



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

Case No: IT-08-91-T  
Date: 29 June 2011  
Original: English

**IN TRIAL CHAMBER II**

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

**Registrar:** Mr. John Hocking

**Decision of:** 29 June 2011

**PROSECUTOR**

v.

**MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN**

***PUBLIC***

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**DECISION DENYING MIĆO STANIŠIĆ'S REQUEST  
FOR PROVISIONAL RELEASE DURING THE  
UPCOMING SUMMER COURT RECESS**

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**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. Alexandar Aleksić for Stojan Župljanin

## I. INTRODUCTION

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 the upcoming summer court recess”, filed by the Defence of Mićo Stanišić (“Defence”) on 2 June 2011 with confidential annexes (“Motion”). The Prosecution responded on 10 June 2011 (“Response”).<sup>1</sup> On 9 June 2011, the Government of the Kingdom of the Netherlands (“the Host State”) confirmed that it has no objection to the request for provisional release.<sup>2</sup>

## II. SUBMISSIONS

2. The Defence requests that Mićo Stanišić be granted “temporary provisional release” from 23 July 2011 to 15 August 2011, the period of summer recess at the Tribunal, on the same terms and conditions under which he was previously 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>3</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; always behaved respectfully towards the Trial Chamber; complied with the terms and conditions of his provisional release; and poses no risk of flight, nor any danger to any victim, witness or other person.<sup>4</sup>

4. The Defence attaches the personal undertaking of Mićo Stanišić to abide by all terms and conditions imposed on him by the Trial Chamber, should his request be granted.<sup>5</sup> The guarantee provided by the Government of the Republic of Serbia (“Serbia”) in support of the request is also provided along with the Motion.<sup>6</sup>

5. The Defence further submits that the defence team will be in Belgrade for the summer recess and “direct and continuous cooperation between Mr. Stanišić is indispensable for the team’s

<sup>1</sup> Prosecution’s response to Stanišić’s motion for provisional release during the upcoming summer court recess, 10 Jun 2011. The Response was filed pursuant to the Trial Chamber’s order for an expedited response. Hearing, T. 21822, 3 Jun 2011.

<sup>2</sup> Correspondence from Host State, 9 Jun 2011 (confidential).

<sup>3</sup> Motion, paras 1-2, 11.

<sup>4</sup> Motion, para. 10.

<sup>5</sup> *Id.*, Annex B.

<sup>6</sup> *Id.*, Annex C.

planned work activities and would considerably enhance its future performance”.<sup>7</sup> The Defence anticipates that its case will conclude by the summer recess and Mićo Stanišić’s presence in Belgrade to contribute to the process of overall analysis of evidence is crucial.<sup>8</sup> It notes that “temporary provisional release” during breaks in trial proceedings has been granted in other cases before the Tribunal.<sup>9</sup>

6. The Defence relies on the Decision of this Trial Chamber from 25 February 2011 to assert that, despite the late stage of these proceedings, the Accused has been found not to be a flight risk or to pose a danger to any victim, witness or other person.<sup>10</sup> It quotes substantially from both the Decision and the Separate Opinion appended thereto and maintains that “compelling humanitarian grounds” need not be put forth by an accused person at advanced stages of trials.<sup>11</sup>

7. The Defence notes that its appeal, impugning the Decision, was rejected as moot since the period for which provisional release was sought had elapsed by the time the Appeals Decision was issued.<sup>12</sup> However, the Defence underscores that Judge Robinson’s Separate Opinion, appended to the Appeals Decision, emphasised the conflation of the standard applicable for provisional release during appeal under Rule 65(I) with that applicable to an accused during trial under Rule 65(B) which, in effect, raises issues of propriety and fairness for an accused seeking provisional release during trial.<sup>13</sup> The Defence requests the Trial Chamber to use its discretionary power in a compassionate manner and uphold fairness by granting the Motion.<sup>14</sup>

8. The Prosecution submits that the Trial Chamber must deny the Motion since Mićo Stanišić has failed to provide sufficiently compelling humanitarian grounds at this late stage of the trial for provisional release to be granted, as is required by established jurisprudence.<sup>15</sup> The Prosecution notes that the legal standard was most recently upheld by a majority of the Appeals Chamber in the *Stanišić and Simatović* case.<sup>16</sup>

