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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 Former Yugoslavia since 1991

Case No. IT-04-84-R77.4

Date: 28 August 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: 28 August 2008

PROSECUTOR

v.

ASTRIT HARAQLJA

and

BAJRUSH MORINA

CONFIDENTIAL

**DECISION ON BAJRUSH MORINA'S REQUEST FOR A
DECLARATION OF INADMISSIBILITY AND EXCLUSION OF
EVIDENCE**

The Office of the Prosecutor:

Mr. Dan Saxon
Mr. Vincent Lunny

Counsel for the Accused:

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

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 (“ICTY” or “Tribunal”) is seised of “Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence”, filed confidentially on 22 July 2008 (“Morina Motion”) and of “Astrit Haraqija’s Defence Motion to Join Bajrush Morina’s Request for a Declaration of Inadmissibility and Exclusion of Evidence and to Seek the Exclusion of Same Against Astrit Haraqija”, filed publicly on 4 August 2008 (“Joinder Motion”) and hereby renders its Decision.

A. Background and Submissions

1. On 12 February 2008, Judge Moloto confirmed an indictment against Astrit Haraqija and Bajrush Morina (“Accused”) for contempt of the Tribunal (“Indictment”).¹ In the Indictment, both Accused are charged with contempt of the Tribunal pursuant to Rule 77 (A)(iv) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) for allegedly interfering with a protected witness (“PW”) in the case of *Haradinaj et al.* (Count 1). Only the Accused Haraqija is indicted with the alternative charge of incitement to contempt of the Tribunal (Count 2).² On 25 April 2008, the confidentiality of the Indictment was lifted,³ and on 29 April 2008, both Accused pleaded not guilty to the charges against them at their initial appearance before Trial Chamber I.⁴
2. On 26 October 2007, the Accused Morina had been interviewed by Prosecution investigators at the ICTY Field Office in Priština as a suspect regarding his purported interference with PW (“Suspect Interview”).⁵ Although the Accused Morina, a professional journalist,⁶ speaks English, his native language is Albanian, and thus a translator was present during the Suspect Interview to translate the proceedings into Albanian for him.⁷
3. Following the initial appearance of both Accused, and in accordance with their disclosure obligations under the Rules, the Prosecution provided counsel for the Accused Morina (“Morina Defence”) a transcript of the Suspect Interview.⁸ Subsequently, the Morina Defence was also provided with an audio tape recording of the Suspect Interview.⁹

¹ Decision on Review of Indictment, 12 February 2008.

² Indictment, p. 2.

³ Morina Motion, para. 2.

⁴ Hearing 29 April 2008, Transcript p. 6-7.

⁵ Morina Motion, para. 16.

⁶ Prosecution’s Response to Request of Bajrush Morina and Astrit Haraqija for a Declaration of Inadmissibility and Exclusion of Evidence, With Confidential Annexes A, B, C and D (“Response”), para. 13.

⁷ Response, para. 8.

⁸ Morina Motion, para. 4.

⁹ Morina Motion, para. 5.

4. On 5 August and 14 August 2008, the Prosecution submitted corrected versions of the Suspect Interview transcript.¹⁰ The correction was made because an investigator who took part in the Suspect Interview had reviewed the transcript and noticed that certain responses attributed to the Accused Morina did not match with what was on the audio recording.¹¹ As the interpreter who translated and produced the English transcript of the interview speaks English and B/C/S—and not Albanian¹²—the Prosecution then “assigned an Albanian speaking language assistant to conduct a more thorough review of the English transcript”.¹³

1. Morina Motion

(a) Morina Defence Submissions

5. The Morina Defence contends that (1) the Accused Morina had not been properly informed about the nature and cause of the charge against him prior to being notified of his right to counsel, and (2) the Accused Morina did not waive his right to counsel prior to or during the 26 October 2007 interview conducted by ICTY investigators.¹⁴

6. In support of its Motion, the Morina Defence asserts that the burden of proof to demonstrate that the questioning adhered to the Rules rests with the Prosecution,¹⁵ that the Accused Morina was confused about the nature of charges against him at the time he was informed of his right to counsel,¹⁶ and that the probative value of the interview is outweighed by the need to ensure a fair trial.¹⁷

(b) Prosecution Response

7. On 5 August 2008, the “Prosecution’s Response to Request of Bajrush Morina and Astrit Haraqija for a Declaration of Inadmissibility and Exclusion of Evidence, With Confidential Annexes A, B, C and D” (“Response”) was filed confidentially. Therein, the Prosecution contends that the Prosecution fully respected the Accused Morina’s rights during the Suspect Interview, and

¹⁰ Annex B to Prosecution’s Response to Request of Bajrush Morina and Astrit Haraqija for a Declaration of Inadmissibility and Exclusion of Evidence, With Confidential Annexes A, B, C and D, 5 August 2008; Prosecution’s Submission of Revised Annexes B and C to ‘Response to Request of Bajrush Morina and Astrit Haraqija for a Declaration of Inadmissibility and Exclusion of Evidence, With Confidential Annexes A, B, C and D’, 14 August 2008.

