



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

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Case No.: IT-04-74-AR65.14

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IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Iain Bonomy
Judge Fausto Pocar
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr John Hocking

Decision of: 5 June 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON JADRANKO PRLIĆ'S APPEAL AGAINST THE *DÉCISION*
RELATIVE À LA DEMANDE DE MISE EN LIBERTÉ PROVISOIRE DE
L'ACCUSÉ PRLIĆ, 9 APRIL 2009**

Office of the Prosecutor

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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
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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 (“Appeals Chamber” and “Tribunal”, respectively) is seized of “Jadranko Prlić’s Appeal Against the *Décision relative à la demande de mise en liberté provisoire de l’accusé Prlić*, 9 April 2009” (“Appeal”) filed by Counsel for Jadranko Prlić (“Prlić”) on 16 April 2009 against the “*Décision relative à la demande de mise en liberté provisoire de l’accusé Prlić*” (“Impugned Decision”), issued by Trial Chamber III (“Trial Chamber”) on 9 April 2009 and denying provisional release for Prlić. The Prosecution responded on 27 April 2009,¹ and Prlić replied on 1 May 2009.²

I. BACKGROUND

2. On 17 March 2009, Prlić filed a motion for provisional release in which he requested provisional release until the final judgement in his case.³ On 9 April 2009, the Trial Chamber issued the Impugned Decision, whereby it rejected the Motion for Provisional Release *inter alia* on the grounds that the reasons for provisional release advanced by Prlić: (i) did not constitute sufficiently compelling humanitarian reasons as required by the jurisprudence of the Appeals Chamber by which the Trial Chamber is bound; and (ii) were not in conformity with the law of the Tribunal, as defined by its Statute and the Rules of Procedure and Evidence (“Rules”) as interpreted by the Appeals Chamber.⁴

3. Furthermore, the Trial Chamber held that: (i) following the Appeals Chamber’s decision in these proceedings of 20 January 2009, the Trial Chamber had to find that Prlić posed a flight risk;⁵ (ii) it could not consider arguments relating to international human rights standards in deciding whether to provisionally release Prlić;⁶ (iii) Prlić’s participation in this trial would significantly decrease if he was provisionally released;⁷ and (iv) provisionally releasing Prlić would undermine the perceived legitimacy of proceedings and cause an inequality in treatment between all accused at trial.⁸

¹ Prosecution’s Response to Jadranko Prlić’s Appeal Against the *Décision relative à la demande de mise en liberté provisoire de l’accusé Prlić*, 9 April 2009 (“Response”).

² Jadranko Prlić’s Reply to Prosecution’s Response to Jadranko Prlić’s Appeal Against the *Décision relative à la demande de mise en liberté provisoire de l’accusé Prlić*, 1 May 2009 (“Reply”).

³ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić’s Motion for Provisional Release, 17 March 2009, p. 1 (“Motion for Provisional Release”). Three annexes were attached to the Motion for Provisional Release (“Annexes”).

⁴ Impugned Decision, para. 45.

⁵ Impugned Decision, para. 35, referring to *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.13, Reasons for Decision on Prosecution’s Appeal of the Trial Chamber’s 10 December 2008 Decision on Prlić Provisional Release During Winter Recess and Corrigendum, 20 January 2009 (“Decision of 20 January 2009”).

⁶ Impugned Decision, para. 43.

⁷ *Id.*, para. 41.

⁸ *Id.*, para. 44.

4. Prlić raises eight grounds of appeal and requests the Appeals Chamber to reverse the Impugned Decision and to grant his request for provisional release.⁹

II. STANDARD OF REVIEW

5. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of a Trial Chamber's decision.¹⁰ The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.¹¹ Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.¹²

6. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".¹³ The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.¹⁴

III. APPLICABLE LAW

7. Under Rule 65(B) of the Rules, a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, 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.¹⁵

8. 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

⁹ Motion for Provisional Release, p. 21.

¹⁰ See e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 17 December 2008, para. 4 ("*Praljak Decision*"); *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006 ("*Brahimaj Decision*"), para. 5; *Prosecutor v. 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, para. 5.

¹¹ See e.g., *Praljak Decision*, para. 4; *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, 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, para. 5.

¹² *Id.*

¹³ *Praljak Decision*, para. 5 (internal quotations omitted).

