

**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

CASE NO. IT-04-74-T

IN THE TRIAL CHAMBER

**Before: Judge Jean-Claude Antonetti, Presiding
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua**

Registrar: Mr. John Hocking

Date filed: 14 November 2011

THE PROSECUTOR

v.

**JADRANKO PRLIĆ
BRUNO STOJIĆ
SLOBODAN PRALJAK
MILIVOJ PETKOVIĆ
VALENTIN ĆORIĆ
BERISLAV PUŠIĆ**

PUBLIC

**MOTION OF MILIVOJ PETKOVIĆ FOR RELEASE PENDING
JUDGEMENT**

**The Office of the Prosecutor
Mr. Douglas Stringer**

**Counsel for Jadranko Prlić
Mr. Michael G. Karnavas
Ms. Suzana Tomanović**

**Counsel for Milivoj Petković
Ms. Vesna Alaburić
Mr. Zoran Ivanišević**

**Counsel for Bruno Stojić
Ms. Senka Nožica
Mr. Karim Khan**

**Counsel for Valentin Ćorić
Ms. Dijana Tomašegović Tomić
Mr. Dražen Plavec**

**Counsel for Slobodan Praljak
Ms. Nika Pinter
Ms. Nataša Fauveau-Ivanović**

**Counsel for Berislav Pušić
Mr. Fahrudin Ibrišimović
Mr. Roger Sahota**

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**MOTION OF MILIVOJ PETKOVIĆ FOR RELEASE PENDING
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A. BACKGROUND

1. Since the beginning of the proceedings Mr. Milivoj Petković has been released by the Trial Chamber(s) for various periods of time and under various conditions imposed, on 14 previous occasions. On the last occasion by the Trial Chamber's order of 24 June 2011 (for three weeks).
2. The trial is currently in the phase of deliberations by the Trial Chamber. Considering extraordinary complexity of the case it could be reasonably assessed that it will pass at least several more months until the judgement. There being currently no need for Petković to be in The Hague for court sittings, or for any other reason, he respectfully asks to be released until the pronouncement of the judgement in his case.

B. APPLICABLE LAW (CHANGED)

3. Release of the accused is governed by Rule 65 of the Rules. It has been recently amended and now provides in relevant part:

*B. Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement 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. **The existence of sufficiently compelling humanitarian grounds may be considered in granting such release.** (Amendments in bold)*

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Jurisprudence prior to changes in Rule 65

4. Prior to these amendments the ICTY jurisprudence pursuant to Rule 65 required “sufficiently compelling humanitarian grounds” for release of the accused at a late stage of the proceedings, (in particular after Rule 98 bis decision). In other words, release could be granted in the post-98 bis stage “*only if*” justified by sufficiently compelling humanitarian reasons.¹
5. Introduction of the new requirement in the context of the post-Rule 98 release jurisprudence came under criticism, not only from the defence counsels but from the honourable judges as well. Considerable number of the ICTY judges (including the judges of the Appeals Chamber) expressed their disagreement with an approach taken by the Appeals Chamber on this particular issue. Nevertheless, the judges of the Trial Chambers considered themselves constrained by interpretation and application of law as expressed in the Petkovic Appeals decision.
6. Petković Defence expressly submits that under the law applicable in this Tribunal there is no *requirement* that there should be “sufficiently compelling humanitarian reasons” justifying release (in any phase of the trial proceedings) once the Trial Chamber is satisfied that all conditions of Rule 65(B) are being met by the applicant. The interpretation of Rule 65 as expressed in the Petkovic Appeals decision and subsequently applied in the ICTY jurisprudence, is in stunning contrast to all relevant human rights jurisprudence which is, or should be, binding for the ICTY. It can not be reasonably justified by any “specificity” of the Tribunal, or its alleged lack of enforcement powers, or by any other legitimate reason. It is legally untenable and therefore arbitrary and should be changed.

¹ See 21 April 2008 Appeals Chamber *Decision on “Prosecution’s Appeal from Decision Relative a la Demande de Mise en Liberte Provisoire de l’Accuse Petković dated 31 March 2008*¹ (“the Petković Appeal Decision”)

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7. First of all, this “only if” pre-condition for a release applicable after Rule 98 bis procedure represents a flagrant violation of the accused human right to *liberty* and security of person (explicitly guaranteed by all relevant universal or/and regional international human rights agreements²). Secondly, it de facto declares the presumption of innocence, one of the corner stones of any criminal proceedings (explicitly guaranteed by various international human rights agreements as well as by the ICTY Statute³) null and void in the middle of the trial.

