IT-03-66-PT
D944 - D984
12 SEPTEMBER 2003.

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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

Case No.: IT-03-66-PT

Date: 12 September 2003

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Alphons Orie, Presiding**
Judge Amin El Mahdi
Judge Martín Canivell

Registrar: **Mr. Hans Holthuis**

Decision of: **12 September 2003**

PROSECUTOR
v.
FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

DECISION ON PROVISIONAL RELEASE OF FATMIR LIMAJ

Office of the Prosecutor

Mr. Andrew Cayley
Mr. Alex Whiting

Counsel for the Accused

Mr. Karim AA. Khan for Fatmir Limaj
Mr. Tome Gashi and Mr Peter Murphy for Haradin Bala
Mr. Bajram Krasniqi and Mr Steven Powles for Isak Musliu

TRIAL CHAMBER I (the "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(the "Tribunal");

BEING SEISED OF the Defense Motion for Provisional Release of Fatmir Limaj (the "Motion"), filed on 24 June 2003;

NOTING the Prosecution's Response to Application for Provisional Release (the "Response"), filed on 8 July 2003;

NOTING the Application by Fatmir Limaj for Leave to File a Reply and Motion for an Extension of Time, filed on 15 July 2003;

NOTING the Order Setting Time for Submission of Various Replies, filed on 22 July 2003;

NOTING the Reply to Prosecution's Response to the Defense Application for Provisional Release of Fatmir Limaj (the "Reply"), filed on 22 July 2003, and the Addendum to Reply to Prosecution's Response to the Defense Application for Provisional Release of Fatmir Limaj ("Addendum"), filed on 24 July 2003;

NOTING Rule 65 of the Rules of Procedure and Evidence (the "Rules") which provides in the relevant part:

> (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.

NOTING that, in support of its Motion, the Defense submits, *inter alia*, the following:

(i) the Accused was in the process of surrendering voluntarily at the time he was arrested in Slovenia[1] and he made no attempt to evade the jurisdiction of the Tribunal after he had learned of the indictment against him;[2]

(ii) the Accused cannot – and will not – flee because: (a) the United Nations controls the territory of Kosovo and therefore the Chamber's orders will be enforced,[3] (b) there is no place for the Accused to go to avoid trial,[4] (c) "his wife, four children, parents, all his brothers and his sisters are in Kosovo along with a large extended family and it would be most unlikely he would leave them all for a life of isolation and subterfuge",[5] and (d) various undertakings and testimonials of local authorities, including of Prime Minister of Kosovo, insure that the Accused will appear for trial;[6]

(iii) no evidence has been adduced that the Accused has in the past "[...] directly or indirectly ever threatened or intimidated any victim, witness or other person connected to matters subject to the indictment";[7]

(iv) the Accused is willing to accept and comply with all conditions and orders imposed on him to ensure his surrender to the Tribunal;[8]

NOTING that, in its Response, the Prosecution opposes the Motion arguing, *inter alia*, as follows:

(i) the Accused did not surrender voluntarily to the Tribunal and was, as he acknowledges himself, arrested by the Slovenian police;[9]

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[1] Motion, par. 15.
[2] *Ibid.*, par. 16.
[3] *Ibid.*, par. 18.
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*, par. 21.
[8] *Ibid.*, par. 22.
[9] Response, par. 9.

(ii) during the several hours he knew of the indictment against him, the Accused could have called the Tribunal to arrange for his surrender, or could have presented himself to the police in Slovenia to accomplish his surrender, but did not do so;[10]

(iii) "the Accused's public misrepresentation of his whereabouts and activities at the time of his arrest places further considerable doubt on his claim he was trying to surrender";[11]

(iv) there is a real risk that the Accused will flee because: (a) the United Nations' power in Kosovo to prevent the Accused from absconding remains limited,[12] (b) the Accused could easily flee to Albania, or to one of the many Albanian communities in Europe,[13] (c) the fact that the family of the Accused is living in Kosovo will not prevent him from avoiding arrest and "living a life of isolation and subterfuge",[14] (d) undertakings by local authorities in Kosovo to insure that the Accused appears for trial are without significant value because matters of police and security are reserved to the United Nations, and therefore the local authorities have no means to enforce any such undertakings,[15] and (e) the Accused has a significant incentive to flee, because he is charged with playing a leadership role, and directly participating in, very serious crimes, and he will, if convicted, receive a substantial sentence;[16]

