber erred in finding that the nature of the

[53] Appeal, para. 10.
[54] Appeal, para. 10.
[55] Appeal, para. 12.
[56] Appeal, para. 11 (emphasis in the original).
[57] Appeal, para. 13.
[58] Appeal, para. 14.
[59] Appeal, para. 19. The Appeals Chamber notes that the Prosecution makes the same argument with respect to Miletić's flight risk. *See Ibid.*
[60] Appeal, para. 24.
[61] *Gvero* Response, para. 12.
[62] *Gvero* Response, para. 13.
[63] *Gvero* Response, para. 14.

case against Gvero constituted a factor mitigating the risk of flight was already dismissed by the Appeals Chamber in the *Tolimir* Decision.[64]

22. The Appeals Chamber notes that when considering the impact of a 98*bis* ruling on the flight risk of an accused pursuant to Rule 65(B) of the Rules, a Trial Chamber may deem it necessary to address the arguments raised by the accused in his motion for acquittal in order to assess his perception of the strength of the case against him. However, contrary to the Prosecution's inference, such an assessment does not constitute a fixed requirement of the Rules. The Appeals Chamber accordingly finds that the Trial Chamber did not commit a discernible error when it concluded that the 98*bis* Decision did not increase Gvero's flight risk without addressing the arguments he made in his motion for acquittal.

23. The Appeals Chamber further notes that as required by the *Prlić* Decision of 11 March 2008, the Trial Chamber explicitly addressed the impact of the 98*bis* Decision on Gvero's flight risk, considering not only the nature of Gvero's case and the Trial Chamber's findings in the Rule 98*bis* Decision but also a number of additional factors.[65] Specifically, the Trial Chamber considered that Gvero is 70 years old, voluntarily surrendered to the Tribunal when the charges against him became known, and has been provisionally released on several occasions since his surrender, abiding by all conditions imposed by the Trial Chamber in each instance.[66] The Trial Chamber also found that it was satisfied with the guarantees provided by the Republic of Serbia ("Serbia").[67] Only after weighing all of the aforementioned factors along with the 98*bis* Decision did the Trial Chamber conclude that Gvero did not pose a flight risk or a threat to witnesses, victims or other persons in the case.[68] Accordingly, the Appeals Chamber is not satisfied that the Trial Chamber committed a discernible error when it concluded that the 98*bis* Decision did not increase Gvero's flight risk.

24. Nevertheless, the Appeals Chamber recalls that when considering a provisional release motion at the post-98*bis* stage of the proceedings, even when a Trial Chamber is satisfied that sufficient guarantees exist to offset the flight risk of an accused, it should not exercise its discretion to grant provisional release unless sufficiently compelling humanitarian reasons tip the balance in favour of allowing provisional release.[69] The Appeals Chamber accordingly finds, Judges Güney and Liu dissenting, that a Trial Chamber properly exercising its discretion would have denied Gvero's provisional release request given that he did not propose any compelling humanitarian justifications

[64] *Gvero* Response, para. 15, citing *Tolimir* Decision, paras 23-26.
[65] Impugned *Gvero* Decision, paras 11-18.
[66] Impugned *Gvero* Decision, paras 15-16.
[67] Impugned *Gvero* Decision, para. 18.
[68] Impugned *Gvero* Decision, para. 17.

for release. Gvero points out that in the 7 December 2007 Decision, the Trial Chamber did not consider his personal circumstances relevant to its decision to grant his provisional release motion, and that in the Impugned Decision, the Trial Chamber granted him provisional release in accordance with previous Trial and Appeal Chamber decisions.[70] However, the Appeals Chamber notes that each of the decisions relied upon by Gvero were rendered before the 98*bis* Decision in this case.

(3) Impugned *Miletić* Decision

25. As in the Impugned *Gvero* Decision, the Prosecution submits that the Trial Chamber committed a discernible error by concluding that the 98*bis* Decision did not increase Miletić's flight risk without providing reasons specifically relating to Miletić's changed perception of the likely outcome of the proceedings.[71] The Prosecution asserts that the factors which the Trial Chamber considered in determining that Miletić did not pose a flight risk led to an incorrect conclusion.[72] Specifically, the Prosecution submits that the Trial Chamber summarized the outcome of the 98*bis* hearings without conducting a clear assessment of the impact of the 98*bis* Decision on Miletić's flight risk.[73] The Prosecution argues that consequently, the Trial Chamber failed to address the arguments raised by Miletić in his motion for acquittal to assess his perception of the case against him.[74]

