



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-04-84bis-PT

Date: 10 September 2010

Original: English

IN TRIAL CHAMBER II

Before: Judge Bakone Justice Moloto, Presiding
Judge Burton Hall
Judge Guy Delvoie

Registrar: Mr. John Hocking

Decision: 10 September 2010

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON RAMUSH HARADINAJ'S MOTION FOR PROVISIONAL
RELEASE**

Office of the Prosecutor

Mr. Paul Rogers

Counsel for the Defence:

Mr. Ben Emmerson QC and Mr. Rodney Dixon for Ramush Haradinaj
Mr. Gregor Guy-Smith and Ms. Colleen Rohan for Idriz Balaj
Mr. Richard Harvey and Mr. Paul Troop for Lahi Brahimaj

THIS 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 the “Motion on behalf of Ramush Haradinaj for Provisional Release” filed on 26 July 2010 (“Motion”);

A. PROCEDURAL BACKGROUND

1. On 21 July 2010 the Appeals Chamber quashed the Trial Chamber’s decisions to acquit Ramush Haradinaj (“Accused”), Idriz Balaj and Lahi Brahimaj on certain counts of the Indictment and ordered that they be retried on these counts.¹ The Appeals Chamber also ordered the detention on remand of Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj and enjoined the Commanding Officer of the United Nations Detention Unit in The Hague to detain them until further order.²

2. On 26 July 2010 the Defence for Mr Ramush Haradinaj (the Defence) filed the “Motion on Behalf of Ramush Haradinaj for Provisional Release” (“Motion”). The Prosecution filed the “Prosecution Response to Ramush Haradinaj’s Motion for Provisional Release” on 2 August 2010 (“Response”). On 6 August 2010 the Defence filed the “Reply to the Prosecution Response to Ramush Haradinaj’s Motion for Provisional Release” (“Reply”). On 11 August a letter from the Dutch Ministry of Foreign Affairs was filed confidentially and on 13 August 2010 a letter from the Norwegian Embassy in The Hague was filed. On 18 August 2010 the Trial Chamber issued a “Request to EULEX for Submissions on Ramush Haradinaj’s Motion for Provisional Release” (“Request”). On 24 August 2010 EULEX filed a letter in response.

B. SUBMISSIONS

1. Motion

3. In the Motion the Defence requests that the Accused be granted provisional release under the conditions specified in the Motion or under such conditions as may be ordered by the Trial Chamber.³ The Defence states that the requested conditions all applied to the Accused when he was provisionally released before his trial.⁴ The Defence does not request that, if granted provisional release, the Accused be permitted to participate in any “public political activities” under conditions

¹ Appeals Judgement, para. 377. The Appeals Chamber ordered that both the Accused and Idriz Balaj be retried on counts 24, 26, 28, 30, 32 and 34 of the Indictment and that Lahi Brahimaj be retried on counts 24, 26, 30 and 34 of the Indictment.

² Appeals Judgement, para. 377.

³ Motion, para. 7.

⁴ *Ibid.*, para. 7.

that were applicable during the latter part of the pre-trial stage or under any other conditions.⁵ The Trial Chamber is invited to request EULEX to confirm that it is prepared to guarantee fulfilment of the conditions sought by the Accused or any conditions the Trial Chamber may seek to impose.⁶

4. The Accused submits that the decision to grant him pre-trial provisional release before his original trial on 6 June 2005 followed his immediate resignation as the Prime Minister of Kosovo and his voluntary surrender to the Tribunal as soon as he was notified that he was indicted.⁷

5. The Accused submits that he has an “unblemished record of complete co-operation with the ICTY” and that there have been no instances of any breaches of the conditions imposed by the Trial Chambers and the Appeals Chamber.⁸

6. The Accused submits that there can be no doubt that he will return for his partial re-trial and that nothing has changed in respect of the circumstances that applied during his initial pre-trial provisional release.⁹

7. The Accused asserts that his provisional release in the past has never posed any danger to victims or witnesses, and there is no evidence at all that witnesses have been endangered as a result of his previous provisional release.¹⁰ The Accused stresses that the Trial Chamber and the Appeals Chamber did not find that he posed a danger to witnesses, nor had the Trial Chamber made any adverse findings or remarks regarding his conduct before or during his trial.¹¹ The Accused submits that there is no suggestion in the Trial Judgement or the Appeal Judgement that he was in any way involved in the failure to testify of the two witnesses mentioned in the Appeal Judgement and that furthermore neither of these witnesses resides in Kosovo.¹² The Accused further contends that there is no evidence showing that he would represent a concrete risk of harm to any victims and witnesses, and no information showing that he has influenced or threatened witnesses in the past or intends to do so in the future¹³

8. The Accused now applies for provisional release on similar conditions to those set out in the Disposition of the “Decision on Lahi Brahimaj’s Application for Provisional Release”, issued by

⁵ *Ibid.*, para. 8.

