

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: 23 July 2009  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Liu Daqun, Presiding  
Judge Iain Bonomy  
Judge Mehmet Güney  
Judge Fausto Pocar  
Judge Andréia Vaz

**Registrar:** Mr. John Hocking

**Judgement of:** 23 July 2009

**PROSECUTOR**

v.

**ASTRIT HARAQIJA  
and  
BAJRUSH MORINA**

*Public*

**JUDGEMENT**

**The Office of the Prosecutor:**

Ms. Barbara Goy

**Counsel for Astrit Haraqija:**

Mr. Karim A. A. Khan

**Counsel for Bajrush Morina:**

Mr. Jens Dieckmann

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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 three appeals filed by Astrit Haraqija (“Haraqija”), Bajrush Morina (“Morina”), and the Prosecution against the Judgement on Allegations of Contempt, rendered by Trial Chamber I (“Trial Chamber”) on 17 December 2008 in the case of *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4 (“Trial Judgement”).

## I. INTRODUCTION

### A. Background

2. These appeals concern the convictions of Morina and Haraqija for contempt of the International Tribunal based on their intimidation of Witness 2, a protected witness in the case of *Prosecutor v. Ramush Haradinaj et al.* (“*Haradinaj et al.* case”). The indictment followed an investigation ordered at the request of the Prosecution by the Trial Chamber in the *Haradinaj et al.* case on 27 August 2007.<sup>1</sup>

#### 1. Bajrush Morina

3. Morina was born on 10 December 1962 in Veda/Veđa, Rahovec/Orahovac Municipality in Kosovo.<sup>2</sup> At the relevant time covered by the Indictment, he served as a political adviser to Kosovo’s Deputy Minister in the Ministry of Culture, Youth and Sports.<sup>3</sup>

4. Morina was indicted on 12 February 2008 on one count of contempt pursuant to Rule 77(A)(iv) of the International Tribunal’s Rules of Procedure and Evidence (“Rules”).<sup>4</sup> The Indictment alleges that Morina “knowingly and wilfully interfered with the administration of justice by interfering with a protected witness (“Witness 2”) in the *Haradinaj et al.* case.”<sup>5</sup> He voluntarily surrendered to the International Tribunal shortly after learning of the charges against him and arrest warrant, which were issued on 25 April 2008.<sup>6</sup>

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<sup>1</sup> Trial Judgement, para. 4.

<sup>2</sup> Trial Judgement, para. 1.

<sup>3</sup> Trial Judgement, para. 1.

<sup>4</sup> Trial Judgement, paras 3, 7.

<sup>5</sup> Trial Judgement, para. 5 (internal citations omitted).

<sup>6</sup> Decision on Motion of Bajrush Morina for Provisional Release, 9 February 2009 (“Morina Provisional Release Decision”), paras 2, 5.

5. The Trial Chamber concluded that Morina was aware that Witness 2 was about to give evidence in the *Haradinaj et al.* case.<sup>7</sup> Furthermore, it found that, on 10 July 2007, Morina met with Witness 2 and attempted to convince him not to testify. In this respect, the Trial Chamber found that Morina urged Witness 2 to “save” Ramush Haradinaj<sup>8</sup> by not testifying, invoked the “powerful authority of third parties”, and alluded to the killing of witnesses who had testified.<sup>9</sup> Based on this conduct, the Trial Chamber found Morina guilty of contempt.<sup>10</sup> For his conviction, he was sentenced to three months of imprisonment.<sup>11</sup>

## 2. Astrit Haraqija

6. Haraqija was born on 14 June 1972 in Gjakove/Đakovica, Gajkove Municipality, in Kosovo.<sup>12</sup> At the relevant time covered by the Indictment, he served as Kosovo’s Minister of Culture, Youth and Sports.<sup>13</sup>

7. On 12 February 2008, Haraqija was indicted on one count of contempt pursuant to Rule 77(A)(iv) of the Rules as well as an alternative count of incitement to contempt.<sup>14</sup> The Indictment alleges that Haraqija “knowingly and wilfully interfered with the administration of justice by interfering with a protected witness (“Witness 2”) in the *Haradinaj et al.* case.”<sup>15</sup> In particular, it states that Haraqija instructed Morina “to organize a meeting with Witness 2 in order to persuade the witness not to testify against Ramush Haradinaj.”<sup>16</sup> On 28 April 2008, Haraqija voluntarily surrendered to the International Tribunal after learning of the charges against him.<sup>17</sup>

8. The Trial Chamber concluded that “Haraqija knew that Witness 2 was a witness in the *Haradinaj et al.* trial and instructed Bajrush Morina to call on Witness 2 with the specific task of interfering with his testimony.”<sup>18</sup> It further found that Haraqija’s actions “formed an integral part of

<sup>7</sup> Trial Judgement, para. 55.

