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

Case No. IT-03-69-AR65.5

Date: 7 January 2010

Original: English

BEFORE THE DUTY JUDGE

Before: Judge Christoph Flüggé, Duty Judge

Registrar: Mr. John Hocking

Decision of: 7 January 2010

THE PROSECUTOR

-V-

JOVICA STANIŠIĆ

AND

FRANKO SIMATOVIĆ

PUBLIC

**DECISION ON URGENT DEFENCE REQUEST TO
APPEAL THE TRIAL CHAMBER'S 18 DECEMBER 2009
"DECISION ON URGENT STANIŠIĆ DEFENCE
MOTION FOR PROVISIONAL RELEASE"**

The Office of the Prosecutor:

Mr. Dermot Groome

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1. I, Christoph Flügge, a Judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”), acting in my current capacity as Duty Judge in accordance with Rule 28 of the Rules of Procedure and Evidence (“Rules”) am seized of the “Urgent Defence Request to Appeal the Trial Chamber’s 18 December 2009 ‘Decision on Urgent Stanišić Defence Motion for Provisional Release’ with Public Annex A”, filed on 22 December 2009 (“Appeal”), the “Prosecution Response to Appeal of the Trial Chamber’s Denial of Provisional Release and Motion for Additional Evidence Pursuant to Rule 115”, filed on 4 January 2010 (“Response” and “Motion for Additional Evidence”), the “Defence Reply to ‘Prosecution Response to Defence Appeal of the Trial Chamber’s Denial of Provisional Release and Motion for Additional Evidence pursuant to Rule 115’”, filed on 6 January 2009 (“Reply”), and hereby render my decision thereon.

I. BACKGROUND

2. On 9 December 2009, Jovica Stanišić (“the Appellant or “the Defence”, respectively) filed a motion requesting provisional release from 16 December 2009 until 15 January 2009 “or for a lesser period”, submitting, *inter alia*, that a term of provisional release is likely to benefit the Appellant and that the Military Hospital in Belgrade (the “VMA”) would ensure the continuity of the Appellant’s medical treatment.¹ The Prosecution responded on 10 December 2009, submitting that the Appellant’s request should be denied on the grounds that, *inter alia*, the personal reasons supporting the request for provisional release are inadequate, the Appellant’s state of health does not necessitate his provisional release, and the VMA, in contrast to the Defence submission, is not able to ensure the continuity of the Appellant’s medical treatment and transparent reporting to the Chamber.² On 18 December 2009, the Trial Chamber issued its “Decision on Urgent Stanišić Defence Motion for Provisional Release” (hereinafter: the “Impugned Decision”), whereby it dismissed the Appellant’s request for provisional release.

¹ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69, Urgent Stanišić Defence Motion for Provisional Release with Public Annexes A-C and Confidential Annex D, 9 December 2009 (“Original Motion”), *see e.g.*, paras 11-12, 15.

² *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69, Prosecution Response to Third Urgent Stanišić Defence Motion for Provisional Release, 10 December 2009, para. 2.

II. STANDARD OF REVIEW

3. An interlocutory appeal is not a *de novo* review of a Trial Chamber's decision.³ 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.⁴ 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, in particular by considering all those relevant factors which a reasonable trial chamber would have been expected to take into account before reaching a decision"⁵

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 resulting in prejudice.⁶ The Appeals Chamber will only overturn a Trial Chamber decision on provisional release where it is found to be (a) based on an incorrect interpretation of governing law; (b) based on a patently incorrect conclusion of fact; or (c) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.⁷ 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.⁸

³ See, e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.11, Decision on Praljak's Appeal of the Trial Chamber's 2 December 2008 Decision on Provisional Release, 17 December 2008, para. 4 ("*Praljak Decision*") (citing *Prosecutor v. 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. 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. Boškoski and Tarčulovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005, para. 5).

⁴ See e.g., *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on the Accused Praljak's Motion for Provisional Release, 25 July 2008, para. 6; *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, 40 June 2006, 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.

