



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-AR65.4

Date: 26 June 2008

Original: English

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**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Theodor Meron

**Registrar:** Mr. Hans Holthuis

**Decision of:** 26 June 2008

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

*PUBLIC*

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**DECISION ON PROSECUTION APPEAL OF DECISION ON  
PROVISIONAL RELEASE AND MOTIONS TO PRESENT ADDITIONAL EVIDENCE  
PURSUANT TO RULE 115**

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**Office of the Prosecutor**

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

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal”, respectively), is seized of the “Prosecution Appeal of the Trial Chamber’s ‘Decision on Provisional Release’ Together with Annexes, Confidential Annexes, and Confidential and Ex Parte Annexes and Motion for Leave to Exceed Word Limit,” filed confidentially and partly *ex parte* on 27 May 2008 (“Appeal”),<sup>1</sup> as well as the “Prosecution Motion Pursuant to Rule 115 for Submission of Additional Evidence, and for a Stay of Provisional Release Pending Its Decision,” filed on 28 May 2008 (“Rule 115 Motion of 28 May”),<sup>2</sup> the “Prosecution Motion Pursuant to Rule 115 for Submission of Additional Evidence,” filed partly confidentially on 4 June 2008 (“Rule 115 Motion of 4 June”),<sup>3</sup> the “Defence Motion Pursuant to Rule 115 for the Admission of Additional Evidence,” filed on 11 June 2008 (“Rule 115 Motion of 11 June”),<sup>4</sup> the “Defence Motion Pursuant to Rule 115 for Submission of Additional Evidence with Confidential Annex,” filed on 19 June 2008 (“Rule 115 Motion of 19 June”),<sup>5</sup> and the “Partly Confidential Defence Motion Pursuant to Rule 115 for Submission of Additional Evidence with Two Confidential Annexes,” filed on 20 June 2008 (“Rule 115 Motion of 20 June”).<sup>6</sup>

## I. PROCEDURAL HISTORY

2. On 16 May 2008, the Appeals Chamber issued the “Decision on Defence Appeal of the Decision on Future Course of the Proceedings,” in which it granted Jovica Stanišić’s (“Stanišić”) request to adjourn the case for a minimum of three months and to reassess his state of health before determining when the trial should commence.<sup>7</sup> On 26 May 2008, Trial Chamber III (the “Trial Chamber”) rendered the Impugned Decision, granting Stanišić and Franko Simatović (“Simatović”) (collectively, “Accused”) provisional release and ordering the Impugned Decision to be stayed in accordance with Rule 65(E) of the Rules of Procedure and Evidence (“Rules”), following the

<sup>1</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Prosecution Appeal of the Trial Chamber’s “Decision on Provisional Release” Together with Annexes, Confidential Annexes, and Confidential and Ex Parte Annexes and Motion for Leave to Exceed Word Limit, 27 May 2008 (“Appeal”).

<sup>2</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Prosecution Motion Pursuant to Rule 115 for Submission of Additional Evidence, and for a Stay of Provisional Release Pending Its Decision, 28 May 2008 (“Rule 115 Motion of 28 May”).

<sup>3</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, *partially confidential* Prosecution Motion Pursuant to Rule 115 for Submission of Additional Evidence, 4 June 2008 (“Rule 115 Motion of 4 June”).

<sup>4</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Defence Motion Pursuant to Rule 115 for the Admission of Additional Evidence, 11 June 2008 (“Rule 115 Motion of 11 June”).

<sup>5</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Defence Motion Pursuant to Rule 115 for Submission of Additional Evidence with Confidential Annex, 19 June 2008 (“Rule 115 Motion of 19 June”).

<sup>6</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Partly Confidential Defence Motion Pursuant to Rule 115 for Submission of Additional Evidence with Two Confidential Annexes, 20 June 2008 (“Rule 115 Motion of 20 June 2008”).

<sup>7</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of the Proceedings, 16 May 2008 (“Adjournment Decision”).

submission by the Office of the Prosecutor (“Prosecution”) that it intended to file an appeal should the Trial Chamber grant provisional release to the Accused.<sup>8</sup> On 27 May, Stanišić filed a request to set aside the Trial Chamber’s stay order.<sup>9</sup> On the same day, the Office of the Prosecutor (“Prosecution”) responded to the Request to Set Aside Stay<sup>10</sup> and filed its Appeal of the Impugned Decision.<sup>11</sup> On 28 May 2008, the Prosecution further filed the Rule 115 Motion of 28 May. On 29 May 2008, Stanišić filed a combined Response to the Appeal and to the Rule 115 Motion of 28 May.<sup>12</sup> On the same day, Simatović filed a confidential Response to the Appeal.<sup>13</sup> On 30 May 2008, the Prosecution filed a confidential and partly *ex parte* consolidated Reply to the Stanišić and Simatović Responses.<sup>14</sup> On 4 June 2008, the Prosecution filed the Rule 115 Motion of 4 June, and Stanišić filed a Response thereto on 6 June 2008.<sup>15</sup> On 11 June 2008, Simatović filed the Rule 115 Motion of 11 June. The Prosecution filed its Response thereto the following day.<sup>16</sup> On 18 June

<sup>8</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Provisional Release, 26 May 2008 (“Impugned Decision”).

<sup>9</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Extremely Urgent Request to Set Aside the Stay of the Decision of 26<sup>th</sup> May 2008 on Provisional Release Pursuant to Rule 65(G)(III) of the Rules, 27 May 2008 (“Request to Set Aside Stay”).

<sup>10</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Prosecution’s Response to Jovica Stanišić’s “Extremely Urgent Request to Set Aside the Stay of the Decision of 26<sup>th</sup> May 2008 on Provisional Release Pursuant to Rule 65(G)(III) of the Rules” With Confidential Annexes A and B, 27 May 2008 (“Response to Request to Set Aside Stay”).

<sup>11</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Confidential and Partly Ex Parte Prosecution Appeal of the Trial Chamber’s “Decision on Provisional Release” Together with Annexes, Confidential Annexes, and Confidential and Partly Ex Parte Annexes and Motion for Leave to Exceed Word Limit, 27 May 2008 (“Appeal”). The Prosecution filed a public version of the Appeal on 28 May 2008. See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Prosecution Submission of Public Version of the Prosecution’s “Appeal of Trial Chamber’s ‘Decision on Provisional Release’ Together with Annexes, Confidential Annexes, and Confidential and Ex Parte Annexes and Motion for Leave to Exceed Word Limit,” 28 May 2008.

<sup>12</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Defence Response to “Prosecution Appeal of Trial Chamber’s Decision on Provisional Release” and Defence Response to “Prosecution Motion Pursuant to Rule 115,” 29 May 2008 (“Stanišić Response”).

<sup>13</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Confidential Defence Response to Confidential and Partly Ex Parte “Prosecution Appeal of the Trial Chamber’s ‘Decision on Provisional Release’ Together with Annexes, Confidential Annexes, and Confidential and Ex Parte Annexes and Motion for Leave to Exceed Word Limit,” 29 May 2008 (“Simatović Response”).

<sup>14</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Confidential and Partly Ex Parte Prosecution’s Consolidated Reply to Defence Responses to Prosecution’s Appeal of Trial Chamber’s “Decision on Provisional Release” Together with Annexes, Confidential Annexes, and Confidential and Ex Parte Annexes and Motion for Leave to Exceed Word Limit, 30 May 2008 (“Prosecution Consolidated Reply”). The Prosecution filed a public version of its Consolidated Reply on 2 June 2008. See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Prosecution Submission of Public Version of the Prosecution’s “Consolidated Reply to Defence Responses to Prosecution’s Appeal of Trial Chamber’s “Decision on Provisional Release” Together with Annexes, Confidential Annexes, and Confidential and Ex Parte Annexes and Motion for Leave to Exceed Word Limit,” 2 June 2008.

<sup>15</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Defence Response to Prosecution Motion Pursuant to Rule 115 for Submission of Additional Evidence, 6 June 2008 (“Stanišić Response to Rule 115 Motion of 4 June”).

<sup>16</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Prosecution’s Reply to Simatović Defence’s Rule 115 Motion, 12 June 2008 (“Prosecution Response to Rule 115 Motion of 11 June”).

2008, the Appeals Chamber dismissed the Request to Set Aside Stay.<sup>17</sup> Stanišić filed additional Rule 115 Motions on 19 and 20 June 2008, respectively.<sup>18</sup>

## II. STANDARD OF REVIEW

3. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.<sup>19</sup> The Appeals Chamber has previously held that a decision on provisional release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.<sup>20</sup> Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision but whether the Trial Chamber has correctly exercised its discretion in reaching that decision.<sup>21</sup>

4. In order to successfully challenge a discretionary decision on provisional release, a party must demonstrate that the Trial Chamber has committed a "discernible error".<sup>22</sup> The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>23</sup> The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>24</sup>

<sup>17</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Decision on Extremely Urgent Request to Set Aside the Stay of the Decision of 26<sup>th</sup> May 2008 on Provisional Release Pursuant to Rule 65(G)(III) of the Rules, 18 June 2008.

<sup>18</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Defence Motion Pursuant to Rule 115 for Submission of Additional Evidence with Confidential Annex, 19 June 2008; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Partly Confidential Defence Motion Pursuant to Rule 115 for Submission of Additional Evidence with Two Confidential Annexes, 20 June 2008.

<sup>19</sup> See e.g., *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006 ("*Brahimaj* Decision"), para. 5; *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Decision"), para. 6; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Bošković's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5.

<sup>20</sup> See e.g., *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006 ("*Borovčanin* Decision"), para. 5; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.2, Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess, 14 December 2006 ("*Milutinović* Decision"), para. 3.

<sup>21</sup> See e.g., *Borovčanin* Decision, para. 5; *Milutinović* Decision, para. 3.

<sup>22</sup> See e.g., *Borovčanin* Decision, para. 6; *Milutinović* Decision, para. 3.

<sup>23</sup> See e.g., *Borovčanin* Decision, para. 6; *Milutinović* Decision, para. 3.