¹⁴ *Id.*

¹⁵ *Praljak Decision*, para. 6; *Brahimaj Decision*, para. 6.



opinion indicating its view on those relevant factors.¹⁶ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁷ 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.¹⁸ The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.¹⁹ Moreover, an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, should only be granted when serious and sufficiently compelling humanitarian reasons exist.²⁰

IV. DISCUSSION

9. Prlić raises the following eight grounds of appeal:

- I. The Trial Chamber erred as a matter of law and abused its discretion by not embarking upon a *de novo* analysis of all arguments raised by the Prlić Defence (“first ground of appeal”).²¹
- II. The Trial Chamber erred as a matter of law and abused its discretion by not taking into account the fact that there is nothing in the Rules to suggest that provisional release should be limited to recess periods in reaching its decision on provisionally releasing Prlić (“second ground of appeal”).²²
- III. The Trial Chamber erred as a matter of law and abused its discretion when it failed to consider the fact that trials *in absentia* – whether the accused has voluntarily or involuntarily waived his presence – are permissible in international criminal law generally and according to the practice of this Tribunal (“third ground of appeal”).²³
- IV. The Trial Chamber erred as a matter of law and abused its discretion by not embarking upon a substantive consideration of the legal arguments raised by the

¹⁶ *Praljak* Decision, para. 7; *Brahimaj* Decision, para. 10.

¹⁷ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

¹⁸ *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.

¹⁹ *Praljak* Decision, para. 7; *Stanišić* Decision, para. 8.

²⁰ *Cf. Praljak* Decision, para. 15.

²¹ Appeal, p. 5. See also Reply, paras 5-7.

²² Appeal, p. 7.

²³ Appeal, p. 8.

Prlić Defence challenging the legitimacy of the requirement of sufficiently compelling humanitarian reasons (“fourth ground of appeal”).²⁴

- V. The Trial Chamber erred as a matter of law and abused its discretion by not considering the arguments relating to Prlić’s fundamental fair trial rights when reaching its decision (“fifth ground of appeal”).²⁵
- VI. The Trial Chamber erred as a matter of law and fact when it found that Prlić constituted a flight risk (“sixth ground of appeal”).²⁶
- VII. The Trial Chamber erred as a matter of fact when it found that Prlić’s participation in trial proceedings would only decrease if provisionally released (“seventh ground of appeal”).²⁷
- VIII. The Trial Chamber erred as a matter of law and fact when it placed concerns relating to the equal treatment of the Co-Accused and the perceived legitimacy of the trial over the protection of Prlić’s substantive human rights (“eighth ground of appeal”).²⁸

10. At the outset, the Appeals Chamber observes that the Trial Chamber, in the Impugned Decision, held that it was bound by the Decision of 20 January 2009 in which the Appeals Chamber found that Prlić’s breach of an order not to have contact with potential witnesses put into doubt his reliability in abiding by the conditions of provisional release.²⁹ The Trial Chamber held in particular that the Appeals Chamber found that such breach of an order not to have contact with potential witnesses has an impact on Prlić’s risk of flight and on the influence he could have on potential witnesses.³⁰ As a consequence, the Trial Chamber found that it could only reject Prlić’s argument that he does not pose a risk of flight³¹ and did not consider whether it was satisfied that Prlić, if released, would not pose a danger to any victim, witness or other person. The Appeals Chamber finds that the Trial Chamber erred in this respect.

11. The Appeals Chamber recalls that when deciding whether the requirements of Rule 65(B) of the Rules are met, a Trial Chamber must consider all relevant factors that a reasonable Trial

²⁴ Appeal, p. 10.

²⁵ Appeal, p. 14.

²⁶ Appeal, p. 18. *See also* Reply, paras 1-4.

²⁷ Appeal, p. 19.

²⁸ Appeal, p. 20.

²⁹ Decision of 20 January 2009, para. 10.

³⁰ Impugned Decision, para. 35: “[...] *n’est pas sans avoir d’incidence sur le risque de fuite dudit Accusé et sur l’influence qu’il serait susceptible d’exercer sur des témoins potentiels.*”

³¹ Impugned Decision, para. 35.

Chamber would have been expected to take into account before coming to a decision.³² It must then provide a reasoned opinion indicating its view on those relevant factors.³³ In the present case, the Trial Chamber failed to do so. Instead, it held that it was bound by the Decision of 20 January 2009³⁴ and as a consequence it failed to find whether it is satisfied that the requirements of Rule 65(B) of the Rules were fulfilled.

12. The Appeals Chamber recalls that in its Decision of 20 January 2009, it found that

[i]n addition to any bearing on the question of the risk of flight, the possibility that potential witnesses are unduly influenced in such circumstances [where Prlić had breached an order not to contact potential witnesses] is one of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision under Rule 65(B) of the Rules.³⁵

The Appeals Chamber then held that the Trial Chamber erred in assessing the breach of the conditions of provisional release imposed upon Prlić. The Appeals Chamber concluded that previous breaches of the conditions of provisional release ought to be taken into consideration when assessing the criteria set forth in Rule 65(B). The Decision of 20 January 2009 did not, however, relieve the Trial Chamber from making a finding as to whether it is satisfied that the requirements of Rule 65(B) of the Rules are met in the present case.

