



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: 8 December 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 Temporary Provisional Release During Winter Court Recess” 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 (“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 November 2010 the Accused filed the “Motion on behalf of Ramush Haradinaj for Temporary Provisional Release During Winter Court Recess” (“Motion”). On 3 December 2010 the Prosecution filed “Prosecution Response to Ramush Haradinaj’s Second Motion for Provisional Release” (“Response”). On 7 December 2010 the Accused filed confidentially “Reply to Prosecution Response to Motion on Behalf of Ramush Haradinaj for Temporary Provisional Release during Winter Court Recess” (“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 Ramush Haradinaj’s Motion for Temporary Provisional Release”. On 6 December 2010 EULEX filed a letter in response.

B. SUBMISSIONS

1. Motion

4. The Accused requested that he be provisionally released on a temporary basis over the winter court recess from Friday 17 December 2010 until Friday 14 January 2011, or for such limited period as the Trial Chamber may deem appropriate.³ The Accused submits that his wife is expected

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. 2.

to give birth to their child around the middle of January 2011 and that he wishes to be with her in the final period before she gives birth and, if possible, when the child is born.⁴

5. The Accused submits that EULEX could offer guarantees in the terms requested in his application for provisional release of 26 July 2010⁵ and that the same guarantees could apply to any period of temporary provisional release ordered by the Trial Chamber as the terms requested by the Accused are the same except that he does not request to travel to Glogjan.⁶

6. The Accused states that in the “Decision on Ramush Haradinaj’s Motion for Provisional Release” issued on 10 September 2010 (“September 2010 Decision”) the Trial Chamber was clearly of the view that the Accused did not in any way pose a flight risk and that he “does not pose a personal risk to the safety of any witnesses, victims or other persons”.⁷ He submits that any risk to the integrity of the proceedings as identified by the Trial Chamber would be sufficiently lessened if his limited request were to be granted at this stage and that any potential risks to witnesses that may arise from provisional release over an extended period of time until the commencement of the trial, as noted by the Trial Chamber in its September 2010 Decision, would be sufficiently minimised by an order for temporary provisional release for a very limited period in light of his present family circumstances.⁸

7. The Accused urges the Trial Chamber to give weight to the time that the Accused has already been in detention in considering his submission that a short period of release should not be refused for the same reasons as pre-trial provisional release until the start of trial.⁹ He submits a further factor in favour of temporary release is the Accused’s full co-operation with the Tribunal and the United Nations Detention Unit (“UNDU”) in the present and previous proceedings.¹⁰

2. Response

8. The Prosecution submits that “nothing has changed” since the September 2010 Decision when the Trial Chamber denied the Accused’s request for provisional release because it posed a risk to the integrity of the proceedings.¹¹

9. The Prosecution argues that witness intimidation remains a prevalent feature in Kosovo,¹² and that this is confirmed by the European Commission Kosovo 2010 Progress Report issued on 9

⁴ *Ibid.*, para. 3.

⁵ Motion on Behalf of Ramush Haradinaj for Provisional Release, 26 July 2010.

⁶ *Ibid.*, para. 7.

⁷ *Ibid.*, para. 9.

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*, para. 12.

¹⁰ *Ibid.*, para. 14.

November 2010.¹³ The Prosecution further submits that since the retrial was ordered it has encountered difficulties in persuading witnesses in and outside Kosovo to testify.¹⁴

10. 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.¹⁵ The Prosecution submits that the increased media coverage resulting from the Accused's provisional release shortly before the start of the retrial will undermine the establishment of the truth by the Trial Chamber.¹⁶

11. The Prosecution asserts that the Accused remains a highly prominent figure in Kosovo and that his prominence will be heightened during the forthcoming election period¹⁷ 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 the Accused's supporters to engage in acts of intimidation.¹⁸

12. In the submission of the Prosecution, the limited length of the provisional release does not automatically decrease the risk to the integrity of the proceedings and the current situation is different from the position when the Accused was released for two weeks during the winter recess of 2007 because a retrial in which witnesses are to be heard will commence shortly.¹⁹ The Prosecution concludes that as part of the measures to counter witness intimidation and to ensure the fairness of the proceedings the Trial Chamber should exercise its discretion to deny the Motion.²⁰

13. 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;²¹ 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").²²

¹¹ Response, para. 1.

