

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-04-84-R77.4-A
Date: 8 April 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz

Acting Registrar: Mr. John Hocking

Decision of: 8 April 2009

PROSECUTOR

v.

**ASTRIT HARAQLJA
and
BAJRUSH MORINA**

PUBLIC

**DECISION ON MOTION OF ASTRIT HARAQLJA FOR
PROVISIONAL RELEASE**

The Office of the Prosecutor:

Ms. Barbara Goy

Counsel for Astrit Haraqija:

Mr. Karim A. A. Khan

Counsel for Bajrush Morina:

Mr. Jens Dieckmann

1. 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 (“Appeals Chamber” and “International Tribunal”, respectively), is seized of “Astrit Haraqija’s Motion for Release on Expiration of Sentence or, in the Alternative, Release Pending Appeal”, filed on 1 April 2009 (“Motion”) by Astrit Haraqija (“Haraqija”). The Prosecution has indicated that it will not file a response.

I. BACKGROUND

2. On 25 April 2008, Trial Chamber I issued a warrant for the arrest of Haraqija based on charges of contempt of the International Tribunal.¹ On 28 April 2008, Haraqija surrendered and was transferred to The Hague to stand trial.² The Trial Chamber granted him provisional release at the pre-trial and trial stages.³ On 17 December 2008, it convicted him of contempt of the International Tribunal pursuant to Rule 77(A)(iv) of the Rules of Procedure and Evidence (“Rules”) and sentenced him to five months of imprisonment subject to credit of 36 days for time already served.⁴ Haraqija filed his Notice of Appeal against his conviction on 2 January 2009.⁵ On the same day, the Prosecution filed its Notice of Appeal challenging the sentence imposed by the Trial Chamber and seeking an increase to a term of two years of imprisonment.⁶

3. If Haraqija had not filed his notice of appeal, his sentence imposed by the Trial Chamber would have been served as of 10 April 2009. On 1 April 2009, Haraqija filed the present motion seeking release on the expiration of his sentence or in the alternative provisional release pending the disposition of the appeal.⁷ In similar circumstances, the Appeals Chamber granted provisional release on 9 February 2009 to Bajrush Morina, Haraqija’s co-accused, pending conclusion of the

¹ *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-0484-R77.4, Judgement on Allegations of Contempt, 17 December 2008 (“Trial Judgement”), paras 5, 11.

² Trial Judgement, para. 11; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-0484-R77.4, Decision on Defence Application for Provisional Release of the Accused Astrit Haraqija, 15 September 2008 (“Second Decision on Haraqija’s Provisional Release”), para. 8; Motion, paras 4, 16.

³ Haraqija was granted provisional release on 13 May 2008 and 15 September 2008. See *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-0484-R77.4, Decision on Application for Provisional Release of Astrit Haraqija, 13 May 2008, para. 17; Second Decision on Haraqija’s Provisional Release, para. 13.

⁴ Trial Judgement, paras 102, 120, 121.

⁵ Astrit Haraqija’s Notice of Appeal of the “Judgement on Contempt Allegations” dated 17 December 2008, 2 January 2009. Haraqija’s co-accused Bajrush Morina also filed his Notice of Appeal against his conviction and sentence on 2 January 2009. See Notice of Appeal on Behalf of Bajrush Morina, 2 January 2009.

⁶ Prosecution’s Notice of Appeal, 2 January 2009, p. 1.

⁷ Motion, paras 2, 12, 13.

appeal process.⁸ The Appeals Chamber further notes that the Ministry of Foreign Affairs of The Netherlands has indicated that it does not have any objection to Haraqija's provisional release.