13. The Trial Chamber's erroneous interpretation of the Decision of 20 January 2009 is demonstrated by the fact that the factual circumstances on the basis of which the Appeals Chamber decision was made may well have changed by the time a new request for provisional release is before the Trial Chamber. In this respect, the Appeals Chamber recalls that the relevant factors which must be taken into account before coming to a decision pursuant to Rule 65(B) of the Rules,

as well as the weight to be accorded to them, depends upon the particular circumstances of each case. 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.³⁶

In particular, a Trial Chamber is required to assess the relevant factors as they exist at the time when it reaches its decision on provisional release.³⁷ Consequently, the Trial Chamber erred in merely referring to the Decision of 20 January 2009 without finding whether it is satisfied that the

³² *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on Popović's Motion for Provisional Release, 1 July 2008 ("*Popović* Decision of 1 July 2008"), para. 8.

³³ *Id.*

³⁴ Impugned Decision, para. 35.

³⁵ Decision of 20 January 2009, para. 11.

³⁶ *Pušić* Decision, para. 7.

³⁷ *Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ndirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release, 7 April 2009, para. 16, referring *inter alia* to *Popović* Decision of 1 July 2008, para. 8.

requirements of Rule 65(B) of the Rules, in the factual circumstances before it at the time the Impugned Decision was rendered, were met.

14. This error, however, did not invalidate the Impugned Decision, because the Trial Chamber correctly dismissed the Motion for Provisional Release for its failure to show any compelling humanitarian reasons justifying provisional release.³⁸ Prlić's submission under his fourth ground of appeal that the Trial Chamber erroneously abused its discretion in failing to consider his legal arguments challenging the legitimacy of the requirement of sufficiently compelling humanitarian reasons must fail.³⁹ In essence, Prlić asked the Trial Chamber to depart from binding jurisprudence. The Appeals Chamber finds that the Trial Chamber did not err when it followed this jurisprudence and required him to show compelling humanitarian reasons to justify provisional release at this stage of the proceedings.⁴⁰

15. Furthermore, Prlić requests that the Appeals Chamber reconsider the legitimacy of the requirement of sufficiently compelling humanitarian reasons.⁴¹ The Appeals Chamber recalls that an accused's prolonged provisional release after a decision pursuant to Rule 98bis of the Rules could have a prejudicial effect on victims and witnesses,⁴² a concern that is equally pertinent with respect to Prlić's present request. Further, the Appeals Chamber has previously found that the 98bis Ruling in this case constituted a significant change in circumstances, which warranted a renewed and thorough evaluation of the risk of flight. Mindful of such a flight risk at a late stage of proceedings, the Tribunal's jurisprudence implies that an application for provisional release, in particular brought after the close of the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist.⁴³ The Appeals Chamber finds that Prlić has not shown any cogent reasons to depart from this jurisprudence⁴⁴ and dismisses his request accordingly.

16. Having thus found that the Trial Chamber correctly rejected the Motion for Provisional Release on the basis that Prlić did not advance sufficiently compelling humanitarian reasons to be

³⁸ Impugned Decision, para. 36, referring to *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision relative à la demande en mise en liberté provisoire de l'accusé Petković* Dated 31 March 2008", 21 April 2008, ("*Petković* Decision"), para. 17 (with further references). See also Impugned Decision, paras 37, 43. See also *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR65, Decision on Appeal Concerning Provisional Release, 20 May 2009, para. 8, footnote 28.

³⁹ Appeal, paras 18-25. See also Reply, para. 6.

⁴⁰ Impugned Decision, para. 43. See also *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 113: "The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers [...]."

⁴¹ Appeal, paras 31-33.

⁴² *Petković* Decision, para. 17.

⁴³ *Petković* Decision, paras 15, 17 (with further references).

⁴⁴ See *inter alia* *Praljak* Decision, paras 14-15, citing *inter alia* *Prosecutor v. Zoran Žigić*, Case No. ICTY-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement Delivered on 28 February 2005", 26 June 2006, para. 9.

granted provisional release,⁴⁵ the Appeals Chamber is not required to consider Prlić's remaining grounds of appeal.

V. DISPOSITION

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

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



Judge Mehmet Güney
Presiding

Judge Mehmet Güney appends a partially dissenting opinion.