<sup>24</sup> See e.g., *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, para. 5; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10; *Stanišić* Decision, para. 6, fn. 10; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005 ("*Tolimir* Decision"), para. 4; *Brahimaj* Decision,

### III. MOTIONS UNDER RULE 115 OF THE RULES

#### A. Applicable Law

5. Pursuant to Rule 115 of the Rules, a party may submit a request to present additional evidence before the Appeals Chamber. The Appeals Chamber has held that Rule 115 applies not only to appeals from judgment but also to interlocutory appeals, including the interlocutory appeal of a provisional release decision.<sup>25</sup>

6. For additional evidence to be admissible under Rule 115, the moving party must establish that the evidence: (1) was unavailable during proceedings before the Trial Chamber and could not have been discovered by the exercise of due diligence; (2) is relevant to a material issue; (3) is credible; and (4) could have been a decisive factor in reaching the decision at trial.<sup>26</sup> The moving party must also identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed<sup>27</sup> and specify with sufficient clarity the impact the evidence could have had upon the Trial Chamber's decision.<sup>28</sup> A party that fails to do so runs the risk that the evidence will be rejected without detailed consideration.<sup>29</sup>

7. Evidence is relevant if it relates to findings material to the Trial Chamber's decision, in the sense that those findings were crucial or instrumental to the decision.<sup>30</sup> Evidence is credible if it appears to be reasonably capable of belief or reliance.<sup>31</sup> A finding that evidence is credible does not demonstrate anything about the weight to be accorded such evidence.<sup>32</sup> Evidence could have been a

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para. 5; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, para. 6.

<sup>25</sup> See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case Nos. IT-03-69-AR65.1 and IT-03-69-AR65.2, Decision on Prosecution's Application under Rule 115 to Present Additional Evidence in Its Appeal Against Provisional Release, 11 November 2004 ("Stanišić Decision of 11 November 2004"), paras 4-7. See also *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-AR65.1, Decision on Interlocutory Appeal From Trial Chamber Decision Denying Vinko Pandurević's Application for Provisional Release, 3 October 2005 ("Pandurević Decision of 3 October 2005"), para. 15; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115, 3 March 2006 ("Haradinaj Decision of 3 March 2006"), para. 9; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.1, Confidential Decision on Prosecution's Application to Present Additional Evidence in Its Appeal Against the Re-Assessment Decision, 10 March 2006 ("Haradinaj Decision of 10 March 2006"), para. 11.

<sup>26</sup> Rule 115(B). See also *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003 ("Blaškić Decision of 31 October 2003"), p. 3; Stanišić Decision of 11 November 2004, para. 8; Haradinaj Decision of 3 March 2006, paras 10-11; Haradinaj Decision of 10 March 2006, paras 12 and 14.

<sup>27</sup> Rule 115(A). See also Haradinaj Decision of 10 March 2006, para. 13.

<sup>28</sup> See *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001 ("Kupreškić Appeal Judgement"), para. 69. See also *Prosecutor v. Željko Mejković et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defense Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, 16 November 2005, para. 10.

<sup>29</sup> Kupreškić Appeal Judgment, para. 69.

<sup>30</sup> See Haradinaj Decision of 3 March 2006, para. 26. See also Haradinaj Decision of 10 March 2006, paras 15 and 95.

<sup>31</sup> Haradinaj Decision of 10 March 2006, para. 16.

<sup>32</sup> Haradinaj Decision of 10 March 2006, para. 16.

decisive factor in the trial decision if it could have impacted the verdict, that is, if it could demonstrate that the decision was unsafe.<sup>33</sup> A decision will be considered unsafe if the Appeals Chamber ascertains that there is a realistic possibility that the Trial Chamber's verdict might have been different if the new evidence had been admitted.<sup>34</sup> In making this determination, the Appeals Chamber considers the new evidence in the context of the evidence heard at trial and any other evidence already admitted.<sup>35</sup>

8. If the moving party cannot establish that the evidence was unavailable at trial, the Appeals Chamber may still admit the evidence if the moving party shows that if it had been available at trial, it would have affected the decision, such that its exclusion would lead to a miscarriage of justice.<sup>36</sup>

## B. Discussion

### 1. Rule 115 Motion of 28 May

#### (a) Summary of Evidence

9. In the Rule 115 Motion of 28 May, the Prosecution seeks the admission of two documents in support of its Appeal and its Response to Request to Set Aside Stay, including a press release from the Serbian government dated 27 May 2008 and a newspaper article from the Serbian publication "Blic" dated 28 May 2008 (collectively, "Articles"). The press release states that the Serbian Ministry of Internal Affairs ("MUP") arrested members of an organized criminal group consisting of lawyers, MUP police officials, and doctors for taking bribes to protect criminals from prosecution.<sup>37</sup> Specifically, the press release reports, *inter alia*, that lawyers bribed police officials and doctors to supply false records and medical documentation to facilitate the release of suspects or prevent criminal reports from being filed against them.<sup>38</sup> The newspaper article describes the press release, specifying that the doctors arrested were from the Military Medical Academy in Belgrade ("Military Hospital").<sup>39</sup>

<sup>33</sup> *Haradinaj* Decision of 10 March 2006, para. 17.

<sup>34</sup> *Haradinaj* Decision of 10 March 2006, para. 17.

<sup>35</sup> See *Blaškić* Decision of 31 October 2003, p. 3. See also *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Naletilić's Consolidated Motion to Present Additional Evidence, 20 October 2004, para. 11; *Haradinaj* Decision of 10 March 2006, para. 17.

<sup>36</sup> See *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003, p. 4. See also *Blaškić* Decision of 31 October 2003, p. 3; *Stanišić* Decision of 11 November 2004, para. 8; *Haradinaj* Decision of 3 March 2006, para. 11.

<sup>37</sup> Rule 115 Motion of 28 May, para. 5 and Annex B.

<sup>38</sup> Rule 115 Motion of 28 May, para. 5 and Annex B.

<sup>39</sup> Rule 115 Motion of 28 May, paras 3-4 and Annex A. The Appeals Chamber notes that the newspaper article refers to the "Military Medical Academy," the Rule 115 Motion of 28 May refers to both the "Military Medical Hospital" and

(b) Party Submissions

10. The Prosecution notes that the Impugned Decision ordered Stanišić to be provisionally released to the Military Hospital and ordered the medical doctors of that Hospital to provide regular reports on Stanišić's state of health, upon which the Trial Chamber would base its determination of Stanišić's ability to attend trial.<sup>40</sup> The Prosecution asserts that the monitoring regime established by the Trial Chamber as part of the conditions for provisional release was based upon the integrity of the Military Hospital as well as the high standard of care Stanišić would receive there, and that the Articles call into question the reliability of assessments made by the Military Hospital staff.<sup>41</sup> The Prosecution submits that the Trial Chamber accordingly must conduct a further inquiry into this matter to ensure that Stanišić's treatment at the Military Hospital "is not an effort to circumvent international justice."<sup>42</sup> The Prosecution also submits that the information contained in the Articles pertains to Section II(G) of the Appeal and that it was not before the Trial Chamber when it rendered the Impugned Decision.<sup>43</sup>

11. In Response, Stanišić submits that the Rule 115 Motion of 28 May should be dismissed on the grounds that the information therein is not relevant or credible and consequently would not have impacted the Trial Chamber's verdict in the Impugned Decision.<sup>44</sup> Stanišić implies that the newspaper article lacks credibility because it suggests that the Ministry of Internal Affairs ("MUP") was aware of the situation at the Military Hospital for some time, and consequently, if the Military Hospital or anyone relevant to his case had been involved in the incidents, the Serbian government would not have issued guarantees to the International Tribunal.<sup>45</sup> Stanišić asserts that the newspaper article is irrelevant because it does not contain evidence that any of the lawyers or doctors linked to his case are part of the investigation.<sup>46</sup>

12. The Prosecution replies that contrary to Stanišić's contention that the incidents described in the Articles do not concern his doctors, according to the latest information, the investigation is still in progress, ten people have been arrested to date, and an unknown number of people have been

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the "Military Medical Academy," and the Impugned Decision refers to the "Military Medical Hospital." See Rule 115 Motion of 28 May, paras 1-2 and Annex A. See also Impugned Decision, para. 12. The Appeals Chamber understands that these different names refer to the same institution.

<sup>40</sup> Rule 115 Motion of 28 May, paras 1-2.

<sup>41</sup> Rule 115 Motion of 28 May, paras 2 and 6.

<sup>42</sup> Rule 115 Motion of 28 May, para. 6.

<sup>43</sup> Rule 115 Motion of 28 May, paras 6-7. In Section II(G) of the Appeal, the Prosecution asserts: "The Trial Chamber erred in granting Mr. Stanišić provisional release for health reasons when the available evidence indicates (i) that Mr. Stanišić's health is stable and improving slowly; and (ii) that Mr. Stanišić will receive better medical treatment if he remains in custody in the Netherlands." See Appeal, p. 18.

<sup>44</sup> Stanišić Response, paras 50 and 56.

<sup>45</sup> Stanišić Response, para. 51.

<sup>46</sup> Stanišić Response, paras 52-54.

questioned and detained.<sup>47</sup> The Prosecution opines that under such circumstances, it is not possible to guarantee that doctors who have treated or will treat Stanišić were not involved.<sup>48</sup> In light of the foregoing, the Prosecution submits that the Trial Chamber should investigate the quality of care that Stanišić will receive at the Military Hospital before he is released.<sup>49</sup>

(c) Discussion

13. The Appeals Chamber notes that the Impugned Decision was issued on 26 May 2008, whereas the press release from the Serbian government and the newspaper article were issued on 27 May and 28 May 2008, respectively.<sup>50</sup> The Appeals Chamber accordingly finds that the information contained in the Articles was unavailable to the Trial Chamber when it rendered the Impugned Decision. Furthermore, since the arrests described in the Articles occurred on 27 May 2008, a day after the Impugned Decision was rendered, the Appeals Chamber considers that the Prosecution could not have obtained the information at an earlier date by exercising due diligence.

