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D25821-D25813  
14 DECEMBER 2007

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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-04-84-T  
Date: 14 December 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: 14 December 2007

PROSECUTOR

v.

RAMUSH HARADINAJ  
IDRIZ BALAJ  
LAHI BRAHIMAJ

*PUBLIC*

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DECISION ON MOTION ON BEHALF OF LAHI BRAHIMAJ FOR PROVISIONAL  
RELEASE

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## I. PROCEDURAL BACKGROUND

1. On 7 December 2007, the Defence for Mr Brahimaj filed a Motion for Temporary Provisional Release during Recess Period.<sup>1</sup> The Defence requests that Mr Brahimaj be provisionally released during the court recess, for such a period of time as the Trial Chamber deems reasonable.<sup>2</sup>

2. On 10 December 2007, the Trial Chamber notified UNMIK of its opportunity to be heard on the Motion under Rule 65(B) and invited UNMIK to make its submissions by 13 December 2007.<sup>3</sup> On 13 December 2007, UNMIK confirmed that it had the ability to effectively monitor Mr Brahimaj during a possible provisional release and guaranteed that it would ensure compliance with any conditions that the Trial Chamber would set.<sup>4</sup>

3. On 12 December 2007, the Prosecution filed its Response Opposing Lahi Brahimaj's Motion for Provisional Release.<sup>5</sup> The Prosecution requests that the Trial Chamber deny the Motion.<sup>6</sup>

4. On 13 December 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.<sup>7</sup> The Netherlands understood from the Motion that upon provisional release Mr Brahimaj would leave Dutch territory.<sup>8</sup>

## II. APPLICABLE LAW

<sup>1</sup> Motion of Lahi Brahimaj for Temporary Provisional Release during Recess Period, confidential with confidential annexes A, B and C, 7 December 2007 ("Motion"); Lahi Brahimaj's Notice to Lift Confidentiality of His 7 December 2007 Motion and Annex A, 10 December 2007.

<sup>2</sup> Motion, paras 1, 20-21.

<sup>3</sup> Notification to UNMIK of the Opportunity to Be Heard on the Motion of Lahi Brahimaj for Temporary Provisional Release during Recess Period, 10 December 2007.

<sup>4</sup> Submission by the United Nations Interim Administration in Kosovo (UNMIK) to the Trial Chamber on Notification to UNMIK of the Opportunity to Make Submissions on the Motion of Lahi Brahimaj for Temporary Provisional Release, 13 December 2007.

<sup>5</sup> Prosecution's Response Opposing Lahi Brahimaj's Motion for Provisional Release, 12 December 2007 ("Response").

<sup>6</sup> *Ibid.*, para. 13.

<sup>7</sup> Letter from The Netherlands with Regard to the Provisional Release of Mr Lahi Brahimaj, dated 11 December 2007, filed 13 December 2007.

<sup>8</sup> *Ibid.*

5. Rule 65 of the Tribunal's Rules of Procedure and Evidence ("Rules") 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.<sup>9</sup> 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.

6. 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.<sup>10</sup> It is for the accused to prove that the conditions of Rule 65(B) have been met<sup>11</sup> and to satisfy the Trial Chamber "that release is appropriate in a particular case".<sup>12</sup>

7. Where an accused applies for provisional release following the denial of a previous application, it is incumbent upon that accused to satisfy the Trial Chamber that there has been a change in circumstances that materially affects the approach taken in earlier provisional release decisions regarding the same accused.<sup>13</sup>

### III. SUBMISSIONS

8. The Defence submits that Mr Brahimaj's conduct in relation to the Tribunal has been exemplary, noting his voluntary surrender to the Tribunal immediately upon learning of an indictment against him.<sup>14</sup> The Defence further submits a letter from Mr Agim Çeku, Prime

<sup>9</sup> *Prosecutor v. Milutinović et al.*, Decision on Interlocutory Appeal of Denial of Provisional Release during the Winter Recess, 14 December 2006, para. 10.