⁶ *Ibid.*, para. 9.

⁷ *Ibid.*, para. 10 (citing Decision on Ramush Haradinaj’s Motion for Provisional Release, Case No. IT-04-84-PT, 6 June 2005 (“June 2005 Decision”).

⁸ Motion, para. 16.

⁹ *Ibid.*, para. 23.

¹⁰ *Ibid.*, para. 27.

¹¹ *Ibid.*, para. 28.

¹² *Ibid.*, para. 29.

¹³ *Ibid.*, para. 30.

the Appeals Chamber on 27 May 2010 (“Brahimaj Appeals Decision”)¹⁴, save for specific conditions regarding political activities and geographical conditions set out in the Motion.¹⁵

9. The Accused also requests that it be taken into account that his two children are very young and that his wife is pregnant.¹⁶

10. He submits that the requirements of Rule 65 are satisfied and that there is no reason to deny him provisional release before his partial retrial.¹⁷

2. Response

11. The Prosecution opposes the Accused’s application for provisional release because of the danger that it would pose to witnesses and the integrity of the re-trial.¹⁸ It accepts that “there is no evidence that Haradinaj personally poses a danger to witnesses”.¹⁹ However, it does submit that “because witness intimidation was a constant feature of the trial, preserving the integrity of the re-trial requires, at a minimum, that [the Motion] be denied.”²⁰

12. The Prosecution submits that the Trial Chamber refused the Accused’s application for provisional release in July 2007 without evidence of the personal involvement of the Accused in witness interference because the vivid risk of witness intimidation in Kosovo called for specific caution when deciding on a request for provisional release, and because the inevitable media attention surrounding the provisional release of the Accused would intensify the Trial Chamber’s difficulties in preserving the integrity of the proceedings.²¹

13. The Prosecution states that nothing has changed in Kosovo with respect to witness security and that the release of the Accused at this stage would “present a real risk of impairing the retrial by aggravating the difficulties in securing witnesses’ attendance and testimony before the Tribunal”.²² It submits that the difficulties encountered during the trial were characterised by the Appeals Chamber as an “unprecedented atmosphere of widespread and serious witness intimidation”²³ and that “rampant witness intimidation remains a prevalent feature in Kosovo”.²⁴

¹⁴ Brahimaj Appeals Decision, para. 18.

¹⁵ Motion, para. 33-36.

¹⁶ *Ibid.*, para. 37.

¹⁷ *Ibid.*, para. 38.

¹⁸ Response, para. 1.

¹⁹ *Ibid.*, para. 3.

²⁰ *Ibid.*, para. 2.

²¹ *Ibid.*, para. 5.

²² *Ibid.*, para. 6.

²³ *Ibid.*, para. 7 (citing Appeals Judgement, para. 34).

²⁴ Response, para. 8.

14. The Prosecution submits that it is irrelevant that witnesses may reside outside Kosovo, on the grounds that it may call witnesses who reside in Kosovo and witnesses outside Kosovo are exposed to many of the same risks as those in Kosovo.²⁵

15. The Prosecution contends that while the Accused may not present a direct danger to witnesses, the publicity surrounding his release would “add to the already threatening atmosphere influencing witnesses not to appear before the Tribunal”²⁶ and/or risk “encouraging Haradinaj’s supporters to engage in acts of intimidation”.²⁷

16. Additionally, the Prosecution requests that any grant of provisional release be stayed on the basis that it intends to appeal against any such decision.²⁸

3. Reply

17. On 6 August 2010 Haradinaj requested leave to reply to the Prosecution’s response.²⁹

18. The Accused submitted that the Prosecution’s claims that publicity accompanying the Accused’s release will present a concrete risk that witnesses will be intimidated and the partial retrial undermined, are “unsubstantiated, erroneous, and contrary to the jurisprudence of the Appeals Chamber in respect of provisional release”³⁰

19. The Accused also submits that the Prosecution has not submitted evidence that any witnesses have refused to testify because the Accused has been provisionally released, or that they would have been prepared to testify if he was in custody.³¹ Additionally, the Accused argues that the media will report on his case whether he remains in custody or not.³²

20. The Accused submits that no evidence has been submitted to show that his presence in Kosovo would impact negatively on witnesses or induce persons to take steps against witnesses in this case³³. The Accused also submits that there is no foundation for claims that his release would undermine the rights of the witnesses in this case and that protecting the integrity of the trial also

²⁵ *Ibid.*, paras. 10–11.