14. With regard to whether the Articles are relevant to a material issue, the Appeals Chamber accepts the Prosecution's argument that in the Impugned Decision, the Trial Chamber based its decision to provisionally release Stanišić to Belgrade for treatment at the Military Hospital on an implicit assumption regarding the reliability and integrity of the doctors working at the Military Hospital. In this regard, the Appeals Chamber notes that the conditions of release imposed by the Trial Chamber included an order to the Military Hospital doctors who would be treating Stanišić to, *inter alia*, provide the Trial Chamber with regular updates on Stanišić's health condition and, if he is admitted to the Hospital, to inform the Trial Chamber as soon as he is considered well enough to leave.<sup>51</sup> In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber's assumption regarding the reliability and integrity of the Military Hospital staff constitutes a finding material to the Impugned Decision. The Appeals Chamber notes, however, that the Articles do not demonstrate that any of Stanišić's doctors or lawyers are implicated in the investigation. Given the absence of evidence directly pertaining to Stanišić, his doctors or lawyers, the Appeals Chamber finds that the Articles are not relevant to that material finding, and consequently, are inadmissible under Rule 115.

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<sup>47</sup> Prosecution Consolidated Reply, para. 45. The Appeals Chamber notes that the Prosecution did not file a separate reply to the *Stanišić* Response but that the Prosecution addressed this argument in its Consolidated Reply to the Appeal.

<sup>48</sup> Prosecution Consolidated Reply, para. 45.

<sup>49</sup> Prosecution Consolidated Reply, p. 17.

<sup>50</sup> See Rule 115 Motion of 28 May, Annex A and Annex B.

<sup>51</sup> Impugned Decision, para. 68(2).



## 2. Rule 115 Motion of 4 June

### (a) Summary of Evidence

15. In the Rule 115 Motion of 4 June, the Prosecution seeks admission of a confidential medical report on Stanišić's health condition dated 2 June 2008 ("Medical Report of 2 June"), which was provided by Dr. Paulus Falke, the United Nations Detention Unit ("UNDU") Medical Officer.<sup>52</sup>

### (b) Party Submissions

16. The Prosecution notes that Stanišić's state of health is an issue that is central to the Appeal.<sup>53</sup> The Prosecution submits that the Medical Report of 2 June, like the Articles submitted in the Rule 115 Motion of 28 May, relates specifically to Section II(G) of the Appeal.<sup>54</sup> The Prosecution asserts that the information in the Medical Report of 2 June does not indicate that Stanišić's life is in danger, that Dr. Falke recommends in the Report that Stanišić be treated by a "multi-disciplinary team of doctors in a medical environment," and that such treatment is available at many hospitals in The Netherlands, including the Pieter Baan Centrum in Utrecht.<sup>55</sup> The Prosecution concludes that the Appeals Chamber should have the opportunity to consider such information when it deliberates on the Appeal.<sup>56</sup>

17. In Response, Stanišić submits that he does not oppose the admission of the Medical Report of 2 June.<sup>57</sup> However, Stanišić disputes the Prosecution's interpretation of the medical information contained therein.<sup>58</sup> Stanišić asserts that the Medical Report of 2 June indicates that his health condition is very serious, opining that if it were not, the UNDU medical team would not have stressed "*the need for Mr. Stanisic [sic] to receive treatment from a multi-disciplinary team of doctors in a medical environment.*"<sup>59</sup> Stanišić contends that, contrary to the Prosecution's submission, this need cannot be met at many hospitals throughout The Netherlands, including at the Pieter Baan Centrum.<sup>60</sup>

<sup>52</sup> Rule 115 Motion of 4 June, para. 2 and *Confidential Annex A*.

<sup>53</sup> Rule 115 Motion of 4 June, para. 1.

<sup>54</sup> Rule 115 Motion of 4 June, para. 4.

<sup>55</sup> Rule 115 Motion of 4 June, para. 2.

<sup>56</sup> Rule 115 Motion of 4 June, para. 3.

<sup>57</sup> *Stanišić Response to Rule 115 Motion of 4 June*, para. 3.

<sup>58</sup> *Stanišić Response to Rule 115 Motion of 4 June*, para. 3.

<sup>59</sup> *Stanišić Response to Rule 115 Motion of 4 June*, para. 4 (emphasis in the original).

<sup>60</sup> *Stanišić Response to Rule 115 Motion of 4 June*, paras 6-7.

(c) Discussion

18. The Appeals Chamber observes that the Medical Report of 2 June was issued seven days after the date that the Impugned Decision was rendered. The Appeals Chamber accordingly finds that this evidence was unavailable during the proceedings before the Trial Chamber and that the Prosecution could not have discovered it through the exercise of due diligence.

19. With regard to the relevance of the Medical Report of 2 June, the Appeals Chamber notes the Trial Chamber's finding that Stanišić's health condition "is a salient and relevant factor that strengthens the case in favour of granting provisional release."<sup>61</sup> The Appeals Chamber further observes that the Trial Chamber based its assessment of Stanišić's health condition on "the views and opinions expressed by Dr. Falke and Dr. Petrović in their respective reports," which indicated that "Stanišić is gravely ill."<sup>62</sup> In light of the foregoing, the Appeals Chamber finds that the Medical Report of 2 June submitted by Dr. Falke, which provides an update on Stanišić's health condition, relates to a finding that was material to the Impugned Decision and thus meets the relevance requirement. The Appeals Chamber also notes that the credibility of the Medical Report of 2 June is not disputed, and finds that, having been submitted by the UNDU Medical Officer, it is reasonably capable of belief or reliance.

20. Having found that the Medical Report of 2 June was unavailable at trial and is both relevant and credible, the question remains whether it could have impacted the Impugned Decision such that there is a realistic possibility that the Trial Chamber's decision might have been different had this new evidence been before it. The Appeals Chamber recalls that in making this determination, it must consider the Medical Report of 2 June in the context of the evidence heard by the Trial Chamber. Accordingly, the Appeals Chamber notes that, as indicated above, in determining that Stanišić's health condition militated in favour of provisional release, the Trial Chamber considered the medical reports of Dr. Falke and Dr. Petrović submitted on 20 May 2008.<sup>63</sup> In particular, the Trial Chamber took into account Dr. Petrović's observations that "I recon [*sic*] one could be mentioned with certainty, we are going to loose [*sic*] him," and "I think we've done everything possible within our powers, but in this case, our specialties are simply not enough."<sup>64</sup> The Trial Chamber also considered Dr. Falke's observation that Dr. Petrović had "reached a plateau in her ability to treat Mr. Stanišić without the assistance of a multi-disciplinary team in a medical

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<sup>61</sup> Impugned Decision, paras 60 and 65.

<sup>62</sup> Impugned Decision, para. 60.

<sup>63</sup> Impugned Decision, para. 59.

<sup>64</sup> Impugned Decision, para. 59.

environment” as well his statement that he viewed Dr. Petrović’s opinion in this regard as important.<sup>65</sup>

21. The Appeals Chamber considers that the new information contained in the Medical Report of 2 June, when compared with the medical information before the Trial Chamber when it rendered the Impugned Decision, does not indicate any substantial change in Stanišić’s state of health.<sup>66</sup> The Appeals Chamber also observes that in the Medical Report of 2 June, Dr. Falke reiterates the view that Dr. Petrović expressed in her medical report submitted on 20 May 2008 – namely, that Stanišić’s health condition “supports the need for Mr. Stanišić to receive treatment from a multi-disciplinary team of doctors in a medical environment.”<sup>67</sup> Given the similarity between the information contained in the Medical Report of 2 June and the information contained in the medical reports previously considered by the Trial Chamber, the Appeals Chamber is not satisfied that the Medical Report of 2 June could have impacted the Impugned Decision. Accordingly, the Appeals Chamber finds that the evidence contained in the Rule 115 Motion of 4 June is inadmissible in support of the Prosecution’s Appeal.

### 3. Rule 115 Motion of 11 June

#### (a) Summary of Evidence

22. In the Rule 115 Motion of 11 June, Simatović requests, in support of his Response to the Appeal, admission as additional evidence the fact that Stojan Župljanin (“Župljanin”) was arrested on 11 June 2008 in Serbia.<sup>68</sup>

#### (b) Party Submissions

23. Simatović notes that in his Response, he asserts that Serbia’s cooperation with the International Tribunal demonstrates the reliability of guarantees from the Serbian government.<sup>69</sup> Simatović submits that Župljanin’s recent arrest constitutes additional persuasive evidence of such cooperation.<sup>70</sup> In Response, the Prosecution submits that it does not object to the Appeals

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<sup>65</sup> Impugned Decision, para. 59.

<sup>66</sup> See Impugned Decision, paras 59-60. See also Rule 115 Motion of 4 June, *Confidential Annex A*.

<sup>67</sup> See Impugned Decision, para. 59. See also Rule 115 Motion of 4 June, *Confidential Annex A*.

<sup>68</sup> Rule 115 Motion of 11 June, paras 4-5. The Appeals Chamber notes that Simatović erroneously states that Župljanin’s arrest occurred “today, 11 May 2008” rather than on 11 June 2008, which is the correct date of the arrest. See Rule 115 Motion of 11 June, para. 4.

<sup>69</sup> Rule 115 Motion of 11 June, para. 2.

<sup>70</sup> Rule 115 Motion of 11 June, para. 4.

Chamber's consideration of Župljanin's arrest but notes, *inter alia*, that three Serb fugitives are still at large, which remains a matter of serious concern.<sup>71</sup>

(c) Discussion

24. The Appeals Chamber observes that Župljanin was arrested on 11 June 2008, which is subsequent to the date that the Impugned Decision was issued. The Appeals Chamber accordingly finds that the additional evidence submitted in support of the Rule 115 Motion of 11 June was unavailable during the proceedings before the Trial Chamber and that Simatović could not have discovered it through the exercise of due diligence.

