UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991	Case No.	IT-08-91-AR65.2
		Date:	29 August 2011
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Decision: **29 August 2011**

PROSECUTOR

v.

MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN

PUBLIC

DECISION ON MIĆO STANIŠIĆ'S APPEAL AGAINST DECISION ON HIS MOTION FOR PROVISIONAL RELEASE

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. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seised of "Mr. Mićo Stanišić's Appeal Against the Decision Denying Mićo Stanišić's Request for Provisional Release During the Upcoming Summer Court Recess", filed by Counsel for Mr. Stanišić on 1 July 2011 ("Appeal"), against a decision rendered by Trial Chamber II of the Tribunal ("Trial Chamber") on 29 June 2011, which denied Mr. Stanišić's application for provisional release.[1] The Office of the Prosecutor ("Prosecution") filed its response on 8 July 2011.[2] Mr. Stanišić did not file a reply.

I. BACKGROUND

2. On 2 June 2011, Mr. Stanišić filed a motion requesting that the Trial Chamber grant him provisional release to the Republic of Serbia for the period of the summer recess in order to assist in the preparation of his defence case ("Motion").[3]

3. On 29 June 2011, the Trial Chamber issued the Impugned Decision, in which it denied the Motion.[4] The Impugned Decision found that Mr. Stanišić was not a threat to witnesses, victims, or any other person associated with the case and would return to detention should he be provisionally released.[5] It held that the rationale for provisional release advanced by Mr. Stanišić, namely, the need to assist in the preparation of his defence case,[6] was not a practical advantage at this point in the proceedings, as the defence case was in its concluding stages.[7] In light of the fact that Mr. Stanišić did not advance any serious and sufficiently compelling humanitarian reasons in favour of his request for provisional release,[8] the Trial Chamber opined that, "only due to the overriding effect of Appeals Chamber precedent, of which the Trial Chamber is cognisant, [...] the Motion [had to] be denied for lack of 'compelling humanitarian grounds'."[9]

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1 *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Decision Denying Mićo Stanišić's Request for Provisional Release During the Upcoming Summer Court Recess, 29 June 2011 ("Impugned Decision"), para. 38.
2 Prosecution's Response to Mićo Stanišić's Appeal Against the Decision Denying Mićo Stanišić's Request for Provisional Release During the Upcoming Summer Court Recess, 8 July 2011 ("Response").
3 *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Mr. Stanišić's Motion for Provisional Release During the Upcoming Summer Court Recess (public with confidential annexes), 2 June 2011 ("Motion"), paras 1-2, 10(g).
4 Impugned Decision, para. 38.
5 Impugned Decision, paras 33-37.
6 *See* Motion, para. 10(g).
7 Impugned Decision, paras 31-32.
8 *See* Impugned Decision, paras 31-32, 37.
9 Impugned Decision, para. 37.

4. On 22 July 2011, Mr. Stanišić's supplemental submission requesting that the period of his provisional release, should his Appeal be granted, be extended to 30 August 2011 to account for a change in the scheduling of trial proceedings was filed ("Supplemental Submission").[10] In its response to the Supplemental Submission, the Prosecution maintained its objection to Mr. Stanišić's request for provisional release, but did not object to an extension of the period of provisional release in the event that Mr. Stanišić's request should be granted.[11]

5. During the summer recess, the Duty Judge became seised of the Appeal.[12] The Duty Judge declared, however, that, "in the specific circumstances of Mr. Stanišić's Appeal," he, as Duty Judge, "lack[ed] competence to decide the matter"[13] because the matter was neither urgent nor otherwise appropriate to deal with within the meaning of Rule 28 of the Tribunal's Rules of Procedure and Evidence ("Rules").[14]

II. STANDARD OF REVIEW

6. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.[15] The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.[16] Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision.[17]

7. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".[18] The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's

