

UNITED
NATIONS



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

Case No. IT-03-69-T
Date: 3 November
2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 3 November 2009

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON URGENT STANIŠIĆ DEFENCE
MOTION FOR PROVISIONAL RELEASE**

Office of the Prosecutor

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4-03-69-T
D 18806 - D 187916
03 November 2009

18806 143

I. PROCEDURAL HISTORY

1. On 14 October 2009, the Stanišić Defence filed a motion seeking provisional release of Jovica Stanišić (“Accused”) during the adjournment of the proceedings ordered by the Chamber on 15 October 2009.¹ On 16 October 2009, the Kingdom of the Netherlands filed a letter stating its position on the relief sought in the Motion.² On the same day, the Stanišić Defence submitted additional information supporting its Motion and asked for a Chamber’s order expediting pleadings.³

2. On 20 October 2009, the Chamber ordered the Prosecution to file its response to the Motion, if any, by 26 October 2009.⁴ On 26 October 2009, the Prosecution opposed the Motion.⁵

II. SUBMISSIONS

1. The Stanišić Defence

3. In its Motion, the Stanišić Defence requests that the Accused be granted temporary provisional release for the duration of the current adjournment in the proceedings, namely until 30 November 2009.⁶ The Stanišić Defence seeks provisional release under such terms and conditions that the Chamber deems appropriate to best guarantee the efficient continuation of the proceedings after the adjournment.⁷

4. The Stanišić Defence argues that the personal interests of the Accused in returning home for the adjournment and the consequential benefits to his health remove, or at least substantially outweigh, any concerns relating to the integrity of the proceedings.⁸ The Stanišić Defence further submits that any risk of deterioration of the Accused’s health is remote and manageable.⁹

5. The Stanišić Defence submits that on 22 July 2009, the Chamber found that the criteria for provisional release pursuant to Rule 65(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) — i.e. that the Accused if provisionally released, will appear for trial and will not pose a

¹ Urgent Stanišić Defence Motion for Provisional Release, 14 October 2009 (“Motion”), paras 5, 21; Decision on Motion for Adjournment of Proceedings by the Simatović Defence, 15 October 2009 (“Adjournment Decision”).

² Letter of the Ministry of Foreign Affairs of the Kingdom of the Netherlands on Provisional Release of Mr. Jovica Stanišić, 16 October 2009.

³ Defence Submission of Additional Information from VMA and Request for an Order Expediting Filings Provisional Release, 16 October 2009 (“Addendum”).

⁴ The Chamber informed the parties accordingly through an informal communication.

⁵ Prosecution Response to Urgent Stanišić Defence Motion for Provisional Release, 26 October 2009 (“Response”).

⁶ Motion, paras 5, 21.

⁷ Motion, para. 5.

⁸ Motion, para. 6.

threat or danger to any victim, witness, or other person, were satisfied.¹⁰ The Stanišić Defence argues that the circumstances that existed at that time have not altered, materially or otherwise.¹¹ Furthermore, it points out that the Republic of Serbia (“Serbia”) has provided guarantees affirming its commitment to ensure that the maintenance of any provisional release conditions imposed by the Chamber are observed and that the security and well being of the Accused during the provisional release are safeguarded.¹²

6. The Stanišić Defence submits that the Motion is timely and provides the required opportunity for the parties and the Chamber to verify the details of the medical treatment and reporting regime established with the assistance of the Military Medical Hospital in Belgrade (“VMA”) as detailed in the annexes to the Motion and the Addendum.¹³

7. The Stanišić Defence submits that the treatment regime available in Serbia is superior (or equal) to that provided in the United Nations Detention Unit (“UNDU”) as the Accused would be able to attend the VMA as an outpatient and/or as an in-patient and would have daily access to all required specialists.¹⁴

8. The Stanišić Defence submits that the Accused’s current treating doctors and reporting doctor, in full knowledge of the Accused’s anticipated treatment by the VMA, endorse and support the application for provisional release.¹⁵

9. The Stanišić Defence proposes a plan of submitting reports on the medical condition of the Accused during his provisional release.¹⁶ Moreover, it submits that the VMA will abide by any additional reporting conditions imposed by the Chamber.¹⁷ The Stanišić Defence recalls that the program for treatment and reporting falls under the same guarantees by Serbia as those that regulate the “usual conditions” of provisional release.¹⁸ It argues that there exists no evidence to support any inference that any previous non-compliance with the reporting duties imposed on the doctors treating the Accused in Belgrade was intentionally or unintentionally obstructive.¹⁹

⁹ Ibid.

