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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

Cases: IT-03-66-AR65

Date: 31 October 2003

Original: English

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Decision of: **31 October 2003**

THE PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

DECISION ON FATMIR LIMAJ'S REQUEST FOR PROVISIONAL RELEASE

Counsel for the Prosecutor:
Mr. Andrew Cayley
Mr. Alex Whiting

Counsel for the Defence:
Mr. Karim A. A. Khan for Fatmir Limaj
Mr. Tome Gashi and Mr. Peter Murphy for Haradin Bala
Mr. Steven Powles for Isak Musliu

I. Background

1. This Bench of the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (respectively, "Bench" and "International Tribunal") is seized of the "Application for Leave to Appeal Against the Decision on Provisional Release of Fatmir Limaj, Rendered by Trial Chamber I on 12 September 2003", filed by counsel for Fatmir Limaj (respectively, "Defence" and "Limaj") on 22 September 2003 ("Application for Leave to Appeal"), pursuant to Rule 65(D) of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. The Application for Leave to Appeal challenges a decision issued by Trial Chamber I on 12 September 2003, rejecting Limaj's request for provisional release ("Impugned Decision").[1] In the Impugned Decision, the Trial Chamber denied provisional release, *inter alia*, on the following grounds: (i) that "[it] cannot be satisfied that the Accused would have surrendered voluntarily to the Tribunal if he would not have been arrested"; (ii) that "the Accused alleged to have command responsaibility and is charged with participating in serious crimes... [and] that, if convicted, the Accused is charged with participating in serious crimes" and "that therefore if convicted, the Accused is likely to face long prison terms and he therefore has a stong incentive to flee"; (iii) that "according to the letter of Mr. Coffey [Director of the Department of Justice of UNMIK], UNMIK is not able to provide any guarantees that the Accused, if provisionally released would be available for trial"; and (iv) that "the Chamber is not satisfied that if released, the Accused would appear before the Tribunal".

3. With respect to the procedural background, the Bench granted the Office of the Prosecutor ("Prosecution") leave to file a joint response, and an extension of time, on 30 September 2003.[2] The Prosecution filed its response on 26 September 2003 ("Response").[3] Following an oral grant of an extension of time, the Defence replied on 13 October 2003 ("Reply").[4]

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[1] *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No.: IT-03-66-PT, "Decision on Provisional Release of Fatmir Limaj", 12 September 2003.

[2] *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case Nos.: IT-03-66-AR65, IT-03-66-AR65.2, IT-03-66-AR65.3, "Order on the Prosecution's Request for Leave to Respond Jointly to the Applications for Leave to Appeal", 30 September 2003.

[3] *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case Nos.: IT-03-66-AR65, IT-03-66-AR65.2, IT-03-66-AR65.3, "Prosecution's Motion for Leave to Respond Jointly to the Accused's Applications for Leave to Appeal the Trial Chamber's Provisional Release Decisions", 26 September 2003.

[4] *The Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case Nos.: IT-03-66-AR65, IT-03-66-AR65.2, IT-03-66-AR65.3, "Reply of Famir Limaj to Consolidated Response of Prosecution to Applications for Leave to Appeal Against Decisions on Provisional Release", 13 October 2003.

4. The question before the Bench is whether "good cause" pursuant to Rule 65(D) Sentence 1 for granting leave to pursue the appeal to the full Appeals Chamber has been shown.

II. Applicable Law

5. Rule 65(B) of the Rules sets out the basis upon which a Trial Chamber may order the provisional release of an accused. It states that provisional 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" (emphasis added).

6. Rule 65(D) of the Rules provides, *inter alia*, that leave to appeal a Trial Chamber's decision on provisional release may be "granted by a bench of three judges of the Appeals Chamber, upon good cause being shown". According to the settled jurisprudence of the Appeals Chamber, there is "good cause" within the meaning of Rule 65(D) for granting leave to appeal when it appears that the Trial Chamber "may have erred" in rendering the impugned decision.[5]

7. A Trial Chamber "may have erred" when it did not apply the law correctly or failed to take into account and assess all the decisive facts of a case.

