

**UNITED  
NATIONS**



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-03-66-T  
Date: 26 October 2005  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Krister Thelin  
Judge Christine Van Den Wyngaert

**Registrar:** Mr. Hans Holthuis

**Decision of:** 26 October 2005

**PROSECUTOR**

v.

**Fatmir LIMAJ  
Haradin BALAJ  
Isak MUSLIU**

**DECISION ON DEFENCE RENEWED MOTION FOR  
PROVISIONAL RELEASE OF FATMIR LIMAJ**

**The Office of the Prosecutor:**

Mr. Alex Whiting  
Mr. Julian Nicholls  
Mr. Milbert Shin  
Mr. Colin Black

**Counsel for the Accused:**

Mr. Michael Mansfield, QC, and Mr. Karim A. Khan for Fatmir Limaj  
Mr. Gregor Guy-Smith and Mr. Richard Harvey for Haradin Bala  
Mr. Michael Topolski, QC, and Mr. Steven Powles for Isak Musliu

## I. BACKGROUND

1. This Trial Chamber (“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 “Defence Renewed Motion for Provisional Release of Fatmir Limaj” (“Motion”) filed confidentially on 5 September 2005. This Motion seeks an order from the Chamber for the Accused Fatmir Limaj to be provisionally released until the day of the rendering of the judgement or for any shorter period to be determined by the Chamber, pursuant to articles 20 and 21 of the Statute and Rules 54, 65 and 73 of the Rules of Procedure and Evidence (“Rules”). On 14 September 2005 the Prosecution filed the “Prosecution’s Response to Defence Renewed Motion for Provisional Release of Fatmir Limaj” (“Response”), objecting to the Motion. The Defence filed a “Defence Reply to the Prosecution Response to Defence Renewed Motion for Provisional Release of Fatmir Limaj” (“Reply”) on the 21 September 2005. Pursuant to Rule 126*bis* of the Rules, the Chamber granted leave to the Defence to file the Reply on 22 September 2005.

2. The Defence previously filed a Motion for provisional release on 24 June 2003 (“Previous Application”). Trial Chamber I gave its decision on 12 September 2003<sup>1</sup> (“Previous Decision”) denying the Accused request on the grounds that there was a risk the Accused would abscond. The Trial Chamber reached this conclusion based on a number of factors, namely; it could not be satisfied that the Accused would have surrendered voluntarily if given the opportunity, the seriousness of the charges against the Accused and the lack of guarantees from the legitimate authority and administration of Kosovo, UNMIK. The Defence filed an application for leave to appeal challenging the Trial Chamber’s decision on 22 September 2003.<sup>2</sup> The Appeals Chamber dismissed the application on 31 October 2003, on the basis that the Trial Chamber did not err in its finding (“Appeals Chamber Decision”). Notably the Appeals Chamber upheld the Trial Chamber’s finding on the surrender of the Accused and did not consider that the Trial Chamber had placed too much emphasis on the absence of guarantees from UNMIK.

## II. SUBMISSIONS

3. In support of its Motion, the Defence submits that the requirements for provisional release after trial are no different than the requirements that would apply to pre-trial release. The Defence refers to the Previous Decision and submits that the Trial Chamber’s finding was predicated upon

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<sup>1</sup> “Decision on Provisional Release of Fatmir Limaj”, 12 September 2003.

<sup>2</sup> “Application for Leave to Appeal Against the Decision on Provisional Release of Fatmir Limaj, Rendered by Trial Chamber I on 12 September 2003”, 22 September 2003.

