



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: 14 October 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: 14 October 2008

PROSECUTOR

v.

ASTRIT HARAQIJA

and

BAJRUSH MORINA

PUBLIC

**DECISION ON ASTRIT HARAQIJA AND BAJRUSH
MORINA'S JOINT REQUEST FOR RECONSIDERATION OF
THE TRIAL CHAMBER'S DECISION OF 28 AUGUST 2008**

The Office of the Prosecutor:

Mr. Dan Saxon

Counsel for the Accused:

Mr. Karim A. A. Khan for Astrit Haraqija
Mr. Jens Dieckmann 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 seised of “Astrit Haraqija and Bajrush Morina’s Joint Request for Reconsideration of the Trial Chamber’s *Decision on Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence* Dated 28 August 2008 and *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis and/or 92 ter* Dated 2 September 2008”, filed confidentially on 8 September 2008 (“Motion”), and hereby renders its Decision.

A. Submissions

1. Defence

2. In its Motion, counsels for Astrit Haraqija and Bajrush Morina (“Defence”) request that the Trial Chamber reconsider its “Decision on Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence” rendered on 28 August 2008 (“Impugned Decision”) and “Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* and/or 92 *ter*” rendered on 2 September 2008 (“Rule 92 *bis* Decision”) insofar as it admits into evidence the recorded audio tape and transcripts of the Prosecution’s interview with Bajrush Morina on 26 October 2007 (“Suspect Interview”).¹ Moreover, the Defence requests that the Trial Chamber appoints an independent translator to verify the contents of the audio interview.²

3. In support of its Motion, the Defence submits that the Trial Chamber failed to realise, or failed to properly consider, that the correct translation of the Suspect Interview was “an area of clear dispute between the parties”.³ The Defence takes issue with the assessment given by the Trial Chamber in the Impugned Decision, namely that it was “*not in dispute*” that Bajrush Morina during the Suspect Interview responded “maybe, later” to the question whether he wished to proceed, as transcribed in the corrected version of translation (“Corrected Transcript”).⁴ The Defence submits that a previous version of the transcript was accurate in reflecting Bajrush Morina’s words as “maybe, maybe”.⁵ Consequently, in case of doubt, the Defence asserts that the interpretation more favourable to the Accused should prevail in accordance with the principle *in dubio pro reo*.⁶

¹ Motion, paras 1, 8, 20.

² Motion, para. 20.

³ Motion, para. 10.

⁴ Motion, paras 13-15; Impugned Decision, para. 22 (emphasis in the original).

⁵ Motion, para. 16.

⁶ Motion, paras 17-18.

4. During the trial, the Defence orally submitted that the disputed words in the Suspect Interview were said in English and as a consequence, it is for the Trial Chamber to determine what the accurate transcription should be.⁷

5. Moreover, the Defence argues that the original version of the transcript of the Suspect Interview could lead the Trial Chamber to a different conclusion as to the voluntary character of Bajrush Morina's waiver to the assistance of counsel during the interview. As the Prosecution relies heavily on the Suspect Interview, this issue would significantly affect the outcome of the trial as well as its fair and expeditious conduct.⁸

6. The Defence also argues that in spite of the Trial Chamber's awareness of "numerous irregularities" in the procedures by which the Suspect Interview was transcribed, it did not *proprio motu* request the appointment of an independent translator to verify the accuracy of the transcripts of the Suspect Interview.⁹

7. Finally, the Defence submits that if the Trial Chamber was unaware of a dispute between the parties regarding translation, then this constitutes a "new fact" that will justify reconsideration of the Impugned Decision, in order to avoid injustice.¹⁰

2. Prosecution

8. On 16 September 2008, the "Prosecution's Response to Joint Defence Request for Reconsideration of the Trial Chamber's Decision on Bajrush Morina's Request for a Declaration of Inadmissibility and Exclusion of Evidence Dated 28 August 2008 and Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis* and/or 92 *ter* Dated 2 September 2008" ("Response") was filed confidentially, whereby the Prosecution opposes the Motion.¹¹

9. In support of its objection, the Prosecution submits that prior to filing the Motion, the Defence never disputed the accuracy of the words "maybe, later".¹² Moreover, the Prosecution asserts that the Trial Chamber has never expressed uncertainty, or doubt, about the accuracy of the transcription of this phrase. Nor have the Defence, previously or presently, provided any factual basis for such "uncertainty", for example, by obtaining another verification of the words spoken. As

⁷ Hearing, 9 September 2008, T. 226-227.

⁸ Motion, paras 19-23.

⁹ Motion, paras 24-26.