II. DISCUSSION

4. Pursuant to Rule 102(A) of the Rules, "as soon as notice of appeal is given, the enforcement of a judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention".⁹ Haraqija and the Prosecution filed notices of appeal on 2 January 2009, respectively challenging his conviction and sentence. As a result, the remainder of the sentence imposed by the Trial Chamber against Haraqija will not have expired on 10 April 2009 since it has been stayed pending the disposition of the appeal. Therefore, contrary to Haraqija's submissions, in these circumstances, the fact that his sentence as imposed by the Trial Chamber would have expired on 10 April 2009 does not itself provide a basis for his release.

5. However, a convicted person may be provisionally released while the appeal is pending pursuant to Rule 65(I) of the Rules, if the Appeals Chamber is satisfied that: "(i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be; (ii) the appellant, if released, will not pose a danger to any victim, witness or other person; and (iii) special circumstances exist warranting such release."¹⁰ These requirements must be considered cumulatively.¹¹ Whether an applicant satisfies these requirements is to be determined on a balance of probabilities, and the fact that an individual has already been sentenced is a matter to be taken into account by the Appeals Chamber when balancing the probabilities.¹² The Appeals Chamber will consider Haraqija's submissions in connection with each of these criteria below.

⁸ Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009 ("Morina Provisional Release Decision"), paras 10-12.

⁹ See also Morina Provisional Release Decision, para. 3.

¹⁰ See also Morina Provisional Release Decision, para. 3.

¹¹ Morina Provisional Release Decision, para. 3. See also *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on the Renewed Defence Request Seeking Provisional Release on Compassionate Grounds, 15 April 2008, para. 5; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Decision on Defence Request Seeking Provisional Release on the Grounds of Compassion, 2 April 2008, para. 3; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Decision on Motion on Behalf of Enver Hadžihasanović for Provisional Release, 20 June 2007, para. 8; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Radoslav Brđanin's Motion for Provisional Release, 23 February 2007, para. 5.

¹² *Idem*.

A. The Appellant, if released, will either appear at the hearing of the Appeal or will surrender into detention at the conclusion of the fixed period, as the case may be

6. Haraqija submits that if granted provisional release on appeal he “would surrender to the jurisdiction of the [International Tribunal] whenever so ordered by the Appeals Chamber”.¹³ In this regard, he points out that he “has never given the slightest ground for suspicion that he would fail to surrender voluntarily to the Tribunal”, having cooperated fully throughout the proceedings and having complied with the conditions set out by the Trial Chamber when he was previously granted provisional release.¹⁴

7. Haraqija was convicted of contempt, which is a particularly serious offence. However, the Appeals Chamber also notes that the Trial Chamber sentenced Haraqija to a term of five months imprisonment, which would have been served in full on 10 April 2009 but for the notices of appeal filed by the parties. While the pending appeal of the Prosecution, seeking an increase in the sentence, may give Haraqija an incentive to flee, the Appeals Chamber considers that two facts militate against that possibility. First, Haraqija voluntarily surrendered to the Tribunal as soon as he was made aware of the Indictment against him.¹⁵ Second, he has a record of returning to custody after provisional release and complying with other conditions set out by the Trial Chamber for that release.¹⁶ These factors suggest that if granted provisional release, he would surrender into detention when required to do so by the Appeals Chamber.

8. The Appeals Chamber notes that Haraqija has not submitted any State guarantees in support of his Motion and requests the Appeals Chamber to direct the Registry to enquire about the willingness and ability of the United Nations Interim Administration in Kosovo (“UNMIK”) to ensure compliance with any conditions imposed on release.¹⁷ While the submission of State guarantees is not a pre-requisite for provisional release, it is generally advisable for an applicant seeking provisional release to submit guarantees in order to satisfy the International Tribunal that he will appear when required.¹⁸ In the instant case, the Appeals Chamber understands that UNMIK has indicated in consultations with the Registry that it would be prepared to provide similar guarantees for Haraqija as imposed on his co-accused Bajrush Morina and to honour any directions provided

¹³ Motion, para. 18.

¹⁴ Motion, paras 14-18.

¹⁵ Second Decision on Haraqija’s Provisional Release, para. 8.

¹⁶ Trial Judgement, para. 11.