the absence of a guarantee from the legitimate authority and administration of Kosovo, UNMIK. In this regard, the Defence mentions the recent decision in the Ramush Haradinaj case, in which UNMIK provided guarantees for the release of the Defendant and mentioned the general improvement of the security situation in Kosovo. The Defence submits that as a result, the renewed Motion is materially different from that of the Previous Application. The Defence maintains that, contrary to the finding of the Chamber in the Previous Application for provisional release, the Accused did, in fact, voluntarily surrender. In support of this submission, the Defence refers to the Accused's live testimony and that of Mr Bajram Rexhepi at trial, as well as the written submissions previously considered by the Trial Chamber. The Defence submits that the circumstances of the Accused's surrender are similar to those of Ramush Haradinaj except that he was not afforded the same opportunity to voluntarily surrender. The Defence contends that there are personal circumstances which support the granting of provisional release, in particular, the health of the Accused's parents, the Accused's desire to be reunited with his family and to prepare for after the trial, whatever the outcome. The Defence included within the submission a pre-emptive rebuttal to anticipated submissions by the Prosecution. The Defence asserts that the fact that the Prosecution has given its sentencing recommendations is meaningless until the pronouncement of judgement. In this regard, the Defence also submits that the evidence in the case is not "overwhelming". It is the Defence's submission that the Accused would not use the opportunity to flee as he would not want to become a fugitive for life. Finally, the Defence submits that the decision by another Trial Chamber to provisionally release Biljana Plavšić following her plea of guilty and prior to the rendering of sentencing is relevant in consideration of the Motion. In the Reply the Defence denies all allegations of interference with witnesses. The Defence asserts that there were unsubstantiated allegations made by the Prosecution prior to trial, no evidence of which was tendered at trial. The Defence notes that no evidence of witness intimidation has been offered by the Prosecution. The Defence also contends that the Prosecution's submissions are factually inaccurate in alleging that the Accused had a false place and date of birth on his passport advancing by way of explanation that during this period of turmoil many travel documents contained mistakes. The Defence further insists that the Accused's failure to inform the media of his correct whereabouts was to avoid difficulties in travel arrangements and afford the Accused an amount of privacy and allow him to maintain some dignity. In response to the Prosecution assertion that at this stage in the proceedings the incentive is stronger than ever for the Accused to flee, the Defence contends that the charges, and the sentencing recommendations in the submissions of the Prosecution are at the "lower end of the spectrum of crimes before the ICTY".<sup>3</sup> Further, should UNMIK be unwilling or unable to monitor the Accused effectively, the Defence reiterates its alternative submission for a short fixed

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<sup>3</sup> "Defence Reply to Prosecution Response to Defence Renewed Motion for Provisional Release of Fatmir Limaj",

period of provisional release. As a further alternative it is submitted that the Chamber might order that no legal transfer take place but the Accused be allowed to make a supervised visit to his parents in Kosovo, undertaken in the custody of Tribunal personnel.

4. The Prosecution objects to the Motion on a number of grounds. It submits that the assertion of the Accused in his Motion that the Previous Decision was “predicated upon the absence of a guarantee from UNMIK”<sup>4</sup> is merely a reiteration of the argument put forth in the appeal against the initial decision which was rejected in the Appeals Chamber Decision. Further, the Prosecution argues that the ability of UNMIK to provide guarantees to the Chamber in respect of the Accused has not materially changed from its position stated in the Previous Application; in support of this, the Prosecution makes reference to the case of Beqa Beqaj in which UNMIK advised, earlier this year, that it would be unable to fully monitor the Accused due to insufficient resources. The Prosecution submits that the circumstances of the Accused’s surrender should not be re-examined and as it was thoroughly dealt with in the Previous Decision and the Appeal Chamber Decision, which specifically upheld the Trial Chamber’s finding that the Accused did not voluntarily surrender, noting his false representations to the press and to the arresting authorities in Slovenia. The Prosecution submits that there has been nothing put before the Chamber to cause it to depart from the Previous Decision. It suggests that, in view of the strong evidence against the Accused and his awareness of the Prosecutions submissions as to sentencing, it is “difficult to imagine a case in which an accused would have a stronger incentive to flee”<sup>5</sup>. The Prosecution distinguishes the two recent cases granting provisional release pending judgement on the facts<sup>6</sup>, particularly as all three accused granted provisional release had previously being granted provisional release before trial. Further, it draws a further distinction with the application of Ramush Haradinaj, who had voluntarily surrendered to the Tribunal and whose trial will not begin until possibly 2007. The Prosecution submits that the case of Biljana Plavšić is not comparable as she had entered a plea of guilty, a plea which represented an important step towards reconciliation in her country. The Prosecution further maintains that the Accused would pose a threat to victims and witnesses should he be released. In this regard it is contended that events since 2003 have confirmed the danger to victims and witnesses in this case and that there are “supported suspicions”<sup>7</sup> that people close to the Accused have been involved in witness intimidation. The Prosecution submits that this situation

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21 September 2005.