8. Article 21(3) of the Statute of the Tribunal, adopted by Security Council Resolution 827 of 25 May 1993 ("Statute"), mandates that "the accused shall be presumed innocent until proved guilty". This provision both reflects and refers to international standards as enshrined, *inter alia*, in Article 14(2) of the International Covenant on Civil and Political Rights ("ICCPR") of 19 December 1966 and Article 6 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("ECHR").

9. Furthermore, Article 9(3) of the ICCPR emphasizes *inter alia* that: "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial". Article 5 (3) of the ECHR provides *inter alia* that: "everyone

[5] See, *inter alia, Prosecutor v Blagojević et al*, Case Nos.: IT-02-60-AR65.3 & IT-02-60-AR65.4, "Decision on Application by Blagojević and Obrenović for Leave to Appeal", 16 January 2003, par 8; *Prosecutor v Brđanin and Talić*, IT-99-36-AR65, "Decision on Application for Leave to Appeal", 7 September 2000, p 3; and *Prosecutor v Jokić*, IT-02-53-AR65, "Decision on Application for Leave to Appeal", 18 April 2002, par 3.

arrested or detained...shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".

10. These human rights instruments form part of public international law.

11. The ICTY is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and other innocent people. Justice, however, also means respect for the alleged perpetrators' fundamental rights. Therefore, no distinction can be drawn between persons facing criminal procedures in their home country or on an international level.

12. Rules 65 (B) and (D) of the Rules must therefore be read in the light of the ICCPR and ECHR and the relevant jurisprudence.

13. Moreover, when interpreting Rule 65(B) and (D) of the Rules, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure than mandatory detention, it must be applied.[6]

III. Discussion

14. At the outset, the Bench notes that, in breach of Rule 65(D) of the Rules, the Application for Leave to Appeal was filed one day late (Monday 22nd of September instead of Friday 19th September 2003). In fairness to the Accused, who should not be held responsible for his counsel's negligence, the Bench has nevertheless decided to consider it. In the Application for Leave to Appeal, the Defence relies on five grounds of appeal. They will be dealt with in the following sections, grouped together where appropriate.

(a) The Trial Chamber erred in not granting an oral hearing, in not giving reasons for such a failure, and in failing to inform the parties of its decision (Grounds 1-3)

[6] See, among others, *Prosecutor v. Darko Mrđa*, Case No.: IT-02-59-PT, "Decision on Darko Mrđa on Request for Provisional Release", 15 April 2002, Prosecutor *v. Enver Hadžihasonivić, Mehmed Alagić and Amir Kubura,* "Decision granting Provisional Release to Enver Hadžihasonivić", 19 December 2001.

15. According to the Defence, the Trial Chamber erred in refusing its request for an oral hearing because there are no cases in the practice of the International Tribunal in which an application for provisional release has been refused "on paper" where such a hearing had been requested. This rejection, it is claimed, denied the Defence the opportunity to call important witnesses. The Defence also argues that the Trial Chamber erred in not giving any explanation for its denial, as it is under an obligation to provide reasons for its decisions. Lastly, the Defence contends that the Trial Chamber erred in failing to inform the Defence of its rejection of the request for an oral hearing because it deprived the Defence of the possibility to make detailed submissions in support of its request for an oral hearing, and to make fully informed decisions regarding how best to present certain evidence before the Trial Chamber.

16. The Prosecution submits that the decision whether or not to receive oral submissions in addition to written submissions is one reserved for the discretion of the Trial Chamber and that, when requesting an oral hearing, the Defence did not express its intention to call additional witnesses. The Prosecution contends that the duty to provide a reasoned opinion applies only when the Chamber is dealing with substantive aspects of the Application, and does not limit the Trial Chamber's discretion to decide whether or not to call an oral hearing. The Prosecution argues that the alleged failure by the Trial Chamber to notify the Defence of its decision did not prejudice the preparation of the case as the Defence had ample opportunity to present its case in its written submissions, which indeed amounted to more than 100 pages. Thus, if the Defence did not put before the Trial Chamber all the evidence it could have submitted, this was a miscalculation on the part of the Defence and not an error of the Trial Chamber.