<sup>8</sup> Mr. Ramush Haradinaj (“Haradinaj”) is the former Prime Minister of Kosovo.

<sup>9</sup> Trial Judgement, paras 56, 58, 60.

<sup>10</sup> Trial Judgement, paras 60, 61, 122(3).

<sup>11</sup> Trial Judgement, para. 122(4).

<sup>12</sup> Trial Judgement, para. 2.

<sup>13</sup> Trial Judgement, para. 2.

<sup>14</sup> Trial Judgement, paras 3, 7.

<sup>15</sup> Trial Judgement, para. 5 (internal citations omitted).

<sup>16</sup> Trial Judgement, para. 6.

<sup>17</sup> Decision on Motion of Astrit Haraqija for Provisional Release, 8 April 2009 (“Haraqija Provisional Release Decision”), paras 2, 7.

<sup>18</sup> Trial Judgement, para. 100.

Bajrush Morina's criminal conduct" and therefore found him guilty of contempt.<sup>19</sup> For his conviction, he was sentenced to five months of imprisonment.<sup>20</sup>

## **B. The Appeals**

9. Morina filed his Notice of Appeal on 2 January 2009, advancing nine grounds of appeal against his conviction and sentence.<sup>21</sup> Morina filed his Appellant's brief on 19 January 2009.<sup>22</sup> He requests that the Appeals Chamber reverse his conviction or, in the alternative, reduce his sentence.<sup>23</sup> The Prosecution filed a consolidated Respondent's brief on 29 January 2009.<sup>24</sup> Morina filed his Reply brief on 2 February 2009.<sup>25</sup> The Appeals Chamber dismissed Morina's request to add an additional ground to his Notice of Appeal and Appellant's brief on 19 March 2009.<sup>26</sup>

10. Haraqija filed his notice of appeal on 2 January 2009; he advances seven grounds of appeal against his conviction.<sup>27</sup> Haraqija filed his Appellant's brief on 19 January 2009,<sup>28</sup> and replied to the Prosecution Response Brief on 2 February 2009.<sup>29</sup> He requests that the Appeals Chamber reverse his conviction.<sup>30</sup>

11. The Prosecution filed its notice of appeal on 2 January 2009, advancing two grounds of appeal against the sentences imposed by the Trial Chamber against Morina and Haraqija.<sup>31</sup> It filed

<sup>19</sup> Trial Judgement, paras 102, 122(1).

<sup>20</sup> Trial Judgement, para. 122(2).

<sup>21</sup> Notice of Appeal on Behalf of Bajrush Morina, 2 January 2009 ("Morina Notice of Appeal"), paras 3-17.

<sup>22</sup> Appeal Brief on Behalf of Bajrush Morina (confidential), 19 January 2009 ("Morina Appeal Brief"). A public version was filed on 23 June 2009.

<sup>23</sup> Morina Notice of Appeal, paras 18, 19; Morina Appeal Brief, para. 84.

<sup>24</sup> Prosecution's Consolidated Response Brief (confidential), 29 January 2009. As noted below, Haraqija filed two corrigenda to his Appellant's brief correcting paragraph numbering. Subsequently, the Prosecution also filed a corrigendum to its Respondent's brief. The Appeals Chamber refers to the corrected version of the brief annexed to the corrigendum. *See* Corrigendum to Prosecution's Consolidated Response Brief (confidential), 26 February 2009 (Annex: Prosecution's Corrected Consolidated Response Brief) ("Prosecution Response Brief"). A public version of the Prosecution Response Brief was filed on 24 June 2009.

<sup>25</sup> Bajrush Morina's Reply to "Prosecution's Consolidated Response Brief" (confidential), 2 February 2009 ("Morina Reply Brief").

<sup>26</sup> Decision on Bajrush Morina's Application for a Variation of the Grounds of Appeal, 19 March 2009, para. 10.

<sup>27</sup> Astrit Haraqija's Notice of Appeal of the "Judgement on Contempt Allegations" Dated 17 December 2008, 2 January 2009 ("Haraqija Notice of Appeal"), paras 4-28. There are eight grounds of appeal in the Notice of Appeal, but Haraqija withdrew one ground of appeal in his Appellant's brief. The Appeals Chamber follows the numbering contained in the Appellant's brief.

