

**UNITED
NATIONS**



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

Case No. IT-04-81-T
Date: 15 July 2010
Original: English

IN THE TRIAL CHAMBER I

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

Registrar: Mr. John Hocking

Decision: 15 July 2010

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC REDACTED VERSION

**PUBLIC REDACTED VERSION OF
DECISION ON MR. PERIŠIĆ'S MOTION FOR PROVISIONAL
RELEASE DURING THE SUMMER 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 the former Yugoslavia since 1991 (“Tribunal”) is seized of “Mr. Perišić’s Motion for Provisional Release During the Summer Recess”, filed confidentially on 10 June 2010 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS

A. The Defence

1. In its Motion, the Defence requests the Trial Chamber to grant Momčilo Perišić (“Accused”) temporary provisional release for the duration of the Summer Recess, which is scheduled to begin on Friday 23 July 2010, until trial resumes on Monday 16 August 2010,¹ or for such a period as specified by the Chamber. The Defence wishes its request be granted on same terms and conditions under which the Accused 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”).²

2. The Defence recalls the Trial Chamber’s decision of 31 March 2010, where the Accused last applied for provisional release.³ In denying the motion, the Trial Chamber was satisfied that the Accused met the requirements of Rule 65(B), notably, that if released he would return for trial and that he would not pose any danger to victims, witnesses or other persons. Nonetheless, the Trial Chamber emphasised that it was bound by the jurisprudence of the Appeals Chamber, which it interpreted as depriving the Trial Chamber of its discretionary power to grant provisional release in the absence of any sufficiently compelling humanitarian grounds when the proceedings are at a late stage, in particular, after the close of the Prosecution’s case.⁴

3. The Defence argues that the foregoing interpretation by the Trial Chamber does not address the Accused’s arguments on the rationale behind the Appeal Chamber standard, “which is based on pronouncements made by *the trier of fact* in a Rule 98 *bis* Decision, on the potential guilt or innocence of the accused”.⁵ The Defence submits that it chose not to make Rule 98 *bis* submissions for a variety of strategic reasons unrelated to having a case to answer.⁶ Accordingly, the Defence

¹ The Trial Chamber notes that the proceedings in the present case will recommence after the Summer Recess in the week of 23 August 2010, Court Calendar for August 2010.

² Motion, paras 1-2.

³ Decision on Mr. Perišić Motion for Provisional Release, 31 March 2010 (“31 March 2010 Decision”).

⁴ See Motion, para. 11.

⁵ Motion, para. 15 (emphasis in the original).

⁶ Motion, para. 14.

reiterates its arguments on the inapplicability of Appeals Chamber jurisprudence in the present motion as set out in its previous filing.⁷

4. In support of its Motion, the Defence also 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;⁸
 - b. The Accused has always been in full compliance with the terms and conditions of his provisional release;⁹
 - 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;¹⁰
 - d. The Accused has always acted respectfully towards the Trial Chamber;¹¹
 - e. The Accused's attitude and frame of mind regarding this case has not changed, and his risk of flight is no greater now than it was on 31 March 2010, when the Trial Chamber previously found that he met the requirements of Rule 65(B);¹²
 - f. The Government of the Republic of Serbia ("Serbian Government") has confirmed the validity of guarantees in support of the Motion.¹³
5. In the alternative, should the Trial Chamber decide that sufficiently compelling humanitarian grounds need to exist; the Defence submits the following material changes of circumstance to support the granting of provisional release:
- a. [The Accused's] wife is [redacted] unable to travel to The Hague in the foreseeable future.¹⁴ The Defence contends that the presence of the Accused at his wife's side will have

⁷ Motion, para. 15 referring to Mr. Perišić's Motion for Provisional Release, 19 March 2010, paras 11-14.

⁸ Motion, para. 16.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Motion, para. 17; Motion Annex D.