17. The Bench largely concurs with the Prosecution's submissions. Another bench of the Appeals Chamber, rejecting an application for leave to appeal in *Odjanić*, reasoned as follows:

> "CONSIDERING that the right of an accused to be heard is not similar to what the accused regards as his right to be heard personally;
> CONSIDERING that the "right" of an accused, who is represented, to be heard personally is not unfettered and is subject to the discretion of the Chamber before which the accused is appearing;
> CONSIDERING that Ojdanić has not put forth any cogent reason why he should have been heard personally in the present case, nor has he shown that the Trial Chamber abused its discretion when refusing to hear him personally[the Chamber refuses leave to appeal].[7]

[7] *Prosecutor v. Nikola Sainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR65.2, "Decision Refusing Ojdanić Leave to Appeal", 27 June 2003, p.4.

It follows that the right to be heard personally is not absolute. The granting of an oral hearing is a matter for the discretion of a Chamber, and it may legitimately be regarded as unnecessary when, as in the present case, the information before the Trial Chamber is sufficient to enable the Chamber to reach an informed decision. The Defence has failed to demonstrate the added value of an oral hearing, namely the reason why if granted, such a hearing could have led the Trial Chamber to another conclusion. Contrary to what was argued by the Defence, the tendering of "detailed submissions" in support of an oral hearing (if available) has to be done when the request for a hearing is made. Finally, the Trial Chamber is not obliged to explain prior to its final decision why a hearing is unnecessary or to notify the parties of this.

18. For the foregoing reasons, the Bench finds that the Defence's arguments under Grounds 1 to 3 do not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) of the Rules – see above paragraphs 5-13 - and, therefore, these grounds are dismissed.

(b) The Trial Chamber erred in failing to notify the parties that Mr. Steiner had not responded to the Pre-Trial Judge's letter of 31 July 2003 seeking his appearance (Ground 4)

19. The Defence submits that the Trial Chamber erred in deciding the application for provisional release without informing it that Mr. Steiner, the Director of the United Nations Interim Administration Mission in Kosovo ("UNMIK"), had not responded to a letter of 31 July 2003, in which the Pre-Trial Judge had requested that Mr. Steiner submit his comments on Limaj's provisional release ("Letter"). Had it been informed, the Defence argues, it would at least have sought a subpoena so as to obtain the "very important evidence" that Mr. Steiner could have offered with regard to Limaj's application for provisional release.

20. The Prosecution submits that the Letter only asked Mr. Steiner to respond "if he so wished", and that by no means was the Trial Chamber obliged to notify the Defence of Mr. Steiner's failure to respond. It argues that the Defence was at least on notice that Mr. Steiner had not responded as otherwise the response to the Letter would have been filed, and made available to the Defence. The Trial Chamber waited a full two weeks beyond the deadline of 25 August 2003 set out in the Letter before issuing the Impugned Decision, giving Mr. Steiner extra time to respond, and allowing the Defence ample opportunity to inquire as to whether any response had been received or was forthcoming by, for instance, contacting Chambers or the Registry.

21. First, the Bench wishes to stress that the Trial Chamber was under no obligation to notify the Defence that Mr. Steiner had not responded to the Letter. It was for the Defence, if it so wished, at the expiry of the deadline set out in the Letter, to contact the Registry, which is the channel of communication for the International Tribunal, in order to seek any available information. Secondly, the Bench notes that the Letter requested Mr. Steiner to respond by the 25th of August 2003; having received no answer from Mr. Steiner before the expiry of the deadline, it would have been evident, in the Bench's view, that Mr. Steiner, who had been appropriately asked by the Trial Chamber to respond only "if he so wished", had chosen not to do so. This is all the more so because Mr. Coffey had already clearly stated UNMIK's position with regard to Limaj's provisional release, and thus it was neither realistic nor warranted to expect an additional response from UNMIK.

22. For the foregoing reasons, the Bench finds that Ground 4 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) of the Rules – see above paragraphs 5-13 - and, therefore, it is dismissed.

(c) The Trial Chamber failed to give appropriate consideration to the issue of "guarantees" (Ground 5)[8]

23. According to the Defence, the Trial Chamber placed excessive weight on the absence of guarantees from UNMIK and insufficient weight on the undertakings from the provisional authorities of Kosovo, including the statement by the Prime Minister of Kosovo and by Limaj himself.