<sup>28</sup> Astrit Haraqija's Appeal of the "Judgement on Contempt Allegations" Dated 17 December 2008 (confidential), 19 January 2009. A public version was filed on 6 February 2009. Haraqija subsequently filed two corrigenda to his brief, correcting the paragraph numbering on 20 January 2009 and 10 February 2009, respectively. The Appeals Chamber refers to the corrected version of the brief set out in an annex to Second Corrigendum to Astrit Haraqija's Appeal of the "Judgement on Contempt Allegations" Dated 17 December 2008 with Confidential Annex (confidential), 10 February 2009 ("Haraqija Appeal Brief").

<sup>29</sup> Astrit Haraqija's Reply to "Prosecution's Consolidated Response Brief" Dated 29 January 2009 (confidential), 2 February 2009 ("Haraqija Reply Brief"). A public version was filed on 6 February 2009.

<sup>30</sup> Haraqija Notice of Appeal, p. 9; Haraqija Appeal Brief, p. 23.

<sup>31</sup> Prosecution's Notice of Appeal, 2 January 2009 ("Prosecution Notice of Appeal").

its Appellant's brief on 19 January 2009.<sup>32</sup> The Prosecution requests that the Appeals Chamber increase Morina's sentence to one year of imprisonment and increase Haraqija's sentence to two years of imprisonment.<sup>33</sup> Morina and Haraqija filed their Respondent's briefs, respectively, on 29 January 2009.<sup>34</sup> The Prosecution filed a consolidated Reply brief on 2 February 2009.<sup>35</sup>

### C. Provisional Release

12. The Appeals Chamber has the discretion to provisionally release a convicted person while an appeal is pending if the requirements set forth in Rule 65(I) of the Rules are satisfied.<sup>36</sup> Bearing these criteria in mind, the Appeals Chamber ordered the provisional release of Morina on 9 February 2009 and of Haraqija on 8 April 2009.<sup>37</sup> In this respect, the Appeals Chamber was satisfied that neither of them was a flight risk, nor posed a danger to any victim, witness, or other person.<sup>38</sup> In addition, it considered the fact that Morina and Haraqija would have served their entire sentence if there had not been an appeal as a special circumstance warranting release.<sup>39</sup>

### D. Request for Oral Argument

13. On 6 February 2009, Haraqija requested an oral hearing in order to expound on several arguments raised in his brief which in his view touch on novel issues of law.<sup>40</sup> The Prosecution opposes the motion.<sup>41</sup> Rule 116*bis* of the Rules provides that an appeal of a decision on contempt rendered under Rule 77 of the Rules "may be determined entirely on the basis of written briefs". Haraqija also acknowledges that "the matters on appeal involve clear errors of law and fact that can be resolved in favour of the Defence simply on the basis of written submissions".<sup>42</sup> Accordingly, the Appeals Chamber considers that oral argument is not necessary and denies the motion.

<sup>32</sup> Prosecution's Appeal Brief, 19 January 2009 ("Prosecution Appeal Brief").

<sup>33</sup> Prosecution Notice of Appeal, pp. 1, 2; Prosecution Appeal Brief, para. 17.

<sup>34</sup> Bajrush Morina's Response to Prosecution's Appeal Brief, 29 January 2009 ("Morina Response Brief"); Astrit Haraqija's Response to the "Prosecution's Appeal Brief" Dated 19 January 2009 (confidential), 29 January 2009 ("Haraqija Response Brief"). A public version of the Haraqija Response Brief was filed on 6 February 2009.

<sup>35</sup> Prosecution's Consolidated Reply Brief (confidential), 2 February 2009 ("Prosecution Reply Brief"). A public version was filed on 9 February 2009.

<sup>36</sup> The requirements under Rule 65(I) of the Rules are: "(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."

<sup>37</sup> Morina Provisional Release Decision, para. 12; Haraqija Provisional Release Decision, para. 15.

<sup>38</sup> Morina Provisional Release Decision, paras 7, 8; Haraqija Provisional Release Decision, paras 9, 10.

<sup>39</sup> Morina Provisional Release Decision, para. 10; Haraqija Provisional Release Decision, para. 12. The Appeals Chamber notes that, 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".

<sup>40</sup> Astrit Haraqija's Request for Oral Argument on Appeal, 6 February 2009 ("Haraqija Request"), paras 1, 8, 9.

<sup>41</sup> Prosecution's Response to "Astrit Haraqija's Request for Oral Argument on Appeal", 12 February 2009, paras 1-5.

<sup>42</sup> Haraqija Request, para. 8.