Dated this fifth day of June 2009,
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴⁵ Impugned Decision, paras 45-46.

OPINION PARTIELLEMENT DISSIDENTE DU JUGE GÜNEY

1. Dans plusieurs décisions antérieures⁴⁶, j'ai eu l'occasion d'exprimer mon désaccord avec l'interprétation de la Décision du 11 mars 2008⁴⁷ faite par la majorité dans la décision *Petković* qui impose une condition supplémentaire à celles énoncées à l'article 65 B) du Règlement de Procédure et Preuve⁴⁸ dans le cadre d'une demande de mise en liberté provisoire suite à une décision prise au titre de l'article 98 *bis*, soit celui dit « des raisons humanitaires suffisamment impérieuses »⁴⁹.
2. Comme élaboré dans mes opinions dissidentes antérieures, je considère que l'ajout systématique de la condition de « raisons humanitaires impérieuses » lors de l'évaluation d'une demande de mise en liberté provisoire après une décision de l'article 98*bis* viole non seulement la présomption d'innocence garantie par le Statut du Tribunal⁵⁰, mais également la discrétion accordée à la Chambre de première instance ainsi que le Règlement. Je suis d'accord pour affirmer que des raisons humanitaires soulevées par l'accusé sont des facteurs à prendre en considération et devront être appréciés dans le contexte des deux conditions prévues à l'article 65 B) du Règlement.⁵¹ En effet, je crois que seul ce raisonnement juridique permet une lecture de la Décision du 11 mars 2008 compatible avec le libellé de l'article 65 B) du Règlement, la discrétion déferée à la Chambre de première instance ainsi que le respect de la présomption d'innocence.
3. Dans la présente décision, je suis d'accord avec la majorité⁵² qu'une erreur a effectivement été commise par la Chambre de première instance relativement à l'évaluation des conditions

⁴⁶ *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR65.7, Décision concernant l'appel interjetée par l'Accusation contre la Décision relative à la demande de mise en liberté provisoire de l'Accusé Petković rendue le 31 mars 2008, 21 avril 2008 (« Décision *Petković* »), Opinion Partiellement Dissidente du Juge Güney; *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR65.8, Décision relative à l'appel interjeté par l'Accusation contre la Décision relative à la demande de mise en liberté provisoire de l'Accusé Prlić rendue le 7 avril 2008, 25 avril 2008, Opinion Partiellement Dissidente du Juge Güney (« Décision du 25 avril »); *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR65.6, Motifs de la Décision du 14 avril 2008 concernant l'appel urgent interjeté par l'Accusation contre la Décision relative à la demande de mise en liberté provisoire de l'Accusé Pušić, 23 avril 2008; *Le Procureur c/ Popović et consorts.*, affaire n° IT-05-88-AR65.4, *Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletic's Motions for Provisional Release During the Break in the Proceedings*, 15 Mai 2008, Opinion Partiellement Dissidente des juges Liu et Güney.

⁴⁷ *Le Procureur c/ Prlić et consorts*, affaire n° IT-04-74-AR65.5, Décision relative à l'appel unique interjeté par l'Accusation contre les décisions ordonnant la mise en liberté provisoire des Accusés Prlić, Stojić, Praljak, Petković et Čović, 11 mars 2008 (« Décision du 11 mars 2008 »).

⁴⁸ Règlement de Procédure et de Preuve, tel qu'amendé le 4 novembre 2008. (ci-après « Règlement »).

⁴⁹ *Le Procureur c/ Prlić*, Affaire n° IT-04-74-AR65.5, *Decision on Prosecutor's Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čović*, 11 mars 2008 (« Décision du 11 mars 2008 »). J'aimerais préciser que je ne faisais pas parti du Collège de juges qui a rendu cette décision.

⁵⁰ Statut actualisé du Tribunal pénal international pour l'ex-Yougoslavie, septembre 2008, article 21 3).

⁵¹ Décision du 25 avril 2009, Décision partiellement dissidente du Juge Güney, para. 3.



prévues à l'article 65 B) du Règlement, et en particulier avec l'évaluation du risque de fuite de l'accusé Prlić. Toutefois, elle considère que cette erreur n'invalide pas la décision attaquée étant donné qu'en l'absence de raisons humanitaires impérieuses, la Chambre de première instance devait rejeter la demande sans avoir à évaluer toutes les conditions posées à l'article 65 B) du Règlement. Je suis en désaccord avec cette conclusion.

