

**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

IT-08-91-T  
D11261-011247  
28 FEBRUARY 2011

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JF

Case No: IT-08-91-T  
Date: 25 February 2011  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Burton Hall, Presiding  
Judge Guy Delvoie  
Judge Frederik Harhoff

**Registrar:** Mr. John Hocking

**Decision of:** 25 February 2011

**PROSECUTOR**

v.

**MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN**

***PUBLIC***

**DECISION DENYING MIĆO STANIŠIĆ'S REQUEST  
FOR PROVISIONAL RELEASE DURING THE BREAK  
AFTER THE CLOSE OF THE PROSECUTION CASE  
WITH SEPARATE DECLARATION OF  
JUDGE GUY DELVOIE**

**The Office of the Prosecutor**

Ms. Joanna Korner  
Mr. Thomas Hannis

**Counsel for the Accused**

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić  
Mr. Dragan Krgović and Mr. Aleksandar Aleksić for Stojan Župljanin

1. **TRIAL CHAMBER II** (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of ”Mr. Stanišić’s motion for provisional release during upcoming break in trial proceedings”, filed on 26 January 2011 with confidential annexes (“Motion”). The Prosecution responded on 2 February 2011 (“Response”).<sup>1</sup> On 4 February 2011, the Defence of Mićo Stanišić (“Defence”) filed a reply (“Reply”).<sup>2</sup> On 7 February 2011, the Defence filed the guarantee from the government of Serbia (“Serbia”)<sup>3</sup> and on 8 February 2011, the government of the Kingdom of the Netherlands (“the Netherlands”) filed a correspondence on the request for provisional release.<sup>4</sup>

## I. SUBMISSIONS

### 1. Motion

2. The Defence requests that Mićo Stanišić be granted “temporary provisional release” from 1 February to 17 March 2011, on the same terms and conditions under which he has previously been released or under such conditions as the Trial Chamber deems appropriate to impose pursuant to Rule 65(C) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).<sup>5</sup>

3. The Defence submits that Mićo Stanišić surrendered voluntarily to the Tribunal within four days of being formally notified of the indictment; voluntarily co-operated with the Prosecution; has always behaved respectfully towards the Trial Chamber; has always been in compliance with the terms and conditions of his provisional release, including any variation to those terms and conditions; and poses no risk of flight, nor any danger to any victim, witness or other person.<sup>6</sup>

4. The Defence further submits that Mićo Stanišić’s defence team will be in Belgrade “preparing the Rule 65 *ter*(G) brief and actively preparing for the defence case during the upcoming break in trial proceedings.”<sup>7</sup> It asserts that “direct and continuous cooperation between Mr. Stanišić and his Defence team is indispensable for the team’s planned work activities and would considerably enhance its future performance” and that Mićo Stanišić’s presence in Belgrade would

<sup>1</sup> Prosecution’s response to Mr. Stanišić’s motion for provisional release during the upcoming break in trial proceedings, 2 Feb 2011. The response was filed pursuant to the Trial Chamber’s order for an expedited response, hearing, 27 Jan 2011, T. 19280.

<sup>2</sup> Application for leave to file a reply and reply to the Prosecution’s response to Mr. Stanišić’s motion for provisional release during the upcoming break in trial proceedings, 4 Feb 2011.

<sup>3</sup> Supplement to Mr. Stanišić’s motion for provisional release during the upcoming break in trial proceedings, 7 Feb 2011, filed publicly with confidential Annex A.

<sup>4</sup> Correspondence from Host Country, 8 Feb 2011 (confidential).

<sup>5</sup> Motion, paras 1-2, 11.

<sup>6</sup> *Id.*, para. 9.

<sup>7</sup> *Ibid.*

therefore be “important to the logical and efficient preparation for the resumption of trial proceedings”.<sup>8</sup> The Defence submits that the Trial Chamber “must use its power of discretion to uphold fairness and the interests of justice” and should do so “in a compassionate and reasonable manner”.<sup>9</sup>

## 2. Response

5. The Prosecution argues that the Trial Chamber must deny the Motion as a matter of law because Mićo Stanišić has failed to provide any humanitarian grounds for provisional release, as required by settled jurisprudence.<sup>10</sup> In support of this argument, the Prosecution cites an Appeals Chamber decision in the *Prlić* case which states that “an application for provisional release brought at a late stage of proceedings, and in particular after the close of the the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist.”<sup>11</sup> It also cites a recent decision in the *Perišić* case in which the Trial Chamber ruled that, according to the jurisprudence of the Appeals Chamber, “in the absence of [...] humanitarian grounds the Trial Chamber is deprived of any discretionary power [to grant provisional release] when proceedings reach an advanced stage”.<sup>12</sup>

