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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

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**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*

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**DECISION ON STOJAN ŽUPLJANIN'S REQUEST FOR  
PROVISIONAL RELEASE**

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**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 “Stojan [Ž]upljanin’s Request for Provisional Release” filed by Stojan Župljanin (“Župljanin”) on 22 October 2013 (“Motion”). In the Motion, Župljanin requests provisional release “pending resolution of his Motion to Vacate Trial Judgement” for a time period to be determined by the Appeals Chamber.<sup>1</sup>

## 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 Župljanin guilty of persecutions and extermination 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.<sup>2</sup>

3. Župljanin as well as Mićo Stanišić and the Office of the Prosecutor (“Prosecution”) have appealed the Trial Judgement.<sup>3</sup>

4. On 23 October 2013, President Theodor Meron, Pre-Appeal Judge in this case, issued an “Order Assigning Motions [*sic*] to a Judge” withdrawing himself from considering the Motion and referring the Motion to the Acting President, Judge Carmel Agius, for appropriate action.<sup>4</sup>

5. 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.<sup>5</sup>

6. On 28 October 2013, Župljanin filed his Consolidated Reply.<sup>6</sup>

<sup>1</sup> Motion, paras 1, 11, referring to Stojan [Ž]upljanin’s Motion to Vacate Trial Judgement, 21 October 2013 (“Motion to Vacate Trial Judgement”).

<sup>2</sup> Trial Judgement, Vol. 2, para. 956.

<sup>3</sup> Notice of Appeal on Behalf of Stojan [Ž]upljanin, 13 May 2013, corrected on 22 August 2013 (*see* [Ž]upljanin’s Submission of Corrected Notice of Appeal) and amended on 9 October 2013 (*see* [Ž]upljanin’s Submission of Amended Notice of Appeal); Notice of Appeal on Behalf of Mićo Stanišić, 13 May 2013; Prosecution Notice of Appeal, 13 May 2013.

<sup>4</sup> Order Assigning Motions [*sic*] to a Judge, 23 October 2013, p. 1.

<sup>5</sup> Consolidated Response, paras 3, 12-13, 17.

<sup>6</sup> Stojan Župljanin’s Reply to Prosecution’s Response to Motions to Vacate Trial Judgement, Provisional Release and for Recusal of Judge Liu Daqun, 28 October 2013 (“Consolidated Reply”).

7. On 25 November 2013, Župljanin filed a Guarantee from Republika Srpska ensuring the compliance with all orders by the Tribunal, should Župljanin be provisionally released to the territory of Republika Srpska.<sup>7</sup>

8. 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 Župljanin's provisional release.<sup>8</sup>

9. 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.<sup>9</sup>

## II. SUBMISSIONS

10. Župljanin requests provisional release in Banja Luka, Republika Srpska in Bosnia and Herzegovina "pending resolution of his Motion to Vacate Trial Judgement" for a period to be determined by the Appeals Chamber.<sup>10</sup> Župljanin argues that "[a] strong basis has arisen to believe that the Trial Judgement against Mr [Ž]upljanin must be vacated" and that in these circumstances, "[h]is continued detention would constitute an ongoing violation of his rights to be tried without undue delay and the presumption of innocence".<sup>11</sup>

11. Župljanin argues that: (i) the "likely invalidity" of his conviction is a special circumstance warranting immediate provisional release;<sup>12</sup> (ii) if released, he will return to the custody of the Tribunal on any terms as may be deemed appropriate and comply with any condition as may be required;<sup>13</sup> and (iii) he will pose no danger to any victim, witness, or other person.<sup>14</sup>

12. Concerning the evaluation of the flight risk, Župljanin submits that he "did not surrender immediately upon the issuance of the Indictment against him and his one and only request for provisional release during the pre-trial stage was denied".<sup>15</sup> He however contends that the evaluation of the flight risk can change over time given a variety of factors.<sup>16</sup>

<sup>7</sup> Notice of Filing Republika Srpska Guarantee for Stojan [Ž]upljanin, Annex A, Conclusion and Guarantee of the Republika Srpska Government, 25 November 2013 ("Guarantee from Republika Srpska").

<sup>8</sup> Correspondence from the Head of the Host Nation Division for the Minister of Foreign Affairs, 21 November 2013 (confidential) filed on 27 November 2013.

<sup>9</sup> Order Replacing a Judge in Respect of a Motion Before the Appeals Chamber, 28 November 2013.

<sup>10</sup> Motion, paras 1, 11.

<sup>11</sup> Motion, para. 1.

<sup>12</sup> Motion, paras 4-5.

