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20 July 2007

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**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-04-84-T
Date: 20 July 2007
Original: English

IN TRIAL CHAMBER I

**Before: Judge Alphons Orie, Presiding
Judge Frank Höpfel
Judge Ole Bjørn Støle**

Registrar: Mr Hans Holthuis

Decision of: 20 July 2007

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON MOTION ON BEHALF OF RAMUSH HARADINAJ FOR
PROVISIONAL RELEASE**

Office of the Prosecutor

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I. PROCEDURAL BACKGROUND

1. On 29 June 2007, the Defence for Mr Haradinaj filed a Motion on Behalf of Ramush Haradinaj for Temporary Provisional Release (“Motion”). The Defence requests that Mr Haradinaj be provisionally released during the court recess, specifically from Friday 20 July 2007 until Wednesday 15 August 2007, or such dates as ordered by the Trial Chamber.¹ The Defence further requests that Mr Haradinaj be required to reside in his home in Priština/Prishtinë, Kosovo, and remain within the confines of the municipality of Priština/Prishtinë, with permission to travel to his parents’ residence in Glodane/Gllogjan upon providing 24 hours advance notice to the United Nations Interim Administration Mission in Kosovo (UNMIK).²

2. On 6 July 2007, the Netherlands, in its capacity as the host country and limiting itself to the practical consequences of a possible provisional release, filed a letter pursuant to Rule 65(B) stating that it has no objection to the Motion being granted.³ The Netherlands understood from the Motion that upon provisional release Mr Haradinaj would leave Dutch territory.⁴

3. On 11 July 2007, the Prosecution filed its Response to the Motion on Behalf of Ramush Haradinaj for Temporary Provisional Release (“Prosecution’s Response”), requesting that the Trial Chamber deny the Motion.⁵

4. On 16 July 2007, the Trial Chamber formally notified UNMIK of its opportunity to be heard on the Motion under Rule 65(B).⁶ UNMIK filed its submission in response on 18 July 2007 (“UNMIK Submission”).⁷

5. On 17 July 2007, the Defence for Mr Haradinaj filed its Reply on Behalf of Ramush Haradinaj to the Prosecution’s Response to the Defence Motion for Temporary Provisional

¹ Motion, para. 2.

² Ibid., para. 5.

³ Letter from The Netherlands with Regard to the Provisional Release of Mr Ramush Haradinaj, dated 4 July 2007, filed 6 July 2007.

⁴ Ibid.

⁵ Prosecution’s Response, para. 38.

⁶ Formalized Notification to UNMIK of the Opportunity to be heard on the Motion on Behalf of Ramush Haradinaj for Temporary Provisional Release, 16 July 2007 (“Chamber’s Notification”), page 2.

⁷ Submission by the United Nations Interim Administration Mission in Kosovo (UNMIK) to the Trial Chamber on Formalized Notification to UNMIK of the Opportunity to Be Heard on the Motion on Behalf of Ramush Haradinaj for Temporary Provisional Release, 18 July 2007.

Release (“Defence’s Reply”), submitting that none of the arguments raised by the Prosecution provide grounds for refusing the request for provisional release.⁸

6. On 19 July 2007, the Prime Minister of Kosovo filed a letter stating the Government’s readiness to support UNMIK in ensuring compliance with any conditions that the Trial Chamber would set to a possible provisional release.⁹

II. APPLICABLE LAW

7. Rule 65 of the Tribunal’s Rules of Procedure and Evidence sets out the basis upon which a Trial Chamber may order the provisional release of an accused. Rule 65 applies during pre-trial, as well as during the course of trial.¹⁰ Rule 65 reads, in relevant parts:

(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.

8. The conditions listed under Rule 65(B) are the minimum requirements necessary for granting provisional release. A Trial Chamber has the discretion not to grant the provisional release of an accused even if it is satisfied that these conditions have been met.¹¹ It is for the accused to prove that the conditions of Rule 65(B) have been met¹² and to satisfy the Trial Chamber “that release is appropriate in a particular case”.¹³

⁸ Defence’s Reply, para. 10.