24. The Prosecution responds that the Trial Chamber was correct in placing more weight on the representations from UNMIK as UNMIK, not the provisional government, remains responsible for public safety and order in Kosovo and for monitoring the borders of the province. Further, Mr. Coffey, the head of the UNMIK justice system, had stated that given the limited resources available to UNMIK, it would be relatively easy for Limaj to flee and that, the provisional authorities of Kosovo have no means to enforce their own undertakings, as the Prime Minister of Kosovo himself has publicly acknowledged.

[8] In the Application for Leave to Appeal, this ground of appeal is (erroneously) referred to as Ground 4. See Application for Leave to Appeal at pp. 7 and 9. The numbers of this and the following grounds of appeal have been accordingly been adjusted in these reasons.

25. According to the settled practice of the International Tribunal, it is the State into the territory of which the accused will be released, as the guarantor of public safety and order in that territory, that must provide the International Tribunal with guarantees that the accused will not flee and that if he does so, he will be arrested. As the Trial Chamber correctly noted, in the province of Kosovo, according to Security Council Resolution 1244 of 10 June 1999, UNMIK, and not the provisional institutions of Kosovo, is the authority which, in coordination with KFOR (the NATO Forces in Kosovo), is entrusted with ensuring public safety, and conducting bordering monitoring, and is given the necessary means to enforce such duties. Thus, there is no reason why the Trial Chamber should have taken into account guarantees given by other authorities.

26. For the foregoing reasons, the Bench finds that Ground 5 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) – see above paragraphs 5-13 - and, therefore, it is dismissed.

(d) The Trial Chamber failed to give "the most anxious scrutiny" to the Defence's arguments (Ground 6)

27. Pursuant to this ground of appeal, the Defence submits that the Trial Chamber made three different kinds of error. They will be dealt with in turn.

28. First of all, the Defence submits that the Trial Chamber erred in relying on the seriousness of the charges against Limaj when refusing to grant provisional release because, in the ECHR jurisprudence, the severity of the sentence that may be imposed if the accused is convicted is not a ground for refusing an accused provisional release.

29. The Prosecution responds that the jurisprudence of the International Tribunal is fully consistent with international law and hat the Trial Chamber considered the seriousness of the charges and the possibility of a lengthy sentence together with several other factors.

30. The Bench considers that, while under Rule 65(B) of the Rules the seriousness of the charges against an accused cannot be the sole factor that determines the outcome of an application for provisional release, it is certainly one that a Trial Chamber is entitled to take into account when assessing whether an accused, if released, would appear for trial.[9] It is evident that the more severe

[9] *The Prosecutor v. Nikola Šainović and Dragoljub Ojdanić*, "Decision on Provisional Release", 30 October 2002, para 6.

the sentence which an accused faces, the greater is the incentive to flee. As the Trial Chamber relied on the seriousness of the charges against Limaj in addition to several other factors, it did not err in taking this factor into account. Furthermore, this approach is not inconsistent with the ECHR jurisprudence. Rather, in the Bench's view, such an approach accords with that of the ECourtHR.[10]

31. Next, the Defence claims that Mr. Coffey was not asked for information in a neutral manner but was effectively "primed" by the Prosecution, and that he made his statement without the benefit of any representation from the Defence.

32. The Prosecution rebuts this, arguing that Mr. Coffey's letter was not submitted to the Trial Chamber in response to a Prosecution request but in response to the accused's request, and that it did not "prime" Mr. Coffey; to the contrary, "care was taken not to infringe the neutrality of UNMIK". It rejects as untrue the assertion that Mr. Coffey made his statement "without the benefit of any representation from the Defence" arguing that the Defence in fact met with Mr. Coffey to discuss Limaj's provisional release before Mr. Coffey replied to the letter.

33. The Bench notes that, contrary to what was argued by the Defence, the Defence appears to have met with Mr. Coffey before he sent his letter to the Trial Chamber and thus, Mr. Coffey did in fact have the opportunity to hear both the parties. The Bench does not accept the Defence's implication that the Director of Justice of UNMIK would give a false assessment of the security situation in Kosovo after being "primed" by the Prosecution. There is no basis for asserting that Mr. Coffey's assessment would not be reliable, and thus the Trial Chamber did not err in relying upon it.