6. The Prosecution submits that the fact that Mićo Stanišić did not move for a judgement of acquittal pursuant to Rule 98 bis “has no impact on [his] need to establish serious and sufficiently compelling humanitarian grounds for his provisional release”.<sup>13</sup> It concludes that that the Motion “is devoid of any humanitarian grounds that would justify [Stanišić’s] provisional release at this juncture in the case [and accordingly submits] that the Trial Chamber must deny his request for provisional release” absent any subsequent submission providing “sufficiently compelling humanitarian grounds for his release.”<sup>14</sup>

## 3. Reply

7. The Defence requests leave to file a reply and submits that “[d]ecisions on motions for provisional release are fact intensive and cases must be considered on an individual basis in the

<sup>8</sup> *Ibid.*

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

<sup>10</sup> Response, paras 2-5, 8-9.

<sup>11</sup> *Id.*, para. 3, citing *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR65.7, Decision on “Prosecution’s appeal from décision relative à la demande de mise en liberté provisoire de l’Accusé Petković dated 31 March 2008”, 21 Apr 2008 (“*Prlić* 21 April 2008 Decision”), para. 17.

<sup>12</sup> Response, paras 6-7, citing *Prosecutor v. Perišić*, Case No. IT-04-81-T, Public redacted version of decision on Mr. Perišić’s motion for provisional release during the summer recess, 15 Jul 2010 (“*Perišić* July 2010 Decision”), para. 16.

<sup>13</sup> *Id.*, para. 6, referring, *inter alia*, to *Perišić* July 2010 Decision, para. 16.

<sup>14</sup> Response, para. 8.

light of the particular circumstances of the accused.”<sup>15</sup> In this case, the Defence submits, “circumstances [...] warrant the granting of provisional release.”<sup>16</sup> In support of its position, the Defence argues, first, that a Trial Chamber may order provisional release when the applicant satisfies the provisions of Rule 65, and secondly, cites a decision in which the Appeals Chamber states that the Trial Chamber “should” grant provisional release “when serious and sufficiently compelling humanitarian reasons exist”.<sup>17</sup>

8. Furthermore, the Defence submits that the fact that the Prosecution has closed its case and the fact that Mićo Stanišić made no application pursuant to Rule 98 bis “should have no adverse impact upon Mr. Stanisic’s request for provisional release.”<sup>18</sup> It notes that Mićo Stanišić was recently granted provisional release during the last winter recess, “very late in the Prosecution Case” and that only five witnesses have testified since then.<sup>19</sup>

9. Finally, the Defence submits that “provisional release may be granted at a ‘late stage of proceedings’ as a matter of judicial discretion in the light of the particular circumstances of the individual accused” and jurisprudence “does not preclude the Trial Chamber from granting Mr. Stanišić provisional release during the upcoming break in trial proceedings”.<sup>20</sup>

#### 4. Other filings

10. The guarantee from Serbia provides, *inter alia*, that Serbia “undertakes, in the event that the [Trial Chamber] grants provisional release to [...] Mićo Stanišić, to comply with all orders issued of the [...] Trial Chamber so that the accused is able to appear before the [...] Tribunal at any time”.<sup>21</sup>

11. The Netherlands, the host state, filed a communication on 8 February 2011, wherein it states that it has no objection to the request for provisional release.<sup>22</sup>

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<sup>15</sup> Reply, paras 1-2.

<sup>16</sup> *Id.*, para. 2.

<sup>17</sup> Reply, para. 4, citing *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.10, Decision on Radivoje Miletic’s appeal against decision on Miletic’s motion for provisional release, 19 Nov 2009 (*Miletic* 19 November 2009 Decision”), public redacted version, para. 7.

<sup>18</sup> *Ibid.*

<sup>19</sup> Reply, paras 1, 3,6.

<sup>20</sup> *Id.*, paras 4-5.

<sup>21</sup> Supplement to Mr. Stanišić’s motion for provisional release during the upcoming break in trial proceedings, 7 Feb 2011, Annex A.

<sup>22</sup> Correspondence from Host Country, 8 Feb 2011.

## II. LAW AND DISCUSSION

### **A. Rule 65(B)**

12. Pursuant to Rule 65(B), the Trial Chamber may order provisional release 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 and that the Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate.

