

IT-03-66-PT
D954 - D946
17 SEPTEMBER 2003

954 AT

**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-03-66-PT
Date: 16 September 2003
Original: English

IN THE TRIAL CHAMBER

Before: Judge Alphons Orie, Presiding
Judge Amin El Mahdi
Judge Martin Canivell

Registrar: Mr. Hans Holthuis

Decision of: 16 September 2003

PROSECUTOR

v.

**FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU**

DECISION ON PROVISIONAL RELEASE OF HARADIN BALA

Office of the Prosecutor

**Mr. Andrew Cayley
Mr. Alex Whiting**

Counsel for the Accused

**Mr. Karim AA. Khan for Fatmir Limaj
Mr. Tome Gashi and Mr Peter Murphy for Haradin Bala
Mr. Bajram Krasniqi and Mr Steven Powles for Isak Musliu**

Case No.: IT-03-66-PT

16 September 2003

TRIAL CHAMBER I (the “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 (the “Tribunal”);

BEING SEISED OF the Defense Motion for Provisional Release of Haradin Bala (the “Accused”) and Request for Hearing (the “Motion”), filed on 7 July 2003;

NOTING the Partly Confidential Prosecution’s Response to Motion of Haradin Bala for Provisional Release (the “Response”), filed on 18 July 2003;

NOTING the Confidential Reply of Haradin Bala to Prosecution’s Response to Motion for Provisional Release (the “Reply”), filed on 25 July 2003;

NOTING Rule 65 of the Rules of Procedure and Evidence (the “Rules”) which provides in the relevant part:

- (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.

NOTING that, in support of its Motion, the Defense submits, *inter alia*, the following:

- (i) the jurisprudence of the Tribunal is now such that provisional release, rather than detention, is the general rule, which means that provisional release should be granted unless the Prosecution demonstrates that the Accused would fail to surrender or would pose a danger to a victim, a witness or another person;¹
- (ii) the Accused cannot – and will not – flee because: (a) the Accused is the head of a large family who needs his presence and support,² (b) the Accused has strong ties to his community, and has neither the desire nor the ability to escape the jurisdic-

¹ Motion, par. 5.

² *Ibid.*, para 6.

tion of the Tribunal,³ (c) the United Nations Interim Administration Mission in Kosovo (“UNMIK”) controls the territory of Kosovo and may be instructed by the Tribunal to take steps “to convey the Accused to and from his home, to monitor his residence, to allow the Accused to report to UNMIK, and generally to supervise his provisional release”,⁴ and (d) the Accused who has lived all his life in Kosovo has no place to go to avoid trial;⁵

- (ii) the Accused was prevented from surrendering himself to the Tribunal because the indictment against him was sealed and he was arrested by an armed force early in the morning;⁶
- (iii) the Accused has never approached or interfered with witnesses and gives full assurances to the Chamber that “[...] he will not attempt to contact any victim, witness, or other person while on provisional release, either personally or through others”;⁷
- (iv) the Accused is willing to accept and comply with all conditions as may be required of him with respect to his residence, his movements, his conduct, and his return to the Tribunal;⁸
- (v) the Office of the Prime Minister of the Provisional Institutions of Self-Government of Kosovo supports the provisional release of the Accused, which should increase confidence that the terms and conditions of provisional release will be fully enforced;⁹
- (vi) the medical condition of the Accused renders it undesirable that he should be kept in detention;¹⁰

³ *Ibid.*

⁴ *Ibid.*, par. 10.

⁵ *Ibid.* par. 6.

⁶ *Ibid.*, para 7.

⁷ *Ibid.*, par. 8.

⁸ *Ibid.*, par. 9.

⁹ *Ibid.*, par. 11.

¹⁰ *Ibid.*, par. 12.

- (vii) although the charges against the Accused are serious, he had no military or political rank and no command responsibility, and represents the lowest level of accused in the Tribunal;¹¹

NOTING that, in its Response, the Prosecution opposes the Motion arguing, *inter alia*, as follows:

- (i) Rule 65(B) of the Rules places “a substantial burden on the Accused to show that, if he is released, he will appear for trial and will not pose a danger to any witness, victim or other person” and, even when the Chamber is satisfied that the minimum requirements of Rule 65 of the Rules are met, it still retains the discretion to refuse provisional release;¹²
- (ii) the Accused has the burden of proving his suitability for provisional release, and while voluntary surrender might have furthered that cause, arrest without an opportunity for voluntary surrender certainly does not – it is at best a neutral factor;¹³
- (iii) the strong ties that some accused have with their community have not prevented them from remaining at large for years without detection and, therefore, does not constitute a guarantee of appearance for trial;¹⁴
- (iv) as Kosovo’s borders are poorly controlled, “the Accused could with relative ease escape to and hide indefinitely in neighbouring Albania, even without a passport”;¹⁵
- (v) the medical disability of the Accused did not prevent him from participating in military service with Kosovo Liberation Army in 1998 and, as stated by the Appeals Chamber, does not warrant release “even if stress of detention has temporarily aggravated a condition which otherwise can be adequately managed or controlled by a physician”;¹⁶

¹¹ *Ibid.*, par. 13.

