

**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: 7 December 2009

Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. John Hocking

Decision of: 7 December 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON MR. PERIŠIĆ'S MOTION FOR
PROVISIONAL RELEASE**

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 the former Yugoslavia since 1991 (“Tribunal”) is seised of “Mr. Perišić’s Motion for Provisional Release”, filed publicly with confidential Annexes on 19 November 2009 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS

1. The Defence submits that the Prosecution rested its case and recalls that the trial proceedings are currently adjourned until the commencement of the Defence case, scheduled for 25 January 2010.¹
2. In its Motion, the Defence requests the Trial Chamber to grant Momčilo Perišić (“Accused”) provisional release for the duration of the current break in trial until the commencement of the Defence case scheduled for 25 January 2010 on the same terms and conditions under which he was previously on provisional release or under such conditions as are deemed appropriate pursuant to Rule 65 (C) of the Rules of Procedure and Evidence (“Rules”).²
3. In support of its Motion, the Defence makes the following submissions:
 - a. The Accused poses no risk of flight or danger to any victim, witness or other person and he appends his personal guarantee whereby he undertakes to abide by any and all conditions imposed by the Trial Chamber should his request be granted;³
 - b. The Accused has always been in full compliance with the terms and conditions of his provisional release;⁴
 - c. The Accused voluntarily co-operated with the Office of the Prosecutor prior to being indicted and voluntarily surrendered to the Tribunal within three days of being formally notified of the Indictment;⁵
 - d. The Accused has always acted respectfully towards the Trial Chamber;⁶

¹ Motion, para. 1.

² Motion, para. 2, citing Decision on Momčilo Perišić’s Motion for Provisional Release, 9 June 2005; Decision on Momčilo Perišić’s Motion for Provisional Release During the Court’s Winter Recess, 17 December 2008; and Decision on Perišić’s Motion for Provisional Release During the Summer Court Recess, 17 July 2009 (“17 July Decision”).

³ Motion, para. 14(a); Motion, Confidential Annex B.

⁴ Motion, para. 14(b).

⁵ Motion, para. 14(c).

⁶ Motion, para. 14(d).

- e. The Government of the Republic of Serbia (“Serbian Government”) has provided guarantees in support of the Motion;⁷
 - f. It is important to the efficient preparation of the defence case for the Accused to be present in Belgrade so that he can assist his counsel with day-to-day information and advice;⁸
 - g. The time spent away from the United Nations Detention Unit (“UNDU”), particularly the opportunity to spend time with his family, would have a positive effect on the Accused’s health and well-being.⁹
4. Finally, the Defence urges the Trial Chamber to “exercise its power of discretion in a compassionate and reasonable manner in order to uphold fairness and the interests of justice”.¹⁰
5. The “Prosecution Response to Mr. Perišić’s Motion for Provisional Release” (“Response”) was filed publicly on 3 December 2009, whereby the Prosecution opposes the Motion.¹¹
6. The Prosecution submits that there has been a material change in the circumstances since the Trial Chamber granted the Accused provisional release during the summer recess in July 2009.¹²
7. The Prosecution states that the Trial Chamber has heard additional seven witnesses who provided important and credible evidence relevant to the criminal responsibility of the Accused, admitted additional 190 exhibits since the summer recess and is currently reviewing whether to remove the “Marked for Identification” designation of more than 400 exhibits.¹³ As a consequence, the Prosecution argues that the risk of flight of the Accused is substantially greater now than it was during the time of his last provisional release.¹⁴
8. The Prosecution also submits that it “effectively closed its case” and recalls that the Defence has indicated that it will not likely make submissions pursuant to Rule 98 *bis* of the Rules.¹⁵ Accordingly, the Prosecution argues that “in a practical sense, these proceedings are now at the stage where the Appeals Chamber jurisprudence requires an accused to demonstrate ‘serious and

⁷ Motion, para. 14(e); Motion, Confidential Annex C.