(v) "in the light of specific threats made by the Accused, the evidence of his violence, the numerous threats that have already occurred in this case, and the background of widespread witness intimidation in Kosovo", the Accused has failed to demonstrate that he will not pose a danger to victims and witnesses; [17]

(vi) the United Nations authorities are not yet in a position to provide real protection to witnesses; [18]

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[10] *Ibid.*
[11] *Ibid.*, par. 11.
[12] *Ibid.*, par. 12.
[13] *Ibid.*, par. 13.
[14] *Ibid.*, par. 14.
[15] *Ibid.*, par. 15.
[16] *Ibid.*, par. 17.
[17] *Ibid.*, par. 27.
[18] *Ibid.*

(vii) the schedule established by the Presiding Judge at the last status conference would minimize the likelihood of lengthy pre-trial detention;[19]

NOTING that, in its Reply, the Defense submits, *inter alia*, the following:

(i) Rule 65 of the Rules does not place the burden of proof on the Accused and that this notion ceased to be the practice of the Tribunal, when the words "in exceptional circumstances" were deleted from the text of Rule 65 at the twenty-first plenary session on 30 November 1999;[20]

(ii) the Prosecution has decided to oppose the provisional release of the Accused, as if it were a matter of principle, and regardless of the evidence that he voluntarily surrendered at the time of his arrest;[21]

(iii) "[...] given the Accused's location and the import of the news he received, a gap of one and one-half hours in telephoning and managing to make contact with the Prime Minister is negligible and in no way can it reasonably be construed as being a material delay [...]";[22]

(iv) in light of the fact that the Accused contacted the Prime Minister of Kosovo and told him he wished to surrender and asked that the Special Representative of the Secretary General in Kosovo ("SRSG") be notified of his whereabouts and intentions, and that the Accused requested that the Prime Minister and the SRSG work towards effecting such a surrender, the conduct of the Accused was exemplary; [23]

(v) it is well accepted by the European Court of Human Rights that the severity in likely sentence is not a ground to refuse the Accused provisional release;[24]

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[19] *Ibid.*, par. 29.
[20] Reply, pars. 14-15.
[21] *Ibid.*, par. 8.
[22] *Ibid.*, par. 25.
[23] *Ibid.*, par. 26.
[24] *Ibid.*, pars. 37-38.

(vi) "[g]iven that he would have broken his promise to his father, his Prime Minister and his people, it is submitted that the Accused will have no other option, but to abide by the conditions of bail that are imposed by the [Tribunal]";[25]

(vii) the Accused's conduct, in not evading justice when he had the chance, but instead contacting the United Nations authorities and informing them of his location provides cogent and compelling evidence that he would not pose a flight risk if released now;[26]

(viii) there is no credible evidence which shows that Fatmir Limaj has directly or indirectly threatened any witnesses; [27]

(ix) the Prosecution has failed to establish that the United Nations Interim Administration Mission In Kosovo ("UNMIK") is unwilling or unable to provide a adequate protection to witnesses in Kosovo; [28]

NOTING that on 16 July 2003, Judge Martín Canivell invited the former SRSG to provide the Chamber with a statement on his knowledge, if any, of facts potentially relevant for the Chamber's assessment of the risk that the Accused would evade justice or pose a danger to any witness, victim or other person ("Decision of Judge Martín Canivell");

NOTING that the former SRSG has not responded to the invitation of Judge Martín Canivell and that Mr. Paul E. Coffey, the Director of the Department of Justice of UNMIK, has provided a response to the Chamber on behalf of UNMIK;

NOTING that, in its reply to the Decision of Judge Martín Canivell, Mr. Coffey stated that "UNMIK is unable to provide a guarantee that Mr. Limaj, if provisionally released, would be available for subsequent court proceedings at The Hague", that "[t]he seriousness of the charges against Mr. Limaj, however, would argue that he has a motive to flee", that "[g]iven Kosovo's geographic situation, the limited resources available to UNMIK to provide comprehensive policing in Kosovo's territory, and the support resources available to a person in Mr.

