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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-04-83-T
Date: 5 June 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Frederick Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 5 June 2008

PROSECUTOR

v.

RASIM DELIĆ

PUBLIC

**REDACTED VERSION OF
DECISION ON DEFENCE MOTION FOR PROVISIONAL
RELEASE OF THE ACCUSED RASIM DELIĆ**

The Office of the Prosecutor:

Mr. Daryl A. Mundis

Counsel for the Accused:

Ms. Vasvija Vidović
Mr. Nicholas Robson

1. 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 the “Defence Motion for Provisional Release of the Accused Rasim Delić”, filed confidentially on 16 May 2008 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS

2. The Defence seeks provisional release of the Accused for the period commencing “immediately subsequent to the conclusion of closing arguments” and ending when “the Trial Chamber reconvenes to issue its judgement” (the “Provisional Release Period”).¹ Closing arguments are scheduled for Monday 9 and Tuesday 10, and, if needed, Wednesday 11 June 2008.²

3. The Defence submits that the Accused will appear for the conclusion of the case and, if released, will not pose a danger to any victim, witness or other person. In support of this, the Defence submits that: (1) the Accused surrendered voluntarily to the custody of the Tribunal;³ (2) the Accused has previously cooperated with the Prosecution;⁴ (3) that the Government of the Federation of BiH’s assurances carry “significant weight” given the “senior position” the Accused “formerly held in the Army of BiH”.⁷ (4) the Accused was granted provisional release on two prior occasions;⁹ (5) the Accused has provided a signed statement attesting that he will return to the Tribunal as directed by the Trial Chamber, and will not contact any victim, witness or other person;¹⁰ (6) the Accused would comply with various terms and conditions of release subject to orders of the Trial Chamber.¹¹

4. On 7 May 2008, the Government of the Federation of Bosnia and Herzegovina submitted that it will ensure that the Accused will respond to “any call of the International Tribunal”.¹²

5. On 22 May 2008, the Ministry of Foreign Affairs (“MFA”) of The Netherlands submitted, as the host country, that it has no objection to “the practical consequences relating” to a provisional release of the Accused.¹³

¹ Motion, para. 1.

² See *Scheduling Order for Case Completion* dated 22 April 2008.

³ Motion, para. 18.

⁴ Motion, para. 19.

⁷ Motion, para. 21.

⁹ Motion, paras 8 and 12. See also Response, paras 5-6.

¹⁰ Motion, Annex B.

¹¹ Motion, para. 31.

¹² Motion, para 20; Motion, Annex A.

¹³ See “Correspondence from Host Country” dated 8 April 2008 and submitted 22 May 2008.

6. On 30 May 2008, the Prosecution confidentially filed its “Response to the Defence Motion for Provisional Release” (“Response”), whereby it opposes provisional release of the Accused on three grounds: (1) the Accused’s personal guarantee does not outweigh his increased flight risk; (2) the Accused has not demonstrated a compelling humanitarian reason for being granted provisional release; (3) consideration of the victims and witnesses warrants the denial of provisional release.¹⁴

7. In support of its objection to the provisional release, the Prosecution notes that the Accused breached a condition of release during his second provisional release;¹⁵ that the Defence has failed to mitigate the increased flight risk presented when provisional release is granted subsequent to a Rule 98 *bis* ruling;¹⁶ and that granting provisional release to the Accused in light of the Accused’s prior provisional-release breach would be an injustice and could have a prejudicial effect on victims and witnesses.¹⁷

8. On 2 June 2008, the Defence confidentially filed its “Reply to Prosecution Response to Defence Motion for Provisional Release” (“Reply”). The Defence reiterates the presumption of innocence to be accorded the Accused, and contends that the Prosecution made a number of incorrect assertions in its Response.¹⁸ The Defence contends, among other things, that according to the jurisprudence of the Tribunal, it is not required to prove the existence of the compelling humanitarian reason for provisional release.¹⁹

II. APPLICABLE LAW

9. Pursuant to Rule 65(A) of the Rules of Procedure and Evidence, 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.²⁰

¹⁴ Response, para. 2.

¹⁵ Response, para. 13.

¹⁶ Response, para. 16.

¹⁷ Response, para. 21.

