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	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-04-84-AR65.2
		Date:	9 March 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Liu Daqun, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision: **9 March 2006**

PROSECUTOR

v.

Ramush HARADINAJ
Idriz BALAJ
Lahi BRAHIMAJ

DECISION ON LAHI BRAHIMAJ'S INTERLOCUTORY APPEAL AGAINST THE TRIAL CHAMBER'S DECISION DENYING HIS PROVISIONAL RELEASE

The Office of the Prosecutor:

Mr. Stephan Waespi
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Counsel for the Accused:

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Mr. Gregor Guy-Smith for Idriz Balaj
Mr. Richard Harvey for Lahi Brahimaj

1. The Appeals 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 ("Appeals Chamber" and "International Tribunal", respectively) is seized of the "Interlocutory Appeal Against the Decision by the Trial Chamber of 3 November 2005 to Dismiss the Motion for Provisional Release Filed by the Accused Lahi Brahimaj With Partly Confidential Annexes" filed on 10 November 2005 ("Appeal") by Lahi Brahimaj ("Appellant").

I. PROCEDURAL BACKGROUND

2. On 3 November 2005, Trial Chamber II ("Trial Chamber") rendered the "Decision on Lahi Brahimaj's Motion for Provisional Release" ("Impugned Decision"), denying the Appellant's motion pursuant to Rule 65 of the Rules of Procedure and Evidence of the International Tribunal ("Rules")[1] for provisional release to Kosovo.

3. On 21 November 2005, the Prosecution filed the "Prosecution's Response to 'Interlocutory Appeal Against the Decision by the Trial Chamber of 3 November 2005 to Dismiss the Motion for Provisional Release Filed by the Accused Lahi Brahimaj With Partly Confidential Annexes'" ("Response") opposing the Appeal. The "Reply by Defence of Lahi Brahimaj to Prosecution's Response to 'Interlocutory Appeal Against the Decision by the Trial Chamber of 3 November 2005 to Dismiss the Motion for Provisional Release Filed by the Accused Lahi Brahimaj With Partly Confidential Annexes'" ("Reply"), was filed on 25 November 2005 by the Appellant.

4. On 3 March 2006, the Appeals Chamber admitted into evidence for the purpose of this Appeal Exhibits 1 and 3 proffered by the Appellant with a motion filed pursuant to Rule 115 of the Rules[2] and allowed the Prosecution's request for the admission of rebuttal material.[3]

II. STANDARD OF REVIEW

5. The Appeals Chamber recalls that an interlocutory appeal is not a *de novo* review of the Trial Chamber's decision.[4] The Appeals Chamber has previously held that a decision on provisional

[1] IT/32/Rev.36.
[2] "Defence Application under Rule 115 to Present Additional Evidence on Appeal Against the Trial Chamber's Decision of 3 November 2005 Denying Provisional Release to the Accused Lahi Brahimaj" ("Rule 115 Motion"), filed confidentially on 15 November 2005; *see* also "Prosecution's Response to Defence Application Under Rule 115 to Present Additional Evidence on Appeal Against the Trial Chamber's Decision of 3 November 2005 Denying Provisional Release the Accused Lahi Brahimaj [*sic*] and Prosecution Application to Present Rebuttal Material Under Rule 115 With Annexes A-C" filed confidentially on 25 November 2005 ("Rule 115 Response").
[3] "Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115", 3 March 2006 ("Rule 115 Decision"), p. 19.

release by the Trial Chamber under Rule 65 of the Rules is a discretionary one.[5] Consequently, the question before the Appeals Chamber is not whether it "agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."[6] In order to challenge a discretionary decision, appellants must demonstrate that "the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion," or that the Trial Chamber "[gave] weight to extraneous or irrelevant considerations, [...] failed to give weight or sufficient weight to relevant considerations, or [...] made an error as to the facts upon which it has exercised its discretion," or that the Trial Chamber's decision was "so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."[7]