## II. STANDARDS OF REVIEW

14. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 25 of the Statute of the International Tribunal ("Statute"). The Appeals Chamber reviews errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice. This standard of review applicable for appeals against judgements also applies to appeals against convictions for contempt.<sup>43</sup>

15. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.<sup>44</sup> A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error allegedly invalidates the decision.<sup>45</sup> When considering alleged errors of fact, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the original decision.<sup>46</sup> In determining whether or not a Trial Chamber's finding was reasonable, the Appeals Chamber will not lightly disturb findings of fact made by a Trial Chamber.<sup>47</sup>

16. The Appeals Chamber recalls that an appeal is not a trial *de novo* and a party may not merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such an error as to warrant the intervention of the Appeals Chamber.<sup>48</sup> Arguments of a party that do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.<sup>49</sup> The Appeals Chamber has discretion in selecting which submissions merit a detailed reasoned opinion in writing and may dismiss arguments which are evidently unfounded without providing detailed reasoning.<sup>50</sup>

<sup>43</sup> *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 25 June 2009 ("*Dragan Jokić Appeal Judgement*"), para. 11; *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007 ("*Jović Appeal Judgement*"), para. 11; *Prosecutor v. Ivica Marjačić and Markica Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006 ("*Marjačić and Rebić Appeal Judgement*"), para. 15.

<sup>44</sup> *Dragan Jokić Appeal Judgement*, para. 12; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin Appeal Judgement*"), para. 12; *Jović Appeal Judgement*, para. 12; *Marjačić and Rebić Appeal Judgement*, para. 16.

<sup>45</sup> *Dragan Jokić Appeal Judgement*, para. 12; *Mrkšić and Šljivančanin Appeal Judgement*, para. 11; *Jović Appeal Judgement*, para. 12; *Marjačić and Rebić Appeal Judgement*, para. 15.

<sup>46</sup> *Dragan Jokić Appeal Judgement*, para. 13; *Mrkšić and Šljivančanin Appeal Judgement*, para. 13; *Jović Appeal Judgement*, para. 13; *Marjačić and Rebić Appeal Judgement*, para. 16.

<sup>47</sup> *Dragan Jokić Appeal Judgement*, para. 13; *Mrkšić and Šljivančanin Appeal Judgement*, para. 14; *Jović Appeal Judgement*, para. 13; *Marjačić and Rebić Appeal Judgement*, para. 16.

<sup>48</sup> *Dragan Jokić Appeal Judgement*, para. 14; *Mrkšić and Šljivančanin Appeal Judgement*, para. 16; *Jović Appeal Judgement*, para. 14; *Marjačić and Rebić Appeal Judgement*, para. 17.

<sup>49</sup> *Dragan Jokić Appeal Judgement*, para. 14; *Mrkšić and Šljivančanin Appeal Judgement*, para. 16; *Jović Appeal Judgement*, para. 14; *Marjačić and Rebić Appeal Judgement*, para. 17.

<sup>50</sup> *Dragan Jokić Appeal Judgement*, para. 16; *Mrkšić and Šljivančanin Appeal Judgement*, para. 18; *Jović Appeal Judgement*, para. 15.

### III. COMMON GROUNDS OF APPEAL

#### A. Alleged Error in Admitting Intercept Evidence (Morina Grounds 1A and 2; Haraqija Ground 4)

17. In convicting Morina and Haraqija of contempt, the Trial Chamber relied on the audio and video recordings of the conversations on 10 and 11 July 2007 between Morina and Witness 2.<sup>51</sup> The domestic police in the country where the conversation occurred,<sup>52</sup> in consultation with the Prosecution, fitted Witness 2 with hidden electronic recording devices in order to covertly record the conversations.<sup>53</sup> According to the transcript of the recordings on 10 July 2008, Morina told Witness 2 that he had been asked to meet with the witness by Haraqija in order to tell him to withdraw from testifying.<sup>54</sup> Morina also alluded to the killing of witnesses who had testified before the International Tribunal.<sup>55</sup>

18. On 4 September 2008, the Trial Chamber dismissed a joint defence motion seeking to declare this secretly obtained material inadmissible, pursuant to Rules 89(D) and 95 of the Rules, based on the argument that it was allegedly obtained in violation of the domestic law where it was recorded.<sup>56</sup> The Trial Chamber observed that the parties disagreed as to whether in fact the recording violated the relevant domestic law.<sup>57</sup> Nevertheless, it reasoned that, even if the intercepts were unlawful under domestic law, the jurisprudence of the International Tribunal favoured admissibility so long as the evidence is relevant and its probative value is not substantially outweighed by the need to ensure a fair trial.<sup>58</sup> The Trial Chamber was satisfied that the surrounding circumstances showed the domestic authorities acted in good faith to protect Witness 2 and that the recordings were relevant and had probative value.<sup>59</sup>

<sup>51</sup> Trial Judgement, paras 14, 45, 47, 48, 55, 56, 77-79, 86.