¹¹ Response, Confidential Annex A: Declaration by Investigator Barry Allan Hogan (“Declaration by Prosecution Investigator”), para. 6.

¹² Declaration by Prosecution Investigator, para. 4.

¹³ Declaration by Prosecution Investigator, para. 7.

¹⁴ Morina Motion, para. 15.

¹⁵ Morina Motion, para. 13.

¹⁶ Morina Motion, para. 27.

¹⁷ Morina Motion, para. 29.

that there are no grounds for excluding the evidence from the Suspect Interview pursuant to Rule 89(D) of the Rules.¹⁸

8. In its Response, the Prosecution asserts that the Defence misstated the threshold standard for the admission of suspect interviews.¹⁹ The Prosecution also claims that the Accused Morina gave his statement voluntarily and with full awareness of his rights as a suspect.²⁰

(c) Morina Reply

9. On 11 August 2008, the Morina Defence filed confidentially the “Bajrush Morina’s Motion for Leave to Reply to ‘Prosecution’s Response to Request of Bajrush Morina and Astrit Haraqija for a Declaration of Inadmissibility and Exclusion of Evidence, with Confidential Annexes A, B, C and D’ and Reply, with Confidential Annex A” (“Morina Reply”). Therein, the Morina Defence contends that (1) the Prosecution made misinterpretations or incorrect assertions in its transcript of the interview,²¹ (2) there is a lack of sufficient indicia of reliability of the interview transcript to constitute a *prima facie* case,²² (3) the Prosecution was required to, and failed to, inform the Accused Morina of the nature of the “charge” against him,²³ and (4) “the Accused did not clearly and unequivocally waive his right to counsel”.²⁴

2. Joinder Motion

10. On 4 August 2008, counsel for the Accused Haraqija (“Haraqija Defence”) publicly filed the Joinder Motion, in which the Haraqija Defence endorses the arguments in the Morina Motion. In addition, the Haraqija Defence pleads for the interview to be excluded as evidence not only against the Accused Morina, but against the Accused Haraqija as well. According to the Haraqija Defence, “in most common law countries, such evidence is not admissible unless the accused testifies *viva voce* and is subjected to cross-examination by the Defence of his co-accused.”²⁵ Although the Haraqija Defence acknowledges that in the case-law of the Tribunal, the absence of cross-examination does not automatically lead to the exclusion of the evidence, even if offered by a co-accused, it argues that the Suspect Interview should nevertheless be excluded because the

¹⁸ Response, para. 1.

¹⁹ Response, paras 2-4.

²⁰ Response, paras 5-20.

²¹ Morina Reply, para. 1.

²² Morina Reply, paras 4-8.

²³ Morina Reply, para. 9.

²⁴ Morina Reply, paras 12-14.

²⁵ Joinder Motion, para. 8, with references to US case-law.

procedural safeguards of Rules 42 and 43 were not respected when the Accused Morina was interviewed.²⁶

11. On 15 August 2008, the Prosecution filed the “Response to the Accused Haraqija’s Motion to Join Bajrush Morina’s Request to Exclude Evidence” (“Joinder Response”), wherein the Prosecution requests that the Joinder Motion be denied. In support, the Prosecution contends that the jurisprudence of the Appeals Chamber holds that the right to cross-examination is not absolute and that the Accused Haraqija’s right to a fair trial will be preserved by the requirement that “untested evidence [...] must have some corroboration”.²⁷ The Prosecution further submits that the arguments of the Haraqija Defence concern the weight given to the Suspect Interview, but not its admissibility as such.²⁸

B. Applicable Law

12. Rule 42(A) of the Rules concerns the rights of suspects during investigations and provides as follows:

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands:

- (i) the right to be assisted by counsel of the subject’s choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it;
- (ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and
- (iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect expresses a desire to have counsel, questioning shall thereupon cease and shall only resume when the suspect has obtained or has been assigned counsel.²⁹

13. Rule 43 of the Rules sets forth the procedure according to which questioning of a suspect shall be audio- or video-recorded.