III. APPLICABLE LAW

6. Pursuant to Rule 65(B), a Chamber may grant provisional release only if it is satisfied that, if released, the accused will appear for trial and will not pose a danger to any victim, witness or other person; and after having given the host country and the State to which the accused seeks to be released the opportunity to be heard.[8] Where a Trial Chamber finds that one of these two conditions has not been met, it need not consider the other and must deny provisional release.[9]

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[4] *Prosecutor v. Ljube Boškoski & Johan Tarčulovski*, Case No.: IT-04-82-AR65.2, Decision on Ljube Boškoski's Interlocutory Appeal on Provisional Release, 28 September 2005 ("*Boškoski* Decision"), para. 5.

[5] *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Joinder Decision"), para. 3; *Prosecutor v. Mićo Stanišić*, Case No.: IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Mićo Stanišić* Decision"), para. 6; *Prosecutor v. Zdravko Tolimir et al.*, Case No.: IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005 ("*Tolimir* Decision") para. 4.

[6] *Milošević* Joinder Decision, para. 4; *Mićo Stanišić* Decision, para. 6; *Tolimir* Decision, para. 4.

[7] *Slobodan Milošević v. Prosecutor*, Case No.: IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004 ("*Milošević* Decision on Assignment of Counsel"), para. 10; *Milošević* Joinder Decision, paras 5-6; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No.: IT-04-82-AR65.1, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 4 October 2005 ("*Tarčulovski* Decision"), para. 2; *Tolimir* Decision, para. 4.

[8] *See*, for example, *Boškoski* Decision, para. 24 in which it was noted that because the Trial Chamber found that the Appellant's release would pose a significant risk of flight, it was not necessary for the Trial Chamber to consider whether the Appellant would also pose a danger to others in denying him provisional release; *see* also *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No.: IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, para. 10; *Mićo Stanišić* Decision, para. 7.

[9] *See*, for example, *Boškoski* Decision, para. 24 in which it was noted that because the Trial Chamber found that the Appellant's release would pose a significant risk of flight, it was not necessary for the Trial Chamber to consider whether the Appellant would also pose a danger to others in denying him provisional release; *see* also *Prosecutor v. Dario Kordić & Mario Čerkez*, Case No.: IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 19 April 2004, para. 10; *Mićo Stanišić* Decision, para. 7.

IV. SUBMISSIONS OF THE PARTIES AND DISCUSSION

7. The Appellant argues that the Trial Chamber did not exercise its discretion correctly and committed a number of discernible errors.[10] In addition, the Appellant submits that the Trial Chamber weighed all the relevant considerations with regard to both requirements in an unreasonable manner.[11]

A. Trial Chamber's finding that the Appellant would not appear for trial

1. The Vagueness of the Appellant's Plans and Ability to Earn a Livelihood

8. The Appellant submits that the Trial Chamber gave inappropriate and undue weight to the alleged vagueness in his plans and uncertainty about his ability to earn a livelihood and in considering that they should have a negative impact on whether the Trial Chamber should be satisfied that he will appear for trial.[12] He submits that any lack of clarity should not be considered as evidence that the Appellant may not appear for trial in principle, for that would mean that the lack of clarity or "vagueness" is considered a deliberate act on the part of an accused in some pre-determined "escape-plan" to abuse his provisional release.[13] He further argues that a lack of personal financial resources would not increase the likelihood that the Appellant might abuse his conditions of provisional release.[14]

9. The Prosecution submits that at the time of the provisional release proceedings before the Trial Chamber, the details provided by counsel for the Appellant ("Defence") on the Appellant's planned activities and means of subsistence were extremely limited and that this appeared to be recognised by the Appellant in his submissions.[15] The Prosecution argues that the Trial Chamber was not unreasonable in its exercise of discretion in considering the vagueness of the Appellant's plans and the uncertainty of his ability to earn a livelihood if granted provisional release, since this is a legitimate concern as the Appellant will be reliant on family and friends to assist him.[16]

