



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: 18 December 2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 18 December 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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I. PROCEDURAL HISTORY

1. On 9 December 2009, the Stanišić Defence filed a motion seeking provisional release of Jovica Stanišić (“Accused”) between 16 December 2009 and 15 January 2010.¹
2. On 10 December 2009, the Prosecution opposed the Motion.²
3. On 14 December 2009, upon the request of the Stanišić Defence, Dr. Rowell was asked to answer questions by the parties and the Chamber in relation to the Motion.³ On the same day, the Kingdom of the Netherlands filed a letter stating its position on the relief sought in the Motion.⁴ On 15 December 2009, the Stanišić Defence submitted additional guarantees issued by the Republic of Serbia (“Serbia”) supporting its Motion.⁵

II. SUBMISSIONS

1. The Stanišić Defence

4. In its Motion, the Stanišić Defence requests that the Accused be granted provisional release between 16 December 2009 and 15 January 2010 or for a shorter period of time as deemed fit by the Chamber.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
5. The Stanišić Defence submits that on 22 July 2009 and again on 3 November 2009, the Chamber found that the requirements 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 threat or danger to any victim, witness, or other person— were satisfied.⁸ The Stanišić Defence argues that the circumstances that existed at that time remain

¹ Urgent Stanišić Defence Motion for Provisional Release with Public and Confidential Annexes, 9 December 2009 (“Motion”), paras 5, 18.

² Prosecution Response to Third Urgent Stanišić Defence Motion for Provisional Release, 10 December 2009 (“Response”).

³ Hearing, 14 December 2009, T. 2623-2639.

⁴ Letter of the Ministry of Foreign Affairs of the Kingdom of the Netherlands on Provisional Release of Mr. Jovica Stanišić, 14 December 2009.

⁵ Defence Submission of Additional Document for Provisional Release Motion with Public Annex E, 15 December 2009 (“Addendum”).

⁶ Motion, paras 5, 18; Hearing, 15 December 2009, T. 2734-2735.

⁷ Motion, para. 5.

⁸ Motion, paras 3-4, 7. See Decision on Urgent Stanišić Defence Motion for Provisional Release, 3 November 2009 (“3 November 2009 Decision”), paras 22, 24; Decision on Urgent Stanišić Defence Motion for Provisional Release During the Upcoming Court Recess, 22 July 2009 (“22 July 2009 Decision”), paras 17, 19.

the same.⁹ Furthermore, it points out that Serbia confirmed the guarantees it had previously issued wherein it had affirmed its commitment to ensure that 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.¹⁰

6. The Stanišić Defence points out the “observable and manifest improvements in the Accused’s health since the commencement of the trial” and submits that it is “a clearly stated view of the current medical team that a short period of provisional release will benefit the Accused and (therefore) will not endanger the continuance of the trial”.¹¹

7. The Stanišić Defence presents a plan of the medical treatment and reporting regime established with the assistance of the Military Medical Hospital in Belgrade (“VMA”) and submits that the VMA has the medical expertise and capabilities to ensure the continuity of the Accused’s medical treatment, including being able to provide the so-called “biologicals”.¹²

8. The Stanišić Defence also submits that it is impracticable to fully address, within the confines of written pleadings, questions related to the transplantation of the medical regime from the United Nations Detention Unit (“UNDU”) to the VMA and the modalities of a reporting regime to be implemented through the VMA.¹³ Therefore, the Stanišić Defence requests Dr Eekhof, the reporting medical officer (“RMO”) to provide additional live evidence as to these issues.¹⁴

9. 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 and physical and mental health”.¹⁵ It points out that this is particularly true for provisional release during the Christmas break, which is a holiday of religious and familial significance.¹⁶ It submits in this regard that provisional release of the Accused over the Christmas Holidays with his family could have “inestimable health benefits”.¹⁷

10. Finally, in addressing the previous “different degrees of non-compliance with the reporting duties imposed by the Chamber on the doctors treating the Accused in Belgrade”, the Stanišić Defence submits that it has not been argued or shown that such non-compliance was deliberate or

⁹ Motion, para. 7.

¹⁰ Motion, para. 9, Annexes A, B.

¹¹ Motion, para. 11.

¹² Motion, paras 12-13, Annex D, Addendum.

¹³ Motion, paras 14, 16.

¹⁴ Motion, paras 14, 16, 18.

¹⁵ Motion, para. 15.

