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Provisional Release at the ICTY: Rights of the Accused and the Debate that Amended a Rule

Raphael Sznajder*

Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand. - Antonio Cassese, 24 November 1995.

INTRODUCTION

¶1 The International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY or the Tribunal) detains accused individuals throughout trial proceedings at the United Nations Detention Unit (hereinafter UNDU), which is located close to the Tribunal in The Hague.¹ During breaks in trial, the Tribunal's accused may be granted provisional release subject to certain conditions. Such conditions are set forth in Rule 65(B) (hereinafter the Rule) of the ICTY Rules of Procedure and Evidence (RPE).²

¶2 On October 20, 2011, the judges at the ICTY amended Rule 65(B) of the RPE governing the administration of provisional release.³ The Amendment took effect on October 28.⁴ The apparent purpose of the October 2011 amendment was to mitigate the effect of a highly subjective requirement brought about by judicial interpretation, through the creation of questionable precedent. The precedent, set forth by the Appeals Chamber in 2008 interjected a requirement obligating accused in late stages of proceedings to demonstrate that they had sufficiently "compelling humanitarian grounds" in order to be provisionally released—in addition to fulfilling the objective requirements of Rule 65(B). With the most recent amendment to Rule 65(B), the ICTY demonstrated a commitment to upholding the rights of its accused by affording them a meaningful presumption of innocence with regard to their ability to be provisionally released. In doing so, the ICTY addressed a significant controversy that had

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¹ See *Detention*, ICTY WEBSITE, <http://www.icty.org/sections/AbouttheICTY/Detention>.

² ICTY Rules of Procedure and Evidence, Rule 65(B), U.N. Doc IT/32/Rev. 46 (Oct. 21, 2011) [hereinafter ICTY RPE].

³ *Id.*

⁴ *Id.*

challenged the Tribunal throughout its mandate, and made an imprint on its legacy in international criminal justice.

¶3 The ICTY has long struggled to determine the proper standard for provisional release. The recent amendment was the culmination of years of debate among the various chambers at the Tribunal over exactly what that standard should be. The back-and-forth that took place among ICTY judges over this standard is emblematic of a larger debate in the developing international criminal law jurisprudence. In particular, to what extent can certain internationally embraced rights of the accused be protected given the unique ideological and practical considerations that characterize several of the *ad hoc* tribunals?

¶4 The mandate of the ICTY—the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the former Yugoslavia since 1991—is to adjudicate criminal atrocities of immense gravity and historical magnitude. The ideological significance of the exercise of the due process of law is to bring about justice, national reconciliation and redress for the victims of atrocities of this magnitude.

¶5 Moreover, practical limitations on the most basic institutional level clearly constrain the Tribunal in its ability to carry out its mandate in a satisfactory way to all stakeholders. For example, the ICTY is located hundreds of miles away from the locations in which the crimes within its jurisdiction occurred.⁵ The accused are not tried in their native countries, but in The Hague, which makes the accused’s presence in The Hague during trial a practical necessity. Providing individual private accommodations for all accused would prove logistically unwieldy and expensive for the Tribunal given the necessity of securing and monitoring them.

¶6 Further, while the Netherlands has agreed to host such accused war criminals in contained settings, it is unlikely that it would be similarly amenable to granting them complete freedom within the country.⁶ Moreover, victim and witness protection are paramount priorities at the ICTY.⁷ The defendants are accused of crimes of the highest gravity and often continue to wield substantial influence in their countries of origin.⁸ In these ways, the dilemma posed by the ICTY’s provision of custodial arrangements for accused war criminals before it is unlike that faced by criminal courts in domestic jurisdictions.

⁵ See, e.g., Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT’L L. 635, 658–59 (2007) (discussing the practical limitations of ICTY and other international criminal tribunals).

⁶ See, e.g., Andrew Trotter, *Innocence, Liberty and Provisional Release at the ICTY: A Post-Mortem of ‘Compelling Humanitarian Grounds’ in Context*, 12 HUM. RTS. L. REV. 353, 369 (2012) (“Of course, in the case of tribunals such as the ICTY, there are certain practical difficulties with the provisional release of defendants during trial. Tribunals that are set up on the territory of a third state require detainees’ presence in the country to attend their trials, but are unlikely to be able to secure, or inclined to negotiate, long-term residential visas for alleged war criminals, many of whom may yet to be captured or even identified at the establishment of the tribunal”); see also Caroline L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1, 68 (2010) (finding reluctance of host country to allowing international criminal defendants to roam free on its soil presents a “significant obstacle”).

⁷ See Davidson, *supra* note 6, at 53 (“[T]he ICTY does not allow victims any participation rights. However, the provisional release decisions reflect a concern over victims’ rights to protection and their interests generally. The decision to require ‘sufficiently compelling humanitarian circumstances’ seems in no small part motivated by concern for victims” (internal citation omitted)); see also ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mučić also known as “Pavo,” Hazim Delić & Esad Landžo also known as “Zenga,” IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Hazim Delić*, ¶ 3 (Oct. 24, 1996).

⁸ Davidson, *supra* note 6, at 35 (citing Patricia M. Wald & Jenny Martinez, *Provisional Release at the ICTY: A Work in Progress*, in *ESSAYS ON ICTY PROC. & EVID.* 231, 236 (Richard May et al. eds., 2001) [hereinafter Wald & Martinez]).

¶7 The determination of the appropriate standard for provisional release has challenged the ICTY since its earliest cases and has been the source of intense debate among judges and practitioners alike. In 1999, in an effort to more closely emulate international human rights standards, the Tribunal amended Rule 65(B) by removing the requirement that the accused show “exceptional circumstances” in order to be provisionally released.⁹ Then, nearly a decade later, in what seemed to be a swing in the opposite direction, the Appeals Chamber added a requirement through precedent: that an accused demonstrate “compelling humanitarian grounds” in applications for provisional release to justify release made at late stages of proceedings.¹⁰ For accused in late stages of proceedings, the standard created by precedent in 2008 was even more stringent than had existed before the 1999 amendment.

¶8 The precedent created by the Appeals Chamber became binding on Trial Chambers, imposing an obligation on them to make a subjective assessment of the sufficiency of the accused’s “compelling humanitarian grounds,” which were now needed to justify provisional release during breaks in the proceedings. This unconventional, unilateral policy change by the Appeals Chamber drew criticism on both procedural and substantive grounds. The central criticism of the new requirement for provisional release was that it contravened the presumption of innocence.¹¹ Finally, over three years later, on October 28, 2011, the Rule was again amended to eliminate the “compelling humanitarian grounds” requirement, marking the second time in the Tribunal’s short history that it eliminated a subjective requirement concerning the grant of provisional release to its accused.

¶9 The various incarnations of the ICTY’s standard for provisional release reflect its general struggle to calibrate a presumption of innocence standard suitable to its accused. The Tribunal’s apparent ambivalence as to the proper standard for provisional release results from the division among the Tribunal’s judges as to the appropriate balance of the values at play: the right of the accused to be presumed innocent before conviction versus the competing ideological and practical considerations unique to the Tribunal and the accused that come before it.

¶10 Part One of this article elucidates the competing human rights values at stake in provisional release. Such rights have historically been truncated due to the Tribunal’s unique realities and values. Part Two selectively tracks the textual development of Rule 65(B) through examination of the Tribunal’s jurisprudence leading up to *Petković*, the decision that created the “compelling humanitarian grounds” requirement. This section offers the competing views advanced by both sides of the debate.

¶11 In the most substantial section of the article, Part Three, I will pause to examine *Petković*, the decision that spawned the “compelling humanitarian grounds” requirement of 2008 and created uproar among judges at the Tribunal. The article will identify the judicial misinterpretations that caused this hiccup in the ICTY’s administration of provisional release, and resulted in a step backwards for the rights of its accused seeking to be provisionally released from detention. It will first discuss the decision generally, and then it will focus on the misuse of precedent as foundation for the decision. The precedent on which the Chamber did rely—*Prosecutor v. Prlić, et al.* (hereinafter “*Prlić*”)—did not lead to the inference that the Chamber construed: that an accused must demonstrate sufficiently “compelling humanitarian grounds” to

⁹ See ICTY RPE, Rule 65(B), U.N. Doc IT/32/Rev. 17 (Nov. 17, 1999).

¹⁰ ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT 04-74-AR.65.7, Decision on “Prosecution’s Appeal From *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković* Dated 31 March 2008”, ¶ 15 (Apr. 21, 2008).

¹¹ See, e.g., Davidson, *supra* note 6, at 52.

be granted provisional release in late stages of proceedings. In the discussion of precedent, this article addresses *Petković*'s failure to consider an immediately prior decision, which dictated a completely different course, and of subsequent chambers' failure to adopt an alternate course when offered the opportunity to do so by another Appeals Chamber in a decision immediately following *Petković*.

¶12 The section will then address the procedural oddity of *Petković* in that *Petković* deviated from the Tribunal's established practice of rule amendment by using precedent rather than by formally amending the RPE. Both the misuse of precedent and the circumvention of rule amendment are failures of *stare decisis* on some level. In addition to these failures, the section will also discuss the Chamber's foremost misinterpretation—the mistaken emphasis on the stage of trial at which an accused, still presumed innocent, requests provisional release. The final section of Part Three illustrates the *Petković* Appeals Chamber's error, by showing how the resultant Rule conflated the provisional release standard between the ICTY's accused during trial and the ICTY's guilty while pending appeal release standard.

¶13 Lastly, Part Four of this article examines the October 28, 2011 amendment to Rule 65(B) and assesses its impact after a year in effect. Through examination of ICTY jurisprudence and commentary, this article posits, and intends to demonstrate, that the ICTY made the right decision in amending Rule 65(B) in October 2011. This article shows that the amendment has proven effective in respecting the accused's right to liberty, ultimately finding that the recent amendment strikes an acceptable balance between the accused's right to liberty and to be presumed innocent before conviction, and the practical realities and ideological goals of the ICTY. As such, the amendment bolsters the ICTY's credibility as a fair arbiter of justice. This article concludes that due to the realities of the ICTY, the presumption of innocence is more of an aspiration than an absolute and rigid doctrine in this unique context. Nonetheless, the presumption of innocence cannot be divorced from the aspirations of the ICTY. However, neither can it be divorced from the atrocity crimes the Tribunal was created to address.

¶14 As the grandfather of modern international criminal law—the first in the second generation of war crimes tribunals from which current and future international criminal tribunals look to for guidance—the ICTY's recent amendment to its provisional release rule was critical. The Tribunal's provisional release policy will be closely scrutinized and its internal debates followed. Thus, the amendment will doubtless be instrumental in shaping the ICTY's legacy and, even more importantly, the amendment will also be instrumental to the development of international criminal law.

PART ONE: THE PRESUMPTION OF INNOCENCE IN THE CONTEXT OF THE ICTY

The ICTY is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and other innocent people. Justice, however, also means respect for the alleged perpetrators' fundamental rights.¹²

¶15 The ICTY is mandated to investigate and prosecute individuals responsible for among the worst abuses of basic human rights and international humanitarian law during the violent

¹² ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu*, IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, ¶ 11 (Oct. 31, 2003).

disintegration of Yugoslavia in the 1990s.¹³ As an international bastion of justice, the ICTY was to succeed where the Nuremberg and Tokyo Tribunals failed: fulfilling its mandate, while upholding the rights of the accused.¹⁴ To safeguard the human rights of victims of this conflict, the ICTY was established to bring the perpetrators of these grave crimes—former military and political leaders, the so-called “untouchables”—to justice.¹⁵ In addition to protecting the human rights of victims, as a fair and neutral arbiter of atrocity crimes, the ICTY has a duty to protect the rights of its accused, irrespective of the gravity of their alleged crimes.¹⁶

¶16 Among all of the rights implicated in detention, provisional release most directly implicates the presumption of innocence. At the ICTY’s inception, then-Secretary General of the United Nations Boutros Boutros-Ghali asserted:

It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings... such internationally recognized standards are, *in particular*, contained in article 14 of the International Covenant on Civil and Political Rights.¹⁷

¶17 Article 14(2) of the International Covenant on Civil and Political Rights (hereinafter ICCPR) states “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”¹⁸ Article 14(2) of the ICCPR was adopted verbatim in article 21 of the ICTY Statute.¹⁹

¶18 The Tribunal therefore has a *de jure* obligation to provide its accused with the presumption of innocence.²⁰ Applied to provisional release, the purest form of the presumption contains three implications.²¹ First, the defendant must be *treated* as innocent until proven guilty, in which case any detention necessitates strong justifications. Second, the *burden of proof* for any continued detention rests on the prosecutor rather than the defendant, meaning that the defendant should not have to prove innocence to be provisionally released, instead the prosecutor should prove that the accused should not be provisionally released. Third, an accused must be proven guilty through a clear and discrete standard of proof, which should be used to justify continued detention when not otherwise required.²²

¹³ See *Office of the Prosecutor*, ICTY WEBSITE, <http://www.icty.org/sections/AbouttheICTY/OfficeoftheProsecutor> (last visited Dec. 12, 2012).

¹⁴ Gordon, *supra* note 5, at 658–59.

¹⁵ Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. U. J. INT’L. HUM. RTS. 1, 1 (2009) (noting that these individuals were referred to as untouchables because they allegedly committed heinous crimes but were historically shielded from prosecution).

¹⁶ *Id.*

¹⁷ U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 106, U.N. Doc. S/25704 (May 3, 1993).

¹⁸ International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁹ ICTY Statute, art. 20(3) (May 25, 1993).

²⁰ See, e.g., Trotter, *supra* note 6.

²¹ See Davidson, *supra* note 6, at 15 (citing ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 390 (2003) and SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 84 (2003)).

²² *Id.*

PART TWO: THE EVOLUTION OF RULE 65(B) FOR PROVISIONAL RELEASE

A. *Exceptional Circumstances Requirement*

¶19 During trial at the ICTY, the purpose of detaining accused at the UNDU is primarily practical. Detention ensures that the accused appears for trial and does not pose a danger to anyone. As such, there have always been two objective requirements contained in the text of Rule 65(B) that an accused must satisfy in order to be provisionally released during the course of proceedings: 1) he will not pose a flight risk; and 2) he will not pose a danger to any victim, witness, or any other person. The first iteration of Rule 65(B), adopted on February 11, 1994, 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.²³

¶20 Under this Rule 65(B), there were four factors that had to be satisfied for an accused to be granted provisional release. They were: 1) that “exceptional circumstances” existed; 2) that there were no objections raised from the host country; 3) that the accused would appear for his trial if released; and 4) that the accused would pose no danger to any victim, witness or other person. The burden of proof rested on the defense, and these factors were conjunctive, so that a chamber could exercise discretion to deny release even if all factors were met. The Rule existed as such until November, 1999.

¶21 The Rule contained one procedural factor, two objective factors, and one subjective factor. The objective factors were to be tested after first addressing the procedural factor—*i.e.*, giving the host country the opportunity to voice its objections. The remaining objective factor was common to most jurisdictions for an accused to be granted provisional release.²⁴ However, the subjective factor was not common to other jurisdictions.²⁵ Even if a trial chamber were satisfied that an accused posed no danger to anybody nor risk of flight, the general rule was that an accused would be detained.²⁶ Provisional release was granted extremely sparingly—only four times in the five years that this version of Rule 65(B) was in effect, and only in cases in which life-threatening health conditions existed.²⁷ The reasons that constituted “exceptional circumstances”

²³ ICTY RPE, Rule 65(B), U.N. Doc. IT/32 (Feb. 11, 1994); additionally, Rule 65(B) was amended on January 30, 1995 to provide that the host country (typically in the Former Yugoslavia) would be given the opportunity to express its view on the provisional release of the accused as well; *see* ICTY RPE, Rule 65(B), U.N. Doc IT/32/Rev. 3 (Jan. 30, 1995).