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[10] Supplemental Submission to Mr. Stanišić's Motion for Provisional Release During the Upcoming Summer Court Recess, 22 July 2011 ("Supplemental Submission"), paras 2-3.
[11] *Prosecutor v. Mićo Stanišić and Stojan Župljanin,* Case No. IT-08-91-T, Prosecution's Response to Stanišić's Supplemental Submission to Motion for Provisional Release During the Upcoming Court Recess, 22 July 2011, para. 2.
[12] Decision on Competence of Duty Judge Pursuant to Rule 28, 29 July 2011 ("Decision of the Duty Judge").
[13] Decision of the Duty Judge, para. 14.
[14] Decision of the Duty Judge, para. 13.
[15] *See, e.g., Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.25, Decision on Slobodan Praljak's Appeal Against Decision on His Motion for Provisional Release, 10 June 2011 ("*Praljak* Decision"), para. 3; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.24, Decision on Jadranko Prlić's Appeal Against the Trial Chamber Decision on His Motion for Provisional Release, 8 June 2011 ("*Prlić* Decision"), para. 3.
[16] *See, e.g., Praljak* Decision, para. 3; *Prlić* Decision, para. 3.
[17] *See, e.g., Praljak* Decision, para. 3; *Prlić* Decision, para. 3.
[18] *See, e.g., Praljak* Decision, para. 4; *Prlić* Decision, para. 4.

discretion.[19] The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[20]

III. APPLICABLE LAW

8. Under Rule 65(B) of the Rules, a Trial Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness, or other person, and after having given both the host country and the State to which the accused seeks to be released the opportunity to be heard.[21]

9. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.[22] What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.[23] This is because decisions on motions for provisional release are fact-intensive and cases are considered on an individual basis in light of the particular circumstances of the individual accused.[24] The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.[25] Finally, an application for provisional release brought at a late stage of the proceedings, and in particular at the close of the Prosecution case, should only be granted if serious and sufficiently compelling humanitarian reasons exist.[26]

IV. ARGUMENTS OF THE PARTIES

10. Mr. Stanišić asserts that the Trial Chamber: (i) found that he met all of the criteria under Rule 65(B) of the Rules; and (ii) indicated that the Motion was only denied due to the overriding effect of the Appeals Chamber's jurisprudence requiring that compelling humanitarian grounds be established before provisional release is granted in the late stages of a trial.[27] Mr. Stanišić submits that Appeals Chamber jurisprudence regarding the compelling humanitarian reasons requirement is

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[19] *See, e.g.*, *Praljak* Decision, para. 4; *Prlić* Decision, para. 4.
[20] *See, e.g.*, *Praljak* Decision, para. 4; *Prlić* Decision, para. 4.
[21] *See, e.g.*, *Praljak* Decision, para. 5; *Prlić* Decision, para. 5.
[22] *See, e.g.*, *Praljak* Decision, para. 6; *Prlić* Decision, para. 6.
[23] *See, e.g.*, *Praljak* Decision, para. 6; *Prlić* Decision, para. 6.
[24] *See, e.g.*, *Praljak* Decision, para. 6; *Prlić* Decision, para. 6.
[25] *See, e.g.*, *Praljak* Decision, para. 6; *Prlić* Decision, para. 6.
[26] *See, e.g.*, *Praljak* Decision, para. 6; *Prlić* Decision, para. 6.
[27] Appeal, paras 4-6.

conflicting[28] and asserts that there are cogent reasons for the Appeals Chamber to depart from its previous case law and discard this requirement.[29]

11. The Prosecution responds that the Appeals Chamber's jurisprudence on the compelling humanitarian grounds requirement for granting provisional release is not conflicting and is well established.[30] It argues that there are compelling reasons to circumscribe a Trial Chamber's discretion to grant provisional release after the close of the Prosecution's case, which are consistent with internationally applicable legal standards for provisional release.[31] It therefore urges the Appeals Chamber to dismiss the Appeal.[32]

V. DISCUSSION

12. The Appeals Chamber notes that the Appeal is exclusively based on the arguments that the Appeals Chamber case-law on the serious and sufficiently compelling humanitarian reasons requirement is conflicting and that there are cogent reasons to depart from the jurisprudence regarding this standard.[33] However, Mr. Stanišić does not challenge the Trial Chamber's finding that he failed to advance any serious and sufficiently compelling humanitarian reasons that would justify his provisional release.[34]

13. The Appeals Chamber recalls that since the *Petković* Decision of 21 April 2008, it has repeatedly affirmed, by majority, the "serious and sufficiently compelling humanitarian reasons requirement" for granting provisional release at a late stage of trial proceedings, in particular after the close of the Prosecution case.[35] In the absence of cogent reasons to depart from its well-established jurisprudence, and given the narrow focus of the Appeal, there is no basis to overturn the Impugned Decision. Accordingly, the Appeals Chamber need not consider the Supplemental Submission.

