

**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-PT

Date: 26 May 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 26 May 2008

PROSECUTOR

v.

**JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ**

PUBLIC

DECISION ON PROVISIONAL RELEASE

The Office of the Prosecutor

Mr. Dermot Groome
Ms. Doris Brehmeier-Metz
Mr. Gregory Townsend
Mr. John Docherty

Counsel for the Accused

Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić
Mr. Zoran Jovanović and Mr. Vladimir Domazet for Franko Simatović

1. **TRIAL CHAMBER III** (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Extremely Urgent Defence Motion for Immediate Provisional Release for Purposes of Medical Treatment”, filed on 20 May 2008 (“Stanišić Motion”) in which the Defence for Jovica Stanišić (“Stanišić Defence”) requests that the Trial Chamber grant provisional release to the Accused Jovica Stanišić and the oral motion for provisional release of Franko Simatović, made by his counsel (“Simatović Defence”) during the hearing of 20 May 2008 (“Simatović Motion”).

1. Relevant Procedural History

2. On 14 January 2004, the Accused Stanišić filed his first request for provisional release, partly on the ground of his ill health.¹ On 30 January 2004, Franko Simatović also applied for provisional release.² Both requests were granted by the Chamber on 28 July 2004.³ On the same day, the Prosecution announced it would appeal the Trial Chamber’s decisions and requested that the provisional release of both Accused be stayed, which request was granted by the Trial Chamber on 29 July 2004.⁴ The decisions regarding provisional release were appealed, and confirmed on appeal.⁵ During his provisional release, on four occasions, Stanišić requested and was granted leave to travel to the Igalo Institute in Montenegro for health reasons.

3. On 6 February 2008, Jovica Stanišić and Franko Simatović were ordered to return to the United Nations Detention Unit (“UNDU”) by 11 February 2008, as the Pre-Trial Conference and opening statements in their trial were scheduled to begin on 27 February 2008.⁶

4. On 11 February 2008, the Trial Chamber scheduled a confidential and *ex parte* hearing on 3 and 4 March 2008 so as to hear medical experts regarding Jovica Stanišić’s fitness to stand trial.⁷ On 3, 4, 5 and 6 March 2008, the hearing on the Accused Jovica Stanišić’s fitness to stand trial was held and a number of medical experts were heard. On 10 March 2008, while recognising that Jovica Stanišić suffered from a chronic and serious physical illness as well as a severe depression both of which affected his daily life, the Trial Chamber dismissed the motion of the Stanišić Defence

¹ Motion for provisional release, filed confidential and *ex parte* on 14 January 2004, paras 35–52.

² Defence Motion for Provisional Release, 30 January 2004.

³ Decision on Provisional Release (Stanišić), 28 July 2004; Decision on Provisional Release (Simatović), 28 July 2004.

⁴ Order granting stay of Decisions on Provisional Release, 29 July 2004.

⁵ Decision on Provisional Release, 28 July 2004; *Prosecutor v. Jovica Stanišić*, IT-03-69-AR65.1, Decision on Prosecution’s Appeal against Decision Granting Provisional Release, filed confidentially on 3 December 2004; *Prosecutor v. Franko Simatović*, IT-03-69-AR65.2, Decision on Prosecution’s Appeal against Decision on Provisional Release, 3 December 2004.

⁶ Scheduling Order, 6 February 2008.

⁷ Scheduling Order, 11 February 2008.

arguing that the Accused Stanišić was unfit to stand trial and concluded that he was fit to stand trial.⁸

5. On 9 April 2008, following several delays in starting the trial due to the ill health of the Accused Stanišić, the Trial Chamber decided to implement a procedure that would enable the Accused Stanišić to participate in the proceedings from the UNDU using a video-conference link on days that he is too unwell to attend court.⁹ On 11 April 2008, the Stanišić Defence requested leave to appeal the Trial Chamber's decision of 9 April 2008,¹⁰ which request was granted on 16 April 2008.¹¹

6. On 28 April 2008, the trial commenced and opening statements were heard on 28 and 29 April. On 29 April and on 6 May 2008, witness B-299 was heard. Subsequently, on a number of occasions the trial was adjourned due to a change in the medical condition of the Accused Stanišić.

7. By decision of 16 May 2008, the Appeals Chamber, reversed the Trial Chamber's Decision of 9 April and granted the Defence request "to adjourn the proceedings for a minimum of three months and to reassess the Accused's state of health before determining when the trial should commence".¹²

8. On 20 May 2008, the Trial Chamber adjourned the proceedings and ruled that during a period of a minimum of three months, "[t]he UNDU doctor will report weekly on the health of the Accused. The gastroenterologist is to examine the Accused once every month or more frequently, if required, and submit a report thereon. Dr. de Man, the court-appointed psychiatrist is to examine the Accused once every three weeks and submit a report after each examination."¹³ On the same day, the Defence for both Accused submitted their motions for provisional release.

2. Arguments of the Parties

(a) Submissions by the Defence for Jovica Stanišić

9. In its Motion, the Stanišić Defence has primarily structured its provisional release application around Jovica Stanišić's health condition, submitting that "[t]he principal purpose of the

⁸ Decision on Motion re Fitness to Stand Trial, filed confidentially and *ex parte* on 10 March 2008. On 13 March 2008, the Stanišić Defence requested leave to appeal the decision, which request was denied on 17 March 2008, Decision on Defence Motion Requesting Certification for Leave to Appeal, 17 March 2008.

⁹ Decision on Future Course of Proceedings, 9 April 2008.

¹⁰ Defence Request for Certification to Appeal the Trial Chamber's Decision on Motion Future Course of Proceedings, 11 April 2008.

¹¹ Decision on Defence Motion Requesting Certification for Leave to Appeal, 16 April 2008.

¹² Decision on Defence Appeal of the Decision on Future Course of the Proceedings, 16 May 2008 ("Appeals Decision").

¹³ Hearing 20 May 2008, T. 1258.

provisional release would be to provide for the optimum conditions for recovery” of the Accused Stanišić and “to prevent further serious deterioration of health and to ensure that the Accused’s life is not further endangered by a non-clinical environment”.¹⁴

10. The Stanišić Defence therefore submitted that notwithstanding the “professional care”¹⁵ dispensed to the Accused during his detention, his continued presence in “a detention environment” would serve only to further exacerbate his already severe medical condition.¹⁶ It argued that the available medical evidence “indicates a real and present danger of continued physical and mental deterioration” which the Defence submitted is “directly related to – or cannot be ameliorated by – a detention environment”.¹⁷

11. In support of its submissions, the Stanišić Defence cited the medical report of Dr. M. Cazemier, the Accused’s treating gastroenterologist, filed 16 May 2008, in which he outlined the weight loss, sleep deprivation, abnormally frequent bowel movements and extensive blood loss associated with those bowel movements, which are presently being experienced by the Accused Stanišić. The Defence also relied upon a psychiatric report issued by Dr. Vera Petrović, the treating psychiatrist, on 20 May 2008 in which she indicated that all remedies available to her in treating the Accused have been exhausted, with the only remaining recourse being to submit the Accused Stanišić to more extensive treatment by a multi-disciplinary team of experts. The Stanišić Defence finally pointed to a report of Dr. Falke dated 9 May 2008, in which he referred to the “vulnerable situation”¹⁸ of the Accused as well as the Accused’s fragile mental state.