⁸ Motion, paras 14(f) and 14(g).

⁹ Motion, para. 14(h).

¹⁰ Motion, para. 15.

¹¹ Response, paras 1, 9, 14-15.

¹² Response, paras 10, 14.

¹³ Response, para. 10.

¹⁴ Response, para. 10.

¹⁵ Response, paras 7, 11.

sufficiently compelling humanitarian reasons' to justify provisional release."¹⁶ It further submits that the arguments provided by the Defence fail to meet this standard.¹⁷

9. The Prosecution requests that should the Trial Chamber decide to grant the Motion, that the Trial Chamber stay the decision for 24 hours on the basis that the Prosecution intends to appeal the decision.¹⁸

10. Finally, the Trial Chamber notes that the Host Country upon invitation to indicate whether it has any objections to the Accused being provisionally released, replied in its letter of 20 November 2009, stating that it had no objection to such provisional release.¹⁹

II. APPLICABLE LAW

11. 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.

12. 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.²⁰

13. 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.²¹ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.²² The Trial Chamber is required to assess such circumstances not only as they exist at the time when it

¹⁶ Response, paras 7-9.

¹⁷ Response, paras 12-13.

¹⁸ Response, para. 15.

¹⁹ Filed on 1 December 2009.

²⁰ See *Prosecutor v. Lazarević*, Decision on Defence Request for Provisional Release, Case No. IT-03-70-PT, 14 April 2005 (footnote omitted), p. 2.

²¹ *Prosecutor v. Haradinaj et al.*, 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. 10.

²² *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.

reaches its decision, but also at the time the accused is expected to return to the Tribunal, as far as these can be foreseen.²³

III. DISCUSSION

14. 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, should only be granted when serious and sufficiently compelling humanitarian reasons exist”.²⁴ The Trial Chamber notes that the Prosecution has not formally rested its case yet. The Trial Chamber recalls in this respect that on 12 November 2009, the Prosecution conditioned the closing of their case to the final resolving of the status of certain exhibits.²⁵ Moreover, in the recent submission pertaining to this very issue, the Prosecution stresses that:

To the extent that the Trial Chamber considers that certain documents are inadmissible on authenticity or other grounds, the Prosecution reserves the right to call or re-call witnesses through whom to tender those documents.²⁶

15. Therefore, being mindful that the issue of the outstanding exhibits has not been resolved, the Trial Chamber finds that, contrary to the Parties’ submissions, the Prosecution case is not “effectively closed”. Rather, it seems that the Prosecution intends to postpone the official resting of its case until it has assessed the impact of the Trial Chamber’s decisions on the status of certain outstanding exhibits on its case. In this regard, the Trial Chamber notes that the group of documents with the status of which resolution is still pending consists of roughly 400 outstanding exhibits.

16. Based on the foregoing, the Trial Chamber, Judge Picard dissenting, finds that the proceedings remain at a stage which does not require the showing of the existence of a sufficiently compelling humanitarian reason for provisional release.

17. As regards the issue whether the Accused, if released, would return for trial, the Trial Chamber takes into consideration the seriousness of the allegations against the Accused, as well as

²³ *Prosecution v. Prlić et al.*, Case No. IT-04-74-AR65.15, Decision on Prosecution’s Appeal Against the Trial Chamber’s Decision on Slobodan Praljak’s Motion for Provisional Release, 8 July 2009, para. 7.

²⁴ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-AR65.3, Decision on Ivan Čermak’s Appeal Against Decision on his Motion for Provisional Release, 3 August 2009 (confidential), para. 6; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.8, 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, para. 16.

²⁵ See Hearing of 12 November 2009 at T. 9705: “MR. HARMON: Obviously we will not rest until we have the issue of the exhibits resolved. And so that is how it impacts on the status of the case.” See also the submission made by the Defence on the same day at T. 9712: “I’m saying again that as the situation now stands, the Defence won’t be tendering a request under rule 98 bis, but once Mr. Harmon really does complete the Prosecution case and producing his evidence, then that would be our position unless we have a new witness which would give us reason to table a request of that kind.”