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[28] Appeal, paras 7, 9-10.
[29] Appeal, paras 11-15.
[30] Response, paras 12-15.
[31] Response, paras 16-22.
[32] Response, para. 34.
[33] Appeal, paras 7-15.
[34] *See* Appeal; *see also* Impugned Decision, paras 31-32, 37.
[35] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision relative à la demande de mise en liberté provisoire de l'Accusé Petković* Dated 31 March 2008," 21 April 2008, para. 17; *see also, e.g.*, *Praljak* Decision, para. 9; *Prlić* Decision, para. 9.

VI. DISPOSITION

14. On the basis of the foregoing, the Appeals Chamber **DISMISSES** the Appeal in its entirety.

Judge Robinson and Judge Güney append dissenting opinions to this decision.

Judge Liu appends a declaration to this decision.

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

Dated this 29th day of August 2011,
At The Hague,
The Netherlands.

Judge Patrick Robinson
Presiding

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE ROBINSON

1. While the Appeals Chamber has consistently affirmed, by majority, the "serious and sufficiently compelling humanitarian reasons" requirement for granting provisional release at a late stage of trial proceedings since the *Petković* Decision of 21 April 2008,[1] I believe there exist, within the terms of the *Aleksovski* principle,[2] cogent reasons for the Appeals Chamber to depart from its decision of 21 April 2008.

2. Rule 65(B) of the Rules was adopted on 11 February 1994. In its original form, it provided:

> Release may be ordered by a Trial Chamber only in exceptional circumstances, 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.[3]

3. As is evident from the text of the Rule at that time, provisional release was an exception to the general rule of detention. Due to concerns, inter alia, about the Rule's conformity with international human rights standards which make clear that release should be the rule before a conviction, and not the exception, the "exceptional circumstances" language was removed from the text of the Rule in November 1999.[4]

4. On 21 April 2008, in response to an appeal by the Prosecution in the *Prlić et al.* case regarding the provisional release of the accused Milivoj Petković, the Appeals Chamber created an additional requirement for provisional release applications made at a late stage of the trial proceedings. In this decision, the Appeals Chamber held:

> the development of the Tribunal's jurisprudence implies that an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution's case, will only be granted when serious and sufficiently compelling humanitarian reasons exist.[5]

5. After the *Petković* Decision of 21 April 2008, Trial Chambers began explicitly requiring that accused show the existence of sufficiently compelling humanitarian circumstances to justify provisional release at an advanced stage of the proceedings, in particular after the close of the Prosecution case.[6] The lone exception occurred in the *Prlić et al.* case, on an appeal by the Prosecution regarding the provisional release of the accused Berislav Pušić, issued on 23 April

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1 *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 ("*Petković* Decision of 21 April 2008"), para. 17, fn. 52 and references cited therein. *See also, e.g.*, *Miletić* Decision, para. 7; *Gotovina* Decision, para. 6.

2 *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, paras 107-108.

3 IT/32. This Rule was amended on 30 January 1995 to provide that the host country will be given the opportunity to be heard on its position regarding the potential provisional release of an accused. IT/32/Rev. 3.

4 *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 and 40-PT, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson ("Krajišnik Decision of 8 October 2001") paras 2, 16.

2008, which held that "Rule 65(B) of the Rules does not mandate humanitarian justification for provisional release".[7] Instead, it found 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.[8]

All cases other than this decision, however, have followed the standard articulated in the *Petković* Decision of 21 April 2008.

6. The current understanding of Rule 65(B) of the Rules is that it confers upon the Trial Chamber a discretionary power to grant provisional release, if it is satisfied that (a) the accused will appear for trial at the end of his release and (b) will not pose a danger to any victim, witness, or other person while released.

7. According to the Tribunal's jurisprudence, a Chamber retains the discretionary power not to grant provisional release even if it is satisfied as to the fulfilment of the two conditions identified in Rule 65(B) of the Rules. But there has been at least one opposing view. In the dissenting opinion in *Prosecutor v. Krajišnik et al.*, it was held that, if the two criteria in 65(B) of the Rules have been met and the Trial Chamber is so satisfied, it has an obligation to grant provisional release.[9] That view of Rule 65(B) of the Rules is explained by the doctrine known in some common law jurisdictions as a power coupled with a duty.[10] That is, when a statutory or regulatory provision identifies the condition(s) for the exercise of a discretion, and that condition(s) has been fulfilled, the decision-maker, notwithstanding the use of the word "may", is required to exercise his or her discretion in favour of the beneficiary.