<sup>52</sup> Like the Trial Chamber, the Appeals Chamber has not mentioned the name of the country for witness protection reasons.

<sup>53</sup> Trial Judgement, para. 45; *Prosecutor v. Astrit Haraqija and Barush Morina*, Case No. IT-04-84-R77.4, Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence (confidential), 4 September 2008, para. 1. The Trial Chamber subsequently filed an amended public redacted version of the decision. See *Prosecutor v. Astrit Haraqija and Barush Morina*, Case No. IT-04-84-R77.4, Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence (Amended Public Redacted Version), 27 November 2008 ("Intercept Exclusion Decision"), para. 1.

<sup>54</sup> Trial Judgement, para. 48.

<sup>55</sup> Trial Judgement, para. 48.

<sup>56</sup> Intercept Exclusion Decision, paras 7-9, 23, 30, 31.

<sup>57</sup> Intercept Exclusion Decision, para. 19.

<sup>58</sup> Intercept Exclusion Decision, para. 15.

<sup>59</sup> Intercept Exclusion Decision, paras 20-22, 25, 26.

19. Morina submits that the Trial Chamber erred in law in admitting the audio and video recordings.<sup>60</sup> Haraqija also challenges the Trial Chamber's admission of the recordings and incorporates the arguments made by Morina.<sup>61</sup> In particular, Morina argues that the secret recording of his conversations with Witness 2 violated his right to respect for his private life and correspondence under Article 8(1) of the European Convention on Human Rights and Article 17(1) of the International Covenant on Civil and Political Rights.<sup>62</sup> He claims that any interference in his private life by a public authority can only be justified if, as stated in Article 8(2) of the European Convention on Human Rights, it is "in accordance with law" and "necessary in a democratic society" for one of the purposes enunciated in that paragraph.<sup>63</sup> According to Morina, the jurisprudence of the European Court of Human Rights defines "in accordance with law" as a proper statutory code.<sup>64</sup> He also points to the need for judicial safeguards where national law dictates that a court order is needed.<sup>65</sup>

20. Against this backdrop, Morina submits that the Prosecution did not establish that the domestic police undertook the secret surveillance in accordance with relevant domestic law, in particular by pointing to a legal basis for recording private conversations.<sup>66</sup> Accordingly, Morina maintains that the recordings were made in violation of the domestic law and thus in violation of his rights under Article 8(1) of the European Convention on Human Rights and Article 17(1) of the International Covenant on Civil and Political Rights.<sup>67</sup> In this respect, he refers primarily to his submissions at trial on the legality of the intercepts under the relevant domestic law.<sup>68</sup>

21. In Morina's view, such evidence is inadmissible pursuant Rules 89(D) and 95 of the Rules.<sup>69</sup> He points to the views of "numerous judges" of the European Court of Human Rights, cited in a submission made at trial, suggesting that a trial cannot be regarded as fair where the evidence was obtained in violation of fundamental rights guaranteed by the European Convention on Human Rights.<sup>70</sup> Therefore, in view of the violation of his internationally guaranteed rights, the probative value of the intercept evidence was outweighed by the need to ensure a fair trial and was antithetical

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<sup>60</sup> Morina Notice of Appeal, paras 3, 5, 6; Morina Appeal Brief, paras 15-37; Morina Reply Brief, paras 5-11.

<sup>61</sup> Haraqija Notice of Appeal, paras 14, 15; Haraqija Appeal Brief, paras 36, 37; Haraqija Reply Brief, paras 12, 13.

<sup>62</sup> Morina Appeal Brief, paras 17-22, 31; Morina Reply Brief, paras 5, 6, 10, 11.

<sup>63</sup> Morina Appeal Brief, para. 18.

<sup>64</sup> Morina Appeal Brief, para. 19.

<sup>65</sup> Morina Appeal Brief, para. 19.

<sup>66</sup> Morina Appeal Brief, para. 20.

<sup>67</sup> Morina Appeal Brief, paras 21, 22, 31.

<sup>68</sup> Morina Appeal Brief, paras 20-22.

<sup>69</sup> Morina Appeal Brief, paras 23-37; Morina Reply Brief, para. 10.