²⁴ Davidson, *supra* note 6, at 20–21 (citing *United States v. Salerno*, 481 U.S. 739, 744 (1987)); *see also* *R. v. Pearson*, [1992] 3 S.C.R. 665, ¶ 4 (Can.) (U.S. and Canadian Supreme Courts have held that the government can “constitutionally restrict a person’s liberty if there is a permissive regulatory purpose, such as ensuring the defendant’s presence at trial or ‘preventing danger to the community,’ and the measure is not excessive”); Daniel J. Rearick, *Innocent Until Alleged Guilty: Provisional Release at the ICTR*, 44 HARV. INT’L L. J. 577, 579 (2003).

²⁵ *See* ICTY RPE, Rule 65(B), U.N. Doc. IT/32/Rev. 41 (Feb. 28, 2008) (the determination of those “exceptional circumstances” under which provisional release may be granted is subjective).

²⁶ ICTY, *Prosecutor v. Mićo Stanišić & Stojan Župljanin*, IT-08-91-AR65.2, Decision on Mićo Stanišić’s Appeal Against Decision on his Motion for Provisional Release, ¶ 3 (Aug. 29, 2011) (Robinson, J., dissenting) (“As is evident from the text of the Rule at that time, provisional release was an exception to the general rule of detention”).

²⁷ Kate Doran, *Provisional Release in International Human Rights Law and International Criminal Law*, 11 INT’L CRIM. L.R. 707, 719 (2011) (citing ICTY, *Prosecutor v. Dario Kordić & Mario Čerkez*, IT-95-14/2-T, Order on Motion of the Accused Mario Čerkez for Provisional Release (Sept. 22, 1999); ICTY, *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić & Vladimir Šantić* also known as

were: in order for the accused to obtain specialized treatment unavailable in The Hague,²⁸ because the accused was terminally ill,²⁹ or so that the accused could visit a terminally ill parent.³⁰ In practice, the subjective factor became determinative in applications for provisional release.

¶22 Judge Patricia Wald of the ICTY noted that under this Rule, ICTY jurisprudence regarding the two objective prongs were “technically gratuitous or dicta,” because trial chambers did not need to go beyond finding an absence of “exceptional circumstances” to deny an accused provisional release.³¹ And the presence of exceptional circumstances during this period did not guarantee provisional release; it was merely a factor assessed in the mix, used principally to deny provisional release to accused who otherwise met the objective and procedural criteria delineated in Rule 65(B).

¶23 As a result, this provisional release policy carried a strong presumption of detention, as acknowledged by the Trial Chamber in *Prosecutor v. Blaškić et al.* (hereinafter “*Blaškić*”). In its December 1996 judgment denying provisional release, the Trial Chamber posited:

...both the letter of [Rule 65(B)] and the spirit of the Statute of the International Tribunal require that the legal principle is detention of the accused and that release is the exception; that, in fact, the gravity of the crimes being prosecuted by the International Tribunal leaves no place for any other interpretation even if it is based on the general principles of law governing the applicable provisions in respect of national laws which in principle may not be transposed to international criminal law.³²

¶24 Recognizing the truism that provisional release would only be granted exceptionally, the *Blaškić* Chamber articulated the status quo at the Tribunal in this era: detention was the rule and provisional release the exception.

¶25 During the reign of the “exceptional circumstances” requirement, trial chambers at the Tribunal gave only marginal credence to prevailing international human rights standards regarding rights of the accused. They justified the provisional release stringency by reference to the Tribunal’s unique circumstances, and judges often distinguished the ICTY from domestic jurisdictions in which comparatively liberal detention standards for accused were used.

¶26 For example, in *Prosecutor v. Delalić et al.* (hereinafter “*Delalić*”) in September 1996, the Trial Chamber explicitly recognized that the Tribunal’s provisional release regime was at odds with prevailing international human rights standards.³³ The *Delalić* Trial Chamber justified the

“Vlado”, IT-95-16-T, Decision on the Motion of Defense Counsel for Drago Josipović, (May 7, 1999); ICTY, *Prosecutor v. Milan Simić*, IT-95-9-PT, Decision on Provisional Release of the Accused (Mar. 26, 1998); and ICTY, *Prosecutor v. Đorđe Đukić*, IT-96-20-T, Decision Rejecting the Application to withdraw the Indictment and Order for Provisional Release (Apr. 24, 1996).

²⁸ Simić, IT-95-9-PT, *supra* note 28.

²⁹ Đjukic, IT-96-20-T, *supra* note 28.

³⁰ Kupreškić, IT-95-16-T, *supra* note 28.

³¹ Megan A. Fairlie, *The Precedent of Pretrial Release at the ICTY: A Road Better Left Less Traveled*, 33 *FORDHAM INT’L L.J.* 1101, 1151 (2010) (quoting Wald & Martinez, *supra* note 8, at 231).

³² ICTY, *Prosecutor v. Tihomir Blaškić*, IT-95-14, Order Denying a Motion for Provisional Release, 4 (Dec. 20, 1996).

³³ ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mucić* also known as “Pavo,” Hazim Delić & Esad Landžo also known as “Zenga,” IT-96-21-T, Decision of Motion for Provisional Release filed by the Accused Zejnil Delalić, ¶¶ 19–20 (Sept. 25, 1996).

Tribunal's contravention to international norms concerning the presumption of innocence by distinguishing the gravity of the crimes before the Tribunal and its lack of an enforcement mechanism.³⁴ "[B]oth the shifting of the burden to the accused and the requirement that he show 'exceptional circumstances' to qualify for provisional release are justified by the extreme gravity of the offences with which persons before the International Tribunal are charged and the unique circumstances under which the Tribunal operates."³⁵ It also noted the Tribunal's reliance on host-country cooperation which further logistically complicated an accused's possibility of release.³⁶

¶27 During the ICTY's formative years, such an exceptionally stringent provisional release regime could be understood as a byproduct of the fulfillment of its foremost mandate in bringing the "untouchables" to justice. To be sure, as the Tribunal was getting off the ground, the possibility of the accused escaping could have devastating effects on the Tribunal's credibility in the countries of the former Yugoslavia and it could undermine the Tribunal's legitimacy while the entire world was watching. Unlike domestic jurisdictions, if a defendant were to abscond at the ICTY, the Tribunal had no police to search for him.³⁷ Furthermore, an escape would be politically disastrous. U.N. and NATO forces had risked their lives arresting suspects who had evaded the Tribunal. If the accused were then granted provisional release, even if they did not abscond, U.N. and NATO efforts might appear to have been taken for granted.

¶28 On its face, such rationalization may appear inconsistent with the presumption of innocence contained in the ICTY's Statute. Under Daniel Rearick's rubric, detention justified by the gravity of an alleged crime is necessarily punitive.³⁸ Rearick, supported by the Human Rights Committee (hereinafter HRC), posits that detention must serve a clear objective aim. If it is not flight risk or danger, then why detain? Prevailing international law also opposes any general rule of detention because the denial of liberty constitutes *treatment* as guilty, which violates the first principle of the presumption of innocence.³⁹

¶29 The Tribunal's lack of enforcement mechanisms, the necessary cooperation of states in the former Yugoslavia, and concerns about danger to victims or witnesses are addressed by the flight risk and danger inquiry contained in the objective prongs of Rule 65(B), without the additional requirement of "exceptional circumstances."⁴⁰ The necessary reliance on other states and the Tribunals' lack of a police power, while important, are already factored into the analysis because they affect the likelihood that the accused will appear for trial and if they pose a danger. Thus,

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Davidson, *supra* note 6 (citing Wald & Martinez, *supra* note 8, at 236 (expressing concern that absence of a police force increases the likelihood that "once released an accused could escape the International Tribunal's grasp")).

³⁸ See, e.g., Rearick, *supra* note 25, at 577; see also Lorraine Smith, *Provisional Release*, INTERNATIONAL BAR ASS'N ICC MONITORING AND OUTREACH PROGRAM, <http://www.ibanet.org/Document/Default.aspx?DocumentUid=F50F53C7-2623-461E-955A-37C3E9EF73C2> (last accessed Apr. 14, 2013).

³⁹ For example, ICCPR article 9(3) states: "anyone arrested or detained on a criminal charge . . . 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. . ." ICCPR, *supra* note 19, art. 9(3). The Human Rights Committee (HRC) has similarly stated that detention should be the exception. See Smith, *supra* note 39, at 2 (providing that the HRC has similarly stated that "detention should be as short as possible" and "limited to essential reasons, such as danger of absconding . . . suppression of evidence, witness interference, or repetition of the offence").

⁴⁰ Davidson, *supra* note 6, at 65 ("[A]t the ICTY, victims' rights to protection are already largely addressed in the danger or future crime prong of the release inquiry"); see also Matthew M. DeFrank, *Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change*, 80 TEX. L. REV. 1429, 1431 (2002) (observing that the objective prongs require that the defense show that the defendant would not pose a danger to victims if released).

the “exceptional circumstances” requirement could be seen as superfluous, even harmful, because it derailed the provisional release inquiry from meaningful evaluation of the objective requirements.⁴¹ By diverting the legal analysis to an unduly subjective requirement, this incarnation of Rule 65(B) inadequately accounted for the presumption of innocence.

B. 1999 Amendment to Rule 65(B)

¶30 As the Tribunal established itself and gained credibility, it came time to revisit the Rule that governed its provisional release policy. On November 17, 1999, Rule 65(B) was amended to eliminate the subjective “exceptional circumstances” requirement.⁴²

¶31 Although it is impossible to ascertain the exact legislative intent behind rule amendments at the ICTY because its plenary meetings are held in private, the reason the subjective requirement was eliminated is apparent. Former President of the ICTY, Judge Patrick Robinson advanced that the Rule was amended due to concerns about its “conformity with international human rights standards which make clear that release should be the rule before a conviction, and not the exception.”⁴³ Another reason advanced was the imminent publication of a report produced by an expert group evaluating the work of ICTY which found that the “exceptional circumstances” standard proved “difficult to satisfy” in practice, and reported “serious concerns regarding the generally recognized right to a speedy trial.”⁴⁴ An additional reason was that judges were concerned about the “depressive effects” of prolonged detention following the deaths of two defendants in detention while awaiting trial.⁴⁵ In sum, the Rule, as originated, infringed too much on the rights of the accused at the ICTY.

¶32 Hence, at the Twenty-First Plenary Session in December 1999, a majority of judges voted to amend Rule 65(B) to omit the words “only in exceptional circumstances.”⁴⁶ The amended rule provided:

Release may be ordered by a Trial Chamber only after giving the host country and the state to which the accused seeks to be released the opportunity to be heard 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.⁴⁷

¶33 Following the 1999 amendment, the objective-subjective hybrid test became a two-pronged objective test, with the procedural prong requiring hearing from the host country.

¶34 Early reports of the amendment’s effects were positive from a human rights perspective. “The rule that once functioned as a roadblock now draws a line between two classes of cases,” those cases in which the accused poses a risk of flight or a danger to witnesses and victims, and those in which the accused does not.⁴⁸ In observing its effects, Rearick noted that Simo Zarić and

⁴¹ Rearick, *supra* note 25, at 589–91.

⁴² See ICTY RPE, Rule 65(B), U.N. Doc. IT/32/Rev. 17 (Nov. 17, 1999).

⁴³ See Stanišić, IT-08-91-AR65.2, *supra* note 27.

⁴⁴ See Fairlie, *supra* note 32, at 1134–35 (citing *Report of the Expert Group to Conduct a Review of the Effective and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, ¶ 51, U.N. Doc. A/54/634 (Nov. 22, 1999) (internal quotations omitted)).

⁴⁵ Geoffrey R. Watson, *The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 871, 881 (2003) (quoting Wald and Martinez, *supra* note 8, at 233).

⁴⁶ ICTY RPE, Rule 65(B), U.N. Doc. IT/32/Rev. 17 (Nov. 17, 1999).

⁴⁷ *Id.*

⁴⁸ Rearick, *supra* note 25, at 589–91.

Miroslav Tadić, previously denied provisional release for failing to prove “exceptional circumstances,” were released post-amendment.⁴⁹ With optimism, he noted that at least twelve provisional release applications had been granted within the first three years, compared with only four in the five years prior.⁵⁰ The new analysis offered the possibility that the objective Rule 65(B) criteria would be evaluated by their merits to the potential benefit of many accused-detainees.⁵¹ From a human rights perspective, such optimism was warranted: a 300% increase in provisional release applications granted, in almost half the time, was significant progress toward affording accused a meaningful presumption of innocence at the Tribunal.

1. Discretion to deny provisional release post-amendment

¶35 Despite the loosening of the criteria for an accused to be granted provisional release under the 1999 amendment, many trial chambers at the ICTY routinely denied applications for provisional release even when the objective criteria of the Rule were met.⁵² The Tribunal’s chambers may exercise discretion to deny provisional release even when an accused satisfies the objective requirements of Rule 65(B).⁵³

¶36 In the July 2000 case, *Prosecutor v. Brđjanin et al.* (hereinafter “*Brđjanin*”), the Trial Chamber stated:

It is not in dispute that Rule 65(B), by the use of the word ‘may’, gives to the Trial Chamber a discretion [sic] as to whether release is ordered. But it should be clearly understood that...it is a discretion to *refuse* the order notwithstanding that the applicant has established the two matters which that Rule identifies.⁵⁴

¶37 The issue of whether chambers at the ICTY retain discretion to deny provisional release after the accused satisfies the objective requirements remains contested. A number of judges hold the view that a chamber has an obligation to exercise its discretion to grant provisional release when the objective and procedural criteria of Rule 65(B) have been satisfied.⁵⁵ However, the controlling jurisprudence maintains that a chamber retains the discretion *to deny* release even when the objective requirements are met.

⁴⁹ *Id.* at 590.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² ICTY, *Prosecutor v. Radoslav Brđjanin & Momir Talić*, IT-99-36-T, Decision on Motion by Radoslav Brđjanin for Provisional Release, ¶ 22 (July 25, 2000).

⁵³ ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj & Lahi Brahimaj*, IT-04-84-T, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, ¶ 8 (July 20, 2007) (despite the Trial Chamber’s satisfaction Haradinaj posed no flight risk or danger to any witness, victim, or person, the Chamber denied his release based on its desire to not contribute to the intimidating atmosphere in Kosovo in which witnesses were scared to testify before the Tribunal, though there was no evidence Haradinaj would contribute to the intimidation).

⁵⁴ *Brđjanin*, IT-99-36-T, *supra* note 52.

⁵⁵ See Stanišić, IT-08-91-AR65.2, *supra* note 27, ¶¶ 7, 29 (“[W]hen 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”); see also ICTY, *Prosecutor v. Momčilo Krajišnik & Biljana Plavšić*, IT-00-39 & 40-PT, Decision on Momčilo Krajišnik’s Notice of Motion for Provisional Release, Dissenting Opinion of Judge Patrick Robinson (Oct. 8, 2001) (if the Trial Chamber is satisfied that the two objective factors of Rule 65(B) have been met, it has an obligation to grant provisional release).

¶38 Consequently, denials of provisional release continued to be the norm and trial chambers routinely denied applications for release even after an accused proved not to pose a risk of flight, nor a danger to victims, witnesses, or other people.⁵⁶ On the other hand, there is no corresponding discretion to grant provisional release when the objective requirements have not been met. This inconsistency in the permissible exercise of judicial discretion is a telling example of the balance of values at play in the ICTY's proceedings.

2. Towards conformity with international standards

¶39 Notably, following the 1999 amendment some judges gave more consideration to the weight that should be afforded to internationally accepted rights of the accused. Some trial chambers exercised their newfound license to grant provisional release, and used international human rights standards in support. Unrestricted by the “exceptional circumstances” requirement, some chambers no longer felt obligated to categorically deny release in its absence. Indeed, in the post-“exceptional circumstances” regime, several decisions referenced explicitly the relevant principles enshrined in the ICCPR, ECHR, and the Tribunal's Statute, identifying the presumption of innocence as the underlying principle of provisional release.⁵⁷

¶40 In *Prosecutor v. Hadžihasanović et al.* (hereinafter “*Hadžihasanović*”) the Trial Chamber evinced a growing trend at the ICTY—among certain chambers—to better align its provisional release jurisprudence with internationally recognized rights of accused.⁵⁸ The Trial Chamber devoted space in its opinion to elaborate on the role of international human rights standards and the presumption of innocence, and how they were relevant to the provisional release inquiry.⁵⁹ In particular, the Trial Chamber reproduced article 21(3) of the Statute mandating the presumption of innocence until proven guilty, and recalled that the provision reflected international standards contained in the ECHR and ICCPR, which states that detention should not be the general rule.⁶⁰

¶41 While acknowledging that the Tribunal's circumstances were unique from other jurisdictions,⁶¹ unlike other ICTY chambers, the *Hadžihasanović* Chamber focused on the objective criteria contained in the Rule (rather than the subjective criteria that had been eliminated by amendment).⁶² In assessing the Rule's objective criteria, the Chamber noted Hadžihasanović's voluntary surrender and cooperation with the Tribunal.⁶³ The Trial Chamber

⁵⁶ See, e.g. Haradinaj, IT-04-84-T, *supra* note 53.