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<sup>7</sup> *Id.*, para 10. g.  
<sup>8</sup> *Ibid.*  
<sup>9</sup> *Id.*, para. 10. h.  
<sup>10</sup> 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, 25 Feb 2011 (“Decision”), para. 11.  
<sup>11</sup> *Id.*, paras 12-15.  
<sup>12</sup> Decision on Mićo Stanišić’s appeal against decision on his motion for provisional release, 11 May 2011 (“Appeals Decision”).  
<sup>13</sup> Separate Opinion of Judge Patrick Robinson, Decision on Mićo Stanišić’s appeal against decision on his motion for provisional release, 11 May 2011 (“Judge Robinson’s Separate Opinion”), paras 18-19.  
<sup>14</sup> *Id.*, para. 16.  
<sup>15</sup> Response, paras 2-5, 8-9. 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 de l’Accusée Petković dated 31 March 2008”, 21 Apr 2008 (“*Prlić* 21 April 2008 Decision”), para. 17.  
<sup>16</sup> Response, para. 5, citing *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-AR65.7, Decision on Franko Simatović’s appeal against the decision denying his urgent request for provisional release, 23 May 2011 (“*Simatović* Decision”).

9. The Prosecution further submits that the fact that Trial Chamber has in the past imposed several conditions on the Accused for each period of provisional release establishes that he does indeed pose a flight risk.<sup>17</sup> It concludes that, given the late stage of proceedings, the Trial Chamber cannot “impose adequate conditions on his release that will remove any such risk”.<sup>18</sup> The Prosecution asserts that “at this juncture in the trial proceedings, any risk of flight is simply too great.”<sup>19</sup>

10. The Prosecution clarifies that the fact that it did not take any position on the previous motions for provisional release by Mićo Stanišić did not imply that “it agreed with all [the] averments” made therein.<sup>20</sup> It adds that the motions went unopposed since the Prosecution “had no information one way or the other” whether on prior occasions the Accused had violated any of the conditions imposed on him.<sup>21</sup> The Prosecution states that, given that the case of Mićo Stanišić would be concluded before the start of summer recess, it cannot “remain reticent” any longer.<sup>22</sup>

11. The Prosecution submits that it “strongly disputes” the assertion that Mićo Stanišić cooperated with the Office of the Prosecutor and adds that he was “neither forthright nor particularly forthcoming” during the interviews conducted with him.<sup>23</sup> The Prosecution submits that it did not challenge the previous motions for provisional release “because it had no information one way or the other whether on prior occasions [Mićo] Stanišić had violated any of the Trial Chamber’s conditions of his provisional release”.<sup>24</sup> The Prosecution further questions the need for the Accused to be physically present in Belgrade to assist his team in the overall analysis of the evidence for the final trial brief.<sup>25</sup>

12. Lastly, the Prosecution requests a stay in order to allow it to appeal pursuant to Rule 65(E), in the event that the Chamber decides to grant the Motion.<sup>26</sup>

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<sup>17</sup> Response, para. 11.  
<sup>18</sup> *Ibid.*  
<sup>19</sup> *Id.*, para. 15.  
<sup>20</sup> *Id.*, para. 12.  
<sup>21</sup> *Ibid.*  
<sup>22</sup> *Id.*, para. 13.  
<sup>23</sup> *Id.*, para. 12.  
<sup>24</sup> *Ibid.*  
<sup>25</sup> *Id.*, para. 14.  
<sup>26</sup> *Id.*, para. 16.

### III. LAW AND DISCUSSION

#### A. Rule 65(B)

13. 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. The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate.

14. When deciding upon a request for provisional release, a Trial Chamber must address all relevant factors which a reasonable Trial Chamber is expected to take into account before coming to a decision and must include a reasoned opinion indicating its view on those relevant factors.<sup>27</sup> A Trial Chamber is required to assess the relevant factors as they exist at the time when it reaches its decision on provisional release.<sup>28</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>29</sup>

#### B. Humanitarian grounds

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

15. Since 2008, the Appeals Chamber has construed the law of provisional release as requiring that there exist “sufficiently compelling humanitarian grounds” when the proceedings against an accused are at an advanced stage.<sup>30</sup> The Trial Chamber notes that, once again, Mićo Stanišić has not advanced any humanitarian grounds for release in the Motion.