⁹ Letter by the Prime Minister of Kosovo, dated 18 July 2007, filed 19 July 2007.

¹⁰ *Prosecutor v. Milutinović et al.*, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, Appeals Chamber, 14 December 2006, para. 10.

¹¹ *Prosecutor v. Popović et al.*, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovčanin Provisional Release, Appeals Chamber, 1 March 2007, para. 5; *Prosecutor v. Milutinović et al.*, Decision on Milutinović Motion for Provisional Release, Trial Chamber, 22 May 2007, para. 6.

¹² *Prosecutor v. Limaj et al.*, Decision on Fatmir Limaj’s Request for Provisional Release, Appeals Chamber, 31 October 2003, para. 40; *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradinaj’s Motion for Provisional Release, Trial Chamber, 6 June 2005, para. 21.

¹³ *Prosecutor v. Šešelj*, Decision on Defence Motion for Provisional Release, Trial Chamber 23 July 2004, para. 6.

9. When assessing a request for provisional release, a Trial Chamber must consider all relevant factors and provide a reasoned opinion indicating its view with regard to those factors.¹⁴ What relevant factors to consider and how to balance them depends upon the particular circumstances of the case and of the accused.¹⁵

III. SUBMISSIONS

10. The Defence for Mr Haradinaj submits that all requirements of Rule 65(B) have been met.¹⁶ It points out that Mr Haradinaj surrendered voluntarily to the Tribunal.¹⁷ In addition, the Defence notes that Mr Haradinaj fully complied with all conditions imposed by the Pre-Trial Chamber on his pre-trial provisional release, which proceeded without difficulties or incidents.¹⁸ The Defence further argues that since there have been no relevant changes to the circumstances that existed during his pre-trial provisional release, there can be no doubt that Mr Haradinaj would return for trial.¹⁹

11. The Defence submits that there is no basis for asserting that Mr Haradinaj's provisional release would pose a danger to victims or witnesses.²⁰ It points out that there is no evidence that Mr Haradinaj's pre-trial provisional release posed any such danger and no reason why the situation would be different today.²¹ The Defence further notes that Mr Haradinaj does not request permission to engage in public political activities, which the Trial Chamber understands as an additional argument in support of the Defence's position that Mr Haradinaj's provisional release would not pose a risk to victims or witnesses.²²

12. The Prosecution does not contest the Defence's submission that Mr Haradinaj, if released, would return for trial. However, the Prosecution submits that Mr Haradinaj's

¹⁴ *Prosecutor v. Šainović and Ojdanić*, Decision on Provisional Release, Appeals Chamber, 30 October 2002, para. 6; *Prosecutor v. Limaj et al.*, Decision on Fatmir Limaj's Request for Provisional Release, Appeals Chamber, 31 October 2003, para. 36; *Prosecutor v. Popović et al.*, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, Appeals Chamber, 1 March 2007, paras 7, 13.

¹⁵ *Prosecutor v. Stanišić*, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, Appeals Chamber, 17 October 2005, para. 8.

¹⁶ Motion, paras 3, 17.

¹⁷ *Ibid.*, para. 6.

¹⁸ *Ibid.*, para. 10.

¹⁹ *Ibid.*, para. 17.

²⁰ *Ibid.*, para. 19.

²¹ *Ibid.*, paras 19-20.

²² *Ibid.*, para. 20.

provisional release would pose a danger to either victims or witnesses.²³ The Prosecution argues that since the beginning of the trial in March 2007, the *Me Ramushin* (with Ramush) publicity campaign has spread the message that Mr Haradinaj must be supported and that witnesses who testify against him are traitors.²⁴ According to the Prosecution, this campaign creates a climate of fear and intimidation affecting many Prosecution witnesses.²⁵ It is the view of the Prosecution that Mr Haradinaj's provisional release "would be perceived as a prelude to his permanent release" and therefore the message "that [Mr] Haradinaj should be supported until he is inevitably acquitted (...) would be reinforced and strengthened".²⁶ The Prosecution contends that it has already encountered serious problems in ensuring that witnesses appear before the Tribunal to give evidence and that, if Mr Haradinaj were provisionally released, "existing fears of Prosecution witnesses would increase, and the ability of the Prosecution and the Trial Chamber to ensure that witnesses appear and provide testimony would deteriorate even further".²⁷