10. The Appeals Chamber recalls that in any given case, the Trial Chamber only needs to examine those factors that a reasonable Trial Chamber would take into account.[17] These include

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[10] Appeal, para. 3.
[11] *Ibid.*, para. 4.
[12] *Ibid.*, para. 3(i)(a), referring to Impugned Decision, p. 6.
[13] *Ibid.*, para. 33.
[14] *Ibid.*, para. 29.
[15] Response, paras 36 and 37, referring to para. 32 of the Appeal.
[16] *Ibid.*, para. 40.
[17] *Prosecutor v. Nikola Šainović* and *Dragoljub Ojdanić*, Case No.: IT-99-37-AR65, Decision on Provisional Release, 30 October 2002 ("*Šainović* and *Ojdanić* Decision"), para. 6; *Prosecutor v. Vujadin Popović*, Case No.: IT-02-57-

those which are relevant to its taking a fully informed and reasonable decision as to whether, pursuant to Rule 65(B), the accused will appear for trial if provisionally released.[18] A Trial Chamber is not obliged to deal with all possible factors when deciding whether it is satisfied that the requirements of Rule 65(B) are fulfilled, but at a minimum, must provide reasoning to support its findings regarding the substantive considerations relevant to its decision.[19] Pursuant to these previous findings, the Appeals Chamber considers that the Impugned Decision provides no reasons explaining how the uncertainty of the Appellant's ability to earn a livelihood, and the vagueness of his plans would have an impact upon the likelihood that he would not appear for trial if provisionally released.[20] For the foregoing reasons, this ground of appeal is allowed.

11. In addition, the Appeals Chamber recalls that the affirmation by the Defence relating to the Appellant's plans if granted provisional release and the letter from the Dean of the University of Pristina indicating, *inter alia*, that the Appellant would be able to resume his studies as soon as he is granted provisional release, have been admitted as additional evidence on appeal.[21] In so far as these documents admitted on appeal constitute *prima facie* evidence of the Appellant's future plans and provided that the Trial Chamber gives reasoning to support the inference that the vagueness of the Appellant's plans and the uncertainty of his ability to earn a livelihood weigh upon the likelihood that he will appear for trial if released, the Appeals Chamber finds that this issue is now moot.

AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popović's Application for Provisional Release, 28 October 2005, para. 8.

[18] *Šainović*, and *Ojdanić* Decision, para. 9.

[19] *See Prosecutor v. Slobodan Milošević*, Case No.: IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, in which the Appeals Chamber examined whether the Trial Chamber considered appropriate factors in sufficient measure, and determined that the Trial Chamber had an obligation to provide reasons for its decision, although the Trial Chamber need not have provided its reasoning in detail; *Prosecutor v. Dragoljub Kunarac et al.*, Case No.: IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 42, which stated that a Chamber has an obligation to give reasoned opinions for its decisions but this obligation does not require it to spell out every step in its reasoning; *Šainović and Ojdanić Decision*, para. 6.

[20] The Appeals Chamber also notes that the Appellant had provided the Trial Chamber with information concerning his plans if provisionally released, and addressed this issue in the Initial Reply where he explained to the Trial Chamber that if released he would rely upon his family and friends to assist him with accommodation and means to support himself while pursuing his studies. *See Prosecutor v. Ramush Haradinaj et al.*, Case No.: IT-04-84-PT, Defence Reply to Prosecution's Response to Defence Motion on Behalf of Lahi Brahimaj for Provisional Release, Confidential, 24 October 2005 ("Initial Reply"), para. 40. The Appellant had also explained to the Trial Chamber that if released he would resume his studies at Pristina University, visit his family in Jablanica during weekends and breaks from his studies, and assist his family by joining in agricultural work on the land his family rents close to Djakovica. *See* Initial Reply, paras 33 and 41.

[21] Rule 115 Decision, p. 19 where the Appeals Chamber granted the request for admission into evidence of Exhibits 1 and 3.

