



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: 8 December 2010

Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 8 December 2010

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

PUBLIC

**DECISION ON APPLICATION FOR TEMPORARY PROVISIONAL
RELEASE FILED BY THE ACCUSED LAHI BRAHIMAJ**

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 seized of the “Application for Temporary Provisional Release Filed by the Accused Lahi Brahimaj” filed on 26 November 2010 (“Motion”);

A. PROCEDURAL BACKGROUND

1. On 21 July 2010 the Appeals Chamber quashed the Trial Chamber’s decisions to acquit Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (“Accused”), 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 November 2010 the Accused filed the “Application for Temporary Provisional Release Filed by the Accused Lahi Brahimaj” (“Motion”). On 3 December 2010 the Prosecution filed “Prosecution Response to Lahi Brahimaj’s Second Motion for Provisional Release” (“Response”). On 8 December 2010 the Accused filed confidentially “Reply to Prosecution Response to Lahi Brahimaj’s Second Motion for Provisional Release with Annex A and Confidential Annex B, with Request for Leave to Reply” (“Reply”).

3. On 3 December 2010 correspondence from the Dutch Ministry of Foreign Affairs was filed. On 29 November 2010 the Trial Chamber issued a “Request to EULEX for Submissions on Lahi Brahimaj’s Motion for Temporary Provisional Release”. On 6 December 2010 EULEX filed a letter in response.

B. SUBMISSIONS

1. Motion

4. The Accused requests that the Trial Chamber grant him provisional release for the period from 20 December 2010 to 10 January 2011 upon the same terms and conditions as those previously authorized, or upon such other terms and conditions as the Trial Chamber shall consider appropriate.³

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

² Appeal Judgement, para. 377.

³ Motion, para. 2.

5. The Accused submits that he has complied with the conditions of provisional release that he has been granted in the past.⁴

6. The Accused submits that in the “Decision on Lahi Brahimaj’s Motion for Provisional Release” issued on 10 September 2010 (“September 2010 Decision”) the Trial Chamber was satisfied that he would surrender to the Tribunal when ordered to do so.⁵

7. The Accused argues that he has demonstrated by past conduct throughout the proceedings that he will return as and when ordered to do so for the partial retrial.⁶ He states that his ties to Kosovo remain strong as ever and that he is currently enrolled as a student in the law faculty.⁷

8. The Accused submits that the circumstances since the September 2010 Decision have changed, such that there is no danger to any witness, victim or other person.⁸ He further argues that in this Decision the Trial Chamber attached particular importance to the length of provisional release that had been requested.⁹ The Accused requests provisional release for a limited duration of three weeks and he argues that the concerns voiced by the Trial Chamber in the September 2010 Decision are now fundamentally mitigated.¹⁰

9. The Accused recalls that the Appeals Chamber has previously held that his former provisional release has never posed any danger to victims or witnesses.¹¹ He states that the Appeals Chamber made an express finding that the Prosecution had offered “no substantiated indication” that he “will seek to intimidate witnesses”.¹² The Accused further submits that the two potential witnesses who are the subject of the Appeal Judgement are resident outside of Kosovo and that there is no evidence of him posing a concrete risk to any potential witnesses, particularly not when the requested period of provisional release is “a matter of short weeks” and the potential witnesses are not resident in Kosovo.¹³

10. The Accused states that his record of more than one year in compliance with his conditions of provisional release needs to be considered by the Trial Chamber.¹⁴

⁴ Motion, paras. 11–13.

⁵ Motion, para. 20; September 2010 Decision, para. 29.

⁶ Motion, para. 21.

⁷ *Ibid.*, para. 22.

⁸ *Ibid.*, para. 25.

⁹ *Ibid.*, para. 26.

¹⁰ *Ibid.*, para. 27.

¹¹ *Ibid.*, para. 28.

¹² *Ibid.*, para. 29.

¹³ *Ibid.*, para. 34.

¹⁴ *Ibid.*, para. 30.

