



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-08-91-A
	Date: 19 December 2013
	Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius, Presiding

Judge William H. Sekule

Judge Patrick Robinson

Judge Liu Daqun

Judge Arlette Ramaroson

Registrar: Mr. John Hocking

Decision of: 19 December 2013

PROSECUTOR

v.

**MIĆO ŠTANIŠIĆ
STOJAN ŽUPLJANIN**

PUBLIC

**DECISION ON MOTION ON BEHALF OF MIĆO ŠTANIŠIĆ
SEEKING PROVISIONAL RELEASE**

The Office of the Prosecutor:

Ms. Helen Brady

Counsel for Mićo Stanišić:

Mr. Slobodan Zečević and Mr. Stéphane Bourgon

Counsel for Stojan Župljanin:

Mr. Dragan Krgović and Ms. Tatjana Čmerić

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 seised of the “Motion on Behalf of Mićo Stanišić Seeking an Order Granting Provisional Release until Adjudication [*sic*] of Motion Requesting a Declaration of Mistrial” filed by Mićo Stanišić (“Stanišić”) on 23 October 2013 (“Motion”).¹ In the Motion, Stanišić requests that he be granted provisional release pending the Appeals Chamber’s decision on the “Motion on Behalf of Mićo Stanišić Requesting a Declaration of Mistrial”.²

I. BACKGROUND

2. On 27 March 2013, Trial Chamber II of the Tribunal issued the Trial Judgement in *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T (“Trial Judgement”). It found Stanišić guilty of persecutions as crimes against humanity and murder and torture as violations of the laws or customs of war, and sentenced him to 22 years of imprisonment.³

3. Stanišić as well as Stojan Župljanin and the Office of the Prosecutor (“Prosecution”) have appealed the Trial Judgement.⁴

4. On 25 October 2013, President Theodor Meron, Pre-Appeal Judge in this case, issued an “Order Assigning a Motion to a Judge” withdrawing himself from considering the Motion and referring the Motion to the Acting President, Judge Carmel Agius, for appropriate action.⁵

5. Also on 25 October 2013, the Prosecution filed the “Prosecution Consolidated Response to Stanišić’s Motions for Mistrial and Provisional Release, and Župljanin’s Motions to Vacate Trial Judgement, for Recusal of Judge Liu and Provisional Release” (“Consolidated Response”), opposing the Motion.⁶

6. On 29 October 2013, Stanišić filed his Consolidated Reply, submitting in Annex A two letters by the Serbian Government guaranteeing the compliance with all orders by the Tribunal to

¹ The Motion was initially filed on 16 October 2013 before the wrong Bench but subsequently re-filed correctly on 23 October 2013.

² Motion, paras 1, 4, 34, 42, *referring to* the Motion on Behalf of Mićo Stanišić Requesting a Declaration of Mistrial, 14 October 2013 (“*Stanišić* Mistrial Motion”).

³ Trial Judgement, Vol. 2, para. 955.

⁴ Notice of Appeal on Behalf of Mićo Stanišić, 13 May 2013; Notice of Appeal on Behalf of Stojan Župljanin, 13 May 2013, corrected on 22 August 2013 (*see* Župljanin’s Submission of Corrected Notice of Appeal) and amended on 9 October 2013 (*see* Župljanin’s Submission of Amended Notice of Appeal); Prosecution Notice of Appeal, 13 May 2013.

⁵ Order Assigning a Motion to a Judge, 25 October 2013, p. 1.

⁶ Consolidated Response, paras 3, 12-13, 17.

ensure Stanišić's appearance before it, should he be provisionally released to the territory of the Republic of Serbia.⁷

7. On 27 November 2013, the Kingdom of the Netherlands, in its capacity of host state, informed the Tribunal that it did not have any objections to Stanišić's provisional release.⁸

8. On 28 November 2013, Judge Carmel Agius, Acting President, issued an order assigning Judge William H. Sekule to replace President Theodor Meron on the Bench for the purposes of considering the Motion.⁹

II. SUBMISSIONS

9. Stanišić requests provisional release "until adjudication of the Stanišić Mistrial Motion".¹⁰ Stanišić submits that: (i) special circumstances exist warranting his provisional release;¹¹ (ii) he presents no flight risk;¹² and (iii) he will not pose any danger to victims, witnesses, or other persons.¹³

10. More specifically, Stanišić submits that the legal basis justifying his continued detention is currently being challenged before the Appeals Chamber through the *Stanišić* Mistrial Motion.¹⁴ Stanišić argues that he was not tried by a properly constituted chamber consisting of three independent and impartial Judges which violates his fair trial rights.¹⁵ He contends that the "resulting uncertainty" regarding the legal basis for his detention "constitutes exceptional circumstances pursuant to Rule 65(I)(iii)".¹⁶ Stanišić further argues that the proportionality principle militates in favour of granting his request for provisional release, as "there is no remedy available to [him] for his imprisonment and continued detention which [...] is without legal basis.