¹⁷ Motion, para. 25(ii).

¹⁸ Morina Provisional Release Decision, para. 6; *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-53-AR65, Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, paras 7-8. *See also Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-PT, Order on Provisional Release of Berislav Pusić, 30 July 2004, para. 32.

by the Appeals Chamber in the event of provisional release. The Appeals Chamber accepts this as a sufficient guarantee of compliance.

9. In light of the foregoing, the Appeals Chamber is satisfied that Haraqija does not pose a flight risk and therefore meets the requirements of Rule 65(I)(i) of the Rules.

B. The Appellant, if released, will not pose a danger to any victim, witness or other person

10. Haraqija submits that his good behaviour throughout the proceedings demonstrates that he will not pose a danger to any victim, witness or other protected person, and points out that his previous periods of provisional release were without incident.¹⁹ The Appeals Chamber is satisfied that Haraqija's past periods of provisional release were indeed without incident and that his conduct throughout the proceedings in this case illustrate that he does not pose a danger to victims, witnesses or other persons as required by Rule 65(I)(ii) of the Rules.

C. Special circumstances exist warranting such release

11. Finally, Haraqija submits that special circumstances exist warranting his provisional release in that on 10 April 2009, he will have served his five month sentence imposed by the Trial Chamber.²⁰ He further points out that since a date has not yet been scheduled for the delivery of the Appeals Chamber's Judgement in this case there is no reason why he should not be granted provisional release pending the outcome of the Appeal.²¹

12. The Appeals Chamber has already determined in this case, with respect to Haraqija's co-accused Bajrush Morina, that the fact that an appellant would have already served the entire sentence imposed by the Trial Chamber were it not for the filing of the notices of appeal may constitute a special circumstance.²² As Haraqija is in the same position, the Appeals Chamber also considers that special circumstances exist warranting his provisional release.

¹⁹ Motion, paras 19-21.

²⁰ Motion, para. 22.

²¹ Motion, para. 23.

²² Morina Provisional Release Decision, para. 10. *See also Prosecutor v. Mile Mrksić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Decision on the Motion of Veselin Šljivančanin for Provisional Release, 11 December 2007, p. 3 (noting that the fact that Šljivančanin had served 90 percent of his sentence imposed by the Trial Chamber constituted a special circumstance); *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Kvočka's Request for Provisional Release, 17 December 2003, pp. 3, 4 (noting that the fact that Kvočka had served around 80 percent of the sentence imposed by the Trial Chamber amounted to a special circumstance).

III. CONDITIONS OF PROVISIONAL RELEASE

13. The Appeals Chamber finds that Haraqija has satisfied all the conditions necessary for the granting of provisional release under Rule 65(I). Haraqija requests that, in the event he is granted provisional release, no conditions should attach to his release as he will have served the entirety of his sentence.²³ Alternatively, Haraqija submits that should the Appeals Chamber deem that conditions must apply to his release, he requests that he be allowed free and unrestricted movement within Kosovo.²⁴

14. The Appeals Chamber notes that, although at the time of his release, Haraqija would have already served the entire sentence imposed by the Trial Chamber, he still maintains the status of a convicted person pursuant to Rule 102 of the Rules. As such, he is not in the same position as a person who has finished serving his sentence after completion of criminal proceedings against him. Further, an appeal against his sentence is still pending which may result in an increase in his sentence. Given these circumstances, the Appeals Chamber finds that there is a need to have in place conditions restricting his movement so as to ensure that Haraqija will be available to surrender into detention when required to do so by the Appeals Chamber. Thus, the Appeals Chamber denies Haraqija's requests relating to his conditions of provisional release. Instead, the Appeals Chamber considers it appropriate to impose on Haraqija the same conditions of provisional release in force during the trial.²⁵

IV. DISPOSITION

15. For the forgoing reasons and pursuant to Rules 102(A) and 65(I) of the Rules, the Appeals Chamber **GRANTS** the Motion in part, and

ORDERS that Haraqija be provisionally released pending the disposition of his appeal under the following terms and conditions:

- a. As soon as practicable, Astrit Haraqija shall be transported to Schiphol airport in the Netherlands by the Dutch authorities;

²³ Motion, paras 24, 25(iii).