2. The Appellant's Cooperation

12. The Appellant argues that the Trial Chamber erred in law and in fact in finding that the Appellant's refusal to answer particular questions "outside his criminal responsibility" during a voluntary interview as a suspect in December 2004 meant that it cannot be said that he cooperated fully and in a meaningful manner with the Prosecution.[22]

13. The Appellant argues that during the interview he cooperated with the Prosecution as he admitted becoming a member of the Kosovo Liberation Army ("KLA") in 1994 and working in the finance office of the KLA General Staff.[23] He further states that although he declined to give the names of the members of the General Staff, in the exercise of his right to remain silent as a suspect, he pointed out that there are books on the KLA containing all the names of such persons.[24] He continues that he was fully justified in refusing to answer questions concerning his involvement in the KLA in 1998 as they might have touched upon his potential criminal responsibility.[25]

14. In response, the Prosecution argues that the Appellant did not provide any substantial and meaningful cooperation during his interview by way of answers to questions on the KLA operations and facts contained in the indictment generally.[26] As to the Appellant's argument that it was difficult for him to establish what fell within his own criminal responsibility, the Prosecution argues that he waived his right to legal representation during the interview.[27]

15. The Prosecution submits that in the present case the Trial Chamber did not penalise the Appellant for his lack of full cooperation with the Prosecution but only observed that contrary to the Appellant's assertions, he "had not objectively co-operated in a way that warranted his alleged co-operation being taken into account in a substantial way in its decision on provisional release."[28] It further argues that the Appellant has not demonstrated that the Trial Chamber violated the right of an accused to remain silent when it made this finding related to the weight to be attributed to the Appellant's cooperation.[29]

16. The Appeals Chamber notes that the Trial Chamber found that it cannot be said that the Appellant "co-operated fully and in a meaningful way with the Prosecution during a voluntary interview in December 2004, as far as he remained silent to questions touching upon areas outside

[22] Appeal, para. 3(i)(b), referring to Impugned Decision, p. 6; Reply, para. 14.
[23] Appeal, paras 16 and 23.
[24] *Ibid.*, para. 16.
[25] *Ibid.*, para. 22; Reply, para. 10.
[26] Response, paras 14 and 18.
[27] *Ibid.*, para. 16.
[28] *Ibid.*, para. 20.
[29] *Ibid.*, para. 22.

his own criminal responsibility".[30] At the outset, the Appeals Chamber notes that an accused may, if he decides to do so, cooperate with the OTP, *inter alia*, by accepting to be interviewed by the Prosecution, but he does not have to do so and his provisional release is not conditioned, all other conditions being met, upon his agreement to be interviewed.[31] Against this backdrop the Appeals Chamber recalls that it has previously held that when an accused person decides to cooperate with the Prosecution, this matter may weigh in his favour when he seeks to be provisionally released, insofar as it shows his general attitude of cooperation towards the International Tribunal which is relevant to the issue that he will appear for trial.[32] However, an accused will not be penalised because he declines to cooperate with the Prosecution.[33]

17. The Appeals Chamber recalls that the cooperation of an accused should not be assessed solely by reference to the value of the information the accused provides.[34] This is because an accused before this International Tribunal is not obliged to assist the Prosecution in proving its case and any evidence of willingness on the part of an accused to be voluntarily interviewed by the Prosecution is evidence of a degree of cooperation that an accused is entitled to withhold without adverse inference being drawn.[35]

18. In the present case, the Appellant actively made it possible for the Prosecution to interview him, by returning to Pristina from Tirana as soon as he learned that the OTP wished to interview him as a suspect, and, on 6 December 2004, made himself available for an interview conducted by an investigator.[36] At the time when the interview took place no indictment had been served against the Appellant, and thus he may have not been able to determine which questions were related to his alleged involvement in the crimes he was suspected of having committed. In this context, the Appeals Chamber recalls that the fact that the Prosecution does not accept the information provided by an accused to be credible or as extensive as the accused could provide, is irrelevant.[37] In light of the foregoing, the Appeals Chamber finds that the Trial Chamber appears to have reached its finding concerning the Appellant's cooperation by assessing solely the value of the information