¹⁰ Motion, paras 27-30.

¹¹ Response, para. 1.

¹² Response, para. 2.

a consequence, in absence of such uncertainty, the Trial Chamber could not commit an error of reasoning by violating the principle *in dubio pro reo*.¹³

10. Finally, the Prosecution submits that, as the Defence has not shown any dispute in translation, it has not been demonstrated that there exists a new fact justifying reconsideration of the Impugned Decision.¹⁴

B. Applicable Law

11. According to the jurisprudence of the Tribunal, the Trial Chamber has inherent discretionary power to reconsider a previous decision if there has been a clear error of reasoning, or if particular circumstances exist that justify reconsideration in order to prevent an injustice.¹⁵ Such circumstances may include new facts or arguments that have arisen since the issuance of a decision.¹⁶

C. Discussion

12. The Trial Chamber concurs with the Prosecution that a thorough reading of the Defence submissions made prior to the Impugned Decision reveals that the Defence did not submit that it took issue with the accuracy of the Prosecution's revised translation, in particular as regards the expression "maybe, later".¹⁷ Nor has the Defence on a prior occasion requested that the revised translation be verified by an independent interpreter. However, after careful examination of the relevant part of the audio recording of the Suspect Interview, the Trial Chamber is satisfied that Bajrush Morina could indeed be understood to say "maybe, maybe" and not "maybe, later" as transcribed in the Corrected Transcript.

13. The Trial Chamber recalls that immediately after the above exchange, the Prosecution investigator carried on to say:

The choice is yours. If you at any stage you want legal counsel to be present here with you, we can stop the interview and arrange... give you time to arrange for counsel to be present.¹⁸

¹³ Response, para. 3.

¹⁴ Response, para. 4.

¹⁵ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, Confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40.

¹⁶ See *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Second Decision on the Admission of Documentary Evidence submitted by the Prosecution (Dretelj and Gabela), 12 December 2007, p. 4 fn. 4 with further references.

¹⁷ Footnote 2 of the Defence submission of 4 August 2008 reads: "The Defence has, as of yet, been unable to verify whether this corrected version is indeed an accurate transcription and translation of the audio of the interview. If the translation is in dispute, it may need to be submitted to an independent interpreter for verification. Nonetheless, even assuming that the language in the latest English transcript is correct, the Defence submits that the ambiguity of the language of Mr Morina's purported waiver remains unchanged".

¹⁸ Corrected Transcript, p. 3, lines 1-3.

14. The Trial Chamber recalls that Morina was next informed of the nature of the allegations against him, *i.e.*, that he was suspected to be involved in a “possible contempt of Court issue, in which a potential witness [...] may have been contacted and influenced in an attempt to either give false evidence or not give evidence.”¹⁹ When Morina stated that he did not understand,²⁰ the investigator said that it was him, Morina, who “visited this witness and spoke with him.”²¹ Morina was then told the real name of the Protected Witness (“PW”), and Morina said that he knew PW.²² The Prosecution investigator then asked Morina whether he wanted to proceed with the interview. Morina replied in the affirmative.²³

15. As a consequence, the substitution of words “maybe later” by “maybe, maybe”, taken in the context of the whole Suspect Interview, does not justify a change in conclusion of the Impugned Decision, in which the Trial Chamber found that Morina voluntarily waived his right to legal representation during the Suspect Interview.

D. Disposition

16. For the reasons set forth above, and pursuant to Rules 42, 43 and 54 of the Rules, the Trial Chamber

DISMISSES the Motion; and

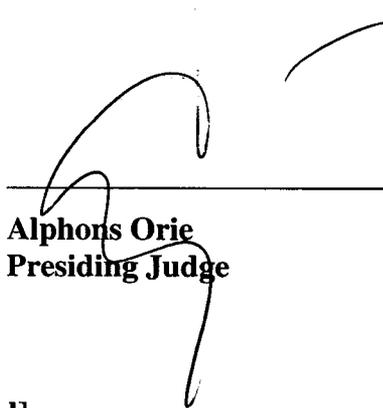
UPHOLDS the Impugned Decision and the Rule 92 *bis* Decision.

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

Dated this fourteenth day of October 2008

At The Hague

The Netherlands



Alphons Orie
Presiding Judge

[Seal of the Tribunal]

¹⁹ Corrected Transcript, p. 3, lines 5-8.

²⁰ Corrected Transcript, p. 3, lines 12-13.

²¹ Corrected Transcript, p. 3, lines 14-16.

²² Corrected Transcript, p. 3, lines 19-22.

²³ Corrected Transcript, p. 3, lines 23, 25-26.