26. The Prosecution also notes that Miletić originally requested to visit his ill father in Republika Srpska; however, given the death of his father, he currently requests provisional release to visit the graves of his father and sister and to spend time with his wife and children.[75] As indicated above, the Prosecution submits that such reasons do not constitute sufficiently compelling humanitarian grounds, or alternatively, do not justify the duration of provisional release granted by the Trial Chamber.[76]

27. In response, Miletić asserts that the Trial Chamber properly assessed his flight risk.[77] Miletić notes that the Trial Chamber emphasized the need to address the impact of the 98*bis* Decision on his flight risk and accordingly considered the crimes for which Miletić is indicted along with the fact that he voluntarily surrendered to the Tribunal when the charges against him became known and that he has been provisionally released on several occasions, abiding by all conditions ordered by the Trial

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[69] *See Stojić* Decision, para. 14. *See also Petković* Decision, para. 15.
[70] *Gvero* Response, paras 7-8.
[71] Appeal, para. 10.
[72] Appeal, para. 10.
[73] Appeal, para. 17.
[74] Appeal, para. 17.
[75] Appeal, para. 25.
[76] Appeal, paras 20 and 27.
[77] *Miletić* Response, para. 13.

Chamber in each instance.[78] Miletić further submits that, contrary to the Prosecution's assertion, the Trial Chamber specifically considered the arguments he raised in his motion for acquittal, finding that they were appropriate for the final stage of the case and not for the purpose of Rule 98*bis*.[79]

28. Miletić further asserts that the Prosecution erroneously interpreted his justifications for provisional release.[80] Miletić points out that his sister died in January 2008 while he was on provisional release in Belgrade; however, he was unable to attend her funeral in Republika Srpska because he could not obtain guarantees from Republika Srpska in time.[81] He notes that his father died on 3 April 2008, and since the funeral was held the following day, he was unable to travel to Republika Srpska in time to attend.[82] He explains that the Trial Chamber's grant of provisional release between 2 to 16 May in particular would allow him to attend the commemoration ceremony taking place 40 days after his father's death, in accordance with Serbian tradition.[83] Miletić further asserts that the death of a close family member has always been a valid justification for provisional release.[84] He concludes that the Trial Chamber correctly found that the humanitarian justifications he raised were sufficiently compelling to warrant provisional release.[85]

29. For the same reasons as outlined above, the Appeals Chamber finds that the Trial Chamber did not commit a discernible error when it concluded that the 98*bis* Decision did not increase Miletić's flight risk without addressing the arguments Miletić made in his motion for acquittal.

30. The Appeals Chamber disagrees with the Prosecution's assertion that the Trial Chamber did not conduct a clear assessment of the impact of the 98*bis* Decision on Miletić's flight risk. Rather, the Trial Chamber explicitly noted that in light of the *Prlić* Decision of 11 March 2008, it was required to conduct such an assessment.[86] Accordingly, the Trial Chamber considered the charges against Miletić, that he voluntarily surrendered to the Tribunal when he became aware of those charges, that he has been provisionally released several times since his surrender and has abided by all conditions imposed by the Trial Chamber in each instance, and his strong desire to spend time with his family members in the aftermath of the death of his sister and father.[87] The Trial Chamber also considered that it was

[78] *Miletić* Response, paras 13-14.
[79] *Miletić* Response, para. 12.
[80] *Miletić* Response, para. 18.
[81] *Miletić* Response, para. 19.
[82] *Miletić* Response, para. 19.
[83] *Miletić* Response, para. 19.
[84] *Miletić* Response, para. 21.
[85] *Miletić* Response, para. 20.
[86] Impugned *Miletić* Decision, paras 30 and 32.
[87] Impugned *Miletić* Decision, para. 32 and 34.

satisfied with the guarantees provided by Serbia and the Republika Srpska.[88] The Trial Chamber concluded that based on all of the aforementioned factors, it was not satisfied that the 98*bis* Decision increased Miletić's flight risk.[89] It further concluded that Miletić did not pose a flight risk or a threat to witnesses, victims or other persons in the case.[90]

31. Turning to the humanitarian grounds provided in support of Miletić's request, the Appeals Chamber notes that the Trial Chamber considered that Miletić's loss of his mother, sister and father within a short duration and consequent wish to visit their gravesites and spend time with his family constituted sufficiently compelling grounds militating in favour of provisional release.[91] The Appeals Chamber observes that the Trial Chamber accordingly granted Miletić provisional release to Belgrade for a period of fourteen days, including a three day visit to the graves of his relatives in Republika Srpska.[92] The Appeals Chamber further notes that in his Response, Miletić clarified that his provisional release between 2 to 16 May would allow him to attend a commemoration ceremony taking place in the Republika Srpska 40 days after his father's death.[93] It is not clear whether this information was before the Trial Chamber when it rendered the Impugned *Miletić* Decision.

