



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-03-69-AR65.7

Date: 23 May 2011

Original: English

IT-03-69-AR65.7
A27-A22
23 May 2011

27
SMS

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

Registrar: Mr. John Hocking

Decision: 23 May 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON FRANKO SIMATOVIĆ'S APPEAL AGAINST
THE DECISION DENYING HIS URGENT REQUEST FOR
PROVISIONAL RELEASE**

The Office of the Prosecutor

Mr. Dermot Groome

Counsel for the Defence

Mr. Wayne Jordash and Mr. Geert-Jan Knoops for Mr. Jovica Stanišić
Mr. Mihajlo Bakrač and Mr. Vladimir Petrović for Mr. Franko Simatović

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”),

NOTING the “Decision on Simatović Urgent Request for Provisional Release” rendered by Trial Chamber I (“Trial Chamber”) on 21 April 2011, which denied a request for provisional release submitted by Franko Simatović (“Simatović”);¹

BEING SEISED of the “Appeal Against the Decision Denying Franko Simatović’s [sic] Urgent Request for Provisional Release” filed by Simatović on 28 April 2011 (“Appeal”);

NOTING the “Prosecution Response to Appeal Against the Decision Denying Franko Simatović’s Urgent Request for Provisional Release” filed by the Office of the Prosecutor on 6 May 2011, opposing the Appeal;²

NOTING that Simatović’s sole ground of appeal is his argument that the Trial Chamber erred in law by denying Simatović’s request for provisional release on the basis that his request involved a late stage of the trial’s proceedings and did not present “compelling humanitarian grounds”;³

CONSIDERING that the “compelling humanitarian grounds” requirement for granting provisional release at a late stage of trial proceedings is well established in the Tribunal’s jurisprudence;⁴

FINDING that Simatović has therefore failed to demonstrate any error in the Impugned Decision;

HEREBY DISMISSES the Appeal.

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

¹ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Simatović Urgent Request for Provisional Release, 21 April 2011 (“Impugned Decision”), para. 14.

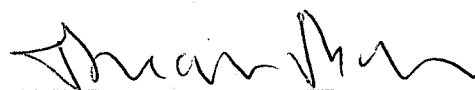
² Simatović did not file a reply.

³ Appeal, paras 6-9.

⁴ See, e.g., *Prosecutor v. Vujadin Popović et al.*, Decision on Radivoje Miletić’s Appeal Against Decision on Miletić’s Motion for Provisional Release, 19 November 2009, para. 7; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.17, Decision on Prosecution’s Appeal Against Decision on Prlić’s Motion for Provisional Release, 23 July 2009 (public redacted version), para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.16, Decision on Prosecution’s Appeal Against Decision on Pušić’s Motion for Provisional Release, 20 July 2009 (public redacted version), para. 6; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.8, Decision on Prosecution’s Appeal Against Decision on Gvero’s Motion on Provisional Release, 20 July 2009 (public redacted version), para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.15, Decision on Prosecution’s Appeal Against the Trial Chamber’s Decision on Slobodan Praljak’s Motion for Provisional Release, 8 July 2009, para. 7.

Judge Mehmet Güney appends a dissenting opinion.

Dated this 23rd day of May 2011
At The Hague
The Netherlands



Judge Theodor Meron
Presiding

[Seal of the Tribunal]

I. DISSENTING OPINION OF JUDGE GÜNEY

1. On 21 April 2011, the Trial Chamber issued a decision (“Impugned Decision”) denying the request of Mr. Simatović (“Simatović”) for provisional release in relation to the period of time following the Rule 98 *bis* decision for failure to present sufficient compelling humanitarian grounds justifying his request.¹ In his Appeal, Simatović argues that the Trial Chamber abused its discretion when demanding “compelling humanitarian grounds” in order to grant provisional release, since the jurisprudence is inconsistent on this issue.² The majority of the Bench of the Appeals Chamber (the “Majority”) rejects the Appeal stating in a concise decision that “the ‘compelling humanitarian grounds’ requirement for granting provisional release at a late stage of trial proceedings is well established in the Tribunal’s jurisprudence.”³

2. I would like first to reiterate my opinion already expressed on this issue in countless decisions.⁴ I remain of the opinion that the application of Rule 65 (B) of the Rules does not impose an additional requirement on the accused to demonstrate the existence of “compelling humanitarian reasons” even at a late stage of the proceedings. Rather, these humanitarian grounds will “have to be assessed in the context of the two requirements of Rule 65 (B), and the weight attached to [them] as justification for provisional release will differ from one defendant to another depending upon all of the circumstances of the case.”⁵ I am of the view that the approach expressed by the Majority undermines the continuing presumption of innocence and effectively fetters the discretion of the Trial Chamber.⁶

¹ Impugned Decision, para. 13.

² Appeal Against the Decision Denying Franko Simatović’s Urgent Request for Provisional Release, Case No. IT-03-69-T (“Appeal”), para. 6.