12. The Stanišić Defence also noted that a grant of provisional release would enable the Accused to seek medical treatment at the Military Medical Hospital in Belgrade, an institution familiar with the Accused’s medical condition, owing to his treatment history with the institution, and one at which a multi-disciplinary medical team would be available to treat the range of medical conditions currently experienced by the Accused. Counsel for Jovica Stanišić proposed that the medical team at the Belgrade Hospital “liaise with the team at [the] UNDU so [as] to provide the Trial Chamber with information to allow a sensible rescheduling of the trial”.¹⁹

¹⁴ Extremely Urgent Defence Motion for Immediate Provisional Release for Purposes of Medical Treatment, 20 May 2008 (“Stanišić Motion”), para. 2.

¹⁵ Stanišić Motion, para. 3.

¹⁶ *Ibid.*, para. 4.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, para. 14.

¹⁹ *Ibid.*, para. 13.

13 Having outlined its efforts to secure guarantees from the Serbian Government and, having noted that “these will be filed in due course”,²⁰ the Stanišić Defence concluded by stating that “[i]t can be submitted that no risk exists that the Accused would not comply with any of the common provisional release conditions”.²¹ It further noted that, in the first instance, when provisional release was granted to the Accused in January 2004, “both the Accused and the government of Serbia fully complied with their obligations”, responding in a timely manner in ensuring the Accused’s return to the Tribunal as ordered.²² Finally, the Stanišić Defence adverted to the fact of its having submitted a request to the Government of Montenegro for permission and guarantees to allow for the possibility that the Accused, following the possibility of treatment at the Military Medical Hospital in Belgrade, be received for treatment at the Igalo Institute - a facility at which he had been admitted on four previous occasions -.

(b) Submissions by the Defence for Franko Simatović

14. In the Simatović Motion, the Defence for Franko Simatović requested the provisional release of the Accused Simatović, noting that his continued detention during the adjournment period seemed baseless “especially in view of the fact that the length of this period seems uncertain”.²³ The Simatović Defence argued that the rationale behind the discontinuance of the provisional release granted to the Accused Simatović in 2004 and the Trial Chamber’s order of 6 February 2008 requiring him to return to the Tribunal, was the commencement of the trial. As trial proceedings have been postponed, consequent upon the Appeal Chamber’s decision of 16 May 2008, the Simatović Defence reasoned “that the Chamber could revoke its decision of the 6th of February and based on its previous decision on provisional release, the accused could be immediately released provisionally”.²⁴

15. The Simatović Defence also emphasised the fact that Franko Simatović, despite being aware of the possibility of conviction and its attendant consequences, nevertheless returned to the Tribunal from provisional release, as required by the Trial Chamber’s order of 6 February 2008. It proceeded to express confidence that in the current instance the Accused would be no less compliant.

16. As regards the concerns raised by the Prosecution in its oral submissions, questioning the “reliability...of the guarantees that would be proffered”²⁵ by the Government of the Republic of Serbia, in light of the current uncertainty as to the political party or parties that will form the

²⁰ *Ibid.*, para. 17.

²¹ *Ibid.*, para. 23.

²² *Ibid.*, para. 23.

²³ Hearing 20 May 2008, T. 1292.

²⁴ *Ibid.*, T. 1292.

²⁵ *Ibid.*, T. 1296.

government and the willingness of any such Government to co-operate with the Tribunal in ensuring that persons indicted be delivered to the Tribunal for trial, the Simatović Defence emphasised that the Government of the Republic of Serbia is bound by its own laws to co-operate with the Tribunal. It argued that “there is a legal obligation, there is a law on cooperation with the International Criminal Tribunal and issuance of guarantees that are to be observed are issued based on this law so if anyone should want to neglect this law, they would have to change the law in the regular procedure”.²⁶ Counsel for Simatović noted further in his submissions that it was highly unlikely that any such attempt at amendment would be made.²⁷ Counsel also submitted that the Accused Simatović should not be held in detention pending the final political outcome in Serbia, citing the fact that this may only transpire as late as September 2008 – consuming practically the entire adjournment period set by the Appeals Chamber of a minimum of three months.

(c) Prosecution’s Response

17. On 21 May 2008, the Prosecution filed its “Prosecution Response to Jovica Stanišić’s ‘Extremely Urgent Defence Motion for Immediate Provisional Release for Purposes of Medical Treatment’ and Franko Simatović’s Oral Application for Provisional Release with Public Annexes A and B and Confidential and *Ex Parte* Annexes C through F” (“Prosecution’s Reponse”). The Prosecution requested, *inter alia*, leave to exceed the word limit in its Response. The requested leave is hereby granted.

18. The first of the Prosecution’s grounds for objecting to the Accuseds’ respective applications for provisional release posited that “the three prerequisites for provisional release outlined by Rule 65 of the Rules of Procedure and Evidence (the “Rules”) have not been met”.²⁸ The Prosecution submitted that the Rule in fact makes three pre-conditional requirements to a grant of provisional release. These are: firstly, that the Accused will not pose a flight risk; secondly, that the Accused will not pose a threat to victims and witnesses; and thirdly, that the State into which the Accused are to be released has been given an opportunity to be heard on the matter.

19. As regards the flight risk factor, the Prosecution submitted that the prevailing uncertainty in the Republic of Serbia, as to which political party might assume control of the country’s government in the near future, had resulted in a situation whereby the Trial Chamber could no longer be satisfied that either of the Accused would appear for trial, if released. The Prosecution in essence argued that there was no assurance that the incoming Serbian government would co-operate

²⁶ *Ibid.*, T. 1299.

²⁷ *Ibid.*, T. 1299.

with the Tribunal in returning the Accused to The Hague and cited a number of statements made by Mr. Tomislav Nikolić, the deputy leader of the Serbian Radical Party - one of the political parties currently vying to constitute Serbia's next government - in support of this assertion. In these statements to the press, Mr. Nikolić declared his refusal to co-operate with the Tribunal in the future by handing over any fugitives or indictees for trial.²⁹ The Prosecution's submissions projected that "[t]he most likely scenario currently seems to be that a coalition will be formed by Mr. Nikolić's (and Vojislav Šešelj's) Serbian Radical Party" and that the real probability existed that this coalition government could be in control of Serbia within the immediate future.³⁰

20. In light of the foregoing, the Prosecution concluded that "[i]n this situation, given that Mr. Nikolić, who is likely to be one of the most powerful people in the next Serbian government, has explicitly stated that his government will not honour such guarantees, the Trial Chamber cannot be satisfied that the Accused will appear for trial if released".³¹

21. As regards the second factor concerning any potential threat posed to witnesses on the grant of provisional release to the Accused, the Prosecution submitted that, the trial against both Accused having already commenced, the identifying details of twenty-six of the Prosecution's witnesses, in respect of whom protective measures had been granted, were disclosed to the Defence between 18 and 20 February 2008, resulting in both Accused now being cognisant of the identities of witnesses "most critical to the Prosecution case".³² The Prosecution consequently emphasised that this state of affairs distinguished the current set of circumstances from those pursuant to which the Accused had previously been granted provisional release in July 2004, noting that when the Accused were originally granted provisional release in that period, neither one knew the identities of protected witnesses. As such, the Prosecution concluded that the Trial Chamber could not be satisfied that the Accused would not pose a danger to witnesses if released under the prevailing circumstances.