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5 *Petković* Decision of 21 April 2008, para. 17.

6 *See, e.g., 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 November 2009, para. 7; *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, 3 August 2009 (confidential); *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 17 December 2008, para. 15; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Valentin Ćorić's Request for Provisional Release, 16 December 2008, para. 34; *Prosecutor v. Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5, and IT-05-88-AR65.6, 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* Decision of 15 May 2008"), 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 April 2008, para. 16; *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 July 2010, para. 16.

7 *Pušić* Decision of 23 April 2008, para. 14 (emphasis added).

8 *Pušić* Decision of 23 April 2008, para. 14.

9 *Krajišnik* Decision of 8 October 2001.

10 *See Karemera et al. v. Prosecutor,* Case No. ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision Not to Prosecute Witness BTH for False Testimony, 16 February 2010, Dissenting Opinion of Judge Patrick Robinson, paras 15-18(confidential).

8. As discussed in *Justice v. Oxford (Bishop)*, while the word "may" in its ordinary meaning retains a discretionary quality, there are circumstances where the action that "may" be taken becomes obligatory. It stated that:

> Where a power is deposited with a public officer for the purpose of being used for the benefit of persons (1) who are specifically pointed out, and (2) with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised.[11]

9. In the same case, Lord Blackburn noted:

> Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right: and if the object of the power is to enable the donee to effectuate a legal right, then it is the *duty* of the donee of the power to exercise the power when those who have the right call upon him to do so.[12]

10. It is not necessary to decide whether Rule 65(B) of the Rules vests the Chamber with a "power coupled with a duty". What is clear however is that the presumption of innocence, coupled with the requirement in Article 9(3) of the International Covenant on Civil and Political Rights ("ICCPR"), which are both principles that reflect rules of customary international law, are factors that must influence the interpretation of the Rule. Article 9(3) provides that:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.[13]

11. There may be circumstances in which, although the two criteria in the Rule have been fulfilled, it would not be in the interests of justice to grant provisional release. An example would be a situation in which the Trial Chamber has information that the accused intends to destroy important documentary evidence relevant to the trial proceedings. In that case, even if a Trial Chamber is satisfied that the accused, if released, will appear for trial and will not pose a threat to victims and witnesses, it would be in the interests of the proper administration of justice to refuse an application for provisional release. In light of the history of the Rule, the elimination of the requirement of exceptional circumstances in 1999, the influence of the presumption of innocence, and the principle enunciated in the ICCPR that detention must not be the general rule, it is clear that, once the two criteria have been met, the discretionary power to nonetheless refuse an application for provisional release should only be exercised in exceptional cases where there is a strong and compelling basis for the refusal. A discretionary power must be exercised lawfully, not arbitrarily. The accused

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[11] *Julius v. Oxford (Bishop)*, 5 App. Cas. 214, 1880.
[12] Cited in John S. James, *Stroud's Judicial Dictionary of Words and Phrases* (5th edition, Volume 3), 1567, 1568.
[13] UN General Assembly, ICCPR, 16 December 1966, United Nations Treaty Series, vol. 999.

enjoys the benefit of the presumption of innocence throughout the entire proceedings, no less so at the later than at the earlier stage of the trial.

12. It is appropriate to examine the precise wording of the *Petković* Decision of 21 April 2008. The Appeals Chamber held:

> the perception that persons accused of international crimes are released, for a prolonged period of time, after a decision that a reasonable trier of fact could make a finding beyond any reasonable doubt that the accused is guilty (this being the meaning of a decision dismissing a Rule 98bis motion), could have a prejudicial effect on victims and witnesses.[14]

13. The reasoning in that statement indicates that the motivating factor for that decision is the dismissal of a motion for acquittal under Rule 98 bis of the Rules. However, it is settled that the standard of proof to be met by the Prosecution so that the accused is called upon to present his Defence case is low: the Prosecution need only present evidence on the basis of which a reasonable trier of fact could, not must, convict. In fact, an accused may yet be acquitted following the dismissal of a motion for acquittal under Rule 98 bis of the Rules, and this may happen even if the Defence rests its case and calls no evidence whatsoever; that is so because the standard of proof for conviction is proof beyond reasonable doubt, whereas the standard of proof for the Defence to be called upon to present its case is much lower. The position in law is that the dismissal of a motion for acquittal under Rule 98 bis of the Rules does not place the accused any nearer to a conviction than to an acquittal.