⁷ Consolidated Reply on Behalf of Mićo Stanišić to Prosecution Consolidated Response with Confidential Annexes A & B, public with confidential annexes, 29 October 2013 ("Consolidated Reply"). In the Consolidated Reply, Stanišić also addresses submissions proffered by the Prosecution in relation to the *Stanišić* Mistrial Motion. This decision will only address submissions by Stanišić and the Prosecution in regard to the Motion.

⁸ Correspondence from the Head of the Host Nation Division for the Minister of Foreign Affairs, confidential, 21 November 2013, filed on 27 November 2013.

⁹ Order Replacing a Judge in Respect of Motions Before the Appeals Chamber, 28 November 2013.

¹⁰ Motion, para. 42. See Motion, para. 1.

¹¹ Motion, paras 2-4, 32-41.

¹² Motion, paras 5, 26-29.

¹³ Motion, paras 5, 30-31.

¹⁴ Motion, para. 33.

¹⁵ Motion, paras 3, 34, 39-40, referring to *Stanišić* Mistrial Motion, paras 20-28, 37, 31-41; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion for Reconsideration of Decision on Disqualification, Requests for Clarification, and Motion on Behalf of Stanišić and Župljanin, 7 October 2013; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice-President, 28 August 2013. See also Consolidated Reply, paras 3, 10, 14-15, 19.

¹⁶ Motion, paras 4, 33-34, 36, 40. See Consolidated Reply, paras 5, 26-27.

Therefore, the dominant risk of prejudice stems from [his] continued detention, rather than from his provisional release.”¹⁷

11. With respect to the requirements under Rules 65(I)(i) and 65(I)(ii) of the Rules of Procedure and Evidence (“Rules”), Stanišić argues that he surrendered voluntarily to the Tribunal within four days of being indicted and that he has always fully complied with any conditions imposed upon him during previous occasions of provisional release.¹⁸ He refers to guarantees from the Serbian Government¹⁹ and personally undertakes to comply with all and any conditions that the Appeals Chamber may impose upon him, including to surrender into the custody of the Tribunal when required to do so.²⁰ Stanišić further submits that on all previous occasions when he had been granted provisional release, he never posed a danger to any victim, witness, or other person.²¹

12. The Prosecution responds that the Motion is based on the alleged merits of the *Stanišić* Mistrial Motion, which according to the Prosecution is “procedurally flawed”,²² and should therefore be denied.²³

13. The Prosecution further submits that the jurisprudence is clear that a request for provisional release is not the appropriate forum to argue the substance of an appeal and that thus the merits of the case cannot amount to factors that could be taken into account in determining whether provisional release should be granted.²⁴ It argues that the Motion should be denied because Stanišić relies solely on the merits of his proposed new ground of appeal when arguing that there are special circumstances justifying his provisional release.²⁵

14. Stanišić replies that the Prosecution fails to acknowledge the grave injustice that would occur in the event his detention was found to have no legal basis.²⁶ He further submits that the grave

¹⁷ Motion, paras 35-37. See Consolidated Reply, para. 27.

¹⁸ Motion, paras 5-7, 26-27, 30.

¹⁹ Motion, paras 5, 28-29. See Consolidated Reply, para. 29, Confidential Annex A.

²⁰ Motion, para. 27. See Consolidated Reply, Confidential Annex B.

²¹ Motion, paras 30-31.

²² Consolidated Response, paras 3, 12. Specifically, the Prosecution argues that the proper procedure for challenging a trial judge’s impartiality after a trial has ended is through the grounds of appeal and not by requesting, during the appeal phase, to vacate the trial judgement. See *ibid.*, paras 5-11.

²³ Consolidated Response, paras 3, 12.

²⁴ Consolidated Response, paras 3, 13, referring to *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motions for Provisional Release and Leave to File *Corrigendum*, 2 September 2009, para. 22; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Second Defence Request for Provisional Release of Stanislav Galić, 31 October 2005, para. 16; *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Mario Čerkez’s Request for Provisional Release, 12 December 2003, para. 8.

²⁵ Consolidated Response, paras 3, 13.

²⁶ Consolidated Reply, para. 27. See Consolidated Reply, paras 26, 28, 30.

concerns regarding the legitimacy of his detention amount to special circumstances warranting his immediate provisional release.²⁷

III. APPLICABLE LAW

15. Rule 65(I) of the Rules provides that the Appeals Chamber may grant provisional release to convicted persons pending an appeal if it is satisfied that:

- (i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;
- (ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and
- (iii) special circumstances exist warranting such release.