¹⁴ [redacted], Motion, Annex D.

a positive effect on her mental and physical well-being, and will alleviate the Accused's distress at not being able to be present with her;¹⁵

b. [redacted];¹⁶

c. Further, the Accused's daughter-in-law is due to give birth to the Accused's grandchild by 15 August 2010.¹⁷ The Defence submits that the birth of a child is an event of such importance that falls under the area protected by the fundamental right to respect for family life;¹⁸

d. 11 August 2010 marks the third anniversary of the death of the Accused's brother, and the Accused wishes to attend the memorial service scheduled for that day.¹⁹

6. The Defence also recalls the jurisprudence of the Appeals Chamber, which states that Rule 65(B) of the Rules must be read in light of the provisions of various regional and human rights treaties.²⁰ In relying on Article 8(2) of the European Convention on Human Rights, and in particular on the requirement that an interference with the Accused's right to respect for his family life "must pursue a legitimate aim", the Defence submits that a denial of the Motion "serves no justification in the needs of a democratic society as it does not follow from any pressing social need and is not proportionate to any aim sought to be achieved."²¹

7. 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.²²

B. The Prosecution

8. On 25 June 2010, the Prosecution filed its response, objecting to the Motion.²³ At the outset, the Prosecution addresses the Defence contention that, in the absence of a Rule 98 *bis* Decision, sufficiently compelling humanitarian reasons to justify provisional release need not be shown in order to grant the motion.²⁴ The Prosecution asserts that the Defence is essentially requesting the

¹⁵ Motion, para. 19.

¹⁶ Motion, para. 20. [redacted] Motion, Annex D.

¹⁷ Motion, Annex E.

¹⁸ Motion, para. 20. The Defence relies on the 2004 Tribunal jurisprudence to the effect that the right to respect for family life is so fundamental that it may even justify the temporary release of a convicted person awaiting appeal, *Ibid.*

¹⁹ Motion, para. 21.

²⁰ Motion, para. 22.

²¹ *Ibid.*

²² Motion para. 23.

²³ Prosecution Response to Mr. Perišić's Motion for Provisional Release During the Summer Recess, filed confidentially on 25 June 2010 ("Response"), paras 2, 16.

²⁴ Response, paras 5-7.

Trial Chamber to reconsider its previous finding and requests the Trial Chamber to reject this argument.²⁵

9. More specifically, the Prosecution on this point argues that “strategic choices of the Defence are irrelevant to the application of appellate jurisprudence, which requires that, after the close of the Prosecution case, provisional release should be granted when serious and sufficiently compelling humanitarian grounds exist.”²⁶

10. Additionally, the Prosecution argues that the humanitarian grounds set forth by the Accused are insufficient to grant provisional release, whether viewed either individually or collectively.²⁷

11. The Prosecution also requests that the Trial Chamber defer a ruling on the Motion pending a decision on the urgent request it filed to the Appeals Chamber in the *Prlić et al.* case for permission to disclose certain confidential materials to the Defence.²⁸ Should such a request be granted, the Prosecution requests that the Trial Chamber stay the decision for 24 hours on the basis that the Prosecution intends to appeal it.²⁹

C. The Host State

12. Finally, the Trial Chamber notes that the Host State, in its letter of 16 June 2010, states that it has no objection to such a provisional release.³⁰

II. APPLICABLE LAW

13. The Trial Chamber recalls the law applicable to the present Motion as set out in previous decisions of this Trial Chamber.³¹

III. DISCUSSION

A. Potential Risk of Flight

14. The Trial Chamber recalls its 31 March 2010 Decision where it was satisfied that the Accused did not pose a potential risk of flight and, if released, would return for trial.³² The Trial

²⁵ Response, para. 6.

²⁶ Response para. 7.

²⁷ Response paras 8-13.

²⁸ Response para. 15.

²⁹ *Ibid.*

³⁰ Correspondence from Host State (Confidential), 16 June 2010.

³¹ 31 March 2010 Decision, paras 11-13; Decision on Mr. Perišić’s Motion for Provisional Release During the Easter Court Recess, 6 April 2009, paras 7-9.