<sup>10</sup> *Prosecutor v. Popović et al.*, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007 ("Popović et al. Decision"), para. 5.

<sup>11</sup> *Prosecutor v. Limaj et al.*, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para. 40; *Prosecutor v. Prlić et al.*, Decision on Motions for Re-Consideration, Clarification, Request for Release and Application for Leave to Appeal, 8 September 2004, para. 28.

<sup>12</sup> *Prosecutor v. Šešelj*, Decision on Defence Motion for Provisional Release, 23 July 2004, para. 6.

<sup>13</sup> Popović et al. Decision, para. 12.

<sup>14</sup> Motion, paras 3, 17.

Minister of Kosovo/Kosova, and a letter from Mr Nait Hasani, a Member of the Parliament of Kosovo/Kosova, who both express confidence in Mr Brahimaj.<sup>15</sup> Additionally, the Defence submits a statement from Mr Brahimaj in which he undertakes to return to the Tribunal on the date and at the time ordered by the Trial Chamber and to comply with any further order of the Trial Chamber.<sup>16</sup>

9. The Defence submits that considerations of an accused posing a danger to victims, witnesses, or other persons during provisional release, are of primary importance during the pre-trial and trial stages and notes that the Prosecution case is now closed.<sup>17</sup> The Defence further submits that the Trial Chamber can order conditions of residence, supervision and monitoring that eliminate this cause for concern.<sup>18</sup> In his statement, Mr Brahimaj suggests he be released to Priština/Prishtinë, and consents to UNMIK personnel, or any other person designated by the Registrar, making unannounced visits to check on his presence.<sup>19</sup>

10. The Defence bases its Motion on humanitarian grounds. Mr Brahimaj has four children, aged between four and nine.<sup>20</sup> Mr Brahimaj has been in the custody of the ICTY since March 2005 and has not seen his children since this time.<sup>21</sup>

11. The Prosecution notes that an atmosphere of fear exists in Kosovo/Kosova, which has caused witnesses to feel intimidated.<sup>22</sup> The Prosecution adds that this atmosphere has not ended with the close of the Prosecution's case.<sup>23</sup> The Prosecution submits that the provisional release would worsen the atmosphere of intimidation perceived by witnesses who have testified for the Prosecution.<sup>24</sup> The Prosecution therefore submits that the application for provisional release does not meet the requirements under Rule 65(B) and should be denied.<sup>25</sup>

12. The Prosecution further submits that even a short period of provisional release would be disproportionate to the grave nature and the factual and legal complexity of the charges against Mr Brahimaj.<sup>26</sup> The Prosecution also argues that provisional release would be

<sup>15</sup> Ibid., para. 16, Annex A, Confidential Annex B.

<sup>16</sup> Ibid., para. 18, Confidential Annex C.

<sup>17</sup> Ibid., para. 13.

<sup>18</sup> Ibid., para. 13.

<sup>19</sup> Ibid., para. 18, Confidential Annex C.

<sup>20</sup> Ibid., paras 2, 14-15, Annex A, Confidential Annexes B and C.

<sup>21</sup> Ibid., paras 2, 14-15, Annex A, Confidential Annexes B and C.

<sup>22</sup> Response, para. 5.

<sup>23</sup> Ibid., para. 5.

<sup>24</sup> Ibid., paras 2, 5, 7.

<sup>25</sup> Ibid., paras 5-8.

<sup>26</sup> Ibid., paras 3, 12.

inappropriate on account of the proximity of the judgement in the *Haradinaj et al.* case.<sup>27</sup> In addition, the Prosecution submits that the Defence has not presented circumstances of an acute nature that call for an immediate reunion of Mr Brahimaj with his family.<sup>28</sup>

#### IV. DISCUSSION

13. 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 its Decision of 3 May 2006, during the pre-trial phase, the Trial Chamber found that Mr Brahimaj, if granted provisional release, would return for trial.<sup>29</sup> Furthermore, in its Response the Prosecution does not dispute that Mr Brahimaj will appear for the remainder of the trial. Moreover, The Trial Chamber considers the voluntary nature of Mr Brahimaj's surrender to the Tribunal and the two reference statements submitted by the Defence.