Relevant human rights jurisprudence

8. Human rights jurisprudence concerning the issue of detention on remand in the context of the specific human rights to *liberty* and security of person is well established. The case law of the ECHR pursuant to Article 5 of the Convention (right to liberty⁴) established, *inter alia*, the following basic principles concerning detention on remand⁵:
- i) underlying aim of Article 5 of the Convention is the *prevention of arbitrary detention*, i.e. to ensure that no one should be deprived of his liberty in a fashion that is *arbitrary in its motivation or effect*;
 - ii) detention without a conviction is *serious departure from the rules* of respect for individual liberty and of the presumption of innocence;
 - iii) any system of mandatory detention is *per se* incompatible with Article 5(3) of the Convention;

² See Article 9(1)(3) of the *International Covenant on Civil and Political Rights* (ICCPR), Article 3 and 9 of the *Universal Declaration of Human Rights* (UDHR), Article 5(1)(3) of the *European Convention on Human Rights and Fundamental Freedoms* (ECHR), Article 7(1)(3)(5) of the *American Convention on Human Rights* (ACHR) and Article 6 of the *African Charter on Human and People's Rights* (ACHPR).

³ See Art. 14(2) of ICCPR, Art. 11 of UDHR), Art. 6 of ECHR, Art. 8(2) of ACHR and Art. 7 of ACHPR

⁴ Right to liberty and security of person (Art. 5 of the ECHR) is one of the most frequently invoked Convention rights and the ECHR jurisprudence on this matter is well settled.

⁵ In this regard see, for example, the ECHR judgements: *Neumeister v Austria* (1968), *Lettelier v France* (1991), *Imre v Hungary* (2003), *Matznetter v Austria* (1969), *Ilijkov v Bulgaria* (2001), *Stogmuller v Austria* (1969), *Labita v Italy* (2000), *Belchev v Bulgaria* (2004), *Shishkov v Bulgaria* (2003), *Hamanov v Bulgaria* (2004), *Klarnecki v Poland* (.2002), *Smirnova v Russia* (2003), *Wemhoff v Germany* (1968), *Clooth v Belgium* (1991), *W. v Switzerland* (1993), and many others.

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- iv) Article 5 makes detention an *exceptional departure* from the right to liberty, permissible only in exhaustively enumerated and strictly defined cases;
- v) Article 5 remains equally applicable to detention throughout period from arrest to conviction/acquittal but not to detention pending appeal;
- vi) persistence of reasonable suspicion that the person arrested committed an offence is a condition *sine qua non* for the lawfulness of the continued detention but *after a certain time it no longer suffices*;
- vii) in cases of continued detention other “*relevant*” and “*sufficient*” grounds justifying the continued deprivation of liberty must be established by the relevant judicial authority acting with “*special diligence*” in the conduct of the proceedings;
- viii) where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of the *concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated*;
- ix) any system that would require from the accused to demonstrate that there is not even a hypothetical danger of absconding, re-offending or collusion would be incompatible with Article 5(3);
- x) detention must not exceed a *reasonable time*; since it is not feasible to translate this into a fixed number of days or years or into various periods depending on the seriousness of the offence, the judicial authority must assess the *reasonableness of the grounds* justifying continued detention *in the specific circumstances of individual case*; as a general rule, the longer the detention continues, the less it could be justified;
- xi) justification for any period of detention, no matter how short or long, must be *convincingly demonstrated*;

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- xii) continued detention can be justified in a given case only if there are specific indications of a *genuine requirement of public interest* which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty;
- xiii) ECHR case law recognized/identified only *four genuine requirements of public interests* (i.e. four legitimate reasons) justifying continued detention: (a) the risk that the accused will fail to appear for trial, (b) the risk that the accused, if released, would take action to prejudice the administration of justice, or (c) commit further offences, or (d) cause public disorder;
- xiv) Even if properly motivated, a detention may be arbitrary if it is disproportionate to the attainment of its purpose;
- xv) the danger of absconding cannot be gauged solely on the basis of severity of the possible sentence but must be assessed with reference to a number of other relevant factors such as the *character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted*; the danger of flight necessarily decreases as the time spent in detention passes by for the probability that the length of detention on remand will be deducted from the period of imprisonment which the person concerned may expect if convicted is likely to reduce his temptation to flee.
- xvi) when the only remaining reason for continued detention is the fear that the accused will abscond his release must be ordered if it is possible to obtain from him guarantees that will ensure his appearance.