³ Majority Decision, p. 2.

⁴ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.11, Decision on Prosecution’s Appeal Against Decision on Gvero’s Further Motion for Provisional Release, 25 January 2010 (confidential, “Gvero Decision of 25 January 2010”), Joint Dissenting Opinion of Judges Güney and Liu; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.19, Decision on Prosecution’s Appeal of the Trial Chamber’s Decision to Provisionally Release Accused Praljak, 17 December 2009 (confidential), Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Vujadin 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 November 2009 (confidential, “Miletić Decision of 19 November 2009”), Joint Dissenting Opinion of Judges Güney and Liu; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.3, Decision on Ivan Čermak’s Appeal Against Decision on his Motion for Provisional Release, 3 August 2009 (confidential, “Čermak Decision of 3 August 2009”), Partly Dissenting Opinion of Judges Güney and Liu; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.16, Decision on Prosecution’s Appeal Against Decision on Pušić’s Motion for Provisional Release, 20 July 2009 (confidential), Opinion Dissidente du Juge Güney.

⁵ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007.

⁶ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on “Prosecution’s Appeal from *Décision relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković* Dated 31 March 2008”, 21 April 2008, para. 17, Partly Dissenting Opinion of Judge Güney, paras. 1, 4; Gvero Decision of 25 January 2010, Joint Dissenting Opinions of

3. Also, it is difficult for me to support the statement expressed in the Majority Decision that the compelling humanitarian reasons principle is “well-established” in the Tribunal’s jurisprudence. Although this requirement has been part of the recent jurisprudence, the Majority description of the case law is both an overstatement and misleading, for the following reasons. Firstly, it neglects to reflect the fact that the requirement was reinstated by a slim majority of Appeals Chamber Judges (four out of seven) changing the Rules on Evidence and Procedures that were specifically amended in 1999 to remove it;⁷ hence, a small change in the constitution of the Appeals Chamber could provoke an immediate change in the current trend.⁸ Secondly, it remains controversial as three Judges of the Appeals Chamber have expressed their disagreement with it, and this disagreement is shared by several trial Judges.⁹ Thirdly, establishing such a stringent criterion prior to the trial judgement is not supported by any international human rights instruments¹⁰ or by any other international criminal law jurisdictions.¹¹

4. Consequently, I believe that the Appeals Chamber should have found that the Trial Chamber erred in finding that Simatović was required to present “compelling humanitarian grounds justifying provisional release”.¹² Accordingly, I believe that the Appeals Chamber should have referred the matter back to the Trial Chamber to apply the correct legal standard and to determine, in the exercise of its discretion, whether the provisional release of Simatović was warranted.

Judges Güney and Liu, para. 29; *Miletić* Decision of 19 November 2009, Joint Dissenting Opinion of Judges Güney and Liu, para. 1.

⁷ IT/32/REV.17. Before this amendment of the Rules, Rule 65 (B) stated (IT/32/REV.16, 2 July 1999):

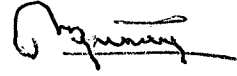
(B) Release may be ordered by a Trial Chamber only in *exceptional circumstances*, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

⁸ I note that Judge Robinson, Judge Liu and I have steadily dissented on this issue. For instance *see Gvero* Decision of 25 January 2010 and *Prosecutor v. Mico Stanišić et al.*, Case No. IT-08-91-AR65.1, Decision on Mico Stanišić’s Appeal against Decision on his Motion for Provisional Release, 11 May 2011, Dissenting Opinion of Judge Robinson.

⁹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Miletić’s Motion for Provisional Release, confidential with public dissenting opinion of Judge Prost, 15 October 2009; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.23, Decision on Valentin Ćorić’s Appeal Against the Trial Chamber’s “Décision relative à la demande de mise en liberté provisoire de l’Accusé Valentin Ćorić”, confidential, 24 December 2009 (duty Judge); *The Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, 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 February 2011 (“*Stanišić* Decision of 25 February 2011”), paras. 14-26 and the separate opinion of Judge Delvoie; Impugned Decision, paras. 23-24.

¹⁰ Article 21(3) of the ICTY Statute and 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 on Human Rights (“ECHR”); ECHR jurisprudence has held that “[a]ny system of mandatory detention on remand is *per se* incompatible” with Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECPHRFF”), European Court of Human Rights, *Ilijkov v. Bulgaria*, Judgement, 26 July 2001, paras. 84 and 85.

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



Judge Mehmet Güney

On this 23rd day of May 2011,

At The Hague, the Netherlands.

[Seal of the Tribunal]

¹¹ International Criminal Tribunal for Rwanda Rules of Procedure and Evidence, Rule 65 (B); International Criminal Court Rules of Procedure and Evidence, Rules 118-119; Special Tribunal for Lebanon Rules of Procedure and Evidence, Rule 102.

¹² Impugned Decision, para. 13.