25. With regard to the relevance requirement, the Appeals Chamber observes that in deciding to grant Simatović provisional release, the Trial Chamber considered, *inter alia*, the reliability of the guarantees offered by the Serbian government.<sup>72</sup> The Trial Chamber dismissed as speculative the Prosecution's argument that, given the current political uncertainty in Serbia, there was no assurance that the incoming Serbian government would cooperate with the International Tribunal in delivering the Accused to the International Tribunal for trial.<sup>73</sup> The Trial Chamber found that it was satisfied that the Serbian government would fulfil its guarantees<sup>74</sup> and that, *inter alia*, "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," neither Accused would pose a danger to victims or witnesses if provisionally released.<sup>75</sup> The Appeals Chamber accordingly considers that the Trial Chamber's satisfaction with the guarantees offered by the Serbian government was material to its decision to provisionally release Simatović. The Appeals Chamber finds that the fact that the Serbian government arrested Župljanin could be construed as an indication that the Serbian government is willing to cooperate with the International Tribunal and thus relates to this material finding. However, the Appeals Chamber notes that Simatović seeks admission of the fact that Župljanin was arrested as additional persuasive evidence that Serbia is willing to cooperate with the International Tribunal without actually adducing any evidence that supports this assertion – that is, the Appeals Chamber is asked to interpret the fact of arrest as *prima facie* supporting an indication of willingness to cooperate on the part of the Serbian authorities. The Appeals Chamber considers that although the assertion of this fact alone does not establish the fact, if the Appeals Chamber were to accept Simatović's characterization, the fact

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<sup>71</sup> Prosecution Response to Rule 115 Motion of 11 June, para. 2.

<sup>72</sup> Impugned Decision, paras 44-45.

<sup>73</sup> Impugned Decision, paras 19 and 45.

<sup>74</sup> Impugned Decision, para. 45.

<sup>75</sup> Impugned Decision, paras 54 and 57.

would meet the relevance requirement and would be capable of belief or reliance. In this respect, the Appeals Chamber notes that the Prosecution does not dispute its credibility or the characterisation of its relevance as presented by the Defence.

26. Turning to whether evidence of Župljanin's arrest could have impacted the Impugned Decision, the Appeals Chamber recalls that, as indicated above, the Trial Chamber was satisfied with the guarantees provided by Serbia and relied in part on those guarantees when it decided to provisionally release Simatović. Given that the Trial Chamber already ruled in favour of Simatović on this point, the Appeals Chamber finds that this additional evidence could not have impacted the Impugned Decision, and as such, is inadmissible as additional evidence under Rule 115 of the Rules.

#### 4. Rule 115 Motion of 19 June

##### (a) Summary of Evidence

27. In the Rule 115 Motion of 19 June, Stanišić requests the admission of an additional confidential medical report dated 16 June 2008 ("Medical Report of 16 June"), in which Dr. Falke provides an update on Stanišić's state of health.<sup>76</sup>

##### (b) Party Submissions

28. Stanišić notes that his health is central to issues raised in the Appeal and submits that the Medical Report of 16 June relates specifically to paragraphs 58 through 61 and paragraph 65 of the Impugned Decision, in which the Trial Chamber found that Stanišić's state of health militated in favour of provisional release.<sup>77</sup> Stanišić opines that the Appeals Chamber should have the opportunity to consider all medical reports and up to date information while deliberating on the Appeal.<sup>78</sup>

##### (c) Discussion

29. The Appeals Chamber observes that the Medical Report of 16 June concerns Stanišić's state of health 21 days after the rendering of the Impugned Decision. Accordingly, the Appeals Chamber finds that the evidence contained therein was not available during the proceedings before the Trial Chamber and that Stanišić could not have discovered it through the exercise of due diligence. The

<sup>76</sup> Rule 115 Motion of 19 June, pp. 2-3.

<sup>77</sup> Rule 115 Motion of 19 June, paras 1 and 3.

<sup>78</sup> Rule 115 Motion of 19 June, para. 3.

Appeals Chamber further finds that the Medical Report of 16 June is both relevant and credible for the same reasons as described above in relation to the Medical Report of 2 June.<sup>79</sup>

30. With regard to whether the Medical Report of 16 June could have impacted the Impugned Decision, the Appeals Chamber recalls that in the Impugned Decision, the Trial Chamber found that medical reports submitted by Dr. Falke and Dr. Petrović indicated that Stanišić is gravely ill, which strengthened his case for provisional release.<sup>80</sup> The Appeals Chamber notes that Stanišić seeks admission of the Medical Report of 16 June as additional evidence regarding his medical condition. However, given that the Trial Chamber already ruled in favour of Stanišić in this regard when it granted his request for provisional release, and considering that the Medical Report of 16 June, when compared with the evidence before the Trial Chamber, does not indicate any substantial change in Stanišić's state of health, the Appeals Chamber finds that the evidence contained therein could not have impacted the Impugned Decision and is thus inadmissible.

#### 5. Rule 115 Motion of 20 June

##### (a) Summary of Evidence

31. In the Rule 115 Motion of 20 June, Stanišić requests the admission of an additional guarantee from the government of Montenegro, including a letter from the Administration of the Police, [REDACTED].<sup>81</sup>

##### (b) Party Submissions

32. Stanišić submits that, even though the Trial Chamber did not decide specifically on Stanišić's provisional release to Montenegro in the Impugned Decision, this further guarantee by the government and Police Administration of Montenegro should be provided to the Appeals Chamber to assist it in allowing Stanišić's provisional release on medical grounds.<sup>82</sup> Stanišić further submits that this new evidence relates specifically to the Trial Chamber's finding of fact in paragraph 64 of the Impugned Decision, in which the Trial Chamber found that Stanišić's request for additional treatment at the Igalo Institute in Montenegro should be examined if and when such treatment appears necessary.<sup>83</sup>

<sup>79</sup> See *supra*, para. 22.

<sup>80</sup> Impugned Decision, para. 60.

<sup>81</sup> Rule 115 Motion of 20 June, paras 2 and 4.

<sup>82</sup> Rule 115 Motion of 20 June, para. 3.

<sup>83</sup> Rule 115 Motion of 20 June, para. 3.

(c) Discussion

33. The Appeals Chamber does not consider it necessary to determine whether the additional guarantees from the government and Police Administration of Montenegro were unavailable at trial or whether they are relevant and credible because it finds that they could not have impacted the Impugned Decision. As noted by Stanišić, the Trial Chamber declined to examine Stanišić's request for additional treatment in Montenegro until such time that additional treatment in Montenegro appears necessary.<sup>84</sup> Accordingly, the Appeals Chamber finds that the evidence contained in the Rule 115 Motion of 20 June is inadmissible.

#### IV. APPEAL AGAINST PROVISIONAL RELEASE

##### A. Applicable Law

34. 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 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.<sup>85</sup>

35. 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.<sup>86</sup> What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.<sup>87</sup> 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.<sup>88</sup> The Trial Chamber is required to assess these circumstances not only as they exist at the time when it reaches 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.<sup>89</sup>

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<sup>84</sup> Impugned Decision, para. 64.

<sup>85</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.8, Decision on "Prosecution's Appeal from *Décision relative à la Demande de mise en liberté provisoire de l'Accusé Petković* Dated 31 March 2008", 21 April 2008 ("*Petković* Decision"), para. 7.

<sup>86</sup> *Ibid.*, para. 10.

<sup>87</sup> *Stanišić* Decision, paras 6-8.

<sup>88</sup> *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 4 October 2005, para. 7.

## **B. Discussion**

36. The Prosecution alleges that in granting the Accused provisional release, the Trial Chamber discernibly erred on three grounds, including: (i) when it held this case to be in the pre-trial rather than trial stage;<sup>90</sup> (ii) when it concluded, based on guarantees from the Serbian government, that the Accused would appear for trial if released<sup>91</sup> and, or in the alternative, when it did not hold a hearing to assess the reliability of those guarantees;<sup>92</sup> and (iii) when it concluded that neither Accused would pose a danger to victims, witnesses or other persons.<sup>93</sup> With regard to Stanišić specifically, the Prosecution alleges that the Trial Chamber erred on two additional main grounds, including: (i) when it held that Stanišić's provisional release was appropriate on medical grounds;<sup>94</sup> and (ii) when it failed to provide the best possible conditions for assessing Stanišić's health.<sup>95</sup> The Prosecution accordingly requests the Appeals Chamber to reverse the Impugned Decision and to devise the most efficacious way of treating Stanišić within The Netherlands.<sup>96</sup> In the alternative, the Prosecution requests the Appeals Chamber to remand the matter to the Trial Chamber for a hearing into the reliability of the Serbian government guarantees and of the reports from Stanišić's treating psychiatrist, Dr. Petrović.<sup>97</sup>

37. In Response, both Stanišić and Simatović submit that the Prosecution has failed to demonstrate that the Trial Chamber erred in the Impugned Decision and request the Appeals Chamber to dismiss the Appeal in its entirety.<sup>98</sup> Simatović further asserts that in accordance with the Rules and their complementary directives, the Appeal should have been filed no later than 16:00 hours on 27 May 2008.<sup>99</sup> He submits that the Appeal is untimely given that it was received on 27 May 2008 at 23:36 hours and distributed on 28 May 2008 at 11:46 a.m.<sup>100</sup>

38. In Reply, the Prosecution submits that the Stanišić and Simatović Responses fail to address several of the Prosecution's grounds of appeal and asserts that the unchallenged grounds may thus

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<sup>89</sup> *Stanišić* Decision, para. 8.

<sup>90</sup> Appeal, paras 6 and 13-20.

<sup>91</sup> Appeal, paras 6 and 31-44.

<sup>92</sup> Appeal, paras 6 and 45-47.

<sup>93</sup> Appeal, paras 6 and 24-30.

<sup>94</sup> Appeal, paras 6 and 47-93.

<sup>95</sup> Appeal, paras 6 and 90-96..

<sup>96</sup> Appeal, para. 99.

<sup>97</sup> Appeal, paras 66-69 and 99.

<sup>98</sup> *Stanišić* Response, paras 4 and 57; *Simatović* Response, paras 5 and 18.

<sup>99</sup> *Simatović* Response, para. 4.