³² 31 March 2010 Decision, paras 15-18.

Chamber notes that the circumstances of the case have since changed in that the presentation of evidence is further underway and the Trial Chamber has since heard the evidence of four additional Defence witnesses. However, the Trial Chamber does not consider that this change is such as to give rise to a reasonable fear that the Accused, if released, will attempt to abscond. The Trial Chamber is thus satisfied that the Accused does not pose a potential risk of flight and, if provisionally released, will return for trial.

B. Potential Danger to Victims, Witnesses or Other Persons

15. As regards whether the Accused, if released, will pose a danger to any victim, witness or other person, the Trial Chamber once again recalls its 31 March 2010 Decision, where it concluded that there was nothing in the evidence to suggest that the Accused interfered or would interfere with the administration of justice.³³ In this regard, the Trial Chamber notes that there has been no significant change in circumstances which would lead it to come to a different conclusion. The Trial Chamber thus finds that the Defence has reasonably met its burden that, on a balance of probabilities, the Accused, if provisionally released, will not pose a danger to any victim, witness or other person.

C. Lack of Sufficiently Compelling Humanitarian Grounds

16. The Defence contention that the absence of a Rule 98 *bis* decision in this case renders the showing of sufficiently compelling humanitarian grounds inapplicable was previously rejected by the Trial Chamber on 31 March 2010.³⁴ The jurisprudence of the Appeals Chamber shows that in the absence of such humanitarian grounds the Trial Chamber is deprived of any discretionary power when proceedings reach an advanced stage, in particular after the close of the prosecution case, as is the case here.³⁵ This is irrespective of whether the actual Rule 98 *bis* motion was filed or not and irrespective of the Defence's actual motives to refrain from doing so.

17. Turning therefore to the compelling humanitarian grounds, the Appeals Chamber has held that special circumstances related to humane and compassionate grounds are deemed to be sufficient where there is an acute justification, such as the applicant's medical need or a memorial

³³ 31 March 2010 Decision, para. 19.

³⁴ Motion, para. 14; 31 March 2010 Decision, para. 20.

³⁵ See *Prosecutor v. Vujadin 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. Jadranko 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. Jadranko 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.

service for a close family member.³⁶ The Appeals Chamber has also granted provisional release for a visit to a close family member in “extremely poor health and whose death is believed to be imminent.”³⁷

18. Having reviewed the medical reports submitted in support of the Motion, the Trial Chamber notes that they do not suggest that [redacted] is in a “serious” or “critical” condition nor indicate that there is any risk of imminent death. The Trial Chamber reaches the same conclusion upon examination of the medical evidence submitted [redacted]. In this regard, the Trial Chamber is mindful of the Appeals Chamber jurisprudence, where it was held that [redacted] was not a sufficient humanitarian reason to warrant provisional release.³⁸

19. The Trial Chamber also considers the wish of the Accused to be present at his grandchild’s birth. The Trial Chamber finds that such a desire is entirely understandable and humanitarian in nature.³⁹ Nonetheless, the Trial Chamber finds that alone it is not sufficiently compelling to justify provisional release.⁴⁰

20. Finally, the Trial Chamber in considering the Accused’s desire to be present at the memorial service which will mark the third anniversary of his brother’s death, notes that it alone is not sufficiently compelling to justify provisional release. The Trial Chamber is however mindful of the jurisprudence of the Appeals Chamber which indicates that the attendance at a memorial service may constitute a special circumstance within the meaning of Rule 65(I)(iii).⁴¹

21. Though each individual humanitarian ground advanced by the Defence by itself does not constitute sufficiently compelling humanitarian grounds, the Trial Chamber, in the exercise of its

³⁶ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Decision on Vladimir Lazarević’s Motion for Temporary Provisional Release on the Grounds of Compassion, 2 April 2009, (Confidential), (“Lazarević Decision 2 April 2009”), para. 8, referring to *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008, (Public Redacted Version), (“Strugar Decision 2 April 2008”), para. 12. See also *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić for Provisional Release for a Fixed Period to Attend Memorial Services for his Mother, 5 May 2006, (“Simić Decision 5 May 2006”), para. 3, referring to *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father, 21 October 2004, para. 14.