¹⁶ Ibid.

was instrumental in prejudicing the Accused's treatment or recovery.¹⁸ Rather, it states, such non-compliance was minimal, unintentional and insignificant.¹⁹

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.²⁰ At the same time, however, it submits that there are compelling factors that weigh against granting provisional release.²¹ It submits that the Chamber refused two previous Stanišić Defence motions for provisional release and that there has been no change in the circumstances to merit granting of the Motion at this time.²²

12. The Prosecution argues that the self-reported "personal problems" by the Accused are inadequate to justify provisional release based on the totality of circumstances.²³ It adds that the extent and degree of these problems are not defined by the RMO or the Stanišić Defence.²⁴ Moreover, the significance of these problems is severely undermined by the RMO's opinion that they do not prevent the Accused from participating in the present proceedings.²⁵ The Prosecution further submits that the RMO stresses the importance of continued treatment and defers to the Chamber to determine whether provisional release would jeopardise the continuation of the trial.²⁶

13. The Prosecution points out that neither the RMO nor Dr Petrović explains the basis of their opinion that the Accused's health would improve during his presence in Belgrade. Similarly, it argues that the Stanišić Defence's opinion that provisional release over the Christmas holidays with his family could have "inestimable health benefits" is not supported by any medical reports.²⁷

14. The Prosecution stresses that there is a constant improvement in the Accused's health since his return to the UNDU, that this improvement demonstrates the effectiveness of the medical care

¹⁷ Ibid.

¹⁸ Motion, para. 17.

¹⁹ Ibid.

²⁰ Response, para. 8.

²¹ Response, paras 2, 8, 29.

²² Response, paras 1, 10, referring to 3 November 2009 Decision and 22 July 2009 Decision.

²³ Response, para. 11.

²⁴ Ibid.

²⁵ Response, para. 14.

²⁶ Response, para. 13.

²⁷ Response, paras 16-17.

the Accused receives in the UNDU and raises the concern that if he were provisionally released his care may be insufficient to ensure he is physically well and able to proceed when hearings resume.²⁸

15. The Prosecution submits that the Chamber cannot safely rely on recent representations that the Accused will continue to be treated with biologicals if provisionally released, since such information is in contradiction with sworn testimony previously given by a staff member of the VMA.²⁹ Moreover, the Prosecution argues that the reporting regime currently proposed in the Motion only lists doctors that would be involved in treating of the Accused and not doctors who would be required to undertake an independent assessment of his medical condition.³⁰

16. The Prosecution disagrees with the Stanišić Defence that the previous non-compliance by the VMA with its reporting duties was minimal, unintentional and insignificant, arguing instead that it caused substantial delay to the recommencement of trial.³¹

17. The Prosecution also strongly objects to the direct contacts of the Stanišić Defence with the RMO.³² It argues that it is improper for the Defence to directly communicate with an “*independent expert*” in order to elicit opinions to support its Motion as such communications place the RMO in a difficult position, potentially compromising his independence.³³ The Prosecution also points out the leading nature of the questions directed by the Stanišić Defence to the RMO and the fact that the RMO, in his answers, did not quantify the risk that the Accused’s health will regress.³⁴

18. The Prosecution therefore requests that the Chamber expressly prohibit direct communication with the RMO without authorisation from the Chamber and notice to the Prosecution.³⁵ It further requests that the Chamber order the Stanišić Defence to produce the record of any *ex parte* communications with the RMO since the commencement of trial.³⁶

19. The Prosecution requests that should the Chamber consider granting the Motion, before it does so it should conduct a hearing to take evidence from the RMO on the issue of quantifying the assertion that the Accused’s health may deteriorate whilst on provisional release.³⁷

²⁸ Response, paras 5, 18-19, 21.

²⁹ Response, para. 20.

³⁰ Response, para. 23.

³¹ Response, para. 24.

³² Response, paras 2, 25.

³³ Response, para. 26.

³⁴ Ibid.

³⁵ Response, paras 27, 29.

³⁶ Ibid.

³⁷ Response, para. 29.

20. Finally, the Prosecution requests a stay of the decision pursuant to Rule 65(E) should the Chamber decide to grant the Motion.³⁸

III. APPLICABLE LAW

21. 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.

22. 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 grant the provisional release of an accused even if it is satisfied that these conditions have been met.³⁹

IV. DISCUSSION

23. 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 Tribunal⁴⁰ 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.⁴¹ Finally, the Accused has demonstrated his willingness to cooperate with the Prosecution by giving several

³⁸ Ibid.

³⁹ *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.

⁴⁰ 3 November 2009 Decision, para. 21; 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.

⁴¹ See 3 November 2009 Decision, para. 21; 22 July 2009 Decision, para. 15; 26 May 2008 Decision.

interviews.⁴² Furthermore, the Chamber takes into consideration, and gives appropriate weight to, the guarantees given by Serbia.⁴³

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

25. 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 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.⁴⁴

26. 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.

27. 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 early 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.

28. The Chamber notes that the medical reports have shown constant improvement of the Accused's health condition during the last few months of treatment in the UNDU. His physical condition has been reported as posing no impediment either to participating in the proceedings, subject to incorporating certain modalities set forth in various decisions of the Chamber, or to travelling as far as Belgrade as long as sitting for more than three hours is not required.⁴⁵ The psychological condition of the Accused is still considered as depressed, yet showing clear

⁴² See 3 November 2009 Decision, para. 21; 22 July 2009 Decision, para. 15; 26 May 2008 Decision, para. 46; 28 July 2004 Decision, paras 16-18.

⁴³ Motion, Annex B.

⁴⁴ See 3 November 2009 Decision, para. 23; 22 July 2009 Decision, para. 18.