32. The Appeals Chamber finds that the Trial Chamber did not err in determining that the humanitarian grounds provided by Miletić warranted his provisional release to the Republika Srpska for a three-day period to visit the graves of his recently deceased relatives. However, the Appeals Chamber finds that the Trial Chamber's grant of an additional 11 days to visit his family in Belgrade was unreasonable. The Appeals Chamber reiterates that the duration of provisional release granted on humanitarian grounds should be proportional to the period of time necessary to carry out the humanitarian purpose of the release. The Appeals Chamber accordingly finds, Judge Güney dissenting, that a Trial Chamber properly exercising its discretion would have limited Miletić's provisional release to a visit to Republika Srpska for a period of time no longer than necessary for Miletić to visit the graves of his relatives.

33. The Appeals Chamber will not address the Prosecution's argument that the uncertainty concerning the 11 May general election in Serbia increases the flight risk of both Gvero and Miletić[94] given that the Prosecution failed to raise this issue before the Trial Chamber.

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[88] Impugned *Miletić* Decision, para. 37.
[89] Impugned *Miletić* Decision, para. 34.
[90] Impugned *Miletić* Decision, para. 35.
[91] Impugned *Miletić* Decision, paras 33 and 36.
[92] Impugned *Miletić* Decision, para. 39.
[93] Miletić Response, para. 19.
[94] Appeal, para. 19.

V. DISPOSITION

34. On the basis of the foregoing, the Appeals Chamber **GRANTS**, Judge Güney dissenting, the Prosecution Appeal in part, **REMANDS**, Judge Güney dissenting, the Impugned *Borovčanin* Decision to the Trial Chamber for a *de novo* adjudication of the duration of provisional release granted to Borovčanin and all consequent arrangements, **REMANDS**, Judge Güney dissenting, the Impugned *Miletić* Decision to the Trial Chamber for a *de novo* adjudication of the location and duration of provisional release granted to Miletić and all consequent arrangements, **REVERSES**, Judges Güney and Liu dissenting, the Impugned *Gvero* Decision, and **INSTRUCTS** the Registry of the International Tribunal to lift the confidential status of the *Borovčanin* Response.

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

Judge Güney and Judge Liu append Partly Dissenting Opinions.

Done this 15th day of May 2008,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

PARTLY DISSENTING OPINION OF JUDGE GÜNEY

1. In my Partly Dissenting Opinions appended to the *Prlić et al.* Decisions,[1] I expressed my disagreement with the majority's interpretation of the *Prlić* Decision of 11 March 2008[2] which results in imposing, in post-Rule 98*bis* proceedings, 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. In the present instance, the majority relies on this newly-created requirement, and states that "when considering a provisional release motion at the post-98*bis* stage of the proceedings, even when a Trial Chamber is satisfied that sufficient guarantees exist to offset the flight risk of an accused, it should not exercise its discretion to grant provisional release unless sufficiently compelling humanitarian reasons tip the balance in favour of allowing provisional release".[3] I respectfully dissent from this statement (I).[4]

2. Additionally, because of the majority's undue interference in the Trial Chamber's exercise of discretion, I cannot join the majority's finding regarding the length of Borovčanin and Miletić's provisional release (II).

I. THE NEWLY CREATED REQUIREMENT OF "SUFFICIENTLY COMPELLING HUMANITARIAN REASONS"

3. Since the new hurdle elaborated on by the majority in the *Prlić et al.* Decisions,[5] and endorsed in the Majority Decision,[6] 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 Opinions.

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[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 ("*Petković* Partly Dissenting Opinion"); *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.8, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Prlić* Dated 7 April 2008", 25 April 2008 ("*Prlić* Decision"), Partly Dissenting Opinion of Judge Güney ("*Prlić* Partly Dissenting Opinion"); *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.9, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Stojić* Dated 8 April 2008", 29 April 2008 ("*Stojić* Decision"), Partly Dissenting Opinion of Judge Güney ("*Stojić* Partly Dissenting Opinion"). The *Petković* Decision, the *Prlić* Decision and the *Stojić* Decision will be jointly referred to as the "*Prlić et al.* Decisions", and the *Petković* Partly Dissenting Opinion, the *Prlić* Partly Dissenting Opinion and the *Stojić* Partly Dissenting Opinion as "Partly Dissenting Opinions".