<sup>70</sup> Morina Appeal Brief, para. 26. *See also* Morina Reply Brief, paras 6-9 (referring to decisions of the International Criminal Court holding that violations of internationally recognized human rights principles are grounds for exclusion of evidence).

to the integrity of the proceedings.<sup>71</sup> In particular, Morina alleges that the use of secret recordings during his suspect interview violated his right against self-incrimination, since it prompted him to give a detailed account of the meeting which the Trial Chamber relied on to convict him.<sup>72</sup>

22. While Morina acknowledges that the International Tribunal has admitted intercept evidence taken in violation of domestic law in the past, he distinguishes that precedent by noting that that evidence was produced in a time of armed conflict.<sup>73</sup> In contrast, he was recorded during peacetime in a member State of the European Union, which he submits is committed to applying high standards of human rights governed by the European Convention on Human Rights.<sup>74</sup>

23. The Prosecution submits that the Trial Chamber did not err in admitting the surveillance evidence and that neither Rule 89(D) nor Rule 95 of the Rules would justify its exclusion.<sup>75</sup> In addition, the Prosecution submits that Haraqija fails to show why he should be able to rely on a violation of Morina's rights.<sup>76</sup>

24. The Appeals Chamber considers that the Trial Chamber properly determined that the admissibility of this evidence was not dependent on whether or not it was in conformity with the laws of a domestic jurisdiction.<sup>77</sup> Rule 89(C) of the Rules sets forth the general framework for the admissibility of evidence before the International Tribunal and allows a Chamber to admit any relevant evidence which it deems to have probative value. It is not disputed that the recordings of the conversations between Morina and Witness 2 are both relevant and have probative value.

25. Rule 89(D) of the Rules allows a Chamber to exclude relevant evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Furthermore, Rule 95 of the Rules states that 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.

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<sup>71</sup> Morina Appeal Brief, paras 23-37; Morina Reply Brief, para. 6.

<sup>72</sup> Morina Appeal Brief, paras 31-33.

<sup>73</sup> Morina Appeal Brief, para. 28.

<sup>74</sup> Morina Appeal Brief, paras 28-30.

<sup>75</sup> Prosecution Response Brief, paras 7-29.

<sup>76</sup> Prosecution Response Brief, para. 109.

<sup>77</sup> In particular, Rule 89(A) of the Rules provides that the "a Chamber [...] shall not be bound by national rules of evidence", and Rule 89(B) states that "a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

26. The crux of Morina's arguments, and by extension those of Haraqija,<sup>78</sup> against the admission of this evidence is that it was taken by the domestic police in violation of their domestic law. Neither Morina nor Haraqija, however, substantiate this claim on appeal. Morina only references submissions he made at trial. The Appeals Chamber has previously held in similar circumstances that "[m]erely referring the Appeals Chamber to one's arguments set out at trial is insufficient as an argument on appeal".<sup>79</sup> Consequently, the Appeals Chamber is not satisfied that it has been shown that the intercept evidence was taken contrary to the domestic law of the country where it was recorded. Therefore, there is no need to address the arguments relating to the alleged violations of the International Covenant on Civil and Political Rights and the European Convention of Human Rights.

27. Contrary to Morina's submissions, the jurisprudence of the European Court of Human Rights unequivocally holds that the admission of secretly taped material, even when taken in violation of Article 8 of the European Convention on Human Rights, does not *per se* conflict with the requirements of a fair trial, in particular where the accused has an opportunity to challenge the authenticity and use of the material, where there is no doubt as to its reliability or accuracy, and where the evidence is very strong or supported by other material.<sup>80</sup> As noted above, these criteria were satisfied.

28. In any case, even if the conversations of 10 and 11 July 2007 were recorded in violation of domestic law, the Appeals Chamber is not convinced that either Rule 89(D) or Rule 95 of Rules required their exclusion. In denying the request to exclude this evidence, the Trial Chamber noted that the parties did not dispute its relevance or probative value.<sup>81</sup> Furthermore, the Trial Chamber considered the circumstances surrounding the collection of the evidence and observed that the domestic authorities acted in "good faith" in order to safeguard a protected witness in the context of a trial that was being held in an "atmosphere where witnesses felt unsafe".<sup>82</sup> Where Witness 2's own account of his various conversations would not amount to a violation of Morina's right to privacy, the Appeals Chamber considers that the use of an accurate recording of them at trial would not call into question the fairness of the proceedings. Consequently, in the circumstances of this

<sup>78</sup> With respect to the Prosecution's argument that Haraqija should not be permitted to invoke the alleged violation of Morina's rights as a basis for relief, the Appeals Chamber observes that the Trial Chamber considered this issue on the basis of joint defence submissions. It also does not appear from the decision or the underlying pleadings that the Prosecution objected to this at trial.

<sup>79</sup> *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Judgment, 3 April 2007, para. 35.

<sup>80</sup> See, e.g., *Case of Bykov v. Russia*, Application No. 4378/02, Judgment, 10 March 2009, paras 84-105; *Case of Khan v. The United Kingdom*, Application No. 35394/97, Judgment, 12 May 2000, paras 29-40; *Case of Schenk v. Switzerland*, Application No. 10862/84, Judgment, 12 July 1988, paras 39-49.