13. When deciding on a request for provisional release, a Trial Chamber must address all relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision and must include a reasoned opinion indicating its view on those relevant factors.<sup>23</sup> The determination of what constitutes “relevant factors” as well as the weight to be attributed to them depends upon the particular circumstances of each case given that “decisions on motions for provisional release are fact intensive, and cases are considered on an individual basis in light of the particular circumstances of the individual accused”.<sup>24</sup>

### **B. Humanitarian grounds**

#### **1. Development of Rule 65(B) and jurisprudence**

14. The Trial Chamber notes that since 2008, the Appeals Chamber has read an additional requirement of “sufficiently compelling humanitarian grounds” into the law of provisional release when the proceedings against an accused are at an advanced stage.<sup>25</sup>

15. It appears to the Trial Chamber that this requirement evokes the standard of “exceptional circumstances” that was removed from Rule 65(B) in November 1999.<sup>26</sup> For provisional release to

<sup>23</sup> *Prosecutor v. Popović et al.*, IT-05-88-AR65.4-6, 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 May 2008 (“Popović 15 May 2008 Decision”), para. 6; *Prosecutor v. Prlić et al.*, IT-04-74-AR65.5, Decision on Prosecution’s consolidated appeal against decisions to provisionally release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 Mar 2008 (“Prlić 11 March 2008 Decision”), para. 7.

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

<sup>25</sup> See, for example, *Miletic* Decision of 19 November 2009, para. 9; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR65.3, Decision on Ivan Čermak’s appeal against decision on his motion for provisional release, filed confidentially on 3 Aug 2009 (“Čermak 3 August 2009 Decision”) para. 6; *Prosecutor v. Prlić et al.*, IT-04-74-AR65.11, Decision on Praljak’s appeal of the Trial Chamber’s 2 December 2008 decision on provisional release, 17 Dec 2008 (“Praljak 17 December 2008 Decision”), para. 15; *Popović* 15 May 2008 Decision, para. 24; *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 Apr 2008 (“Prlić 25 April 2008 Decision”), para. 16; *Prlić* 21 April 2008 Decision, para. 17.

<sup>26</sup> See *Popović* 15 May 2008 Decision, Partially dissenting opinion of Judge Güney, para. 6 and Partially dissenting opinion of Judge Liu, paras 2-3; *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 Stojic dated 8 April 2008”, 29 Apr 2008 (“Stojic 29 April 2008 Decision”), Partly dissenting opinion of Judge Güney, para. 5; *Prlić* 25 April 2008

be considered, an accused had to make a showing of “exceptional circumstances” in addition to satisfying the Trial Chamber that he or she was not a flight risk or a danger to any victim, witness or other person.<sup>27</sup>

16. Due to the November 1999 amendment, the criteria for provisional release for an accused awaiting or in trial were modified— the subjective test that needed to be met was the two-pronged test of not being a flight risk or a threat to any victim, witness or other person.<sup>28</sup>

17. It is noteworthy that the *Prlić* 11 March 2008 Decision, in which the Appeals Chamber first held that the humanitarian reasons brought forward by the accused were not “sufficiently compelling”, was a decision which repeatedly emphasized the specific circumstances “in this case [and] in the present context of the proceedings”.<sup>29</sup> The Appeals Chamber ruled on a discrete submission on humanitarian grounds made by the accused in that case. This Trial Chamber’s reading of this *Prlić* 11 March 2008 Decision leads it to question whether the Appeals Chamber intended to add a new requirement to Rule 65(B), because in this Trial Chamber’s view, the “sufficiently compelling humanitarian grounds” standard was not a mandatory objective test that Trial Chambers had to follow after a Rule 98 *bis* decision was rendered.<sup>30</sup>

18. The Trial Chamber notes in this context that post-2008 Appeals Chamber decisions do not contain references to the International Covenant on Civil and Political Rights (“ICCPR”) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”),<sup>31</sup> or to the principle of presumption of innocence but, instead, emphasize policy considerations, such as the perception of the Tribunal and its work in the former Yugoslavia, particularly by the victims of the crimes charged.<sup>32</sup> In a 2005 decision, the Appeals Chamber stated *obiter* that it was not persuaded that decisions to provisionally release accused persons “would affect the confidence of

Decision, Partly dissenting opinion of Judge Güney, para. 5. Up to November 1999, Rule 65(B) read as follows: “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.” At the Twenty-First Plenary Session, the Rule was amended and the words “only in exceptional circumstances” were dropped. See Rules of Procedure and Evidence, IT/32/Rev.2, 17 Nov 1999. The Rule was further amended on 30 January 1995, IT/32/REV.3 and on 13 December 2001, IT/32/REV.22.

<sup>27</sup> *Prosecutor v. Kupreškić et. al.*, Case No.: IT-95-16-AR65.4, Decision on application for leave to appeal, 1 Dec 1999, p. 2; *Prosecutor v. Kupreškić et. al.*, Case No.: IT-95-16-AR65, Decision on application for leave to appeal, 18 Aug 1999, p. 3.

<sup>28</sup> The rule also requires hearing the host state and the state to which the accused is to be released but these are objective tests which do not affect the analysis here.

<sup>29</sup> *Prlić* 11 March 2008 Decision, paras 19-21.

<sup>30</sup> See *Popović* 15 May 2008 Decision, Partially dissenting opinion of Judge Liu, paras 5-6; *See also Prosecutor v. 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 Pusić issued on 14 April 2008, 23 Apr 2008 (“*Prlić* 23 April 2008 Decision”), paras 14-15.