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[30] Impugned Decision, p. 6.
[31] *Šainović and Ojdanić* Decision, para. 8; *see* also *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No.: IT-03-73-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para. 22.
[32] *Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No.: IT-99-37-AR65.3, Decision Refusing Milutinović Leave to Appeal, 3 July 2003 ("*Milutinović* Decision"), para. 12.
[33] *Milutinović* Decision, para. 12.
[34] *Prosecutor v. Jovica Stanišić*, Case No. IT-03-69.AR65.1, Confidential Decision on Prosecution's Appeal Against Decision Granting Provisional Release, 3 December 2004 ("*Jovica Stanišić* Decision"), para. 14.
[35] *Jovica Stanišić* Decision, para. 14; *Mićo Stanišić* Decision, para. 24.
[36] *See* Appeal, para. 15 and Confidential Annex 1: Transcript of OTP Interview With the Accused. This is not contradicted by the Prosecution, *see* Response, paras 13-22. Compare to *Tarčulovski* Decision, para. 15, where the accused actively tried to make it impossible for the Prosecution and FYROM authorities to contact him.
[37] *Prosecutor v. Franko Simatović*, Case No.: IT-03-69-AR65.2, Decision on Prosecution's Appeal Against Decision on Provisional Release,3 December 2004, para. 9.

provided, rather than the interview and voluntariness thereof and is therefore in direct conflict with the International Tribunal's jurisprudence.[38] For the foregoing reasons, this ground of appeal is allowed.

3. The Appellant's Pre-Trial Detention

19. The Appellant argues that the Trial Chamber erred in law and in fact by considering the time spent by him in pre-trial detention up until the date of the delivery of the Impugned Decision as the sole basis for holding that his pre-trial detention cannot be said to be excessive,[39] and in considering this time as a factor to be taken into account in determining whether the Appellant can satisfy the Trial Chamber that, if released he will appear for trial.[40] He submits that the total period of pre-trial detention runs from the moment an accused comes into the custody of the International Tribunal until the first day of trial.[41] He further submits that the Trial Chamber failed to give any or any sufficient weight to the fact that all parties acknowledge that trial may well not commence until 2007, at which time he would have spent almost two years in pre-trial detention.[42]

20. The Prosecution, on the other hand, argues that the period to consider when deciding upon the potentially excessive nature of the pre-trial detention commences on the date of incarceration and ends on the date the decision on the motion for provisional release is rendered.[43] The Prosecution further submits that it does not dispute that the length of pre-trial detention before the beginning of trial can be a relevant factor to consider when deciding upon provisional release applications, but argues that in the current circumstances, this period can in no way become a determining factor on the facts of this case.[44] It argues that in light of the gravity of the crimes alleged against the Appellant, his incarceration is in no way excessive and, therefore, the Defence has failed to demonstrate that the Trial Chamber erred in considering that the pre-trial detention was not excessive.[45]

21. The Prosecution further argues that even if the Trial Chamber had added the time the Appellant is likely to spend in pre-trial detention into its calculations, this period could in no way be considered excessive because the latest indication provided by the Trial Chamber was that the trial would start in November 2006.[46] The Prosecution also argues that in any case, other accused have

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[38] *Jovica Stanišić* Decision, para. 14.
[39] Appeal, para. 3(i)(c).
[40] *Ibid.*, para. 3(i)(d), referring to Impugned Decision, p. 6.
[41] *Ibid.*, para. 25.
[42] *Ibid.*, paras 3(i)(c) and 25, referring to Impugned Decision, p. 6.
[43] Response, para. 26.
[44] *Ibid.*, para. 27.
[45] *Ibid.*, para. 28.
[46] *Ibid.*, paras 29 and 30, referring to the transcript of the Status Conference of 16 September 2005, T. 103.