¹⁰ Motion, para. 8. See Decision on Urgent Stanišić Defence Motion for Provisional Release During the Upcoming Court Recess, 22 July 2009 (“22 July 2009 Decision”), paras 17, 19.

¹¹ Motion, para. 8.

¹² Motion, para. 9.

¹³ Motion, para. 11. See Motion, Annex C; Addendum, Annex.

¹⁴ Motion, para. 13.

¹⁵ Motion, para. 14. See Motion, Annex A.

¹⁶ Motion, para. 17; Addendum, Annex.

¹⁷ Motion, para. 16.

¹⁸ Motion, para. 18.

¹⁹ Motion, para. 19.

10. Finally, the Stanišić Defence argues that the Chamber should be mindful of the general benefits of provisional release and give due weight to the fact that a period of release tends to boost an accused person's morale as well as his physical and mental health. Moreover, it is submitted that the Accused's psychological state will certainly improve if he is able to solve some of his personal problems during his stay in Belgrade and that provisional release may well provide the best means of continuing the demonstrable improvements seen during the course of the last few months.²⁰

2. The Prosecution

11. The Prosecution acknowledges that, on previous occasions, the Accused returned to the UNDU without any incident after having been provisionally released.²¹ At the same time, however, it submits that there are other compelling factors weighing against granting provisional release.²²

12. The Prosecution submits that the Accused's state of health does not necessitate his provisional release.²³ It argues that in light of the regular reports of the court-appointed medical experts, his health has been slowly but constantly improving.²⁴

13. The Prosecution also submits that there is no factual basis upon which the Chamber may conclude that medical treatment in Serbia is superior, or equivalent, to the treatment currently received by the Accused in the Netherlands.²⁵ It points out that the medical information submitted by the Stanišić Defence in the Motion in relation to the gastroenterological treatment with "biologicals" is contradictory to sworn testimony previously given by a staff member of the VMA.²⁶ As a consequence, the Prosecution argues that there is no reliable evidence before the Chamber allowing it to conclude that the Accused, if provisionally released, will receive the same high standard of care he has received in the UNDU.²⁷

14. The Prosecution submits that a coherent system of regular and transparent reporting would not be guaranteed if the Accused was provisionally released to Belgrade. It points out that in establishing a system of reporting on the Accused's health, the Chamber gave particular importance to reports by independent, court-appointed, non-treating doctors and that the Motion only lists

²⁰ Motion, para. 20.

²¹ Response, para. 1.

²² Ibid.

²³ Response, paras 3-4.

²⁴ Ibid.

²⁵ Response, paras 5-6.

²⁶ Response, para. 6.

²⁷ Response, paras 5-6.

doctors who would also be involved in treating the Accused.²⁸ According to the Prosecution, the Stanišić Defence's suggestion that the independent experts would have to rely on information received from the VMA would compromise their independence.²⁹ It also argues that the Stanišić Defence does not properly address previous incidents of non-compliance by the VMA doctors with the reporting duties imposed by the Chamber other than finding them "unacceptable".³⁰

15. The Prosecution further submits that the Stanišić Defence's direct contact with Dr Eekhof, the Reporting Medical Officer, whose sole responsibility is to report to the Chamber, is improper.³¹

16. The Prosecution also moves for the Chamber to lift the confidential and *ex parte* status *vis-à-vis* the Simatović Defence of the extracts from the *ex parte* testimony of Dr Tarabar in relation to the availability of the gastroenterological treatment with "biologicals" in Belgrade.³²

17. Finally, although opposing the Motion, the Prosecution requests, in the alternative, that a hearing be conducted to resolve the contradictory evidence on the availability of "biologicals" in the VMA.³³

III. APPLICABLE LAW

18. Rule 65 of the Rules governs provisional release. It provides, in relevant parts:

(A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) 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.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

19. The conditions listed under Rule 65 (B) of the Rules are the minimum requirements necessary for granting provisional release. The Chamber at all times retains the discretion not to

²⁸ Response, paras 7-8.