22. Regarding what the Prosecution refers to as the "final requirement"³³ of Rule 65, that is, that the State into which the Accused are to be released should be given an opportunity to be heard prior to the making of any decision on a provisional release application, the Prosecution submitted that this procedure was followed in the first set of provisional release applications considered by the Trial Chamber in 2004 and should be followed in the instant matter. The Prosecution therefore

²⁸ Prosecution Response to Jovica Stanišić's 'Extremely Urgent Defence Motion for Immediate Provisional Release for Purposes of Medical Treatment' and Franko Simatović's Oral Application for Provisional Release with Public Annexes A and B and Confidential and *Ex Parte* Annexes C through F, 21 May 2008 ("Prosecution Response"), para. 1.

²⁹ Prosecution Response, para. 6.

³⁰ *Ibid.*, para. 7.

³¹ *Ibid.*, para. 8 (emphasis in original).

³² *Ibid.*, para. 11.

³³ *Ibid.*, para. 13.

argued that “in 2004, a representative of the Serbian Government was called to address these issues. At the same time, the Trial Chamber can put questions to the official relevant to the question of the weight to be accorded to guarantees of the government in the current political climate”.³⁴

23. Having set out its submissions on “the three prerequisites for provisional release outlined by Rule 65”,³⁵ the Prosecution’s Response turned to the particular issue exclusively affecting the Accused Stanišić’s application - that is, his medical condition - and submitted that a grant of provisional release to this Accused, permitting him to return to Belgrade, would interfere with the proper and expeditious conduct of the trial.

24. Having noted the Defence’s submissions alleging the severity of the Accused’s ill health and the Defence’s emphasis as to the urgent need for the Accused to be provisionally released in order to permit him to access multi-disciplinary medical treatment at the Military Medical Hospital in Belgrade to prevent any further deterioration of the Accused’s health, the Prosecution proceeded to dismiss the Defence’s assertions as “unfounded” and as overstating the severity of his condition.³⁶

25. Comparing the various medical reports issued by Doctors Cazemier and Falke, the Prosecution contested the Defence’s submissions as to the Accused’s condition being life-threatening asserting that firstly, the medical reports reflected that the Accused’s physical condition is not life threatening in nature³⁷ and that secondly, they showed instances in which there have been improvements in his psychiatric condition.³⁸ The Prosecution also consider the medical assessments of Dr. Petrović in her report issued 20 May 2008, in which she described the Accused’s condition as consistently worsening and classified his medical status as being in the pre-terminal phase. The Prosecution contended that “[t]hese dire predictions come precisely two days after Dr. Petrović had reported to Dr. Falke that Mr. Stanišić’s depression showed ‘significant improvement’, which improvement had also been noted by Dr. Falke”.³⁹

26. The Prosecution further opined that in any event, “the evidence before the Trial Chamber indicates that he will receive better care for all his conditions in the Netherlands than he would if granted provisional release”⁴⁰ and points to the information submitted to the Trial Chamber as annexations to the Prosecution’s Response, which detailed the facilities and quality of care available at the Netherlands Institute of Forensic Psychiatry and Psychology (“NIFPP”). The

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 1.

³⁶ *Ibid.*, para. 15.

³⁷ *Ibid.*, paras 17 and 18.

³⁸ *Ibid.*, paras 18 and 21.

³⁹ *Ibid.*, para. 22.

⁴⁰ *Ibid.*, para. 36.

Prosecution also asserted the sufficiency of care available at the Pieter Baan Centrum in Utrecht, an institution that is part of the NIFPP, highlighting that it “is capable of providing a multi-disciplinary approach to all health problems of the individuals being assessed there”,⁴¹ noting that it had access to specialists and staff from hospitals throughout the Netherlands and further noting that the quality of gastroenterological care at this and other Dutch medical institutions “is superior to that available at the Military Medical Academy in Belgrade”.⁴² The Prosecution further referred to the fact that the medical institutions in Amsterdam and Leiden offer treatments “such as biological therapy, that are not available in Belgrade”.⁴³

27. The Prosecution concluded its submissions on this point by noting that “[i]n addition it will be much easier for the Trial Chamber to monitor the Accused’s compliance with his treatment regimen if he remains in the Netherlands”.⁴⁴ This, it argued, was especially important in light of evidence which it alleged conclusively showed the Accused’s refusal in the past to co-operate with his treating physicians and his refusal on some occasions to abide by the treatments prescribed by his doctors.⁴⁵ As a result, the Prosecution submitted that “[s]ince the principal justification for granting provisional release is the unfounded assertion that it will aid in the Accused’s recovery, the Stanišić Provisional Release Motion should be denied”.⁴⁶

28. Finally, and in the alternative, pursuant to Rule 65(E) of the Rules, the Prosecution requested that the Trial Chamber stay the execution, pending possible appeal by the Prosecution of any decision to grant the Stanišić Motion or the Simatović Motion.⁴⁷

(d) Reply by Stanišić Defence

29. The Stanišić Defence replied that “the medical condition of the Accused when considered in light of earlier compliance with provisional release demonstrates an overwhelming case for immediate provisional release”.⁴⁸ In this respect, the Stanišić Defence acknowledged that the medical condition would not ordinarily be relevant to a provisional release inquiry.⁴⁹ However, it submitted that in the present case “the severity of the Accused medical condition makes it directly relevant”.⁵⁰ According to the Stanišić Defence, the report of Dr. Petrović demonstrated that “the

⁴¹ *Ibid.*, para. 30 (emphasis in original).

⁴² *Ibid.*, para. 34.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, para. 36.

⁴⁵ *Ibid.*, paras 26 and 27.

⁴⁶ *Ibid.*, para. 36.

⁴⁷ *Ibid.*, para. 39 (iii).

⁴⁸ Defence Reply to Prosecution Response to Stanišić’s “Extremely Urgent Defence Motion for Immediate Provisional Release for Purpose of Medical Treatment”, Confidential, 22 May 2008 (“Defence Reply”), para. 16.

⁴⁹ *Ibid.*, para. 4.

⁵⁰ *Id.*

current situation amounts to a life threatening situation”.⁵¹ It added that there was no indication in this report of manipulation of the medical situation by the Accused, as insinuated by the Prosecution during the hearing on 20 May 2008.⁵²

30. Furthermore, the Stanišić Defence was of the view that “treatment by the team of experts in Belgrade who are familiarized with the situation of the Accused will be more beneficial for his recovery th[a]n the suggested option of the Prosecution”, namely that the Accused be admitted to the Pieter Baan Centrum.⁵³ It pointed out that this facility “is not a therapeutic centre but merely a centre for observation and testing in order to provide opinions to the Dutch courts on the existence of mental diseases, diminished capacity and testing on the eligibility for detention”.⁵⁴ It concluded, for this reason, that “[t]his option is totally falling outside the scope of the requested provisional release, since the primary aim [...] is to obtain medical *treatment* in order to have the Accused recovered”.⁵⁵

31. As to the first and second grounds of the Prosecution objection to the Stanišić Motion, the Stanišić Defence recalled, in particular, that the Accused was provisionally released in December 2004 after both the Trial Chamber and the Appeals Chamber found that he would not pose a threat to potential witnesses or victims if released and would return for trial.⁵⁶ It considered that, at the current time, there is still no evidence from which the Trial Chamber could properly infer that the Accused would not appear for trial or that he would pose a danger to any victim, witness or other person.⁵⁷ On the contrary, the Stanišić Defence submitted that, in light of the medical evidence, it was clear that the Accused “could not evade any provisional release supervision” and was not “physically or mentally capable of presenting a threat to any victim, witness or other person”.⁵⁸ The fact that the Accused knew some of the victims’ and witnesses’ identities was therefore irrelevant.⁵⁹

32. Finally, the Stanišić Defence submitted that the guarantee provided by the government of the Republic of Serbia “can be seen as an expression of the State’s view” on the issue of the Accused’s provisional release.⁶⁰ There was therefore no need to provide the Republic of Serbia with an opportunity to be heard on this issue.⁶¹ On 23 May 2008, the Stanišić Defence filed the State guarantee provided by the government of the Republic of Serbia, with a translation of that

⁵¹ *Ibid.*, para. 9.