<sup>27</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 Miletić’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>28</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.14, Decision on Jadranko Prlić’s appeal against the *Décision relative à la demande de mise en liberté provisoire de l’accusé Prlić* 9 April 2009, 5 Jun 2009, para. 13; *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.

<sup>29</sup> *Ibid.*

<sup>30</sup> See, for example, *Prlić* 21 April 2008 Decision, para. 17; *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; *Popović* 15 May 2008 Decision, para. 24; *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; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.10, Decision on Radivoje Miletić’s appeal against decision on Miletić’s motion for provisional release, 19 Nov 2009, para. 9; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR65.3, Decision on Ivan

16. It appears to the Trial Chamber that this requirement reinstates a standard similar to “exceptional circumstances”, overturning its removal from Rule 65(B) in November 1999.<sup>31</sup> Due to the November 1999 amendment, the criteria for provisional release for an accused awaiting or in trial were modified – the subjective standard that hence needed to be met was the two-pronged test of being neither a flight risk nor a threat to any victim, witness or other person.<sup>32</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 emphasised the specific circumstances “in this case [and] in the present context of the proceedings”.<sup>33</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 the *Prlić* 11 March 2008 Decision leads it to respectfully question whether the Appeals Chamber intended to add a new requirement to Rule 65(B), because the “sufficiently compelling humanitarian grounds” standard was not at that point a mandatory objective test that Trial Chambers had to follow after a Rule 98 *bis* decision was rendered.<sup>34</sup>

18. Prior to the *Prlić* 11 March 2008 Decision, when interpreting Rule 65(B), the Appeals Chamber jurisprudence had identified the presumption of innocence as the underpinning principle of the provision and explicitly referred to Article 21(3) of the Statute as well as the relevant principles enshrined in Articles 9(3) and 14(2) of the International Covenant on Civil and Political Rights and Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>35</sup> The Trial Chamber notes, in this context, that Appeals Chamber

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Čermak’s appeal against decision on his motion for provisional release, filed confidentially on 3 Aug 2009 (“*Čermak* 3 August 2009 Decision”) para. 6.

<sup>31</sup> See Judge Robinson’s Separate Opinion, para. 18; *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 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.17, 17 Nov 1999. The Rule was also amended on 30 January 1995, IT/32/Rev.3 and on 13 December 2001, IT/32/Rev.22.

<sup>32</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>33</sup> *Prlić* 11 March 2008 Decision, paras 19-21.

<sup>34</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>35</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*

decisions post-March 2008 do not contain references to these internationally applicable legal standards<sup>36</sup> nor to the principle of presumption of innocence. Instead, the decisions emphasise 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>37</sup> In a 2005 decision, the Appeals Chamber stated, *obiter*, that it was not persuaded that decisions to grant provisional release for accused persons “would affect the confidence of the international community in the administration of justice by the [...] Tribunal”.<sup>38</sup>

19. However, 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>39</sup> a conclusion which was premised on the potential prejudice victims and witnesses could suffer if accused persons were to be provisionally released to the same regions in which the victims and witnesses live.<sup>40</sup> While this is indeed a relevant consideration, and one that would have existed even from the beginning of the proceedings, the Appeals Chamber appears not to have explained why and how it becomes the basis for the creation of the new standard of “sufficiently compelling humanitarian reasons” that is ultimately 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.

20. The Trial Chamber notes that the Appeals Chamber in the *Prlić* 23 April 2008 Decision recalled that “many humanitarian grounds have to be assessed in the context of the two requirements expressly listed in Rule 65(B)”.<sup>41</sup> Importantly, the Appeals Chamber stated 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

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*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>36</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>37</sup> *Prlić* 21 April 2008 Decision, para. 17.

<sup>38</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>39</sup> *Prlić* 21 April 2008 Decision, para. 17.