²⁴ Motion, paras 24, 25(iii).

²⁵ Second Decision on Haraqija's Provisional Release, pp. 6-8; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-0484-R77.4, Decision on Astrit Haraqija's Request to Vary Condition of Provisional Release, 7 October 2008, p. 3.

- b. At Schiphol airport, Haraqija shall be provisionally released into the custody of the security officer designated by the Registrar of the Tribunal who shall accompany Haraqija for the remainder of his travel to Kosovo/Kosova;
- c. At Priština airport, Haraqija shall be met by a designated official of UNMIK, who shall accompany Haraqija to his place of residence;
- d. Haraqija shall provide the address at which he will be staying in Kosovo/Kosova to the authorities of UNMIK and the Registrar of the Tribunal before leaving the United Nations Detention Unit ("UNDU") in The Hague;
- e. The authorities of UNMIK shall instruct Haraqija 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 but may be permitted to leave his place of residence in consultation with UNMIK one day a week between 10.00 and 18.00hrs in order to visit his parents in Gjakova, Kosovo;
 - 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 his counsel;
 - iv. to continue to cooperate with the Tribunal;
 - v. to comply strictly with any requirements of the authorities of 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 Appeals Chamber varying the terms of or terminating his provisional release.
- f. The authorities of UNMIK shall ensure that:
 - i. Haraqija surrenders his passport to UNMIK authorities upon arrival to Kosovo/Kosova;
 - ii. Haraqija reports weekly to UNMIK police in the place of his residence;
 - iii. a report on the provisional release of Haraqija is sent to the Appeals Chamber on a weekly basis.
- g. Haraqija shall return to the UNDU in The Hague at the time to be determined by the Appeals Chamber. He shall be accompanied from the place of his residence in Kosovo/Kosova by the same designated official of UNMIK, who shall deliver Haraqija at

Priština airport to the custody of the security officer designated by the Registrar of the Tribunal. Upon arrival at Schiphol airport, Haraqija shall be delivered to the custody of the Dutch authorities, and the Dutch authorities shall then transport Haraqija back to the UNDU in The Hague.

REQUIRES UNMIK to assume responsibility as follows:

- a. by designating an official of UNMIK who shall accompany Haraqija from Priština airport to his place of residence, and notifying, as soon as practicable, the Appeals Chamber and the Registrar of the Tribunal of the name of the designated official;
- b. for all expenses concerning the transportation of Haraqija from Priština airport to his residence;
- c. at the request of the Appeals 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 Appeals Chamber any breach of the conditions set out above.

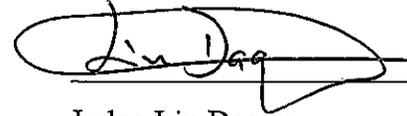
INSTRUCTS the Registrar of the Tribunal to consult with the Ministry of Justice in the Netherlands as to the practical arrangements for the release of Haraqija, to designate the official who shall accompany Haraqija from Schiphol airport to Priština airport and back and to continue to detain Haraqija at the UNDU in The Hague until such time as Haraqija has provided the address at which he will be staying in Kosovo/Kosova and until the Appeals Chamber and the Registrar have been notified of the name of the designated official of UNMIK who is to accompany Haraqija from Priština airport to Haraqija's place of residence.

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

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

ORDERS that Haraqija 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.

A handwritten signature in black ink, appearing to read "Liu Daqun", is written over a horizontal line. The signature is enclosed in a large, loopy oval shape.

Judge Liu Daqun
Presiding Judge

Dated this 8th day of April 2009
At The Hague
The Netherlands

[Seal of the International Tribunal]