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**UNITED
NATIONS**



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-04-81-T
Date: 6 April 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Decision of: 6 April 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON MR. PERIŠIĆ'S MOTION FOR
PROVISIONAL RELEASE DURING THE EASTER
COURT RECESS**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (“Tribunal”) is seized of “Mr. Perišić’s Motion for Provisional Release During the Easter Court Recess”, filed publicly with confidential Annexes on 30 March 2009 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS

1. In its Motion, the Defence moves the Trial Chamber to grant Momčilo Perišić (“Accused”) temporary provisional release between 9-19 April 2009.¹
2. In support of its Motion, the Defence submits that:
 - a) The Accused poses no risk of flight, nor a danger to any victim, witness or other person;²
 - b) The Accused has always behaved respectfully towards the Trial Chamber and has always been in full compliance with the terms and conditions of prior periods of provisional release;³
 - c) The trial is still at an early stage;⁴
 - d) The Accused surrendered voluntarily to the Tribunal on 7 March 2005, within three days of being formally notified of the indictment against him;⁵
 - e) The Accused voluntarily co-operated with the Office of the Prosecutor (“OTP”) prior to being indicted;⁶
 - f) The government of the Republic of Serbia has provided guarantees in support of the Accused’s provisional release;⁷
 - g) In other cases before the Tribunal, temporary provisional release has been granted to accused persons during breaks in trial proceedings;⁸

¹ Motion, paras 1-2, p. 6.

² Motion, sub-para. a), p. 3.

³ Motion, sub-para. b), p. 4; sub-para. f), p. 5.

⁴ Motion, sub-para. c), p. 4.

⁵ Motion, sub-para. d), p. 4.

⁶ Motion, sub-para. e), p. 4.

⁷ Motion, sub-para. g), p. 5; Motion, Confidential Annex B.

⁸ Motion, sub-para. h), p. 5.

- h) The Accused appends his personal guarantee, whereby he undertakes to abide by any and all conditions imposed by the Trial Chamber should his request be granted;⁹
- i) The Accused wishes to spend the recess period actively participating in preparations for his case with his team members who are based in Belgrade, in particular his investigator;¹⁰
- j) The Accused's granddaughter was born on 13 January 2009 and he has not yet met her or had opportunity to spend time with her and would like to avail himself of the upcoming recess to do so.¹¹

3. On 2 April 2009, the "Prosecution Response to Mr. Perišić's Motion for Provisional Release During the Easter Court Recess" ("Response") was filed whereby the Prosecution opposes the Motion.¹²

4. In support of its position, the Prosecution submits that the following changes in circumstances have occurred since the Trial Chamber granted the Accused provisional release during the winter recess:¹³

- a) The Prosecution case is at a significantly more advanced stage as the Trial Chamber has heard additional 31 witnesses and admitted additional 1844 exhibits. Moreover, the Prosecution points out that a number of these witnesses gave testimony relating to the acts and conduct of the Accused.¹⁴
- b) The Accused's request relates to a short period of time, outside of the scheduled biannual court recess.¹⁵

5. On 3 April 2009, "Mr. Perišić Reply to Prosecution Response to Mr. Perišić's Motion for Provisional Release During the Easter Court Recess" ("Reply") was filed¹⁶ whereby the Defence points out that the Prosecution has presented less than half of its anticipated case to date as well as the fact that no new issues have arisen from the testimony of the witnesses who testified since

⁹ Motion, sub-para. a), p. 3; Motion, Confidential Annex C.

¹⁰ Motion, sub-para. i), p. 5.

¹¹ Motion, sub-para. j), p. 5.

¹² Response, paras 1, 6.

¹³ See Decision on Mr. Perišić's Motion for Provisional Release During the Winter Court Recess, 17 December 2008 ("17 December Decision").

¹⁴ Response, paras 3-4.

¹⁵ Response, paras 3, 5. The Prosecution recalls the Trial Chamber in *Gotovina et al.* case in denying Mr Čermak's request for provisional release for ten days between the end of the Prosecution case and the commencement of oral submissions under Rule 98bis, held that "[t]he duration of the preparatory period constitutes both a relevant and material change in circumstance", Response, para. 5, with further references.

¹⁶ The leave to file a reply was orally granted by the Trial Chamber on 2 April 2009, T. 5233.

Christmas that should lead to denial of the Accused's request for provisional release.¹⁷ Furthermore, the Defence submits that there is nothing in Rule 65 or the jurisprudence of the Tribunal which sets a minimum time limit for provisional release or limits the provisional release to winter or summer recess.¹⁸

6. Finally, the Trial Chamber notes that the Host Country was invited to indicate whether it has any objections to the Accused being provisionally released. In its letter of 2 April 2009, the Host State did not raise any objection in this matter.