⁵ See, e.g., *Praljak Decision*, para. 4; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR65.1, Decision on Ante Gotovina's Appeal Against Denial of Provisional Release, 17 January 2008, para. 5; *Milutinović Decision*, para. 3; *Prosecutor v. 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. 5.

⁶ *Praljak Decision*, para. 5 (internal citation omitted).

⁷ *Ibid.*

⁸ *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.7, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on Popović's Motion for Provisional Release, 1 July 2008 ("*Popović Decision*"), para. 6; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, filed confidentially on 26 June 2008 ("*Stanišić & Simatović Provisional Release Decision June 2008*"), para. 4.

III. APPLICABLE LAW

A. Rule 65

5. Under Rule 65(B) of the Rules, a Chamber may grant provisional release 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.⁹ If the Trial Chamber is satisfied that the requirements of Rule 65(B) have been met, it has the discretion as to whether or not to grant provisional release to an accused.¹⁰

6. In deciding whether the requirements of Rule 65(B) have been met, a Trial Chamber must consider all of those relevant factors which 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.¹¹ 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.¹² What these relevant factors are and the weight to be accorded to them depend upon the particular circumstances of each case.¹³ 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.¹⁴

B. Rule 115

7. 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

⁹ *Praljak* Decision, para. 6; *Brahimaj* Decision, para. 6.

¹⁰ See e.g. *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.19, Decision on Prosecution's Appeal of the Trial Chamber's Decision to Provisionally Release Accused Praljak, filed confidentially on 17 December 2009, para. 7; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.3, Decision on Ivan Čermak's Appeal Against Decision on his Motion for Provisional Release, filed confidentially on 3 August 2009, para. 6.

¹¹ *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 of 30 June 2006"), para. 8.

¹² *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR65.1, Decision on Ante Gotovina's Appeal Against Denial of Provisional Release, 17 January 2008 ("*Gotovina* Decision"), para. 8; *Stanišić* Decision, para. 8.

¹³ *Stanišić* Decision, para. 8; *Gotovina* Decision, para. 8.

¹⁴ *Prosecutor v. Bošković and Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Interlocutory Appeal from Trial Decision Denying Johan Tarčulovski's Motion for Provisional Release, 4 October 2005, para. 7.

only to appeals from judgement but also to interlocutory appeals, including an interlocutory appeal of a provisional release decision.¹⁵

8. For 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.¹⁶ The moving party must also identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed¹⁷ and specify with sufficient clarity the impact the evidence could have had upon the Trial Chamber's decision.¹⁸

IV. SUBMISSIONS

1. Defence Motion

9. The Defence submits that “no reasonable decision maker, placing appropriate weight upon the relevant medical evidence, would have concluded that provisional release bore too great a risk to the Accused's health and therefore the ongoing proceedings.”¹⁹ According to the Defence, the Trial Chamber failed to “take into account or give due weight” to the medical evidence demonstrating that the risks of deterioration of the Appellant's health during a short period of provisional release were remote, and, if any, manageable.²⁰ It argues in this respect that, *inter alia*, the Trial Chamber failed to refer to or contextualize the opinions provided by the Reporting Medical Officer (“RMO”), who reported on behalf of the clinical team at the UNDU.²¹ Further, it submits that the Trial Chamber demanded the impossible by expecting the substitute RMO to exclude the possibility that the Appellant's health would not deteriorate during provisional release,

¹⁵ *Stanišić & Simatović* Provisional Release Decision June 2008, para. 5; see also *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, paras 4-7;

¹⁶ See Rule 115(B) of the Rules.

¹⁷ See Rule 115(A) of the Rules; see *Stanišić & Simatović* Provisional Release Decision June 2008, para. 6; see also *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AT65.1, Confidential Decision on Prosecutions' Application to Present Additional Evidence in Its Appeal Against the Re-Assessment Decision, 10 March 2006, para. 11.