⁵² *Ibid.*, para. 7.

⁵³ *Ibid.*, para. 14.

⁵⁴ *Id.*

⁵⁵ *Id.* (emphasis in the original).

⁵⁶ Defence Reply, para. 2.

⁵⁷ *Ibid.*, para. 3.

⁵⁸ *Ibid.*, para. 16.

⁵⁹ *Ibid.*, para. 11.

⁶⁰ *Ibid.*, para. 15.

guarantee being filed on 26 May 2008. On 26 May 2008, the Stanišić Defence also filed the State guarantees provided by the Government of the Republic of Montenegro.

(e) Reply by Simatović Defence

33. On 23 May 2008, the Simatović Defence filed a reply to the Prosecution Response. In its Reply, the Simatović Defence replied to two main arguments of the Prosecution, namely the political situation in the Republic of Serbia and the potential danger the Accused Simatović was alleged to pose to victims and witnesses.

34. As regards the political situation in the Republic of Serbia, the Simatović Defence argued that the Prosecution argument was “wholly inappropriate, since it represents nothing except for mere speculation and guessing.”⁶² While questioning whether it was proper for the Prosecution to present presumptions as arguments, it posited that it was compelled to point out that the President of the Republic of Serbia has repeatedly indicated that he would not allocate mandates for the composition of the government to parties opposing European integration, a precondition of which was co-operation with the Tribunal.⁶³ Furthermore, a coalition with the SRS, to which the Prosecution alluded, was only one of four potential coalitions to be formed. As to the co-operation of the current “technical” government, the Simatović Defence argued that the current government was “completely dedicated to the co-operation with this Tribunal” and that this technical government would be functioning during the next three months, the period of time the case now stands adjourned.⁶⁴

35. As regards the Prosecution argument that Franko Simatović would pose a threat to the victims and witnesses whose names have been disclosed during the course of the proceedings, the Simatović Defence submitted that a general concern for the safety of witnesses was insufficient to show that an accused posed a danger to victims and witnesses. The Simatović Defence recalled a decision of the Trial Chamber of 6 September 2007, in which the Trial Chamber found that during three years of provisional release “there has been no report of any conduct on [the part of both Accused] constituting a danger to any victim or witness” and ordered that the names of five protected witnesses be disclosed. The Simatović Defence emphasised that this decision was made during the provisional release of the Accused. After the disclosure of the names of five witnesses,

⁶¹ *Ibid.*, para. 15.

⁶² Defence Request to Reply and Defence Reply to ‘Prosecution Response to Franko Simatović’s Oral Application for Provisional Release’, filed on 23 May 2008 (“Simatović Reply”), para. 6.

⁶³ Simatović Reply, para. 7.

⁶⁴ *Ibid.*, para. 8.

Franko Simatović never attempted to influence those witnesses, nor was there any evidence to that effect.

36. As to the State guarantees, the Simatović Defence argued that the government of the Republic of Serbia had reaffirmed its guarantees and provided a certificate of the Office of the National Council for the Co-operation with the International Criminal Tribunal for the Former Yugoslavia confirming the reaffirmation of the guarantees provided in 2004 with respect to Franko Simatović. On 23 May 2008, the Simatović Defence filed a decision of the Council of Ministers of Serbia, and the conclusion of the Government of the Republic of Serbia, both concerning guarantees for the provisional release of Franko Simatović.

3. Applicable Law

37. Pursuant to Rule 65(A) of the Rules, once detained, an accused may not be provisionally released except upon an order of a Chamber. Under Rule 65(B) of the Rules, a Trial Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness or other person, and after having given the host country and the State to which the accused seeks to be released the opportunity to be heard.⁶⁵ The burden of proof on the balance of probabilities is placed upon the accused with respect to both prongs of the provisional release inquiry.⁶⁶

38. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all relevant factors that a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.⁶⁷ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.⁶⁸ This is because decisions on motions for provisional release are fact-intensive, and cases are considered on an individual basis in light of the particular circumstances of the individual accused.⁶⁹ The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches

⁶⁵ *Prosecutor v. Popović et al.*, IT-05-88-AR65.4, IT-05-88-AR65.5, IT-05-88-AR65.6, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for Custodial Visit and Decisions on Gvero's and Miletić's Motions for Provisional Release During the Break in the Proceedings ("*Borovčanin* Decision"), 15 May 2008, para. 5; *Prosecutor v. Prlić et al.*, IT-04-74-AR65.8, Decision on "Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Petković* Dated 31 March 2008" ("*Petković* Decision"), 21 April 2008, para. 7.

⁶⁶ *Prosecutor v. Momčilo Perišić*, IT-04-81-PT, Decision on Momčilo Perišić's Motion for Provisional Release ("*Perišić* Decision"), p. 2; *Prosecutor v. Lazarević*, IT-03-70-PT, Decision on Defence Request for Provisional Release ("*Lazarević* Decision"), pp. 2-3.

⁶⁷ *Borovčanin* Decision, para. 6; *Petković* Decision, para. 10.

⁶⁸ *Borovčanin* Decision, para. 6; *Prosecutor v. Mićo Stanišić*, IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Miće Stanišić* Decision"), para. 8.

its decision on provisional release but also, as much as can be foreseen, at the time the accused is expected to return to the International Tribunal.⁷⁰

39. The following list of factors has previously been identified as relevant to the provisional release inquiry:⁷¹

- the accused is charged with serious criminal offences;
- if convicted, he is likely to face a long prison term;
- circumstances of the accused's surrender;
- degree of co-operation given by the authorities of the State to which the accused seeks to be released;
- guarantees offered by those authorities, and any personal guarantees offered by the accused; in particular, the weight given to the governmental guarantees must be assessed in light of the position held by the Accused;
- likelihood that, in case of breach of the conditions of provisional release, the relevant authorities will re-arrest the Accused if he declines to surrender,
- the accused's degree of co-operation with the Prosecution; and
- any suggestion that the Accused has interfered with the administration of justice since the confirmation of the indictment against him.

40. The health condition and considerations regarding treatment of ill detainees are factors are part of "all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision."⁷² In this regard, the Trial Chamber takes note of its finding in the decision on Jovica Stanišić's request for provisional release issued on 28 July 2004 that "for an application for provisional release on medical grounds to succeed, it must be substantiated by a showing by the applicant that he needs treatment which is unavailable while at the UNDU".⁷³ This finding no longer appears to be in line with the recent jurisprudence of the Tribunal. In the case of *Prosecutor v. Pavle Strugar*, the Appeals Chamber held that "provisional release may be granted to an accused who may remain temporarily outside of The Netherlands for the purpose of receiving medical treatment, provided that the prerequisites of Rule 65 of the Rules are fulfilled".⁷⁴

⁶⁹ *Borovčanin* Decision, para. 6; *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-AR65.1, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7.