14. The *Petković* Decision of 21 April 2008 is problematic in its assessment of the significance of a dismissal of a 98 bis motion. The decision attaches too much weight to a dismissal of a Rule 98 bis motion, especially in circumstances where the two requirements of Rule 65(B) of the Rules have been satisfied. Rule 98 bis of the Rules, as it originated in common law jurisdictions, was designed to prevent juries consisting of laypersons from "bring[ing] in an unjust conviction".[15] However, at the Tribunal, there is no jury; there is instead a Chamber of three professional trial Judges perfectly capable of sifting through evidence to determine what items could lawfully sustain a conviction and what items could not. Against that background, the Rule has far less significance at the Tribunal than it does in common law jurisdictions from which it is derived. That historical perspective is an additional reason why the dismissal of a Rule 98 bis motion should not be overvalued by drawing from it conclusions adverse to the accused. Significantly, the Rules and Procedure and Evidence of

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[14] *Petković* Decision of 21 April 2008, para. 17.

[15] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement on Acquittal ("Acquittal Decision"), 16 June 2004, Separate Opinion of Judge Patrick Robinson, para. 10. *Cf.* para. 11 of Acquittal Decision where the Trial Chamber refers to *R v. Galbraith*, 73 Cr. App. R. 124 (1981), at p. 127 (per Lord Lane, C.J.).

the International Criminal Court ("ICC") do not provide for a procedure equivalent to Rule 98 bis of the Rules.

15. It may also be observed that a Trial Chamber which has evidence that the release of an accused could have a "prejudicial effect on victims and witnesses", as outlined in paragraph 17 of the *Petković* Decision of 21 April 2008, would be properly exercising its discretion under Rule 65(B) of the Rules if it refused an application for provisional release made at any stage of the trial on that ground, because such a refusal would be covered by the second limb of the Rule. Indeed, it would be an improper exercise of the discretionary power to grant provisional release in those circumstances.

16. The effect of the requirement that provisional release will only be granted at a late stage of the proceedings when "serious and sufficiently compelling humanitarian circumstances exist" is to effectively take the Tribunal back to the pre-1999 situation where provisional release was only granted in exceptional circumstances. There is no warrant for such a step, particularly where the Trial Chamber is satisfied that, if released, the accused will turn up for trial and not pose a threat to victims and witnesses.

17. Additionally, the criterion of "serious and sufficiently compelling humanitarian reasons" is substantially close to the third criterion of Rule 65(I) of the Rules for granting provisional release to convicted persons whose appeals are pending; this provision, in addition to the other two criteria, requires "special circumstances" to exist that warrant such a release. 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. That is so because, while a convicted person no longer enjoys the benefit of the presumption of innocence, an accused person does. 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.

18. An application for provisional release that is made after the close of the Prosecution's case, following the dismissal of a Rule 98 bis motion for acquittal, should be considered in the same way as an application made at any other stage of the trial. That is, the Trial Chamber will examine the submissions of the parties and the relevant evidence and decide whether it is satisfied that, if released, the accused will turn up for trial and not pose a threat to victims, witnesses, or any other person. If the Trial Chamber determines that it is so satisfied, it may yet conclude that provisional release is not warranted if there are strong and compelling grounds for the refusal.

19. In light of the foregoing, there exist, within the terms of the *Aleksovski* principle, cogent reasons for the Appeals Chamber to depart from its decision of 21 April 2008.[16] Consequently, I would have reversed the Impugned Decision and remitted the matter to the Trial Chamber.

Dated this 29th day of August 2011,
At The Hague,
The Netherlands.

Judge Patrick Robinson

[Seal of the Tribunal]

[16] *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, paras 107-108.