²⁹ Response, para. 8.

³⁰ Response, para. 9.

³¹ Response, para. 10, referring to Annex A of Motion.

³² Response, para. 12.

³³ Ibid.

grant the provisional release of an accused even if it is satisfied that these conditions have been met.³⁴

20. According to the Appeals Chamber, when considering a provisional release motion at a late stage of proceedings, even when satisfied that sufficient guarantees would offset the risk of flight, a Trial Chamber should not exercise its discretion in favour of granting provisional release unless compelling humanitarian grounds to do so were present.³⁵

IV. DISCUSSION

21. As to whether the Accused, if released, will return for trial, the Chamber considers the seriousness of the charges against him, as well as the current stage of the proceedings. Moreover, the Chamber gives due consideration to the fact that the Accused expressed his intent to voluntarily surrender to the Tribunal³⁶ and that in the course of previous periods of provisional release, he has generally been in compliance with the terms and conditions set by the Chamber.³⁷ Finally, the Accused has demonstrated his willingness to cooperate with the Prosecution by giving several interviews.³⁸ Furthermore, the Chamber takes into consideration, and gives appropriate weight to, the guarantees given by Serbia.³⁹

22. For these reasons, the Chamber is satisfied that the Accused, if provisionally released, would appear for trial.

23. As to whether the Accused, if released, will pose a danger to any victim, witness, or other person, the Chamber notes that there is no indication that the Accused interfered or would interfere

³⁴ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007, para. 5; Decision on Prosecution Appeal on Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, 26 June 2008, para. 3; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on Popović's Motion for Provisional Release, 1 July 2008, para. 5.

³⁵ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on "Prosecution's Appeal from Décision relative à la demande de mise en liberté provisoire de l'accusé Petković dated 31 March 2008", 21 April 2008, paras 15, 17; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.9, Decision on "Prosecution's Appeal from Décision relative à la demande de mise en liberté provisoire de l'accusé Stojić dated 8 April 2008", 29 April 2008, paras 14-15; *Prosecutor v. Popović et al.*, Case No. IT-05-AR65.4-6, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for Custodial Visit and Decision on Gvero's and Miletić's Motions for Provisional Release During the Break in the Proceedings, 15 May 2008, para. 24.

³⁶ 22 July 2009 Decision, para. 15; Decision on Prosecution's Appeal Against Decision Granting Provisional Release, 3 December 2004; Decision on Provisional Release, 26 May 2008 ("26 May 2008 Decision"), para. 46; Decision on Simatović Defence Motion for Provisional Release During the Upcoming Court Recess, 10 July 2009. See also Decision on Provisional Release, 28 July 2004 ("28 July 2004 Decision"), paras 19-20.

³⁷ See 22 July 2009 Decision, para. 15; 26 May 2008 Decision.

³⁸ See 22 July 2009 Decision, para. 15; 26 May 2008 Decision, para. 46; 28 July 2004 Decision, paras 16-18.

³⁹ Motion, Annex B.

with the administration of justice. As stated above, during previous periods of provisional release the Accused generally complied with the terms and conditions set by the Chamber.⁴⁰

24. For these reasons, the Chamber is satisfied that the Accused, if provisionally released, would not pose a danger to any victim, witness, or other person.

25. The Chamber notes that the jurisprudence of the Tribunal does not grant the accused the right of provisional release during either regular or extraordinary breaks in proceedings even if the Chamber is satisfied that the conditions listed in Rule 65 (B) are met.⁴¹ The Chamber further notes that there is no requirement set out in the case law for compelling humanitarian reasons at an early stage of the proceedings, as is the case here. In examining whether provisional release is appropriate in this case, the Chamber has given particular consideration to its obligation to avoid unnecessary interruptions in the trial proceedings. In this regard, it has examined the totality of the circumstances, including the current stage of the proceedings, the length and character of the break during which provisional release is requested, the Accused's health situation and the medical care available to him in the VMA in Belgrade, as well as the importance for the health of the Accused that the efficient reporting system set up in The Hague continues unhindered.