14. Rules 89(C) of the Rules provides that: “A Chamber may admit any relevant evidence which it deems to have probative value”. Rule 89(D) of the Rules sets forth that: “A Chamber may

²⁶ Joinder Motion, paras 11, 12.

²⁷ Joinder Response, para. 4, referring to *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcripts of Jadranko Prlić’s Questioning into Evidence, 23 November 2007 (“Prlić Decision”); *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovčanin’s Questioning, 14 December 2007 (“Popović Decision”).

²⁸ Joinder Response, para. 6.

²⁹ See also Article 18(3) of the Statute.

exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”.

15. Rule 95 of the Rules sets forth: “No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings”.

C. Discussion

16. At the outset, the Trial Chamber notes that the Suspect Interview appears on the Prosecution’s Rule 65 *ter* exhibit list,³⁰ and there is a pending request to admit it into evidence.³¹ This Decision is therefore only concerned with whether there are grounds to declare the Suspect Interview inadmissible at this stage.

17. According to the case-law of the Appeals Chamber, two questions arise in this context for determination: (1) whether the procedural safeguards set forth for interviews of suspects in Rules 42 and 43 of the Rules are satisfied in this case; and (2) whether the relevance and probative value of the Suspect Interview is not substantially outweighed by the need to ensure a fair trial, in accordance with Rules 89(C) and 89(D).³²

1. Whether Morina Gave his Statement in Accordance with the Rules

18. Article 18(3) of the Statute and Rule 42 of the Rules afford a suspect various rights and protections, among them, the right to counsel, the right to remain silent during questioning and the right to free assistance of an interpreter.³³

(a) The Suspect Interview

19. On 16 October 2007, the Prosecution summoned Morina to appear at the ICTY Field Office in Priština on the date of 23 October 2007 at 09:00 hrs (“Summons”). The Summons informed Morina that he was being called to provide a statement in respect to a Prosecution investigation “as a suspect” (typed in bold letters). Attached to the Summons was Article 18 of the Tribunal’s Statute, which informed Morina of, among other things, his rights to counsel and translation services during

³⁰ Prosecution’s Submission of Pre-Trial Brief, List of Witnesses and List of Exhibits, 21 July 2008, Confidential Annex B, item 8.

³¹ Motion for Admission of Evidence Pursuant to Rule 92 bis and/or Rule 92 ter, 25 July 2008.

³² See *Popović* Decision, paras 33-34.

³³ See para. 12 *supra*.

questioning. The Summons included a reproduction of Article 29 of the Statute as well as Rule 39 of the Rules.³⁴

20. At the outset of the Suspect Interview, Morina conveyed that he understood that the interview was being recorded.³⁵ Immediately following this, Morina was informed that he “may be a suspect responsible for committing acts which may be chargeable under the Tribunal Statute”,³⁶ and that he had the right to be assisted by a legal representative or lawyer of his choice and if he could not afford counsel, counsel would be provided for him at no cost. When asked if understood this, Morina stated “Yes”.³⁷

21. The Prosecution investigator then advised Morina in the following terms:

I just want to make clear that, as you are a suspect, under the rules, this interview shall not proceed without the presence of counsel, and that’s your legal representative or your lawyer and we will only proceed if you waive your right to having a counsel present. At the moment you are here alone, without the presence of legal counsel. So, do you want to proceed with this interview?³⁸

22. It is in dispute between the parties whether Morina then wished to proceed with the Suspect Interview in the absence of counsel. The Defence argues that Morina’s response to the above question, as recorded in the revised transcript—which indicates that Morina used either the word “Nderkohe”, which means “meanwhile”, or “Ndo kohe”, which means “eventually”—is not unequivocal in this regard. However, it is *not* in dispute that Morina stated in English, immediately following these words in Albanian, “Maybe, later”.³⁹ The Prosecution investigator responded:

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.⁴⁰

23. 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.”⁴¹

24. When Morina stated that he did not understand,⁴² the investigator said that it was him, Morina, who “visited this witness and spoke with him.”⁴³ Morina was then told PW’s real name,

³⁴ Response, Confidential Annex D, Summons dated 16 October 2007.

³⁵ Response, Confidential Annex C, Excerpt of Interview with Bajrush Morina, ICTY Field Office in Priština, 26 October 2007, Revised 28 July 2008 (“Revised Transcript”), p. 1, line 14.

