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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: 17 December 2008

Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. Hans Holthuis

Decision of: 17 December 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON MR. PERIŠIĆ'S MOTION FOR
PROVISIONAL RELEASE
DURING THE COURT'S WINTER 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 Winter Court Recess”, filed publicly with confidential Annexes on 5 December 2008 (“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 for the duration of the winter recess (22 December 2008 – 13 January 2009).¹
2. In support of its Motion, the Defence submits that:
 - a) The Accused surrendered voluntarily to the Tribunal on 7 March 2005, within three days of being formally notified of the indictment against him;²
 - b) The Accused voluntarily co-operated with the Office of the Prosecutor (“OTP”) prior to being indicted;³
 - c) The Accused has always behaved respectfully towards the Trial Chamber and has always been in full compliance with the terms and conditions of his provisional release;⁴
 - d) The government of the Republic of Serbia has provided guarantees in support of the Accused’s provisional release;⁵
 - e) In other cases before the Tribunal, temporary provisional release has been granted to accused persons during breaks in trial proceedings and that the presumption of innocence is an important consideration in this regard;⁶
 - f) 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;⁷

¹ Motion, paras 1-2, p. 6.

² Motion, para. 7.

³ Motion, para. 8.

⁴ Motion, paras 9-10.

⁵ Motion, para. 11; Motion, Confidential Annex B.

⁶ Motion, para. 14.

⁷ Motion, para. 12; Motion, Confidential Annex C.

- g) Since the Accused's defence team has planned to work from Belgrade for the majority of the recess period, granting the provisional release in this case would shorten the necessary time needed for the preparation of the defence case since "[i]t is important to the logical and efficient preparation for the resumption of trial proceedings for Mr. Perišić to be present in Belgrade so that he can assist his counsel with day to day information and advise";⁸

3. On 16 December 2008, the "Prosecution's Opposition to Defence Motion for Provisional Release of Momčilo Perišić" was publicly filed ("Response"), whereby the Prosecution opposes the Motion and alternatively, if provisional release were to be granted, asks for more stringent release conditions than those in existence during the Accused's pre-trial provisional release.⁹ The Prosecution requests that the Trial Chamber order the Accused to not seek direct access to documents or archives, nor destroy evidence; moreover, the authorities of Serbia shall (a) ensure that the daily report of the Accused to the police take place before 1 p.m.; (b) notify the Registry of the Tribunal within two hours of any failure of the Accused to report to the police station as directed; (c) place the Accused under 24 hours surveillance and maintain a written daily log of his movements, which log is to be made available to the Trial Chamber upon request; and (d) immediately transfer the Accused back to The Hague should he breach any terms and conditions of his provisional release.¹⁰

4. In support of its position, the Prosecution submits that:

- a) The Tribunal is wholly dependant on the co-operation of States to monitor effectively compliance with relevant orders relating to provisional release and in the present case, Serbia's compliance with the Chamber's previous provisional release orders has not been reassuring;¹¹
- b) Since the trial of Momčilo Perišić has started, more stringent conditions of release of the Accused and the reporting requirements by Serbia, as compared with the conditions imposed during the pre-trial phase, are warranted;¹²
- c) Given that the Defence had unfettered access to the Accused prior to the commencement of trial as well as throughout these proceedings, greater efficiency of working in Belgrade is not sufficient reason to release the Accused during the winter recess;¹³

⁸ Motion, para. 13.

⁹ Response, paras 2-3, 18. *See* Decision on Momčilo Perišić's Motion for Provisional Release, 9 June 2005 ("Pre-Trial Provisional Release Decision").

¹⁰ *See* Response, paras 16-17.

d) There is no right to holiday or recess leave for the Accused at the Tribunal and while provisional release has been granted during breaks in some cases, it has been rejected in others. The Prosecution submits in this regard that presumption of innocence is not a determinative in assessing provisional release.¹⁴

5. The Prosecution does not take issue with the Defence arguments presented in paragraph 2 (a)-(c) and (f) of the present Decision.¹⁵

II. APPLICABLE LAW

6. 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.

7. 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.¹⁶

8. 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.¹⁷ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁸

¹¹ Response, paras 10-11, referring to Decision on Request for Alteration of Conditions of Provisional Release, 14 August 2006, para. 8.

¹² Response, paras 12, 15.

¹³ Response, para. 13.

¹⁴ Response, para. 14, referring to *Prosecutor v. Milutinović et al.*, Decision on Joint Defence Motion for Provisional Release During Winter Recess, Case No. IT-05-87-AR65.2, 14 December 2006, para. 12.

