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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: 31 March 2010  
Original: English

**IN TRIAL CHAMBER I**

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

**Registrar:** Mr. John Hocking

**Decision of:** 31 March 2010

**PROSECUTOR**

v.

**MOMČILO PERIŠIĆ**

***PUBLIC***

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

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**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 March 2010 (“Motion”) and hereby renders its Decision.

#### A. SUBMISSIONS

1. In its Motion, the Defence requests the Trial Chamber to grant Momčilo Perišić (“Accused”) temporary provisional release for the duration of the adjournment of the trial, which is scheduled to begin on Friday 2 April 2010 until trial resumes on Monday 12 April 2010 on same terms and conditions under which he has previously been on provisional release, or under such conditions as the Trial Chamber deems appropriate to impose pursuant to Rule 65(C) of the Rules of Procedure and Evidence (“Rules”).<sup>1</sup>

2. The Defence recalls the Appeals Chamber’s holding according to which where a trial is in a late stage of proceedings, specifically after a Rule 98 *bis* submission, a Trial Chamber must consider the impact of changed circumstances constituted by a Rule 98 *bis* Decision and find sufficiently compelling justifications for the provisional release of an accused.<sup>2</sup> The Defence, however, submits that the present case is distinguishable from other cases where “sufficiently compelling humanitarian grounds” have been required since there were no Rule 98 *bis* submissions and consequently no pronouncements by the Trial Chamber as to the potential guilt or innocence of the Accused. The Defence contends that the absence of a Rule 98 *bis* Decision in the present case renders the showing of “sufficiently compelling humanitarian grounds” inapplicable.<sup>3</sup>

3. The Defence further submits that the Accused’s risk of flight is no greater now than it was when he was last released from 9 December 2009 to 14 January 2010 for there has been no significant change in circumstances and the Trial Chamber has since then heard the testimony of only one more Prosecution witness before the Prosecution rested its case on 25 January 2010.<sup>4</sup>

4. In support of its Motion, the Defence also makes the following submissions:

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<sup>1</sup> Motion, paras 1-2.

<sup>2</sup> Motion, para. 9 and the jurisprudence cited therein.

<sup>3</sup> Motion, para. 13.

<sup>4</sup> Motion, para. 14.

- 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;<sup>5</sup>
  - b. The Accused has always been in full compliance with the terms and conditions of his provisional release;<sup>6</sup>
  - 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;<sup>7</sup>
  - d. The Accused has always acted respectfully towards the Trial Chamber;<sup>8</sup>
  - e. The Accused has previously used his provisional release to work with his counsel and team in a manner which is not possible during periods of trials and he would like to make use of the upcoming break in the trial to do just that;<sup>9</sup>
  - f. 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;<sup>10</sup>
  - g. The Government of the Republic of Serbia (“Serbian Government”) has provided guarantees in support of the Motion.<sup>11</sup>
5. 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”.<sup>12</sup>
6. Finally, the Defence requests the Trial Chamber to order the Prosecution to seek an order permitting them to disclose any confidential decision cited in their Response to the Defence.<sup>13</sup> Since the Trial Chamber would base its Decision on public decisions, it does not find it necessary to issue such an order as requested by the Defence.

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<sup>5</sup> Motion, para. 15(a); Motion, Confidential Annex B.

<sup>6</sup> Motion, para. 15(b).

<sup>7</sup> Motion, para. 15(c).

<sup>8</sup> Motion, para. 15(d).

<sup>9</sup> Motion, para. 15(e).

<sup>10</sup> Motion, paras 15(f).

<sup>11</sup> Motion, para. 15(g); The Defence filed a subsequent confidential motion with an annex on 22 March 2010 containing the guarantees for provisional release of the Accused (“Subsequent Motion”), Annex A.