spent much longer periods in the United Nations Detention Unit ("UNDU") than this Appellant.[47] Finally the Prosecution argues that "the length of pre-trial detention is a factor to consider when appreciating the risk that an [a]ccused will flee [because] the risk of an accused person's escape diminishes as the length of pre-trial detention augments."[48] In reply, the Appellant submits that this argument defies all logic and that the Prosecution has misread the Trial Chamber's holding in the *Krajišnik* case.[49]

22. The Appeals Chamber notes that in reaching a determination as to whether the first requirement of Rule 65(B) had been met, the Trial Chamber discussed several considerations tending to show whether the Appellant might or might not return for trial. Among those considerations, the Trial Chamber also discussed whether the period spent in pre-trial detention was excessive.[50] The Appeals Chamber will now turn to discuss the question whether the period spent in pre-trial detention was excessive is a factor which may be legitimately examined under the first requirement of Rule 65(B).

23. Undisputedly, a Trial Chamber may determine whether the particular circumstances of a case[51] warrant that provisional release be granted to an accused based on the actual or likely excessive length of his pre-trial detention. However, such determination is an additional discretionary consideration which has no bearing upon the assessment as to whether an accused will appear for trial if released.[52] Therefore, the Trial Chamber erred by taking this factor into account in determining that the Appellant had not satisfied the first requirement of Rule 65(B). For the foregoing reasons this ground of appeals is allowed.

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[47] *Ibid.*, para. 31, referring to Paško Ljubičić and Milan Martić who the Prosecution submits arrived at the UNDU on 21 November 2001 and 15 May 2002 respectively and were, at the time of filing the Appeal, still awaiting the commencement of trial. The Prosecution also refers to the case of Momčilo Krajišnik, arguing that he waited almost four years before the beginning of his trial, but was nonetheless denied provisional release by the Trial Chamber.
[48] *Ibid.*, para. 33.
[49] Reply, para. 17.
[50] Impugned Decision, p. 6. The Appellant was transferred to the International Tribunal on 9 March 2005. *See* Case No.: IT-04-84-I, Decision by Registrar re: Assignment of Mr Harvey as Counsel for Lahi Brahimaj, 11 March 2005, p.1. The Trial Chamber indicated that the trial is expected to start in November 2006. Status Conference, 16 September 2005, T. 103, in outlining the work-plan for the trial, Judge Brydensholt stated: "The Pre-Trial Conference, according to this plan, should be able to take place in October 2006, and the start of trial, as I mentioned, in November 2006."
[51] *See Prosecutor v. Mile Mrkšić*, Case No.: IT-9513/1-PT, Decision on Mile Mrkšić's Application for Provisional Release, 24 July 2002 ("*Mrkšić* Trial Chamber's Decision"), para. 49.
[52] *See Prosecutor v. Enver Hadžihasonivić, Mehmed Alagić and Amir Kubura,* Case No.: IT-01-47-PT, Decision Granting Provisional Release to Enver Hadžihasonivić, 19 December 2001, para. 16; *Mrkšić* Trial Chamber's Decision, para. 47; *Prosecutor v. Nikola Šainović* and *Dragoljub Ojdanić*, Case No.:IT-99-37-PT, Decision on Applications of Nikola Šainović and Dragoljub Ojdanić for Provisional Release, 26 June 2002, para. 17; *Prosecutor v. Momčilo Krajišnik,* Case No.: IT-00-39&40-PT, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, 8 October 2001, para. 22.