[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 (*Prlić* 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] Majority Decision, para. 24 (footnote omitted). *See* also paras 17, 31.

[4] I note that my Colleague, Judge Liu, also dissents with this holding for reasons similar to those developed in this section.

[5] *Petković* Decision, paras 15, 17, 19-20; *Prlić* Decision, paras 14, 16; *Stojić* Decision, paras 13, 14, 19, 20, and fn. 56.

[6] Majority Decision, para. 24; *See* also paras 17, 31.

4. Pursuant to Rule 65(B) of the Rules, a "Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person".[7] 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.[8] 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),[9] 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".[10]

5. The Majority Decision relies on the majority's reading of the *Prlić* Decision of 11 March 2008 in the *Petković* Decision[11] 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 98*bis* decision. According to the majority, even when the two requirements of Rule 65(B) of the Rules are met, after a Rule 98*bis* 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.[12]

6. 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"[13] 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 98*bis* 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 98*bis* 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

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[7] *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.
[8] *See* Majority Decision, para. 6.
[9] *Tarčulovski* Decision, para. 14.
[10] *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.
[11] *Petković* Decision, paras 15, 17, 19-20, and Disposition; *Prlić* Decision of 11 March 2008, para. 21; *See* also *Prlić* Decision, paras 14, 16, and *Stojić* Decision, paras 13, 14, 19, 20, and fn. 56.
[12] Majority Decision, para. 24; *See* also paras 17, 31.
[13] 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 provides 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 which could justify provisional

of 17 November 1999.[14] Consequently, the newly-built standard of "sufficiently compelling humanitarian reasons" breaches both the Rules and the continuing presumption of innocence guaranteed to accused pending trial.

7. 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 *Prlić* Decision of 11 March 2008.[15] 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 remaining 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.[16]

8. Indeed, in the *Prlić* 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

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release on compassionate grounds at the appellate stage of the proceedings before the Tribunal" for the purposes of Rule 65(I)(iii) of the Rules.

[14] IT/32/REV.17. Before this amendment, Rule 65(B) stated (IT/32/REV.16, 2 July 1999 (emphasis added)):

> (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.

[15] *Prlić* 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. Furthermore, I note that Judge Liu who was a member of the Bench of the *Prlić* Decision of 11 March 2008 indicates in his Partly Dissenting Opinion appended to the Majority Decision that the "reliance by the *Petković* Bench on the 11 March 2008 Decision to reach this finding was misplaced. The ruling in the 11 March 2008 was specific to the circumstances of that particular case and was made in light of the arguments presented." (Partly Dissenting Opinion of Judge Liu, para. 6. *See* also, paras 5, 7).

[16] I observe that the flight risk does often potentially exist, which is the raison d'être of restrictive conditions imposed upon release. The Impugned *Borovčanin* Decision provides a clear illustration of such a situation: "[T]he Trial Chamber continues to have some concerns as to the risk of flight on the part of Borovčanin. However, the Trial Chamber is satisfied that the limitation of the release to a very short period of time, under strict custodial conditions, will fully address these concerns." (Impugned *Borovčanin* Decision, para. 29; *See* also, para. 31.)

the Appeals Chamber, faced with a situation in which such a risk or danger could not be excluded, require sufficiently compelling humanitarian reasons.[17]

9. In the present instance, the Trial Chamber considered, for each Accused, that the criteria of Rule 65(B) of the Rules were met.[18] Therefore, the Trial Chamber was 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 circumstances related to each Accused and determine whether there were factors in favour of provisional release, which it did.

10. For these reasons, I disagree with the majority's finding that "a Trial Chamber properly exercising its discretion would have denied Gvero's provisional release request given that he did not propose any compelling humanitarian justifications for release."[19] After having balanced all factors related to Gvero,[20] the Trial Chamber found that Gvero's risk of flight had not increased following the 98*bis* Decision – a finding upheld by the Majority Decision.[21] I fail to understand how reasons sufficient for justifying provisional release automatically become insufficient following a Rule *98bis* decision despite the Trial Chamber's express finding of no increase in flight risk and absent any other change of circumstances. I note further that the Trial Chamber also considered that, given the "advanced stage of the proceedings", Gvero's provisional release should be limited to 14 days.[22] Consequently, I do not see any discernable error in the Trial Chamber's exercise of discretion.