13. It is the Prosecution's position that in assessing the second part of the test of Rule 65(B), the Trial Chamber should not only consider whether Mr Haradinaj is likely to personally pose a danger to victims or witnesses, but also whether his provisional release would result in a concrete risk of harm for witnesses.²⁸ The Prosecution argues that Mr "Haradinaj's return to Kosovo would result in increased witness intimidation".²⁹ The Prosecution also submits that the Trial Chamber should exercise its discretion to deny Mr Haradinaj's request for provisional release "in the interests of justice, out of fairness to the witnesses and to protect the integrity of the proceedings".³⁰

IV. DISCUSSION

14. According to Rule 65(B), a Trial Chamber cannot grant provisional release unless it is satisfied that an accused, if released, would return for trial. In this respect the Trial Chamber makes the following observations on two relevant factors:

²³ Prosecution's Response, paras 27-30.

²⁴ *Ibid.*, paras. 2, 6-10.

²⁵ *Ibid.*, para. 3.

²⁶ *Ibid.*, para. 4.

²⁷ *Ibid.*, paras 3, 5.

²⁸ *Ibid.*, para. 27.

²⁹ *Ibid.*, para. 27.

³⁰ *Ibid.*, para. 34.

15. First, the Trial Chamber examines the guarantees provided by the government of the country to which the accused seeks to be provisionally released.³¹ According to Security Council Resolution 1244 of 10 June 1999, UNMIK is entrusted with ensuring public safety and order in Kosovo,³² and therefore UNMIK is the proper authority to provide these guarantees.³³ On the basis of the UNMIK Submission, the Trial Chamber is satisfied that UNMIK would be able to secure the attendance of Mr Haradinaj before the Tribunal and the compliance with any conditions that may be imposed by the Trial Chamber.

16. Second, the Trial Chamber considers the circumstances of Mr Haradinaj's surrender to the Tribunal and behaviour during his prior provisional release. In general, the fact that an accused surrendered voluntarily to the Tribunal is a strong indication that he would not try to escape from justice if provisionally released. Mr Haradinaj voluntarily surrendered to the Tribunal in 2005 under circumstances that the Pre-Trial Chamber considered to be "exemplary" and "in positive contrast against the conduct of other accused of his rank in comparable circumstances who have been indicted by the Tribunal".³⁴ In its decision of 6 June 2005, the Pre-Trial Chamber provisionally released Mr Haradinaj, who returned voluntarily to the Tribunal on 27 February 2007 for the commencement of his trial.

17. Additionally, provisional release cannot be granted unless the Trial Chamber is satisfied that an accused, if released, would not pose a danger to victims, witnesses or other persons. This assessment cannot be made in abstract – a concrete danger needs to be identified.³⁵ The Trial Chamber has considered, as suggested by the Prosecution, the decision taken in the *Tarčulovski* case; whereas it accepts the legal reasoning in that decision, the Trial Chamber notes that the facts of that case are substantially different since the accused in that case was linked to supporters who were engaged in violent behaviour.³⁶

³¹ *Prosecutor v. Delić*, Decision on Defence Request for Provisional Release, Trial Chamber, 6 May 2005, page 3.

³² Security Council Resolution 1244 (1999), UN Doc. S/RES/1244 (1999), para. 11(i).

³³ *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradinaj's Motion for Provisional Release, Trial Chamber, 6 June 2005, para. 26.

³⁴ *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradinaj's Motion for Provisional Release, Trial Chamber, 6 June 2005, para. 33.

³⁵ *Prosecutor v. Hadžihasanović et al.*, Decision Granting Provisional Release to Enver Hadžihasanović, Trial Chamber, 19 December 2001, para. 11; *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradinaj's Motion for Provisional Release, Trial Chamber, 6 June 2005, para. 22; *Prosecutor v. Stanišić*, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, Appeals Chamber, 17 October 2005, para. 27.