¹² Reply, par. 4.

¹³ *Ibid.*, par. 12.

¹⁴ *Ibid.*, par. 7.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, par. 8.

- (vi) undertakings by local authorities in Kosovo to ensure that the Accused appears for trial are without significant value because matters of police and security are reserved to the United Nations, and therefore the local authorities have no means to enforce any such undertakings;¹⁷
- (vii) the authorities of UNMIK are not yet in a position to provide real protection to witnesses or to prevent the Accused from absconding;¹⁸
- (viii) the Chamber has no special power of compulsion over UNMIK different from the Chamber's power over all States;¹⁹
- (ix) the Chamber should give personal undertakings of the Accused limited weight until such time as it has heard from UNMIK on its ability to enforce them;²⁰
- (x) in the light of specific threats made by the Accused, the evidence of his past violence, the tremendous fear expressed by some witnesses that he be provisionally released, the numerous threats that have already occurred in this case and the background of widespread witness intimidation in Kosovo, the Accused has failed to demonstrate that he will not pose a danger to victims and witnesses;²¹
- (xi) low-level perpetrators such as the Accused "may be more difficult to monitor and prevent from fleeing or interfering with witnesses, and the personal violence associated with low-level perpetrators such as the Accused may actually heighten the physical danger to witnesses, particular in cases such as this where the perpetrator seeks to be released back to the scene of the crime and personally knows the surviving victims";²²
- (xii) the schedule established by the Presiding Judge at the last status conference would minimise the likelihood of lengthy pre-trial detention;²³

¹⁷ *Ibid.*, pars. 9 and 13.

¹⁸ *Ibid.*, par. 11.

¹⁹ *Ibid.*, par. 10.

²⁰ *Ibid.*, par. 14.

²¹ *Ibid.*, par. 22.

²² *Ibid.*, par. 23.

NOTING that, in its Reply, the Defense submits, *inter alia*, the following:

- (i) Rule 65 of the Rules should accord with the universal standard adopted by international humanitarian law and be read as creating a general right to pre-trial release and as requiring the Prosecution to bear the burden of proving, “to a standard not less than that of clear and convincing evidence or substantial grounds”, that the Accused should not be released;²⁴
- (ii) the nature of the charges and evidence does not justify denial of provisional release;²⁵
- (ii) while the Tribunal has no effective way of compelling a State to comply with its requests, it has a direct way of influencing UNMIK through the Security Council of the United Nations in the event that UNMIK declined to comply with request made by the Chamber;²⁶
- (iii) the possibility of trial in February 2004, which is uncertain, should not be a ground for denying provisional release;²⁷

CONSIDERING that Rule 65 of the Rules must be read in the light of Article 21(3) of the Statute of the Tribunal;

CONSIDERING that Rule 65 of the Rules previously stipulated that provisional release was only to be granted in “exceptional circumstances” and detention was therefore in reality the rule;

CONSIDERING that the removal of this requirement has neither made detention the exception and release the rule, nor resulted in the situation that despite amendment, detention remains the rule and release the exception;²⁸

²³ *Ibid.*, par. 25.

²⁴ Reply, pars. 2-11.

²⁵ *Ibid.*, par. 19.

²⁶ *Ibid.*, par. 20.

²⁷ *Ibid.*, par. 21.

²⁸ *Prosecution v. Miodrag Jokić*, Order on *Miodrag Jokić* for Provisional Release, IT-01-42-PT, 20 February 2002, par. 17.