II. LENGTH OF PROVISIONAL RELEASE

11. The Majority Decision states that, "even when provisional release is found to be justified on humanitarian grounds, the length of the release should be proportional to the circumstances".[23] I believe that provisional release should indeed be proportional to the circumstances of each accused – including, but not limited to, humanitarian reasons. The Majority Decision reiterates here the requirement of an explicit reasoning on this question built up in the *Prlić et al.* Decisions.[24] I have already expressed my reservations concerning such a systematic requirement of explicitness in the post-Rule 98*bis* provisional release context as contrary to what is generally required for the reasoning

[17] *Prlić* Decision of 11 March 2008, paras 19-21.
[18] Impugned *Borovčanin* Decision, paras 27, 29-30; Impugned *Gvero* Decision, paras 17-18; Impugned *Miletić* Decision, paras 34, 37.
[19] Majority Decision, para. 24.
[20] The Trial Chamber considered, *inter alia,* "Gvero's particular circumstances and history of compliance", including the crimes charged, his age (70 years), his voluntary surrender to the International Tribunal when the charges against him became known (Impugned *Gvero* Decision, paras 15, 17).
[21] Majority Decision, para. 23; Impugned *Gvero* Decision, para. 16.
[22] Impugned *Gvero* Decision, para. 18.
[23] Majority Decision, para. 18. *See* also para. 32.
[24] Majority Decision, para. 18, referring to *Stojić* Decision, para. 20; *Prlić* Decision, para. 18; *Petković* Decision, para. 17.

of decisions.[25] I acknowledge, however, that the majority is satisfied that the Trial Chamber did address the proportionality between the nature and weight of Borovčanin's circumstances and the duration of provisional release.[26]

12. However, the majority remands the Impugned *Borovčanin* and *Miletić* Decisions for a *de novo* adjudication of the duration of Borovčanin and Miletić's provisional release on the ground that the 7-day period and the 14-day period respectively granted to each of them are excessive.[27]

13. 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.[28] In the present instance, the Prosecution limits itself to claiming that "the periods granted for provisional release/custodial visit are excessive in light of the reasons given".[29] It also notes a decision issued in another case, specifying that "any period of provisional release/custodial visit that is granted similarly must be strictly limited to the minimum duration necessary to achieve the humanitarian purpose of the visit".[30] 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 particular circumstances of the individual accused".[31] 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 periods of provisional release respectively granted to Borovčanin and Miletić are excessive in light of the particular circumstances of each of them. 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.

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[25] *See Stojić* Partly Dissenting Opinion, para. 8; *Prlić* Partly Dissenting Opinion, para. 8. As illustrations to what is usually required for the reasoned opinions of decisions, *see i.e. 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 that "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)).

[26] Majority Decision, para. 18.

[27] Majority Decision, paras 18, 32, and Disposition.

[28] *See* Majority Decision, para. 4.

[29] Appeal, para. 27.

[30] *Ibid.*

[31] Majority Decision, para. 6 (footnote omitted).

14. I note moreover that the Trial Chamber properly balanced the circumstances relevant to each Accused. Regarding Borovčanin, the Trial Chamber considered (1) the absence of danger to any witness, victim or other person,[32] (2) that the "limitation of the release to a very short period of time, under strict custodial conditions" addresses fully the remaining concerns as to the flight risk,[33] (3) the fact that a previously granted provisional release was carried out without incident,[34] (4) the advanced age and the critical medical condition of Borovčanin's father, and the fact that there "may be few occasions left for a visit between father and son".[35] It then granted a limited period (7 days, including travel time) of provisional release to Borovčanin.[36] Unlike the majority, I am not convinced that the Trial Chamber included "time to allow Borovčanin to 'attend to his personal matters'"[37] in its assessment of the duration of the provisional release. I read the Impugned *Borovčanin* Decision as only permitting Borovčanin to also "attend to personal matters" while on provisional release.[38] In any event, in light of all the factors considered by the Trial Chamber, and given the broad margin of discretion afforded to Trial Chambers,[39] I fail to identify any discernable error or abuse of discretion by the Trial Chamber in its determination of the length of Borovčanin's provisional release. I thus disagree with the majority's holding that "a Trial Chamber properly exercising its discretion would have granted the custodial visit for a shorter period – namely, for a period no longer than the time necessary for Borovčanin to visit his ailing father".[40]

15. With regard to Miletić, the Trial Chamber took into account (1) the charges against him,[41] (2) his voluntary surrender,[42] (3) his compliance with the imposed conditions while previously provisionally released,[43] (4) the absence of flight risk despite the Rule 98*bis* Decision,[44] (5) the absence of danger to witnesses, victims or other persons,[45] (6) the advanced stage of the proceedings,[46]