9. In sum, detention on remand must serve one or more of the legitimate purposes/genuine public interests (indicated above, under 9(xiii)), and be *necessary* and *proportionate* for the declared purpose(s). It must never

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transcend into punishment prior to judgement, *either by its motivation or by its effect*.

10. Contrary to the established human rights jurisprudence (explained above), the ICTY Appeals Chamber requirement of “sufficiently compelling humanitarian grounds” for *release* during trial (when the person is still presumed innocent and fully entitled to the right of liberty) is even stricter (more limited in its scope) and harder to meet than the requirement of “exceptional circumstances” applicable for *provisional release*⁶ in the post-judgement phase (when the person is presumed guilty and no more entitled to the right of liberty). Respectfully, this is absurd.
11. Moreover, the requirement of “sufficiently compelling humanitarian grounds” is unjust and humiliating for the accused (who, again, is still presumed innocent and fully entitled to the right of liberty). Namely, he could hope to be temporarily released, for a very limited period, only (more or less) in case(s) of his or his family members’ sufficiently compelling, illness(es) or, perish the thought, death(s). Consequently, utilization of his human right guaranteed is fully dependable on the blind course of Nature. There is nothing reasonable he personally can do about it. With due respect, no human being deserves to be put in such an awkward position.

Underlying purpose of recent amendments to Rule 65

12. The Petkovic Defence therefore understands recent amendments to Rule 65 as an expression of will of the ICTY judges to ensure legal preconditions for a proper correction of the current jurisprudence in order to bring this jurisprudence in line with the relevant human rights jurisprudence. It goes without saying that it is essential for the noble

⁶ Significantly, in Rule 65(A)(B)(C)(E)(F)(G)(H) the term *release* is consistently used in the context of the pre-trial (i.e. prior to judgement) phase, while the term *provisional release* is exclusively used in Rule 65 (I) applicable in the appeals context. Such use of language is by no means accidental, but correctly points to fundamental difference in the position, and consequentially in the rights, of the accused in essentially different stages of the proceedings (prior to judgement – after judgement).

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mission and aspiration of the ICTY to fully respect internationally recognized standards on the rights of the accused.

13. After changes in Rule 65 it is clear now that:
- i) accused may be released until the judgement under the same requirements regardless of the stage of the proceedings;
 - ii) there is nothing in new Rule 65 indicating that requests for release should be treated and/or considered differently depending on the particular stage of the proceedings (prior and/or post-Rule 98 stage);
 - iii) it is left to the *discretion* of the Trial Chamber, at any stage of the proceedings, whether to consider “sufficiently compelling grounds” for release or not;
 - iv) it is obvious now that the existence of “sufficiently compelling humanitarian grounds” is no more a precondition for release at any stage of the trial, including post-Rule 98 bis stage (otherwise new Rule 65 would explicitly state so), but merely a factor which may or may not be considered by the Trial Chamber.
14. In any case, the applicable law has been changed and such new situation requires renewed consideration of the Trial Chamber since there is no binding jurisprudence pursuant to the amended Rule 65.

C. ARGUMENT

No risk of flight, or danger for any victim, witness, or any other person – Petkovic personal and family circumstances

15. At the outset it should be mentioned that so far all (14) requests of Mr. Petkovic for provisional release during various stages of the proceedings have been granted without exception.

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16. It is also important to note that the last nine provisional release orders of this Trial Chamber concerning Mr. Petkovic followed the 20 February 2008 decision pursuant to Rule 98 *bis* and that the last provisional release order (of 24 June 2011) have been issued after the close of the hearings.
17. Mr. Petkovic has been deprived of (or substantially restricted in) his liberty for more than 7,5 years.
18. He surrendered voluntarily to the ICTY on 5 April 2004 (four days after receiving the indictment). He initially remained detained in the UNDU until 8 September 2004 when he was released by the Trial Chamber's order dated 30 July 2004. This Order was clearly based on the Trial Chamber's conclusion that Mr Petković had satisfied the conditions under Rule 65.
19. During more than 19 months of his pre-trial release Petkovic's behavior has been impeccably. He fully complied with the conditions of his release. There was no harm or threat of any sort to his or his family members personal security and there never was any suggestion from any of the public authorities in Croatia and the Netherlands or from anybody else of any difficulty/problem caused by Petković while being on release.
20. All of those points being also true for all (13) subsequent periods of Mr Petković's provisional release. On each occasion he returned to The Hague strictly as ordered. There was no report or even suggestion of any breach or abuse whatever by Mr Petković of the terms and conditions of the orders for his provisional release or of any failure by the Republic of Croatia fully to respect and observe its obligations under the orders.
21. Petkovic's previous provisional releases have not caused any kind of public disturbance or disorder, neither in Croatia (where Mr. Petkovic spent his provisional releases) nor in BiH (where the victims reside).