⁷⁰ *Borovčanin* Decision, para. 6; *Mičo Stanišić* Decision, para. 8.

⁷¹ *Perišić* Decision, 9 June 2005, pp. 1-2, citing *Lazarević* Decision, 14 April 2004, p. 2.

⁷² *Pušić* Decision, paras 7, 16 and 17.

⁷³ *Prosecutor v. Jovica Stanišić*, IT-03-69-PT, Decision on Provisional Release, para. 37.

⁷⁴ *Prosecutor v. Pavle Strugar*, IT-01-43-A, Decision on "Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro", 16 December 2005, p. 2, citing *Prosecutor v. Dragoljub Ojdanić*, IT-99-37-PT, Confidential Order on General Ojdanić's Urgent Motion for Modification of Conditions of Provisional Release, 30 June 2005; *Prosecutor v. Vladimir Kovacević*, IT-01-42/2-I, Decision on Provisional Release, 2 June 2004. The Trial Chamber notes that Strugar requested the Appeals Chamber to allow him to be provisionally

41. In the case of the *Prosecutor v. Berislav Pušić*, the Appeals Chamber held that “any humanitarian grounds have to be assessed in the context of the two requirements expressly listed in Rule 65(B) of the Rules.”⁷⁵ It continued: “Of course, if the two requirements of Rule 65(B) are met, the existence of humanitarian reasons warranting release can be a salient and relevant factor in assessing whether to exercise discretion to grant provisional release. In that respect, ‘the weight attached to humanitarian reasons as justification for provisional release will differ from one defendant to another depending upon all the circumstances of a particular case.’”⁷⁶ In the instant case, it is medical, rather than humanitarian grounds that are relevant. In the Trial Chamber’s view, the reasoning of the Appeals Chamber is equally applicable to medical grounds. Consequently, provided the two requirements of Rule 65(B) of the Rules are met, medical grounds can be a salient and relevant factor in assessing whether to exercise the discretion to grant provisional release.⁷⁷

4. Discussion

42. In its decision of 16 May 2008, the Appeals Chamber “grant[ed] the Defence request to adjourn the proceedings for a minimum of three months and to reassess the Accused’s state of health before determining when the trial should commence”.⁷⁸ The Prosecution submitted that, notwithstanding the use of the term “commence”, the proper construction of the Appeals Chamber ruling was that the trial continues. On the other hand, the Stanišić Defence submitted that the term “commence” in the ruling indicated that the trial will begin afresh after the three month period and re-assessment of the health of the Accused Stanišić. The Trial Chamber expresses its view on this issue in paragraphs 62 and 63 of this decision.

(a) State Guarantees

43. On 22 May 2008, the Trial Chamber received a the letter on behalf of the Government of the Netherlands, in which it was stated, *inter alia*, that, limited to the practical consequences relating to provisional release, the Netherlands, as host country, did not object to the provisional release of

released in order to receive a surgical placement of a total hip prosthesis in the Clinical Center in Podgorica, Montenegro. The rehabilitation was to take place in the specialised rehabilitation center in Igalo, Montenegro. The Prosecutor did not oppose Strugar’s motion in light of the “special humanitarian aspects pertaining to the Appellant’s medical condition”, pp. 2-3.

⁷⁵ *Prosecutor v. Prlić et al.*, 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 (“*Pušić Decision*”), 23 April 2008, para. 14, citing *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 27 July 2007, para. 14. In this latter decision, the Appeals Chamber held that “a Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person. It is in this context that any humanitarian grounds have to be assessed”.

⁷⁶ *Pušić Decision*, para. 14.

⁷⁷ *Pušić Decision*, para. 17.

⁷⁸ Appeals Decision, para. 22.

Jovica Stanišić and Franko Simatović, and that it understood that, if released, both Jovica Stanišić and Franko Simatović would leave Dutch territory. The Trial Chamber finds that the requirement that the host country be given the opportunity to be heard, set forth in Rule 65(B) of the Rules, is satisfied.

44. On 23 May 2008, the Simatović Defence and the Stanišić Defence filed the State guarantees of the government of the Republic of Serbia, with the translation of the guarantees with respect to Jovica Stanišić being filed on 26 May 2008. The documents contain a number of guarantees and undertakings by the government of the Republic of Serbia, relating to the provisional release of the two Accused, including, importantly, the undertaking of the Ministry of Interior to immediately place the Accused under arrest if they attempt to flee or if they violate any term of the provisional release. The Prosecution argued that the Trial Chamber should call a representative of the Government of the Republic of Serbia, in order to ensure that the requirement of giving “the State to which the accused seeks to be released” the opportunity to be heard, set forth in Rule 65(B) of the Rules, is met. This argument is entirely without merit. The consistent practice of this Tribunal is to treat this requirement as satisfied when such guarantees are provided to the Trial Chamber.⁷⁹

45. The Trial Chamber has taken careful note of the Prosecution argument that in the present circumstances the guarantees should not be accepted.⁸⁰ There is no certainty that Mr. Nikolić’s political party will be part of the next Government of Serbia and even if his party does form part of that government, there is no certainty that it would implement a policy such as that advocated by Mr. Nikolić and in this regard, the Trial Chamber agrees with the Simatović Defence that the Prosecution comments are only speculative. Having seen the guarantees and having considered the information contained in Confidential and Ex-Parte Annexes C and D to the Prosecution Response, the Trial Chamber attaches greater weight to the guarantees, which are specifically directed at the circumstances of this case, than to the information contained in the Annexes, which is not so directed. In sum, the Trial Chamber is satisfied that the Government of Serbia will fulfill its obligations as set out in an order on provisional release, in particular, that it will arrest the Accused for any breach of conditions of such release.

⁷⁹ See e.g. *Prosecutor v. Vladimir Lazarević*, Case No. IT-03-70-PT, Decision on Defence Request for Provisional Release, 14 April 2005; *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-PT, Decision on Vinko Pandurević’s Application for Provisional Release, 15 July 2005; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Momčilo Perišić’s Motion for Provisional Release, 9 June 2005.

⁸⁰ See *supra*, paras 19 and 20.

(b) Whether the Accused, if released, will appear for trial(i) Jovica Stanišić

46. In its decision of 28 July 2004, the Trial Chamber found that, if released, the Accused Stanišić would appear for trial.⁸¹ The Trial Chamber took into account and accorded due weight to, *inter alia*, (i) the “voluntariness of the Accused in his interviews at a time when the law on cooperation with the International Tribunal had not been passed in Serbia and Montenegro”;⁸² (ii) the “intent of the Accused to surrender voluntarily” to the Tribunal;⁸³ and (iii) that the Accused was charged with “serious criminal offences” and would “likely face a long prison sentence”.⁸⁴ However, it observed that the European Court of Human Rights (“ECHR”) repeatedly held that “the gravity of the charges could not by itself serve to justify long periods of detention on remand”.⁸⁵ By decision of 3 December 2004, the Appeals Chamber upheld the decision of the Trial Chamber.⁸⁶

47. The Accused Stanišić complied with the order of the Trial Chamber of 6 February 2008 and returned to the United Nations Detention Unit in The Hague on 11 February 2008. From December 2004 to February 2008, the Trial Chamber did not find it necessary to revoke the provisional release of Jovica Stanišić.