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[32] Impugned *Borovčanin* Decision, para. 30.
[33] Impugned *Borovčanin* Decision, para. 29.
[34] *Ibid.*
[35] *Ibid.*
[36] Impugned *Borovčanin* Decision, paras 29, 31.
[37] Majority Decision, para. 18 (footnote omitted) and fn. 52.
[38] Impugned *Borovčanin* Decision, para. 31. The relevant sentence reads: "In addition, during his stay in the Republika Srpska he must spend every night in the local detention facility, while being allowed to visit his father or attend to personal matters during the day-time".
[39] *See* Majority Decision, para. 3. "Deference is afforded to the Trial Chamber's discretion in [...] decisions Fof provisional releaseğ 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.)
[40] Majority Decision, para. 18.
[41] Impugned *Miletić* Decision, para. 32.
[42] *Ibid.*
[43] Impugned *Miletić* Decision, paras 32, 35-36.
[44] Impugned *Miletić* Decision, paras 34, 36-37.
[45] Impugned *Miletić* Decision, paras 35, 37.
[46] Impugned *Miletić* Decision, para. 39.

(7) the loss of three immediate family members within a short duration, and Miletić's wish to visit their gravesites in Republika Srpska and spend some time with his family during this difficult period,[47] (8) the conditions imposed for provisional release,[48] and (9) the length of time granted for the preparation of the defence case.[49] Based on all these factors, the Trial Chamber granted Miletić provisional release "for a limited period of 14 days, which can include a short visit of three days to the graves of Miletić's relatives in Republika Srspka".[50] I do not see any discernable error or abuse of discretion in such a finding. I am of the opinion that the majority unduly interferes with the Trial Chamber's discretion in ruling that "a Trial Chamber properly exercising its discretion would have limited Miletić's provisional release to a visit to Republika Srpska for a period of time no longer than necessary for Miletić to visit the graves of his relatives".[51]

16. I recall that 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".[52] I believe that is what the Trial Chamber did in the Impugned Decisions.

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

Dated this 15th day of May 2008,
At The Hague, The Netherlands.

Mehmet Güney
Judge

[Seal of the International Tribunal]

[47] Impugned *Miletić* Decision, para. 33.
[48] Impugned *Miletić* Decision, para. 40.
[49] Impugned *Miletić* Decision, para. 39.
[50] *Ibid.*
[51] Majority Decision, para. 32.
[52] *See* Majority Decision, para. 3.

PARTIALLY DISSENTING OPINION OF JUDGE LIU

1. I respectfully disagree with the Majority decision that a Trial Chamber should not exercise its discretion to grant provisional release "unless sufficiently compelling humanitarian reasons tip the balance in favour of allowing provisional release" and its interference with the Trial Chamber's discretion in granting Gvero provisional release.[1] Not only is this holding and subsequent finding inconsistent with the long established jurisprudence of this Tribunal which has not required such a showing, but it also represents an *ultra vires* extension of the Rules. I note that my colleague, Judge Güney has previously filed dissenting opinions on this issue and has done so in the present case.[2] I fully align myself with the skilful and well reasoned analysis in his dissenting opinions, and contribute the following additional points in support of the holding that Rule 65(B) of the Rules does not require a showing of "compelling humanitarian reasons" prior to granting provisional release to accused persons after the rule 98*bis* stage.[3]

2. By requiring a demonstration of "compelling humanitarian reasons" prior to granting provisional release after the Rule 98*bis* stage, the Majority is essentially re-introducing the previous requirement in the Rules that an applicant should establish "exceptional circumstances" to justify the granting of provisional release.[4] Whilst the terms used are different, they are fundamentally the same. To illustrate my point, the Appeals Chamber in the *Petković* Decision held that:

> The perception that persons accused of international crimes are released, for a prolonged period of time, after a decision that a reasonable trier of fact could make a finding beyond any reasonable doubt that the accused is guilty (this being the meaning of a decision dismissing a Rule 98bis motion), could have a prejudicial effect on victims and witnesses.[5]

According to this holding, it seems the rationale behind this new principle is to restrict provisional release because the accused in this Tribunal are charged with international crimes, and secondly, that at the post-98*bis* stage a reasonable trier of fact *could* convict the accused. This was precisely

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[1] Majority Decision, para. 24.

[2] *Petković* Decision, pp. 12-15 and *Stojić* Decision, pp. 11-15. I further note that Judge Güney also objects to the Majority's finding regarding the length of provisional release of Borovčanin and Miletić at paras 11-15 of his Partially Dissenting Opinion. To the extent that the Majority's decision finding error in the amount of time granted for provisional release is based on a view that "compelling humanitarian reasons" have to be shown as a rule, I agree with Judge Güney. In my view, where provisional release is granted for a fixed period, the length of release should be proportional to that which the circumstances of the case require.