⁵⁷ See Limaj, IT-03-66-AR65, *supra* note 12; ICTY, *Prosecutor v. Darko Mrda*, IT-02-59-PT, Decision on Darko Mrda request for provisional release, ¶¶ 22–26 (Apr. 15, 2003); ICTY, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević & Sreten Lukić*, IT-05-87-PT, Decision on Sainović's Request for Variation of Conditions for Provisional Release, ¶ 36 (June 28, 2006).

⁵⁸ The European Court of Human Rights (ECtHR) has balanced competing interests similar to those of the ICTY with the presumption of innocence and, in doing so, has afforded the presumption of innocence greater weight. In *Ilijkov v. Bulgaria*, the ECtHR held “the gravity of the charges” alone cannot “justify long periods of detention on remand.” See Davidson, *supra* note 6, at 16 (citing *Ilijkov v. Bulgaria*, 2001-IV Eur. Ct. H.R. P 81 (2001)).

⁵⁹ ICTY, *Prosecutor v. Enver Hadžihasanović, Mehmed Alagic & Amir Kubura*, IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasanović (Dec. 19, 2001).

⁶⁰ *Id.* ¶¶ 2–3 (Trial Chamber restated Article 9(3) of the ICCPR, providing that “[I]t shall not be the general rule that persons awaiting trial shall be detained in custody,” and its ECHR analog, “[E]veryone arrested or detained [...] shall be entitled to trial within a reasonable time or to release pending trial”).

⁶¹ *Id.* ¶ 7 (It stated that the primary reason for the *de facto* rule of detention was because the Tribunal lacked “coercive powers” to enforce its decisions).

⁶² *Id.* ¶ 13 (alluding to the fact that nebulous or subjective criteria were ill-suited to justify detention of an accused, it noted, “[N]ormally, the prerequisites for any deprivation of liberty should be established by law exclusively (see e.g. Statute of the International Criminal Court of 17 July 1998, Article 60(2))”).

⁶³ *Id.* ¶¶ 14–15.

seriously considered Hadžihasanović's rights infringed by detention. The Chamber consequently granted him provisional release.⁶⁴

¶42 The *Hadžihasanović* Trial Chamber directly addressed the issue of the gravity of the crimes that the accused are charged with—the principal ideological justification for the ICTY's stringent provisional release regime. It found that because the ICTY's full name stated explicitly that it presided exclusively over “serious” crimes, yet Rule 65(B) nonetheless provided for provisional release of the accused,⁶⁵ that provisional release was clearly meant to apply in the Tribunal's specific context. As the RPE provided for provisional release upon satisfaction of the objective criteria—the only criteria referenced in the text of Rule 65(B)—the Chamber found that “any system of mandatory detention on remand [was] *per se* incompatible with article 5(3) of the [European Court of Human Rights].”⁶⁶

¶43 The *Hadžihasanović* Trial Chamber also directly addressed the weight of victims' interests in provisional release determinations—another chief ideological consideration perennially used to justify detention of accused at the Tribunal. In response to the Prosecution's argument that the accused's release would send the “wrong signal” to victims and the international community, the Chamber answered that its role was to apply the law, not to send signals.⁶⁷

¶44 The outlook advanced by the *Hadžihasanović* Chamber was particularly respectful of the rights of the accused. Its reverence for Hadžihasanović's right to liberty is particularly noteworthy considering that he was ultimately found guilty for his crimes and sentenced to prison.⁶⁸ Despite the fact that he was ultimately found guilty, by granting his application for provisional release, the Trial Chamber treated him as innocent, which is what the presumption of innocence requires. As such, the *Hadžihasanović* approach to provisional release differed from that of other chambers at the ICTY who still believed that the gravity of crimes and the interests of victims outweighed the accused's right to liberty during trial.

¶45 During this period of the ICTY's provisional release regime, the divide among judges as to the proper balance between rights of the accused and the Tribunal's unique realities was pronounced. Many trial chambers continued to exercise the discretion to deny provisional release notwithstanding fulfillment of the Rule's objective criterion. For example, in *Brdjanin*, in July 2000, the Trial Chamber distinguished the Tribunal from other jurisdictions to justify the prolonged detention of Radoslav Brdjanin, an accused not yet proven guilty.⁶⁹ “Care should be taken that too great a reliance is not placed upon [the ECtHR and the ECHR] as defining what is a reasonable length of...detention in an international criminal court or tribunal rather than in particular domestic jurisdictions in Europe.”⁷⁰ Emphasizing the Tribunal's unique circumstances,

⁶⁴ *Id.*

⁶⁵ *Id.* (referring to the full name of the Tribunal: “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”).

⁶⁶ *Id.*

⁶⁷ *Hadžihasanović*, IT-01-47-PT, *id.* ¶¶ 12–13.

⁶⁸ Ultimately, Enver Hadžihasanović, a Senior Officer in the Army of Bosnia and Herzegovina, was convicted and sentenced to three and a half years for failing to prevent or punish perpetrators of cruel treatment to others at a school. *Case Information Sheet for Prosecutor v. Hadžihasanović*, ICTY WEBSITE, http://www.icty.org/x/cases/hadzhasanovic_kubura/cis/en/cis_hadzhasanovic_kubura_en.pdf (last accessed Apr. 23, 2013).

⁶⁹ *Brdjanin*, IT-99-36-T, *supra* note 52, ¶ 25 (citing ICTY, *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgment, ¶ 185 (Mar. 24, 2000) (“The Tribunal was established in order to prosecute persons responsible for such serious violations: Statute of the Tribunal, Article 1”)).

⁷⁰ *Id.* ¶ 26.

the *Brdjanin* Chamber adopted a *sui generis* approach to determining what constituted a “reasonable length” of detention for Brdjanin.⁷¹

¶46 However, even at the ICTY, “reasonable” length of detention can only be stretched so far. The complexity of the cases over which the ICTY presides makes for inordinately long trial periods, which exacerbates the negative effects of detention.⁷² Additionally, prolonged detention of those still presumed innocent contravenes the presumption of innocence according to international human rights standards.⁷³ Moreover, those defendants that are not ultimately convicted pay a high price for the Tribunal’s detention policy during trial. The Tribunal has acquitted eighteen accused thus far and all had been held in detention throughout their trials.⁷⁴ While the ICC, ECHR, and the ICCPR provide compensation for accused persons wrongfully detained, the ICTY does not.⁷⁵

¶47 For practical purposes, following the 1999 amendment, liberty continued to be the exception and detention the rule.⁷⁶ The burden of proof remained with the accused to prove that he met the objective prongs of Rule 65(B), and the Tribunal’s Statute and RPE lacked a “clear and precise criteria with regard to the application of the concrete possibility of release on bail.”⁷⁷ This may explain why Professor Gregory S. Gordon noted that “postamendment provisional-release practices operate[d] in exactly the same manner” as pre-1999 amendment practices.⁷⁸

¶48 Still, the period following the removal of the “exceptional circumstances” requirement up until *Prosecutor v. Prlić et al.* (“*Petković*”) saw more defendants provisionally released than ever before. The liberty infringed by detention of the Tribunal’s accused were being meaningfully considered by a number of the ICTY’s chambers, like *Hadžihasanović*, and international human rights standards were finally included in the provisional release calculus. The differing approaches to the provisional release inquiry advanced in the *Hadžihasanović* and *Brdjanin*

⁷¹ *Id.* (“First...the Tribunal has no power to execute its own arrest warrant in the event that the applicant does not appear for trial, and it must rely upon local authorities within the former Yugoslavia or upon international bodies to effect arrests on its behalf. That is markedly different to the powers of a court granting release in a domestic jurisdiction. Secondly, the serious nature of the crimes charged in this Tribunal would be very unlikely to produce sentences of such a short duration”); Radoslav Brdjanin was convicted of many atrocity crimes, and was ultimately sentenced to thirty years in prison. See *Appeals Chamber Reduces Radoslav Brđanin’s Sentence to 30 Years*, ICTY WEBSITE, <http://www.icty.org/sid/8886> (last accessed Apr. 14, 2013).

⁷² See Schomburg, *supra* note 15, at 14 (noting as of October 31, 2008, accused were being held at the United Nations Detention Unit (UNDU) for an average of five years. Of all people arrested on the ICTY’s behalf and detained through trial and appeal, 511 days was the average time spent in detention before trial. 489 days was the average time spent in detention during trial. And 663 days was the average time spent in detention while awaiting the completion of appeal proceedings).

⁷³ Both the ICCPR and the European Convention on Human Rights (ECHR) provide that the remedy for failure to decide on charges expeditiously is release. The European Court of Human Rights (ECtHR) has held that four or more days without judicial supervision is inconsistent with Article 5(3) of the ECHR. Davidson, *supra* note 6, at 22–23 (quoting M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 609 (2003) and citing *Tomasi v. France*, App. No. 12850/87, 15 Eur. H.R. Rep. 1, 49–50). Article 5(3) of the ECHR additionally states that detention becomes unreasonable if authorities do not act with special diligence or if the proceedings take too long. ECHR, art. 5(3). The HRC provides that no more than approximately three days should elapse between detention and initial appearance, per Article 9(3) of the ICCPR. Schomburg, *supra* note 16, at 7.

⁷⁴ See *Key Figures ICTY*, ICTY WEBSITE, <http://www.icty.org/sections/TheCases/KeyFigures> (last visited April 23, 2013).

⁷⁵ See Davidson, *supra* note 6, at 63 (“Although the ICTY’s statute and rules are silent on the possibility of compensation after unlawful detention, compensation for unlawful detention appears to be a tool that is increasingly available at international courts”).

⁷⁶ *Id.* (citing ZAPPALA *supra* note 21, at 70).

⁷⁷ See Gordon, *supra* note 5, at 640 (citing GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF INTERNATIONAL CRIMINAL TRIBUNALS, A COMPARATIVE STUDY, 21–22 (2003)).

⁷⁸ See Gordon, *supra* note 5, at 691 (citing DeFrank, *supra* note 41, at 1449) (internal quotations omitted).

decisions are emblematic of a larger divide among judges at the ICTY. A chasm existed between ICTY judges over the relative importance of its accuseds' rights at the Tribunal. In comparison to the provisional release practice under the former Rule 65(B), however, the Tribunal was considering its defendants' rights more significantly. This progression was dramatically derailed after *Prosecutor v. Prlić et al.* (“*Petković*”) was decided in April of 2008.

PART THREE: COMPELLING HUMANITARIAN GROUNDS AND THE PETKOVIĆ PRECEDENT

¶49 In Part Two, this article sought to illuminate the competing interests and values at stake in the debate over the ICTY's provisional release regime through an examination of Rule 65(B)'s amendment and representative decisions in the Tribunal's provisional release jurisprudence. Part Three will now demonstrate how one party to that debate successfully, although ultimately mistakenly, advanced its preferred policy choice by co-opting the Tribunal's provisional release standard.

¶50 Nearly nine years after the “exceptional circumstances” requirement was eliminated by amendment to the RPE, on April 21, 2008, the Appeals Chamber in *Petković* effectively overturned the previous amendment's elimination of the “exceptional circumstances” requirement by reinserting a subjective requirement into the ICTY's provisional release criteria.⁷⁹ This section analyzes the judicial misinterpretation committed in *Petković* and its effect on provisional release at the ICTY over the next three years.

¶51 The decision in *Petković* was a “perfect storm” of judicial misinterpretation and missed opportunities to correct a mistake which, from a human rights perspective, effectively turned back the clock on the presumption of innocence provided to the Tribunal's accused. This section begins with an overview of the *Petković* decision itself. Secondly, it discusses the Decision's multifarious problems involving precedent. After discussing precedent, the analysis turns to address a grand, hierarchical problem committed when the *Petković* Chamber essentially circumvented the normal process for rule amendment. Fourth, the section addresses an unfortunate consequence of the Decision—the legal conflation of standards for convicted and accused defendants at the ICTY. Fifth and finally, this section examines the real effects of *Petković* on subsequent provisional release decisions at the ICTY.

A. *Petković*

¶52 Milivoj Petković, Jadranko Prlić, Bruno Stojić, Slobodan Praljak, and Valentin Ćorić were indicted for grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity for their actions in the Croatian Defense Council during the conflict in the former Yugoslavia.⁸⁰ On January 30, 2008, Petković filed a motion requesting provisional release at the *98bis* stage of proceedings.⁸¹ *98bis* refers to the period in proceedings after the close of the prosecution's case and before the beginning of the defense's case. During this period the defense may move for acquittal and request that the Chamber consider whether the facts presented are sufficient to support a conviction.⁸² If they are not, the defendant may be acquitted

⁷⁹ *Petković*, IT 04-74-AR.65.7, *supra* note 10.

⁸⁰ *Case Information Sheet for Prlić*, ICTY WEBSITE, http://www.icty.org/x/cases/prlic/cis/en/cis_prlic_al_en.pdf.

⁸¹ *Petković*, IT 04-74-AR.65.7, *supra* note 10, ¶ 2.

⁸² ICTY RPE, *Rule 98bis*, U.N. Doc. IT/32/Rev. 41 (Feb. 28, 2008) (“at the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on any count if there is no evidence capable of supporting a conviction”).

without having to present a defense case. The Trial Chamber granted Milivoj Petković's Motion on February 19, 2008.⁸³ Two days later the Prosecution appealed that decision along with the related decisions of the co-accused in Petković's case.

¶53 On March 11, 2008, the Appeals Chamber granted the Prosecution's Appeal and found that the Trial Chamber had discernibly erred by failing to "explicitly discuss the impact of a 98bis Ruling," and also by considering the accused's proffered humanitarian grounds as "capable of justifying the granting of provisional release."⁸⁴ Six days later Petković's Defense counsel again filed a motion for provisional release.⁸⁵ The Defense reiterated that the 98bis Ruling did not constitute an increased risk of flight while submitting further evidence of Petković's wife's depression as a humanitarian reason supporting his release.⁸⁶ The Prosecution responded that Petković was advancing a redundant argument that had already been dismissed.⁸⁷ On March 21, 2008, Petković filed medical documentation substantiating his mother and wife's poor health condition to bolster the humanitarian grounds supporting provisional release.⁸⁸ The Trial Chamber again granted him provisional release by decision on March 31, 2008, but ordered a stay pursuant to Rule 65(F) pending appeal.⁸⁹ The Prosecution appealed on April 1, 2008.⁹⁰

¶54 In its majority decision on April 21, 2008, the Appeals Chamber again overturned the Trial Chamber's Decision granting release.⁹¹ It held that applications for provisional release after the 98bis stage must be denied, unless accused met the objective criteria in Rule 65(B) *and* that there existed "compelling humanitarian grounds" sufficient to justify provisional release.⁹² In so holding the Appeals Chamber reintroduced a subjective requirement into the Tribunal's provisional release standard. In the Chamber's view, the ICTY's jurisprudence implied this requirement: "[t]he Appeals Chamber notes that 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 case, will only be granted when serious and sufficiently compelling humanitarian reasons exist."⁹³

⁸³ Petković, IT 04-74-AR.65.7, *supra* note 10, ¶ 2.

⁸⁴ ICTY, Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić, IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, ¶ 21 (Mar. 11, 2008).

⁸⁵ Petković, IT 04-74-AR.65.7, *supra* note 10, ¶ 3.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 4; ICTY RPE, Rule 65(F), U.N. Doc. IT/32/Rev. 41 (Feb. 28, 2008) ("[W]here the Trial Chamber grants a stay of its decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision").

