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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-AR65.1

Date: 11 May 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: **11 May 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 Mićo Stanišić
Mr. Slobodan Zečević
Mr. Slobodan Cvijetić

Counsel for Stojan Župljanin
Mr. Dragan Krgović
Mr. Aleksandar Aleksić

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),

NOTING the "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", issued by Trial Chamber II ("Trial Chamber") on 28 February 2011, which denied an application for provisional release made by Mićo Stanišić ("Stanišić");[1]

BEING SEISED of "Mr. Mićo Stanišić's Appeal Against the 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", filed by Stanišić on 28 February 2011 ("Appeal");

NOTING the "Prosecution's Response to Mićo Stanišić's Appeal Against the 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", filed by the Office of the Prosecutor ("Prosecution") on 2 March 2011;

CONSIDERING that Stanišić's request for provisional release was for the period from 1 February until 17 March 2011, during which he would assist his Defence team in the preparation of his Defence case during the adjournment between the Prosecution and Defence cases;[2]

CONSIDERING that the period of the requested release has expired and Stanišić's Defence case has commenced;

CONSIDERING therefore that the Appeal is moot because the relief requested can no longer be granted;

PURSUANT to Rule 65 of the Rules of Procedure and Evidence of the Tribunal,

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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 Break After the Close of the Prosecution Case with Separate Declaration of Judge Guy Delvoie, 28 February 2011.

[2] *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, Mr. Stanišić's Motion for Provisional Release During Upcoming Break in Trial Proceedings, 26 January 2011, paras 2, 9(g), 9(h).

HEREBY DISMISSES the Appeal.

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

Dated this eleventh day of May 2011
At The Hague
The Netherlands

Judge Patrick Robinson
Presiding

Judge Patrick Robinson appends a separate opinion.

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE PATRICK ROBINSON

1. The Motion for Provisional Release was filed on 26 January 2011 requesting that the accused be released from 1 February to 17 March 2011 so that he could assist his Defence team in the preparation of the Defence case. This meant that the Trial Chamber only had five days to issue its decision before the provisional release, if granted in the terms requested, would commence. In the result, the Trial Chamber's decision was rendered on 25 February 2011. Thus, at the time of the Trial Chamber's decision 25 days of the requested period of 46 days had already expired. Arguably, therefore, the request before the Trial Chamber was moot, or partially moot.

2. The appeal was filed promptly on 28 February, that day being the next working day after 25 February. At that time, 17 of the requested 46 days were left. The Appeal Chamber's decision is dated 11 May 2011, that is, some ten weeks after the appeal was filed. In the circumstances, as the Presiding Judge in the Appeal, I accept responsibility for the lateness of the decision and extend an apology to Mr. Stanišić.

3. While being constrained to agree that the appeal is now moot, I wish to say that, had that not been the case, for the reasons set out below, I would have granted the Appeal and remitted the case to the Trial Chamber.

4. 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.[1]

5. 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.[2]

6. 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

[1] 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.

[2] *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.

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.[3]

7. After the 21 April 2008 Decision, 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.[4] The lone exception occurred in the *Prlic et al.* case, on an appeal by the Prosecution regarding the provisional release of the accused Berislav Pušić, issued on 23 April 2008, which held that "Rule 65(B) of the Rules does *not* mandate humanitarian justification for provisional release".[5] 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.[6]

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

8. 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.

9. 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

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[3] *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.

[4] *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.

[5] *Pušić* Decision of 23 April 2008, para. 14 (emphasis added).

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.[7] 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.[8] 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.

10. 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.[9]

11. 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.[10]

12. 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.[11]

13. 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

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[6] *Ibid.*
[7] *Krajišnik* Decision of 8 October 2001
[8] *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).
[9] *Julius v. Oxford (Bishop)*, 5 App. Cas. 214, 1880.
[10] Cited in John S. James, *Stroud's Judicial Dictionary of Words and Phrases* (5th edition, Volume 3), 1567, 1568.
[11] UN General Assembly, ICCPR, 16 December 1966, United Nations Treaty Series, vol. 999.

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 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.

14. It is appropriate to examine the precise wording of the 21 April 2008 decision. The Appeal 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.[12]

15. 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.

16. The 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

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

to prevent juries consisting of laypersons from "bring[ing] in an unjust conviction".[13] 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 the International Criminal Court ("ICC") do not provide for a procedure equivalent to Rule 98 *bis* of the Rules.

17. 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 21 April 2008 decision, 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.

18. 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.

19. Another comment on the criterion of "serious and sufficiently compelling humanitarian reasons" is its substantial closeness 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

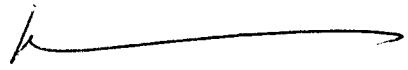
[13] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement on Acquittal ("Acquittal Decision"), 16 June 2004, Separate Opinion of Judge Patrick Robinson, para. 10. *Cf.* para.11 of Acquittal Decision where the Trial Chamber refers to *R v. Galbraith*, 73 Cr. App. R.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

the 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.

20. 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.

21. 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.[14] Consequently, I would have reversed the Impugned Decision and remitted the matter to the Trial Chamber.

Dated this eleventh day of May 2011
At The Hague
The Netherlands



Judge Patrick Robinson

[Seal of the Tribunal]

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