¹⁸ see *Stanišić & Simatović* Provisional Release Decision June 2008, para. 6; see also *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement, 23 October 2001, para. 69; see also *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115, 16 November 2005, para. 10.

¹⁹ Appeal, para. 15(i).

²⁰ Appeal, paras 15(ii).

²¹ Appeal, para. 17 and footnote 51, referring to para. 9. I note that the statements referred to by the Defence in para. 9 of the Appeal are for the most part by Dr. Rowell, the doctor who temporarily substituted the regular Reporting Medical Officer Dr. Eekhof. Dr. Rowell shall be referred to as the substitute RMO, and Dr. Eekhof as the regular RMO throughout this decision.

and that it gave undue weight to this impossibility in denying the request.²² It is the Defence submission that the Trial Chamber furthermore gave undue weight to “old” medical evidence from 2008 to March 2009, where it should have relied on the evidence provided by the current medical team that had, since the Appellant’s return to the UNDU in May 2009, consistently concluded that the Appellant is fit to be tried and his health is improving.²³

10. The Defence also submits that the Trial Chamber placed undue weight on the “different degrees of non-compliance with the reporting duties imposed by the Chamber on the doctors treating the Accused in Belgrade”, and thus did not place a proportionate degree of trust in the guarantees provided by the VMA and the Government of Serbia that they would observe and monitor the Appellant and report the necessary information concerning the Appellant’s medical condition.²⁴ It contends that non-compliance was limited to the late filing of a single report by the treating gastroenterologist Dr. Tarabar, and the absence of an underlying report by neuropsychiatrist Dr. Bucan.²⁵ This non-compliance, as argued by the Defence, was not capable of impacting upon the Appellant’s health, and the Trial Chamber should not have taken it into account in the Decision.²⁶ Given the ample evidence of cooperation between the VMA and the Trial Chamber, the Defence submits that the Trial Chamber could have relied on the current guarantees proffered by the VMA.²⁷ Further, the Defence contends that the Trial Chamber disregarded could have imposing a regime of reporting from the VMA and/or the RMO during the period of provisional release that would have allowed the health of the Appellant to be observed on a daily basis.²⁸

2. Prosecution Response

11. In the view of the Prosecution, the specific issue on appeal is whether the Trial Chamber erred in denying provisional release in light of the totality of the circumstances.²⁹ The Prosecution argues that it is the Trial Chamber who is best positioned to evaluate the medical condition of the Appellant, and that in this particular case, throughout the proceedings, a detailed reporting procedure and ongoing assessment of the Appellant’s health has been in place. As a result, it is

²² Appeal, para. 19.

²³ Appeal, paras 18, 20-21.

²⁴ Appeal, paras 15(iii), 24.

²⁵ Appeal, para 24.

²⁶ Appeal, para. 24.

²⁷ Appeal, para. 24.

²⁸ Appeal, para 22; *see also* para. 9(viii).

²⁹ Response, para. 7.

argued, the Trial Chamber should be provided “great deference” in the evaluation of the Appellant’s condition.³⁰

12. According to the Prosecution, there is no support for the Defence submission that the demonstrated risks of deterioration of the Appellant’s health were “remote”, and indeed neither the regular RMO nor the substitute RMO characterized the physical or psychological risk of deterioration of the Appellant as a result of a provisional release as such.³¹ The Trial Chamber, in view of the Prosecution, correctly considered the fact that the substitute RMO acknowledged deterioration was possible during a period of provisional release, and that he was unable to state whether the Appellant would get better or worse during this time.³² The Prosecution contends that the Trial Chamber did not place undue weight on the fact that the substitute RMO could not rule out the possibility of deterioration to the Appellant’s health during a period of provisional release, but rather noted in the Impugned Decision that the possibility of deterioration could not be excluded.³³