³⁶ *Prosecutor v. Boškoski and Tarčulovski*, Decision on Johan Tarčulovski's Motion for Provisional Release, Trial Chamber, 18 July 2005, paras 30-31; *Prosecutor v. Boškoski and Tarčulovski*, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, Appeals Chamber, 4 October 2005, para. 18.

18. The Prosecution has presented the Trial Chamber with an overview of both those witnesses who have applied for protective measures and those for whom subpoena applications have been made. Some witnesses named in these overviews claim to have been threatened and pressed not to testify before the Tribunal. Others have expressed fear of a more general nature. However, none of these witnesses claim to have been threatened by or on behalf of Mr Haradinaj. Furthermore, none of the people who have allegedly made threats have been identified. The Trial Chamber has insufficient reasons to conclude that the alleged threats have been made by people who support Mr Haradinaj or are associated with him.

19. Nothing in the above gives the Trial Chamber reasons to find that the specific requirements set out in Rule 65(B) for granting provisional release have not been met.

20. The Trial Chamber retains its discretion not to grant provisional release in cases where it is satisfied that the two conditions of Rule 65(B) are met. In exercising this discretion the Trial Chamber must take into account all relevant factors of the case.

21. The Trial Chamber finds that there are factors in favour of granting the request for provisional release. These include Mr Haradinaj's voluntary surrender to the Tribunal as well as his personal circumstances. The Trial Chamber is mindful of the general benefits of provisional release and gives due weight to the fact that a period of release will tend to boost an accused person's morale and physical and mental health. Mr Haradinaj has a wife and two infant children and the Trial Chamber recognizes that few things compare in importance with proximity to one's spouse and children. This said, Mr Haradinaj has not submitted any circumstances of such an acute nature that would call for an immediate, if only temporary, reunion with his family.

22. The Trial Chamber considers that Mr Haradinaj's proper and cooperative behaviour in court throughout the proceedings is another factor in favour of granting the request. In this respect, the Trial Chamber notes in particular his offer to withdraw from the courtroom when a fearful witness refused to enter it to give testimony.³⁷

23. The duration of detention is a further factor relevant to the decision on whether to grant provisional release.³⁸ The Trial Chamber considers, however, that the total length of Mr

³⁷ T. 1815.

³⁸ *Prosecutor v. Šešelj*, Decision on Defence Motion for Provisional Release, Trial Chamber, 23 July 2004, para. 11.

Haradinaj's detention (approximately 8 months), viewed in the light of the factual and legal complexity of this case, is only to be given limited weight.

24. When The Pre-Trial Chamber granted provisional release to Mr Haradinaj in June 2005 the proceedings were in the pre-trial phase and a trial date had not yet been set. Presently, the Prosecution has presented part of its case, with about forty witnesses having been heard and more witnesses expected to testify in the next months after the summer recess. The Prosecution has made 19 applications for trial-related protective measures, of which 14 were granted. The Trial Chamber has also received 15 applications for subpoena in order to secure the appearance of witnesses, of which 14 were granted. A number of subpoenaed witnesses, even after having been served with a subpoena, indicated that they are not willing to testify before the Tribunal. Many of these witnesses cite fear as a prominent reason for not appearing before the Trial Chamber to give evidence. Although there are no indications of any involvement of Mr Haradinaj in these developments, the Trial Chamber has gained a strong impression that this case is being heard in an atmosphere where witnesses feel unsafe and where serious problems arise in ensuring that they testify before the Tribunal. Many witnesses not only perceive the atmosphere as intimidating and threatening, but consequently also try to avoid meeting their duty to testify before the Tribunal. This development calls for great caution when considering a request for provisional release.

25. The parties have agreed that an unstable security situation exists in Kosovo that is particularly unfavourable to witnesses who appear before the Tribunal.³⁹ The Trial Chamber considers that the volatile situation in Kosovo makes the possibility that witnesses are intimidated or threatened so vivid that it calls for specific caution when deciding on a request for provisional release.⁴⁰ The Prosecution has provided the Trial Chamber with ample evidence that witness intimidation, in general, is a serious problem in Kosovo where witnesses who testify in war crime trials are often seen as traitors.⁴¹ Without blaming Mr Haradinaj personally, the Trial Chamber notes as a fact that the comments made in the press by Defence co-ordinator in Priština/Prishtinë, Mr Michael O'Reilly, were of a character to worsen rather than to improve the existing tense atmosphere surrounding the trial.