<sup>100</sup> *Simatović* Response, para. 4.



be considered beyond dispute.<sup>101</sup> The Prosecution further submits that the counter-arguments raised by Stanišić and Simatović are not persuasive.<sup>102</sup>

### 1. Requests to Exceed Word Limit

39. The Appeal, at 10,349 words, is longer than the 9,000 words allowed for appellant briefs in interlocutory appeals.<sup>103</sup> Additionally, the Prosecution Consolidated Reply, at 6,233 words, is longer than the 3000 words allowed for appellant reply briefs in interlocutory appeals.<sup>104</sup> The Prosecution requests to exceed the word limit in both submissions in order to fully inform the Appeals Chamber of the Prosecution's position in relation to complex issues that it considers are of fundamental importance to the continuation of the case.<sup>105</sup> The Appeals Chamber considers that the circumstances of this case justify a detailed explanation of Stanišić's state of health. On this basis, and given that requested extension is rather minor in the overall context of the Appeal, the Appeals Chamber grants both Prosecution requests.

### 2. Timeliness of the Appeal

40. The Appeals Chamber notes that pursuant to Rule 65(F) of the Rules, when a Trial Chamber grants a stay of its decision to provisionally release an accused, the Prosecutor must file any appeal no later than one day from the rendering of that decision. The Appeals Chamber further notes that, pursuant to Article 25 of the Registry Directive,<sup>106</sup> although the business hours of the International Tribunal's Court Records Office are from 9:00 a.m. to 4:00 p.m., Monday through Friday, access to the electronic filing system for purposes of submitting documents electronically is available 24 hours per day, seven days per week, and parties that are unable to file a submission by the close of business may submit a document by 12:00 midnight to comply with the filing deadline on that day.<sup>107</sup> The Appeals Chamber notes that since the Appeal was filed at 11:36 p.m. on 27 May 2008, pursuant to Article 25(3) of the Registry Directive, it is considered to have been validly filed on 27 May 2008 even though it was filed after business hours. The Appeals Chamber further notes that the Appeal was filed one day after the rendering of the Impugned Decision, in accordance with Rule 65(F) of the Rules. Accordingly, the Appeals Chamber finds that the Appeal was timely filed.

<sup>101</sup> Prosecution Consolidated Reply, para. 7.

<sup>102</sup> Prosecution Consolidated Reply, para. 13.

<sup>103</sup> See Practice Direction on the Length of Briefs and Motions, IT/184/Rev. 2, 16 September 2005 ("Practice Direction on Length of Briefs and Motions"), Section I(C)(2)(1) (providing that the brief of an appellant in an interlocutory appeal may not exceed 9,000 words).

<sup>104</sup> Practice Direction on Length of Briefs and Motions, Section I(C)(2)(3) (providing that the reply brief of an appellant in an interlocutory appeal may not exceed 3,000 words).

<sup>105</sup> Appeal, paras 97-99; Prosecution Consolidated Reply, paras 51-53.

<sup>106</sup> Directive for the Court Management and Support Services Section, Judicial Services Section, Registry, IT/121/REV/1, 15 May 2007 ("Registry Directive").

<sup>107</sup> Registry Directive, Article 25(1) and (3).

### 3. Current Stage of Proceedings

41. Under its first ground of appeal, the Prosecution submits that the Trial Chamber committed a discernible error when it held that this case returned to the pre-trial stage of the proceedings.<sup>108</sup> The Prosecution asserts that, to the contrary, the Appeals Chamber only adjourned the proceedings and that there is no legal basis for voiding the portion of the proceedings that have taken place thus far.<sup>109</sup> The Prosecution also requests the Appeals Chamber to clarify the current procedural posture of this case.<sup>110</sup>

42. Stanišić submits that the Appeals Chamber based its decision to adjourn the proceedings upon a violation of the Accused's fundamental right to be present at trial, which necessarily nullified the trial proceedings that had taken place and returned the case to the pre-trial stage.<sup>111</sup> Simatović submits that the Trial Chamber's determination that this case is now in the pre-trial stage is in accordance with the Adjournment Decision, and that in any event, the Prosecution's arguments under this ground of the Appeal are irrelevant when considering the Trial Chamber's competencies under Rule 65 of the Rules during the pre-trial and trial stages of the proceedings.<sup>112</sup>

43. The Appeals Chamber notes that in the Adjournment Decision, the Appeals Chamber adjourned the trial proceedings in this case for a minimum of three months with the aim of recommencing the proceedings as soon as Stanišić's state of health permitted his effective participation.<sup>113</sup> The Appeals Chamber also ordered the Trial Chamber to assess Stanišić's state of health before determining when to commence the trial.<sup>114</sup> The Appeals Chamber considers that it was within the Trial Chamber's discretion to decide that, in light of the Appeals Chamber's ruling, the case is "properly described as being in the pre-trial stage of the proceedings."<sup>115</sup> However, the Appeals Chamber is concerned, given the implications of reverting the proceedings to the pre-trial stage, that the Trial Chamber's decision in this regard lacked explicit reasoning and did not address the arguments of the parties.<sup>116</sup> Nevertheless, the Appeals Chamber considers that this issue is not germane to the outcome of the present decision. The Appeals Chamber accordingly instructs the parties to address any request for clarification of this issue to the Trial Chamber in the first instance.

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<sup>108</sup> Appeal, paras 6 and 13-20.

<sup>109</sup> Appeal, paras 16 and 20.

<sup>110</sup> Appeal paras 20 and 99.

<sup>111</sup> Stanišić Response, paras 6-10.

<sup>112</sup> Simatović Response, para. 6.

<sup>113</sup> Adjournment Decision, paras 19-20 and 22.

<sup>114</sup> Adjournment Decision, para. 22.

<sup>115</sup> Impugned Decision, para. 63.

<sup>116</sup> Impugned Decision, paras 42 and 62-63.

#### 4. Serbian Government Guarantees

44. The Prosecution submits that the Trial Chamber erred when it concluded, based on guarantees from the Serbian government (“Government Guarantees”), that the Accused will appear for trial if released.<sup>117</sup> The Prosecution argues that the Trial Chamber gave insufficient weight to factors that call into question the reliability of those Guarantees and consequently heighten the risk that the Accused will fail to appear if released.<sup>118</sup> In particular, the Prosecution submits that the Trial Chamber failed to accord sufficient weight to evidence that the future government of Serbia will likely be comprised of a coalition including parties that have pledged to obstruct the work of the International Tribunal.<sup>119</sup> The Prosecution also contends that the Trial Chamber gave insufficient weight to evidence from proceedings before the International Tribunal that call into question the reliability of the Government Guarantees.<sup>120</sup> The Prosecution submits that in addition, or in the alternative, the Trial Chamber erred in accepting boilerplate, written Guarantees without holding a hearing to consider the reliability of those Guarantees in light of the current political situation.<sup>121</sup>

45. Stanišić submits that the Trial Chamber correctly labelled the Prosecution’s arguments regarding the reliability of the Government Guarantees as speculative.<sup>122</sup> Stanišić asserts that the Prosecution’s submissions in this regard are based on political events that may never occur.<sup>123</sup> Stanišić further asserts that after he was provisionally released in 2004, both he and the Serbian government fully complied with their obligations over a four-year period.<sup>124</sup> As further evidence that the Serbian government is willing and able to cooperate with the International Tribunal, Stanišić notes that on 28 May 2008, the Serbian government arrested and transferred to the International Tribunal a witness who had been held in contempt in a case before the International Tribunal.<sup>125</sup> Stanišić also argues that, contrary to the Prosecution’s assertion, the Trial Chamber did not err when it denied the Prosecution’s request for a hearing on the reliability of the Government Guarantees.<sup>126</sup> Stanišić opines that “the Trial Chamber rightly held that it is the consistent practice

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<sup>117</sup> Appeal, paras 31-44.

<sup>118</sup> Appeal, para. 32.

<sup>119</sup> Appeal, paras 33-39.

<sup>120</sup> Appeal, paras 40 – 41 and Confidential and *Ex Parte* Annexes G-I.

<sup>121</sup> Appeal, paras 45-47.

<sup>122</sup> *Stanišić* Response, para. 12.

<sup>123</sup> *Stanišić* Response, para. 13.

<sup>124</sup> *Stanišić* Response, paras 14 and 16.

<sup>125</sup> *Stanišić* Response, para. 13.

<sup>125</sup> *Stanišić* Response, para. 18.

<sup>126</sup> *Stanišić* Response, para. 17.

of the ICTY that the requirement of a hearing has been satisfied when guarantees have been provided to the Trial Chamber.”<sup>127</sup>

46. Simatović also asserts that the Prosecution’s arguments under this ground of the Appeal are speculative.<sup>128</sup> In support of this contention, Simatović submits that the Prosecution’s conclusions regarding the reliability of the Serbian government guarantees are based on statements made during election campaigns and statements made by political party leaders who do not hold government office.<sup>129</sup> Simatović further asserts that the Serbian government’s arrest and transfer of a witness to the International Tribunal to face contempt proceedings attests to the reliability of the Government Guarantees.<sup>130</sup>

47. In Reply, the Prosecution reiterates the arguments made in its Appeal regarding the unreliability of the Government Guarantees in light of the current political climate and disputes the characterization of those arguments as speculative by the Trial Chamber and the Accused.<sup>131</sup> The Prosecution further asserts that, contrary to Stanišić’s assertions, both the Serbian government and Stanišić have violated their terms of provisional release, as explained in the Confidential and *Ex Parte* Annex E of the Prosecution Consolidated Reply.<sup>132</sup> With regard to Stanišić’s argument that the willingness of the Serbian government to cooperate is demonstrated by the fact that a witness appeared in court to face contempt proceedings, the Prosecution notes that the Guarantees have thus far been provided and enforced by the outgoing regime.<sup>133</sup> The Prosecution contends, however, that “the proper test must focus on the foreseeable situation at the time the accused would be required to return for trial, when the new coalition will be in place.”<sup>134</sup> The Prosecution further implies that it does not dispute, as indicated in the *Stanišić* Response, that the receipt of a written guarantee may satisfy the right of a State to be heard under Rule 65 of the Rules.<sup>135</sup> The Prosecution clarifies that in the Appeal, the Prosecution’s argument in this regard relates to whether the Serbian government will respect the Guarantees it provided when it was heard rather than whether the right of the Serbian government to be heard has been respected.<sup>136</sup>

<sup>127</sup> *Stanišić* Response, para. 17 (referring to Impugned Decision, para. 44 and fn. 79).