13. With respect to the issue of non-compliance of reporting during the previous term of provisional release, the Prosecution submits that none of the 16 medical reports submitted from the VMA between July 2008 and March 2009 were in full compliance with the Chamber’s reporting regime, as pointed out by the Trial Chamber in the Impugned Decision.³⁴ Moreover, the Prosecution argues, the treatment provided to the Appellant by the VMA was neither adequate nor systematic, and ultimately contributed to the degradation of the Appellant’s health, resulting in multiple hospitalizations while on provisional release.³⁵ It argues moreover that the only proposed cooperation from the VMA concerning the current request for provisional release was a general guarantee from an attorney of the National Council for Cooperation of the Republic of Serbia and not from any of the doctors who would be treating the Appellant or reporting to the Trial Chamber.³⁶ Further, the Prosecution submits, the proposed guarantee suggested a scheme of reporting that would circumvent the decision issued by the Trial Chamber on 29 May 2009, which set out the required reporting procedures relating to the Appellant’s health.³⁷ The Prosecution submits that the regular and transparent reporting of the Appellant’s health currently in place allows

³⁰ Response, paras 6, 10, 23; *see also* paras 11-22, detailing the history of the reporting procedures in place, and assessments made, throughout trial.

³¹ Response, paras 33, 34.

³² Response, para. 34.

³³ Response, para. 32.

³⁴ Response, para. 38; *see also* para. 14.

³⁵ Response, paras 38-39; *see also* para. 16.

³⁶ Response, para. 41.

³⁷ Response, para 42; *see also* paras 18-19. *See also Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Start of Trial and Modalities for Trial, 29 May 2009; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision Amending Modalities for Trial, 9 June 2009; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69, Corrigendum to Second Decision Amending Modalities for Trial, 7 September 2009.

the Trial Chamber to determine whether the Appellant remains fit for trial, and is therefore of critical importance.³⁸

14. Finally, the Prosecution moves for the admission of a 24 December 2009 Report by the regular RMO (“24 December 2009 Report”) pursuant to Rule 115 of the Rules, submitting that this report is credible and directly relevant to whether the possibility of deterioration of the Appellant’s health may impact his ability to return for trial.³⁹ It submits that in the Report, the regular RMO records that the Appellant has suffered a “recidivism deep venous thrombosis of the left leg” and strongly advises that he not fly during the next six weeks.⁴⁰ The Prosecution considers the Report decisive to the issue on appeal.⁴¹

3. Defence Reply

15. In reply, the Defence submits that it does not oppose the admission of the 24 December 2009 Report as additional evidence pursuant to Rule 115 of the Rules.⁴² It requests, however, that the appeal be considered on its merits without taking into account the 24 December 2009 Report as this report would only become relevant in the event the Impugned Decision is overturned and provisional release is granted.⁴³ In this context, the Defence also requests that the anticipated report of 6 January 2010 by the regular RMO and/or the treating doctor Dr. Falke be admitted pursuant to Rule 115 of the Rules.⁴⁴

16. Further, the Defence submits that the matters raised in paragraph 14 of the Prosecution’s Response ought to be dismissed without consideration of their correctness or relevance to the merits of the Appeal, or, in the alternative, the Prosecution should be ordered to file the matters raised as additional evidence pursuant to Rule 115 of the Rules.⁴⁵ It is the position of the Prosecution that these matters have not been found or confirmed by the Trial Chamber, evidenced by the fact that the Trial Chamber did not take them into account in the Impugned Decision.⁴⁶

³⁸ Response, para. 40.

³⁹ Response, para. 43.

⁴⁰ Response, paras 43-44.

⁴¹ Response, para. 47.

⁴² Reply, para. 2.

⁴³ Reply, para. 2.

⁴⁴ Reply, para. 2. The expectation of such a report derives from a standing order of the Trial Chamber addressing various modalities for ensuring the participation of the Appellant in his trial proceedings under the circumstances of his health. The relevant orders are listed in footnote 37 of this decision.

⁴⁵ Reply, para. 3.

⁴⁶ Reply, paras 4-5.