<sup>31</sup> The Trial Chamber notes that none of the decisions of the Appeals Chamber since 2008 contains any reference to either body of international legal standards.

<sup>32</sup> *Prlić* 21 April 2008 Decision, para. 17.

the international community in the administration of justice by the [...] Tribunal".<sup>33</sup> However, in contrast to this position, in the *Prlić* 21 April 2008 Decision, the Appeals Chamber concluded that "provisional release should only be granted at a late stage of the proceedings when sufficiently compelling humanitarian reasons exist,"<sup>34</sup> a conclusion which was premised on the potential prejudice victims and witnesses could suffer if accused are provisionally released to the same regions in which the victims and witnesses live.<sup>35</sup>

19. While these are relevant considerations that would always have existed from the beginning of the trial, the Appeals Chamber does not explain why they should become the basis for the creation of the new standard of "sufficiently compelling humanitarian reasons" or become determinative for the granting of provisional release, particularly in the late stages of the trial, after or even in the absence of an adverse Rule 98 *bis* ruling. When interpreting Rule 65(B), earlier Appeals Chamber jurisprudence, having identified the presumption of innocence as the underpinning principle of the provision, had explicitly referred to Article 21(3) of the Statute and the relevant principles enshrined in Articles 9(3) and 14(2) of the ICCPR and Article 5(3) of the ECHR.<sup>36</sup>

20. The Trial Chamber notes that the Appeals Chamber in the *Prlić* 23 April 2008 Decision recalled that "'any humanitarian grounds have to be assessed' in the 'context' of the two requirements expressly listed in Rule 65(B)".<sup>37</sup> Importantly, it continued that "*Rule 65(B) of the Rules does not mandate humanitarian justification for provisional release*" and that, "[u]nlike for convicted persons seeking provisional release under Rule 65(I), there is no requirement of additional 'special circumstances' justifying release under Rule 65(B) because 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."<sup>38</sup> The Appeals Chamber held that:

if the two requirements of Rule 65(B) are met, the existence of humanitarian reasons warranting release can be a salient and relevant factor in assessing whether to exercise discretion to grant

<sup>33</sup> *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 Oct 2005, para. 32.

<sup>34</sup> *Prlić* 21 April 2008 Decision, para. 17.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Prosecutor v. Limaj et. al.*, Case No. IT-03-66-AR65, Decision on Fatmir Limaj's request for provisional release, 31 Oct 2003, paras 8-12; *Prosecutor v. Mrkšić et al.*, Case No.: IT-95-13/1, Decision on Mile Mrkšić's application for provisional release, 24 Jul 2002, paras 28-32; *Prosecutor v. Mrda*, Case No.: IT-02-59-PT, Decision on Darko Mrda on request for provisional release, 15 Apr 2003, para 22-26; *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47, Decision granting provisional release to Enver Hadžihasanović, 19 Dec 2001, paras 2-6; *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-PT, Decision on Sainović's request for variation of conditions for provisional release, 28 Jun 2006, para. 36.

<sup>37</sup> *Prlić* 23 April 2008 Decision, para. 14, citing *Prosecutor v. Boškoški and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski's interlocutory appeal on provisional release, 27 Jul 2007, para. 14.

<sup>38</sup> *Prlić* 23 April 2008 Decision, para. 14 (emphasis added). See *infra* paras 23-26 for a discussion on the Rule 65(I) standard.

provisional release. In this respect, "the weight attached to humanitarian reasons as justification for provisional release will differ from one defendant to another depending upon all the circumstances of a particular case."<sup>39</sup>

21. This Trial Chamber accepts the position taken by the Appeals Chamber in the *Prlić* 23 April 2008 Decision. Regrettably, subsequent Appeals Chamber decisions have not addressed the reasoning of the *Prlić* 23 April 2008 Decision. They have merely reverted to the position taken in the *Prlić* 21 April 2008 Decision.<sup>40</sup>

22. The Trial Chamber is of the opinion that the parameters within which it is now required to exercise its discretion under Rule 65(B) have been circumscribed by the Appeals Chamber.<sup>41</sup> After assessing the test laid down in Rule 65(B), the Trial Chamber is required to evaluate whether a humanitarian ground exists which is sufficiently compelling to merit provisional release. The ordinary meaning of humanitarian grounds requires it to be construed as an *ex gratia* consideration by the Trial Chamber in the exercise of its discretion under Rule 65.<sup>42</sup> However, in the current jurisprudence, the existence of a humanitarian ground, and a sufficiently compelling one, constitutes a separate requirement to be met for applications for provisional release to be successful when trial proceedings have reached an advanced stage.