¹² *Ibid.*, para. 3.

¹³ *Ibid.*, para. 5.

¹⁴ *Ibid.*, para. 7.

¹⁵ *Ibid.*, para. 7.

¹⁶ *Ibid.*, para. 7.

¹⁷ *Ibid.*, para. 8.

¹⁸ *Ibid.*, para. 8.

¹⁹ *Ibid.*, para. 11; Decision on Motion on behalf of Ramush Haradinaj for Provisional Release, 14 December 2007, para. 21.

²⁰ Response, para. 13.

²¹ *Ibid.*, para. 14.

²² *Ibid.*, para. 15.

3. Reply

14. The Accused requested leave to reply.²³ He submits that the Prosecution in the Response did not submit any evidence to substantiate its claim that witnesses would be placed at risk if the Accused is temporarily released even for a short period of the winter court recess.²⁴ The Accused submits that there is no evidence in the statement in Annex B of the Response, which is very general, or in any of the other materials submitted by the Prosecution that the alleged risk to witnesses will arise or be exacerbated as a result of the very short period of provisional release sought for the Accused.²⁵ He contends that the European Commission Kosovo 2010 Progress Report issued on 9 November 2010²⁶ cannot be relied on to suggest that the witnesses in the present case would be endangered by the temporary release of the Accused.²⁷ He further contends that no evidence is adduced of any correlation between the potential reporting by newspapers and any increased risk to witnesses in this case.²⁸ He concludes that the Prosecution's claim of an increased risk to witnesses on account of temporary provisional release is not established by any evidence.²⁹

4. Correspondence from EULEX

15. 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.³⁰ It also drew attention to the evolving nature of its role in Kosovo and stated that whilst it retained 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.³¹

C. APPLICABLE LAW

16. 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.

²³ Reply, para. 1.

²⁴ *Ibid.*, para. 2.

²⁵ *Ibid.*, paras. 4, 5.

²⁶ Response, Annex A.

²⁷ Reply, para. 6.

²⁸ *Ibid.*, para. 9.

²⁹ *Ibid.*, para. 11.

³⁰ EULEX Correspondence, p. 1.

³¹ *Ibid.*, p. 2.

(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.

17. 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

18. In the September 2010 Decision the Trial Chamber found that there was no reason to believe that there was a risk of the Accused failing to surrender to the Tribunal when ordered.³² 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 stated that it is willing and able to assume responsibilities in relation to the provisional release of the Accused requested in the Motion.³³ The Trial Chamber is satisfied that the Accused will appear for trial.

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

19. In the September 2010 Decision the Trial Chamber found that the Accused does not pose a personal risk to the safety of any witnesses, victims or other persons.³⁴ Again, no evidence has been adduced since that Decision to suggest otherwise. The Trial Chamber is, therefore, satisfied that, if released, the Accused will not pose a danger to any victim, witness or other person.

3. Exercise of discretion whether to grant provisional release

20. 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.³⁵ The Trial Chamber will now consider whether to exercise this discretion.

³² September 2010 Decision, paras. 25–28.

³³ EULEX Correspondence, p. 1.

³⁴ September 2010 Decision, paras. 29–32.

³⁵ July 2007 Decision, para. 20.

21. There is no reason to believe that the position with regard to witness intimidation relating to the instant case has improved since the September 2010 Decision. There was an unprecedented atmosphere of widespread and serious witness intimidation surrounding the trial.³⁶ Witness intimidation remains prevalent in Kosovo.³⁷ There is evidence that since the retrial was ordered witnesses have felt intimidated.³⁸ The Trial Chamber still considers that the provisional release of the Accused will add to the threatening atmosphere for witnesses and may encourage his supporters to engage in acts of intimidation.³⁹ However, the question that needs now to be addressed is how significant a threat this poses to the integrity of the trial.