<sup>4</sup> Motion, para 10.

<sup>5</sup> Response, para 8.

<sup>6</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Decision on Motions by Enver Hadžihasanović and Amir Kubura for Provisional Release, 19 July 2005 (Hadžihasanović and Kubura Decision) and *Prosecutor v. Halilović*, Decision on Motion for Provisional Release, Case No. IT-01-48-T, 1 September 2005 (Halilović Decision).

<sup>7</sup> Response, para 25.

persists even though the witnesses have completed their testimony, particularly as the proceedings in this case are not finalised and there could be reason to call or re-call witnesses in the future.

### III. DISCUSSION

5. Rule 65 of the Rules provides, in so far as it is relevant:

(A) Once detained, an accused may not be released except upon an order of a Chamber.

(B) Release may be ordered by the 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 satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

6. The Chamber accepts that Rule 65 is not as a matter of construction limited to pre-trial proceedings and that it is in a position to consider the application of the Accused.<sup>8</sup>

7. The Appeals Chamber has indicated a non-exhaustive list of factors to be taken into account when considering whether to grant provisional release, so far as these are relevant to provisional release pending judgement, these are: whether the applicant is charged with serious criminal offences and, if convicted, is likely to face a long prison sentence; the circumstances in which he surrendered; the degree of co-operation given by the authorities concerned; whether the relevant government has given guarantees that the accused will return to the Tribunal for judgement and observe the conditions set for his provisional release; whether the accused has held very senior positions, so far as it is relevant to the weight of governmental guarantees; whether the applicant has given a personal guarantee to abide by any conditions set for his provisional release; the likelihood that the relevant authorities will re-arrest the accused should he decline return to the Tribunal when required- so far as that can be predicted in the present circumstances. To this the Chamber would add the conduct of the Accused during trial. The degree of relevance and the relative weight to be attached to these considerations will, of course, vary with the particular circumstances of the case.

8. The Tribunal's jurisprudence indicates that there should be a "material change in circumstances" which would justify reconsideration of a renewed motion for provisional release.<sup>9</sup> The burden of proof remains on the Accused to satisfy the Chamber, in particular, that he will appear for judgement and, while released, that he will not pose a danger to any victim, witness or other person.<sup>10</sup> Due to the jurisdictional and enforcement limitations of the Tribunal and its need to

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<sup>8</sup> Halilović Decision, p 5.

<sup>9</sup> *Prosecutor v. Martić*, Case No. IT-95-11-PT, Decision on the Second Motion for Provisional Release, 12 September 2005, para 16. (Martić Decision)

<sup>10</sup> Martić Decision, para 12.

rely on local or international authorities to monitor the movements and conduct of the Accused and to affect its arrest warrants, the Accused must have a clear and strong case to satisfy the Chamber that he will appear for judgement if released, and that he will not pose a danger to any victim, witness or other person.<sup>11</sup>

9. On 10 October 2005, the authorities of the host country informed the Tribunal that they had no objections in respect of provisional release of the Accused. On 11 October 2005 the legitimate authority and administration in Kosovo, UNMIK, replied to an enquiry ordered by the Chamber as to the nature of the supervision and the guarantees it could provide in relation to the Accused. The Chamber, therefore, considers that the requirement set forth in Rule 65(B) to afford the host country, and the State to which the Accused seeks to be released, the opportunity to be heard has been fulfilled.