[3] *Prosecutor v. Prlić et. al*, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution's Urgent Appeal Against "*Decision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić*" Issued on 14 April 2008, 23 April 2008 ("*Pušić* Decision"), para. 14.

[4] Previously, Rule 65(B) read, "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. In November 1999 the additional requirement that "exceptional circumstances" had to be shown was deleted from the Rule.

the rationale behind the previous "exceptional circumstance" requirement deleted from the Rules, which was that:

> [T]he Rules have incorporated the principle of preventive detention of accused persons because of the extreme gravity of the crimes for which they are being prosecuted by the International Tribunal, and for this reason, subordinate any measure for provisional release to the existence of "exceptional circumstances".[6]

Additionally, like the Majority's new "compelling humanitarian reasons", the Trial Chambers in determining the existence of "exceptional circumstances" considered the probability of a conviction, when they considered "whether there is reasonable suspicion that [an accused] committed the crime or crimes as charged".[7]

3. As for what exactly "compelling humanitarian reasons" are, although they have not been defined by the Majority, they seem to amount to the same as the previous "exceptional circumstances" in practice. For example, thus far, in the *Stojić* and *Petković* Decisions, the Majority has considered the need to visit seriously ill family members "compelling humanitarian reasons".[8] Likewise, the ill-health of family members was considered an "exceptional circumstance" justifying provisional release under the old Rule.[9] All these similarities between the Appeals Chamber's new prerequisite to provisional release and the old Rule regulating provisional release, clearly show the Appeal's Chamber's error in the exercise of its appellate jurisdiction. Had the Appeals Chamber wanted to restrict situations in which provisional release may be granted by Trial Chambers and revert to the previous Rule after the Rule 98*bis* stage, the proper manner to go about it would have been to amend the Rules.

4. Furthermore, the Appeals Chamber exceeded its jurisdiction by adding a new pre-requisite to provisional release which is neither provided nor implied by the Rules. Whilst the Appeals

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[5] *Petković* Decision, para. 17.
[6] *Prosecutor v. Kupreskić et al.*, Case No. IT-95-16-PT, Decision on Motion for Provisional Release Filed by Zoran Kupreškić, Mirjan Kupreškić, Drago Josipović and Dragan Papić (Joined by Marinko Katava and Vladimir Šantić), 15 December 1997, para. 10, citing *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision Rejecting a Request for Provisional Release, 25 April 1996, p. 4.
[7] *Prosecutor v. Delalić et al*, Case No. IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnil Delalić, 1 October 1996, para. 21; *Prosecutor v. Simo Drljača and Milan Kovačević*, Case No. IT-97-24-PT, Decision on Defence Motion for Provisional Release, 21 January 1998, paras 15 and 16.
[8] *Stojić* Decision, para. 19; *Petković* para. 17. Similarly, the current Appeals Chamber Decision, para. 17 considered Borovčanin's request to see his ailing father, a compelling humanitarian reason.
[9] *Presecutor v. Kupreškić*, Case No. IT-95-16-AR65.4, Decision on Application for Leave to Appeal, 1 December 1999, p. 2; *Prosecutor v. Kordić and Cerkez*, Case No. IT-94-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, para. 12, an accused on appeal was granted provisional release, at which time the Appeals Chamber added that "in case of exceptional circumstances such as e.g. a substantial deterioration of the health

Chamber has the power to interpret the law, in this case it went further and improperly made the law. This is clear from a reading of Rule 65 which distinguishes between two situations: before an accused is convicted, in which case a Chamber has to be satisfied that an accused will appear for trial and if released will not pose a danger to any victim, witness or other person;[10] or after conviction, in which case he would additionally have to show that "special circumstances exist warranting such release".[11] I note that the majority in all three said decisions[12] requiring a showing of "compelling humanitarian circumstances" have not addressed this distinction in the Rules nor have they explained the difference between the new "compelling humanitarian reasons" and "special circumstances", if any. With respect, this illuminates the misguided nature of these decisions, because had the Rules intended to raise the threshold for provisional release at the post-98*bis* stage, like at the post-conviction stage, it would have similarly been explicitly provided for in the Rules.