CONSIDERING that, on the contrary, “the focus must be on the particular circumstances of each individual case, without considering that the outcome it will reach is either the rule or the exception”,²⁹

CONSIDERING that the task of the Chamber must therefore be to weigh up and balance the factors presented to it in that case before reaching a decision and, as a general rule, to assess “whether public interest requirements, notwithstanding the presumption of innocence, outweigh the need to ensure, for an accused, respect for the right to liberty of person”,³⁰

CONSIDERING moreover that in determining whether to grant provisional release, the Chamber has to be satisfied: (a) that the Accused will appear for trial, and (b) that, if released, he will not pose a danger to any victim, witness or other person;

CONSIDERING the list of factors set out by the Appeals Chamber of which a Chamber should take into account in deciding whether it is satisfied that, if released, an Accused will appear for trial,³¹ and the “circumstances of each accused who applies for provisional release must be evaluated individually as they weigh upon the likelihood that he will appear for trial”,³²

CONSIDERING that, in the circumstances of this case, the following factors are particularly relevant in the determination of whether, if released, the Accused will appear for trial: (a) the circumstances in which the Accused was arrested; (b) the seriousness of the charges against him; (c) the fact that, if convicted, the Accused is likely to face a long prison term; and (d) the guarantees that the authorities of Kosovo would be able to provide in order to ensure the presence of the Accused for trial;³³

CONSIDERING that, although health is not listed as an issue in Rule 65 of the Rules, the Chamber should first consider the question of whether the state of health of the Accused is incompatible with his detention;

²⁹ *Ibid.*

³⁰ *Ibid.*, par. 18.

³¹ *Prosecutor v. Nikola Šainović & Dargoljub Ojdanić*, Decision on Provisional Release, IT-99-37-AR65, 30 October 2002, par. 6.

³² *Ibid.*, par. 7.

³³ *Ibid.*

NOTING the Confidential Order for Medical Examination of the Accused, filed on 24 July 2003;

NOTING the Medical Report of Dr. Koster, filed on 6 September 2003 (the “Medical Report”);

CONSIDERING that the Medical Report stated that the “the medical condition of Mr. Bala now is satisfactory”; that there “is no reason to believe that the current conditions of detention adversely influence Mr. Bala’s medical condition”; and that he “can be considered fit to stand trial”;

CONSIDERING therefore that the health condition of the Accused does not warrant his release;

CONSIDERING that the Accused was arrested pursuant to a sealed indictment and had no actual notice that he was to surrender to the Tribunal;

CONSIDERING that the Chamber finds therefore that the arrest of the Accused is a neutral factor which does not lend support to the contentions of either side: it does not permit the Accused to rely in support of his application on the fact that he has surrendered; on the other hand, it does not permit the Prosecution to claim that he was evading arrest;

CONSIDERING moreover that the Accused is charged with participating in serious crimes; that, if convicted, the Accused is likely to face long prison terms and that he therefore has a strong incentive to flee;

CONSIDERING that while guarantees are not a requirement for the grant of provisional release,³⁴ they do provide further assurance to the Chamber;

NOTING that in its Resolution 1244 (1999) of 10 June 1999, the Security Council of the United Nations established UNMIK as the interim administration in Kosovo and decided that the responsibility of UNMIK will include, *inter alia*, “[e]nsuring public safety and order until

³⁴ *Prosecutor v. Blagojević et al.*, Decision on Application by Dragan Jokić for Leave to Appeal, IT-02-53-AR65, 18 April 2002, pars. 7-8.
Case No.: IT-03-66-PT

the international civil presence can take responsibility for this task” and “conducting border monitoring duties as required”;³⁵

CONSIDERING that no evidence has been adduced which would show that UNMIK would be able to provide guarantees that the Accused, if provisionally released, would be available for trial;

CONSIDERING therefore that the Chamber is not satisfied that if released, the Accused would appear before the Tribunal;

CONSIDERING furthermore that, according to both Rule 65 of the Rules and the jurisprudence of the Tribunal,³⁶ upon a finding that the accused does not meet one of the two requirements under Rule 65(B) of the Rules, the other requirement need not be addressed;

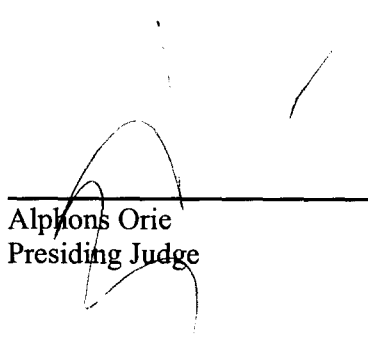
FOR THE FOREGOING REASONS,

PURSUANT to Rule 65 of the Rules,

HEREBY DENIES the Motion.

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

Done this 16th of September 2003
At The Hague
The Netherlands



Alphons Orie
Presiding Judge

[Seal of the Tribunal]

³⁵ S/RES/1244 (1999).

³⁶ *Prosecution v. Krajišnik & Plavšić*, Decision on Momčilo Krajišnik's Motion for Provisional Release and Evidentiary Hearing, IT-00-39 & 40-PT, 18 October 2002.