48. The Trial Chamber considers that Jovica Stanišić’s co-operation with the Prosecution as well as his intent to surrender voluntarily are factors relevant to the present provisional release inquiry. There has been no change in these circumstances since 2004 and they will be weighed in favour of provisional release. As far as the gravity of the crimes and the likely length of the prison sentence is concerned, the Trial Chamber reiterates the dictum of the ECHR,⁸⁷ which is also reflected in the case law of the Tribunal.⁸⁸

(ii) Franko Simatović

49. In its decision of 28 July 2004, the Trial Chamber found that, if released, the Accused Stanišić would appear for trial.⁸⁹ The Trial Chamber took into consideration, *inter alia*, (i) the “voluntariness of the Accused in his interviews at a time when the law on cooperation with the

⁸¹ *Stanišić* Trial Chamber Decision, para. 29.

⁸² *Ibid.*, para. 18.

⁸³ *Ibid.*, para. 20.

⁸⁴ *Ibid.*, para. 21.

⁸⁵ *Ibid.*, para. 22.

⁸⁶ *Stanišić* Appeals Chamber Decision, para. 14, 27 and 38.

⁸⁷ *See supra*, para 46.

⁸⁸ *Lazarević* Decision, pp. 2-3.

⁸⁹ *Simatović* Trial Chamber Decision, para. 27.

International Tribunal had not been passed in Serbia and Montenegro”;⁹⁰ (ii) the Accused’s statements in the Belgrade court that he “wish[ed] to surrender voluntarily” and that he “accept[ed] the jurisdiction” of the International Tribunal;⁹¹ (iii) the Accused’s “signed statement, dated 27 January 2004, stating his willingness, *inter alia*, to appear for trial”;⁹² and (iv) that the Accused was charged with “serious criminal offences” and would “likely face a long prison sentence”.⁹³ However, it observed that the ECHR repeatedly held that “the gravity of the charges could not by itself serve to justify long periods of detention on remand”.⁹⁴ In its decision of 3 December 2004, the Appeals Chamber upheld the Trial Chamber’s decision.⁹⁵

50. The Accused Simatović complied with the order of the Trial Chamber of 6 February 2008 and returned to the United Nations Detention Unit in The Hague on 11 February 2008. From December 2004 to February 2008, the Trial Chamber did not find it necessary to revoke his provisional release.⁹⁶

51. The Trial Chamber considers that Simatović’s co-operation with the Prosecution as well as his intent to surrender voluntarily are factors relevant to the present provisional release inquiry. There has been no change in these circumstances since 2004 and they will be weighed in favour of provisional release. As far as the gravity of the crimes and the likely length of the prison sentence is concerned, the Trial Chamber reiterates the dictum of the ECHR,⁹⁷ which is also reflected in the case law of the Tribunal.⁹⁸

(c) Whether the Accused, if released, will not pose a danger to victims, witnesses or other persons

(i) Jovica Stanišić

52. The Prosecution submitted that the provisional release of the Accused Stanišić would pose a danger to those twenty-six witnesses whose names have been disclosed during the course of the proceedings. In effect, the Prosecution is saying that now that the Accused is in possession of the names of certain protected witnesses, they are in danger. The Stanišić Defence, in its Reply, argued that the previous compliance of the Accused with the conditions of his earlier provisional release as well as his current illness provide evidence to support the current application.

⁹⁰ *Ibid.*, para. 16.

⁹¹ *Ibid.*, paras 18-19.

⁹² *Ibid.*, para. 20.

⁹³ *Ibid.*, para. 21.

⁹⁴ *Id.*

⁹⁵ *Simatović Appeals Chamber Decision*, paras 9, 15 and 27.

⁹⁶ On 3 July 2007, the Republic of Serbia Ministry of Justice filed a State report which indicated that the Accused Simatović had not fully complied with the conditions of his provisional release. However, no further action on the alleged breaches was taken, Report of Republic of Serbia, Ministry of Justice, 3 July 2007, filed on 5 July 2007.

53. In its decision of 28 July 2004, the Trial Chamber found that nothing reflected in the evidence or submissions filed by the Prosecution suggested that the Accused had interfered or would interfere with the administration of justice. In so finding the Trial Chamber noted that the evidence submitted in that instance by the Prosecution reflected only a generalised concern that the Accused might pose a danger to victims or witnesses, as opposed to a more concrete apprehension, grounded on the acts or conduct of the Accused, indicating that the he might indeed pose such a threat if granted provisional release.⁹⁹ At that time, the identities of the twenty-six witnesses about whom the Prosecution now expressed concern had not been disclosed. As such, the disclosure of the names has created a situation that differs from the situation in 2004.

54. During the period of more than three years during which the Accused was provisionally released, there was no evidence of any instances in which the Accused threatened or caused harm to any victims or witnesses. Moreover, the Trial Chamber attaches weight to the circumstance that the names of five protected witnesses had been disclosed during the provisional release of both Accused pursuant to a decision of the Trial Chamber, dated 6 September 2007, as submitted by the Defence for Franko Simatović,¹⁰⁰ and that the Trial Chamber did not receive any evidence indicating that Jovica Stanišić attempted to threaten or harm those witnesses in the period spanning September 2007 to 11 February 2008. Also, having reviewed the submissions of the Prosecution with regard to the present provisional release application and having regard to the guarantees from the Republic of Serbia in which the government has undertaken to arrest the Accused for breach of any of the conditions of the provisional release, the Trial Chamber finds that the Accused Jovica Stanišić will not pose a danger to any victims or witnesses if his present application for provisional release is granted.

(ii) Franko Simatović

55. As it did with respect to Jovica Stanišić, the Prosecution submitted that the provisional release of the Accused Simatović would pose a danger to those twenty-six witnesses whose names have been disclosed during the course of the proceedings. In effect, the Prosecution is saying that now that the Accused is in possession of the names of certain protected witnesses, they are in danger. In its oral application, the Simatović Defence emphasised that Franko Simatović never tried to influence witnesses.¹⁰¹ In its Reply, it pointed to a decision of the Trial Chamber dated 6 September 2007, in which the Trial Chamber found that there was no evidence to suggest that the

⁹⁷ See *supra*, para. 49.

⁹⁸ *Lazarević* Decision, pp. 2-3.

⁹⁹ This approach was upheld by the Appeals Chamber, Decision on Prosecution's Appeal against Decision on Provisional Release, 3 December 2004, para. 43.

¹⁰⁰ See *infra*, para. 55.

Accused has attempted to influence witnesses.¹⁰² It argued that there has not been evidence since September 2007 of any attempt to influence witnesses and victims on the part of Franko Simatović.

56. On 28 July 2004, the Trial Chamber found that nothing in the evidence or submissions filed by the Prosecution suggested that the Accused Franko Simatović had interfered or would interfere with the administration of justice. In so finding the Trial Chamber noted that the evidence submitted in that instance by the Prosecution reflected only a generalised concern that the Accused might pose a danger to victims or witnesses, as opposed to a more concrete apprehension, grounded on the acts or conduct of the Accused, indicating that he might indeed pose such a threat if granted provisional release. This approach on the part of the Trial Chamber was upheld by the Appeals Chamber in its decision of 3 December 2004 issued with regard to the Accused Simatović.¹⁰³ At that time, the identities of the twenty-six witnesses about whom the Prosecution now expressed concern had not been disclosed. As such, the disclosure of the names has created a situation that differs from the situation in 2004.