10. Contrary to a significant thrust of the Defence submissions, the Chamber is not able to accept, at this stage, that it should proceed on the basis that there is a material change of circumstances because, in view of the evidence led at trial, there is a significantly reduced prospect of conviction of the Accused. The Chamber is presently engaged in the process of evaluation of the evidence, and the submissions of the parties on a number of legal issues, with a view to reaching its decision in respect of the guilt or innocence of the Accused, and of each of his two co-accused, in respect of the charges against them. In this case, it cannot be concluded at this stage, without a full and due evaluation of the law and evidence, that there is little or no prospect of conviction of the Accused. In the Chamber's view it would not be in the interests of justice for the purposes of this Motion, to divert its attention from a full assessment of the law and evidence to determine the guilt or innocence of each accused, for the purpose of making some kind of interim assessment of the "prospects of conviction or acquittal" of the Accused Fatmir Limaj in respect of each of the charges he faces.

11. Indeed, in-so-far as the prospects of conviction and punishment may well encourage flight by the Accused, it should be noted that, at this stage, the Accused has heard all the evidence and submissions. It is likely to be his personal evaluation of prospects of conviction which would influence his conduct, rather than this Chamber's ultimate appreciation of the law and the evidence. The Chamber is not in a position to evaluate how the Accused might see his prospects at this stage. Hence, it has been held that proximity to judgement is a factor which might militate against an

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<sup>11</sup> Tolimir, Miletić and Gvero Decision, para 8.

order for provisional release.<sup>12</sup> Depending on the assessment of an accused of his prospects of conviction, the risk of flight may well be at its highest at this stage of the proceedings.

12. While some emphasis was placed by the Prosecution in its submissions as to the appropriate level of punishment which might be imposed in the event that the Accused is convicted of all the charges which he faces, and while this may weigh heavily with the Accused at this stage, the Chamber notes that for this present purpose it gives no weight to the Prosecution submission. Should the Accused be found guilty of one or more of the charges he faces, it remains clear, nevertheless, by virtue of their nature and seriousness, that there is a real prospect of a significant term of imprisonment. Hence, the prospect of conviction cannot be dismissed as of little consequence or relevance.

13. The Chamber is conscience, of course, that, the expectation of a long sentence cannot of itself be held against the accused *in abstracto*, as all accused before the Tribunal are charged with serious crimes and, if convicted, are likely to face heavy sentences.<sup>13</sup> Nevertheless, for the reasons given the seriousness of the charges against the Accused and the length of the Accused's potential sentence is a factor which militates to some extent, especially at this pre-judgement stage, against the Provisional Release of the Accused.<sup>14</sup>

14. Much attention was paid in the course of the submissions to the circumstances of the Accused's surrender. In so far as the Defence now seeks to rely on evidence of the Accused and another in the trial relevant to these circumstances, the Chamber observes that the general effect of this evidence is not to suggest a materially different factual setting but rather to seek to provide a different explanation and justification for the conduct of the Accused at the time. While the Chamber accepts that, if this evidence were to be accepted, the Accused's ultimate objective may not have been flight, nevertheless, it would remain the case that at the least he went to some lengths to avoid and delay the time at which he was taken into custody, and did so with the knowledge of one or more members of the Government. It remains a matter of some uncertainty whether he would have ultimately surrendered voluntarily to the Tribunal had the matter not been taken from his hands.

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<sup>12</sup> *Prosecutor v. Rahim Ademi*, Case No. IT-01-46, Order on Motion for Provisional Release, 20 February 2002, para 22.

<sup>13</sup> *Prosecutor v. Prlić et al*, Case No. IT-04-74-PT, Order on Provisional Release of Jadranko Prlić, 30 July 2004, para 29. (Prlić et al Order)

<sup>14</sup> *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para 25 and Tolimir, Miletić and Gvero Decision, para 10.

15. No formal Governmental guarantees were provided to the Chamber in support of this Motion. Counsel merely outlined possibilities as indicated in two letters. In an effort to clarify the position of the legitimate authority and administration of Kosovo, UNMIK, to which the Accused wishes to be released, it had enquiries made of UNMIK and received a detailed indication of the position of UNMIK. This is relevant and of importance, of course, because of the lack of an enforcement mechanism on the part of the Tribunal.<sup>15</sup> The Chamber will consider the assistance and guarantees UNMIK is ready to offer in light of the particular circumstances of the case<sup>16</sup> and the personal circumstances of the Accused.<sup>17</sup> The need to make enquiries of UNMIK has led to delay in dealing with this Motion.