<sup>40</sup> *Ibid.*

<sup>41</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.

distinct from the burden borne by an individual who is still presumed innocent.”<sup>42</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 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>43</sup>

21. This Trial Chamber respectfully adopts the position taken by the Appeals Chamber in the *Prlić* 23 April 2008 Decision. It appears that subsequent Appeals Chamber decisions have not addressed the reasoning of the *Prlić* 23 April 2008 Decision but have reverted to the position taken in the *Prlić* 21 April 2008 Decision.<sup>44</sup>

22. The Appeals Chamber recognises that the Trial Chamber is the body best positioned to assess whether circumstances at trial materially affect the possibility that an accused will not return from provisional release.<sup>45</sup> 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>46</sup>

23. The Trial Chamber understands that each application for provisional release must be assessed, *de novo*, on its merits and in the context of the circumstances existing at the time of taking the decision. While in the advanced stages of trial, this assessment could warrant a closer scrutiny of the requirements for provisional release, it is the opinion of this Trial Chamber that such assessment must be conducted within the ambit of – and is in fact mandated by – the two prongs of Rule 65(B). While the progress of the trial to more advanced stages thus constitutes a relevant

<sup>42</sup> *Prlić* 23 April 2008 Decision, para. 14 (emphasis added). See *infra* paras 23-26 for a discussion on the Rule 65(I) standard.

<sup>43</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>44</sup> See, e.g., *Popović* 15 May 2008 Decision; *Prosecutor v. Prlić et al.*, Case No. IT-04-74, Decision on Valentin Ćorić’s request for provisional release, 16 Dec 2008; *Čermak* 3 August 2009 Decision, para. 6.

<sup>45</sup> See, for e.g., *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR65.3, Decision on Pavković appeal pursuant to Rule 116bis against the decision on Pavković motion for temporary provisional release dated 12 December 2007, 18 Dec 2007, p. 4; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on interlocutory appeal of denial of provisional release during the winter recess, 14 Dec 2006, para. 15.

<sup>46</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, and so 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

factor for consideration, this factor should not result in the conversion of a Rule *allowing provisional release* where the requirements are met, into a Rule *prohibiting provisional release* unless overridden by “sufficiently compelling humanitarian grounds”.

24. The Trial Chamber considers that the proper construction of the word ‘may’ in Rule 65(B) necessitates that, when the two requirements of the Rule are met, the exercise of discretion to refuse provisional release should only be exercised in exceptional cases “where there is a strong and compelling basis for the refusal”.<sup>47</sup> However, under the current Appeals Chamber’s jurisprudence, the existence of a humanitarian ground, and a sufficiently compelling one moreover, constitutes a mandatory, and not discretionary, factor for granting provisional release when trial proceedings have reached an advanced stage.

## 2. Comparison with the provisional release regime for a convicted person

25. 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 pursuant to Rule 65(B), the existence of “special circumstances” is prescribed in the Rule itself.<sup>48</sup> The Appeals Chamber has held that “where an application for provisional release is made pending the appellate proceedings [...] special circumstances related to humane and compassionate 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>49</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>50</sup>

26. 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>51</sup> It has held that conviction for very serious crimes distinguishes an appellant’s

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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>47</sup> Judge Robinson Separate Opinion, para. 13.

<sup>48</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>49</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. Brdanin*, Case No. IT-99-36-A, Decision on Radoslav Brdanin’s motion for provisional release, 23 Jul 2007, para. 6, with further references.

<sup>50</sup> *Strugar Decision*, para. 12.

<sup>51</sup> *Prosecutor v. Galić*, IT-98-29-A, Decision on second Defence request for provisional release by Stanislav Galić, 31 Oct 2005, para. 3.

situation from that of accused persons.<sup>52</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>53</sup>

27. The Trial Chamber recalls that the Appeals Chamber in *Strugar* held that "the fact that some accused persons 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 release pending the appellate proceedings."<sup>54</sup> In Judge Robinson's Separate Opinion, he points out "the substantial closeness of the criterion of 'serious and sufficiently compelling humanitarian reasons' to the third criterion of Rule 65(I)" and opined that:

While it is appropriate to insist on that requirement for convicted persons, it would not be proper to have the same requirement in relation to an accused person. (...). Although the formulation "serious and sufficiently compelling humanitarian reasons" is different in wording from the formulation "special circumstances", it would seem that their effect or meaning is very much the same, that is, provisional release will only be granted for an accused at a late stage in the proceedings or to a convicted person in exceptional or special cases. Regrettably, there is an appearance of a conflation of two criteria that should be kept separate."<sup>55</sup>

28. While this is undoubtedly a strong argument against introducing the additional criterion of "serious and sufficiently compelling humanitarian reasons" into Rule 65(B), in the Trial Chamber's opinion, introducing this criterion for provisional release, particularly at a late stage of a trial proceeding, creates a requirement for an accused still presumed innocent that does not merely imitate the higher standard applicable to a convicted person at appeal. It is, in effect, imposing an even more stringent and severe requirement on an accused presumed innocent than the one to be met by a convicted person pending appeal.