22. In the September 2010 Decision the Trial Chamber found that 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 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.⁴⁰ The circumstances have changed somewhat since the September 2010 Decision in that the pre-trial proceedings have not been as swift as had been anticipated and, although the trial is expected to start soon, no specific date has been scheduled for the Pre-Trial Conference and certain procedural steps remain to be completed before the commencement of the trial. Provisional release during the winter recess would be neither shortly after the Appeals Chamber's decisions nor shortly before the start of the retrial. Also its impact would be limited by its relatively short duration. The Trial Chamber acknowledges that the prominence of the Accused will be heightened during the ongoing election period that ends on 12 December, election day,⁴¹ i.e. before the start of the period of provisional release requested. The Trial Chamber, therefore, considers that this will not be as important a factor as the timing and duration of the provisional release of the Accused. In light of the foregoing the Trial Chamber finds that the potential effect of the requested provisional release of the Accused on the integrity of the proceedings would not be substantial.

23. A further factor to which the Trial Chamber attached importance in its September 2010 Decision was the length of detention on remand resulting from the exercise of the discretion to deny provisional release.⁴² Specifically, it found that there is less justification for the exercise of this

³⁶ September 2010 Decision, para. 11; Appeal Judgement, para. 34.

³⁷ Response, paras. 4–6; September 2010 Decision, para. 35. Cf. Response, Annex A, European Commission Kosovo 2010 Progress Report, 9 November 2010, pp. 11, 56.

³⁸ Response, para. 7, Annex B.

³⁹ September 2010 Decision, para. 36.

⁴⁰ *Ibid.*, para. 40.

⁴¹ Response, para. 8.

⁴² September 2010 Decision, para. 40.

discretion, if it will result in detention on remand for a long period of time.⁴³ It held that if it became apparent that the pre-trial phase would be lengthy, this would amount to a change in the relevant circumstances, which it would be inclined to consider.⁴⁴ The Trial Chamber notes that the Accused has been in detention on remand since 20 July 2010⁴⁵ and that while the pre-trial proceedings are now advanced, the date of the start of trial has still not been set.

24. The Trial Chamber notes also the personal circumstances of the Accused, in particular his wish to be with his wife in the final period before she gives birth and, if possible, when the child is born.⁴⁶ These circumstances, while they are not to be disregarded, are not of an acute nature.⁴⁷ Consequently they should be accorded comparatively little weight. These circumstances, while they are not of an acute nature⁴⁸ and consequently should not be accorded determining weight, can nevertheless be taken into account.

25. The Trial Chamber finds that the critical factors in deciding whether to exercise its discretion are the insubstantial potential effect of provisional release during the winter recess on the integrity of the trial because of its relatively short duration, the uncertainty about the date of commencement of the trial and the length of time that the Accused has been in detention on remand.

26. Upon weighing up the relevant factors the Trial Chamber finds that it should not exercise its discretion to deny provisional release.

E. DISPOSITION

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

GRANTS the Accused leave to reply;

GRANTS the Motion; and

ORDERS that the Accused be provisionally released for the court winter recess under the following terms and conditions:

- a. The Accused shall be transported in custody to Schiphol airport in the Netherlands by the Dutch authorities as soon as practicable on or after 17 December 2010;

⁴³ September 2010 Decision, para. 40.

⁴⁴ *Ibid.*, para. 41.

⁴⁵ Motion, para. 12.

⁴⁶ *Ibid.*, para. 3.

⁴⁷ *Cf.* Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, 20 July 2007, para. 21.

⁴⁸ *Cf. Ibid.*, para. 21.