## 2. Comparision to the provisional release regime for a convicted person

23. Rule 65(I) contemplates and allows for provisional release of convicted persons pending an appeal. In addition to the two conditions that apply to the trial stage, the existence of "special circumstances" is prescribed.<sup>43</sup> It has held that "where an application for provisional release is made pending the appellate proceedings [...] special circumstances related to humane and compassionate

<sup>39</sup> *Id.*, para. 31, citing *Prosecutor v. 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 Mar 2007, para. 20.

<sup>40</sup> See, e.g., *Popović* 15 May 2008 Decision; *Prlić* 16 December 2008 Decision; *Čermak* 3 August 2009 Decision, para. 6.

<sup>41</sup> See *Prosecutor v. Popović et al.*, Case No. IT-05-88, Decision on Gvero's motion for provisional release with Judge Agius' dissenting opinion and Judge Prost's separate declaration, 17 Dec 2009, Judge Prost's separate declaration, para. 3; *Popović* 15 May 2008 Decision, Partially dissenting opinion of Judge Güney, para. 10 and Partially dissenting opinion of Judge Liu, paras 7-8; *Stojić* 29 April 2008 Decision, Partly dissenting opinion of Judge Güney, para. 1; *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Mr. Perišić's motion for provisional release, 31 Mar 2010, para. 21. The Appeals Chamber has, in the past, cautioned Trial Chambers against taking decisions merely to achieve formal consistency in outcome, to avoid criticism. In *Prosecutor v. Mrksić et al.*, IT-95-13/1-AR65, Decision on appeal against refusal to grant provisional release, 8 Oct 2002, para. 9. It held: "Academic and opinion writers and the interested public may, of course, nevertheless wrongly perceive an inconsistency in those two cases in relation to the same authority, and criticise the Tribunal for what has been wrongly perceived. Trial Chambers should take care to explain their decisions in a way to avoid such criticisms, but they cannot be expected to change their view of the facts in a particular case in order to avoid unfounded criticism. Nor should the Appeals Chamber interfere with either such case simply because of the possibility of such criticism."

<sup>42</sup> See *Prosecutor v. Simić*, Case No.: IT-95-9-A, Decision on motion of Blagoje Simić pursuant to Rule 65(I) for provisional release for a fixed period to attend memorial services for his father, 21 Oct 2004, para. 14.

considerations exist where there is an acute justification, such as the applicant's medical need or a memorial service of a close family member.”<sup>44</sup> In its view, “the notion of acute justification [is] inextricably linked to the scope of special circumstances which could justify provisional release on compassionate grounds at the appellate stage”.<sup>45</sup>

24. In the words of the Appeals Chamber, the “fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities”.<sup>46</sup> It has held that conviction for very serious crimes distinguishes an appellant’s situation from that of accused persons.<sup>47</sup> The Appeals Chamber has also considered that a convicted person’s incentive to flee is greater the more severe the prison term imposed.<sup>48</sup>

25. This Trial Chamber recalls that the Appeals Chamber in *Strugar* held that “the fact that some accused have been granted provisional release for comparable reasons pending their trial cannot be automatically applied by analogy to persons who have already been convicted by a Trial Chamber and who are seeking provisional released pending the appellate proceedings.”<sup>49</sup> However, on several occasions, it appears that the Appeals Chamber has effectively applied the standard of a Rule 65(I) when considering Rule 65(B) applications on appeal.

26. The Trial Chamber questions whether it would have been the intention of the Appeals Chamber in its post-2008 development of the jurisprudence to create as high a standard for accused after the end of the Prosecution case as that set forth by Rule 65(I) for convicted persons. In the Trial Chamber’s view, this would not only go against the apparent words of Rule 65(B) but would also contradict its underling principle – the presumption of innocence of the accused.

### 3. Mićo Stanišić’s circumstances

27. Since the Trial Chamber last considered and granted an application for provisional release from Mićo Stanišić, the Prosecution rested its case on 1 February 2011. Meanwhile, Mićo Stanišić did not move for a judgement of acquittal under Rule 98 bis.

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<sup>43</sup> The Appeals Chamber has held that an applicant has a “substantial burden of proof” to show that the three requirements of Rule 65(I) have been met. *Prosecutor v. Mučić et. al.*, IT-96-21-A, Decision on motion by appellant Zdravko Mučić for provisional and temporary release, 14 Dec 2001.

<sup>44</sup> *Prosecutor v. Strugar*, Case No. IT-01-42-A, Decision on Defence request seeking provisional release on the grounds of compassion, confidential, 2 Feb 2008 (“*Strugar Decision*”), para. 12. See also *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Radoslav Brđanin’s motion for provisional release, 23 Jul 2007, para. 6, with further references.

<sup>45</sup> *Strugar Decision*, para. 12.

<sup>46</sup> *Prosecutor v. Galić*, IT-98-29-A, Decision on second Defence request for provisional release by Stanislav Galić, 31 Oct 2005, para. 3.