¹⁸ *E.g.*, the Defence suggests that the Rule 98 *bis* decision favoured the Defence, in that the Defence pursued an acquittal in respect of one count of the indictment and was successful. Additionally, the Defence asserts that as a retired Army officer with a “settled home and family in Bosnia and Herzegovina”, the Accused will not flee the country.

¹⁹ Reply, para. 5.

²⁰ *Prosecutor v. Prlić*, Case No. IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Ćorić, 11 March 2008 (“Prlić 11 March 2008 Decision”), para. 6.

10. The Defence bears the burden of proof, 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.²¹

11. 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 coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.²² What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²³ 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 Tribunal.²⁴

12. The existence of compelling humanitarian reasons will only become relevant if the accused has met the prerequisite requirements of Rule 65(B), which must be satisfied for the Trial Chamber to have the discretion to consider granting that provisional release.²⁵

III. DISCUSSION

13. As a preliminary point, the Trial Chamber reiterates the finding of the Appeal 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”.²⁶ As any humanitarian reasons are to be considered only after the requirements of Rule 65(B) have been met by the Defence, the Trial Chamber will address the two

²¹ See *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4, Decision on Defence Motion for Provisional Release of the Accused Bajrush Morina, 13 May 2008, para. 8; See also, *Prosecutor v. Lazarević*, Case No. IT-03-70-PT, “Decision on Defence Request for Provisional Release”, 14 April 2005 (footnote omitted), p. 2.

²² *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.

²³ *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. 8.

²⁴ *Prlić* 11 March 2008 Decision, para 7.

²⁵ *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, quoting *Prosecutor v. Boškoški and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 27 July 2007 (“*Tarčulovski* Decision”), para. 14, whereby the Appeals Chamber recalled that “a Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person. It is in this context that any humanitarian grounds have to be assessed”. In applying the above principle of law, the Appeals Chamber proceeded in considering that “[t]he Trial Chamber considered the birth of his second child in the Impugned Decision and found that ‘the arrival of a baby is not a strong weight in the assessment of the likelihood of the Accused’s future attendance at the trial or of the interests of justice in this case’. Therefore, the Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in denying the Appellant’s request for provisional release despite his family situation, since in light of other relevant factors it was not satisfied that the Appellant would appear for trial, if provisional released”.

²⁶ *Ibid.*

Rule 65(B) requirements (*i.e.*, risk that the Accused would not return to the Tribunal, and the potential danger to victims, witnesses or other persons if provisionally released) first.

A. Potential Flight Risk

14. The Prosecution opposes provisional release at this stage in the proceedings (*i.e.*, post Rule 98 *bis* findings and with all the evidence having been presented), as it contends that these factors present too great a risk of the Accused's flight as to warrant provisional release.²⁷

15. The Defence submits that the Accused will reside in one of two locations if provisionally released,²⁸ that he would report weekly to the local police,²⁹ and "consent to unannounced visits by the Federation of BiH Ministry of Justice or by a person designated by the Registrar of the Tribunal".³⁰

16. The Accused has provided a written guarantee that he will comply with all Tribunal orders if provisionally released.³¹ The Prosecution contends that such a guarantee has been rendered worthless due to the Accused's breach of a Tribunal condition during his second provisional release.³² However, the Trial Chamber notes that that breach was not found to increase the flight risk of the Accused and he was placed on conditional house arrest, as opposed to being returned to the United Nations Detention Unit ("UNDU"), for the remainder of the release period.³⁴

17. The Trial Chamber recognises that in certain cases, post Rule 98 *bis* rulings may constitute significant enough change in circumstance to warrant renewed and explicit consideration of the risk of flight by an accused.³⁵ However, "such an assessment does not constitute a fixed requirement of the Rules".³⁶

18. The Trial Chamber has given appropriate weight to the fact that the present Motion was filed after a Rule 98 *bis* decision. Given the safeguards set forth by the Defence, the Trial Chamber is satisfied that the Accused would return to the Tribunal if provisionally released.

²⁷ Response, para. 15.

²⁸ Motion, para. 29.

²⁹ Motion, para. 31(d).

³⁰ Motion, para. 31(e).

³¹ Motion, Annex B.

³² Response, para. 15.

³⁴ Response, para. 14.

³⁵ *Prlić* 11 March 2008 Decision, paras 20-22.