²⁶ Prosecution Submission Regarding Outstanding Documents Labelled ‘Marked for Identification’, with Annexes A to I, para. 5.

the current stage of the proceedings. However, the Trial Chamber is 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”.²⁷ The Trial Chamber notes that the Accused has not attempted to evade justice, that he voluntarily surrendered to the Tribunal as soon as he was made aware of the Indictment against him and that he has always been in full compliance with the terms and conditions of provisional release.²⁸ Finally, the Trial Chamber notes that the Accused demonstrated his willingness to cooperate with the Prosecution by giving several interviews prior to his being indicted.²⁹

18. The Trial Chamber notes the Accused’s personal guarantee by which he undertook to comply with any order issued by the Trial Chamber.³⁰ The Trial Chamber considers, and gives appropriate weight to, the guarantee given by the Republic of Serbia.³¹

19. 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.

20. As regards whether the Accused, if released, will 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 Chamber also takes into account the personal undertaking of the Accused and his conduct during previous periods of provisional release.

21. 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.

22. 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.³²

²⁷ *Ilijkov v. Bulgaria*, European Court of Human Rights, Judgement of 26 July 2001, para. 81 as referred to in *Prosecutor v. 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. Simatović*, Case No. IT-03-69-AR65.2, Decision on Prosecution’s Appeal Against Decision on Provisional Release, 3 December 2004, para. 15.

²⁸ See 17 July Decision, para. 12; Decision on Mr. Perišić’s Motion for Provisional Release During the Easter Court Recess, 6 April 2009, para. 11; Decision on Mr. Perišić’s Motion for Provisional Release During the Court’s Winter Recess, 17 December 2008, para. 10.

²⁹ See 17 July Decision, para. 12.

³⁰ Motion, Confidential Annex B.

³¹ Motion, Confidential Annex C.

³² 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. 15.

23. In exercising its discretion, the Trial Chamber took into account the positive effect previous periods of provisional release have had on the Accused as set out in the Motion³³ and the submission that provisional release would facilitate the Accused's ability to prepare his defence.³⁴

24. Finally, The Trial Chamber had full regard for the fact that the Prosecution's case is indeed more advanced now than it was in July 2009. However, in the instant case, having considered the facts and circumstances as they currently stand, the Trial Chamber, Judge Picard dissenting, is satisfied that it should exercise its discretion in favour of the Accused's request and that, as far as foreseeable, the circumstance of the case will not have substantially changed by the time the Accused is expected to return to the Tribunal, so as to militate against the Accused's request.

³³ Motion, para. 14(h).

³⁴ Motion, para. 14(g).

IV. DISPOSITION

25. For the reasons set out above and pursuant to Rules 54 and 65 of the Rules, the Trial Chamber, Judge Picard dissenting, hereby:

GRANTS the Motion, 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 December 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 Serbian Government 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 14 January 2010, and the Dutch authorities shall then transport the Accused back to the 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 14 January 2010; 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;

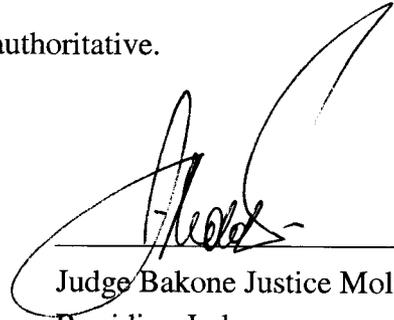
(3) **INSTRUCTS** the Registrar of the Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for release of the Accused and to continue to detain him at the UNDU in The Hague until such time as the Trial Chamber and the Registrar have been notified of the 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.

STAYS this Decision for twenty-four hours.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this seventh day of December 2009

At The Hague

The Netherlands

[Seal of the Tribunal]