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22. It is true that Petković's previous applications for provisional release since the trial began have all been made and consequentially granted on "humanitarian grounds". As responsible person Petkovic understood and accepted that his presence in The Hague was required and necessary during the court hearings. He actively participated in his defence. He therefore requested to be provisionally released mainly during court recesses (with only two exceptions: when he had to undergo a major surgery and for the funeral of his father) as it has consistently appeared that his specific personal and family circumstances would be accepted by the Trial Chamber as sufficiently compelling to justify provisional release on humanitarian grounds. On the other hand, following the Petkovic Appeals decision and subsequent developments in the relevant ICTY jurisprudence he could not adopt any different approach after the close of the hearings since he was aware and respectful of the Trial Chamber's view (clearly expressed on numerous occasions) that it consider itself constrained by the Appeals jurisprudence in this matter.
23. On all previous occasions when ordering provisional release the Trial Chamber has been fully satisfied, *in the specific circumstances of Mr. Petkovic case*, that all requirements of Rule 65 have been met by Mr. Petkovic. i.e. that: (a) he would return to The Hague for trial; (b) he would pose no danger to any victim, witness or other person. *On every occasion that belief has been vindicated*. In addition, in all orders of Mr. Petkovic's provisional release issued subsequent to Rule 98 bis Decision the Trial Chamber consistently held that (c) neither Rule 98 bis Decision nor stages of the proceedings following that Decision in no way increased the flight risk for Mr. Petkovic.
24. Mr. Petkovic's particular personal and family circumstances clearly show that, if released, he will not abscond or pose danger to any victim, witness or other person. Those specific circumstances (including chronically poor state of health of Mr. Petkovic's wife and mother as well as his own medical problems and needs) have been consistently advanced and explained in detail in all his previous requests for

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provisional release. They remained unchanged. The Trial Chamber is therefore well informed on this particular subject, including its humanitarian aspect, so there is no need for a repetition here. In this regard the Defence here incorporates by reference paragraphs 8 and 15-23 of *Motion of Milivoj Petkovic for Provisional Release*, submitted on 7 June 2011 and granted on 24 June 2011.

25. The Trial Chamber is fully entitled to take account of all the facts stated above, as well as Mr. Petković's personal and family circumstances, and ask itself whether it believes, knowing what it does about his background and having observed his irreproachable demeanour towards the Honourable Judges, witnesses, Prosecution and other accused throughout more than 5,5 years of trial, that there is any prospect of Mr Petković now embarking upon the life of a fugitive from this Tribunal. The answer is clearly not.
26. Also, in the light of Mr. Petkovic impeccable behaviour during all previous provisional releases it would be simply unreasonable to assume that now when the court hearings are closed, with no more witnesses to be heard, he could pose any kind of danger to any victim, witness, or any other person, or commit further offences, or in any way interfere with administration of justice in his case.

D. GOVERNMENT OF CROATIA GUARANTEE

27. The Government of Croatia issued on 3 November 2011 its guarantees for Mr. Petković's release pending judgement.⁷ The Government of Croatia has always strictly complied with its obligations pursuant to all the orders for provisional release by this Trial Chamber and there is no reason to believe it will fail to do so on this occasion if the Trial Chamber grants Petković's Motion.

⁷ Annex to this Motion.

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E. PETKOVIĆ'S PERSONAL UNDERTAKINGS

28. Through his counsel Petković offers the Trial Chamber his continuing personal undertakings that he will fully respect all the terms and conditions of his release, including the unequivocal obligation to return to the UNDU in The Hague on the date appointed by the Trial Chamber, and will not abuse such release in any way.

