



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-R77.4

Date: 13 May 2008

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Christine Van Den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Decision of: 13 May 2008

PROSECUTOR

v.

**ASTRIT HARAQIJA
and
BAJRUSH MORINA**

PUBLIC

**DECISION ON APPLICATION FOR PROVISIONAL RELEASE
OF ASTRIT HARAQIJA**

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. David Re
Mr. Stefan Wäspi

Counsel for the Accused:

Mr. Karim A. A. Khan for Astrit Haraqija
Mr. Jens Dieckman for Bajrush Morina

1. Trial Chamber I (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (“Tribunal”) is seized of the “Public Application for Provisional Release of Astrit Haraqija & Confidential Annex ‘A’”, filed on 5 May 2008 (“Motion”) and hereby renders its Decision.

I. SUBMISSIONS

2. In its Motion the Defence moves the Trial Chamber to contact the UNMIK for a Notice of Guarantee for Astrit Haraqija (“Accused”), commence the necessary procedures with the Kingdom of the Netherlands as the host country of the Tribunal and order provisional release of the Accused until the beginning of the trial proceedings.¹

3. In support of its Motion, the Defence submits that:

- a) A provisional release should be granted unless the Trial Chamber considers that the Accused, if released, will fail to surrender or will pose a danger to any victim, witness or other person and the burden of proof should be on the Prosecution to demonstrate why the Accused should not be permitted to enjoy his fundamental right to liberty pending trial.²
- b) There are several factors showing that the Accused will appear for trial, namely that:
 - a. After he was informed of the present allegations on 27 October 2007, the Accused made no attempt to “go to ground” or evade justice in any way, choosing instead to fully cooperate giving two interviews to the OTP.³
 - b. The Accused voluntarily surrendered his passport and presented himself at the ICTY field office for transfer to The Hague.⁴
 - c. The Accused’s wife, two young children, parents and large extended family are in Kosovo. As a consequence “it would be unlikely he would leave them all for a life of isolation and subterfuge which would be the corollary of failing to surrender when so ordered by the Trial Chamber”.⁵

¹ Motion, paras 10-11, 26.

² Motion, paras 5-9.

³ Motion, paras 11-14.

⁴ Motion, paras 15-16.

⁵ Motion, para. 18.

- c) The following factors show that the Accused will not pose a danger to any victim, witnesses or other person:
 - a. The protected witness with whom the Accused allegedly interfered has testified, the Haradinaj case has concluded and there are no other ICTY trials underway in Kosovo.⁶
 - b. Although the OTP formally disclosed the name of the protected witness to the Accused in October 2007, there is no suggestion by the Prosecution that any approach has been made by the Accused towards the protected witness, either directly or indirectly, since the two days in July 2007 specified in the Indictment, nor is there any suggestion that the Accused otherwise interfered with the administration of justice.⁷
- d) There are a number of humanitarian reasons militating in favour of granting the provisional release, namely that:
 - a. The Accused is a sole provider for the immediate family and unnecessary emotional hardship and family disruption would be caused by his incarceration pending trial;⁸
 - b. The Accused's brother is due to get married on 10 May 2008 and the Accused seeks to be allowed to participate in the functions that are planned for that day and in the days thereafter.⁹
- e) The Accused states his "unequivocal willingness to abide by any and all conditions imposed by the Trial Chamber".¹⁰

4. On 9 May 2008, the Prosecution publicly filed its "Response to Applications for Provisional Release" ("Response"), whereby it opposes provisional release of the Accused. At the same time the Prosecution submits that "[i]f, however, the trial cannot be held within a reasonable period – and the length of any pre-trial custody will exceed the likely penalty – the Prosecution will not oppose provisional release subject to the Accused obtaining guarantees from the UNMIK and the Government of Kosovo".¹¹

⁶ Motion, para. 20.

⁷ Motion, paras 21-22.

⁸ Motion, para. 23.

⁹ Motion, para. 24.

¹⁰ Motion, para. 25.

¹¹ Response, paras 2, 3, 30-31, 34.