<sup>47</sup> *Id*, para. 16.

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

<sup>49</sup> *Strugar Decision*, para. 11.

28. The Trial Chamber notes that Mićo Stanišić voluntarily surrendered to the Tribunal, has been provisionally released on several occasions and has always abided by the conditions imposed by the Trial Chamber.<sup>50</sup> He was provisionally released most recently from 21 December to 6 January 2011, at which point only five Prosecution witnesses remained to be heard.<sup>51</sup> The Trial Chamber notes that at the time of the last provisional release, Mićo Stanišić was already well aware of the Prosecution's case and the evidence against him presented over one and half years of trial. Finally, the Trial Chamber notes that Mićo Stanišić does not seek to be provisionally released to Bosnia and Herzegovina, where most of the victims of the crimes he is charged with in the indictment are likely to reside, but to Belgrade in Serbia.

29. The Trial Chamber has also considered Mićo Stanišić's personal guarantee,<sup>52</sup> the guarantee from Serbia,<sup>53</sup> and the non-objection of the host state to his provisional release.<sup>54</sup> It has further assessed the practical advantage of having him close to his Defence team in Belgrade, during the final stages of preparation of his case and notes that he has not advanced any humanitarian grounds in the Motion.

30. The Trial Chamber is of the opinion that the change in circumstances from its recent decision to grant provisional release, caused by the hearing of only five remaining witnesses, the closure of the Prosecution's case, and Mićo Stanišić's option not to make an application under Rule 98 bis, do not change its view that the Accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. In its opinion, it is only the change in the stage of the proceedings which, due to the overriding effect of Appeals Chamber precedent, of which the Trial Chamber is cognisant, requires that the Motion be denied for lack of "compelling humanitarian grounds".

### **III. DISPOSITION**

31. Pursuant to Rules 65 and 126 bis of the Rules, the Trial Chamber

<sup>50</sup>See *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Mićo Stanišić's motion for provisional release, 19 Jul 2005; Order reinstating provisional release, 10 Jul 2008; Order reinstating provisional release, 12 Jun 2009; Decision granting Mr. Stanišić's motion for provisional release during the winter recess, 11 Dec 2009; Decision granting Mićo Stanišić's motion for provisional release during the court summer recess, 16 Jul 2010; Decision granting Mićo Stanišić's motion for provisional release during the court winter recess, 3 Dec 2010.

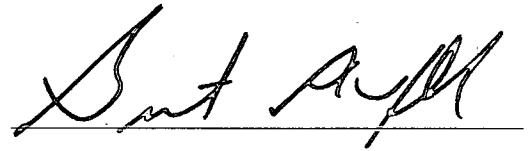
<sup>51</sup> The Trial Chamber notes that of the five witnesses that were heard in January 2011, upon Mićo Stanišić's return from his last provisional release, two witnesses, ST191 and Nedeljko Đekanović, were recalled for additional cross-examination of a limited nature, and one, Ewan Brown, was a military expert whose report had been disclosed to the Accused earlier on in the trial.

<sup>52</sup> Motion, Annex B.

**GRANTS** leave to file the Reply, and

**DENIES** the Motion.

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



Judge Burton Hall  
Presiding

Dated twenty-fifth day of February 2011

At The Hague

The Netherlands

[Seal of the Tribunal]

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<sup>53</sup> See supra, para. 10.

<sup>54</sup> See supra, para. 11.

## CONCURRING SEPARATE DECLARATION OF JUDGE DELVOIE

1. I am in complete agreement with the reasoning presented in the unanimous decision of the Trial Chamber. Through this separate opinion, I only explore a limited aspect of the principle of precedent as applied in this Tribunal to supplement the reasoning of the unanimous decision.
  
2. I rely on the *Aleksovski* Appeal Judgement as the leading jurisprudence on the principle of precedent,<sup>1</sup> where the Appeals Chamber addressed, *inter alia*, whether decisions of the Appeals Chamber are binding on itself.<sup>2</sup> I understand the Appeals Chamber as having identified the underpinning principle as that of the right of every accused to a fair trial, an aspect of which requires that like cases be treated alike and decided possibly by the same reasoning. It, however, also noted that the need for continuity of judicial decisions must be balanced “by a residual principle that ensures that justice is done in all case”.<sup>3</sup>
  
3. Accordingly, it concluded that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.<sup>4</sup> It later clarified that the Appeals Chamber should do so “in exceptional circumstances [...] after the most careful consideration” has been given to it, “both as to the law, including the authorities cited, and the facts”.<sup>5</sup> Significantly, it laid down that where the Appeals Chamber is “faced with previous decisions that are conflicting, it is *obliged* to determine which decision it will follow”.<sup>6</sup>
  
4. The Appeals Chamber in the *Prlić* 11 March 2008 decision found that the Trial Chamber “failed to discuss the impact of its 98bis Ruling when granting provisional release”, which constitutes a significant change in circumstance.<sup>7</sup> It further found that in “the circumstances of this case”, the humanitarian grounds offered by the Accused were not sufficiently compelling to warrant an exercise of the Trial Chamber’s discretion in favour of granting the Accused provisional release.<sup>8</sup>

<sup>1</sup> *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 Mar 2001 (“*Aleksovski* Appeal Judgement”).