29. There is no doubt that "serious and sufficiently compelling humanitarian grounds" squarely fall in the category of "special circumstances". In addition, however, "special circumstances" that would not rise to the standard of "sufficiently compelling humanitarian grounds" can be, and have in fact been, taken into account by the Appeals Chamber in granting provisional release.<sup>56</sup> Indeed, "special circumstances" appears to be a broader category than "serious and sufficiently compelling humanitarian grounds". This results in a situation in which, pending appeal, a convicted person can

<sup>52</sup> *Id.*, para. 16.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Strugar* Decision, para. 11.

<sup>55</sup> Judge Robinson's Separate Opinion, para. 19.

<sup>56</sup> *Prosecutor v. Kvočka et. al.*, Case No. IT-98-30/1-A, Decision on the request for provisional release of Miroslav Kvočka, 17 Dec 2003; *Prosecutor v. Blagoje 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; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on motion of Blagoje Simić for provisional release for a fixed period to attend memorial services for his mother, 5 May 2006, pp 2-3; *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-A, Decision on motion on behalf of Enver Hadžihasanović for provisional release, 20 Jun 2007,

request and be granted provisional release on the basis of “serious and sufficiently compelling humanitarian grounds” presented as “special circumstances” as well as on the basis of “special circumstances” that do not qualify as “serious and sufficiently compelling humanitarian grounds”, whereas an accused person can not do the latter. This places a convicted person in a better position than an accused person with regard to provisional release. In the Trial Chamber’s opinion, this is a wholly unsatisfactory state of law.

30. 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 such a standard for accused after the end of the Prosecution case. This, in the Chamber’s view, not only goes against the literal wording of Rule 65(B) and its underlying principle - the presumption of innocence - but also against the Appeals Chamber’s own jurisprudence, with regard to Rule 65(I) imposing a higher standard for provisional release of a convicted person pending appeal compared to an accused person at trial.

### 3. Mičo Stanišić’s circumstances

31. Mičo Stanišić did not move for a judgement of acquittal under Rule 98 *bis* after the close of the Prosecution case in February 2011.<sup>57</sup> Therefore, at the time the Trial Chamber considered the previous request for provisional release by Mičo Stanišić, it was bound to deny it due to the Appeals Chamber’s jurisprudence on “sufficiently compelling humanitarian grounds”.<sup>58</sup>

32. In the Decision, the Trial Chamber accepted that there existed a practical advantage in having Mičo Stanišić close to his Defence team in Belgrade, during the preparation of his defence case. However, in its *de novo* evaluation at this stage, the Trial Chamber does not find that such an advantage exists at the time when the Defence is in the concluding stages of its case.

33. The Trial Chamber notes that Mičo Stanišić voluntarily surrendered to the Tribunal and has since been provisionally released on several occasions.<sup>59</sup> Each time, Serbia reported that the Accused acted in accordance with the directions of the Trial Chamber and complied with all the

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paras 5-6; *Prosecutor v. Mrkšić & Šljivančanin*, Case No. IT-95-13/1-A, Decision on the motion of Vešelin Šljivančanin for provisional release, 11 Dec 2007, pp 3-4.

<sup>57</sup> Decision, para. 27.

<sup>58</sup> Decision, para. 30.

<sup>59</sup> See *Prosecutor v. Mičo Stanišić*, Case No. IT-04-79-PT, Decision on Mičo 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 Mičo Stanišić’s motion for provisional release during the court summer recess, 16 Jul 2010; Decision granting Mičo Stanišić’s motion for provisional release during the court winter recess, 3 Dec 2010.

measures set by the State.<sup>60</sup> On this basis, the Trial Chamber is satisfied that Mićo Stanišić has always abided by the terms and conditions of his provisional release.