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[25] *Ibid.*, par. 40.
[26] *Ibid.*, par. 44.
[27] *Ibid.*, pars. 47-65.
[28] *Ibid.*, par. 65.

Limaj's situation should he seek to evade apprehension, it would be relatively easy to depart Kosovo into neighboring territories" and that "[c]onsequently the risk of flight is appreciable";

NOTING that Mr. Coffey added that "[a]s extensively described in a recent OSCE report [...], witness intimidation is a common occurrence in Kosovo and a major impediment to establishment of the rule of law", that he has "[...] no grounds to doubt the accuracy of [the Prosecution]'s assessment", and that "UNMIK's ability to protect witnesses is limited by resource constraint and the perceptions of society";

NOTING that the Chamber ordered on 22 July 2003 that the Parties submit their comments to the letter from Mr. Coffey before Friday 25 July 2003;

NOTING that, in its Addendum, the Defense submits, *inter alia*, the following:

(i) the letter of Mr. Coffey does not state that the contents have been agreed to by the SRSG, [29] nor does it specify whether the Director has any direct or indirect knowledge on the issues raised in the Decision of Judge Martín Canivell;[30]

(ii) Mr. Coffey based his contention that the Accused has a motive to flee only on the fact that Fatmir Limaj is charged with very serious crime[31] and he does not take into consideration all the countervailing factors that may militate against the Accused absconding;[32]

(iii) Mr. Coffey has not detailed any evidence or information of his own that demonstrates, or even suggests, that the Accused ever harmed or intimidated any witness in Kosovo or that he would be likely to do so now;[33]

(iv) the information provided by Mr. Coffey is in stark contrast with the evidence that the SRSG[34] would be able to provide;[35]

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[29] Addendum, par. 5.
[30] *Ibid.*, par. 7.
[31] *Ibid.*, par. 8.
[32] *Ibid.*, par. 10.
[33] Ibid., par. 15.
[34] *Ibid.*, par. 17.

NOTING that on 31 July 2003, Judge Martín Canivell invited once again the former SRSG to inform the Judges of his personal knowledge of facts potentially relevant to the Chamber's assessment of the risk that, if provisionally released, Fatmir Limaj would not appear for trial or may pose danger to any witness, victim or other person; that the Trial Chamber was not provided with this information;

CONSIDERING that Rule 65 of the Rules must be read in the light of Article 21(3) of the Statute of the Tribunal;

CONSIDERING that Rule 65 of the Rules previously stipulated that provisional release was only to be granted in "exceptional circumstances" and detention was therefore in reality the rule;

CONSIDERING that the removal of this requirement has neither made detention the exception and release the rule, nor resulted in the situation that despite amendment, detention remains the rule and release the exception;[36]

CONSIDERING that, on the contrary, "the focus must be on the particular circumstances of each individual case, without considering that the outcome it will reach is either the rule or the exception";[37]

CONSIDERING that the task of the Chamber must therefore be to weigh up and balance the factors presented to it in that case before reaching a decision and, as a general rule, to assess "whether public interest requirements, notwithstanding the presumption of innocence, outweigh the need to ensure, for an accused, respect for the right to liberty of person";[38]

CONSIDERING moreover that in determining whether to grant provisional release, the Chamber has to be satisfied of: (a) that the Accused will appear for trial, and (b) that, if released, he will not pose a danger to any victim, witness or other person;

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[35] *Ibid.*, par. 16.
[36] *Prosecution v. Miodrag Jokić,* Order on *Miodrag Jokić* for Provisional Release, IT-01-42-PT, 20 February 2002, par. 17.
[37] *Ibid.*
[38] *Ibid.*, par. 18.