5. In support of its objection to the provisional release, the Prosecution submits that the case is trial-ready,¹² the Prosecution case is strong,¹³ the allegations are serious, if convicted the penalty is imprisonment¹⁴ and the trial may be held in the near future.¹⁵

6. The Prosecution acknowledges that the Accused voluntarily surrendered and therefore it does not consider the Accused to represent a flight risk.¹⁶

II. APPLICABLE LAW

7. Rule 65 of the Rules governs provisional release. It provides, in 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.

(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.

8. The Defence bears the burden of proof, on a balance of probabilities, that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.¹⁷

9. In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors.¹⁸ What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case.¹⁹

¹² Response, paras 2, 29.

¹³ Response, paras 4-21.

¹⁴ Response, paras 2, 22-28.

¹⁵ Response, paras 2, 29.

¹⁶ Response, para. 32.

¹⁷ See *Prosecutor v. Lazarević*, "Decision on Defence Request for Provisional Release", Case No. IT-03-70-PT, 14 April 2005 (footnote omitted), p. 2.

¹⁸ *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, , para. 8.

¹⁹ *Prosecutor v. Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Decision"), para. 8.

10. The existence of compelling humanitarian reasons will only become relevant if the accused has met the prerequisite requirements of Rule 65(B), which must be satisfied for the Trial Chamber to have the discretion to consider granting that provisional release.²⁰

III. DISCUSSION

11. As a preliminary point, the Trial Chamber reiterates the finding of the Appeal Chamber that “an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist”.²¹ In other words, using the argument *a contrario*, the Trial Chamber finds that the proof of the existence of the sufficiently compelling humanitarian reasons for provisional release at the pre-trial stage of the proceedings is not required.

12. The Trial Chamber takes into consideration the seriousness of the allegations against the Accused. However, the Trial Chamber also considers that the Accused has not attempted to evade justice in any way and that the parties are in agreement that the Accused voluntarily surrendered to the Tribunal as soon as he was made aware of the indictment against him.²² The Trial Chamber further notes that the Accused has given two interviews to the Prosecution prior to being indicted.

13. The Trial Chamber finds that neither the fact that the Accused is a sole provider for his family nor the inconvenience caused to the Accused by the fact that if not provisionally released, he would not be able to attend his brother marriage, although taken into account, do not carry much weight in the Trial Chamber’s decision on the Accused’s request for provisional release.

²⁰ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on “Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković* Dated 31 March 2008”, 21 April 2008, para. 17, quoting *Prosecutor v. Boškoški and Tarčulovski*, Case No. IT-04-82-AR65.4, Decision on Johan Tarčulovski’s Interlocutory Appeal on Provisional Release, 27 July 2007 (“*Tarčulovski* Decision”), para. 14, whereby the Appeals Chamber recalled that “a Trial Chamber may grant provisional release only if it is satisfied that the accused will return for trial and that he will not pose a danger to any victim, witness or other person. It is in this context that any humanitarian grounds have to be assessed”. In applying the above principle of law, the Appeals Chamber proceeded in considering that “[t]he Trial Chamber considered the birth of his second child in the Impugned Decision and found that ‘the arrival of a baby is not a strong weight in the assessment of the likelihood of the Accused’s future attendance at the trial or of the interests of justice in this case’. Therefore, the Appeals Chamber finds that the Appellant has not established that the Trial Chamber erred in denying the Appellant’s request for provisional release despite his family situation, since in light of other relevant factors it was not satisfied that the Appellant would appear for trial, if provisionally released”.

□ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.7, Decision on “Prosecution’s Appeal from *Décision Relative à la Demande de Mise en Liberté Provisoire de l’Accusé Petković* Dated 31 March 2008”, 21 April 2008, , para. 17.

²² The indictment against Astrit Haraqija was made public on 25 April 2008 and he was transferred to the Tribunal on 28 April 2008.

14. The Trial Chamber notes that the Host Country was invited to indicate whether it has any objections to the Accused being provisionally released.²³ In its letter of 8 May 2008, the representative of the Host State did not raise any objection in this matter.

15. The Trial Chamber notes the personal guarantee by the Accused in which he undertook to comply with any order issued by the Trial Chamber.²⁴ The Trial Chamber also took into consideration, and gave appropriate weight to, the guarantee given by the UNMIK.²⁵

16. For these reasons, the Trial Chamber is satisfied that the Accused, if released, will return for trial and will not pose a danger to any victim, witness or other person.