57. During the period of more than three years during which the Accused was provisionally released, there was no evidence of any instances in which the Accused threatened or caused harm to any victims or witnesses. Moreover, the Trial Chamber attaches weight to the fact that the names of five protected witnesses had been disclosed during the provisional release of both Accused pursuant to a decision of the Trial Chamber, dated 6 September 2007, and that the Trial Chamber did not receive any evidence indicating that the Accused Simatović attempted to threaten or harm those witnesses in the period spanning September 2007 to 11 February 2008. Also having reviewed the submissions of the Prosecution with regard to the present provisional release application and having regard to the guarantees from the Republic of Serbia in which the government has undertaken to arrest the Accused for breach of any of the conditions of the provisional release, the Trial Chamber finds that the Accused Franko Simatović will not pose a danger to any victims or witnesses if his present application for provisional release is granted.

(d) The Accused Stanišić's medical condition

58. The health of the Accused Stanišić has been a matter of considerable concern ever since his return to the UNDU. The Stanišić Defence based the request for provisional release primarily on the medical condition of the Accused, submitting that "[t]he principal purpose of the provisional release would be to provide for the optimum conditions for recovery". Therefore, it argued that the conditions of treatment of the Accused were to be taken into consideration by the Trial Chamber in

¹⁰¹ Hearing 20 May 2008, T. 1292.

¹⁰² Decision on Third Prosecution Motion for Pre-Trial Protective Measures, dated 6 September 2007.

its assessment of the application. The case law of the Appeals Chamber, and in particular the recent decision in the case of the *Prosecutor v. Berislav Pušić*, is that considerations with respect to medical treatment of an Accused, including the location of such treatment, may be taken into consideration when deciding on a request for provisional release.¹⁰⁴

59. The Trial Chamber is sensitive to the information provided by Dr. Falke and Dr. Petrović in their reports submitted to the Trial Chamber on 20 May 2008.¹⁰⁵ In particular, the Trial Chamber notes Dr. Petrović's following observations:

[I]f you ask me for a medical predicament in these conditions, I recon [*sic*] one could be mentioned with certainty, we are going to loose [*sic*] him.

I think we've done everything possible within our powers, but in this case, our specialties are simply not enough. Furthermore, I think our hands are tight up [*sic*] so to say, as for future medical relief to be provided to Mr. Stanišić.

In his report of 20 May 2008, Dr. Falke referred to Dr. Petrović's views regarding the Accused Stanišić's mental health. He understood her views as meaning that she had "reached a plateau in her ability to treat Mr. Stanišić without the assistance of a multi-disciplinary team in a medical environment". Dr. Falke added that he considered "this opinion as important". The Prosecution questioned the validity of Dr. Petrović's report, pointing to "vast inconsistencies" between her assessment of the health of the Accused on 13 May 2008 and her later assessment of 15 May 2008. In addition, it pointed to "inconsistencies between her opinion and those of Drs. Cazemier and Falke." Finally, it questioned why Dr. Falke had not reported to the Trial Chamber on 15 May 2008, if he had observed a sharp decline in the Accused's condition and why Dr. Falke had not included Dr. Petrović's conclusion concerning the possibility of "losing" the Accused Stanišić in his own report of 20 May 2008.¹⁰⁶

60. The Trial Chamber considers that the views and opinions expressed by Dr. Falke and Dr. Petrović in their respective reports are exceedingly important insofar as the health of the Accused Stanišić is concerned. According to these doctors, the Accused Stanišić is gravely ill. It is true that in the multitude of reports received by the Trial Chamber concerning the health of the Accused Stanišić one may find what the Prosecution describes as inconsistencies. However, in the view of the Trial Chamber, his state of health is such that it is a salient and relevant factor that strengthens the case in favour of granting provisional release.

¹⁰³ Decision on Prosecution's Appeal against Decision on Provisional Release, 3 December 2004, para. 32.

¹⁰⁴ *Pušić* Decision, paras 16-17.

¹⁰⁵ Dr. Falke's report of 20 May 2008, filed in compliance with the Trial Chamber's Order Establishing a Procedure for the Monitoring of and Reporting on the Accused Stanišić's Ability to Attend Court in Person and/or to Participate in the Court Proceedings via Video-Conference Link, dated 8 May 2008; Dr. Petrović's report dated 15 May 2008 and submitted to the Trial Chamber on 20 May 2008.

¹⁰⁶ Prosecution Response, para. 22.

61. The Trial Chamber also notes the Prosecution argument that it would be easier to monitor the health of the Accused Stanišić in The Hague, rather than in Belgrade. However, the Trial Chamber finds that the efficiency or ease of such monitoring depends on the regime that is to be established as part of the conditions of provisional release, if granted.

62. Moreover, in light of the past and current state of health of the Accused Stanišić, a reasonable trier of fact cannot rule out the possibility that the length of the adjournment of the proceedings may exceed three months. In three months time, the health of the Accused may not be such as to permit the trial to commence. In these circumstances, a determination as to the present stage of the proceedings, that is, whether trial or pre-trial, is not strictly necessary, since whether the proceedings are to commence or to continue, the Trial Chamber finds that the period prior to such commencement is uncertain and indeterminate. The Trial Chamber considers this uncertainty to be a factor in favour of granting provisional release.

63. In the Trial Chamber's view, the case is now properly described as being in the pre-trial stage of the proceedings.

64. The Stanišić Defence's request that the Trial Chamber grant permission for additional treatment at the Igalo Institute in Montenegro should be examined if and when such additional treatment appears necessary. The Trial Chamber declines to grant the requested permission, as there is no justification to grant such relief at this stage.

5. Conclusion

65. In sum, the Trial Chamber concludes that the Accused Stanišić has discharged the burden of satisfying the Trial Chamber that, if granted provisional release, he will appear for trial and, if granted provisional release, he will not pose any danger to victims, witnesses or other persons. The Trial Chamber also finds that the status of the Accused's health is such that it strengthens the case for the exercise of its discretion in favour of release. In those circumstances, the request for provisional release of Jovica Stanišić is granted.

66. As for the Simatović Motion, the Trial Chamber finds that the Accused Simatović has also discharged the burden of satisfying the Trial Chamber that, if granted provisional release, he will appear for trial and, if granted provisional release, he will not pose any danger to victims, witnesses or other persons. The request for provisional release for Franko Simatović is granted.

67. Having considered the submissions of the Prosecution, the Trial Chamber will grant a stay of the proceedings pending an appeal of this decision, to be filed in accordance with Rule 65(F) of the Rules.