<sup>128</sup> *Simatović* Response, para. 12.

<sup>129</sup> *Simatović* Response, paras 11-14.

<sup>130</sup> *Simatović* Response, para. 16.

<sup>131</sup> Prosecution Consolidated Reply, paras 14-18

<sup>132</sup> Prosecution Consolidated Reply, para. 20.

<sup>133</sup> Prosecution Consolidated Reply, para. 26.

<sup>134</sup> Prosecution Consolidated Reply, para. 26.

<sup>135</sup> Prosecution Consolidated Reply, para. 25.

<sup>136</sup> Prosecution Consolidated Reply, para. 25.

48. The Appeals Chamber recalls that Rule 65 of the Rules places no obligation upon an accused applying for provisional release to provide guarantees from a State.<sup>137</sup> Nevertheless, such guarantees, if deemed credible, may carry considerable weight in support of a provisional release application.<sup>138</sup> Rule 65(C) permits a Trial Chamber to impose conditions upon the release of an accused so as to ensure his or her presence for trial as well as the protection of others.<sup>139</sup> Frequently, the production of a guarantee from the relevant governmental body is imposed as such a condition.<sup>140</sup> In the instant case, the Accused provide Guarantees from the Serbian government pursuant to which, *inter alia*, the Ministry of the Interior undertakes to immediately place the Accused under arrest for any attempt to violate or violation of the conditions of provisional release.<sup>141</sup> As noted by the Prosecution, the Trial Chamber relied in part on these guarantees in its decision to grant provisional release to the Accused.<sup>142</sup>

49. The Appeals Chamber has held that the reliability of a government guarantee must be determined in relation to the circumstances which arise in a particular case.<sup>143</sup> The Appeals Chamber notes that in accordance with this precedent, the Trial Chamber duly considered the Prosecution's arguments that the guarantees from the Serbian government should not be accepted in light of the current political instability in Serbia.<sup>144</sup> Nevertheless, the Trial Chamber dismissed these arguments as speculative given the uncertainty regarding whether the predicted events will in fact occur.<sup>145</sup> The Appeals Chamber finds no error on the part of the Trial Chamber in this respect.

50. Furthermore, the Appeals Chamber is not persuaded that the Trial Chamber erred in the weight it accorded to evidence from proceedings before the International Tribunal that, according to the Prosecution, calls into question the reliability of the Government Guarantees. The Appeals Chamber notes that the Trial Chamber considered the information contained in the Confidential and Ex Parte Annexes C and D to the Prosecution Consolidated Reply and held that it attached greater weight to the Government Guarantees, which are specifically tailored to the circumstances of this

<sup>137</sup> See, e.g., *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.2, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 30 June 2006, para. 36 ("*Borovčanin* Decision"); *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002 ("*Jokić* Decision"); *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005 ("*Gvero* Decision"), para. 9.

<sup>138</sup> *Borovčanin* Decision, para. 36; *Jokić* Decision, paras 7 and 8; *Gvero* Decision, para. 9.

<sup>139</sup> *Borovčanin* Decision, para. 36; *Gvero* Decision, para. 9.

<sup>140</sup> *Borovčanin* Decision, para. 36; *Gvero* Decision, para. 9.

<sup>141</sup> Impugned Decision, para. 44.

<sup>142</sup> Impugned Decision, para. 45 (stating that "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").

<sup>143</sup> *Borovčanin* Decision, para. 36; *Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, para. 9; *Gvero* Decision, para. 10.

<sup>144</sup> Impugned Decision, para. 45.

<sup>145</sup> Impugned Decision, para. 44.

case, than to the information contained in the Annexes, which is not.<sup>146</sup> The Appeals Chamber finds that the Prosecution fails to demonstrate that the Trial Chamber made a discernible error in reaching this conclusion. Given that the Prosecution has failed to demonstrate that the Trial Chamber erred in relying on the Government Guarantees, the Appeals Chamber further finds that the Trial Chamber did not err when it accepted the Guarantees without holding a hearing to consider their reliability.

##### 5. Danger to Victims, Witnesses or Other Persons

51. The Prosecution asserts that the Trial Chamber erred when it found that the Accused had satisfied their burden of showing that they would not pose a danger to any victim, witness, or other person.<sup>147</sup> The Prosecution submits that the Trial Chamber erred in basing its conclusion on the fact that the Accused did not pose a danger to witnesses, including five witnesses whose names were disclosed to the Accused in September 2007, during their previous provisional release.<sup>148</sup> The Prosecution asserts that the Accused's knowledge of the identities of these witnesses increases the risk that they may influence witnesses.<sup>149</sup> The Prosecution further contends that the Trial Chamber failed to place appropriate weight on the ability of the Accused to intimidate witnesses despite a lack of concrete evidence that they have previously done so.<sup>150</sup> In this regard, the Prosecution submits that the Accused were high-ranking officials in the former Yugoslavia, who held power over a network of people, including some who remain highly influential in the region.<sup>151</sup>

52. Stanišić responds that the Prosecution has failed to demonstrate that he would pose a danger to any victim or witness if provisionally released.<sup>152</sup> Stanišić notes that there is no evidence that he posed a threat to any person during the four-year period of his provisional release and asserts that the Trial Chamber correctly took this factor into account in the Impugned Decision.<sup>153</sup> Stanišić further submits that the Prosecution's assertion that Stanišić has the ability to interfere with witnesses is unrealistic given his health condition and that the Prosecution's suggestion that Stanišić holds influence over a network of people is fallacious.<sup>154</sup>

53. Simatović submits that no difference exists between the vulnerability of the witnesses whose identities were disclosed to the Accused in September 2007 and the witnesses whose identities were

<sup>146</sup> Impugned Decision, para. 45.

<sup>147</sup> Appeal, para. 24.

<sup>148</sup> Appeal, para. 24.

<sup>149</sup> Appeal, para. 26.

<sup>150</sup> Appeal, paras 26-30.

<sup>151</sup> Appeal, para. 27.

<sup>152</sup> Stanišić Response, para. 42.

<sup>153</sup> Stanišić Response, paras 42-45.

disclosed to the Accused 30 days before the start of the trial.<sup>155</sup> Simatović asserts that the protective measures relating to the latter group of witnesses were granted in the case of Slobodan Milošević and were extended without consideration of the circumstances of this case.<sup>156</sup> Simatović further asserts that the Trial Chamber correctly concluded that, based on his relationship toward victims and witnesses as exemplified by his past behavior, he would not pose a danger to any victim or witness if provisionally released.<sup>157</sup>

54. In Reply, the Prosecution asserts that Simatović's claim that the delayed disclosure witnesses whose identities have now been disclosed were granted protection as an extension of the Milošević case without considering the circumstances of this case is erroneous for two reasons.<sup>158</sup> First, the Prosecution submits that Rule 75(F)(ii) states that "past protection shall not prevent the Prosecution from discharging any disclosure obligation under the rules in the second proceeding."<sup>159</sup> Second, the Prosecution asserts that nine of the witnesses to whom the Trial Chamber granted delayed disclosure on 26 October 2004 were not subject to past protection – rather, the Prosecution requested protection for these witnesses for the first time in this case in order to protect them from Stanišić and Simatović.<sup>160</sup> According to the Prosecution, the identities of six of those witnesses were disclosed to the Accused in February 2008.<sup>161</sup>

55. The Appeals Chamber notes that in finding that the Accused had met their burden of establishing that they would not pose a danger to any victims or witnesses if granted provisional release, the Trial Chamber explicitly noted the change in circumstances presented by the disclosure to the Accused during the course of the proceedings of the identities of the twenty-six protected witnesses.<sup>162</sup> The Trial Chamber also noted that the Prosecution considered these witnesses to be in danger as a consequence of this disclosure.<sup>163</sup> The Trial Chamber nevertheless concluded that the Accused posed no risk to these or any other witnesses or victims given the lack of evidence of any instances in which the Accused threatened or harmed any victim or witness during the over three year period of their previous provisional release.<sup>164</sup> In particular, the Trial Chamber emphasized that the identities of five protected witnesses had been disclosed to the Accused in September 2007, and the Trial Chamber received no evidence that either Accused attempted to threaten or harm these

<sup>154</sup> *Stanišić* Response, paras 43, 45, and 47.

<sup>155</sup> *Simatović* Response, para. 8.

<sup>156</sup> *Simatović* Response, para. 8.

<sup>157</sup> *Simatović* Response, para. 8.

<sup>158</sup> Prosecution Consolidated Reply, paras 48-50.

<sup>159</sup> Prosecution Consolidated Reply, para. 50.

<sup>160</sup> Prosecution Consolidated Reply, para. 50.

<sup>161</sup> Prosecution Consolidated Reply, para. 50.

<sup>162</sup> Impugned Decision, para. 53.

<sup>163</sup> Impugned Decision, para. 52.

witnesses after their identities were revealed.<sup>165</sup> In addition, the Trial Chamber accorded weight to guarantees from the Serbian government to arrest the Accused for breach of any provisional release condition.<sup>166</sup> In light of the foregoing, the Appeals Chamber is not satisfied that the Trial Chamber failed to place appropriate weight on the special circumstances of the twenty-six protected witnesses. The Appeals Chamber considers that, to the contrary, the Trial Chamber weighed all relevant factors and came to a reasonable conclusion based upon those factors.