34. Finally, the Defence contends that the Trial Chamber failed to explain why it found that Limaj did not voluntary surrender, notwithstanding the declarations to the contrary by individuals involved in Limaj's surrender, such as the Prime Minister of Kosovo, Mr. Steiner, and General Mini, the head of the KFOR, under whose command Limaj was arrested.

35. The Prosecution responds that the Impugned Decision makes explicit reference to the Accused's arrest by the Slovenian authorities, indicating his intention to return to the protection of Kosovo rather than surrender to the International Tribunal.

[10] See *Letellier v. France*, Judgement of 24 May 1991, ECourtHR, para. 43 and *Mansur v. Turkey*, Judgement of 25 November 1994, ECourtHR, para. 55.

36. In exercising its discretion under Rule 65(B) of the Rules, the Trial Chamber must take into account all the decisive [material] facts of a case. The Trial Chamber was correct to consider, in addition to the submissions of the Defence in its original motion, Limaj's representations to the press and to the Kranj District Court in Slovenia, the reliability of which is not challenged by the Defence. Weighing all these facts together, it reached the reasonable conclusion that Limaj's surrender was not voluntary.

37. For the foregoing reasons, the Bench finds that Ground 6 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) – see above paragraphs 5-13 - and, therefore, it is dismissed.

(d) The Trial Chamber erred in not placing the burden of proof on the Prosecution to demonstrate that the accused is not entitled to provisional release (Ground 7)[11]

38. According to the Defence, international humanitarian law and principles enshrined in the ICCPR and the ECHR impose upon the Prosecution the burden of proof in justifying detention pending trial before this International Tribunal. The Defence adds that the detention should be justified by clear and convincing evidence. In support of its view, the Defence quotes several cases from the Human Rights Committee, the European Court of Human Rights ("ECourtHR"), the United Kingdom. and the United States. It relies as well on Articles 60(2) and 58(1) of the Statute of the International Criminal Court ("ICC").

39. The Prosecution submits that the Defence's interpretation of international law is wrong and that the Impugned Decision is fully consistent with the settled jurisprudence of this International Tribunal, in which it is well established that the burden of proof rests on the accused. It recalls that, unlike national jurisdictions, the International Tribunal lacks a police force and has to rely on States to monitor and enforce conditions of release. It submits that the Trial Chamber's approach is fully consistent with its obligation to conduct a fair evaluation of the circumstances and interests at stake. With respect to the ICC Statute, the Prosecution observes that it is not binding on the International tribunal and it does not support the imposition of a burden of proof on the Prosecution to justify pre-trial detention.

[11] While not discussing this ground of appeal in its brief, the Defence has joined the submissions of the co-accused Bala on this issue. For the sake of clarity, these submissions are summarized again here.

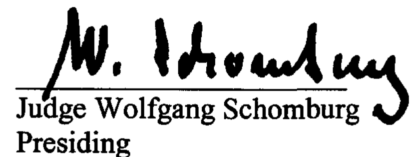
40. It is the Bench's view, contrary to the argument put by the Defence, that the Trial Chamber did not err in not imposing the burden on the Prosecution to demonstrate that provisional release was inappropriate. First, Rule 65(B) does not place the burden of proof on the Prosecution. Pursuant to that Rule, the Trial Chamber was required to determine whether it was "satisfied" that Limaj, if released, would appear for trial. After taking into account the information submitted to it by the parties and weighing all the relevant factors, it held that it was not satisfied. There is thus no basis for holding that, by not placing the burden of proof on the Prosecution, the Trial Chamber erred in its application of Rule 65(B).

41. For the foregoing reasons, the Bench finds that Ground 7 does not demonstrate that the Trial Chamber may have erred in the exercise of its discretion under Rule 65(B) – see above paragraphs 5 -13 – and, therefore, it is dismissed.

IV. Disposition

42. The Bench finds that the Application for Leave to Appeal does not demonstrate that the Trial Chamber may have erred in the exercise of its powers under Rule 65(B) and that, therefore, there is no "good cause" within the meaning of Rule 65(D) for granting leave to appeal. Leave to appeal the Impugned Decision is, therefore, denied.

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



Dated this 31st day of October 2003,
At The Hague,
The Netherlands.

Judge Wolfgang Schomburg
Presiding

[Seal of the Tribunal]