34. The terms and conditions imposed on him on every occasion were no different from those ordinarily imposed on other accused who have also not been found to be a flight risk by other Trial Chambers.<sup>61</sup> This is done for the reason that the Tribunal cannot by itself enforce his re-appearance and hence, imposes conditions that facilitate the transfer, monitoring and other cooperation provided by the State to which the accused persons are released. Contrary to the Prosecution's submission, the imposition of such conditions does not by itself imply that the Trial Chamber considered Mićo Stanišić at risk of flight.

35. Mićo Stanišić was last provisionally released from 21 December 2010 to 6 January 2011, at which point he was already well aware of the Prosecution's case and the evidence against him.<sup>62</sup> The Trial Chamber concluded categorically in the Decision that "the change in circumstances [...] does not change the Chamber's perception that the Accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."<sup>63</sup> The circumstances at the time of taking this decision, that the Defence has effectively exercised the right to present a defence case and called all, but one, of the witnesses on his behalf, does not alter the Trial Chamber's assessment in this regard.

36. The Trial Chamber notes that Mićo Stanišić does not seek to be provisionally released to Bosnia and Herzegovina, where most of the alleged victims of the crimes he is charged with are likely to reside, but to Belgrade in Serbia. It has also considered Mićo Stanišić's personal

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<sup>60</sup> See State report on provisional release of Mićo Stanišić, 28 May 2009; State report on provisional release of Mićo Stanišić, 18 Jun 2009; State report on provisional release of Mićo Stanišić, 27 Aug 2009; State report on provisional release of Mićo Stanišić, 14 Sep 2009; State report on provisional release of Mićo Stanišić, 13 Jan 2010; State report on provisional release of Mićo Stanišić, 19 Jan 2010; State report on provisional release of Mićo Stanišić, 22 Jan 2010; State report on provisional release of Mićo Stanišić, 9 Aug 2010; State report on provisional release of Mićo Stanišić, 20 Aug 2010; State report on provisional release of Mićo Stanišić, 5 Jan 2011; State report on provisional release of Mićo Stanišić, 18 Jan 2011.

<sup>61</sup> See, for e.g., *Prosecution v. Prlić et al.*, Case No. IT-04-74-T, Decision on motion for provisional release of the Accused Prlić, 16 Feb 2011, (confidential) p. 13-16; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on motion on behalf of Ramush Haradinaj for provisional release, 14 Dec 2007, para. 24; *Prosecution v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Mr. Perišić's motion for provisional release during summer recess, 12 Jul 2010, para. 23.

<sup>62</sup> Decision, para. 28. The Trial Chamber noted that, after two and a half years of trial, only five Prosecution witnesses remained to be heard upon Mićo Stanišić's return from his last provisional release.

<sup>63</sup> Decision, para. 30.

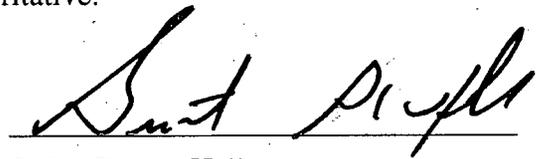
guarantee,<sup>64</sup> the guarantee from Serbia<sup>65</sup> and the lack of objection from the Host State to his provisional release.<sup>66</sup>

37. The change in circumstances from Mićo Stanišić's last provisional release - the closure of the Prosecution's case and the presentation of the Defence's case - do not change the Trial Chamber's 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 due to the overriding effect of Appeals Chamber's precedent, of which the Trial Chamber is cognisant, that the Motion must be denied for lack of "compelling humanitarian grounds".

#### IV. DISPOSITION

38. For the above reasons and pursuant to Rules 65 and 126 *bis* of the Rules, the Trial Chamber **DENIES** the Motion.

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



Judge Burton Hall  
Presiding

Dated this twenty-ninth day of June 2011

At The Hague

The Netherlands

[Seal of the Tribunal]

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<sup>64</sup> Motion, Annex B.

<sup>65</sup> *Id.* Annex C.

<sup>66</sup> Correspondence from Host State, 9 Jun 2011 (confidential).