<sup>2</sup> *Ibid.*, pp 41-47.

<sup>3</sup> *Ibid.*, paras 101-105.

<sup>4</sup> *Ibid.*, para. 107.

<sup>5</sup> *Ibid.*, para. 109; *Prosecutor v. Blagojević et. al.*, Case No. IT-02-65-AR65 & IT-02-60-AR65.2, Decision on provisional release of Vidoje Blagojević and Dragan Obrenović, 3 Oct 2002, para. 5.

<sup>6</sup> *Aleksovski* Appeal Judgement, para. 111. Emphasis added.

<sup>7</sup> *Prlić* 11 March 2008 Decision, paras 19-20.

<sup>8</sup> *Ibid.*, para. 21.

5. However, in the *Prlić* 21 April 2008 Decision, when considering whether the “updated information” submitted by the same Accused merited an exercise of the Trial Chamber’s discretion in their favour, 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 the proceedings, and in particular after the close of the Prosecution case, *will only be granted when* serious and sufficiently compelling humanitarian reasons exist”.<sup>9</sup> In doing so, it cites the *Prlić* 11 March 2008 Decision as the leading authority and additionally refers to two decisions of Trial Chambers made pursuant to the very same decision and to three earlier Trial Chamber decisions.<sup>10</sup>

6. It is my humble opinion that the Appeals Chamber placed improper reliance on the sole previous decision, drawing a *ratio* from a reasoning applied in the circumstances of the specific case,<sup>11</sup> and on Trial Chambers that had applied this sole previous decision in comparable circumstances.<sup>12</sup> Furthermore, it erroneously cited three earlier decisions made by Trial Chambers in the circumstances of the facts before them to discern a pattern in the development of that jurisprudence.<sup>13</sup> Thereby, it is my respectful view that the Appeals Chamber did not give “careful consideration both to the law, including the authorities cited, and to the facts” per the standard set out in the *Aleksovski* Appeal Judgement.<sup>14</sup>

7. This view of the *Prlić* 11 March 2008 Decision and its interpretation as found in the *Prlić* 21 April 2008 Decision are both articulated by the Appeals Chamber in the *Prlić* 23 April 2008 Decision.<sup>15</sup> It concluded that the existence of humanitarian reasons can be a salient and relevant factor in favour of exercising discretion, but is not a requirement under Rule 65(B), by identifying that the *Prlić* 11 March Decision “asked for the existence of sufficiently compelling humanitarian

<sup>9</sup> *Prlić* 21 April 2008 Decision, para. 17. Emphasis added.

<sup>10</sup> *Id.*, fn 52, reproduced here for ease of reference – *Prlić* 21 April 2008 Decision, para. 21. See also, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision relative à la demande de mise en liberté provisoire de l'accusé Prljak*, with confidential Annex, 1 Apr 2008, pp 6-8; *Prosecutor v. Milutinović et al.*, Case No. IT-07-85-T, Decision on *Šainović* motion for temporary provisional release, 4 Apr 2008, paras 7-9; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, *Décision relative à la demande de mise en liberté provisoire de l'accusé Čorić*, with confidential Annex, 8 Apr 2008, pp 6-7; *Prosecutor v. Milutinović et al.*, Case No. IT-07-85-T, Decision on *Lazarević* motion for temporary provisional release, 15 Apr 2008; *Prosecutor v. Ademi*, Case No. IT-04-78, Order on motion for provisional release, 20 Feb 2002 (“*Ademi Order*”), para. 22; *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on motion for provisional release, 21 Apr 2005 (“*Halilović Decision*”), pp 3-4; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Defence motion on behalf of Ramush Haradinaj for urgent provisional release (Confidential), 3 October 2007 (“*Haradinaj Decision*”), p. 3.

<sup>11</sup> *Popović* 15 May 2008 Decision, Partly dissenting opinion of Judge Liu, where he states that, having been a member of the Bench that decided the *Prlić* 11 March 2008 Decision, there was no intention of creating a general principle and the reliance by the majority on it is misplaced, para. 6.

<sup>12</sup> *Prlić* 21 April 2008 Decision, Partly dissenting opinion of Judge Güney, para. 7.