14. In determining whether it is satisfied that Mr Brahimaj would return for the remainder of the trial, the Trial Chamber considered the guarantees provided by UNMIK that it will ensure compliance with any conditions that the Trial Chamber would set.<sup>30</sup> According to Security Council Resolution 1244 of 10 June 1999, UNMIK is entrusted with ensuring public safety and order in Kosovo/Kosova,<sup>31</sup> and therefore UNMIK is the proper authority to provide such guarantees.<sup>32</sup>

15. In light of the above, the Trial Chamber is satisfied that Mr Brahimaj will appear for the remainder of the trial.

<sup>27</sup> Ibid., paras 2, 10.

<sup>28</sup> Ibid., paras 3, 11.

<sup>29</sup> *Prosecutor v. Haradinaj et al.*, Further Decision on Lahi Brahimaj's Motion for Provisional Release ("Brahimaj Decision"), 3 May 2006, para. 33.

<sup>30</sup> Submission by the United Nations Interim Administration in Kosovo (UNMIK) to the Trial Chamber on Notification to UNMIK of the Opportunity to Make Submissions on the Motion of Lahi Brahimaj for Temporary Provisional Release, 13 December 2007.

<sup>31</sup> Security Council Resolution 1244 (1999), UN Doc. S/RES/1244 (1999), para. 11(i).

<sup>32</sup> *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 26.

16. 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.<sup>33</sup>

17. In its Decision of 3 May 2006, during the pre-trial phase, the Trial Chamber denied provisional release for Mr Brahimaj, finding that the totality of the evidence before it raised a substantial doubt that Mr Brahimaj, if granted provisional release, would conduct himself in a way so as not to pose a danger to victims and potential witnesses.<sup>34</sup> The Trial Chamber has considered the facts underlying the Decision of 3 May 2006. The Trial Chamber finds that there has been a change in relevant circumstances. The trial has reached a new stage: the Prosecution's case is closed and no Defence case will be presented. The Trial Chamber finds that this considerably diminishes the risk of interference with victims, witnesses or other persons.

18. The Prosecution argues that the provisional release of Mr Brahimaj would worsen the general atmosphere of intimidation that exists in Kosovo/Kosova.<sup>35</sup> The Trial Chamber finds that this argument does not identify a concrete danger to victims, witnesses or other persons.

19. In light of the above, the Trial Chamber is satisfied that Mr Brahimaj will not pose a danger to victims, witnesses or other persons.

20. The Trial Chamber therefore finds that the requirements of Rule 65(B) of the Rules have been met. The Trial Chamber retains its discretion whether to grant provisional release in cases where it is satisfied that the two conditions of Rule 65(B) are met.

21. Mr Brahimaj has been in detention since March 2005 and has not seen his young children during that time. The Trial Chamber finds that these humanitarian considerations weigh in favour of granting the requested provisional release.

22. The parties have agreed that an unstable security situation exists in Kosovo/Kosova that is particularly unfavourable to witnesses who appear before the Tribunal.<sup>36</sup> The Prosecution argues that the provisional release would worsen the atmosphere of intimidation in

<sup>33</sup> *Prosecutor v. Stanišić*, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005, para. 27.

<sup>34</sup> Brahimaj Decision, paras 40-41, 43.

<sup>35</sup> Response, paras 2, 5, 7.

<sup>36</sup> T. 3955-3956.

Kosovo/Kosova.<sup>37</sup> The Trial Chamber recognizes the possibility that the provisional release could worsen the atmosphere of intimidation in the perception of witnesses who have testified for the Prosecution. The Trial Chamber finds that this factor weighs against the provisional release, but that it carries substantially less weight now that the Prosecution case is closed and no Defence case will be presented.