B. The Trial Chamber's finding that the Appellant will pose a danger to victims, witnesses or other persons

1. The volatile situation in Kosovo and Threats and Intimidation to Witnesses

24. The Appellant submits that the Trial Chamber erred in law and in fact by finding that "the volatile situation in Kosovo" makes the possibility of threat or intimidation so vivid that it calls for specific caution.[53] The Appellant argues that the Trial Chamber reached this conclusion despite recalling that a general fear of intimidation and threatening of witnesses cannot in itself constitute a ground for denying provisional release, and submits that therefore the Trial Chamber "created a contradiction in terms" and "in effect held against the [Appellant] that a danger of witness intimidation exists *in abstracto*," which is contrary to governing law.[54] The Appellant also points out that this was the position adopted by the Trial Chamber when it granted Ramush Haradinaj provisional release.[55] He further argues that no proof has been offered of the existence of a more volatile situation in Kosovo now than there was in June 2005 when Ramush Haradinaj was granted provisional release.[56]

25. The Appellant further submits that the Trial Chamber erred in law and in fact by giving undue weight to one unsubstantiated, unverified and uncorroborated statement of a protected witness who claims to have been threatened by the Appellant.[57] The Appellant submits that if the witness was indeed threatened, it was not by him.[58] He adds that the only link to the Appellant can be found in paragraph 10 of the statement where the name "Lahi" appears. However, in paragraphs 6, 9 and 11 of the statement the witness appears to have mentioned the name of the person who threatened him though this name was redacted by the Prosecution.[59] He claims that if the name were in fact that of the Appellant, it is reasonable to infer that the Prosecution would not have redacted it.[60] The Appellant submits that another statement subsequently submitted by the Prosecution from another witness who had also allegedly been threatened by the Appellant, does not support this allegation, and that this witness explicitly stated that he is not afraid of the Appellant.[61] The Appellant argues that the jurisprudence of the International Tribunal provides that one of the factors to consider is whether there was any suggestion of interference with victims or witnesses since the

[53] Appeal, para. 3(ii)(a), referring to Impugned Decision, p. 6.
[54] *Ibid.*, para. 34.
[55] *Ibid.*, para. 35, referring to, *Prosecutor v. Ramush Haradinaj et al.*, Case No.: IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provision Release, 6 June 2005, para. 47.
[56] *Ibid.*, para. 36.
[57] *Ibid.*, para. 3(ii)(b).
[58] *Ibid.*, para. 41.
[59] *Ibid.*, para. 41.
[60] *Ibid.*, para. 41.
[61] *Ibid.*, para. 42.

date when an indictment was confirmed against him, which has not been proven by the Prosecution.[62]

26. Therefore, the Appellant concludes that the Trial Chamber incorrectly exercised its discretion in determining whether he had satisfied the second requirement of Rule 65(B) since there is no evidence that the Appellant poses a danger to victims, witnesses or third persons if provisionally released.[63]

27. First, the Prosecution recalls that the Appellant initially invited the Trial Chamber to consider the security situation in Kosovo.[64] Secondly, it argues that "the way the [Appellant] characterises the Trial Chamber's alleged error does not correspond to the wording of the [Impugned] Decision" as the Trial Chamber held that "the general fear of intimidation and threats to witnesses currently in Kosovo made the possibility of threats and intimidation of witnesses in this case so vivid that *it called for specific caution when deciding on provisional release*" and therefore the Trial Chamber did not abuse its discretion.[65]

28. The Prosecution submits that it is clear that the person who threatened the witnesses whose statements are contained in Annexes E and F of the Response is the Appellant and that as such he poses a concrete danger to victims and witnesses if granted provisional release.[66] The Prosecution submits that the Appellant's reference to the *Simatović* case should be somewhat nuanced as "[i]t should not matter whether the threats to and intimidation of witnesses happened before the confirmation of the indictment or after, [since] an accused who threatens and intimidates victims and witnesses [...] *before* a formal indictment is issued against him still poses a concrete danger to witnesses or third persons in the context of Rule 65(B)"[67] as correctly found by the Trial Chamber which, according to the Prosecution, was probably too cautious.[68] The Prosecution further contends that this makes him all the more likely to continue to threaten and intimidate witnesses after the issuance of the indictment.[69]