6. Disposition

68. For the foregoing reasons, pursuant to Rule 65 of the Rules, the Stanišić Motion and the Simatović Motion are hereby **GRANTED**, leave is **GRANTED** to the Stanišić Defence and the Simatović Defence to file a reply in the current matter, the oral order of 20 May 2008 as set out in paragraph 8 of this decision is **RESCINDED** and the Trial Chamber **ORDERS** as follows:

(1)

- a) the Accused Jovica Stanišić and Franko Simatović shall be transported to Schiphol airport in the Netherlands by the Dutch authorities;
- b) at Schiphol airport, the Accused shall be provisionally released into the custody of officials of the government of the Republic of Serbia to be designated prior to release in accordance with operative paragraph (4)(a) hereof, who shall accompany the Accused for the remainder of his travel to Serbia and to his place of residence;
- c) on their return, the Accused shall be accompanied by the same designated officials of the government of the Republic of Serbia, who shall deliver the Accused to the custody of the Dutch authorities at Schiphol airport at a date and time to be determined by Order of the Trial Chamber, and the Dutch authorities shall then transport the Accused back to the United Nations Detention Unit in The Hague;
- d) during the period of their provisional release, the Accused shall abide by the following conditions, and the authorities of the Government of the Republic of Serbia, including the local police, shall ensure compliance with such conditions:
 - (i) to remain within the confines of the municipality of Belgrade;
 - (ii) to surrender their passports to the Ministry of Justice;
 - (iii) to provide the address at which they will be staying in Belgrade to the Ministry of Justice and the Registrar of the International Tribunal before leaving the United Nations Detention Unit in The Hague;
 - (iv) to consent to having the Ministry of Justice check with the local police about their presence and to the making of occasional, unannounced visits upon the Accused by the Ministry of Justice or by a person designated by the Registrar of the International Tribunal;
 - (v) not to have any contact with the co-accused in the case;
 - (vi) not to have any contact whatsoever or in any way interfere with any victim or potential witness or otherwise interfere in any way with the proceedings or the administration of justice;
 - (vii) not to discuss their case with anyone, including the media, other than with their counsel;
 - (viii) to continue to co-operate with the International Tribunal;
 - (ix) to comply strictly with any requirements of the authorities of the Republic of Serbia necessary to enable them to comply with their obligations under this Order and their guarantees;

- (x) to return to the International Tribunal at such time and on such date as the Trial Chamber may order;
- (xi) to comply strictly with any further Order of the Trial Chamber varying the terms of or terminating their provisional release;
- (xii) the Accused Franko Simatović is to report each day to the police in Belgrade at a local police station to be designated by the Ministry of Justice;
- (xiii) in light of the medical condition of the Accused Jovica Stanišić, and noting that at present the Accused is considered to be showing an increased risk of suicide, he is to be taken to the Military Medical Hospital in Belgrade for an assessment of his physical and mental state and, if necessary, to be admitted for treatment at that hospital, under such conditions as the doctors deem appropriate for his health and safety, which conditions may include admission to a secure or closed section of said hospital, in which case, if required, this order may be considered to be authorisation thereof;
- (xiv) in the event the Accused Jovica Stanišić is not admitted to the Military Medical Hospital in Belgrade, he is to report each day to the police in Belgrade at a local police station to be designated by the Ministry of Justice;
- (xv) in the event the Accused Jovica Stanišić is admitted to the Military Medical Hospital, the Ministry of Justice shall appoint a member of the police in Belgrade to verify each day that the Accused Stanišić is present at said hospital;

(2) **ORDERS** the medical doctors of the Military Medical Hospital in Belgrade who will be examining and may be treating the Accused Jovica Stanišić, unless otherwise determined by the Trial Chamber,

- a) to report to the Trial Chamber, immediately upon the arrival and assessment of Jovica Stanišić at the hospital, on the regime under which the Accused Stanišić is going to be treated;
- b) if the Accused Stanišić is to be admitted to said hospital, to provide a report to the Trial Chamber every week, as detailed as possible, specifying where appropriate specific symptoms of the Accused Stanišić and identifying symptoms which have been observed directly by the medical staff of said hospital;
- c) if he is to be admitted to said hospital, to report at the commencement of his stay at that hospital and to report as soon as he is considered to be well enough to leave the hospital;
- d) to consult with Dr. Falke and Dr. Petrović on the medical condition of Jovica Stanišić during his detention at The Hague and to allow Dr. Petrović, if feasible, to continue treating Jovica Stanišić during the period of his provisional release;
- e) if the Accused Stanišić is not admitted to hospital, to notify the Trial Chamber of the identity of the medical practitioners who will be responsible for his care, for further order by the Trial Chamber;
- f) to provide all names of the medical practitioners who will be treating the Accused Stanišić at the hospital, irrespective of whether he be admitted or not;
- g) to allow any court-appointed medical expert to examine the Accused Stanišić at any time;

(3) **ORDERS** the court-appointed psychiatrist, Dr. de Man, assisted by a psychologist of his choosing and approve by the Registrar, to provide a report, as detailed as possible, on the mental health of the Accused Jovica Stanišić, which report is to be based on a minimum of three visits during the three-month period from the date of this decision and provided within a week of Dr. de Man final examination of Jovica Stanišić;

(4) **ORDERS** the court-appointed gastroenterologist, Dr. Fidder, to provide a report, as detailed as possible, on the physical health of the Accused Jovica Stanišić, which report is to be based on a minimum of two visits during the three-month-period from the date of this decision and provided within a week after Dr. Fidder final examination Jovica Stanišić;

(5) **REQUIRES** the government of the Republic of Serbia to assume responsibility as follows:

- a) by designating an official of the government of the Republic of Serbia into whose custody the Accused shall be provisionally released and who shall accompany the Accused from Schiphol airport to Serbia and to their place of residence, and notifying, as soon as practicable, the Trial Chamber and the Registrar of the International Tribunal of the name of the designated official;
- b) for the personal security and safety of the Accused while on provisional release;
- c) for all expenses concerning transport of the Accused from Schiphol airport to Belgrade and back;
- d) for all expenses concerning accommodation, medical treatment and security of the Accused while on provisional release;
- e) at the request of the Trial Chamber or the Parties to facilitate all means of co-operation and communication between the parties and to ensure the confidentiality of any such communication;
- f) to submit a written report to the Trial Chamber every two weeks as to the compliance of the Accused with the terms of this Order;
- g) to arrest and detain the Accused immediately if they should breach any of the conditions of this Order; and
- h) to report immediately to the Trial Chamber any breach of the conditions set out above; and
- i) in the event the Accused Jovica Stanišić is admitted to the Military Medical Hospital in Belgrade, to appoint a member of the police in Belgrade to verify each day that the Accused Stanišić is present at said hospital; and
- j) to ensure that the reporting regime set out in paragraph (2) of this disposition is strictly adhered to;

(6) **INSTRUCTS** the Registrar of the International Tribunal to

- a) consult with the Ministry of Justice in the Netherlands as to the practical arrangements for the release of the Accused;

b) to continue to detain the Accused at the United Nations Detention Unit in The Hague until such time as the Trial Chamber and the Registrar have been notified of the name of the designated official of the government of the Republic of Serbia into whose custody the Accused is to be provisionally released;

c) to facilitate at least three examinations of the Accused by Dr. de Man in the next three months and to ensure that Dr. de Man will be assisted by a psychologist of Dr. de Man's choosing;

d) to appoint the psychologist of Dr. de Man's choosing as expert, provided that psychologist meets the requirements of the Tribunal for such appointment; and

e) to facilitate at least two examinations of the Accused by Dr. Fidler in the next three months;

(7) **REQUESTS** the authorities of all States through which the Accused will travel;

a) to hold the Accused in custody for any time that they will spend in transit at the airport;

b) to arrest and detain the Accused pending their return to the United Nations Detention Unit in The Hague, should they attempt to escape;

(8) **GRANTS** the Prosecution request for a stay in the execution of this decision pending appeal such that the Accused shall not be released save as provided in Rule 65(G) of the Rules;

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



Judge Patrick Robinson
Presiding Judge

Dated this twenty-sixth day of May 2008

At The Hague

The Netherlands

[Seal of the Tribunal]