<sup>13</sup> *Id.*; *Ademi Order*, which considered that the proximity of a prospective judgement *may* weigh against a decision to release, para. 22; *Halilović Decision*, where the application was made “during the course of the trial”, the Trial Chamber denied provisional release since the facts submitted in support of the Motion did not amount to “exceptional circumstances”, pp 3-4; *Haradinaj Decision*, where the application was for immediate release was granted on the basis of compelling humanitarian grounds of “such an acute nature that immediate provisional release is warranted”, p. 3.

<sup>14</sup> *Aleksovski* Appeal Judgement, para. 109.

grounds” in the absence of clarity of the flight risk, given that the Trial Chamber had not evaluated the impact of its Rule 98 bis ruling.<sup>16</sup> As such, it is plain from the reasoning that the Appeals Chamber clarified that the two earlier decisions were both to be viewed in the “context” of the circumstances of that particular case and did not create a higher standard that places an additional burden on those presumed innocent, similar to that borne by convicted persons under Rule 65(I).<sup>17</sup>

8. I note that subsequent Appeals Chamber decisions refer to and rely upon the *Prlić* 11 March 2008 and *Prlić* 21 April 2008 Decisions when imposing the requirement of ‘sufficiently compelling humanitarian grounds’ as an additional “anomously strict standard of explicitness” for accused seeking provisional release after the close of the Prosecution case.<sup>18</sup> While strong dissents were appended to each of these decisions, in my humble opinion, these subsequent decisions neither address the *Prlić* 23 April 2008 Decision nor why they depart from it, and since there is an apparent tension in what was then the most recent rulings, they similarly do not determine why one is followed over the other, as the *Aleksovski* Appeal Judgement obliges the Appeals Chamber to do<sup>19</sup>.

9. This being the trajectory along which the Appeals Chamber jurisprudence resulted in the creation of a new and additional standard, I respectfully note that there exists a lack of cogent reasons for the departure from existing settled jurisprudence on the application of Rule 65(B) since the amendment of November 1999. I, most respectfully, suggest that the Appeals Chamber not only created a “highly questionable precedent”,<sup>20</sup> but, in the absence of cogent reasons, did so in a manner inconsistent with its own pronouncements on the authority and duties of the Appeals Chamber.

10. As Trial Chambers are bound by the *ratio decidendi* of Appeals Chamber decisions,<sup>21</sup> this Trial Chamber has conformed with the jurisprudence as it has developed. However, in the absence of cogent reasons that allow departing from the existing jurisprudence in exceptional circumstances,

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<sup>15</sup> *Prlić* 23 April 2008 Decision, paras 14-15.

<sup>16</sup> *Ibid.*, para. 15.

<sup>17</sup> *Ibid.*, para. 14.

<sup>18</sup> *Prlić* 25 April 2008 Decision, para. 16 and Partly dissenting opinion of Judge Güney, para. 1; *Stojić* 29 April 2008 Decision, paras 16-17; *Popović* 15 May 2008 Decision, paras 18, 24; *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR65.14, Decision on “Prosecution’s appeal from décision relative à la demande de mise en liberté provisoire de l’Accusé Prlić dated 9 April 2009”, 5 Jun 2009, para. 7; *Čermak* 3 August 2009 Decision, para. 6. See also, *Prosecutor v. Popović et. al.*, Case No. IT-05-88-T, Decision on Miletic’s motion for provisional release (Confidential), 15 Oct 2009, Judge Prost’s dissenting opinion of, para. 12.

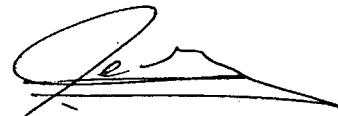
<sup>19</sup> *Aleksovski* Judgement, para. 111.

<sup>20</sup> *Orić* Appeal Judgement, Partially dissenting opinion and declaration of Judge Liu, p. 73, paras 7-8.

<sup>21</sup> *Aleksovski* Appeal Judgement, para. 113. See also *Martic* Appeal Judgement (8 October 2008), para. 8; *Brdanin et al.*, Decision on Application by Momir Talic for the disqualification and withdrawal of a Judge, 18 May 2000, para. 6; *Kordić et al.*, Decision on Joint Defence Motion to dismiss the amended indictment for lack of jurisdiction based on the limited jurisdictional reach of Articles 2 and 3, 2 March 1999, para. 12

I find myself in a position where I am bound to apply the additional standard of ‘sufficiently compelling humanitarian grounds’ mechanically.

11. I respectfully urge the Appeals Chamber to either reconsider the precedent it created as “material errors in its reasoning have been identified”<sup>22</sup> or, in the alternative, provide concrete guidance to Trial Chambers by setting out the exceptional circumstances that justified the departure from the applicable law with cogent reasons in the interests of justice.



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Judge Guy Delvoie

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<sup>22</sup> *Oric* Appeal Judgement, Partially dissenting opinion and declaration of Judge Liu, p. 73, paras 7-8.