#### 6. The Appropriateness of Granting Stanišić Provisional Release on Medical Grounds

56. The Prosecution submits that the Trial Chamber erred when it concluded 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.”<sup>167</sup> In support of this argument, the Prosecution asserts that the evidence before the Trial Chamber indicates that Stanišić’s health condition is stable and slowly improving and that he will receive better medical treatment if he remains in The Netherlands.<sup>168</sup> The Prosecution further asserts that the Trial Chamber erred when it declined to consider the possibility that Stanišić is exaggerating his symptoms.<sup>169</sup>

57. With regard to Stanišić’s health condition, the Prosecution asserts that the medical reports submitted by Dr. Falke and Dr. Cazemier, Stanišić’s treating gastroenterologist, do not support the Trial Chamber’s conclusion that “According to [Drs. Falke and Petrović], the Accused is gravely ill.”<sup>170</sup> The Prosecution asserts that the only evidence which suggests that Stanišić is gravely ill is a 15 May 2008 report from Dr. Petrović (“Petrović Report”), which is inconsistent with a report she filed two days earlier as well as with all other available evidence.<sup>171</sup> The Prosecution argues that the Trial Chamber erred in placing undue weight on the Petrović Report and in relying on it without convening a hearing to explore its conclusions.<sup>172</sup>

58. The Prosecution also submits that the Trial Chamber erred in failing to consider whether Stanišić would receive adequate treatment for his health problems if granted provisional release in Belgrade as well as in failing to compare the quality of care that he would receive in The Netherlands with the care he would receive in Belgrade.<sup>173</sup> The Prosecution asserts that because

<sup>164</sup> Impugned Decision, paras 54 and 57.

<sup>165</sup> Impugned Decision, paras 54 and 57.

<sup>166</sup> Impugned Decision, paras 54 and 57.

<sup>167</sup> Appeal, paras 6 and 57.

<sup>168</sup> Appeal, paras 57-86.

<sup>169</sup> Appeal, paras 6 and 87-93.

<sup>170</sup> Appeal, paras 59-62 (referring to Impugned Decision, para. 60). *See also* Prosecution Consolidated Reply, paras 31-34.

<sup>171</sup> Appeal, paras 66-69.

<sup>172</sup> Appeal, paras 66-70.

<sup>173</sup> Appeal, para. 72.



Stanišić's health condition is the primary reason for his provisional release, these errors amount to an abuse of discretion.<sup>174</sup> The Prosecution maintains that Stanišić received inadequate psychological treatment while on provisional release in Belgrade, which contributed to his weak psychological state, and that the Trial Chamber was not entitled to grant Stanišić provisional release absent evidence that he would receive significantly better care.<sup>175</sup> [REDACTED]

[REDACTED].<sup>176</sup> The Prosecution submits that provisional release will enable Stanišić to cease complying with his medical regime in order to avoid unpleasant side-effects or to evade trial.<sup>177</sup> The Prosecution asserts that, by contrast, if Stanišić remains in The Netherlands, the Trial Chamber will remain in control of his care, the UNDU staff will closely monitor his compliance with his medical regime, and he will receive superior medical care.<sup>178</sup>

59. The Prosecution also argues that the Trial Chamber disregarded evidence that indicated Stanišić could be exaggerating his symptoms.<sup>179</sup> Specifically, the Prosecution notes two incidents discussed during oral submissions on provisional release which, in its view, demonstrate that Stanišić is not legitimately seeking treatment and that his statements regarding his condition are not reliable.<sup>180</sup> The Prosecution further contends that the Trial Chamber erred in failing to investigate the possibility of sending Stanišić to the Pieter Baan Centrum to address the possibility that he is manipulating his medical condition.<sup>181</sup>

60. In Response, Stanišić submits that contrary to the Prosecution's assertions, UNDU medical reports indicate that his health condition has deteriorated since 13 May 2008, as demonstrated, *inter alia*, by a report from Dr. Falke dated 26 May 2008.<sup>182</sup> He also submits that reports from Dr. Petrović and Dr. Falke have continuously indicated that his medical condition is subject to relapse.<sup>183</sup> He claims that medical reports do not support the Prosecution's conclusion that he will receive better medical care in The Netherlands.<sup>184</sup> In this regard, he asserts that his health has deteriorated despite the treatment he has received at the UNDU and Brovono Hospital.<sup>185</sup> He also asserts that the Prosecution ignores the testimony of Dr. Rachmilewitz during the fitness hearings,

<sup>174</sup> Appeal, para. 72 and 86.

<sup>175</sup> Appeal, paras 73-79.

<sup>176</sup> Appeal, para. 73.

<sup>177</sup> Appeal, para. 74.

<sup>178</sup> Appeal, paras 80-85.

<sup>179</sup> Appeal, paras 6 and 87-93 (referring to, *inter alia*, *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, T. 20 May 2008, pp. 1267-1268).

<sup>180</sup> Appeal, paras 89-90.

<sup>181</sup> Appeal, para. 93.

<sup>182</sup> *Stanišić* Response, paras 22, 32-33 and 35.

<sup>183</sup> *Stanišić* Response, paras 22 and 35.

<sup>184</sup> *Stanišić* Response, para. 23.

<sup>185</sup> *Stanišić* Response, para. 23.

which indicated that the treatment provided by Dr. Tarabar of the Military Hospital meets all professional and ethical criteria, and notes that the Military Hospital can provide medical treatment through a multi-disciplinary team of experts, which is an approach supported by Dr. Falke and Dr. Petrović.<sup>186</sup>

61. With regard to the Prosecution's suggestion that Stanišić could be malingering, Stanišić notes that none of the doctors who have evaluated him have ever suggested that he is exaggerating his health condition.<sup>187</sup> In addition, Stanišić submits that the regime implemented by the Trial Chamber to monitor his provisional release was reasonable.<sup>188</sup> In this regard, he notes that the Trial Chamber ordered, *inter alia*, the Military Hospital doctors to allow Dr. de Man, the court-appointed psychiatrist, and Dr. Fidder, the court-appointed gastroenterologist, to regularly visit him during his provisional release.<sup>189</sup> In light of the foregoing, Stanišić concludes that a reasonable trier of fact could have concluded that Stanišić's state of health "strengthens the case for the exercise of discretion in favour of provisional release."<sup>190</sup>

62. In its Reply, the Prosecution submits that the Stanišić Response fails to address the Prosecution's arguments with respect to the quality of psychological and psychiatric care Stanišić received in Belgrade and the credibility of the Petrović Report.<sup>191</sup> The Prosecution also reiterates its view that multi-disciplinary treatment for Stanišić's ailments is available at various hospitals in The Netherlands.<sup>192</sup> Furthermore, the Prosecution asserts that Dr. Falke, Dr. de Man, and Dr. Petrović have not had sufficient time to evaluate whether Stanišić is manipulating his medical condition.<sup>193</sup> In light of the foregoing, the Prosecution reiterates that the Trial Chamber erred in failing to order a proper assessment to determine whether Stanišić is malingering.<sup>194</sup>

63. The Appeals Chamber recalls that, in light of Stanišić's health condition, the proceedings in this case were adjourned for a minimum of three months, and the Trial Chamber was instructed to reassess Stanišić's state of health before determining when the trial should commence.<sup>195</sup> The Appeals Chamber agrees with the Prosecution that "[t]he three month adjournment in this case was meant to facilitate Mr. Stanišić's recovery and thereby to ensure that the trial can continue in the near future."<sup>196</sup> The Appeals Chamber further notes that Stanišić requested provisional release in order "to provide for the optimum conditions for recovery" and "to prevent further serious

<sup>186</sup> Stanišić Response, paras 24-25.

<sup>187</sup> Stanišić Response, para. 25.

<sup>188</sup> Stanišić Response, para. 38.

<sup>189</sup> Stanišić Response, para. 38 (referring to Impugned Decision, para. 68(2)(g), 68(3), and 68(4)).

<sup>190</sup> Stanišić Response, para. 40.

<sup>191</sup> Prosecution Consolidated Reply, paras 29-30.

<sup>192</sup> Prosecution Consolidated Reply, para. 34.

<sup>193</sup> Prosecution Consolidated Reply, paras 35-39.

<sup>194</sup> Prosecution Consolidated Reply, para. 42.

<sup>195</sup> Adjournment Decision, paras 11 and 22.

deterioration of health and to ensure that [his] life is not further endangered by a non-clinical environment.”<sup>197</sup> The Appeals Chamber bears these factors in mind when assessing whether the Trial Chamber properly exercised its discretion in granting Stanišić provisional release to Belgrade on medical grounds.

64. The Appeals Chamber notes that in deciding that “[Stanišić’s] health is such that it strengthens the case for the exercise of its discretion in favour of release,”<sup>198</sup> the Trial Chamber relied upon information contained in the Petrović Report and a medical report from Dr. Falke dated 20 May 2008 (“Falke Report”).<sup>199</sup> In the Impugned Decision, the Trial Chamber noted, in particular, Dr. Petrović’s concern that “we are going to lose [sic] him,” Dr. Falke’s understanding that Dr. Petrović is unable to continue treating Stanišić “without the assistance of a multi-disciplinary team in a medical environment,” and the importance that Dr. Falke attached to Dr. Petrović’s opinion.<sup>200</sup> [REDACTED]

[REDACTED] In light of this information, the Trial Chamber concluded that “[a]ccording to these doctors, Stanišić is “gravely ill.”<sup>203</sup> Considering the evidence before the Trial Chamber, the Appeals Chamber finds that the Trial Chamber’s conclusion was reasonable.

65. The Appeals Chamber further finds that the Prosecution has failed to demonstrate that the Trial Chamber erred by placing undue weight on the Petrović Report and in relying on it without exploring its conclusions in a hearing. The Appeals Chamber notes that the Trial Chamber considered that inconsistencies existed in the many reports it had received concerning Stanišić’s health condition but concluded that his health nevertheless militated in favour of provisional release.<sup>204</sup> With regard to the Prosecution’s implication that the Petrović Report is unreliable given that it is inconsistent with a report Dr. Petrović filed two days earlier, the Appeals Chamber points out that the Petrović Report was dated 15 May 2008, which is one day after Stanišić was admitted to the Bronovo Hospital, and considers that medical conditions can fluctuate from day to day. Accordingly, the Appeals Chamber does not consider that this circumstance constitutes evidence

<sup>196</sup> Appeal, para. 12.

<sup>197</sup> Impugned Decision, para. 4.

<sup>198</sup> Impugned Decision, para. 65.

<sup>199</sup> Impugned Decision, paras 59-60.

<sup>200</sup> Impugned Decision, para. 59.

<sup>201</sup> See Falke Report.

<sup>202</sup> See Falke Report.