16. These requirements must be “considered cumulatively” and “the discretionary assessment of whether they have been met is made on a case-by-case basis”.²⁸ The Appeals Chamber recalls that “whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities”.²⁹

IV. DISCUSSION

17. The Appeals Chamber recalls that Rule 65(I)(iii) of the Rules imposes an additional prerequisite for provisional release at the post-trial stage, specifically, the requirement that “special circumstances exist warranting such release”.³⁰ Special circumstances have been found to be established on humanitarian and compassionate grounds “where there is an acute justification, such as the applicant’s medical need or a memorial service for a close family member”.³¹ The Appeals

²⁷ Consolidated Reply, para. 27. See Consolidated Reply, para. 26.

²⁸ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vujadin Popović’s Urgent Motion for Custodial Release on Compassionate Grounds, 30 January 2013, p. 3; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, Decision on Momčilo Perišić’s Motion for Provisional Release, confidential, 10 July 2012 (“*Perišić* Decision of 10 July 2012”), para. 5; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vinko Pandurević’s Urgent Motion for Provisional Release on Compassionate Grounds, 11 January 2012 (“*Pandurević* Decision of 11 January 2012”), para. 5.

²⁹ *Perišić* Decision of 10 July 2012, para. 5; *Pandurević* Decision of 11 January 2012, para. 5; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release on Compassionate Grounds, 17 May 2010 (public redacted version), para. 7.

³⁰ *Pandurević* Decision of 11 January 2012, para. 10; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vinko Pandurević’s Urgent Motion for Provisional Release on Compassionate Grounds, 22 February 2011 (confidential) (“*Pandurević* Decision of 22 February 2011”), para. 9.

³¹ See *Pandurević* Decision of 11 January 2012, para. 10; *Pandurević* Decision of 22 February 2011, para. 9; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Public Redacted Version of the “Decision on Vladimir Lazarević’s Second Motion for Temporary Provisional Release on the Grounds of Compassion” Issued on 21 May 2009, 22 May 2009, para. 9.

Chamber has further found that other exceptional factors may amount to special circumstances within the meaning of Rule 65(I)(iii) of the Rules.³²

18. The Appeals Chamber notes that Stanišić's request for provisional release is in principle premised on the outcome of the *Stanišić* Mistrial Motion. The Appeals Chamber is of the view that the fact that there is another motion pending before it, which may or may not be successful, does not in any way constitute special circumstances as required under Rule 65(I)(iii) of the Rules. Special circumstances cannot be established by the mere fact that Stanišić repeats the same arguments which he has also submitted as a basis for his requests to amend his notice of appeal,³³ as well as the subsequent *Stanišić* Mistrial Motion. Applying the rationale behind Stanišić's submissions would lead to provisionally release any appellant who raises an issue which allegedly has "serious consequences".³⁴ The Appeals Chamber notes, without prejudice to the adjudication of the *Stanišić* Mistrial Motion, that Stanišić has been tried, found guilty, and sentenced to 22 years' imprisonment.³⁵

19. Moreover, any issue relating to Stanišić's fair trial rights raised in the *Stanišić* Mistrial Motion will be addressed by the Appeals Chamber in the decision adjudicating that motion. The Appeals Chamber finds that repeating these concerns in the present motion does not constitute special circumstances as required under Rule 65(I)(iii) of the Rules.

20. As the requirements under Rule 65(I) of the Rules are cumulative, the Appeals Chamber need not determine further whether the requirements of Rules 65(I)(i) or 65(I)(ii) are met in the case at hand.

³² See *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on the Motion of Veselin Šljivančanin for Provisional Release, 11 December 2007, p. 3; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para. 13; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on the Request for Provisional Release of Miroslav Kvočka, 17 December 2003, p. 3.

³³ Motion on Behalf of Mićo Stanišić Seeking Leave to Amend Notice of Appeal with Annexes A, B, and C, 2 July 2013, paras 5-6, 30-33; Supplemental Submission in Support of Mićo Stanišić's Motion to Amend Notice of Appeal, 9 September 2013.

³⁴ Consolidated Reply, para. 27 (emphasis in original).

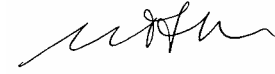
³⁵ Trial Judgement, Vol. 2, para. 955.

V. DISPOSITION

21. For the foregoing reasons, pursuant to Rule 65(I) of the Rules, the Appeals Chamber hereby **DENIES** the Motion.

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

Done this nineteenth day of December 2013,
At The Hague,
The Netherlands.



Judge Carmel Agius
Presiding

[Seal of the Tribunal]