³⁶ Revised Transcript, p. 1, lines 19-21.

³⁷ Revised Transcript, p. 2, line 3.

³⁸ Revised Transcript, p. 2, lines 20-25.

³⁹ Revised Transcript, p. 2, line 32.

⁴⁰ Revised Transcript, p. 3, lines 1-3.

⁴¹ Revised Transcript, p. 3, lines 5-8.

⁴² Revised Transcript, p. 3, lines 12-13.

and Morina said that he knew PW.⁴⁴ The Prosecution investigator then asked Morina whether he wanted to proceed with the interview. Morina replied in the affirmative.⁴⁵

(b) Analysis

25. Regarding the Prosecution's obligation to inform suspects of their rights, the Appeals Chamber has stated that

Rule 42 of the Rules provides that a suspect must be informed prior to questioning of various rights, including the right to be assisted by counsel of the suspect's choice. It further provides that questioning must not continue in the absence of counsel unless a suspect has voluntarily waived the right to have counsel present. This right is neither ambiguous nor difficult to understand. As long as a suspect is clearly informed of it in a language he or she understands, the Prosecution fulfills its obligations.⁴⁶

26. In the instant case, the Trial Chamber notes that Morina was already informed in the Summons, prior to the date when the Suspect Interview was conducted, that he was a suspect in a Prosecution investigation, and that pursuant to Article 18 of the Statute, he had a right to have counsel present during any interview with the Prosecution. This information was repeated to him orally at the beginning of the Suspect Interview, following which Morina agreed to proceed. Thus, the Trial Chamber finds that Morina made an informed decision to be interviewed by Prosecution investigators as a suspect and without the assistance of counsel.

27. Irrespective of the correct translation of Morina's words in Albanian, the Trial Chamber infers from the subsequent exchange that it was Morina's free choice to proceed unrepresented with the Suspect Interview. Although the Morina Defence argues that "the Accused merely consented with the *continuation* of the interview",⁴⁷ the Trial Chamber finds that, viewed in context, Morina's consent also extended to the absence of legal assistance by counsel during the continuation of the Suspect Interview, until the moment that Morina would indicate otherwise.⁴⁸

28. Clearly, it is not the responsibility of the Prosecution to inform a suspect of his rights prior to every question. The Trial Chamber finds that in the present case, Morina was sufficiently informed both before and at the commencement of the Suspect Interview of his rights, that he understood those rights, and made an informed decision to proceed. There is no indication that Morina changed his position during the Suspect Interview.

⁴³ Revised Transcript, p. 3, lines 14-16.

⁴⁴ Revised Transcript, p. 3, lines 19-22.

⁴⁵ Revised Transcript, p. 3, lines 23, 25-26.

⁴⁶ *Prosecutor v. Zejnil Delalić, et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 551 (footnotes omitted).

⁴⁷ Morina Reply, para. 14 (emphasis added).

⁴⁸ See also Motion, para. 16.

29. The Morina Defence further claims that the Prosecution failed to inform Morina of the allegations against him.⁴⁹ However, the Trial Chamber finds that it is clear from the record that Morina was informed of the *factual* nature of the allegations against him. Moreover, Morina was informed that he was a possible suspect in a contempt of court matter.⁵⁰

30. The Defence refers to Article 14(3)(a) of the International Covenant on Civil and Political Rights (“ICCPR”), which states that “everyone shall be entitled” to “be informed promptly and in detail in a language which he understands of the nature and cause of the *charge* against him”.⁵¹ However, at the time of the Suspect Interview, there were no charges against Morina as he was merely a *suspect*. The Trial Chamber is satisfied that the Suspect Interview was part of the Prosecution’s fact-gathering process to determine which, if any, charges *should* be brought against him. The record indicates that Morina was informed of the factual basis for the allegations against him. Thus, the Defence argument that Morina was not informed about the charges against him fails.

31. It follows that the procedural safeguards of the Rules were satisfied during the Suspect Interview.

2. Whether the Evidence Presented is Admissible Pursuant to Rule 89(C) and (D)

32. Furthermore, the Morina Defence claims that “there is not sufficient *prima facie* showing of the reliability of the transcripts” because the Prosecution has revised the interview transcript “at least two times”.⁵²

33. The Trial Chamber recalls that on 5 and 14 August 2008, the Prosecution submitted corrected versions of the transcript of the Suspect Interview.⁵³ While the Trial Chamber acknowledges that this was done in an effort to have the most accurate transcript possible, the Prosecution should have done so within a reasonable time following the Suspect Interview in October 2007. It appears from the Prosecution’s own submissions that at least one investigator who interviewed the Accused Morina did not review the transcript until the day that the Motion was filed, 22 July 2008, at which time he discovered certain discrepancies.⁵⁴ Moreover, the Trial Chamber finds it astounding that the Prosecution’s language assistant who was tasked with transcribing the Suspect Interview—which was conducted in English and Albanian—did “not

⁴⁹ Motion, para. 15; Morina Reply, paras 9-11.