⁹⁰ Petković, IT 04-74-AR.65.7, *supra* note 10, ¶ 4.

⁹¹ *Id.*

⁹² *Id.* ¶ 17.

⁹³ Petković, IT 04-74-AR.65.7, *supra* note 10 (as cited by the Petković Appeals Chamber, "Appeals Chamber Decision," ¶ 21; *see also, inter alia*, Prosecutor v. Ademi, Order on Motion for Provisional Release, ¶ 22 (Feb. 20, 2002) (considered that the proximity of a prospective judgment may weigh against a decision to release); ICTY, Prosecutor v. Halilović, IT-01-48-T, Decision on Motion for Provisional Release, 3-4 (Apr. 21, 2005) (Trial Chamber I denied provisional release to the Accused considering "that the facts submitted by the Defence in support of the Motion do not amount to 'exceptional circumstances,'" and "the advanced stage of the Prosecution case where most of the evidence in support of the Prosecution case has been presented and further Prosecution witnesses are still to be heard"); ICTY, Prosecutor v. Ramush Haradinaj, Idriz Balaj & Lahi Brahimaj, IT-04-84-T, Decision on Defence Motion on Behalf of Ramush Haradinaj for Urgent Provisional Release, Confidential, 3 (Oct. 3, 2007); ICTY, Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić, IT-04-74-T, Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accusé Praljak, With a Confidential Annex, 6-8 (Apr. 1, 2008); ICTY, Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub

¶55 The decision in *Petković* placed significant weight on the 98bis ruling, holding that it constituted “a significant change in circumstances” warranting a “renewed and thorough evaluation of the risk of flight of each of the co-Accused.”⁹⁴ Rule 98bis motions, similar to summary judgment motions in U.S. law, require a court to examine “whether a reasonable trier of fact could find the accused guilty beyond a reasonable doubt.”⁹⁵ The Appeals Chamber viewed the advanced stage in proceedings as prejudicial to victims and witnesses. “[T]he perception that persons accused of international crimes are released, for a prolonged period of time, after a decision... dismissing a Rule 98bis motion, could have a prejudicial effect on victims and witnesses.”⁹⁶

¶56 After *Petković*, provisional release at the ICTY became exceptionally difficult for defendants to obtain whenever the prosecution had finished presenting its case (unless they were acquitted at the 98bis stage). *Petković* required that the accused demonstrate “compelling humanitarian grounds” as a prerequisite to their provisional release after their case had passed the 98bis stage. And the requirement also applied to defendants who did not move for acquittal at the 98bis stage. It was imputed that failure to move for acquittal indicated acceptance that evidence was presented during the prosecution’s case that was capable of supporting a conviction.⁹⁷ Such inaction similarly weighed against accused in the determination of eligibility for provisional release.

¶57 The underlying implication was that the culpability of the accused increased as the trial progressed which, in turn, provided the accused greater incentive to abscond while on provisional release and increased the risk of flight.⁹⁸ As such, after the 98bis stage—essentially the midpoint of the trial—defendants were subject to significantly higher scrutiny. The correlation *Petković* imputed between the advanced stage of trial and the increased culpability was in contravention to the presumption of innocence.⁹⁹ The presumption of innocence did not fit well within the *Petković*’s “compelling humanitarian grounds” requirement. As a result, the judicial divide regarding the relative value of the rights of the accused versus those of victims

Ojdanić, Nebojša Pavković, Vladimir Lazarević & Sreten Lukić, IT-07-85-T, Decision on Šainović Motion for Temporary Provisional Release, ¶¶ 7–9 (Apr. 4, 2008); ICTY, Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić, IT-04-74-T, Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Ćorić, With a Confidential Annex, 6–7 (Apr. 8, 2008); ICTY, Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević & Sreten Lukić, IT-07-85-T, Decision on Lazarević Motion for Temporary Provisional Release Apr. 15, 2008) (italics added).

⁹⁴ *Petković*, IT 04-74-AR.65.7, *supra* note 10, ¶ 15.

⁹⁵ *Id.* ¶ 17.

⁹⁶ *Id.*

⁹⁷ See Davidson, *supra* note 6, at 46; see also ICTY, Prosecutor v. Perišić, IT-04-81-T, Decision on Mr. Perišić’s Motion for Provisional Release, ¶ 20 (Mar. 31, 2010). *Perišić* provides an illustrative example: the Defense attempted to avoid the “sufficiently compelling humanitarian grounds” requirement by arguing that it only applied to those accused who had moved for acquittal and a Chamber subsequently made a 98bis Ruling, which Perišić had not. Even though the Trial Chamber was satisfied that the Accused was not a flight risk nor danger to any victims or witnesses, in satisfaction of the objective criteria in Rule 65(B) the Trial Chamber noted that “Rule 98bis is used when the Defence is of the view that there is no evidence capable of supporting a conviction. The corollary is that when the Defence does not use this provision, it is of the view that it does have a case to answer.” *Id.* The Trial Chamber denied Perišić provisional release.

⁹⁸ See Davidson, *supra* note 6, at 52 (“although the judges claimed otherwise, it is difficult to escape the conclusion that the heightened standard reflects a sentiment about the increased likelihood of conviction”); see also *id.* at 15 (“the ICTY’s heightened release standard after the prosecution has rested raises the possible inference that courts view the presumption of innocence as weakening as more evidence comes in against an accused, even if they seek to characterize the relevance of the evidence as the increased flight risk of the defendant”).

⁹⁹ *Id.* at 51–52.

and witnesses became more pronounced than ever. *Petković* set the stage for further debate about the presumption of innocence's proper place in the Tribunal's provisional release jurisprudence.

¶58 From the outset, the Decision was seen as controversial and met with criticism.¹⁰⁰ Critics contended that *Petković* failed to properly employ precedent, that it lacked credibility, and that it weakened the presumption of innocence of the accused at later stages of trial by attributing too much significance to a *98bis* Ruling. Some critics believed the new provisional release standard to be unduly ambiguous.¹⁰¹ Perhaps most apparent was that the new requirement effectively reversed the Tribunal's attempts to reach conformity with internationally recognized rights of the accused.

B. *The Failure of Stare Decisis*

1. Misinterpretation of Prlić Decision

¶59 The *Petković* Decision selectively relied on the Tribunal's jurisprudence interpreting the standard for provisional release, and misinterpreted that which it did rely on as implying the "compelling humanitarian grounds" requirement. Most significantly, *Petković* misinterpreted the *Prlić* Decision of March 11, 2008.¹⁰² In *Prlić*, the Appeals Chamber strictly scrutinized the accused's humanitarian justification and held that the humanitarian reasons advanced were not "sufficiently compelling."¹⁰³ However, the *Prlić* Chamber did not intend to create binding precedent for subsequent ICTY chambers. It repeatedly stressed the specific circumstances of its case as the basis for denying provisional release.¹⁰⁴ In fact, a member of the Appeals Bench in *Prlić*, Judge Liu Daqun, stated in a later dissenting opinion that the ruling "was made in light of the arguments presented" and was specific to the accused's circumstances, and was most definitely "not creating a general principle."¹⁰⁵ The reasoning exercised in *Prlić* did not purport to become the new provisional release standard, nor did it describe how such a standard could be

¹⁰⁰ See, e.g., ICTY, Prosecutor v. Jovica Stanišić & Franko Simatović, IT-03-69-AR65.7, Decision on Franko Simatović's Appeal Against the Decision Denying His Urgent Request for Provisional Release, ¶ 3 (May 23, 2011) (Güney, J., dissenting) (describing the deduction made by the majority opinion as an "overstatement and misleading" because the "well established" implication on which it relied did not reflect its tenuous support among permanent Appeals Chambers Judges, was in fact "controversial," and that such a stringent standard prior to conviction runs afoul to internationally recognized human rights).

¹⁰¹ See, e.g., ICTY, Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero & Vinko Pandurević, IT-05-88-AR65.4 to 65.6, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero and Miletić's Motions for Provisional Release During the Break in the Proceedings, ¶ 3 (May 15, 2008) (Liu, J., dissenting in part) ("As for what exactly 'compelling humanitarian reasons' are, although they have not been defined by the Majority, they seem to amount to the same as the previous 'exceptional circumstances' in practice").

¹⁰² *Prlić*, IT-04-74-AR65.5, *supra* note 82, ¶ 21 ("in the cases of Stojić and *Prlić* the Trial Chamber considered *Prlić*'s request to visit his ailing father and brother and Stojić's request to visit his ailing spouse, brother and parents, to be requests based on humanitarian grounds without offering any indication of how much weight it ascribed thereto...the Appeals Chamber finds that the various justifications...are not sufficiently compelling, particularly in light of the *98bis* Ruling, to warrant the exercise of the Trial Chamber's discretion in favour of granting...provisional release").

¹⁰³ *Id.*

¹⁰⁴ See Popović, IT-05-88-AR65.4 to 65.6, *supra* note 98, ¶ 6 (Liu, J., dissenting in part) ("the ruling in the 11 March 2008 Decision was specific to the circumstances of that particular case and was made in light of the arguments presented. It was not creating a general principle. By assessing whether the Trial Chamber erred in finding that humanitarian reasons existed to justify provisional release, it did not mean that in each and every case 'compelling humanitarian reasons' were to become a prerequisite to granting provisional release").

¹⁰⁵ *Id.*

satisfied. The Opinion merely referenced the specific humanitarian grounds presented and found them insufficient to support release.

¶60 For this reason, several judges at the Tribunal voiced serious misgivings about *Petković*'s reliance on the *Prlić* Decision as the basis for the “compelling humanitarian grounds” requirement. Judge Guy Delvoie alluded to a reasoning gap between *Petković* and *Prlić*.¹⁰⁶ The assertion in *Petković* that the Tribunal's jurisprudence *implied* provisional release could only be granted if sufficiently compelling humanitarian grounds existed was misleading, he found, because it relied on an erroneous deduction—requiring the meeting of a criterion for the grant of provisional release is different than denying release because such grounds, among other reasons, are deemed insufficient.¹⁰⁷ *Petković*'s interpretation that an accused *must* provide compelling humanitarian grounds is likewise quite different than *Prlić*'s denial of provisional release because, among other reasons, such grounds are insufficient.¹⁰⁸

¶61 The outcome of *Petković* was the creation of precedent that inhibited future chambers from granting defendants provisional release absent “compelling humanitarian grounds.” However, the *Petković* Chamber justified its holding as preventing the creation of precedent allowing for provisional release *without* compelling humanitarian grounds. Ironically, the Chamber viewed its decision as averting the creation of binding precedent:

The Appeals Chamber finds that there is no reason to establish a precedent pursuant to which accused are granted provisional release [after the 98bis stage], absent sufficiently compelling humanitarian reasons.¹⁰⁹

¶62 Evidently, it did precisely what it sought to prevent.

2. Petković's Failure to Consider Milutinović

¶63 The *Petković* Appeals Chamber selectively relied on segments of the Tribunal's provisional release jurisprudence while ignoring other jurisprudence that, if considered, would have led to a different outcome.¹¹⁰ This was most clearly evidenced in *Petković*'s failure to the consider arguments advanced in *Prosecutor v. Milutinović et al.* (hereinafter “*Milutinović*”).¹¹¹

¶64 On April 15, 2008, the Trial Chamber issued its decision in *Milutinović*, which interpreted *Prlić* before *Petković* had been decided. The *Milutinović* decision addressed the humanitarian reasons proffered by Vladimir Lazarević, a defendant whose 98bis motion for acquittal had been

¹⁰⁶ ICTY, *Prosecutor v. Mićo Stanišić & Stojan Župljanin*, 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, ¶¶ 5–6 (Feb. 25, 2011) [hereinafter “*Stanišić*, IT-08-91-T (Nov. 18, 2011)"] (Delvoie, J., concurring).

¹⁰⁷ *Id.* ¶ 6 (Judge Delvoie wrote, “[I]t is my humble opinion that the Appeals Chamber placed improper reliance on the sole previous decision, drawing a ratio from a reasoning applied in the circumstances of the specific case”) (Delvoie, J., concurring).

¹⁰⁸ *Id.*

¹⁰⁹ *Petković*, IT 04-74-AR.65.7, *supra* note 10, ¶ 17 (internal citations omitted).

¹¹⁰ *Stanišić*, IT-08-91-T (Nov. 18, 2011), *supra* note 104, ¶ 6 (noting *Petković* “erroneously cited three earlier decisions made by Trial Chambers in the circumstances of the facts before them to discern a pattern in the development of that jurisprudence”).

¹¹¹ ICTY, *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević & Sreten Lukić*, IT-05-87-T, Decision on Lazarević Motion for Temporary Provisional Release (Apr. 15, 2008); *see also* *Petković*, *supra* note 10, ¶ 17.

dismissed.¹¹² Despite the advanced stage of the proceedings, the *Milutinović* Chamber tempered the import of Lazarević’s proffered humanitarian reasons and granted him provisional release. In its analysis of *Prlić*, the Trial Chamber found that because *Prlić* offered no “indication of how much weight it ascribed” the accused’s humanitarian reasons, it did not interpret *Prlić* to be a “*per se* legal ruling that provisional release must always be denied after a Rule 98bis ruling.”¹¹³

¶65 As later revealed by Judge Liu, *Milutinović*’s narrow interpretation of *Prlić* was accurate.¹¹⁴ Thus, if the *Petković* Appeals Chamber had considered *Milutinović*, which clarified the ambiguity contained in *Prlić*, then perhaps it would not have found the “compelling humanitarian grounds” requirement to be implied by the Tribunal’s jurisprudence, and the precedent would not have been established. *Petković*’s failure to consider *Milutinović*, combined with its exclusive reliance on three other trial chamber decisions from which it derived the “compelling humanitarian grounds” requirement,¹¹⁵ caused it to find the new requirement “well-established.” If it had considered *Milutinović*, perhaps *Petković* finding would have not have been forceful enough to justify creating a new standard of provisional release. The fact that *Petković* misinterpreted *Prlić* and disregarded *Milutinović*—the sole decision to have interpreted *Prlić* correctly—suggests that its interpretation may have been colored by a provisional release policy agenda.

3. Aleksovski and departure from precedent at the ICTY

¶66 Adherence to precedent protects the accused’s right to a fair trial by ensuring consistency and predictability of judicial outcomes.¹¹⁶ The adherence to precedent at the ICTY is tempered by a principle formulated in *Prosecutor v. Aleksovski* (hereinafter “*Aleksovski*”) ensuring that “justice is done in all cases.”¹¹⁷ When faced with conflicting decisions, an appeals chamber is obligated “to determine which decision it will follow.”¹¹⁸ *Aleksovski* instructs that an appeals chamber should normally follow precedent, but that it may also depart from precedent “for cogent reasons in the interests of justice.”¹¹⁹ To credit the reasoning in *Petković* is to accept that it did not understand itself to be creating precedent. If it did, the *Petković* Chamber would have submitted cogent reasons for departing from precedent, which it did not. As noted above, The *Petković* Chamber sought to restrain the creation of precedent.

¶67 Nonetheless, *Petković* created binding precedent, and the precedent it created revealed exactly the point on which it stood on the continuum between rights of the accused and those of victims and witnesses. It clearly prioritized latter above the former. To be sure, *Petković* prioritized preventing the improbable “prejudicial effect” that the accused’s provisional release would have on victims or witnesses over the accused’s right to liberty and right to be presumed

¹¹² *Milutinović*, IT-05-87-T, *supra* note 109, ¶¶ 17-21.

¹¹³ *Id.* ¶ 14.

¹¹⁴ See Popović, IT-05-88-AR65.4 to 65.6, *supra* note 98, ¶ 6 (Liu, J., dissenting in part) (“The ruling in the 11 March 2008 Decision was specific to the circumstances of that particular case and was made in light of the arguments presented. It was not creating a general principle. By assessing whether the Trial Chamber erred in finding that humanitarian reasons existed to justify provisional release, it did not mean that in each and every case ‘compelling humanitarian reasons’ were to become a prerequisite to granting provisional release”).