23. The Prosecution argues that even a short period of provisional release would be disproportionate to the grave nature and the factual and legal complexity of the charges against Mr Brahimaj.<sup>38</sup> The Trial Chamber finds that charges of a grave nature and of factual and legal complexity in themselves do not militate against a temporary, provisional release on humanitarian grounds. The Prosecution further argues that provisional release would be inappropriate, given the advanced stage of the proceedings.<sup>39</sup> The Trial Chamber does not consider temporary, provisional release to be inappropriate, solely on account of the imminence of a judgement in the *Haradinaj et al.* case.

24. In light of the above, the Trial Chamber is satisfied that a temporary, provisional release for Mr Brahimaj under the conditions set out below, is appropriate.

25. Therefore, pursuant to Rule 65 of the Rules, the Trial Chamber:

**GRANTS** the Motion and **ORDERS** the temporary provisional release of Mr Brahimaj on the following terms and conditions:

1. Mr Brahimaj shall travel from The Hague to Priština/Prishtinë on 21 December 2007 and return from Priština/Prishtinë to The Hague no later than 4 January 2008;
2. During his travel from The Hague to Priština/Prishtinë, and on his return trip, Mr Brahimaj shall be escorted by security officers of the Tribunal;
3. At Priština/Prishtinë airport Mr Brahimaj shall be delivered into the custody of UNMIK officials;
4. Once in Kosovo/Kosova Mr Brahimaj shall travel directly to the address mentioned in confidential annex B to the Motion, where he will remain, until 4 January 2008, when he will return to Priština/Prishtinë airport;

<sup>37</sup> Response, paras 2, 5, 7.

<sup>38</sup> Ibid., paras 3, 12.

<sup>39</sup> Ibid., paras 2, 10.

5. For his return, Mr Brahimaj shall be accompanied to the airport by UNMIK officials, who shall deliver Mr Brahimaj to the custody of security officers of the Tribunal at Priština/Prishtinë airport;
6. Mr Brahimaj shall not have or attempt to have contact with any Prosecution witnesses in the case against him, or attempt in any way to interfere with the administration of justice;
7. Mr Brahimaj shall not have or attempt to have contact with a representative of any media organisation, he shall not engage in any political activity, and he shall not make any public statement during his provisional release;
8. Mr Brahimaj shall refrain from any activity that is not in accordance with the private nature of his provisional release, which includes any contact with either domestic or international officials not necessitated for security reasons;
9. Mr Brahimaj shall comply with any instructions given to him by anyone acting under the authority of the Special Representative of the United Nations Secretary-General;

**REQUIRES** the authorities of UNMIK to assume responsibility as follows:

- (i) Designate the UNMIK officials who shall take custody of Mr Brahimaj at Priština/Prishtinë airport, and notify the Registrar, prior to Mr Brahimaj's departure from The Hague, of the names of the officials, who shall at all times include at least one non-Albanian UNMIK representative who understands and speaks Albanian;
- (ii) Ensure the 24-hour supervision and protection of Mr Brahimaj while he is in Kosovo/Kosova;
- (iii) Ensure compliance with the conditions of his provisional release as set out in this Decision, and arrest and detain Mr Brahimaj immediately and report immediately to the Registrar any breach of the conditions set out herein;
- (iv) Submit a written report to the Trial Chamber every 48 hours as to the compliance of Mr Brahimaj with the terms of this Decision.

**INSTRUCTS** the Registrar to ensure that Mr Brahimaj is safely escorted from The Hague to Priština/Prishtinë, as well as on the return journey, and to consult with the appropriate authorities as to the arrangements for his provisional release and transport;




**REQUESTS** the authorities of all States through whose territory Mr Brahimaj will travel,

- (i) To hold Mr Brahimaj in custody for any time that he will spend in transit at the airport;
- (ii) To arrest and detain Mr Brahimaj pending his return to the United Nations Detention Unit in The Hague, should he attempt to escape.

**ORDERS** that the Response be made public.

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



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Judge Alphons Orie  
Presiding Judge

Dated this 14th day of December 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

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