²⁶ *Ibid.*, para. 12.

²⁷ *Ibid.*, para. 13.

²⁸ *Ibid.*, para. 15.

²⁹ Reply, paras. 1,6.

³⁰ *Ibid.*, paras. 2-3.

³¹ *Ibid.*, para. 7.

³² *Ibid.*, para. 8.

³³ *Ibid.*, para. 12.

entails guaranteeing his rights and giving proper consideration to the particular circumstances of his situation, his conduct, and the respect he has shown to the Tribunal.³⁴

21. The Accused also provided evidence that he is a positive and stabilising influence in Kosovo.³⁵

22. Finally, the Defence further clarified that the Accused does not seek reassessment after 90 days of the condition that he not participate in public political activities or make any public statements.³⁶

C. APPLICABLE LAW

23. Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rule 65") 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. 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.

24. Rule 65(E) further states that the Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal it and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.

D. DISCUSSION

1. Whether the Accused will appear for trial

25. The Trial Chamber notes that the Accused was provisionally released during the pre-trial stage of his initial trial, from 6 June 2005 until his voluntary return on 27 February 2007³⁷, and again during the winter recess in 2007³⁸. The Trial Chamber further notes that the time spent by the

³⁴ *Ibid.*, para. 15.

³⁵ *Ibid.*, paras. 4, 16–18.

³⁶ *Ibid.*, paras. 5, 19.

³⁷ Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 20 July 2007, para. 16.

³⁸ Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 31 October 2007

Accused on provisional release appears to have passed without incident and that the Prosecution has made no submissions suggesting that the Accused would fail to surrender to the Tribunal when ordered to do so.

26. The Trial Chamber notes that in deciding the Accused's provisional release application in June 2005, the Trial Chamber held that "the circumstances of the surrender of the Accused were exemplary and stand in positive contrast against the conduct of other accused of his rank in comparable circumstances, who have been indicted, by the Tribunal"³⁹

27. In determining whether it is satisfied that the Accused would appear for the partial retrial, the Trial Chamber notes that the EULEX has confirmed that it will provide the guarantees proposed in the Motion.⁴⁰

28. The Trial Chamber concludes that there is no reason to believe that there is a risk of the Accused failing to surrender to the Tribunal when ordered.

2. Whether the Accused, if released, will pose a danger to any victim, witness or other person

29. The jurisprudence of the Tribunal has established that the assessment of whether the accused would pose a danger to victims, witnesses or other persons "cannot be made in abstract", and that "a concrete danger needs to be identified".⁴¹

30. On 14 December 2007 in the course of the trial the Trial Chamber noted that during previous instances of provisional release, no concrete incidents of witness or victim intimidation had come to its knowledge.⁴² At an earlier stage of the trial on 20 July 2007 the Trial Chamber found no evidence of witness or victim intimidation by the Accused or on his behalf.⁴³

31. The Trial Chamber further notes the Prosecution's acceptance in the Response that "there is no evidence that Haradinaj personally poses a danger to witnesses"⁴⁴ and the Trial Chamber finds that no such evidence has been submitted.

³⁹ Decision on Ramush Haradinaj's Motion for Provisional Release, para. 33.

⁴⁰ Submission by EULEX Kosovo to the Trial Chamber, 24 August 2010.

⁴¹ Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 20 July 2007, para 17; *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.

⁴² Decision on Motion of Ramush Haradinaj for Provisional Release, 14 December 2007 ("December 2007 Decision"), para. 19.

⁴³ Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 20 July 2007 ("July 2007 Decision"), para. 18.

⁴⁴ Response, para. 3.

32. On the basis of the foregoing the Trial Chamber finds that the Accused does not pose a personal risk to the safety of any witnesses, victims or other persons.

3. Exercise of discretion whether to grant provisional release

33. The Trial Chamber retains a discretion not to grant provisional release where it is satisfied that the two conditions given in Rule 65(B) have been met, and in deciding whether to exercise that discretion the Trial Chamber must take into account all relevant factors of the case.⁴⁵ The Trial Chamber will now consider whether to exercise this discretion.