26. First, the Chamber notes the medical and psychological condition of the Accused during his last period of provisional release in Belgrade. The Accused was hospitalised at the VMA on 15 instances between 30 June 2008 and 4 May 2009.⁴² The medical report received by the Chamber at the time also mentions additional psychological pressure on the Accused triggered by the conflict with his son.⁴³ The conclusion of Dr Tarabar on the Chamber's order revoking provisional release was:

[w]e were the more surprised by the decision to send a patient in such a condition back to the detention unit and to have him commence with the active participation in the trial as we are not sure that he still is capable of such form of engagement and activities.⁴⁴

27. The Chamber also notes the opinion of the court-appointed expert psychiatrist who had examined the Accused in March 2009 during his provisional release in Belgrade and had concluded that:

⁴⁰ See 22 July 2009 Decision, para. 18.

⁴¹ See *Prosecutor v. Jokić*, Case No. 01-42-PT, Order on Miodrag Jokić's Motion for Provisional Release, 20 February 2002, paras 17, 21. See e.g. *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Motion for Provisional Release of Ivan Čermak, 27 February 2009, para. 10.

⁴² See Dr Tarabar's report, 4 May 2009.

⁴³ Dr Tarabar's report, 14 February 2009, p. 2.

⁴⁴ Dr Tarabar's report, 4 May 2009, p. 2.

Psychiatric treatment has proven quite difficult during the period of provisional release both in the home environment and at the periods of hospital admission. The clinical state of Mr. Stanišić and the recurrent crises in the psychosocial environment have apparently contributed to this unfortunate fact. As seems to have been the case at the outset of Mr. Stanišić depression the actual situation in his family circle and (his perception of) his position within the Serbian community have had a strong negative effect on his wellbeing and on the state of his mental health.

[...]

From a psychiatric point of view a return to Scheveningen may very well have beneficial effects on Mr. Stanišić as he will almost certainly be spared insults to his pride and perhaps threats to his safety due to the distance from his native land.⁴⁵

28. The medical reports submitted to the Chamber since the Accused's return to the UNDU have shown that his physical condition has stabilised and even slowly improved - to the point that on numerous occasions he has been found able to be transported to the court and take part in the proceedings.⁴⁶ At the same time, the medical reports have shown that the Accused's psychological condition can be generally described as depressed but without any evident psychiatric disorders and subject to gradual improvements – a state which does not make him in any way unable to take part in the proceedings subject to incorporating certain modalities set forth in various decisions of the Chamber.⁴⁷

29. Second, the Chamber notes that the Defence relies heavily on the opinion given by Dr Eekhof on 14 October 2009 who stated that:

Mr. Stanišić's mood has been influenced strongly by personal problems; in my opinion Mr. Stanišić's psychological state will certainly improve if he is able to solve some of his personal problems during his stay in Belgrade.⁴⁸

30. In his statement, Dr Eekhof does not address the medical or the psychological history of the Accused during his last period of provisional release in Belgrade, including his frequent hospitalisations and how his family related problems affected his health when he was there. Dr Eekhof's statement remains general and does not constitute an in-depth analysis of all the

⁴⁵ Psychiatric evaluation of the Accused submitted to the Chamber on 19 March 2009, pp 6-7.

⁴⁶ See e.g. the regular medical reports submitted to the Chamber on 28 July, 4, 11, 18, 25, 26, 27 August, 1, 8, 14, 15, 22 and 29 September, 6, 13, 20 and 27 October 2009; Gastroenterological reports submitted on 11 August and 10 September 2009.

⁴⁷ See Psychiatric evaluation of the Accused submitted to the Chamber on 31 August, 28 October 2009. See also regular medical reports submitted to the Chamber on 28 July, 4, 11, 18, 25, 26, 27 August, 1, 8, 14, 15, 22 and 29 September, 6, 13, 20 and 27 October 2009; Second Decision Amending Modalities for Trial, 1 September 2009 ("Second Modalities Decision"); Corrigendum to Second Decision Amending Modalities for Trial, 7 September 2009 ("Corrigendum to Second Modalities Decision").

⁴⁸ Motion, Annex A.

circumstances presently relevant. As a consequence, the Chamber considers that Dr Eekhof's statement insufficiently supports the proposition that provisional release should be granted.⁴⁹

31. The Chamber therefore finds that the medical and psychological condition of the Accused is of such nature that provisional release may increase the risk of possible disruptions in the trial proceedings. It will thus consider various other factors of relevance to whether provisional release should be granted.