¹¹⁵ *Petković*, IT 04-74-AR.65.7, *supra* note 10, ¶ 17 (internal citations omitted); Stanišić, IT-08-91-T, *supra* note 104, ¶¶ 14–26.

¹¹⁶ ICTY, *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgment, ¶ 105 (Mar. 24, 2000).

¹¹⁷ *Id.* ¶¶ 101–05.

¹¹⁸ *Id.* ¶ 111.

¹¹⁹ *Id.* ¶¶ 107–08; see also Stanišić, IT-08-91-T (Feb. 25, 2011), *supra* note 104, ¶ 2 (Delvoie, J., concurring) (stating *Aleksovski* Appeal Chamber judgment is the Tribunal’s leading jurisprudence on precedent).

innocent. Even if the *Petković* Chamber did not actively seek to codify its value preference into the Tribunal's provisional release regime through precedent, it precluded the alternative value—rights of the accused—from becoming a decisive factor in the provisional release inquiry.

4. Pušić, the Abandoned Alternative to Petković

¶68 Just two days after *Petković* was issued, on April 23, 2008, an Appeals Chamber comprised of different judges took an alternative approach in *Prosecutor v. Prlić et al.* (“*Pušić*”). The *Pušić* Appeals Chamber upheld the Trial Chamber's grant of provisional release to Berislav Pušić and emphasized the special role of the trial chamber in evaluating the criteria relevant to the provisional release determination.¹²⁰ According to Judge Liu, the *Pušić* Chamber accurately interpreted the holding in *Prlić*.¹²¹ The *Pušić* Decision made the following commentary on the relevance of compelling humanitarian reasons to the provisional release inquiry:

Because Rule 65(B) of the Rules does not require ‘sufficiently compelling’ humanitarian reasons for provisional release, this Bench understands the *Prlić* Decision of 11 March 2008 to have ruled that it is only when a Trial Chamber, having considered all the circumstances of the case and the impact of the significant change of circumstances constituted by the *98bis* decision, cannot exclude the existence of flight risk or danger, that ‘sufficiently compelling’ humanitarian reasons, coupled with necessary and sufficient measures to alleviate any risk of danger, can constitute a basis for resolving uncertainty and doubt in favour of provisional release.¹²²

¶69 *Pušić* espoused a markedly different interpretation of *Prlić* than was taken in *Petković*. It did not find the requirement of “compelling humanitarian grounds” to be mandated by *Prlić*. The *Pušić* Appeals Chamber tempered the weight afforded such grounds and rejected the imposition of humanitarian reasons as a requirement for provisional release. Instead, it held that humanitarian grounds had to be evaluated in the “‘context’ of the two requirements expressly listed in Rule 65(B),”¹²³ unlike *Petković* which viewed the “compelling humanitarian grounds” requirement as separate from the objective factors contained in the Rule. Additionally, *Pušić* held that the *98bis* Ruling did not constitute a “pre-judgment” that increased the accused's flight risk.¹²⁴

¶70 Compared to *Petković*, the Appeals Chamber in *Pušić* was more cognizant of the rights infringed by detention, advancing a far less rigid interpretation of *Prlić*, and a far more permissive standard for provisional release of defendants. The *Pušić* Chamber emphasized the primacy of the objective criteria in the text of Rule 65(B), the discretion of the trial chamber to grant provisional release, and found that humanitarian reasons were *not* required for provisional release at any stage of proceedings. *Pušić* found that a defendant's compelling humanitarian

¹²⁰ See ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, 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 Pušić” Issued on 14 April 2008, (Apr. 23, 2008) [hereinafter *Pušić*, IT-04-74-AR65.6].

¹²¹ Popović, IT-05-88-AR65.4 to 65.6, *supra* note 98 (Liu, J., dissenting in part).

¹²² *Pušić*, IT-04-74-AR65.6, *supra* note 119, ¶ 15.

¹²³ *Id.* ¶ 14; Milutinović, IT-05-87-T, *supra* note 109, ¶¶ 14, 16 (internal citations omitted).

¹²⁴ *Pušić*, IT-04-74-AR65.6, *supra* note 119, ¶ 15.

reasons could only support a chamber's granting of provisional release, not bar release of an accused in their absence.¹²⁵ It held that humanitarian reasons could become a "salient and relevant factor in assessing whether to exercise discretion to grant provisional release," but only in favor of release.¹²⁶

¶71 Contrary to the determinative role ascribed such humanitarian reasons in *Petković*, the *Pušić* Appeals Chamber held that the trial chamber could exercise discretion to grant provisional release regardless if the accused had humanitarian reasons. Noting the requirement's absence from Rule's text, *Pušić* distinguished the requirements for an accused to be provisionally released from that of a convicted defendant during his appeal.¹²⁷ In sum, *Pušić* interpreted *Prlić* dramatically differently than *Petković* by focusing the provisional release inquiry on the objective factors.

¶72 As *Pušić* offered future chambers at the Tribunal another option to *Petković*, it cannot be said that *Petković* was solely responsible for the three and a half year reign of the "compelling humanitarian grounds" requirement. Per the *Aleksovski* principle, other appeals chambers could also have departed from the *Petković* precedent in light of *Pušić* which was issued two days after *Petković*. Subsequent chambers had reason to depart from the *Petković* requirement because it significantly infringed on the presumption of innocence for the accused at the ICTY. When presented with the option of which precedent to follow, *Petković* or *Pušić*, surely future chambers could have chosen *Pušić* "for cogent reasons in the interests of justice."¹²⁸ Instead, *Pušić* was the sole decision that did not to follow *Petković*'s lead and it became the singular exception to the "compelling humanitarian grounds" precedent.

C. Rule amendment and lack of credibility

¶73 In addition to criticism that the new requirement was dubiously supported by the Tribunal's jurisprudence, criticism was also directed at the fact that the *Petković* precedent effectuated an improper rule amendment to the RPE.¹²⁹ The fact that the "compelling humanitarian grounds" requirement could not have garnered enough support to effectuate a proper amendment to the RPE, in turn, weakened its credibility as a whole.

¶74 The "compelling humanitarian grounds" requirement was tantamount to a Rule Amendment because it created an additional requirement for provisional release on top of those explicitly listed in the text of Rule 65(B). As such, several judges thought it should have gone through the customary rule amendment system pursuant to Rule 6 of the RPE.¹³⁰ However, it is unlikely that the amendment would have succeeded in this way because Rule 6 requires greater consensus than *Petković* received.¹³¹ Rule 6 mandates that in order for a rule amendment to be adopted by the Tribunal, at least ten of the fifteen permanent judges must approve it in plenary session.¹³² As seven of the fifteen permanent judges at the Tribunal voiced opposition to the

¹²⁵ *Id.*

¹²⁶ *Id.* ¶ 14.

¹²⁷ *Id.* ("Unlike 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... is necessarily distinct from the burden borne by an individual who is still presumed innocent.")

¹²⁸ *Aleksovski*, IT-95-14/1-A, *supra* note 115, ¶¶ 107–108.

¹²⁹ *Prlić*, IT-04-74-AR65.5, *supra* note 82, ¶ 20.

¹³⁰ ICTY RPE, Rule 6, U.N. Doc. IT/32/Rev. 46 (Oct. 21, 2011).

¹³¹ ICTY RPE, Rule 6(A), U.N. Doc. IT/32/Rev. 46 (Oct. 21, 2011).

¹³² ICTY RPE, Rule 6, U.N. Doc. IT/32/Rev. 46 (Oct. 21, 2011) ("Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than ten permanent

requirement, it is impossible that the requisite ten judges would have voted to approve the amendment in plenary session.¹³³ As a result, the *Petković* amendment to Rule 65(B) through precedent lacked credibility because it lacked the required judicial support.

¶75 It appeared the *Petković* Appeals Chamber did not consider; the prior amendment's purpose in liberalizing Rule 65(B), the support its holding carried with other ICTY judges, or the weight due to be given to the rule at the time of the case in light of the international standards the ICTY had been approaching, when it overturned the Rule that was specifically amended to eliminate that which it reinstated.

¶76 Whereas the "exceptional circumstances" requirement of Rule 65(B) was deliberately removed by amendment in accordance with Rule 6 (*i.e.*, by confirmation of at least ten of the judges at the ICTY),¹³⁴ the *Petković* Chamber itself was divided as to the interpretation of *Prlić* and the resulting "compelling humanitarian grounds" requirement.¹³⁵ If the compelling humanitarian grounds requirement was indeed "well established in the Tribunal's jurisprudence," as *Petković* advanced, critics asked: why was it not proposed or voted on in plenary session as provided for in Rule 6 of the RPE? The *de facto* form of amendment—through precedent—misrepresented the judicial support for the "compelling humanitarian grounds" provisional release requirement imposed on defendants in advanced stages of proceedings. It is therefore sensible that the requirement was widely criticized by other judges. More opposition was a likely byproduct of the anomalous way in which the Rule was amended.

D. Too much weight attached to 98bis ruling and the conflation of standards

¶77 The Appeals Chamber's added requirement of "compelling humanitarian reasons" was criticized for attaching too much weight to the passage of the 98bis stage of the case.¹³⁶ The added weight effectively conflated the pre-conviction standard for provisional release with the provisional release standard for those who the Tribunal had already convicted. Defendants convicted at the ICTY's trial level must prove that "special circumstances" exist warranting provisional release in order to be released pending appeal.¹³⁷ *Petković* held that the passage of the 98bis stage required defendants who were presumably still presumed innocent to demonstrate

Judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges.").

¹³³ See Stanišić, IT-08-91-AR65.2, *supra* note 27, ¶ 10 (Güney, J., dissenting) (noting other judges who opposed the requirement) (citing ICTY, Prosecutor v. Jovica Stanišić & Franko Simatović, 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 (Confidential) (Aug. 4, 2011); ICTY, Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić, IT-04-74-T, Decision on Slobodan Praljak's Motion for Provisional Release (Apr. 21, 2011) [hereinafter Prlić, IT-04-74 (Apr. 21, 2011)]; ICTY, Prosecutor v. Mićo Stanišić & Stojan Župljanin, IT-08-91-T, Decision Denying Mićo Stanišić's Request for Provisional Release During the Upcoming Summer Court Recess (June 29, 2011) [hereinafter Stanišić, IT-08-91-T (June 29, 2011)]; ICTY, Prosecutor v. Momčilo Krajišnik & Biljana Plavšić, IT-00-39 & 40-PT, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release (Oct. 8, 2001) (Robinson, J., dissenting); ICTY, Prosecutor v. Ante Gotovina, Ivan Čermak & Mladen Markač, IT-06-90-AR65.3, Decision on Ivan Čermak's Appeal Against Decision on His Motion for Provisional Release (Confidential) (Aug. 3, 2009) (Güney, J., & Liu, J., dissenting in part)).

¹³⁴ Prlić, IT-04-74-AR65.5, *supra* note 82, ¶ 1 (noting the "sufficiently compelling humanitarian reasons" requirement was instituted "by a slim majority of Appeals Chamber Judges (four out of seven)," amending the RPE "that were specifically amended in 1999 to remove it").

¹³⁵ *Id.* (Güney, J., dissenting) ("Because the majority decision imposes an additional requirement of 'sufficiently compelling humanitarian reasons' to the two criteria listed in Rule 65(B) of the Rules, contrary to both the Rules and the continuing presumption of innocence, and effectively suspends the grant of discretion to the Trial Chamber by the Rules, I respectfully dissent.").

¹³⁶ Petković, IT 04-74-AR.65.7, *supra* note 10, ¶ 17.

¹³⁷ See ICTY RPE, Rules 65(B), (I), U.N. Doc. IT/32/Rev. 41 (Feb. 28, 2008).

that sufficiently “compelling humanitarian grounds” existed warranting release. The requirement mandated under *Petković* made it so that both scenarios required equivalent burdens of proof for the defendant.

¶78 However, at the ICTY, the standard of proof required of the prosecution to force the defense to present its case after a Rule 98*bis* motion for acquittal is far lower than what is required for conviction.¹³⁸ To overcome a Rule 98*bis* motion for acquittal the prosecution needs only to present evidence from which a reasonable trier of fact *could* convict, not *must* convict, a purposely *de minimis* standard.¹³⁹ In contrast, the standard of proof required for conviction is proof beyond a reasonable doubt. By mandating a premature appraisal of guilt by a more stringent standard, *Petković* effectively mandated that post-98*bis* stage accused be treated as guilty until proven innocent. This presumption of guilt is clear from the fact that an accused’s failure to move for acquittal under *Petković* also required him to demonstrate “sufficiently compelling humanitarian grounds” for release. This standard made treatment as guilty the clear default for accused in late stages of proceedings.

¶79 International criminal statutes, human rights instruments, and ECtHR cases posit that the presumption of innocence retains the same force for an accused at later stages of trial.¹⁴⁰ To be presumed innocent until proven guilty requires that the standard of proof used to justify continued detention (or to be granted provisional release since detention is the default at the ICTY) remain consistent until the accused is proven guilty. In common law countries the standard of proof used to determine guilt is typically “beyond a reasonable doubt” and in civil law countries it is commonly the judge’s innermost conviction.¹⁴¹ By analogy, the same standards should apply to provisional release decisions if they were to assess an accused’s culpability. The presumption of innocence requires that at no point prior to conviction should the standard of proof deviate to a more stringent form. The *Petković* requirement suggested that the passage of the 98*bis* stage indicated a heightened degree of guilt. As such, it violated the presumption of innocence by prematurely assessing guilt, and it disenfranchised defendants’ due process rights by subjecting them to a harsher standard of review with respect to provisional release.

¶80 Predictably some judges took issue with *Petković*’s appraisal of a 98*bis* ruling. Judge Robinson stated, “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.”¹⁴² Indeed, an accused may still be acquitted *after* a 98*bis* dismissal of a motion for acquittal, even in the hypothetical scenario that the defense rests its case without calling further evidence, because the standard of proof for acquittal at the 98*bis* stage is so much higher than the standard for acquittal of conviction.¹⁴³

¶81 Several judges, including Judge Robinson, felt that the high standard for provisional release decisions could not be reconciled with the Tribunal’s mandate to uphold the presumption of innocence, or with the purpose of Rule 98*bis* itself.¹⁴⁴ The inference that the culpability of the

¹³⁸ See Stanišić, IT-08-91-AR65.2, *supra* note 27, ¶ 13 (Robinson, J., dissenting).

¹³⁹ *Id.*

¹⁴⁰ Davidson, *supra* note 6, at 19 (citing ICCPR, *supra* note 18, pt. III, article 14(2) (“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”)).

¹⁴¹ *Id.* at 15 (citing CASSESE, *supra* note 21, at 390 and ZAPPALA, *supra* note 21, at 84).

¹⁴² Stanišić, IT-08-91-AR65.2, *supra* note 27, ¶ 12 (“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.”).

¹⁴³ *Id.*

¹⁴⁴ See, e.g., *id.* ¶¶ 13–14 (internal citations omitted) (Judge Robinson also noted that Rule 98*bis* originated in the

accused is somehow greater after the close of the prosecution's case-in-chief goes against the former Secretary General's instruction for the ICTY to respect the presumption of innocence at "all stages of its proceedings."¹⁴⁵ This premature assessment of culpability after the prosecution's case runs afoul of the presumption of innocence, which ideally should only abate upon conviction.

¶82 A careful and plain reading of the whole text of Rule 65 makes a singular binary distinction among its subjects: *accused* and *convicted*. Accused must satisfy the objective criteria set forth in Rule 65(B) of not posing a flight risk, nor danger to victims, witnesses or any other person, but convicted war criminals must additionally satisfy Rule 65(I)'s requirement of demonstrating that "special circumstances exist warranting such release."¹⁴⁶ According to Judge Liu, had the Rule intended to distinguish among the accused at different stages of proceedings it would have done so explicitly, as it did between the accused and convicted.¹⁴⁷ The clear difference between accused and convicted defendants is that an accused preserves the presumption of innocence whereas a convicted person pending appeal does not.¹⁴⁸ Critics asserted that while it was reasonable to require such a precondition for convicted defendants, it was inappropriate to have a similarly strict standard for the accused still presumed innocent.¹⁴⁹

¶83 Concerns regarding conflation of the requirements for the accused and convicted pervaded ICTY jurisprudence following *Petković* and featured routinely in dissents.¹⁵⁰ The Trial Chamber in *Prosecutor v. Stanišić & Zupljanin* was among the most vocal in raising the conflation problem. The Trial Chamber took issue with the conflation of legal standards between the guilty and innocent and noted that the "compelling humanitarian grounds" requirement contradicted presumption of innocence.¹⁵¹ Solely because of the *Petković* requirement, the Trial Chamber denied Mićo Stanišić's application for provisional release when it would not have otherwise.