7. The Prosecution, in compliance with a Trial Chamber order to expedite its response, if any, by 25 March 2010,<sup>14</sup> filed its “Prosecution Response to Mr. Perišić’s Motion for Provisional Release” (“Response”) wherein it opposes the Motion. The Prosecution argues that there has been a material change in circumstances since the Trial Chamber previously granted provisional release to the Accused, thus warranting the need for the demonstration by the Accused of the existence of serious and sufficiently compelling humanitarian reasons to justify provisional release.<sup>15</sup>

8. The Prosecution contends that at the end of the Prosecution case the Accused waived his right to challenge the evidence against him and should now be regarded in the same position as he would have been had there been a Rule 98 *bis* decision.<sup>16</sup>

9. Further, the Prosecution submits that the arguments presented by the Accused in support of his request for provisional release fail to establish any serious and sufficiently compelling humanitarian reasons that would justify the release of the Accused at this stage of the proceedings i.e. after the close of the Prosecution case.<sup>17</sup>

10. In response to the Defence argument that the Accused would use the recess to work on his Defence case, the Prosecution argues that the Accused could prepare his defence regardless of his location and that he would merely be in the same position as all other defendants before this Tribunal who are held in the UNDU.<sup>18</sup>

## 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.

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<sup>12</sup> Motion, para. 16.

<sup>13</sup> Motion, para. 16.

<sup>14</sup> Order to the Prosecution to Expedite its Filing to the Defence Motion for Provisional Release, 22 March 2010.

<sup>15</sup> Response, para. 10. The Prosecution Response was filed publicly on 25 March 2010.

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

<sup>17</sup> Response, paras 7, 9.

<sup>18</sup> Response, para. 8.

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.<sup>19</sup>

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.<sup>20</sup> What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.<sup>21</sup> The Trial Chamber is required to assess such circumstances not only as they exist at the time when it reaches its decision, but also at the time the accused is expected to return to the Tribunal, as far as these can be foreseen.<sup>22</sup>

### 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”.<sup>23</sup> However, as the issue of humanitarian reasons is to be considered only after the requirements of Rule 65(B) have been met by the Defence, the Trial Chamber will first address whether a potential risk of flight and danger to victims, witnesses or other persons exist should the Accused be provisionally released.

#### A. Potential Risk of Flight

15. As regards the issue 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. Further, 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”.<sup>24</sup> The Trial Chamber notes that the Accused has not attempted to evade

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

<sup>20</sup> *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.

<sup>21</sup> *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.

<sup>22</sup> *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 (Praljak Decision), 8 July 2009, para. 7.

<sup>23</sup> *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.

<sup>24</sup> *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,

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.<sup>25</sup> Further, the Trial Chamber notes that the Accused demonstrated his willingness to cooperate with the Prosecution by giving several interviews prior to being indicted.<sup>26</sup>

16. In addition, the Trial Chamber notes that although the number of witnesses who have already testified *per se* should not be the determining factor as to whether there is a potential risk of flight, there has only been one Prosecution witness and six Defence witnesses since the Trial Chamber previously granted the Accused provisional release, thus no significant change in circumstances that would increase his risk of flight.

17. The Trial Chamber considers, and gives appropriate weight to, the guarantee given by the Serbian Government.<sup>27</sup> The Trial Chamber also notes the Accused's personal guarantee by which he undertook to comply with any order issued by the Trial Chamber.<sup>28</sup>

18. Based on these reasons, the Trial Chamber is satisfied that the Accused does not pose a potential risk of flight and, if released, will return for trial.

#### **B. Potential Danger to Victims, Witnesses or Other Persons**

19. 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. 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 Trial Chamber 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.

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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.

<sup>25</sup> *See* Decision on Mr. Perišić's Motion for Provisional Release During the Summer Court Recess, 17 July 2009, 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.

<sup>26</sup> *See* Decision on Mr. Perišić's Motion for Provisional Release During the Summer Court Recess, 17 July 2009, para. 12.

<sup>27</sup> Subsequent Motion, Confidential Annex A.

<sup>28</sup> Motion, Confidential Annex B.