5. This principle was based on an incorrect interpretation of another decision, and can thus be disregarded on the basis of cogent reasons in the interests of justice. I note that in reaching the conclusion that provisional release should not be granted unless sufficiently compelling humanitarian reasons tip the balance in favour of allowing provisional release, the Majority relies on the *Petković* Decision which in turn relied on the 11 March 2008 Decision[13] of which I was a member. Citing the 11 March 2008 decision, the *Petković* Decision stated:

> Concerning the humanitarian reasons sufficient to justify provisional release, the Appeals Chamber notes that the development of the Tribunal's jurisprudence implies that an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist.[14]

6. Having been a member of the Bench of the Appeals Chamber that rendered the 11 March Decision, I can say with the utmost certainty that the reliance by the *Petković* Bench on the 11 March 2008 Decision to reach this finding was misplaced. The ruling in the 11 March 2008 Decision was specific to the circumstances of that particular case and was made in light of the arguments presented. It was not creating a general principle. By assessing whether the Trial

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conditions of Dario Kordić's mother, the Defence may submit a detailed request for a temporarily controlled visit to his mother."

[10] Rule 65(B).

[11] Rule 65(I).

[12] *Petković* Decision, *Stojić* Decision, and the present decision of the Majority.

[13] *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 Ćorić, 11 March 2008 ("11 March 2008 Decision").

[14] *Petković* Decision, para. 17. The *Petković* Decision also cites at footnote 52 other decisions which are clearly irrelevant to its conclusion that "compelling humanitarian reasons" are required by the jurisprudence.

Chamber had erred in finding that humanitarian reasons existed to justify provisional release, it did not mean that in each and every case "compelling humanitarian reasons" were to become a prerequisite to granting provisional release. Had that been the decision, I would not have supported it, just as I do not support it now.[15]

7. Instead, the relevant section of the 11 March 2008 Decision was based on the long-standing principle that a Trial Chamber may, in the exercise of its discretion determine whether the particular circumstances of a case, in light of the arguments of a party, warrant the granting of provisional release, and that such determination is an additional discretionary consideration which has no bearing upon the assessment of the mandatory factors in Rule 65.[16] While these are additional discretionary considerations, where a Trial Chamber errs in its assessment of these discretionary factors, as stated in the standard of review, the Appeals Chamber may step in and correct the error, and in doing so may reverse the decision of the Trial Chamber. This is what happened in the 11 March 2008 Decision and what has happened over the years in provisional release interlocutory appeals and did not mean that the Appeals Chamber's decision was creating a new requirement to Rule 65.

8. Lastly, I agree with Judge Güney that the distinction between granting provisional release before and after dismissal of a Rule 98*bis* motion is without merit because at that stage the presumption of innocence has not been rebutted. But the Majority's position is not only flawed in practice but in its application, because even if such an assessment were required, the proper Chamber to access to what degree a Rule 98*bis* ruling should have a bearing on provisional release is the Trial Chamber which is better acquainted than the Appeals Chamber with the case before it. This is particularly the case at this stage as the Trial Chamber would have made, prior to granting provisional release, a renewed and explicit consideration of the risk of flight posed by the accused pursuant to Rule 65(B) as required by the jurisprudence.[17] It has to be borne in mind, however, that in rendering its decision at this point the Trial Chamber is not without limitations: having only made it potentially half way through trial, it cannot explicitly and definitively in a provisional release decision state its impression of the facts and evidence before it. These factors should have been taken into account prior to interfering with the Trial Chamber's discretion.

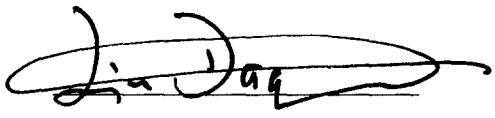
[15] I note that a similar mis-reading of the *Tarčulovski* Decision was made by the Appeals Chamber in the *Petković* Decision, fn. 54.
[16] *Pušić* Decision, para. 14.
[17] 11 March 2008 Decision, para. 20.

9. In conclusion, I reiterate the Appeals Chamber's words in the *Pušić* Decision, that, "'any humanitarian grounds have to be assessed' in the 'context' of the two requirements expressly listed in Rule 65(B) of the Rules. Rule 65(B) of the Rules does not mandate humanitarian justification for provisional release."[18] Although the Majority has nowhere in their decision addressed this divergence in principle in the jurisprudence, I can only hope that in future steps may be taken to ensure greater compliance with the Rules, together with greater certainty and fairness for accused persons being tried before this International Tribunal.

[18] *Pušić* Decision, para. 14.

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

Dated this thirteenth day of May 2008,
At The Hague, The Netherlands.



Liu Daqun
Judge

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