¶84 This provisional release regime contravened the presumption of innocence doctrine in all three possible ways. The conflation of standards among the convicted and accused violated the first feature of the presumption, requiring treatment as innocent until proven guilty. As the accused in later stages of proceedings were treated as less innocent than accused at earlier stages, they were plainly denied treatment as innocent. Second, while not specific to the "compelling humanitarian grounds" provisional release regime, the burden of proof for the provisional release inquiry remained with the defense. Finally, the standard of proof for provisional release became

common law, designed to prevent layperson juries from "bring[ing] in an unjust conviction." He noted that there is no jury at the ICTY, rather, there is a bench of three professional trial judges capable of evaluating evidence to determine what items could sustain a conviction. Unlike its original purpose to protect the rights of the accused, the added weight attached to the 98*bis* stage of proceedings became a mechanism by which their rights were undermined) (internal citations omitted).

¹⁴⁵ U.N. Secretary-General, *Report of the Secretary-General Pursuant to ¶ 2 of Security Council Resolution 808*, ¶ 106, U.N. Doc. S/25704, ¶ 106 (May 3, 1993).

¹⁴⁶ See ICTY RPE, Rule 65(I) & Rule 65(B), U.N. Doc IT/32/Rev. 41 (Feb. 28, 2008).

¹⁴⁷ See, e.g., Popović, IT-05-88-AR65.4 to 65.6, *supra* note 98, ¶ 4 (Liu, J., dissenting in part) (arguing that had the "Rules intended to raise the threshold for provisional release at the post-98*bis* stage, like the post-conviction stage, it would have similarly been explicitly provided for in the Rules").

¹⁴⁸ Stanišić, IT-08-91-AR65.2, *supra* note 27, ¶ 17.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* ¶ 13 (Robinson, J., dissenting) (likewise noting the improper conflation of the two requirements and urging their separation).

¹⁵¹ Stanišić, IT-08-91-T (Feb. 25, 2011), *supra* note 104, ¶ 26 ("The Trial Chamber questions whether it would have been the intention of the Appeals Chamber in its post-2008 development of the jurisprudence to create as high a standard for accused after the end of the Prosecution case as that set forth by Rule 65(I) for convicted persons. In the Trial Chamber's view, this would not only go against the apparent words of Rule 65(B) but would also contradict its underlying principle – the presumption of innocence of the accused.").

inconsistent after *Petković*. It fluctuated depending on the stage of proceedings. And after the 98bis stage, the main component of the standard of proof became subjective, which is incompatible with the clarity and consistency mandated by international human rights law.¹⁵²

E. Effects of the Compelling Humanitarian Grounds Requirement

¶85 The new rule had the predictable effect of eliciting several applications for provisional release in succession, where the accused focused on augmenting the humanitarian circumstances warranting release—a *red queen game* of sorts.¹⁵³ Provisional release applications were eventually reduced to a “fight over the defendant’s health and propinquity of relatives.”¹⁵⁴ Naturally, the accused, after previously being denied provisional release, exaggerated circumstances in subsequent applications to convince the chamber that their humanitarian circumstances were actually sufficiently compelling to warrant provisional release.

¶86 For example, shortly after *Petković*, in *Prosecutor v. Popović et al.* (hereinafter “*Popović*”), Milan Gvero argued for release strictly based on the objective factors in Rule 65(B)—that he was neither a danger nor a flight risk.¹⁵⁵ After the Appeals Chamber overturned the order granting him provisional release because he did not offer any humanitarian circumstances in support, by the next court break, he suddenly had humanitarian grounds—“his well-being” had “deteriorated during the course of proceedings.”¹⁵⁶ This was the perverse consequence of *Petković* on the ICTY’s provisional release regime. The nebulous requirement abstracted the inquiry from the objective prongs, and wasted both the chambers’ and the accused’s time.

¶87 Moreover, the “compelling humanitarian grounds” requirement effectively took the provisional release inquiry out of the trial chamber’s hands. Deference is afforded to the trial chamber’s discretion in these decisions because they “draw on the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and require a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly variable set of trial proceedings.”¹⁵⁷

¶88 The back and forth between chambers and accused results from the fact-intensive inquiry required by applications for provisional release. This is why the Chamber in *Milutinović* emphasized the importance of the trial chamber’s discretion. By eliminating the trial chambers’ ability to exercise discretion to grant provisional release when satisfied that the accused posed no danger or flight risk, the appeals chamber bore the burden of adjudicating more cases than it would otherwise, which was a waste of judicial resources.

¹⁵² See Popović, IT-05-88-AR65.4–65.6, *supra* note 98, ¶ 3 (Liu, J., dissenting in part) (“As for what exactly ‘compelling humanitarian reasons’ are, although they have not been defined by the Majority, they seem to amount to the same as the previous ‘exceptional circumstances’ in practice.”).

¹⁵³ If we treat getting provisional release granted as the accused’s overriding goal, then its objectives remain constant even if provisional release policy at the ICTY changes. The Red Queen hypothesis deals with the process by which accused’s actions change to keep up with the shifting requirements.

¹⁵⁴ Davidson, *supra* note 6, at 49–51; *see also* Popović, IT-05-88-AR65.4–65.6, *supra* note 98, ¶¶ 9, 26, 28 (holding that the defendant’s father’s illness or death did not justify provisional release).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Petković, IT 04-74-AR.65.7, *supra* note 10, ¶ 8 (Güney, J., dissenting) (quoting ICTY, *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, ¶ 9 (Nov. 1, 2004)).

¶89 In this way, the *Petković* condition of “compelling humanitarian grounds” for accused in late stages of proceedings took the Tribunal’s provisional release jurisprudence back to square one. The amendment upset the Tribunal’s alignment with international human rights norms regarding the presumption of innocence. The next section will elucidate how the ICTY remedied this mistake by amending Rule 65(B) on October 28, 2011.

PART FOUR: THE OCTOBER 28, 2011 AMENDMENT

A. *The Amended Rule 65(B)*

¶90 On October 20, 2011, by decision of the plenary session of the ICTY, Rule 65(B) was amended to take force on October 28, 2011.¹⁵⁸ Rule 65(B) now states:

Release may be ordered *at any stage of the trial proceedings prior to the rendering of the final judgment* by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard 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. *The existence of sufficiently compelling humanitarian grounds may be considered in granting such release.*¹⁵⁹

¶91 The objective and procedural prongs of Rule 65(B) have remained the same, but the new provisions in the Rule address the former subjective “compelling humanitarian grounds” requirement directly. The two most prominent changes to the Rule are: (i) its explicit clarification that provisional release applies to the accused “at any stage of the trial proceedings prior to the rendering of the final judgment”—i.e., the accused is still presumed innocent even at late stages of trial; and (ii) the explicit discretionary weight given to the former mandatory “compelling humanitarian grounds” requirement as criteria for determining provisional release.¹⁶⁰ The amendment directly addresses the most egregious faults of *Petković* to the benefit of the accused.

¶92 The first change, “[r]elease may be ordered *at any stage of the trial proceedings prior to the rendering of the final judgment,*” clarifies the former uncertainty in the jurisprudence regarding whether an accused retains the same right to provisional release after the *98bis* stage of proceedings.¹⁶¹ The text of the Rule for the first time emphasizes the *stages* at which provisional release applies—all stages prior to conviction. Rule 65(B) now unequivocally applies equally to all accused, at all times.¹⁶²

¶93 The second significant change directly overturns the former requirement that an accused, post-*98bis*, demonstrate “compelling humanitarian grounds” to be granted provisional release. Now, such grounds “may be considered,” but are not determinative.¹⁶³ They also, however, may be considered to a greater or lesser degree, or they may not be considered at all. The existence of

¹⁵⁸ ICTY RPE, Rule 65(B), U.N. Doc. IT/32/Rev. 46 (Oct. 20, 2011).

¹⁵⁹ *Id.* (emphasis added).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (emphasis added).

¹⁶² *Id.*

¹⁶³ *Id.*

“compelling humanitarian grounds” are now wholly within the trial chambers’ purview to assign importance, or not, in deciding applications for provisional release.

¶94 Rule 65(B) now expressly confers trial chambers at the Tribunal with the discretion they were previously denied. Given the opposing views of judges at the Tribunal with respect to provisional release described above, such discretion may carry the risk of inconsistent decision-making depending on the composition of the adjudicating chamber. If one chamber opted to heavily weigh such considerations and another did not, inconsistent provisional release outcomes could result for similarly situated accused. This would be viewed as unfair because, as stated by Judge Shahabuddeen, provisional release determinations “should not be predicated on the chance composition of a bench.”¹⁶⁴ If the early decisions to interpret the Rule are any indication, the risk of inconsistency appears unlikely.

1. Early Results: Stanišić

¶95 *Prosecutor v. Stanišić & Zupljanin* (“*Stanišić*”) was the first provisional release decision issued following the October 28, 2011 amendment to Rule 65(B). The Stanišić defense filed a Motion for provisional release on the first day that the amendment to Rule 65(B) took effect.¹⁶⁵ The Prosecution responded on November 11, requesting a stay in the event that the Chamber granted his Motion.¹⁶⁶ The Defense replied on November 14, and the Trial Chamber issued its Decision granting Stanišić provisional release and denying the Prosecution’s request for a stay on November 18, 2011.¹⁶⁷

¶96 Interestingly, the Prosecution in *Stanišić* acknowledged that the elimination of the subjective requirement for provisional release converted such grounds “from a limitation...to an *ex gratia* justification for granting provisional release,”¹⁶⁸ while still arguing that Stanišić’s personal circumstances “such as health and family problems” were not “comparable to those that have featured in other Trial Chambers’ decisions to release accused during court recesses.”¹⁶⁹

¶97 The Prosecution advanced several of the arguments used to justify the Tribunal’s historically stringent provisional release practice: the gravity of the crimes,¹⁷⁰ the effect on victims provisional release could have,¹⁷¹ the public’s perception of the Tribunal, the ICTY’s limited resources, and its lack of an enforcement mechanism.¹⁷² Invoking the former justification for heightened scrutiny post-98*bis*, the Prosecution pointed out that Stanišić had accepted that

¹⁶⁴ See e.g., Stanišić, IT-08-91-T (Feb. 25, 2011), *supra* note 104, ¶ 2 (citing ICTY, Prosecutor v. Naser Orić, IT-03-68-A, Judgment, ¶ 15 (July 3, 2008) (Shahabuddeen, J., concurring)).

¹⁶⁵ ICTY, Prosecutor v. Mićo Stanišić & Stojan Zupljanin, IT-08-91-T, Decision Granting Mićo Stanišić’s Request for Provisional Release (Nov. 18, 2011) (including confidential annexes).

¹⁶⁶ ICTY, Prosecutor v. Mićo Stanišić & Stojan Zupljanin, IT-08-91-T, Prosecution’s Response to Stanišić’s Motion for Provisional Release During the Upcoming Winter Court Recess, ¶ 13 (Nov. 11, 2011) [hereinafter Stanišić, IT-08-91-T (Nov. 11, 2011)].

¹⁶⁷ Stanišić, IT-08-91-T (Nov. 18, 2011), *supra* note 165, ¶¶ 1, 25.

¹⁶⁸ *Id.* ¶ 6.

¹⁶⁹ *Id.* ¶ 10.

¹⁷⁰ *Id.* ¶ 12 (“There is a real possibility that he will not be held accountable for these crimes given the near completion of his trial and the Tribunal’s mandate.”).

¹⁷¹ Stanišić, IT-08-91-T (Nov. 18, 2011), *supra* note 165, ¶ 12 (“The costs of delaying or discontinuing this trial at this stage in the proceedings due the absence of the Accused would therefore be immense not only in terms of Tribunal resources, but also in the impact...on the victims, the witnesses who have testified in this case and the public’s perception of this Tribunal.”).

¹⁷² *Id.* (“The Tribunal has expended considerable time and resources on the prosecution of this case, and it lacks law enforcement capabilities to search for and apprehend its fugitives.”).

there was evidence capable of supporting his conviction by not making a Rule 98*bis* submission and that the Defense witnesses had “bolstered” the evidence against him, thereby increasing his incentive to abscond.¹⁷³ It argued that no conditions imposed on Stanišić could adequately guarantee his reappearance for trial and requested a stay in the event that his Motion were granted so it could appeal pursuant to Rule 65(E).¹⁷⁴

¶98 The *Stanišić* Trial Chamber, of which former dissenter Judge Delvoie formed part, noted that Stanišić would have been granted provisional release in his previous two applications but for the requirement of compelling humanitarian grounds.¹⁷⁵ The Chamber could now grant Stanišić provisional release because the amendment “converted the requirement of showing compelling humanitarian grounds...to a discretionary consideration.”¹⁷⁶ As the Accused did “not raise [humanitarian reasons] as a ground for provisional release, the Trial Chamber need not address this issue any further.”¹⁷⁷

¶99 The Chamber assessed the objective prongs of Rule 65(B) *de novo* and again found that Stanišić did not pose a risk of flight or a danger to victims, witnesses, or other people.¹⁷⁸ It noted several factors favoring the grant of provisional release¹⁷⁹ and rejected the Prosecution’s argument that his failure to make a 98*bis* motion for acquittal constituted an acceptance that evidence existed supporting his conviction.¹⁸⁰ With respect to the Prosecution’s argument that the Defense witnesses had “bolstered” the evidence against him, the Chamber noted that it would be premature to assess this argument as there existed a “continuing presumption of innocence afforded to the Accused at all stages of trial prior to the rendering of the final judgment.”¹⁸¹

¶100 Mićo Stanišić was granted provisional release for the 2011 winter recess. Perhaps most revealing about the Decision was that the Chamber denied the Prosecution’s request for a stay. Denials of Rule 65(E) stays are very rare as trial chambers are typically very deferential to appeals chambers at the ICTY. The denial indicates the Chamber’s overwhelming support of the amendment and may also be seen as a direct rebuke of *Petković*. However, on a practical level, granting the stay would defeat the purpose of release in the first place because it would have likely meant that Stanišić remained at the UNDU until the Appeals Chamber adjudicated the

¹⁷³ *Id.* ¶ 11.

¹⁷⁴ *Id.* ¶¶ 11, 13; *see also* ICTY RPE, Rule 65(E), U.N. Doc. IT/32/Rev. 46 (Oct. 20, 2011) (“The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.”).

¹⁷⁵ *See, e.g.*, ICTY, Prosecutor v. Mićo Stanišić & Stojan Zupljanin, IT-08-91-T, Decision Denying Mićo Stanišić’s Request for Provisional Release During the upcoming Summer Court Recess, ¶ 38 (June 29, 2011) [hereinafter *Stanišić*, IT-08-91-T (June 29, 2011)] (“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.’”); *Stanišić*, IT-08-91-T (Feb. 25, 2011), *supra* note 104, ¶ 30 (“...[I]t is only the change in the stage of the proceedings which, due to the overriding effect of Appeals Chamber precedent...requires that the Motion be denied for lack of ‘compelling humanitarian grounds.’”).

¹⁷⁶ *Stanišić*, IT-08-91-T (Nov. 18, 2011), *supra* note 165, ¶ 14.

¹⁷⁷ *Id.* ¶ 14.

¹⁷⁸ *Id.* ¶ 15.

¹⁷⁹ *Id.* ¶¶ 17–22 (noting factors favoring provisional release, including Stanišić’s strong track record of compliance with the conditions of his release in the past, his voluntary surrender to the Tribunal, and that he was seeking release to Serbia where he would be able to work with his Defense team, not to Bosnia Herzegovina, where most of the victims of the alleged crimes resided).