32. The Chamber recalls its 22 July 2009 Decision stating that "the continuity of the existing system of treatment [of the Accused] is of the essence to ensure the fair and expeditious conduct of the proceedings in the present case".⁵⁰ This view seems to be fully supported by Dr Eekhof who recently stressed that it is "paramount" that the Accused's present medication shall remain unchanged.⁵¹ The Chamber notes in this regard, that, as highlighted by the Prosecution, there appears to be a serious contradiction in evidence whether the gastroenterological treatment with the so-called "biologicals" is available in the VMA in Belgrade.⁵² The Chamber also notes that the Stanišić Defence does not provide any evidence for its assertion that medical treatment of the Accused in the VMA in Belgrade could be superior to the standard he enjoys in the Netherlands. The Chamber is of the opinion that any doubt as to whether the treatment would and could be the same in Belgrade and, if not, as to what the consequences of any change to the treatment may be, especially given the urgency of the Motion, ought to be interpreted as militating against granting provisional release. The Chamber cannot risk to see the health of the Accused deteriorate and, as a consequence, that the trial proceedings be disrupted.

33. The Chamber also reiterates the importance for the Accused's health situation that a regular and transparent reporting system be allowed to continue unhindered.⁵³ The Chamber notes in this respect that in the past, there were instances of different degrees of non-compliance with the reporting duties imposed by the Chamber on the doctors treating the Accused in Belgrade.⁵⁴ The reporting system, as imposed in the present case, is based on the regular reporting to the Chamber by independent, court-appointed medical officers who are not directly involved in the treatment of

⁴⁹ In this regard, the Chamber notes that the Stanišić Defence approached Dr Eekhof - court-appointed, independent, reporting medical officer, directly. The Chamber will follow up in due course on the issue as to whether such communications were appropriate.

⁵⁰ 22 July 2009 Decision, para. 23.

⁵¹ Motion, Annex A.

⁵² See Motion, para. 13, Annex C, point 7 as compared to Response, Annex.

⁵³ See 22 July 2009 Decision, paras 21, 23.

⁵⁴ See T. 1316 *et seq*; 22 July Decision, para. 23.

the Accused.⁵⁵ The reporting system has been in place and functioning in the present case for approximately five months, a time during which the Chamber has received medical reports at least once per week. On occasion, this reporting has been combined with questioning in court of the reporting medical officer, by the Chamber and the parties. The requirements of the court proceedings and, in particular, the Accused's persistent claim to be unable to attend these proceedings, have made it necessary to retain the frequency of the reporting in order for the Chamber to be in a position to determine the appropriate trial schedule. In order to maintain the very essence of this system during provisional release, the Accused would have to be regularly examined not only by his treating doctors in Belgrade but also by the court-appointed reporting medical officer. The need for an effective continuation of the current reporting system by the court-appointed reporting medical officer is a factor militating against provisional release of the Accused.

34. In view of all the present circumstances referred to above, balancing the reasons for granting provisional release advanced by the Defence and the possible impact granting the Motion may have on the future course of trial, including potentially risking undue interruptions in the proceedings and consequently disturbing the delicate equilibrium established since the Accused's return to the UNDU, the Chamber finds that provisional release of the Accused should not be granted.

⁵⁵ See Decision on Start of Trial and Modalities for Trial, 29 May 2009. See also Decision Amending Modalities for Trial, 9 June 2009; Second Modalities Decision and Corrigendum to Second Modalities Decision.

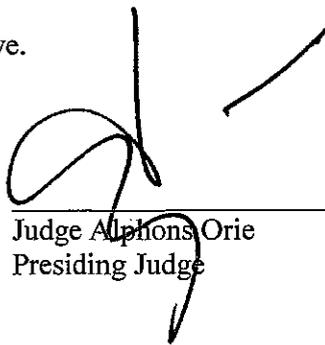
V. DISPOSITION

35. For the foregoing reasons, pursuant to Rules 54 and 65 of the Rules, the Chamber

LIFTS the confidential and *ex parte* status of the annex to the Response; and

DENIES the Motion.

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



Judge Alphons Orié
Presiding Judge

Dated this third day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]