⁵⁰ Revised Transcript, p. 3, lines 5-8.

⁵¹ Morina Motion, para. 27 (emphasis added).

⁵² Morina Reply, paras 5, 8.

⁵³ See para. 4 *supra*.

⁵⁴ Declaration by Prosecution Investigator, paras 5-6.

speak or understand Albanian”,⁵⁵ and that a language assistant with proficiency in the Albanian language was not assigned until after the Morina Defence had filed its Motion.⁵⁶

34. Notwithstanding these shortcomings, the Morina Defence has in the meantime been provided with copies of the revised transcript and had the opportunity to question its accuracy. Although the Prosecution has made corrections to the Suspect Interview at such a late stage, the Trial Chamber does not find that the Defence’s ability to adequately prepare for trial is jeopardised.

35. Regarding the Defence’s contention that “there is not sufficient *prima facie* showing of the reliability of the transcripts of the [26 October 2007] Prosecution interview with the Accused”,⁵⁷ the Morina Defence appears to have confused a question relating to admissibility with that as to weight.⁵⁸ The Trial Chamber finds nothing in the Suspect Interview to suggest that the Accused Morina was coerced, misled or oppressed.⁵⁹ On the contrary, the Prosecution properly informed the Accused Morina of his rights and was forthright about the reasons why it was questioning him. The audio recording of the Suspect Interview and the transcript, as revised, are relevant and carry probative value in the present case. Thus, there is no merit in the argument of the Morina Defence that the transcript of the Suspect Interview is not *prima facie* reliable, and the Trial Chamber will not declare it inadmissible for the reasons set forth in the Morina Motion.

3. Whether the Suspect Interview is Admissible as Evidence Against the Accused Haraqija

36. Having found that the procedural safeguards of the Rules were satisfied during the Suspect Interview and that it is *prima facie* reliable, the last question for determination is whether the Suspect Interview should at least be declared inadmissible as evidence against the Accused Haraqija.

37. As conceded by the Haraqija Defence, the jurisprudence of the Tribunal holds that there is no prejudice *per se* against a co-accused by allowing a suspect interview of the other accused into evidence, provided that the stringent safeguards of Rules 42 and 43 have been observed during that interview.⁶⁰ As this was the case here, the Trial Chamber finds that the Suspect Interview should not be declared inadmissible on these grounds as evidence against the Accused Haraqija.

⁵⁵ Declaration by Prosecution Investigator, para. 4.

⁵⁶ Declaration by Prosecution Investigator, para. 7. *See also* Morina Reply, para. 5.

⁵⁷ Morina Reply, para. 8.

⁵⁸ *See Prosecutor v. Delalić, et al.*, Case No. IT-96-21-AR 73.2. Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, 4 March 1998, para. 20; *Popović* Decision, para. 50.

⁵⁹ *See* fn. 11 *supra*.

⁶⁰ *Popović* Decision, para. 46; *see also Prlić* Decision, para. 45.

D. Disposition

38. For the reasons set forth above, and pursuant to Article 18(3) of the Statute, Rules 42, 43, 54, 89 and 95 of the Rules, the Trial Chamber

GRANTS leave to file the Morina Reply; and

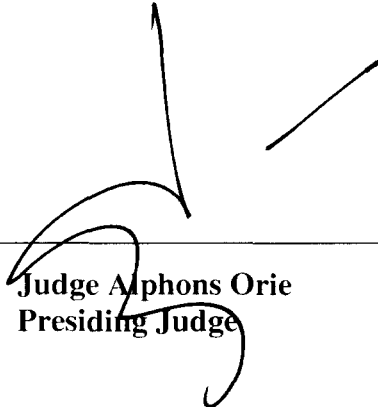
DENIES the Motion by the Accused Morina and the Joinder Motion by the Accused Haraqija.

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

Dated this twenty-eighth day of August 2008

At The Hague

The Netherlands



Judge Alphons Orié
Presiding Judge

[Seal of the Tribunal]