¹⁸⁰ *Id.* ¶¶ 19, 23 (“The decision not to make such submissions may well be based on other grounds. This argument is therefore dismissed.”).

¹⁸¹ *Id.* ¶ 23; *see also* ICTY Statute, *supra* note 19, article 21(3).

Prosecution's appeal, which may have lasted longer than the release period itself.¹⁸² The Chamber weighed "the interests and the risk at stake" in favor of the Accused.¹⁸³ Stanišić has had every extension of provisional release sought granted by the Trial Chamber since the amendment was instituted.¹⁸⁴

2. Early Results: Prlić II

- ¶101 The second provisional release decision released post-amendment was in *Prosecutor v. Prlić et al.* ("*Prlić II*").¹⁸⁵ Jadranko Prlić, an Accused awaiting final judgment after the conclusion of his trial, filed a motion for provisional release on October 31, 2011, seeking release until judgment was rendered.¹⁸⁶ The Prosecution objected to his release for an "indefinite period of time."¹⁸⁷ The *Prlić II* Trial Chamber issued its Decision on November 24, 2011, granting provisional release for a renewable period of three months, but issued a stay pending a ruling on the Prosecution's Appeal.¹⁸⁸ The Appeal was dismissed.¹⁸⁹
- ¶102 The *Prlić II* Trial Chamber acknowledged the 2011 Amendment and conducted its provisional release inquiry exclusively by reference to the procedural and objective criteria contained in the text of the Rule. Even noting that Prlić had breached "certain conditions" of provisional release in the past, the Chamber decided he could still be provisionally released.¹⁹⁰ Citing the international human rights principle that provides, "if it is sufficient to use a more lenient measure than mandatory detention, it must be applied," the Chamber noted Prlić's detention of over five years, and proceeded to grant him provisional release at the very latest stage of proceedings.¹⁹¹
- ¶103 On December 15, 2011, the Appeals Chamber found that the Trial Chamber had not abused its discretion in granting Prlić provisional release and dismissed the Prosecution's appeal.¹⁹² Regarding the Prosecution's argument that the Trial Chamber had abused its discretion

¹⁸² Stanišić, IT-08-91-T (Nov. 18, 2011), *supra* note 165, ¶ 25 ("[W]ith regard to the Prosecution's request for the stay of this Decision, the Trial Chamber notes that the temporary provisional release of the Accused is scheduled to commence 20 working days from the date of this Decision and has been specifically timed to take place during the upcoming recess in the trial and religious holidays. After a thorough assessment of the interests and the risk at stake, the Trial Chamber finds it inappropriate to grant a stay, considering, moreover that there will be sufficient time for the Prosecution to lodge an application for expedited appeal of the Decision pursuant to Rules 65(D) and 116*bis*. Accordingly, the Trial Chamber denies the Prosecution's request for a stay.")

¹⁸³ *Id.*

¹⁸⁴ See ICTY, *Prosecutor v. Mićo Stanišić & Stojan Župljanin*, IT-08-91-T, Decision Granting Mico Stanišić's Second Motion for an Extension of Provisional Release (Nov. 19, 2012) [hereinafter Stanišić, IT-08-91-T (Nov. 19, 2012)]; see also ICTY, *Prosecutor v. Stanišić*, IT-08-91-T, Decision Granting Mico Stanišić's Request for Provisional Release (June 6, 2012) [hereinafter Stanišić, IT-08-91-T (June 6, 2012)]; Stanišić, IT-08-91-T (Feb. 25, 2011), *supra* note 104.

¹⁸⁵ ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT-04-74-T, Decision on Jadranko Prlić's Motion for Provisional Release, ¶ 1 (Nov. 24, 2011) [hereinafter Prlić II, IT-04-74-T (Nov. 24, 2011)].

¹⁸⁶ *Id.* ¶ 1.

¹⁸⁷ *Id.* ¶ 3.

¹⁸⁸ *Id.* ¶¶ 42, 47.

¹⁸⁹ *Id.* ¶ 18.

¹⁹⁰ *Id.* ¶¶ 28–29.

¹⁹¹ Prlić II, IT-04-74-T (Nov. 24, 2011), *supra* note 185, ¶ 36 (citing Limaj, *supra* note 12, ¶ 12) ("Rules 65(B) & 65(D) of the Rules must therefore be read in the light of the ICCPR and ECHR and the relevant jurisprudence.")

¹⁹² ICTY, Prlić II, IT-04-74-AR65.26, Decision on Prosecution's Appeal of Decision on Provisional Release of Jadranko Prlić, ¶ 7 (Dec. 15, 2011) [hereinafter Prlić II, IT-04-74-AR65.26 (Dec. 15, 2011)]; ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT 04-74-

by not giving due weight to Prlić's lack of "compelling humanitarian circumstances justifying release," the Appeals Chamber clarified, "there is ...no absolute requirement for a Trial Chamber to take into account the existence of such [humanitarian] grounds before ordering a release."¹⁹³

¶104 On March 1, 2012, the Trial Chamber extended Prlić's provisional release for an additional three months.¹⁹⁴ The Prosecution had argued that Prlić's protracted release would have a negative effect on the Tribunal's aim of contributing to the stability of the Former Yugoslavia. The Chamber countered that it achieved its aim by trying those accused of having committed such grave crimes "by delivering justice to the victims of these crimes through just and fair trials."¹⁹⁵ It reminded the Prosecution that, "an accused is presumed innocent from the beginning of the trial until the day of the judgment."¹⁹⁶ The Appeal was dismissed.¹⁹⁷ Prlić was granted subsequent extensions of provisional release while awaiting final judgment.¹⁹⁸

¶105 Prlić's co-accused, Valentin Ćorić, Slobodan Praljak, Bruno Stojić, and Milivoj Petković¹⁹⁹ were all similarly granted provisional release and subsequent extensions while awaiting final judgment.²⁰⁰ Moreover, the Trial Chamber in *Prosecutor v. Stanišić and Simatović* granted Franko Simatović provisional release even before hearing from the host country.²⁰¹ Simatović's next request for provisional release, and an extension were also granted.²⁰²

AR.65.7, *supra* note 10, ¶ 6 ("The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (1) based on an incorrect interpretation of the governing law; (2) based on a patently incorrect conclusion or fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.") (internal citations omitted).

¹⁹³ *Id.* ¶ 7.

¹⁹⁴ ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT-04-74-T, Redacted and Public Version of Order on Jadranko Prlić's Motion to Extend His Provisional Release, 7 (Mar. 1, 2012) [hereinafter Prlić, IT-04-74-T (Mar. 1, 2012)].

¹⁹⁵ *Id.* at 4.

¹⁹⁶ *Id.* at 4–5.

¹⁹⁷ ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT-04-74-T, Decision on the Prosecution's Appeal of the Decision on Further Extension of Jadranko Prlić's Provisional Release, ¶ 24 (Apr. 23, 2012) [hereinafter Prlić, IT-04-74-T (Apr. 23, 2012)].

¹⁹⁸ ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT-04-74-T, Public Redacted Version of Order on Motion to Extend Provisional Release of Jadranko Prlić, 6 (June 6, 2012) [hereinafter Prlić, IT-04-74-T (June 6, 2012)].

¹⁹⁹ See ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT-04-74-T, Decision on Motion for Provisional Release of the Accused Milivoj Petković, ¶¶ 46–47 (Nov. 30, 2011) [hereinafter "Petković II"].

²⁰⁰ See ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT-04-74-T, Public Redacted Version of Order on Motion to Extend Provisional Release of Accused Ćorić, 6–7 (Mar. 6, 2012) [hereinafter Prlić, IT-04-74-T (Mar. 6, 2012)]; ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT-04-74-T, Public Redacted Version of Decision on Motion for Extension of Provisional Release of Accused Slobodan Praljak and Modification of Conditions, 8–9 (Mar. 8, 2012) [hereinafter Prlić, IT-04-74-T (Mar. 8, 2012), Public]; ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT-04-74-T, Redacted and Public Version of Order on Bruno Stojić's Motion for Extension of His Provisional Release, 6 (Mar. 8, 2012) [hereinafter Prlić, IT-04-74-T (Mar. 8, 2012), Redacted]; ICTY, *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić*, IT-04-74-T, Redacted Version of Decision on Motion for Extension of Provisional Release of Accused Milivoj Petković and Modification of Conditions, 7–8 (Mar. 14, 2012) [hereinafter Prlić, IT-04-74-T (Mar. 14, 2012)].

²⁰¹ ICTY, *Prosecutor v. Jovica Stanišić & Franko Simatović*, Decision on Simatović Request for Provisional Release, IT-03-69-T, ¶ 8 (Dec. 13, 2011) [hereinafter Stanišić, IT-03-69 (Dec. 13, 2011)].

²⁰² ICTY, *Prosecutor v. Jovica Stanišić & Franko Simatović*, IT-03-69-T, Decision on Simatović Request for Provisional Release (Apr. 4, 2012) [hereinafter Stanišić, IT-03-69 (Apr. 4, 2012)]; see also *Prosecutor v. Jovica Stanišić & Franko Simatović*, IT-03-69-T, Decision on Simatović Request for Extension of Provisional Release (Sept. 24, 2012) [hereinafter Stanišić, IT-03-69 (Sept. 24, 2012)].

¶106 On March 23, 2012, an ICTY trial chamber did have occasion to reject an application for provisional release.²⁰³ The Accused, Vojislav Šešelj, had not secured a host country to stay at during his planned release; he had not even determined himself where he wanted be released prior to applying.²⁰⁴ Šešelj had been found guilty of contempt of court for divulging confidential witness information and obstructing justice, and had several charges pending against him.²⁰⁵ The Chamber was not satisfied that he met any of the objective and procedural requirements of Rule 65(B).²⁰⁶ The Trial Chamber cited the controversial excerpt in *Petković* with a qualification, stating that it considered only the “*potential* impact of his provisional release on the victims and witnesses to be a factor militating against a decision granting the Request.”²⁰⁷

¶107 On January 30, 2012, Jovica Stanišić was denied provisional release due to his precarious health condition, but later granted provisional release by a Decision four months later.²⁰⁸ His co-accused, Franko Simatović, was again granted provisional release on April 4, 2012.²⁰⁹ Sreten Lukić, a defendant who had already been convicted and was awaiting judgment on appeal, was denied provisional release pursuant to Rule 65(I), for lack of “special circumstances” post amendment.²¹⁰ Another convicted defendant, Jelena Rašić, was granted provisional release post-amendment because the Appeals Chamber found that special circumstances did exist—namely, she had already served the custodial portion of her sentence.²¹¹

B. Early Conclusions Drawn from the Amendment

¶108 In its early application, the new Rule 65(B) appears promising from a human rights perspective. In provisional release decisions at the ICTY since Rule 65(B) was amended, provisional release has been granted consistently for accused in late stages of proceedings. All of the accused that had provisional release granted had been previously denied provisional release under the “compelling humanitarian grounds” provisional release regime.²¹² The change in the

²⁰³ ICTY, Prosecutor v. Vojislav Šešelj, IT-03-67-T, Decision on the Accused Vojislav Šešelj’s Request for Provisional Release, ¶¶ 10, 18 (Mar. 23, 2012).

²⁰⁴ *Id.* ¶ 6.

²⁰⁵ *Id.* ¶¶ 11–13.

²⁰⁶ *Id.* ¶ 13.

²⁰⁷ *Id.* ¶¶ 10–11 (citing ICTY, Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić & Berislav Pušić, IT 04-74-AR.65.7, Decision on “Prosecution’s Appeal from Décision relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković dated 31 March 2008,” ¶ 15 (Apr. 21, 2008)) (“[T]he 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 could have a prejudicial effect on victims and witnesses”).

²⁰⁸ ICTY, Prosecutor v. Jovica Stanišić & Franko Simatović, IT-03-69-T, Public Redacted Version of the Confidential “Decision on the Stanišić Defence Request for Provisional Release During the Winter Recess” of 19 December 2011, ¶¶ 14, 16 (Jan. 30, 2012); ICTY, Prosecutor v. Jovica Stanišić & Franko Simatović, IT-03-69-T, Public Redacted Version of the Confidential “Decision on the Stanišić Defence Request for Provisional Release” of 10 April 2012, ¶ 15 (May 8, 2012).

²⁰⁹ ICTY, Prosecutor v. Jovica Stanišić & Franko Simatović, IT-03-69-T, Decision on Simatović Request for Provisional Release, ¶ 8 (Apr. 4, 2012).

²¹⁰ ICTY, Prosecutor v. Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević & Sreten Lukić, IT-05-87-A, Decision on Sreten Lukić’s Motion for Provisional Release, 2 (Mar. 30, 2012).

²¹¹ ICTY, Prosecutor v. Jelena Rašić, IT-98-32/1-R77.2-A, Decision on Jelena Rašić’s Urgent Motion for Provisional Release Pursuant to Rule 65(I), ¶¶ 12–13 (Apr. 4, 2012).

²¹² See also ICTY, In the Contempt Case of Milan Tupajić, IT-95-5/18-R77.2, Decision on Motion for Provisional Release, ¶ 4B (Dec. 21, 2011) (Tupajić was not post-98*bis*, but nonetheless was granted provisional release); ICTY, Prosecutor v. Vojislav Šešelj, IT-03-67-T, Decision on the Accused Vojislav Šešelj’s Request for Provisional Release, 3 (Mar. 23, 2012) (Šešelj was not granted provisional release because he failed to meet the objective and procedural components of Rule 65(B)).

Rule effected a significant change in practice. As such, the Amendment addressed the major problems articulated in judges' dissenting opinions during the *Petković* provisional release era, and seems to have resolved them.

¶109 In *Stanišić*, the accused had been denied provisional release both times he applied following the 98bis stage of his case, even though he had been provisionally released several times before reaching this stage.²¹³ Prlić and his co-accused were all similarly granted provisional release in the past and only denied provisional release due to “compelling humanitarian grounds” requirement. The Trial Chambers granted them provisional release as a direct result of the 2011 amendment and the Appeals Chamber upheld the Decisions. In all of the provisional release decisions since the amendment, the accused were in late stages of trial—all post 98bis stage—and, some were in the latest possible stage of trial proceedings, while awaiting final judgment.

¶110 In a textual nod to the numerous dissents over the preceding three years that argued an inappropriate conflation of the standard for an accused, still presumed innocent, with that of a convicted person, the amended Rule explicitly creates a singular exception to its application; it does not apply to convicted persons. In specifying the distinction between accused and convicted persons, the October 2011 amendment to Rule 65(B) once again links the ICTY's provisional release regime to the presumption of innocence wherefrom it had briefly separated. This distinction is evident in practice, as the denials of provisional release only affected defendants that had previously been found guilty. Rule 65(B) now makes explicit that it applies uniformly to all accused until their status changes by way of acquittal or conviction.

¶111 The October 2011 amendment also appears to reflect the gaining traction of international standards regarding rights of the accused. Several of the post-amendment decisions reference the presumption of innocence and, most decisions have confined the provisional release analysis strictly to the objective and procedural criteria. As such, the inquiry has shifted towards objective analysis and a more serious consideration of the rights of accused in balance against others.²¹⁴ In his article calling for a more robust presumption of innocence in ICTR provisional release practice, Daniel Rearick noted, “[b]ecause the accused is presumed innocent, [i]f it is sufficient to use a more lenient measure, that measure must be applied.”²¹⁵ The fact that several of the provisional release decisions post-amendment have quoted the exact same passage is indicative of a deliberate attempt to give meaning to the presumption of innocence at the ICTY.²¹⁶

¶112 However, it is still clear that all of the judges do not agree on the appropriate standard. The amended Rule still allows for consideration of humanitarian grounds and post-amendment decisions are not uniformly objective. The Chamber in *Šešelj*, for example, referenced the controversial passage from *Petković* regarding the increased burden of accused in later stages of proceedings and cited other familiar justifications for provisional release stringency.

¶113 The contingent of ICTY judges that endorse the “exceptional circumstances” and “compelling humanitarian grounds” requirements for provisional release have not necessarily converted, and their reasons for a higher standard of release cannot be dismissed. The defendants at the ICTY are not garden-variety criminals; they are accused of heinous crimes on a mass

²¹³ *Stanišić*, IT-08-91-T (Nov. 18, 2011), *supra* note 165.