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[62] *Ibid.*, para. 43, citing *Prosecutor v. Simatović*, Case No.: IT-03-69-PT, Decision on Provisional Release, 28 July 2004, para. 12.
[63] *Ibid.*, para. 44.
[64] Response, para. 44, referring to Defence Motion on Behalf of Lahi Brahimaj for Provisional Release, 16 September 2005, para. 18.
[65] *Ibid.*, paras 45 and 48 (emphasis in original), referring to Impugned Decision, p. 6.
[66] *Ibid.*, para. 50.
[67] *Ibid.*, para. 53.
[68] *Ibid.*, para. 54.
[69] *Ibid.*, para. 53.

29. The Appeals Chamber notes that the Trial Chamber concluded that "it has not been verified that the [Appellant] threatened or exercised pressure on victims or potential witnesses".[70] Nonetheless, in finding that it was not satisfied that the Appellant would not endanger any victim, witness, or other person, the Trial Chamber considered the Prosecution's claims about alleged witness intimidation by the Appellant. The Prosecution based its allegations in part on UNMIK documents not provided to the Trial Chamber, but which were referenced in the Initial Response, and which were described as "alleging that the Accused intimidated some witnesses".[71] The Prosecution also offered into evidence a letter from UNMIK barring the Prosecution from introducing the UNMIK documents into evidence on the ground that doing so might make witnesses identifiable.[72] In the Impugned Decision, the Trial Chamber specifically noted the position that UNMIK took in this letter, suggesting that UNMIK had raised "security concerns".[73] The Appeals Chamber has, pursuant to Rule 115, admitted a declaration indicating that UNMIK does not believe the documents in question refer to the Appellant.[74] The Appeals Chamber has also admitted rebuttal evidence submitted by the Prosecution.[75] Because the allegations of witness intimidation by the Appellant that were given weight by the Trial Chamber were based in part on the UNMIK documents whose relevance was called into question by this additional evidence, and were supported in part by the letter from UNMIK whose relevance also has been called into question by the additional evidence, the Appeals Chamber believes that the Trial Chamber should reconsider the issue of witness intimidation.

V. CONCLUSION

30. In light of the foregoing, the Appeals Chamber is satisfied that the Appellant has established that the Trial Chamber erred by giving undue weight to certain factors, whilst giving little or no weight to other relevant factors.

VI. DISPOSITION

31. For the foregoing reasons, the Appeals Chamber **GRANTS** the Appeal in part, **QUASHES** the Impugned Decision, and **REMITS** the matter to the Trial Chamber for further consideration in

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[70] Impugned Decision, p. 6.
[71] *See Prosecutor v. Ramush Haradinaj et al.*, Case No.: IT-04-84-PT, Prosecution Response to Motion for Provisional Release Filed by Mr Brahimaj on 16 September 2005, *Confidential*, 17 October 2005, English Translation filed on 1 November 2005 ("Initial Response"), para. 44.
[72] *Ibid.*, Annex F.
[73] Impugned Decision, p. 5.
[74] Rule 115 Motion, Exhibit 1.
[75] Rule 115 Response, Exhibits A-C.

accordance with the present Decision and in light of the additional evidence admitted on appeal and the Prosecution's rebuttal material. The Trial Chamber is directed to:

a. Take into account the factors set out above which the Impugned Decision failed to consider, such as, the Appellant's cooperation with the Prosecution;

b. Re-examine the finding concerning the "vagueness" of the Appellant's plans, subject to the findings in paragraphs ten and eleven of the present Decision;

c. Re-examine its findings concerning the question of witness intimidation; to this end the Trial Chamber may issue any such orders as it deems necessary for the purpose of availing itself of the evidence required to establish whether the Appellant poses any threat to witnesses or any other persons.

Done this 9th day of March 2006
At The Hague,
The Netherlands.

Judge Liu Daqun
Presiding Judge

[Seal of the International Tribunal]