DISSENTING OPINION OF JUDGE GÜNEY

1. I reiterate my position against the jurisprudence requiring an accused to show "compelling humanitarian reasons" in order to be granted provisional release after a Rule 98 *bis* decision ("the Additional Criterion").[1] However, the issue before us in the instant case is whether there are "cogent reasons" to depart from the jurisprudence requiring the Additional Criterion that was established in the *Petković* Decision of 21 April 2008. Indeed, although I do not consider this jurisprudence to be "well-established" but rather controversial, it remains a judicial precedent.[2]

B. The Applicable Law on Precedents

2. The Statute of this Tribunal is silent on the issue of precedent. In the *Aleksovski* Appeal Judgement, the Appeals Chamber analyzed the current trends of the application of this principle in both civil law and common law countries, and took into account the jurisprudence of other international courts. It specifically cited this excerpt of the *Cossey* case of the European Court of Human Rights:

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[1] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.25, Decision on Slobodan Praljak's Appeal Against Decision on his Motion for Provisional Release, 10 June 2011, Dissenting Opinion of Judge Güney; *Prosecutor v. Prlić et al.*,Case No. IT-04-74-AR65.24, Decsion on Jadranko Prlić's Appeal Against the Trial Chamber Decision on his Motion for Provisional Release, 8 June 2011, Partially Dissenting Opinion of Judge Güney ("8 June 2011 *Prlić* Decision"); *Prosecutor* v. *Stanisić & Simatović*, Case No. IT-03-69-AR65.7, Decision on Franko Simatović appeal Against the Decision Denying his Urgent Request for Provisional Release, 23 May 2011, Dissenting Opinion of Judge Güney ("*Simatović* Decision"); *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 ("*Miletić* Joint Dissenting Opinion"); *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; *Prosecutor v. Vujadin Popović et al*, Case No IT-05-88-AR65.8, Decision on Prosecution's Appeal Against Decision on Gvero's Motion for Provisional Release, 20 July 2009, Opinion Dissidente du juge Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.14, Decison 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 June 2009, Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Petković* Dated 31 March 2008", 21 April 2008 ("*Petković* Decision of 21 April 2008"), Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.8, Decision on "Prosecution's Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Prlić* Dated 7 April 2008", 25 April 2008, Partly Dissenting Opinion of Judge Güney; *Prosecutor v. Jadranko Prlić et al.*, Case No IT-04-74-AR65.6, Reasons for Decision on "*Prosecution's Urgent Appeal Against Décision Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Pušić Issued on 14 April 2008*", 23 April 2008; *Prosecutor v. Vujadin Popović et al*, Case No IT-05-88-AR65.4, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's

> It is true that … the Court is not bound by its previous judgements … However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention cas-law. *Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were* ***cogent reasons*** *for doing so.* [3]

3. The Appeals Chamber then concluded that it "*should* follow its previous decisions, but *should* be free to depart from them for **cogent reasons** in the interests of justice [emphasis added]."[4] This *ratio decidendi* was applied by the International Criminal Tribunal for Rwanda in the *Semanza* case.[5]

4. I note the declaration of Judge Hunt appended to the *Aleksovski* Appeal Judgement on this point. Judge Hunt agreed with the principle articulated in the Appeal Judgement, but elaborated on the reasoning and specified that "a departure from a previous decision is justified only when the interest of justice requires it".[6] He also opined that the solution of the balance between certainty and flexibility is not to be found in other (non-criminal) international courts or in domestic practices.[7] He further specified that the need for certainty commands that a specific bench at a particular time should never disregard a previous decision simply because its members disagree with it.[8] Judge Shahabuddeen also specified that Appeals Chamber was adopting a "practice" not a "legal requirement" and that "the decision does not appear to rest on that doctrine [of *stare decisis*]".[9]

5. In relation to the effect of domestic or international decisions upon this Tribunal, the Trial Chamber, presided by Judge Cassesse in the *Kupreškić* case, interestingly stated:

> Hence, generally speaking, and subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. […] Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non*

Motions for Provisional Release During the Break in the Proceedings, 15 May 2008, Partly Dissenting Opinion of Judges Liu et Güney.

[2] I explained my position my dissenting opinions on this issue in the 8 June 2011 *Prlić* Decision.

[3] European Court of Human Rights, *Cossey* Judgement of 27 September 1990, Series A, vol. 184, para. 35.