### C. Lack of Sufficiently Compelling Humanitarian Grounds

20. The Defence contends that the rationale behind the requirement of sufficient compelling humanitarian grounds at the “post 98 *bis* stage”, “late stage of proceedings” or “close of the Prosecution case” is inextricably linked to the rendering of a Rule 98 *bis* Decision.<sup>29</sup> As a result the Defence argues that the absence of a Rule 98 *bis* decision in this case renders the showing of “sufficiently compelling humanitarian grounds” inapplicable<sup>30</sup> and thus did not submit any sufficiently compelling humanitarian grounds. The Defence misconstrued the provision of Rule 98 *bis* of the Rules. Rule 98 *bis* is used when the Defence is of the view that there is no evidence capable of supporting a conviction. The corollary is that when the Defence does not use this provision, it is of the view that it does have a case to answer.

21. The Trial Chamber clearly emphasises that it is fully satisfied that the requirements of Rule 65(B) are met in that the Accused, if released, will return for trial and will not pose a danger to any victim, witness or other person. However, the Trial Chamber is bound by the jurisprudence of the Appeals Chamber which, in the absence of sufficiently compelling humanitarian grounds deprives it of any discretionary power when proceedings are at a late stage in particular after the close of the prosecution case.<sup>31</sup> In the words of the Appeals Chamber:

[...] even if the Trial Chamber was satisfied that sufficient guarantees were offered, it should not exercise its discretion in favour of a grant of provisional release unless compelling humanitarian grounds were present which caused to tip the balance in favour of allowing provisional release.<sup>32</sup>

22. The Trial Chamber has finally analysed whether the argument that the “time the Accused spends away from the UNDU particularly with his family has a positive effect on his health and well-being”, could be a sufficient humanitarian reason for provisional release. In this regard, the Trial Chamber finds that the mere fact that the Accused’s health and well-being could be fostered by a provisional release does not suffice to be considered as a sufficient compelling humanitarian ground.

<sup>29</sup> Motion, para. 12.

<sup>30</sup> Motion, para. 13.

<sup>31</sup> See *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.8, Decision on Prosecution’s Appeal Against Decision on Gvero’s Motion for Provisional Release, 20 July 2009 (Public Redacted Version), para. 6; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.14, Decision on “Jadranko Prlić’s Appeal Against the *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Prlić*, 9 April 2009”, 25 June 2009, para. 15; *Prosecutor v. Prlić et al.*, 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 Čorić, 11 March 2008, para. 21.

<sup>32</sup> See *Prlić* 21 April 2008 Decision, para. 15; *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR65.11, Decision on Prosecution’s Appeal Against Decision on Gvero’s Further Motion for Provisional Release, 25 January 2010, paras 7, 15.

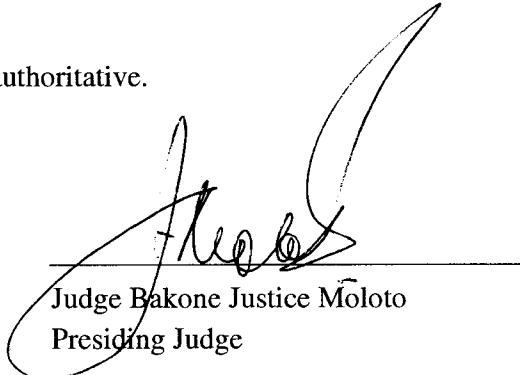
23. In conclusion, the Trial Chamber finds that the Motion fails to provide a sufficiently compelling humanitarian justification for a provisional release after the close of the Prosecution case.<sup>32</sup> Thus, provisional release is not warranted.

#### IV. DISPOSITION

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

**DENIES** the Motion.

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



Judge Bakone Justice Moloto  
Presiding Judge

Dated this thirty first day of March 2010

At The Hague

The Netherlands

**[Seal of the Tribunal]**

<sup>32</sup> See *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 Pektović* dated 31 March 2008", 21 April 2008., paras 15-17 (with further references); Popović 25 January 2010 Decision, para. 7, which require that after the requirements of Rule 65 (B) have been met, the Defence must also demonstrate a sufficiently compelling reason warranting provisional release.