<sup>81</sup> Intercept Exclusion Decision, paras 21, 22.

<sup>82</sup> Intercept Exclusion Decision, para. 20 (internal citations omitted).

case, the Appeals Chamber is not satisfied that the Trial Chamber erred in admitting and relying on the recorded conversations. As a corollary, the Appeals Chamber is also not persuaded that it was inappropriate to use this material during the course of Morina's suspect interview.

29. Accordingly, these grounds of appeal are dismissed.

**B. Alleged Error in Admitting Suspect Interview (Morina Ground 3; Haraqija Ground 3)**

30. On 26 October 2007, the Prosecution interviewed Morina at its field office in Priština.<sup>83</sup> He did not have the assistance of counsel.<sup>84</sup> The interview was recorded, and a transcript as well as the audio recordings were provided to Morina after his initial appearance on 29 April 2009.<sup>85</sup> On 5 and 14 August 2008, the Prosecution submitted corrected versions of the transcript after it was reviewed by an Albanian speaking language assistant.<sup>86</sup> On 28 August 2008, the Trial Chamber denied requests by Morina and Haraqija to declare the transcript of the interview inadmissible.<sup>87</sup> The Trial Chamber concluded that all procedural safeguards in respect of suspect interviews had been respected and that Morina had voluntarily waived his right to counsel.<sup>88</sup> On 14 October 2008, the Trial Chamber considered the issue of waiver again in light of an error in the transcription of a key passage of the interview but reached the same conclusion.<sup>89</sup> The Trial Chamber subsequently relied on the suspect interview in concluding that Haraqija had instructed Morina to meet with Witness 2 in order to dissuade him from giving evidence.<sup>90</sup>

31. Morina submits that the Trial Chamber erred in law in admitting the suspect interview into evidence.<sup>91</sup> In particular, Morina argues that he was not properly informed about the nature and cause of the charges against him prior to being questioned.<sup>92</sup> Morina further points to ambiguities in the transcript of the interview, which in his view demonstrate that he did not voluntarily waive his right to counsel.<sup>93</sup> In these circumstances, Morina argues that the suspect interview should therefore

<sup>83</sup> *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, Decision on Bajrush Morina's Request for a Declaration of Inadmissibility and Exclusion of Evidence, 28 August 2008 ("Suspect Interview Decision"), para. 2.

<sup>84</sup> Suspect Interview Decision, para. 26.

<sup>85</sup> Suspect Interview Decision, para. 3.

<sup>86</sup> Suspect Interview Decision, para. 4.

<sup>87</sup> Suspect Interview Decision, para. 38.

<sup>88</sup> Suspect Interview Decision, paras 25-31.

<sup>89</sup> *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, Decision on Astrit Haraqija and Bajrush Morina's Joint Request for Reconsideration of the Trial Chamber's Decision of 28 August 2008, 14 October 2008 ("Suspect Interview Reconsideration Decision"), paras 12-16.

<sup>90</sup> Trial Judgement, para. 49.

<sup>91</sup> Morina Notice of Appeal, para. 7; Morina Appeal Brief, paras 42-50.

<sup>92</sup> Morina Appeal Brief, paras 42, 45, 47, 50.

<sup>93</sup> Morina Appeal Brief, paras 45, 46.

have been deemed inadmissible pursuant to Rules 89(D) and 95.<sup>94</sup> Haraqija also challenges the Trial Chamber's admission of the interview and incorporates the submissions made by Morina.<sup>95</sup>

32. The Prosecution responds that the record of the suspect interview clearly reflects that Morina was properly informed about and waived his right to counsel.<sup>96</sup> The Prosecution also argues that Haraqija has not shown why he should be able to rely on a violation of Morina's rights.<sup>97</sup>

33. Article 18(3) of the Statute and Rule 42(A) of the Rules provide a suspect with the right to counsel when questioned by the Prosecution during the course of an investigation.<sup>98</sup> Rule 42(A) of the Rules further requires the Prosecution to inform the suspect of this right, along with others, prior to questioning. Rule 42(B) prohibits the Prosecution from questioning a suspect "without the presence of counsel unless the suspect has voluntarily waived his right to counsel."<sup>99</sup>

34. As the Trial Chamber observed, the summons for the interview stated that Morina was a suspect and included a copy of Article 18, which refers, among other things, to his right to counsel during the interview.<sup>100</sup> In addition, at the outset of the interview, the investigator informed Morina that he was a suspect and that he had the right to remain silent and the right to counsel of his choice or to be assigned one at no cost if he could not afford to pay one.<sup>101</sup> Morina stated that he

<sup>94</sup> Morina Appeal Brief, paras 48, 49.