4. Selon moi, l'erreur commise par la Chambre de première instance et relevée par la majorité s'explique de la manière suivante : lors de l'évaluation de la condition relative au risque de fuite de l'Accusé Prlić, la Chambre de première instance conclut que « le procès n'a pas connu de développements procéduraux notables depuis la décision 98 *bis* qui suggèreraient un accroissement du risque de fuite de l'Accusé Prlić »⁵³. En d'autres mots, que M. Prlić ne représente pas un risque de fuite. Toutefois, elle arrive à la conclusion contraire car elle se dit liée par la conclusion de faits de la Décision du 20 janvier 2009⁵⁴ dans laquelle la Chambre d'appel énonce que les violations antérieures des conditions de mise en liberté provisoire par l'Accusé « sème le doute sur la fiabilité de l'Accusé Prlić à respecter les conditions assorties aux ordonnances de mise en liberté provisoire et n'est pas sans avoir d'incidence sur le risque de fuite dudit Accusé et sur l'influence qu'il serait susceptible d'exercer sur des témoins potentiels »⁵⁵. La présente décision sanctionne le raisonnement de la Chambre de première instance et rappelle que celle-ci doit évaluer les critères tels qu'ils se présentent au moment de la décision quant à la mise en liberté provisoire et non pas se baser sur les conclusions de faits d'une décision antérieure. Elle précise que la Décision du 20 mars 2009 souligne en effet que les bris de conditions antérieures doivent être pris en considération dans l'évaluation des conditions, mais ne décharge pas la Chambre de première instance de l'obligation d'évaluer ces critères selon les conditions propres de l'accusé au moment de la décision sur la mise en liberté provisoire⁵⁶. Je suis d'accord avec ce raisonnement. En revanche, contrairement à la présente décision⁵⁷, je suis d'avis que la Chambre de première instance a, ce faisant, commis une « erreur manifeste » en concluant qu'elle demeurerait liée à la conclusion de fait de la Chambre d'appel.
5. Je note par ailleurs que le raisonnement juridique élaboré dans la décision s'inscrit dans la même logique à laquelle j'adhère dans mes opinions antérieures partiellement dissidentes

⁵² Décision, para. 12 et suivants.

⁵³ Décision attaquée, para. 34.

⁵⁴ *Le Procureur c/ Prlić et consorts*, Affaire n° IT-04-74-AR65.13, Motifs de la Décision relative à l'Appel interjeté par l'Accusation contre la décision rendue le 10 décembre 2008 par la Chambre de première instance concernant la mise en liberté provisoire de l'Accusé Jadranko Prlić pendant les vacances judiciaires d'hiver et corrigendum, 20 janvier 2009, (« Décision du 20 janvier 2009 »).

⁵⁵ Décision attaquée, para. 35.

⁵⁶ Décision, para. 13.

concernant le changement de circonstances à la suite d'une décision rendue au titre de l'article 98 *bis* du Règlement. En effet, je suis d'avis que la décision de l'article 98 *bis* doit faire partie de l'évaluation du risque de fuite de l'accusé au moment de la décision de mise en liberté provisoire, mais que ce facteur à lui seul ne peut mener à la conclusion irréversible que l'accusé représente effectivement un risque de fuite.⁵⁸ L'évaluation doit être faite de manière casuistique et prendre en considération l'ensemble des circonstances propres à l'accusé, incluant le changement de circonstances suite à une décision basée sur l'article 98 *bis* ou suite à un bris de condition de mise en liberté provisoire.

6. En conclusion, je considère donc que la Chambre de première instance a commis une erreur dans l'évaluation des conditions prévues à l'article 65 B) du Règlement, non seulement dans l'évaluation du risque de fuite mais également en omettant de se pencher sur l'évaluation du deuxième critère, soit la mise en danger des victimes et témoins, et ce même en l'absence de raisons humanitaires impérieuses. Cependant, et contrairement à l'opinion majoritaire, je crois que cette erreur constitue une « erreur manifeste » qui commande l'intervention de la Chambre d'appel et invalide la décision attaquée. Par conséquent, je suis d'avis que l'appel devrait être accueilli.

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



Judge Mehmet Güney

Dated this fifth day of June 2009,
At The Hague
The Netherlands

[Seal of the Tribunal]

⁵⁷ Décision, paras 12-13.

⁵⁸ Décision du 7 avril 2008, para. 14 où le raisonnement de la décision majoritaire explique qu'une décision rendue au titre de l'article 98*bis* opère un changement irréversible dans les circonstances de tout accusé pour lequel les critères de la règle 65 B) ne pourront jamais être comblés et donc seuls des raisons humanitaires impérieuses pourront légitimer une mise en liberté provisoire.