11. The Accused requests the Trial Chamber to request EULEX to confirm that it is prepared to continue to monitor his compliance with the conditions of release imposed upon him.¹⁵

2. Response

12. The Prosecution opposes the Motion because of the concrete danger that the provisional release of the Accused would pose for witnesses.¹⁶ It further submits that in light of the “prevalent atmosphere of widespread and serious witness intimidation” and the publicity that would follow the provisional release of the Accused, his provisional release risks undermining the integrity of the retrial.¹⁷

13. The Prosecution submits that “nothing has changed” since the September 2010 Decision when the Trial Chamber found that the release of the Accused presented a concrete danger to witnesses.¹⁸

14. In the submission of the Prosecution, the provisional release of the Accused would pose a danger to witnesses irrespective of the length of release requested and when he was released for two weeks during the 2007 winter recess, the crucial consideration was not the brevity of the provisional release requested, but that the presentation of the evidence had concluded and no further witnesses were to be called.¹⁹

15. The Prosecution states that witness intimidation has been a constant feature of the case²⁰ and that the European Commission Kosovo 2010 Progress Report issued on 9 November 2010 confirms that witness intimidation remains a serious problem.²¹ The Prosecution submits that since the retrial was ordered it has encountered difficulties in persuading witnesses in and outside Kosovo to testify.²²

16. It is the contention of the Prosecution that provisional release, even if temporary, will amplify the already widespread atmosphere of witness intimidation and ultimately risk undermining the integrity of the proceedings and that this applies particularly at the present stage when the retrial is about to begin.²³

¹⁵ *Ibid.*, para. 35.

¹⁶ Response, para. 1.

¹⁷ *Ibid.*, para. 1.

¹⁸ *Ibid.*, para. 2.

¹⁹ *Ibid.*, para. 5; Decision on Behalf of Lahi Brahimaj for Provisional Release, 14 December 2007, para. 17.

²⁰ Response, para. 9.

²¹ *Ibid.*, para. 10.

²² *Ibid.*, para. 12.

²³ *Ibid.*, para. 12.

17. The Prosecution submits that the forthcoming elections increase the risk arising from the provisional release of the Accused and that in this political context the decision to release the Accused would draw intense media attention, thereby adding to the atmosphere of witness intimidation and to the encouragement to supporters of the Accused and Ramush Haradinaj to engage in acts of intimidation.²⁴

18. The Prosecution also submits that provisional release should not be granted without guarantees from EULEX that it will ensure compliance with the conditions of provisional release;²⁵ and it requests that, if provisional release is granted, it be stayed pursuant to Rule 65(E) of the Rules of Procedure and Evidence (“Rules”).²⁶

3. Reply

19. The Accused requests leave to reply to the Response.²⁷ He submits that the Prosecution has failed to establish the existence of any evidence that he would pose any concrete risk to victims or witnesses.²⁸ As to the confidential Annex B to the Response, the Accused submits that the information that it contains is vague and does not establish that the provisional release of the Accused would pose a risk to potential witnesses.²⁹ It is the contention of the Accused that he has not had any personal involvement in witness intimidation and the assertion of the Prosecution that he has is based on uncorroborated and untested statements.³⁰ The Accused submits that Kosovo is fundamentally a more stable society than it was in 2006³¹ and that the European Commission Kosovo 2010 Progress Report issued on 9 November 2010 in Annex A of the Response refers to the witness intimidation in a specific context.³² He submits that there is no evidence that any potential witness would be more or less inclined to testify in the partial retrial as a result of any media coverage of the Accused’s past or possible future provisional release.³³

4. Correspondence from EULEX

20. In its letter of 6 December 2010 EULEX confirmed that it was willing and able to assume responsibilities in relation to the provisional release of the Accused requested in the Motion.³⁴ It also drew attention to the evolving nature of its role in Kosovo and stated that whilst it retained

²⁴ *Ibid.*, para. 13.

²⁵ *Ibid.*, para. 15.

²⁶ *Ibid.*, para. 16.

²⁷ Reply, para. 1.

²⁸ *Ibid.*, para. 4.

²⁹ *Ibid.*, para. 5.

³⁰ *Ibid.*, paras. 8–11.

³¹ *Ibid.*, para. 12.

³² *Ibid.*, para. 14.

³³ *Ibid.*, para. 16.

executive powers in respect of war crimes investigations and trials, its mandate was not as expansive as that of the international civilian presence previously administered by UNMIK.³⁵

C. APPLICABLE LAW

21. 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.

22. 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

23. In the September 2010 Decision the Trial Chamber was satisfied that the Accused would surrender to the Tribunal when ordered.³⁶ No evidence has been adduced since the September 2010 Decision that would indicate that the Accused if released would not appear for the trial. Moreover EULEX has confirmed that it is willing and able to assume responsibilities in relation to the provisional release of the Accused requested in the Motion.³⁷ Therefore the Trial Chamber is satisfied that the Accused will appear for trial.

³⁴ EULEX Correspondence, p. 1.

³⁵ *Ibid.*, p. 2.

³⁶ September 2010 Decision, paras. 26–29.

³⁷ EULEX Correspondence, p. 1.