<sup>13</sup> Motion, paras 6-9.

<sup>14</sup> Motion, para. 10.

<sup>15</sup> Motion, para. 6.

<sup>16</sup> Motion, para. 6.

13. He further submits that: (i) “[t]he period of detention served provides an incentive for Mr [Ž]upljanin to face the charges including any sentence that may ultimately be imposed”;<sup>17</sup> (ii) guarantees from Republika Srpska will ensure that Župljanin complies with any measure or order required by the Appeals Chamber;<sup>18</sup> and (iii) “[i]t is only fair and equitable that the Tribunal, having detained Mr [Ž]upljanin for [five and a half years] for a defective proceeding, should demonstrate leniency in assessing respect of his provisional liberty”.<sup>19</sup>

14. The Prosecution responds that the Motion is based on the alleged merits of Župljanin’s Motion to Vacate Trial Judgement, which according to the Prosecution is “procedurally flawed”,<sup>20</sup> and should therefore be denied.<sup>21</sup>

15. 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.<sup>22</sup> It argues that the Motion should be denied because Župljanin relies solely on the merits of his proposed new ground of appeal when arguing that there are special circumstances justifying his provisional release.<sup>23</sup>

16. In his Consolidated Reply, Župljanin submits that the Appeals Chamber has the authority to render interlocutory decisions on provisional release<sup>24</sup> and that “[n]o incompatibility arises from pursuing the so-called ‘normal appellate process’ while at the same time bringing motions for provisional release”.<sup>25</sup>

### III. APPLICABLE LAW

17. 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:

<sup>17</sup> Motion, para. 7.

<sup>18</sup> Motion, para. 8. *See* Guarantee from Republika Srpska.

<sup>19</sup> Motion, para. 9.

<sup>20</sup> 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.

<sup>21</sup> Consolidated Response, paras 3, 12.

<sup>22</sup> 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.

<sup>23</sup> Consolidated Response, paras 3, 13.

<sup>24</sup> Consolidated Reply, para. 4.

<sup>25</sup> Consolidated Reply, para. 6.

- (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.

18. These requirements must be “considered cumulatively” and “the discretionary assessment of whether they have been met is made on a case-by-case basis”.<sup>26</sup> The Appeals Chamber further 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”.<sup>27</sup>

#### IV. DISCUSSION

19. 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”.<sup>28</sup> The jurisprudence provides that “special circumstances related to humane and compassionate considerations exist where there is an acute justification, such as the applicant’s medical need or a memorial service for a close family member”.<sup>29</sup> The Appeals Chamber has further found that other exceptional factors may amount to special circumstances within the meaning of Rule 65(I)(iii) of the Rules.<sup>30</sup>

20. The Appeals Chamber is of the view that the fact that Župljanin has filed the Motion to Vacate Trial Judgement, which is currently pending before the Appeals Chamber and which may or may not be successful, does not, in any way, amount to special circumstances as required under

<sup>26</sup> *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, 10 July 2012 (confidential) (“*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.

<sup>27</sup> *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.

<sup>28</sup> *Pandurević* Decision of 11 January 2012, para. 10; *Prosecutor v. Vujadin Popović et al.* 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.

<sup>29</sup> *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.

<sup>30</sup> 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.

Rule 65(I)(iii) of the Rules. Special circumstances cannot be established by the mere fact that Župljanin repeats the same arguments which he has also submitted as a basis for his request to amend his notice of appeal<sup>31</sup> as well as the subsequent Motion to Vacate Trial Judgement.<sup>32</sup> Applying the rationale behind Župljanin's submissions would lead to provisionally release any appellant who raises an issue of the alleged "likely invalidity" of his or her conviction.<sup>33</sup> The Appeals Chamber notes, without prejudice to the adjudication of the Motion to Vacate Trial Judgement, that Župljanin has been tried, found guilty, and sentenced to 22 years' imprisonment.<sup>34</sup>

21. Moreover, any issue relating to Župljanin's right to a fair trial raised in the Motion to Vacate Trial Judgement will be addressed 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.

22. 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.

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<sup>31</sup> [Ž]upljanin's Second Request to Amend his Notice of Appeal and Supplement his Appeal Brief, 9 September 2013, para. 1.

<sup>32</sup> Motion to Vacate Trial Judgement, para. 26.

<sup>33</sup> Motion, paras 4-5


<sup>34</sup> Trial Judgement, Vol. 2, para. 956.

**V. DISPOSITION**

23. 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.



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Judge Carmel Agius  
Presiding

**[Seal of the Tribunal]**