16. The Chamber has taken into account the submission of the Defence in relation to the guarantees in the Ramush Haradinaj case<sup>18</sup>. The Chamber has also considered that the reply from UNMIK, in which it states that its response to certain requirements in this case differs from those given in the Beqa Beqaj case, shows that in some respects the present capacity of UNMIK to effectively monitor the Accused while he is in Kosovo has improved. However, the Chamber is also conscious of the conditional and limited ability of UNMIK to provide assurances as to the Accused's compliance with the conditions of his provisional release, even while he is in Kosovo. The lack of definite assurances, coupled with the position of UNMIK with respect to the Accused's transfer and its reluctance to assume responsibility for the Accused during the journey between Schipol Airport and Kosovo and the return, leaves the Chamber with real reservations about the extent to which UNMIK is in a position to ensure that the Accused will comply with the conditions of his release, including non-interference with witnesses, and to be present in the Tribunal for judgement. No persuasive justification is offered for the Defence proposal that the Tribunal accept the financial and security obligation of transferring the Accused to and from Kosovo. The Chamber further notes that the Accused has held very high political office in Kosovo and remains a person apparently of considerable influence.

17. The Prosecution correctly noted that each of the three persons who have in recent times been granted provisional release pending judgement had also been granted pre-trial provisional release. Each accused had thereby demonstrated that they could abide by the conditions of their release, a fact taken into account in each case.<sup>19</sup> The Accused in this case has not previously been on provisional release, as a result the Chamber is not in a position to be able to rely on the

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<sup>15</sup> Prlić et al Order, para 17.

<sup>16</sup> *Prosecutor v. Mrkšić*, Case No. IT-95-35/1-AR65, Decision on Appeal Against Refusal to Grant Provisional Release, 8 October 2002, para 9.

<sup>17</sup> Šainović and Ojdanić Decision, para 7.

<sup>18</sup> Motion, para 16-22..



demonstrated past willingness of the Accused to abide by the terms and conditions of release. When assessing these factors the case of Biljana Plavsic is materially distinguishable from the present because provisional release was granted there following a plea of guilty.<sup>20</sup>

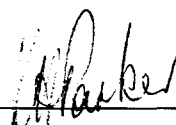
18. The Chamber is not persuaded that it should accept the Prosecution's submissions that, if granted provisional release, the Accused would pose a danger to any victims, or to witnesses that appeared at the trial, or to others. The "supported suspicions"<sup>21</sup> of a potential involvement of the Accused in witness interference have not been substantiated in any way in the course of the proceedings or on this Motion. In this context, and also generally, the Chamber observes that the conduct of the Accused in the course of the trial has been appropriate and without apparent fault.

19. In light of the abovementioned and, in particular, the conditional and limited capacity of UNMIK to guarantee that the Accused would return to the Tribunal when required, the fact that at this stage in the proceedings the potential risk of flight and the personal temptation to flee remains strong and may be at its uppermost and the absence of appropriate security and financial arrangements for the movement of the Accused to and from Kosovo, leaves the Chamber in a position where on those merits it cannot be confident, as required, that the Accused would appear to receive judgement if granted provisional release.

#### IV. DISPOSITION

For the foregoing reasons, pursuant to Rule 65 of the Rules, the Trial Chamber **DENIES** the Motion.

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

  
 Judge Kevin Parker  
 Presiding

Dated this twenty-sixth day of October 2005

At The Hague  
 The Netherlands

[Seal of the Tribunal]

<sup>19</sup> Halilović Decision, p 5, *Prosecutor v. Halilović*, Case No. IT-01-48-T, Decision on Renewed Motion for Provisional Release, 22 July 2005, p 4 and Hadžihasanović and Kubura Decision, pp 3 and 5.

<sup>20</sup> Hadžihasanović and Kubura Decision, p 7 and *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-AR65.3, Decision on Application for Leave to Appeal, 28 July 2005, p 6

<sup>20</sup> *Prosecutor v. Prlić et al*, Case No. IT-04-74-PT, Order on Provisional Release of Jadranko Prlić, 30 July 2004, para 29.

<sup>21</sup> Response, para. 25.