¹⁵ Response, para. 8.

¹⁶ See *Prosecutor v. Lazarević*, "Decision on Defence Request for Provisional Release", Case No. IT-03-70-PT, 14 April 2005 (footnote omitted), p. 2.

¹⁷ *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.

¹⁸ *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.

III. DISCUSSION

9. As a preliminary point, the Trial Chamber recalls 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”.¹⁹ By way of argument *a contrario*, the Trial Chamber finds that the existence of a sufficiently compelling humanitarian reason for provisional release at the early stage of the proceedings—as is the case here—is *not* required.

10. As regards whether the Accused, if released, will return for trial, the Trial Chamber takes into consideration the seriousness of the allegations against the Accused. However, recalling 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”,²⁰ the Trial Chamber also considers that the Accused has not attempted to evade justice in any way and that the Accused voluntarily surrendered to the Tribunal as soon as he was made aware of the indictment against him.²¹ The Trial Chamber notes that the Accused has given several interviews to the OTP prior to being indicted.²² Finally, the Trial Chamber notes that the Accused has always been in full compliance with the terms and conditions of his pre-trial provisional release.²³

11. 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.²⁴ The Trial Chamber also took into consideration, and gave appropriate weight to, the guarantee given by the Republic of Serbia.²⁵

12. 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.

13. 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. Moreover, the Trial

¹⁹ *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.

²⁰ *Ilijkov 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.

²¹ See Pre-Trial Provisional Release Decision, p. 2.

²² See Pre-Trial Provisional Release Decision, p. 3.

²³ See Pre-Trial Provisional Release Decision.

²⁴ Motion, Confidential Annex C.

²⁵ Motion, Confidential Annex B.

Chamber considers the personal undertaking of the Accused to comply with any order of the Trial Chamber.

14. 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.

15. The Trial Chamber concurs with the Prosecution's submission 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.²⁶ In exercising its discretion, the Trial Chamber took into account the fact that the Defence team plans to work from Belgrade during the recess period and that the Accused's presence in the Republic of Serbia at that time would facilitate the preparation of his defence. However, these considerations did not carry much weight in the Trial Chamber's decision on the Accused's request for provisional release.

16. As to the conditions of the eventual provisional release proposed by the Prosecution, the Trial Chamber finds that neither the example of Serbia's non-compliance with the conditions of the pre-trial provisional release referred to by the Prosecution in its Response,²⁷ nor the recent start of the trial, warrant the imposition of a 24-hour surveillance on the Accused.

17. Furthermore, the Trial Chamber is not satisfied that every breach of the conditions and terms of the provisional release automatically warrants the transfer of the Accused back to The Hague, as proposed by the Prosecution.²⁸ Rather, it is for the Trial Chamber to decide, in each case it is notified of an alleged breach, what measures are appropriate to take.

18. 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 11 December 2008, the Host State did not raise any objection in this matter.

²⁶ 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.

²⁷ In its "Decision on Request for Alteration of Conditions of Provisional Release", 14 August 2006, para. 8, the Trial Chamber III, then seized of the case, stated that: "The Trial Chamber notes, as it did in the earlier decisions granting the Accused's requests for modification of conditions of his provisional release dated 20 January 2006 and 11 May 2006, that the Government of the Republic of Serbia has not complied with the Chamber's order that during the period in which the Accused is allowed to travel to Koštunići the Government shall submit a report on the Accused's compliance with the modified terms of his release every two weeks and not on a monthly basis, as required under the original terms of his release. The Trial Chamber reiterates that it expects this condition of the Decision to be strictly adhered to."

²⁸ See Response, para. 17 (m).

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 22 December 2008, 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 9 January 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 9 January 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;

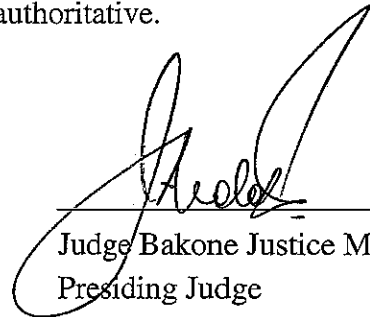
- d. for all expenses concerning transport of the Accused from Schiphol airport to Belgrade and back;
- e. for all expenses concerning accommodation and security of the Accused while on provisional release;
- f. to ensure that the Accused report once a day, no later than 1 p.m., to a local police station;
- 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 seventeenth day of December 2008

At The Hague

The Netherlands

[Seal of the Tribunal]