[4] *Prosecutor* v. *Zlatko Aleksovski*, Case No. IT-95-14/1, Appeals Judgement, 24 March 2000 ("*Aleksovski* Appeals Judgement"), paras. 107-108.

[5] *Prosecutor* v. *Laurent Semanza*, Case No. ICTR 97-20, Decision, 31 May 2000 ("*Semanza* Decision"), para. 92.

[6] *Aleksovski* Appeals Judgement, Declaration of Judge David Hunt, para. 8.

[7] *Ibid*, para. 7.

[8] *Ibid*, para. 8. I note on this issue the Declaration of Judge Liu appended to this decision, para. 2. See also *Fitzleet Estates Ltd.* v. Cherry (Inspector of Taxes, [1977] 3 All ER 996, 999, where the House of Lords stated: "Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected…".

[9] Judge Shahabuddeen's Separate Opinion in the *Semanza* Decision, para. 17.

exemplis, sed legibus iudicandum) also applies to the Tribunal as to other international criminal courts. [10]

6. On the issue of balancing predictability with flexibility, I note Judge Tanaka's Separate Opinion in the *Barcelona Traction (Preliminary Objections)* case in which he opined that, although he agrees with the principle of precedent, he stated that "the formal authority of the Court's decision must not be maintained to the detriment of its substantive authority."[11]

C. Discussion

7. It is apparent that the practice adopted in the *Aleksovski* case is not a direct importation of the common law corresponding principle of *stare decisis*, it is therefore difficult to follow the guidelines issued by the common law jurisdictions on this issue. However, I agree that a Chamber should not lightly overturn its precedent, even if a majority on a particular bench does not agree with the precedent.

8. The applicable law on this issue of precedent offers very little explanation as to the definition as to what would constitute "cogent reasons" and in which circumstances. However, it seems that the principle of "in the interests of justice" offers a reliable platform to serve as a basis to depart from jurisprudence. It also occurs to me that "the form" should not have precedence on the substance, so that a violation of a fundamental right should not be overlooked for the sake of preserving a practice.

9. I also believe that the principle put forward by the majority as the Additional Criterion does not find any root in customary international law. In addition, I can see no attempt from the majority to legitimate its decision to add this criterion or to ensure that this requirement observes international standards. Finally, it is also notable that the majority did not articulate "cogent reasons" to depart from the previously established jurisprudence. Consequently, although this *ratio decidendi* of "compelling humanitarian reasons" has been repeated on several occasions since the *Petković* 21 April 2008 Decision by a majority of the Appeals Chamber, I do not consider the value of this precedent to be strong, for lack of reasoning and lack of support in international customary law.

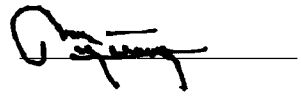
10. Furthermore, Rule 6 (A) of the Rules of Evidence and Procedure ("Rules") requires the approval of ten permanent judges for a change in the Rules to be adopted. It is quite compelling to observe that should a proposition reach the Rules Committee today to amend Rule 65 (B) in order

[10] *Prosecutor* v. *Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000, para. 540.
[11] *Barcelona Traction, Light and Power Company*, Limited, Preliminary Objections, Judgement, ICJ Reports 1964, p. 65 of Judge Tanaka Separate Opinion.

to insert the Additional Criterion, it would likely not find sufficient support to operate the proposed amendment. Indeed, out of fifteen permanent judges of the Tribunal, seven of them have already voiced their disapproval of such requirement.[12]

[12] *Prosecutor v. Stanišic and Simatović*, Case No. IT-03-69-AR65.8, Decision on Defence Appeal of the Trial Chamber's Decision on Stanišić Defence Request for Provisional Release during Summer Recess, 4 August 2011 (Confidential) (*Stanišić* 4 Ausgut 2011 Decision), Judge O-Gon Kwon; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on Slobodan Praljak's Motion for Provisional Release, 21 April 2011, (*Prajlak* 21 April 2011 Decision) Judge Jean-Claude Antonetti; *Prosecutor v. Stanišic and Župljanin*, Case No. IT-08-91-T, Decision Denying Mićo Stanišić's Request for Provisional Release during the Upcoming Summer Court Recess, 29 June 2011 ("*Stanišić* 29 June 2011 Decision"), Judges Hall, Delvoie and Harhoff; *Prosecutor v. Krajišnik and Plavšić*, Case No. IT-00-39 and 40-PT, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, Dissenting Opinion of Judge Patrick Robinson; *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, 3 August 2009 (Confidential), Partly dissenting Opinion of Judges Güney and Liu.