³⁷ Lazarević Decision 2 April 2009, para. 8; Strugar Decision 2 April 2008, para. 10.

³⁸ *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Sreten Lukić’s Motion for Provisional Release on Compassionate Grounds, 22 February 2010, (Confidential), para. 15; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on Mile Mrkšić’s Motion for Provisional Release, 16 February 2009, (Confidential), para. 11; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Provisional Release, 18 December 2008, para. 9; *Prosecutor v. Dragomir Milošević* Case No. IT-98-29/1-A, Decision on Application for Provisional Release Pursuant to Rule 65(I), 29 April 2008, (Confidential), para. 7; Strugar Decision 2 April 2008, para. 13.

³⁹ *Prosecutor v. Vujadin Popović et al.* Case No. IT-05-88-T, Decision on Miletić’s Motion for Provisional Release, (Confidential), 15 October 2009, para. 15.

⁴⁰ *Ibid.*, para. 18.

discretionary power, has assessed them as a whole in light of all the relevant circumstances of this specific case. By doing so, the Trial Chamber, Judge Picard dissenting, finds that the humanitarian grounds advanced by the Accused constitute, collectively, sufficiently compelling circumstances to justify his provisional release.

22. Finally, the Trial Chamber notes that the Prosecution's request to the Appeals Chamber in the *Prlić et al.* case for permission to disclose certain confidential materials to the Defence, although still pending, does not warrant deferring issuing of the present decision.

IV. DISPOSITION

23. 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 23 July 2010, 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 19 August 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:

⁴¹ Simić Decision 5 May 2006. para. 3; *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Urgent Motion Requestion Povisional Release of Nebjoša Pavković on Compassionate Grounds, 17 September 2009, para. 9.

- (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 19 August 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;

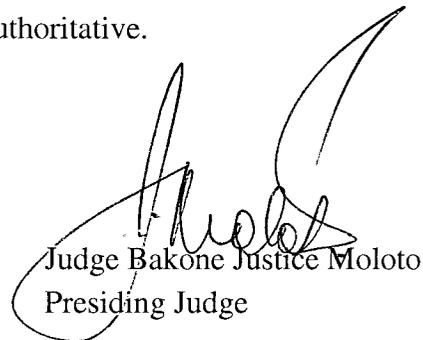
(4) **REQUESTS** the authorities of all States through whose territory the Accused will travel:

- 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 24 hours.

Judge Picard appends a Dissenting Opinion.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this fifteenth day of July 2010

At The Hague

The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE PICARD

1. I respectfully disagree with my colleagues on the provisional release of the Accused.
2. According to a consolidated jurisprudence of the Appeals Chamber, at the late stage of proceedings, especially after the Prosecution has closed its case, the provisional release of the Accused cannot anymore be granted save under exceptional circumstances when sufficiently compelling humanitarian grounds are present.
3. As my colleagues have rightly pointed out, each individual ground advanced by the Defence cannot, by itself, be considered sufficient to justify the provisional release at this stage of the proceedings. The accumulation of these insufficient grounds, irrespective of their number, in my view, still cannot warrant the provisional release of the Accused based on the existence of a sufficiently compelling humanitarian reason. In fact, such approach would lead to a circumvention of the Appeals Chamber's jurisprudence and, inevitably, would deprive it of its value. Indeed, in the Decision, my colleagues cannot but only underscore the inadequacy of each of the grounds advanced by the Accused. In doing so, they ultimately fail to give any reason for their conclusion to provisionally release the Accused.

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

Judge Michèle Picard



Dated this fifteenth day of July 2010

At The Hague

The Netherlands

[Seal of the Tribunal]