34. The Trial Chamber takes account of the high level of cooperation of the Accused with the Tribunal throughout the proceedings.⁴⁶

35. The Trial Chamber accepts that witness intimidation remains prevalent in Kosovo⁴⁷ and that there was an unprecedented atmosphere of widespread and serious witness intimidation surrounding the trial.⁴⁸

36. The Trial Chamber further accepts the submission of the Prosecution that a decision to grant the Accused provisional release will draw additional media attention to the proceedings, which will add to the already threatening atmosphere for witnesses⁴⁹ and that the publicity following such a decision may encourage the Accused's supporters to engage in acts of intimidation.⁵⁰

37. During the trial on 20 July 2007 the Trial Chamber decided that in order to ensure the integrity of the proceedings it would exercise its discretion in denying a request of the Accused for provisional release.⁵¹ In reaching this decision it found that the increased media coverage of the proceedings and the Accused resulting from his provisional release would add to the atmosphere unfavourable to witnesses⁵² and that a further increase in the number of witnesses refusing to give evidence would undermine the fulfilment of the Trial Chamber's task of establishing the truth.⁵³ On 14 December 2007 the same Trial Chamber decided not to exercise its discretion and to grant the request of the Accused for provisional release.⁵⁴ In its reasoning the Trial Chamber stated that the circumstances had changed considerably with regard to the impact on witnesses or victims from

⁴⁵ July 2007 Decision, para. 20.

⁴⁶ Cf. July 2007 Decision, para. 22.

⁴⁷ Cf. Response, paras. 8–9.

⁴⁸ Appeal Judgement, para. 34.

⁴⁹ Response, para. 12.

⁵⁰ *Ibid.*, para. 12.

⁵¹ July 2007 Decision, para. 30.

⁵² July 2007 Decision, para. 27.

⁵³ *Ibid.*, para. 28.

⁵⁴ December 2007 Decision, para. 24.

those on which its earlier July 2007 Decision was based because the Prosecution case had closed and there would be no Defence case.⁵⁵

38. The Trial Chamber finds that the present circumstances are closer to those of the July 2007 Decision, because a partial retrial has been ordered. Moreover the Appeals Chamber found that the failure of the Trial Chamber to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution's requests to secure the testimony of Kabashi and another witness, both of whom were reluctant to testify, resulted in a miscarriage of justice and on the basis of this ordered the partial retrial.⁵⁶ The position of witnesses in the partial retrial will be highly sensitive and the potential harm to the integrity of the proceedings resulting from witness interference has been shown by the Judgement of the Appeals Chamber to be significant.

39. The Trial Chamber finds that the evidence referred to by the Prosecution in paragraph 11 of the Response suggests that witnesses and potential witnesses in the trial were subject to intimidation outside Kosovo. The added risk to witnesses that would result from the provisional release of the Accused could therefore make itself felt beyond Kosovo.

40. The Trial Chamber acknowledges that the duration of detention is a relevant factor.⁵⁷ It considers that there is less justification for the exercise of the discretion to deny provisional release, if it will result in detention on remand for a long period of time. Specifically, it considers that the exercise of the discretion to deny provisional release is justified if only a short period of time elapses between the Appeals Chamber's decisions to partially quash the acquittal of the Accused and to order his detention on remand on the one hand and the start of the partial retrial on the other hand. However, the increased media coverage of the proceedings resulting from the provisional release of the Accused shortly after the Appeals Chamber's decisions and shortly before the start of the partial retrial would have a cumulative effect on the atmosphere that would be unfavourable to witnesses and would further undermine the fulfilment of the Trial Chamber's task of establishing the truth.

41. At the present time while it is difficult to predict the length of the pre-trial phase, there is no indication that it will be lengthy. However, it may become apparent, as the preparations for the partial retrial begin, that the pre-trial phase will indeed be lengthy. This would amount to a change in the relevant circumstances, which the Trial Chamber would be inclined to consider.

⁵⁵ December 2007 Decision, para. 21.

⁵⁶ Appeal Judgement, paras. 37, 49–50.

⁵⁷ See July 2007 Decision, para. 23.

42. Upon weighing up the relevant factors the Trial Chamber finds that although the conditions set forth in Rule 65(B) are met, the Trial Chamber should exercise its discretion to deny provisional release. In exercising its discretion in this way the Trial Chamber attaches special importance to the risk to the integrity of the trial posed by the Accused's release and it takes account, in particular, of the likelihood, as it appears now, that the pre-trial phase will not be lengthy.

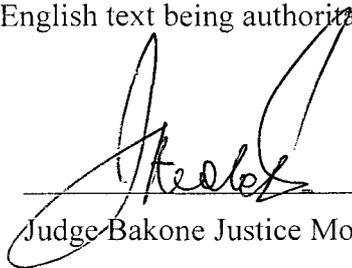
E. DISPOSITION

For the foregoing reasons and pursuant to Rules 65 and 126*bis* the Trial Chamber:

GRANTS the Accused leave to reply; and

DENIES the Motion.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this tenth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]