II. APPLICABLE LAW

7. Rule 65 of the Rules governs provisional release. It provides, in relevant part:

(A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

8. The Defence bears the onus, on a balance of probabilities, that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.¹⁹

9. In deciding whether the requirements of Rule 65(B) of the Rules 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 reaching a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.²⁰ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²¹

¹⁷ The Defence further submits that the Accused has been aware of the vast majority of exhibits and MFI documents now on record since before the 17 December Decision, Reply, paras 2-3.

¹⁸ Reply, para. 4.

¹⁹ See *Prosecutor v. Lazarević*, "Decision on Defence Request for Provisional Release", Case No. IT-03-70-PT, 14 April 2005 (footnote omitted), p. 2.

²⁰ *Prosecutor v. Haradinaj, Balaj and Brahimaj*, 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, para. 8.

²¹ *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, para. 8.

III. DISCUSSION

10. As a preliminary point, the Trial Chamber recalls the finding of the Appeals Chamber that “an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist”.²² By way of argument *a contrario*, the Trial Chamber finds that the existence of a sufficiently compelling humanitarian reason for provisional release at an earlier stage of the proceedings—as is the case here—is *not* required.

11. As regards whether the Accused, if released, will return for trial, the Trial Chamber took into consideration the seriousness of the allegations against the Accused, as well as the current stage of the proceedings. However, the Trial Chamber was also guided by the ruling of the European Court of Human Rights that “the gravity of the charges cannot by itself serve to justify long periods of detention on remand”.²³ Moreover, the Trial Chamber gave due consideration to the fact that the Accused voluntarily surrendered to the Tribunal as soon as he was made aware of the indictment against him²⁴ and that on earlier occasions, he has always been in full compliance with the terms and conditions provisional release.²⁵ Finally, the Accused has demonstrated his willingness to cooperate with the Prosecution by giving several interviews prior to being indicted.²⁶

12. Furthermore, the Trial Chamber notes the personal guarantee by the Accused in which he undertook to comply with any order issued by the Trial Chamber.²⁷ The Trial Chamber also took into consideration, and gave appropriate weight to, the guarantee given by the Republic of Serbia.²⁸

13. For these reasons and subject to the terms and conditions imposed by this Decision, the Trial Chamber is satisfied that the Accused, if released, will return for trial.

14. As regards whether the Accused, if released, will not pose a danger to any victim, witness or other person, the Trial Chamber notes that there is nothing in the evidence to suggest that the Accused interfered or would interfere with the administration of justice. In this regard, the Trial

²² *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, 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, para. 17.

²³ *Ilijakov v. Bulgaria*, European Court of Human Rights, Judgement of 26 July 2001, para. 81 as referred to in *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj Motion for Provisional Release, 6 June 2005, para. 24. See *Prosecutor v. Franko Simatović*, Decision on Prosecution’s Appeal Against Decision on Provisional Release, Case No. IT-03-69-AR65.2, 3 December 2004, para. 15.

²⁴ See 17 December Decision, para. 10.

²⁵ See 17 December Decision.

²⁶ See 17 December Decision, para. 10.

²⁷ Motion, Confidential Annex C.

²⁸ Motion, Confidential Annex B.

Chamber also took into account the personal undertaking of the Accused and his conduct during previous periods of provisional release.

15. For these reasons and subject to the terms and conditions imposed by this Decision, the Trial Chamber is satisfied that the Accused, if released, will not pose a danger to any victim, witness or other person.

16. The Trial Chamber recalls that there is no right of an accused to provisional release during the court recess derived from the presumption of innocence; rather, subject to the requirements of Rule 65 (B) being met, it is based on judicial discretion.²⁹

17. In exercising this discretion, the Trial Chamber took into account the family circumstances of the Accused as set forth in the Motion,³⁰ but attributed limited weight to them. The same holds true for the submission that provisional release would facilitate the Accused's ability to prepare his defence.³¹

18. The Trial Chamber had full regard for the fact that the Prosecution's case is indeed more advanced now than it was in December 2008. However, the Trial Chamber does not base its discretion on the facts of a previous ruling. In the instant case, the Trial Chamber is satisfied that it should exercise its discretion in favour of the Accused's request, notwithstanding that he will be released only for a relatively short amount of time.

²⁹ See also *Prosecutor v. Milutinović et al.*, Decision on Joint Defence Motion for Provisional Release During Winter Recess, Case No. IT-05-87-T, 5 December 2006, para. 12.

³⁰ Motion, sub-para. j), p. 5.

³¹ Motion, sub-para. i), p. 5.