V. DISCUSSION

17. At the outset, I note that the Appeal was filed during the winter court recess and that it was not assigned to a Chamber. I am satisfied as to the urgency of the Appeal and will deal with this matter pursuant to Rule 28(C) of the Rules.

18. There is no dispute among the parties that the Appellant has a medical history indicating poor physical as well as mental health. I consider that the issue that lies at the heart of this appeal is whether the physical and psychological condition of the Appellant has now improved to such an extent that granting a term of provisional release would not result in the deterioration of his health, and in turn result in a disruption of future trial proceedings. In this context, a related issue is the question of whether the health of the Appellant can be properly monitored and reported to the Trial Chamber during his provisional release.

19. In deciding that granting provisional release of the Appellant would result in a risk of deterioration of his health and in turn, the disruption of the trial proceedings, the Trial Chamber relied upon numerous medical reports and submissions made by the regular RMO and the substitute RMO.⁴⁷ In this respect, I note that, as submitted by the Defence, the Trial Chamber did not elaborately “refer to” or “contextualize”⁴⁸ all of the statements made by the substitute and regular RMOs on which the Defence relied in its Original Motion to advance the arguments for provisional release.⁴⁹ Having reviewed statements made, for the most part, by the substitute RMO as recorded in the Appeal,⁵⁰ I consider that even had the Trial Chamber explicitly referred to or “contextualized” these statements this would not have materially affected its finding that there was a potential risk of deterioration of the health of the Appellant if provisional release were granted. Thus, the Appellant has not shown that the Trial Chamber failed to give weight or sufficient weight to relevant considerations in reaching its decision.⁵¹ Concerning specifically the suggestion by the substitute RMO that regular assessments of the Appellant’s health take place during provisional release, I do not consider, as submitted by the Defence,⁵² that the Trial Chamber “disregarded” this option. Rather, the Trial Chamber placed strong emphasis on the need to retain the current reporting system by independent court-appointed medical officers, coupled with a system of daily surveillance of the Appellant’s activities in the UNDU, so that it is in a position to determine the appropriate court schedule.⁵³ The Trial Chamber held that in order to maintain the essence of this

⁴⁷ Impugned Decision, paras 28-31.

⁴⁸ Appeal, para. 17.

⁴⁹ See Appeal, para. 9.

⁵⁰ *Ibid.*

⁵¹ *Cf. supra*, para. 4.

⁵² See Appeal, para. 23; see also para. 9(viii).

⁵³ Impugned Decision, para. 33.

extensive reporting system during provisional release, the Appellant would have to be regularly examined by the court-appointed RMO, the gastroenterologist as well as by the psychiatrist.⁵⁴ It was within the discretion of the Trial Chamber to prefer the maintenance of the current system in preventing unnecessary disruptions in court proceedings.

20. Having noted the evidence of the gradual improvement of the Appellant's health during the last few months of treatment by the UNDU, the Trial Chamber found that his physical condition has been reported as posing no impediment either to participating in the proceedings or to travelling to Belgrade.⁵⁵ The Impugned Decision also refers to the improvement of the Appellant's psychological condition over the past few months, referring to multiple psychiatric evaluations performed throughout the months of July to December of 2009, as well as to statements to this effect made by the RMOs.⁵⁶ The Defence does not show that the Trial Chamber gave undue weight to "old" evidence when weighing the factors it took into account in its decision.

21. The Trial Chamber, after determining the improved state of health of the Appellant, then contrasted this finding with submissions made by the substitute RMO, who in qualifying the regular RMO's statement to the effect that the Appellant's mental health would improve during a presence in Belgrade, stated that it could not be excluded that the Appellant's health may deteriorate if provisional release were granted.⁵⁷ I consider that, in contrast to the Defence submission, the Trial Chamber did not give undue weight to the substitute RMO's incapability of excluding any possible deterioration of the Appellant's health during provisional release. Having been provided with the substitute RMO's opinion that the Appellant's health *may* deteriorate, the Trial Chamber reasonably took this opinion into account as a factor weighing against the granting of the provisional release.