³⁹ T. 3955-3956.

⁴⁰ *Prosecutor v. Haradinaj et al.*, Decision on Lahi Brahimaj's Motion for Provisional Release, Trial Chamber, 3 November 2005, page 6.

⁴¹ Prosecution's Response, para. 14, Annex A.

26. Mr Haradinaj was a prominent politician in Kosovo and has a large number of supporters.⁴² The Trial Chamber is convinced that Mr Haradinaj's provisional release would be widely covered in local media. Mr Haradinaj has requested to stay in his home in Priština/Prishtinë and visit his parents in Glodane/Gllogjan, without appearing in public.⁴³ Mr Haradinaj also offered to make a public statement in this regard.⁴⁴ The Trial Chamber is not convinced that such a statement could be expected to have the envisaged effect.

27. Protective measures can contribute to witness security. At the same time, a number of factors complicate witness protection in Kosovo. First, because of Kosovo's small communities and tight family and community networks, guaranteeing anonymity for witnesses requires additional efforts. Second, witness protection programmes in Kosovo face serious financial, administrative and organisational problems, as can be concluded from material presented by the Prosecution.⁴⁵ The temporary return of Mr Haradinaj would inevitably lead to increased media coverage of the proceedings and Mr Haradinaj himself. The Trial Chamber identifies a risk that this would add to the atmosphere described above and influence witnesses to continue or be even more inclined not to appear and testify before the Tribunal.

28. The Trial Chamber has *propriu motu* inquired into possible alternatives to a provisional release in Kosovo, but did not succeed in finding a solution that would satisfy both the Trial Chamber's concerns and Mr Haradinaj's request.

29. According to Article 20 of the Statute, the Trial Chamber "shall ensure that a trial is fair and expeditious and that the proceedings are conducted [...] with full respect for the rights of the accused and due regard for the protection of victims and witnesses". If a Trial Chamber does not take all necessary measures to ensure that witnesses testify before the Tribunal, it jeopardizes the integrity of the trial. A further increase in the number of witnesses who refuse to give evidence in this trial would entail the risk that the Trial Chamber could not fulfil its most important task, namely establishing the truth. Even though the Trial Chamber has no reason to conclude that this is due to Mr Haradinaj himself, his return to Kosovo could

⁴² Ibid., paras 4-10.

⁴³ Motion, para. 5.

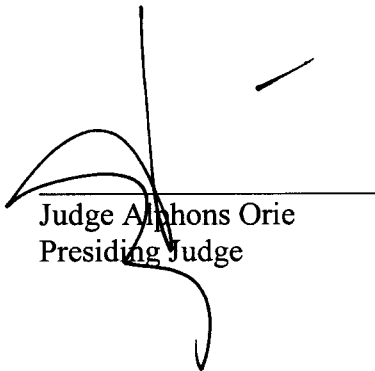
⁴⁴ Reply on Behalf of Ramush Haradinaj to Prosecution's Response to Defence Motion for Temporary Provisional Release, 16 July 2007, para. 5, Confidential Annex A.

⁴⁵ Ibid.

have an impact on the existing atmosphere, which the Trial Chamber is convinced plays a role in witnesses' decisions about whether to testify in this case.

30. In the exercise of its discretion, the Trial Chamber, while considering all the circumstances, finds that the personal interests of Mr Haradinaj are outweighed by the interests of justice, in particular the need to ensure the integrity of the proceedings by avoiding any further risk that the parties will not be able to adduce the necessary evidence in support of their respective cases. The Trial Chamber therefore **DENIES** the request for temporary provisional release.

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



Judge Alphons Orie
Presiding Judge

Dated this 20th day of July 2007
At The Hague
The Netherlands

[Seal of the Tribunal]