IV. DISPOSITION

19. For the reasons set out above and pursuant to Rules 54 and 65 of the Rules, the Trial Chamber hereby:

GRANTS the Motion in part, and

(1) **ORDERS** the provisional release of Momčilo Perišić subject to the following terms and conditions:

- a. As soon as practicable, on or after 9 April 2009, the Accused Momčilo Perišić shall be transported to Schiphol airport in the Netherlands by the Dutch authorities;
- b. At Schiphol airport, the Accused shall be provisionally released into the custody of an official of the government of the Republic of Serbia to be designated prior to release in accordance with operative paragraph 2(a) hereof, who shall accompany the Accused for the remainder of his travel to the Republic of Serbia and to his place of residence;
- c. On his return, the Accused shall be accompanied by the same designated official of the government of the Republic of Serbia, who shall deliver the Accused to the custody of the Dutch authorities at Schiphol airport on or before 17 April 2009, and the Dutch authorities shall then transport the Accused back to the United Nations Detention Unit (“UNDU”) in The Hague;
- d. During the period of his provisional release, the Accused shall abide by the following conditions, and the authorities of the government of the Republic of Serbia, including the local police, shall ensure compliance with such conditions:
 - (i) to provide the address at which he will be staying in Belgrade to the Serbian Ministry of Justice (“Ministry of Justice”) and the Registrar of the Tribunal before leaving the UNDU in The Hague;
 - (ii) to remain within the confines of the municipality of Belgrade;
 - (iii) to surrender his passport to the Ministry of Justice;
 - (iv) to report each day, before 1 p.m., to the police in Belgrade at a local police station to be designated by the Ministry of Justice;

- (v) to consent to having the Ministry of Justice check with the local police about his presence and to the making of occasional, unannounced visits upon the Accused by the Ministry of Justice or by a person designated by the Registrar of the Tribunal;
- (vi) not to have any contact whatsoever or in any way interfere with any victim or potential witness or otherwise interfere in any way with the proceedings or the administration of justice;
- (vii) not to seek direct access to documents or archives nor destroy evidence;
- (viii) not to discuss his case with anyone, including the media, other than with his counsel;
- (ix) to continue to cooperate with the Tribunal;
- (x) to comply strictly with any requirements of the authorities of the Republic of Serbia necessary to enable them to comply with their obligations under this Order and their guarantees;
- (xi) to return to the Tribunal on or before 17 April 2009; and
- (xii) to comply strictly with any further Order of the Trial Chamber varying the terms of or terminating his provisional release;

(2) **REQUIRES** the government of the Republic of Serbia to assume responsibility as follows:

- a. to designate an official of its Government into whose custody the Accused shall be provisionally released and who shall accompany the Accused from Schiphol airport to the Republic of Serbia and to the Accused's place of residence, and to ensure that the same official shall accompany the Accused from his place of residence to Schiphol airport, where the Accused shall be delivered into the custody of the Dutch authorities, who will in turn transport him back to the UNDU;
- b. to notify, as soon as practicable, the Trial Chamber and the Registrar of the Tribunal of the name of the official designated in the previous sub-paragraph;
- c. for the personal security and safety of the Accused while on provisional release;

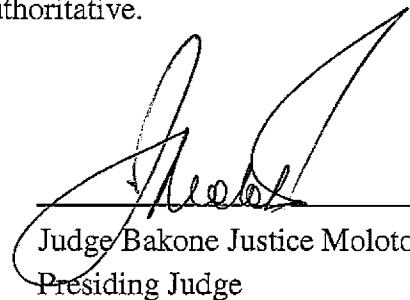
- d. for all expenses concerning transport of the Accused from Schiphol airport to Belgrade and back;
- e. for all expenses concerning accommodation and security of the Accused while on provisional release;
- f. to ensure that the Accused report once a day, no later than 1 p.m., to a local police station;
- g. to notify the Registry of the Tribunal within two hours of any failure of the Accused to report to the police station as directed;
- h. at the request of the Trial Chamber, the Prosecution or the Defence, to facilitate all means of cooperation and communication between the parties and to ensure the confidentiality of any such communication;
- i. to submit a written report to the Trial Chamber every week as to the compliance of the Accused with the terms of this Decision;
- j. to arrest and detain the Accused immediately should he breach any of the conditions of this Decision; and
- k. to report immediately to the Trial Chamber any breach of the conditions set out above;

(3) **INSTRUCTS** the Registrar of the Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for release of the Accused and to continue to detain him at the UNDU in The Hague until such time as the Trial Chamber and the Registrar have been notified of the name of the designated official of the government of the Republic of Serbia into whose custody the Accused is to be provisionally released;

(4) **REQUESTS** the authorities of all States through whose territory the Accused will travel:

- a. to hold the Accused in custody for any time that he will spend in transit at the airport;
- b. to arrest and detain the Accused pending his return to the UNDU in The Hague, should he attempt to escape.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this sixth day of April 2009

At The Hague

The Netherlands

[Seal of the Tribunal]