- b. At Schiphol airport, the Accused shall be transferred to the custody of the security officer designated by the Registrar of the Tribunal who shall accompany the Accused for the remainder of his travel to Kosovo;
- c. At Pristina airport, the Accused shall be delivered into the custody of representatives of the EULEX-Kosovo Mission, who shall accompany him to his place of residence;
- d. The Accused shall provide the address at which he will be staying in Kosovo to the authorities of the EULEX-Kosovo Mission and the Registrar of the Tribunal before leaving the UNDU in The Hague;
- e. During his provisional release the Accused shall abide by the following conditions:
 - i. he shall remain within the confines of the municipality of his residence, Pristina;
 - ii. he shall not have any contact whatsoever, or in any way interfere with any victim or potential witness, or otherwise interfere in any way with the proceedings or the administration of justice;
 - iii. save for his Counsel, he shall not discuss his case with anyone, including the media;
 - iv. he shall not hold any governmental position at any level in Kosovo;
 - v. he shall not engage in any political activity or make any public statements;
 - vi. he shall comply strictly with any instructions of the authorities of the EULEX-Kosovo Mission necessary to enable them to comply with their obligations under this Decision and their guarantees;
 - vii. he shall continue to cooperate with the Tribunal and to comply strictly with any further Order of the Trial Chamber varying the terms of, or terminating, his provisional release.
- f. The authorities of the EULEX-Kosovo Mission shall ensure that:
 - i. the Accused surrenders his passport to the EULEX-Kosovo Mission authorities upon arrival in Kosovo;
 - ii. the Accused reports every other day to the EULEX-Kosovo Mission authorities in the place of his residence;
 - iii. a report on the provisional release of the Accused is sent to the Trial Chamber on a weekly basis.
- g. The Accused shall return to the UNDU in The Hague no later than 14 January 2011, unless otherwise ordered by the Trial Chamber. He shall be accompanied from the place of his residence in Kosovo by an official of the EULEX-Kosovo Mission, who shall deliver the Accused at Pristina airport to the custody of the security officer designated by the Registrar

of the Tribunal. Upon arrival at Schiphol airport, the Accused shall be delivered to the custody of the Dutch authorities. The Dutch authorities shall then transport the Accused back to the UNDU in The Hague.

REQUIRES the EULEX-Kosovo Mission to assume responsibility as follows:

- a. by designating an official of the EULEX-Kosovo Mission who shall accompany the Accused from Pristina airport to his place of residence, and notifying, as soon as practicable, the Trial Chamber and the Registrar of the Tribunal of the name of the designated official;
- b. for all expenses concerning the transportation of the Accused from Pristina airport to his residence and back;
- c. at the request of the Trial Chamber or the parties, to facilitate all means of cooperation and communication between the parties and to ensure the confidentiality of any such communication;
- d. to report immediately to the Trial Chamber any breach of the conditions set out above.

INSTRUCTS the Registrar of the Tribunal to consult with the Dutch Ministry of Justice as to the practical arrangements for the release of the Accused; to designate the official who shall accompany the Accused from Schiphol airport to Pristina airport and back; and to continue to detain the Accused at the UNDU in The Hague until such time as the Accused has provided the addresses at which he will be staying in Kosovo and until the Trial Chamber and the Registrar have been notified of the name of the designated official of the EULEX-Kosovo Mission who is to accompany the Accused from Pristina airport to the Accused's place of residence.

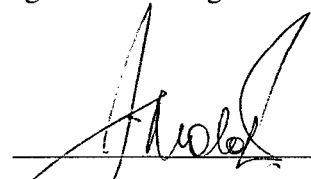
REQUESTS the authorities of all States through whose territory the Accused will travel,

- a. to hold the Accused in custody for any time that he will spend in transit at the airport; and
- b. to arrest and detain the Accused pending his return to the UNDU in The Hague, should he attempt to escape.

REQUESTS the Head of the EULEX-Kosovo Mission, in the event the Accused breaches any of the foregoing terms and conditions of his provisional release, to engage all resources at his disposal to ensure that the Accused is immediately apprehended and detained.

GRANTS the Prosecution's request for a stay of the execution of this decision pending appeal.

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]