CONSIDERING the list of factors set out by the Appeals Chamber of which a Chamber should take into account in deciding whether it is satisfied that, if released, an Accused will appear for trial,[39] and the "circumstances of each accused who applies for provisional release must be evaluated individually as they weigh upon the likelihood that he will appear for trial";[40]

CONSIDERING that, in the circumstances of this case, the following factors are particularly relevant in the determination of whether, if released, the Accused will appear for trial: (a) the circumstances in which the Accused was arrested; (b) the senior position held by the Accused; (c) the seriousness of the charges against him; (d) the fact that, if convicted, the Accused is likely to face a long prison term; and (e) the fact that the authorities of Kosovo would not be able to give guarantees that they would ensure the presence of the Accused for trial and the observance of the conditions set up by the Chamber should provisional release be granted;[41]

CONSIDERING that, although the Accused was arrested by the Slovenian police and that he did not surrender to the Tribunal, he made representations to the press that he intended to return to Kosovo to surrender to the jurisdiction of the Tribunal; [42]

NOTING however that the Accused, when heard by the Kranj District Court in Slovenia upon his arrest on 18 February 2003, stated that "as a deputy, he ha[s] immunity"[43] and should therefore be released and allowed "to travel back to Priština as a normal person"[44], notwithstanding the request of the Tribunal for his arrest;

CONSIDERING that it appears therefore that the Accused had the intention to travel back to Kosovo – where he enjoys the status of a deputy – rather than to directly surrender himself to the custody of the Tribunal;

CONSIDERING that, in those circumstances, the Chamber cannot be satisfied that the Accused would have surrendered voluntarily to the Tribunal if he would not have been arrested;

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[39] *Prosecutor v. Nikola Šainović & Dargoljub Ojdanić,* Decision on Provisional Release, IT-99-37-AR65, 30 October 2002, par. 6.
[40] *Ibid.*, par. 7.
[41] *Ibid.*
[42] Announcement of Mr Fatmir Limaj, Public Television of Kosovo, 18 February 2003, cited in the Motion p. 480.
[43] Minutes of the Interrogation of the Accused, 18 February 2003, cited in the Motion, p. 668.
[44] *Ibid.*

CONSIDERING that the Accused is alleged to have command responsibility and is charged with participating in serious crimes; that, if convicted, the Accused is likely to face a long prison term and that he therefore has a strong incentive to flee;

CONSIDERING that while guarantees are not a requirement for the grant of provisional release,[45] they do provide further assurance to the Chamber;

CONSIDERING that, although the letter of Mr. Coffey does not contain any information with regard to the SRSG's knowledge of the risk that the Accused, if released, would flee or pose any danger to any witness, victim or other person, it contains valuable information pertaining to guarantees that UNMIK would be able to provide in case of provisional release;

NOTING that in its Resolution 1244 (1999) of 10 June 1999, the Security Council of the United Nations established UNMIK as the interim administration in Kosovo and decided that the responsibility of UNMIK will include, *inter alia*, "[e]nsuring public safety and order until the international civil presence can take responsibility for this task" and "conducting border monitoring duties as required";[46]

CONSIDERING that, according to the letter of Mr. Coffey, UNMIK is not able to provide any guarantees that the Accused, if provisionally released, would be available for trial;

CONSIDERING therefore that the Chamber is not satisfied that if released, the Accused would appear before the Tribunal;

CONSIDERING that, according to both Rule 65 of the Rules and the jurisprudence of the Tribunal,[47] upon a finding that the accused does not meet one of the two requirements under Rule 65(B) of the Rules, the other requirement need not be addressed;

CONSIDERING therefore that it is not necessary to examine whether the Accused, if released, will not pose a danger to any victim, witness or other person;

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[45] *Prosecutor v. Blagojević et al.*, Decision on Application by Dragan Jokić for Leave to Appeal, IT-02-53-AR65, 18 April 2002, pars. 7-8.
[46] S/RES/1244 (1999).

FOR THE FOREGOING REASONS,

PURSUANT to Rule 65 of the Rules,

HEREBY DENIES the Motion.

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

Done this 12th of September 2003
At The Hague
The Netherlands

Alphons Orie
Presiding Judge

[Seal of the Tribunal]

[47] *Prosecution v. Krajišnik & Plavšić,* Decision on Momčilo Krajišnik's Motion for Provisional Release and Evidentiary Hearing, IT-00-39 & 40-PT, 18 October 2002.