³⁶ *Prosecutor v. Popović et al.*, Case Nos. IT-05-88-AR65.4, IT-05-88-AR65.5 and IT-05-88-AR65.6, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's Motions for Provisional Release During the Break in the Proceedings, 15 May 2008, ("*Popović* Decision"), para. 22.

B. Potential Danger to Victims, Witnesses or Other Persons

19. The Trial Chamber notes that no evidence has been presented that the Accused endangered any victim, witness or other person during his prior two provisional releases. The Accused did breach a condition of his second provisional release, however, by speaking with BiH Presidency member Haris Silajdžić.³⁷ The Accused spent the remainder of that provisional release under house arrest and returned to the Tribunal at the end of that provisional release period.³⁸

20. The Trial Chamber further notes that the Accused has provided a written statement attesting that he would comply with any conditions set forth by the Tribunal during his requested provisional release including abstaining from speaking with any BiH official, member of the media, victim, prosecution witness, or other person.³⁹

21. As both parties have concluded their arguments and presented all evidence that will be considered for the final judgement,⁴⁰ the Trial Chamber finds that the Accused is not in a position to prejudice the case. Given the lack of any allegations that the Accused endangered anyone during his previous provisional releases, combined with the written assurance by the Accused that he will comply with all orders of the Tribunal should he be granted provisional release, the Trial Chamber finds that the Defence has reasonably met its burden that, on a balance of probabilities, the Accused will not pose a danger to any victim, witness or other person.

C. Lack of Sufficient Humanitarian Reasons for Provisional Release

22. “[P]rovisional release should only be granted at a late stage of the proceedings, and in particular after the close of the Prosecution case, when sufficiently compelling humanitarian reasons exist to justify the release”.⁴¹ The Defence contends that it does not need to demonstrate a sufficiently compelling humanitarian reason in order for the Accused to be granted provisional release,⁴² yet it concedes that the majority in the Appeals Chamber has held that “‘compelling humanitarian reasons’ should be shown to exist at this stage”.⁴³ The Defence notes two dissenting opinions to the majority’s holding,⁴⁴ however, the Trial Chamber is bound by the majority holdings

³⁷ Response, para. 21.

³⁸ Motion, para. 24-26. *See also* Response, paras 13-14.

³⁹ Motion, Annex B.

⁴⁰ The Prosecution completed its case-in-chief on 10 February 2008. The Defence completed its case on 21 April 2008.

⁴¹ *Prosecutor v. Prlić et al.*, Decision on ‘Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prlić* dated 7 April 2008’, 25 April 2008 (“*Prlić* 25 April 2008 Decision”), para 16.

⁴² Reply, para. 5.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

of the Appeals Chamber, and the Appeals Chamber has required a compelling humanitarian reason to justify provisional release in more than one recent case.⁴⁵

23. The Defence did not label any of its requests for provisional release as “humanitarian”. However, the Prosecution has addressed two grounds set forth by the Defence, which the Defence may have sought to assert as humanitarian [REDACTED].

24. Neither factor taken alone, or even in conjunction, presents a sufficiently compelling humanitarian reason for provisional release. The Defence has not stated that the “medical assessments” provided for the Accused at the UNDU have been insufficient or that they have risked the health of the Accused. The Defence has merely stated that *if* the Accused was granted provisional release “he would be able to do [*sic*] have the tests carried out under the direction of his own medical practitioner in Sarajevo” who also provides medical treatment for [REDACTED] of the Accused.⁴⁶ The Defence provides no compelling justification for conducting medical assessments in Sarajevo vis-à-vis the medical unit at the UNDU.

25. The second potential humanitarian ground asserted by the Defence is that the Accused wishes to visit his [REDACTED] brother in Brcko. The Defence states that this same request was granted by the Trial Chamber in response to the Defence’s First Provisional Release Motion dated 1 April 2005.⁴⁷ However, the First Provisional Release Motion was filed and decided on prior to the “sufficiently compelling humanitarian” standard set forth in *Prosecutor v. Prlić et al.*⁴⁸ As such, although a visit by the Accused to his [REDACTED] brother may not violate Rule 65(B), it does not automatically constitute a compelling humanitarian reason for provisional release.