²¹⁴ *See, e.g.*, *Stanišić*, IT-08-91-T (Nov. 18, 2011), *supra* note 165, ¶¶ 11–12; *see also* Prlić II, IT-04-74-T, *supra* note 185, ¶¶ 9–10; *Petković* II, IT-04-74-T, *supra* note 199, ¶¶ 11–12.

²¹⁵ Rearick, *supra* note 25, at 591 (citing ICTY, *Prosecutor v. Radoslav Brdanin & Momir Talić*, IT-99-36-T, Decision on Motion by Momir Talić for Provisional Release, ¶ 23 (Mar. 28, 2001)).

²¹⁶ *Petković* II, IT-04-74-T, *supra* note 199, ¶ 36; Prlić II, IT-04-74-T, *supra* note 185, ¶ 36.

scale. The ICTY lacks an enforcement mechanism for recapturing accused in the case of flight. Moreover, the potential effect on witnesses and victims is very serious as the conflict in the former Yugoslavia is relatively fresh and many of the accused once wielded enormous influence there.

¶114 However, if the principal issues in the provisional release analysis are ensuring that accused appear for trial and pose no danger to victims and witnesses in their regions of origin, then the objective and procedural analysis should be sufficient to determine the suitability of their provisional release.²¹⁷ Alternatively, if the objective in detention for those still “presumed innocent” is punitive and not practical, then the presumption of innocence should not even be entertained because punishment is not for the innocent. The fact that the objective factors of Rule 65(B) are finally being given foremost attention indicates that the focus of the provisional release inquiry has indeed become practical, and the presumption is now given legitimate force.

C. Potential Problems Down the Road

¶115 The October 28, 2011 amendment appears to have been a direct critique of the previous provisional release regime at the ICTY. The amendment addressed the numerous dissents and criticisms of the subjective requirement, and basically invoked the remedies to the critiques into the amended Rule. Inasmuch as the amendment was a direct rebuke of the former “compelling humanitarian grounds” requirement, ICTY judges on the other side of the issue—those that prioritize victims’ interests and the Tribunal’s practical constraints—may not have fully embraced the new model. This possibly indicates that the new Rule does not enjoy broad support among judges. The discretionary power now afforded trial chambers—while favoring provisional release in the provisional release decisions after one year—could easily work the other way, to justify the denial of provisional release if a trial chamber were to choose to consider humanitarian grounds.

¶116 As detrimental as the former requirement was to the rights of the accused in late proceedings, it was, at least, consistent. Because trial chambers were previously constricted in the exercise of positive discretion to grant provisional release to accused (those that did not possess the ambiguously-defined “humanitarian grounds”) there was certain predictability to the outcome of provisional release decisions—denial.²¹⁸ Now trial chambers have the positive discretion to grant provisional release, but they also retain the negative discretion to deny provisional release.

¶117 There is division among judges at the ICTY as to the competing values at stake in provisional release. This is evident from the divergence in proposals for Rule 65(B) amendment submitted by Judge Meron versus those put forth by Judges Hall, Delvoie, and Harhoff, who proposed much less stringent options.²¹⁹ Thus, the potential for inconsistent provisional release decision-making is a valid concern. Especially given how the former subjective requirement

²¹⁷ See Rearick, *supra* note 25, at 591.

²¹⁸ See, e.g., Stanišić & Župljanin, IT-08-91-T, *supra* note 175, ¶ 24 (calling provisional release “a mandatory, and not discretionary, factor”).

²¹⁹ See Memorandum from Michael Karnavas to Judge Agius, ICTY, Proposed Amendment to Rule 65(B), 16 (Oct. 14, 2011) (discussing divergent judicial proposals for amendment, from Judge Meron— who proposed codifying the Appeals Chamber’s position, requiring a showing of “compelling humanitarian grounds” at advanced stages of the proceedings—on one hand, to the comparatively liberalized amendment proposed by Judges Hall, Delvoie, and Harhoff on the other).

came about—through controversial precedent lacking consensus support—the possibility of another misinterpretation should not be discounted.

¶118 A plain reading of the former Rule 65(B) on provisional release reveals that it only contained the objective and procedural criteria for an accused to meet in order to be granted provisional release, yet the “compelling humanitarian grounds” requirement materialized resulting in a provisional release practice that several judges did not support. As the problem did not originate from the Rule’s text, it is unclear whether a textual solution will be a panacea for provisional release at the Tribunal. It is for this reason that Michael Karnavas, the former President of the Association of Defence Counsel (ADC) at the ICTY, submitted a twenty-eight page memorandum recommending that Rule 65(B) *not* be changed.²²⁰

¶119 Despite his opposition to the “compelling humanitarian reasons” as *ultra vires* inconsistent with the rights of the accused, Mr. Karnavas found that the solution to the problem could not lie in inserting the invalid ground into the Rule, albeit for the goal of reducing its influence. Rather, Mr. Karnavas recommended the ICTY judges depart from the faulty precedent in plenary session.²²¹ Moreover, the October 2011 amendment only addressed problems documented in dissents, but it is unclear how it could prevent future misinterpretations. With the increased role of judicial discretion, further misinterpretation is certainly possible.

¶120 The concern about the trial chamber’s discretion being exercised inconsistently, resulting in unfairness, remains to be seen. However, the trial and appeals chambers at the ICTY do appear to be working together, as seen in *Prlić II* where the Appeals Chamber upheld the Trial Chamber’s decision.²²² Furthermore, since the October 2011 amendment went through the proper protocol of judicial vote in plenary session, it assuredly was supported by at least two-thirds of the judges, unlike the previous amendment, which was added by precedent in a majority opinion. This fact provides assurance that judicial discretion will not be applied inconsistently.

CONCLUSION

Justice cannot be for one side alone, but must be for both. - Eleanor Roosevelt

¶121 Provisional release jurisprudence at the ICTY has been a constant struggle between balancing the ICTY’s unique practical and ideological realities with the rights of the accused, in particular, the presumption of innocence. The various manifestations of Rule 65(B) have reflected this struggle: the “exceptional circumstances” regime until November 1999, the regime after its elimination until April 2008, the “compelling humanitarian grounds” regime until October 2011, and finally, Rule 65(B) as it exists today.

²²⁰ *Id.* at 1 (“Codifying the additional criterion risks causing permanent damage to the Tribunal’s legacy; it amounts to using the rule amendment procedure to legitimize a new criterion that is inconsistent with the spirit of the Statute, that manifestly transgresses the fair trial rights of the accused (in particular the presumption of innocence), that denies individuals their right to bail except in the most exceptional circumstances, and that sends the message that provisional detention is a form of punishment. The Appeals Chamber should be urged by the Plenary to reconsider and depart from its previous decisions given that cogent reasons have been shown which demonstrate the additional criterion’s lack of legal basis and inconsistency with international human rights principles.”).

²²¹ *Id.*

²²² *Prlić II*, IT-04-74-AR65.26, *supra* note 192, ¶ 7; Petković, IT 04-74-AR.65.7, *supra* note 10, ¶ 6 (“The Appeals Chamber will only overturn a Trial Chamber’s decision on provisional release where it is found to be (1) based on an incorrect interpretation of the governing law; (2) based on a patently incorrect conclusion or fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.”) (internal citations omitted).

¶122 The trajectory of the Rule and the Tribunal’s jurisprudence reflect a back-and-forth between a stringency reflecting the gravity of the crimes committed and the Tribunal’s limited powers to enforce its mandate, and a more liberal approach aspiring to provide accused—irrespective of their crimes—with the sort of robust presumption of innocence common to many domestic jurisdictions; victim’s rights and rights of the accused. Despite the significant misstep in *Petković*, the overall path of Rule 65(B) has been towards a liberalization of the criterion for provisional release, one that embraces the presumption of innocence.

¶123 The Tribunal’s early stringency in provisional release may be attributed to the context in which it operated, both practically and ideologically. It has been said that, “the extreme character of the crimes alleged before international criminal courts makes the case for accountability stronger than in domestic prosecutions.”²²³ The ICTY was no exception. Professor Gordon recognized this:

There is an ineluctable tension in certain phases of war crimes prosecutions between upholding the due process rights of the accused and assuring the safety and dignity of witnesses to unspeakable horrors. Not surprisingly, that tension often resolves itself in favor of victims and witnesses.²²⁴

¶124 Previously at the Tribunal, this accountability justified the stringency in provisional release determinations. Thus, especially in its early years, the retention of accused was critical to its mission of holding perpetrators of such grave crimes accountable and the chance of them absconding presented too serious a risk to employ a more liberal provisional release regime. Its initial stringency may also be attributed to the fact that the ICTY was a pioneer in international criminal law, learning by trial and error as it went, so it did not take chances that it might have, had it benefited from the experience of prior tribunals operating in a similar context.

¶125 As the Tribunal now approaches the completion of its mandate, having arrested every single accused it has indicted, the balance has tipped away from jeopardizing its completion mandate towards solidifying its legacy in history and setting a lasting example for this generation of international criminal tribunals. Right now that means the provision of more substantive rights for the accused. Now that the risk of an uncompleted mandate is remote, the ICTY can afford to relax its provisional release regime because the stakes are lower. It appears the ICTY has done just that. However, the Tribunal had more than merely posterity in mind in the October 28, 2011 amendment of Rule 65(B); the amendment is more accurately attributable to its desire to change provisional release practice by affording greater respect for the rights of the accused. As Karnavas noted in his memorandum to Judge Agius, an amendment would not have been necessary otherwise since Rule 65(B) did not actually reference the “compelling humanitarian grounds” requirement. The requirement had been created by faulty precedent and not inscribed into the RPE, but its elimination was inscribed. Thus, the amendment can be interpreted as a pragmatically genuine desire to respect the rights of the accused. The effects of the amendment are broad because the Tribunal is close to completing its mandate, meaning that the vast majority of the accused are in late stages of trial.²²⁵

²²³ Gordon, *supra* note 5, at 699 (citing Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT’L L. 111, 114 (2002)).

²²⁴ Gordon, *supra* note 5, at 693.

²²⁵ *Key Figures*, ICTY WEBSITE, <http://www.icty.org/sections/TheCases/KeyFigures> (last visited Apr. 14, 2013).

- ¶126 It appears to have done that. According to public records, at the time of this writing, every application for provisional release by a defendant not yet found guilty after the recent amendment has eventually been granted, even though the accused are all at very late stages of proceedings. Thus, for the first time in its history, both the text of Rule 65(B) *and* the ICTY's jurisprudence are consistent with the ICCPR, because detention is no longer the "general rule."²²⁶
- ¶127 The October 2011 amendment provides the ICTY's accused with a meaningful presumption of innocence, which can be seen through the practical effect it has had already by allowing the release of accused who would not otherwise have been freed. As the burden of proof remains with the defense in applications for provisional release, the Tribunal's implementation of the presumption of innocence is still not quite on par with international standards, but the amendment does give meaning to the presumption of innocence in a more substantive way than ever before—a point most judges applying the revised Rule have emphasized.
- ¶128 However, no matter how much has been learned over its nearly two-decade existence, no matter how much the stakes have lowered, or how much it wants to shape its legacy, the presumption of innocence will always be more an aspiration than an absolute rule at the ICTY. The serious consideration given to the rights and interests of victims, the gravity of the crimes it adjudicates, and its lack of an enforcement mechanism all converge to make the ICTY's context unsuitable for the grant of an absolute presumption of innocence to its accused. Professor Gordon additionally notes that the common law-civil law union causes "certain due process rights" to be "sacrificed."²²⁷ Due to its unique situation, it is not useful to compare the Tribunal's provisional release regime to that of a domestic jurisdiction. Moreover, even domestic jurisdictions, without many of the ICTY's unique realities, often temper the presumption of innocence with respect to provisional release.²²⁸
- ¶129 The October 2011 amendment was a step in the right direction. It demonstrates that the Tribunal is still evolving towards affording greater respect for rights of the accused, towards providing the presumption of innocence without jeopardizing its core mission of prosecuting the untouchables. The judges at the ICTY appear to have achieved a compromise to the competing views that have defined the provisional release debate with the end result airing on the side of the rights of the accused. Even if an absolute presumption will never be possible, in providing a consistent standard of proof, with minimal ambiguity, and granting provisional release as a general rule, the ICTY has achieved a reasonable balance among its competing aims.
- ¶130 The ICTY has a responsibility to lead by example because its RPE and jurisprudence will and do serve as a guide for present and future international criminal tribunals. Needless to say, the rights afforded accused at the ICTY are far greater than those rights afforded to accused in the Nuremburg Trials, the ICTY's chief predecessor. At the Nuremburg Trials there were minimal due process rights provided defendants and no allowance made for provisional release

²²⁶ ICCPR, *supra* note 18, art. 9(3) ("It shall not be the general rule that persons awaiting trial shall be detained in custody.").

²²⁷ Gordon, *supra* note 5, at 639.

²²⁸ For example, the U.S. Supreme Court has found the presumption inapplicable to "a determination of the rights of a pre-trial detainee during confinement..." Thus, other jurisdictions have also found that the presumption does not mean that the accused is actually innocent and privy to the full rights and treatment as a person who is actually innocent. *See* WILLIAM SCHABAS, *THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 518 (2006) (citing *Bell v. Wofish*, 441 U.S. 520, 533 (1979)); *see also* Davidson, *supra* note 6, at 20–21 (citing *United States v. Salerno*, 481 U.S. 739, 744 (1987)).

of the accused.²²⁹ Further, Nuremberg did not have a statute mandating the provision of the presumption of innocence to its defendants.²³⁰ By comparison, the ICTY has made substantial advancements in affording accused due process rights and, in doing so, paved the way for others, such as the ICC.

¶131 The ICC was described as “the culmination of five decades of progress toward the realization of protection for human rights throughout the world.”²³¹ It learned from the ICTY and, perhaps as a result, now grants more robust rights to accused in international criminal proceedings than many of its peers.²³² Even so, Caroline Davidson noted that there has been strong pressure on the ICC to detain its accused.²³³ As the ICC “will rely on the procedures, holdings, and lessons of the ICTY,” and is impacted by the Tribunal’s RPE, the Tribunal’s recent amendment may serve to alleviate some of the pressure felt recently at the ICC to detain defendants.²³⁴ However, because of the ICC’s superior funding, divergent jurisdiction, and preeminent position as an international criminal tribunal without a completion mandate, the amendment to Rule 65(B) will not likely have much practical effect on its provisional release practice. It will, however, present it with a paramount example of judicial compromise and perseverance in the high stakes work of international criminal law.

²²⁹ Gordon, *supra* note 5, at 643–44 (describing that the Nuremberg Charter and its RPE contained a “skeletal set of due process guarantees for the Nuremberg defendants.” They were: “(1) pre-trial—explanation of the right to trial; receipt of the indictment, Charter, and a list of defense counsel—and (2) at trial—the right to give an explanation of the charges, to have a translation of the proceedings (if necessary) to conduct a defense or have assistance of counsel, and to present evidence and cross-examine hostile witnesses”) (internal citations omitted).

²³⁰ *Id.* at 645 (“There was no express rule on the presumption of innocence.”) (internal citations omitted).

²³¹ *Id.* at 658 (citing Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 VA. J. INT’L L. 169, 171 (2003)).

²³² ZAPPALA, *supra* note 21, at 25, 48.

²³³ Davidson, *supra* note 6, at 70.

²³⁴ Gordon, *supra* note 5, at 658–59; see Rabkin, *supra* note 231 (citing Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT’L L. 462, 463 (1998) (“The rules of procedure and evidence each Tribunal has adopted now form the vital core of an international code of criminal procedure and evidence that will doubtless have an important impact on the rules of the future international criminal court.”)); see also Rabkin, *supra* note 231 (citing Scott Luftglass, *Crossroads in Cambodia: The United Nations’ Responsibility to Withdraw from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge*, 90 VA. L. REV. 893, 953 (2004) (“The ICC will have jurisdiction over genocide, crimes against humanity and serious war crimes, meaning that it will rely on the procedures, holdings, and lessons of the ICTY [and] the ICTR.”)).