²³ Request to UNMIK and the Host State, 6 May 2008, p. 3 (confidential).

²⁴ Motion, para. 26.

²⁵ Submission by the United Nations Interim Administration Mission in Kosovo (UNMIK) to the Trial Chamber in Response to the Request to UNMIK regarding Defence Motion for Provisional Release of Bajrush Morina and Application for Provisional Release of Astrit Haraqija, Dated 7 May 2008.

IV. DISPOSITION

17. For the reasons set out above and pursuant to Rules 54 and 65 of the Rules, the Trial Chamber hereby:

GRANTS the Motion, and

1. **ORDERS** as follows:

- a. As soon as practicable, the Accused Astrit Haraqija shall be transported to Schiphol airport in the Netherlands by the Dutch authorities;
- b. At the Schiphol airport, the Accused shall be provisionally released into 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/Kosova;
- c. At the Priština/Prishtinë airport, the Accused shall be met by a designated official of the UNMIK, who shall accompany the Accused to his place of residence as stated in the Annex A to the Motion;
- d. The authorities of UNMIK shall instruct the Accused that during the period of his provisional release, he shall abide by the following conditions:
 - i. to remain within the confines of the municipality of his residence;
 - ii. not to 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. not to discuss his case with anyone, including the media, other than with his counsel;
 - iv. to continue to cooperate with the Tribunal;
 - v. to comply strictly with any requirements of the authorities of the UNMIK necessary to enable them to comply with their obligations under this Decision and their guarantees;
 - vi. to comply strictly with any further Order of the Trial Chamber varying the terms of or terminating his provisional release.

e. The authorities of the UNMIK shall ensure that:

- i. the Accused surrenders his passport to the UNMIK authorities upon arrival to Kosovo/Kosova;
- ii. the Accused reports weekly to the UNMIK police in the place of his residence as stated in the Annex A to the Motion;
- iii. a report on provisional release of the Accused is sent to the Trial Chamber on a weekly basis.

f. The Accused shall return to the United Nations Detention Unit (“UNDU”) in The Hague at the time to be determined by the Trial Chamber. He shall be accompanied from the place of his residence in Kosovo/Kosova by the same designated official of the UNMIK, who shall deliver the Accused at Priština/Prishtinë 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, and the Dutch authorities shall then transport the Accused back to the UNDU in The Hague.

2. **REQUIRES** the UNMIK to assume responsibility as follows:

- a. by designating an official of the UNMIK who shall accompany the Accused from Priština/Prishtinë airport to his place of residence as stated in the Annex A to the Motion, 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 transport of the Accused from Priština/Prishtinë airport to his residence as stated in Annex B to the Motion 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.

3. **INSTRUCTS** the Registrar of the Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for the release of the Accused, designate the official who shall accompany the Accused from Schiphol airport to Priština/Prishtinë airport

and back and to continue to detain the Accused at the UNDU in The Hague until such time as the Trial Chamber and the Registrar have been notified of the name of the designated official of the UNMIK who is to accompany the Accused from Priština/Prishtinë airport to the Accused's place of residence.

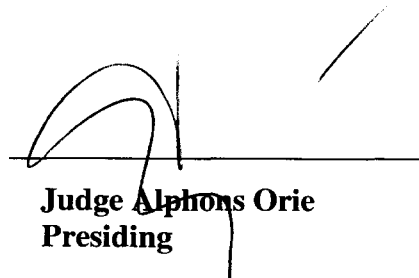
4. **REQUESTS** the authorities of all States through whose territory the Accused will travel:
 - a. to hold the Accused in custody for any time that he will spend in transit at the airport; and
 - b. to arrest and detain the Accused pending his return to the UNDU in The Hague, should he attempt to escape.
5. **ORDERS** that the Accused shall be immediately detained should he breach any of the foregoing terms and conditions of his provisional release.

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

Dated this thirteenth day of May 2008

At The Hague

The Netherlands



Judge Alphons Orie
Presiding

[Seal of the Tribunal]