26. The granting of provisional release is a fact-intensive process.⁴⁹ There has been no assertion by the Defence that the Accused’s brother is terminally ill or that there is an urgent matter necessitating that the Accused visit Brcko. It is noted that the Appeals Chamber has upheld the granting of provisional release in instances where an accused’s family member was in critical

⁴⁵ See *Popović Decision*, in which the Appeals Chamber required a compelling humanitarian standard for accused Borovčanin (“*Borovčanin Decision*”), para. 17; for accused Gvero (“*Gvero Decision*”), para. 24; and accused Miletić (“*Miletić Decision*”), para. 31-32. See also *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.9, *Decision on Prosecution’s Appeal from Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Stojić Dated 8 April 2008*, 29 April 2008, para. 13, in which an accused, Stojić, was required to demonstrate a compelling humanitarian reason for provisional release (“*Stojić Decision*”); and *Prlić 25 April 2008 Decision*, para. 16, noting a compelling humanitarian standard for accused Prlić.

⁴⁶ *Ibid.*

⁴⁷ See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, *Decision on Defence Request for Provisional Release*, 6 May 2005, p. 5.

⁴⁸ *Prlić 11 March 2008 Decision*, para. 21.

⁴⁹ *Prlić 25 April 2008 Decision*, para. 18.

condition.⁵⁰ Even with such a humanitarian reason present, the accused in that case was required to spend each night in a local detention facility.⁵¹ The Appeals Chamber held that even with such protective provisions in place, the duration of the release must be proportional to the humanitarian justification asserted.⁵² In the present case, the Accused seeks an open-ended release period and requests to reside in his own home, checking in with police just once a week.⁵³

27. Additionally, in *Prlić et al.*, where humanitarian reasons for release were recognised,⁵⁴ the Trial Chamber granted the accused provisional release for two weeks. The Appeals Chamber, however, remanded the case back to the Trial Chamber, holding that “a Trial Chamber properly exercising its discretion would have granted provisional release for a period no longer than the time necessary for the Accused to visit his ailing family members”.⁵⁵ Thus, two weeks was excessive even when such humanitarian reasons were present. In the present case, no such humanitarian reasons exist, and the Accused requests an open-ended release period.

28. Although the Accused benefits from a presumption of innocence pursuant to Article 21(3),⁵⁶ and the Trial Chamber has found that the requirements set forth in Rule 65(B) are met (*i.e.*, the Accused will return to the Tribunal, and that on a balance of probabilities, the Accused would not pose a danger to any victim, witness or other person), the Motion fails to provide a sufficiently compelling humanitarian justification.⁵⁷ Thus, provisional release is not warranted.

IV. DISPOSITION

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

GRANTS leave to file the Reply, and

DENIES the Motion.

⁵⁰ See *Borovčanin* Decision, paras 14 and 17.

⁵¹ *Ibid* at para. 16.

⁵² *Ibid* at para. 18. (The Trial Chamber granted the accused provisional release for seven days, including travel time. The Appeals Chamber held, however, that seven days was too long for the humanitarian reason asserted, and remanded the matter back to the Trial Chamber to shorten the provisional release period.) See also, *Popović* Decision, paras 11, 18 and 32.

⁵³ Motion, paras 29 and 31(d).

⁵⁴ *Prlić* 25 April 2008 Decision, para. 17-18. (The accused’s father was aged 80, almost blind and had recently undergone surgery for cancer. Additionally, the accused’s brother had just undergone surgery and was deteriorating in health.)

⁵⁵ *Ibid* at para. 19.

⁵⁶ Reply, para 8.

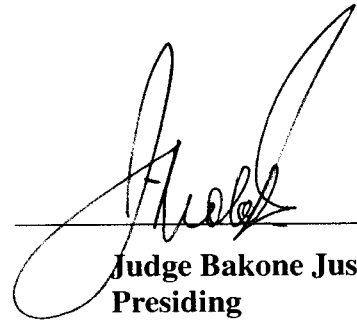
⁵⁷ See *Prlić* 25 April 2008 Decision, para.16, which requires that after the requirements of Rule 65(B) have been satisfied, the Defence must also demonstrate a sufficiently compelling reason warranting provisional release.

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

Dated this fifth day of June 2008

At The Hague

The Netherlands



**Judge Bakone Justice Moloto
Presiding**

[Seal of the Tribunal]