22. Further, the Trial Chamber also took into account the Appellant's physical and psychological condition during his last period of provisional release in Belgrade, noting that the Appellant was hospitalized at the VMA on 15 instances in this period, and that upon return to the UNDU in May 2009, not one hospitalization was required.⁵⁸ The Trial Chamber also referred to two medical reports assessing the Appellant's psychological health during his previous provisional release, issued in January and March of 2009.⁵⁹ These reports demonstrated that certain events with which the Appellant was confronted during his provisional release were in fact detrimental to his mental well-being.⁶⁰ Having considered these factors, the Trial Chamber held that provisional

⁵⁴ Impugned Decision, para. 33.

⁵⁵ Impugned Decision, para. 28.

⁵⁶ Impugned Decision, para. 28.

⁵⁷ Impugned Decision, para. 29 and footnote 50.

⁵⁸ Impugned Decision, para. 30; *see* also para. 31.

⁵⁹ Impugned Decision, paras 30-31.

⁶⁰ Impugned Decision, paras 30-31.

release presented a risk of deterioration of the Appellant's current state of health, and in turn may disrupt trial proceedings.⁶¹ I can find no error in this reasoning, and therefore consider that it was open to the Trial Chamber to take into account the frequent hospitalizations and reports of the increased psychological pressure during the Appellant's previous provisional release as factors militating against granting the current request for provisional release.

23. With respect to the Defence submission that the Trial Chamber placed undue weight on the non-compliance of reporting duties imposed by the Chamber on the doctors treating the Appellant in Belgrade during his last terms of provisional release, I note that this non-compliance, on the basis of the sources relied upon in the Impugned Decision, is indeed limited to one late report by the treating gastroenterologist and the absence of a report by the treating neuro-psychiatrist. While relying on these two incidents to characterise "different degrees of non-compliance" may on its face seem disproportionate, I do not consider that the Trial Chamber erred in exercising its discretion to take these incidents into account in its decision to deny the request for provisional release. Despite the Defence submission that these incidents of non-compliance did not and could not have impacted upon the health of the Appellant, I consider that it is the Trial Chamber that is best positioned to make such a determination. These two incidents of non-compliance were reasonably weighed by the Trial Chamber in the context of a complex reporting regime that it deemed necessary to ensure the health of the Appellant and to prevent the disruption of future trial proceedings.

24. On the basis of the foregoing, I conclude that the decision to deny the request for provisional release was well within the Trial Chamber's reasonable exercise of discretion.

25. Concerning the admission of the 24 December 2009 Report as additional evidence, I note that the Report was attached to the Prosecution's Response and therefore has become part of the record of the Appeal. As such, it is not necessary to assess whether the criteria of its admission pursuant to Rule 115 of the Rules have been met. However, I consider that the 24 December 2009 report cannot impact the question whether the Impugned Decision was reasonable, as it was filed after the Impugned Decision was rendered. Furthermore, as correctly submitted by the Defence in its Reply, the 24 December 2009 Report would only have to be considered on its merits if the Appeal were granted. For the same reasons, the "anticipated" medical report that was expected on 6 January 2010⁶² shall not be considered.

⁶¹ Impugned Decision, para. 32.

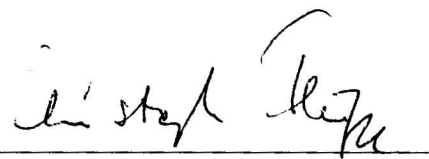
⁶² At the time of the filing of this decision, the "anticipated" report was not yet filed.

VI. DISPOSITION

26. For the foregoing reasons, I

- (i) **CONSIDER** the Prosecution Motion for Additional Evidence as moot, and
- (ii) **DISMISS** the Appeal.

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



Judge Christoph Flüge

Dated this seventh day of January 2010
At The Hague
The Netherlands

[Seal of the Tribunal]