F. RELIEF SOUGHT

29. Pursuant to Articles 20 and 21 of the Statute and Rules 65 and 54 of the Rules, Petković respectfully asks the Trial Chamber to grant him release until the rendering of the judgement in his case, subject to such conditions and undertakings as the Trial Chamber considers necessary.⁸

Word count: 3350

Respectfully submitted by,



Vesna Alaburić

Lead counsel for Milivoj Petković

⁸ Apart from occasionally visiting his 84 years old mother in Vrpolje (near Sibenik, Croatia), at the address: Vrpolje, Iznad Lokve II 35, Petković wishes and intends to spend this requested period living with his wife in Split, Croatia, at the address: Trg Mihovila Pavlinovica 7.

ANNEX

IT-04-74-T
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REPUBLIKA HRVATSKA
MINISTARSTVO PRAVOSUĐAKlasa: 720-11/11-08/19
Urbroj: 514-09-01/1-11-2
Zagreb, 03. studenog 2011.Odvjetnica Vesna Alaburić
Zagreb, Hebrangova 21
Hrvatska**Predmet: Jamstva za privremeno puštanje na slobodu**
- dostavljaju se

Poštovana,

Nastavno na Vaš dopis od 03. studenog 2011. godine kojim ste nam uputili zahtjev za izdavanjem jamstva za privremeno puštanje na slobodu iz pritvora optuženika MKSJ do proglašenja presude, alternativno za kraći period sukladno odluci MKSJ u predmetu Tužiteljstvo MKSJ v. Prlić i dr. IT-04-74, obavještavam Vas o sljedećem:

Vlada Republike Hrvatske će, u slučaju da MKSJ privremeno pusti na slobodu g. Petkovića, u skladu s domaćim zakonodavstvom izvršiti svaku odluku MKSJ-a koja se odnosi na njegovo ponovno pojavljivanje pred tim sudom.

Vlada Republike Hrvatske će također poduzeti sve potrebne mjere kako bi se osiguralo da se g. Petković ponovo pojavi pred MKSJ, te da za vrijeme dok je pušten iz pritvora ni na koji način ne utječe i ne predstavlja opasnost za svjedoke, žrtve ili druge osobe.

Vlada Republike Hrvatske je također spremna, sukladno svojem zakonodavstvu, pružiti drugu dodatnu pomoć ili druga dodatna jamstva u svrhu podupiranja Vašeg zahtjeva za privremeno puštanje na slobodu g. Petkovića.

U skladu sa navedenim, a uzimajući u obzir kooperativnost Vlade Republike Hrvatske, molim da se zajedno sa braniteljima drugih optuženika u predmetu obratite Raspravnom vijeću te zamolite istovremeno puštanje iz pritvora i vraćanje u pritvor svih optuženika, jer bi takvo postupanje bilo praktičnije i poželjnije iz razloga ekonomičnosti i sigurnosti.

S poštovanjem,



MINISTAR

Dražen Bošnjaković

**REPUBLIC OF CROATIA
MINISTRY OF JUSTICE**

Class: 720-11/11-08/19
Number: 514-09-01/1-11-2
Zagreb, 3 November 2011

Attorney

**Vesna Alaburić
Zagreb, Hebrangova 21
Croatia**

Subject: Guarantees for provisional release
- delivered

Dear Ms Alaburić,

Following your request of 3 November 2011 for the issuance of guarantees for the provisional release of the accused before the ICTY until the pronouncement of judgement or, alternatively, for a shorter period in accordance with the Trial Chamber's decision in the case Prosecutor v. Prlic et al., IT-04-74, I am informing you on the following:

The Government of the Republic of Croatia will, if Mr. Petković is provisionally released, act in accordance with its legislation in executing any decision of the ICTY related to his re-appearance before the Tribunal.

The Government of the Republic of Croatia will also undertake all necessary measures to ensure that Mr. Petković re-appears for the trial and that during his provisional release he does not influence or pose threat to any witness, victim or any other person.

The Government of the Republic of Croatia is also prepared, pursuant to its legislation, to provide additional assistance or guarantees in order to support your request for Mr. Petković's provisional release.

In accordance with the above stated and taking into consideration the cooperativeness of the Government of the Republic of Croatia, I ask from you to apply, jointly with defence counsels for other accused, to the Trial Chamber that all accused be simultaneously released and returned, because that would be more preferable and advisable for the reasons of security and economy.

Sincerely yours,

MINISTER OF JUSTICE

Dražen Bošnjaković
/stamped and signed/