⁴⁵ Motion, Annex C, Report of Dr Eekhof to the Stanišić Defence of 20 November, point 1; Report of Dr Eekhof to the Stanišić Defence of 2 December 2009, point 1; Hearing, 14 December 2009, T. 2624-2625. 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, 3, 10, 17, 24, 30 November 2009, 1, 7, 8 and 14 December 2009; Gastroenterological reports submitted on 11 August, 10 September 2009 and 5 November 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").

improvement during the last few months.⁴⁶ The Chamber also notes that the Accused decided for the first time to follow the recent proceedings, although via video-conference link from the UNDU.⁴⁷

29. The Chamber notes that the RMO submits that:

in view of his improved mental health state, Mr. Stanišić would be able to solve some of his problems during his presence in Belgrade and therefore his mental state would improve.⁴⁸

The Chamber recalls that Dr Rowell, the doctor who temporarily replaced the RMO and examined the Accused several times, shared with the Parties and the Chamber the limited information he had concerning the nature of the Accused's personal problems and qualified Dr Eekhof's opinion by stating that:

I don't think from that perspective that anybody can say whether he would get better or get worse, and I don't think that is the medical issue. From the medical perspective all I can say is whether he is sufficiently psychologically capable of dealing with the issues, and whereas a few months ago I would have said that he was not in a position to be able to deal with those issues, now I would say that he was. I cannot tell you. I wouldn't even speculate as to whether this would help or not help, but I would suggest that given he is so enthusiastic about addressing his issues in this way, there is a much higher likelihood of it succeeding. If he was avoiding this issue than there would be a higher likelihood of it failing, so in combination of his psychological state of mind, which is a medical assessment, and his relative enthusiasm, which is just a general assessment, I would say there is a relatively good chance of things going well but ultimately it is still speculation.⁴⁹

At the same time, however, the Chamber notes that Dr Rowell does not exclude the possibility that the Accused's health may deteriorate while on provisional release in Belgrade.⁵⁰

30. In assessing the potential risk of such deterioration of the Accused's health, the Chamber notes the physical 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;⁵¹ not even one hospitalisation has been deemed necessary since the Accused returned to the UNDU. The medical report received by the Chamber at the time also mentions

⁴⁶ Motion, Annex C, Report of Dr Eekhof to the Stanišić Defence of 2 December 2009, point 2; Hearing, 14 December 2009, T. 2624-2625, 2629. 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, 3, 10, 17, 24, 30 November 2009, 1, 7, 8 and 14 December 2009.

⁴⁷ Hearings of 30 November, 1, 8, 9, 14 and 15 December 2009.

⁴⁸ Motion, Annex C, Report of Dr Eekhof to the Stanišić Defence of 2 December 2009, point 2. See Motion, Annex C, Report of Dr Eekhof to the Stanišić Defence of 20 November 2009, point 5.

⁴⁹ Hearing, 14 December 2009, T. 2624, 2632-2633. See T. 2634-2635.

⁵⁰ Hearing, 14 December 2009, T. 2629, 2636-2637.

⁵¹ See Dr Tarabar's report, 4 May 2009.

additional psychological pressure on the Accused triggered by the conflict with his son.⁵² 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.⁵³

31. 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:

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.⁵⁴

32. The Chamber therefore finds that the physical and psychological condition of the Accused is of such nature that provisional release bears the risk of deteriorating the Accused's health, which may result in disrupting the trial proceedings. In the Chamber's opinion, the existence of such risk militates strongly against granting the Motion.

33. The Chamber also reiterates the importance of a regular, unhindered and transparent reporting system for the Accused's health situation.⁵⁵ 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.⁵⁶ 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 the Accused,⁵⁷ coupled with the day-to-day surveillance of the Accused's activities in the UNDU. The reporting system has been in place and functioning in the present case for approximately seven months, a time during

⁵² Dr Tarabar's report, 14 January 2009, p. 2.

⁵³ Dr Tarabar's report, 4 May 2009, p. 2.

⁵⁴ Psychiatric evaluation of the Accused submitted to the Chamber on 19 March 2009, pp 6-7.

⁵⁵ See 3 November 2009 Decision, para. 33.

⁵⁶ See T. 1316 *et seq*; 22 July Decision, para. 23.

⁵⁷ 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. The Chamber notes in this respect that Dr Petrović is a treating doctor and therefore cannot play a role of an independent non-treating medical officer as proposed by the Defence, see Hearing, 15 December 2009, T. 2734-2735.

which the Chamber has received general medical reports at least once per week and reports from the court-appointed gastroenterologist and psychiatrist every eight weeks. On occasion, this reporting has been combined with questioning in court of the RMO, 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 in person, 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 RMO and court-appointed gastroenterologist and psychiatrist whose next reports are due during the winter recess.⁵⁸ The need for an effective continuation of the current reporting system by the court-appointed RMO and medical experts 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.

35. Finally, the Chamber notes that the issue of the appropriateness of contacts between the Stanišić Defence and the RMO will be dealt with in a separate decision.

⁵⁸ See Second Modalities Decision, Annex A, para. 3.

V. DISPOSITION

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

DENIES the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this eighteenth day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]