<sup>203</sup> Impugned Decision, para. 60.

<sup>204</sup> Impugned Decision, para. 60.

that the Petrović Report is unreliable. Given the absence of any evidence calling into question the credibility of the Petrović Report, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion when it relied on it without exploring its conclusions in a hearing.

66. Additionally, although recognizing the Prosecution's concerns regarding the quality of care Stanišić received in Belgrade while previously on provisional release, the Appeals Chamber is not persuaded that the Trial Chamber erred by failing to consider whether Stanišić would receive adequate treatment for his health problems in Belgrade. The Appeals Chamber notes that in granting Stanišić provisional release, the Trial Chamber implemented strict conditions for monitoring Stanišić's medical care, his compliance with his medical regime, and his medical progress.<sup>205</sup> These conditions include an order to both the court-appointed psychiatrist, assisted by a psychologist of his choosing and approved by the Registrar, as well as the court-appointed gastroenterologist, to provide a detailed report on Stanišić's health based on at least three visits during the three-month period of adjournment.<sup>206</sup> The conditions also include an order to the medical doctors of the Military Hospital, if Stanišić is not admitted to the Hospital, to notify the Trial Chamber of the identity of all medical practitioners who will be responsible for his care for further order by the Trial Chamber.<sup>207</sup> The Appeals Chamber considers that these conditions will allow the Trial Chamber to assess both the quality of care Stanišić receives in Belgrade as well as his compliance with the instructions from his doctors and to follow up on any problems that may arise. The Appeals Chamber further notes that, in the event the Trial Chamber finds that the conditions of Stanišić's provisional release are not conducive to his optimal recovery, the Trial Chamber can revoke its grant of provisional release. In light of the foregoing, the Appeals Chamber is not satisfied that the Trial Chamber abused its discretion when it concluded that Stanišić's provisional release to Belgrade for treatment at the Military Hospital was appropriate.

67. With regard to the Prosecution's allegations that Stanišić could be malingering, the Appeals Chamber considers that none of the doctor evaluations in evidence before the Trial Chamber suggest that Stanišić was exaggerating his health condition. Rather, each of these reports indicates that Stanišić is suffering from serious health problems. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err by disregarding evidence that indicated Stanišić was malingering or by failing to investigate this possibility at the Pieter Baan Centrum.

68. Turning to the Prosecution's argument that the Trial Chamber erred in failing to compare the quality of care that Stanišić would receive in The Netherlands with the care he would receive in Belgrade, the Appeals Chamber recalls that an applicant for provisional release on medical grounds

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<sup>205</sup> Impugned Decision, para. 68(2)-(4).

<sup>206</sup> Impugned Decision, para. 68(3)-(4).

<sup>207</sup> Impugned Decision, para. 68(2)(e).

bears the burden of demonstrating that appropriate treatment is not available in The Netherlands.<sup>208</sup> In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred when it concluded that recent jurisprudence suggests that provisional release on medical grounds may be granted absent such a showing provided that the prerequisites of Rule 65 of the Rules are fulfilled.<sup>209</sup>

69. While the usual course of action is to remand the matter to the Trial Chamber so that it can apply the correct legal standard and exercise its discretion accordingly, the Appeals Chamber considers that exceptional circumstances counsel against remand here. The Appeals Chamber notes Stanišić's submissions in his Motion for Provisional Release that the medical evidence indicates a danger of "continued physical and mental deterioration" that is "directly related to – or cannot be ameliorated by – a detention environment" and that the Military Hospital's medical team is familiar with his medical condition and able to treat the range of medical problems he is currently experiencing.<sup>210</sup> Furthermore, the Appeals Chamber notes the report from Dr. Falke dated 9 May 2008, in which he concluded that Stanišić "remains in a delicate position where external factors may jeopardise his mental state."<sup>211</sup> Additionally, the Appeals Chamber takes notice of the Petrović Report, in which Stanišić's treating psychiatrist concluded that "we've done everything possible within our powers, but in this case, our specialties are not enough," as well as the Falke Report, which suggested the need for Stanišić to be treated by a "multi-disciplinary team in a medical environment."<sup>212</sup> In light of the gravity and time-sensitive nature of the present matter, as well as the fact that the Trial Chamber has already deemed the above evidence to be credible, the Appeals Chamber, consistent with the Trial Chamber's conclusion, determines that Stanišić should be provisionally released for treatment at the Military Hospital.

#### 7. The Best Conditions for Assessing Stanišić's State of Health

70. The Prosecution notes that in Adjournment Decision, the Appeals Chamber ordered the Trial Chamber to reassess Stanišić's health condition at the end of a three month period in order to

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<sup>208</sup> See *Prosecutor v. Pavle Strugar*, Case No. IT-01-43-A, Decision on "Defence Motion: Request for Providing Medical Aid in the Republic of Montenegro in Detention Conditions," 8 December 2005, p. 3 (denying provisional release on the ground that "the Appellant did not demonstrate that the preparation for, and the placement of a total hip prosthesis and the ensuing rehabilitation treatment cannot be adequately carried out in health institutions within The Netherlands"). See also *Prosecutor v. Pavle Strugar*, Case No. 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 (granting provisional release after considering the Appellant's argument that "it is necessary for a successful surgery and rehabilitation that the surgery be undertaken in the Clinical Center in Podgorica/Montenegro and the rehabilitation in the specialized rehabilitation center 'Dr. Simo Milošević' in Igalo/Montenegro").

<sup>209</sup> Impugned Decision, para. 40.

<sup>210</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Extremely Urgent Defence Motion for Immediate Provisional Release for Purposes of Medical Treatment, 20 May 2008 ("Stanišić Motion for Provisional Release").

<sup>211</sup> Impugned Decision, para. 11; Report from Dr. Paulus Falke dated 9 May 2008.

<sup>212</sup> Impugned Decision, para. 59. See also *supra*, para. 64.

determine when the trial can commence.<sup>213</sup> The Prosecution asserts that the Trial Chamber was accordingly obliged to ensure that this assessment is carried out in the most efficient and professional manner.<sup>214</sup> The Prosecution submits that Dr. de Man only conducted one brief examination of Stanišić, that Dr. de Man explained that several examinations lasting for a longer duration were necessary, and that the Pieter Baan Centrum fulfils all requirements recommended by Dr. de Man.<sup>215</sup> The Prosecution concludes that the Trial Chamber erred in ordering an inferior psychological assessment in Belgrade when the evidence before the Trial Chamber indicates that the Pieter Baan Centrum provides the best conditions for making such an assessment.<sup>216</sup>

71. Stanišić responds that the provisional release conditions set forth by the Trial Chamber provide the most appropriate medical conditions.<sup>217</sup> In this regard, Stanišić notes that the Military Hospital is not a detention center but rather a medical institution that provides specialists who have been treating Stanišić for years, including a gastroenterologist, nephrologists, vascular surgeon, and rheumatologist, as well as a psychiatric department.<sup>218</sup> Stanišić submits that the Pieter Baan Centrum does not meet his complex medical needs in that it provides a restricted level of medical care with the possibility for a maximum of seven weeks of treatment.<sup>219</sup> Stanišić further submits that the Pieter Baan Centrum has the characteristics of a detention facility and would thus provide inappropriate conditions for his treatment given Dr. Petrović's conclusion that Stanišić should be treated in a medical environment.<sup>220</sup>

72. The Appeals Chamber recalls that in the Impugned Decision, the Trial Chamber ordered the Military Hospital medical doctors, *inter alia*, to report to the Trial Chamber upon Stanišić's arrival and initial assessment the regime under which he is to be treated,<sup>221</sup> to consult with Dr. Falke and Dr. Petrović regarding Stanišić's medical condition while he was in detention in The Hague and to allow Dr. Petrović to continue treating Stanišić if feasible,<sup>222</sup> and to allow any court-appointed medical expert to examine Stanišić at any time.<sup>223</sup> The Trial Chamber also ordered Dr. de Man, assisted by a psychologist of his choosing, to visit Stanišić at least three times during the three-month period from the date of the Impugned Decision and to provide a detailed report on his mental

<sup>213</sup> Appeal, para. 94. The Appeals Chamber notes that paragraph 94 is erroneously labeled as paragraph 90.

<sup>214</sup> Appeal, para. 94.

<sup>215</sup> Appeal, paras 94-95.

<sup>216</sup> Appeal, paras 90-96.

<sup>217</sup> Stanišić Response, para. 27.

<sup>218</sup> Stanišić Response, para. 27.

<sup>219</sup> Stanišić Response, paras 29-30.

<sup>220</sup> Stanišić Response, paras 28 and 37.

<sup>221</sup> Impugned Decision, para. 68(2)(a).

<sup>222</sup> Impugned Decision, para. 68(2)(d).

<sup>223</sup> Impugned Decision, para. 68(2)(d).

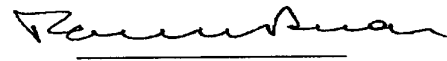
health state.<sup>224</sup> The Prosecution has not satisfied the Appeals Chamber that the psychological assessment ordered by the Trial Chamber is inferior to the type of assessment possible at the Pieter Baan Centrum or that it does not provide conditions for an efficient and professional assessment. The Appeals Chamber further notes that the regime established by the Trial Chamber will enable Dr. de Man to assess Stanišić at least three additional times, which largely responds to the Prosecution's concern that Dr. de Man did not previously have sufficient time in which to assess Stanišić. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber committed no error when it ordered Stanišić's psychological assessment in Belgrade.

## V. DISPOSITION

73. On the basis of the foregoing, the Appeals Chamber **DISMISSES** the Rule 115 Motion of 28 May, **DISMISSES** the Rule 115 Motion of 4 June, and **DISMISSES** the Rule 115 Motion of 11 June, **DISMISSES** the Rule 115 Motion of 19 June, **DISMISSES** the Rule 115 Motion of 20 June and **DISMISSES** the Appeal.

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

Done this 26th day of June 2008,



At The Hague,  
The Netherlands.

Judge Fausto Pocar  
President

[Seal of the Tribunal]

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<sup>224</sup> Impugned Decision, para. 68(3).