11. I also observe that those opposed to the application of the criterion to demonstrate compelling humanitarian reasons based their reasoning on, *inter alia*, on the argument that the criterion is *ultra vires* and that it undermines the presumption of innocence.[13] In the current state in which this controversial jurisprudence prevails, I am unable to agree with prioritizing the practice of precedents over the potential violation of a fundamental human right. I therefore conclude that (i) there are cogent reasons in the interest of justice to depart from the precedent of the 21 April 2008, (ii) the Impugned Decision should be reversed and (iii) remitted to the Trial Chamber.



Judge Mehmet Güney

On this 29th day of August 2011,

At The Hague, the Netherlands.

[Seal of the Tribunal]

[13] Dissenting Opinion of Judge Patrick Robinson, paras. 11-15; *see*, for instance, *Miletić* Joint dissenting Opinion of Judges Liu and Güney; *Stanišić* 29 June 2011 Decision, paras. 17, 19, 22, Judges Hall, Delvoie and Harhoff; *Prajlak* 21 April 2011 Decision, paras. 28-36, Judges Antonetti, Prandler, and Trechsel; *Stanišić* 4 Ausgut 2011 Decision, paras., 11-14, Judge Kwon acted as duty judge.

DECLARATION OF JUDGE LIU

1. While I accept the outcome of this decision, my position with respect to Rule 65(B) of the Tribunal's Rules of Procedure and Evidence ("Rules") remains unchanged. As I have previously indicated, I fundamentally disagree with the requirement of the governing jurisprudence that any application for provisional release made after the Rule 98*bis* stage of trial proceedings "should only be granted when serious and sufficiently compelling humanitarian reasons exist."[1] In my view, the imposition of this additional requirement of "serious and sufficiently compelling humanitarian reasons" to the two criteria listed under Rule 65(B) of the Rules[2] undermines the continuing presumption of innocence and fetters the discretion of the Trial Chamber. Moreover, this requirement represents an *ultra vires* extension of the Rules, imposing a further pre-requisite to grant provisional release which is neither provided for nor implied by the Rules.

2. Notwithstanding my well-documented antipathy towards the case law in this regard, I consider that the "compelling humanitarian circumstances" requirement has become an established part of the Tribunal's jurisprudence.[3] In my view, the force of precedent should not be lightly disturbed. Therefore, while there may, technically, be a majority in this case in favour of departing from the "compelling humanitarian circumstances" requirement, absent a clear consensus in the Appeals Chamber as a whole, I defer to the outcome of this decision. A radical departure from case law, particularly on a contentious point such as this, should not be predicated on the chance composition of a bench.[4]

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1 *See, e.g.*, *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 ("*Miletić* Decision"), 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"), Partly Dissenting Opinion of Judges Güney and Liu; *Prosecutor v. Vujadin Popović et al.*, Case No IT-05-88-AR65.4, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's Motions for Provisional Release During the Break in the Proceedings, 15 May 2008, Partially Dissenting Opinion of Judge Liu. *See also Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ngirumpatse's Appeal Against Decision on Remand on Provisional Release, 8 December 2009, Dissenting Opinion of Judge Liu Daqun.

2 *Rules* of Procedure and Evidence of the Tribunal, as amended on 22 July 2009.

3 *See, e.g.*, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.25, Decision on Slobodan Praljak's Appeal Against Decision on His Motion for Provisional Release, 10 June 2011, para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.24, Decision on Jadranko Prlić's Appeal Against the Trial Chamber Decision on His Motion for Provisional Release, 8 June 2011, para. 6; *Miletić* Decision, para. 7; *Čermak* Decision, para. 6; *Prosecutor v. Jadranko 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 June 2009, para. 8; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from *Décision relative à la demande de mise en liberté provisoire de l'Accusé Petković* Dated 31 March 2008," 21 April 2008, para. 17.

4 *Cf. Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement, 3 July 2008, Declaration of Judge Shahabuddeen, para. 15.

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

Done this 29th day of August 2011,
At The Hague,
The Netherlands.

Liu Daqun
Judge

[Seal of the Tribunal]