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

24. The jurisprudence of the Tribunal has established that an 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”.³⁸

25. On 3 May 2006 the Trial Chamber examined confidential evidence from UNMIK regarding the Accused’s conduct and found that:

“[T]he totality of the evidence, as opposed to each of these incidents considered in isolation, raises a substantial doubt that the Accused, were he granted provisional release, would conduct himself in a way so as not to pose a threat to victims and potential witnesses in his case.”³⁹

On the basis of this evidence the Trial Chamber denied the Accused’s Motion, holding that he had failed to satisfy the requirements of Rule 65(B).

26. In the September 2010 Decision the Trial Chamber examined the Decisions of 14 December 2007⁴⁰ and 25 May 2009⁴¹ allowing the Accused to be provisionally released.⁴² In the December 2007 Decision the Trial Chamber held that the danger that the Accused posed to future witnesses was considerably diminished because the trial had entered a new stage in which the Prosecution’s case was closed and no Defence case would be presented.⁴³ In the May 2009 Decision the Appeals Chamber was seised of a motion from the Accused seeking provisional release, when he had served approximately two-thirds of his sentence⁴⁴ and it considered it unlikely that the Accused would pose a danger to potential witnesses at that particular stage of the proceedings because the outcome of the appeals was unforeseeable and a retrial was only one of the possible outcomes.⁴⁵ The present state of affairs is different in that the preparations for the retrial are advanced and the hearing of the Prosecution witnesses can be expected to take place soon.

27. The Trial Chamber sees no reason to revise the finding that it made in the September 2010 Decision that the position of witnesses in the partial retrial will be highly sensitive and that, given this context, the allegations which cumulatively raise a substantial doubt as to the conduct of the

³⁸ 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; Decision on Ramush Haradinaj’s Motion for Provisional Release, 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.

³⁹ Response, para. 2. See also, Further Decision on Lahi Brahimaj’s Motion for Provisional Release, 3 May 2006 (“May 2006 Decision”), para. 41.

⁴⁰ Decision on Motion on Behalf of Lahi Brahimaj for Provisional Release, 14 December 2007 (“December 2007 Decision”).

⁴¹ Decision on Lahi Brahimaj’s Application for Provisional Release, 25 May 2009 (“May 2009 Decision”).

⁴² September 2010 Decision, paras. 32–34.

⁴³ December 2007 Decision, para. 17.

⁴⁴ May 2009 Decision, para. 2.

Accused with regard to victims and potential witnesses are of even greater concern.⁴⁶ In this connection, the Trial Chamber finds that witness intimidation continues to be a problem generally in Kosovo⁴⁷ and that since the retrial was ordered the Prosecution has encountered difficulties in persuading witnesses to testify.⁴⁸ The Trial Chamber further notes that there was evidence of witness intimidation in the trial extending beyond Kosovo and that witnesses resident in Kosovo may be called during the retrial.⁴⁹

28. In the September 2010 Decision the Trial Chamber attached importance to the length of provisional release requested and considered that the as yet undetermined period of provisional release pending the commencement of the partial retrial increased the possible risk to victims, witnesses or others.⁵⁰ In the Motion the Accused is seeking provisional release for just three weeks. This is the principal difference between the circumstances of the instant request and those of the request that was denied in the September 2010 Decision. The Trial Chamber finds that owing to the length of the provisional release sought the possible risk is less than it was at the time of the September 2010 Decision. It nevertheless considers that although the danger to victims, witnesses or others that would arise from provisional release is limited by the short period of time requested it is not extinguished.

29. Therefore the Trial Chamber is not satisfied that the Accused, if released, will not pose a danger to any victim, witness or other person. Accordingly the Trial Chamber finds that the requirements of Rule 65(B) are not met.

E. DISPOSITION

For the foregoing reasons and pursuant to Rules 65 and 126bis the Trial Chamber **GRANTS** the Accused leave to reply and **DENIES** the Motion.

⁴⁵ *Ibid.*, para. 14.

⁴⁶ September 2010 Decision, para. 35.

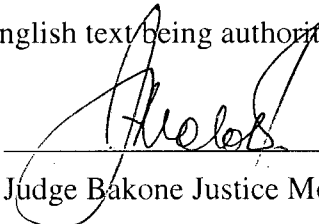
⁴⁷ Response, para. 10. *Cf.* Response, Annex A, European Commission Kosovo 2010 Progress Report, 9 November 2010, pp. 11, 56.

⁴⁸ Response, para. 12.

⁴⁹ September 2010 Decision, para. 34. *Cf.* Prosecution Pre-Trial Brief, Annex A, confidential, 3 December 2010.

⁵⁰ September 2010 Decision, para. 36.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this eighth day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]