<sup>95</sup> Haraqija Notice of Appeal, paras 10, 11; Haraqija Appeal Brief, paras 34, 35.

<sup>96</sup> Prosecution Response Brief, paras 36-42.

<sup>97</sup> Prosecution Response Brief, para. 108.

<sup>98</sup> Article 18(3) of the Statute provides that "[i]f questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands." Rule 42(A) of the Rules states: "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 suspect'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."

<sup>99</sup> Rule 42(B) of the Rules reads: "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 subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."

<sup>100</sup> Suspect Interview Decision, paras 19, 26. Furthermore, the Appeals Chamber observes that Morina noted in the interview that he had reviewed the summons in both Albanian and English, which he understands. *See* Prosecution Exhibit 19 (suspect interview), pp. 33, 34.

<sup>101</sup> Prosecution Exhibit 19 (suspect interview), p. 1 ("Based on the information that the Tribunal has, the Prosecutor of the Tribunal believes that you may be a suspect responsible for committing acts which may be chargeable under the Tribunal Statute. My colleague in just a minute is going to go into some detail about the information that we have but before we ask any further questions I am required to advise you of certain rights that you have because you are considered to be a possible suspect. Do you understand so far? Am I being clear? You do not have to say anything or answer my questions unless you want to do so. Anything that you do say will be recorded and could be used in evidence against you at later Tribunal proceedings, including at Trial. The questions that we ask you and any response that you give will be recorded and at the end of this interview you will be given a copy of that recording. You have the right to be assisted by a legal representative or lawyer of your choice. If you cannot afford legal representation, the Tribunal will arrange this for you at no cost. Did you understand everything that I said so far?").

understood this.<sup>102</sup> The investigator then clarified that an Albanian translator was available and that Morina could respond to any questions in Albanian or English.<sup>103</sup>

35. After this, the investigator noted that Morina did not have counsel and stated that the interview would only proceed if he waived his right to counsel; Morina was then asked if he wished to proceed.<sup>104</sup> The following exchange contains Morina's response as well as his ultimate agreement to proceed with the interview:

BM/int: (Language assistant: BM actually says: "I don't know the indictment, why I am a suspect, so to speed up the process, at the moment I am not considering it necessary, but ?meanwhile? ?eventually? it may be necessary. I simply don't know what I am accused of.")(Language Assistant: BM uses either "Nderkohe" which means "meanwhile" or "Ndo kohe" which means "eventually".

BM: (in english) Maybe, [maybe].<sup>105</sup>

PMB: 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 the counsel to be present. The purpose of the interview is this: The Trial Chamber in the case of HARADINAJ, Ramush HARADINAJ, has directed an inquiry to be undertaken in relation to possible contempt of Court issue, in which a potential witness for that case may have been contacted and influenced in an attempt to either give false evidence or not give evidence. We believe at this stage that you may be able to help us in our investigation into this matter and essentially that's the reason why we would like to talk to you.

BM/Int. I didn't really understand. You mean I have put pressure on witnesses not to testify or what?

PMB: Yes, as we understand it one of the potential witnesses in that case has been approached and influenced as to whether he would or would not give evidence in that case.

BM/Int: And I am the person who has influenced this witness?

PMB: We understand that you are the person that visited this witness and spoke with him. The name of the witness is [...]. Does that make it more clear?

BM/Int: I knew this person.

PMB: Are you still happy to proceed with this interview?

BM/Int: / INT unintelligible/ (Language Assistant: BM says "Po, patetër", which means "Yes, of course/ Yes, certainly".)<sup>106</sup>

<sup>102</sup> Prosecution Exhibit 19 (suspect interview), p. 2.

<sup>103</sup> Prosecution Exhibit 19 (suspect interview), p. 2.

<sup>104</sup> Prosecution Exhibit 19 (suspect interview), p. 2 ("Just before we start the formal part of the interview, 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?").

<sup>105</sup> After examining the audio portion of the interview, the Trial Chamber concluded that Morina stated "maybe, maybe" as opposed to "maybe, later", which is reflected in the transcript of the interview (Prosecution Exhibit 19 (suspect interview), p. 2). See Suspect Interview Reconsideration Decision, para. 12.

<sup>106</sup> Prosecution Exhibit 19 (suspect interview), pp. 2, 3.

36. At the heart of Morina's argument, and by extension that of Haraqija,<sup>107</sup> is the contention that the Prosecution was required to inform Morina of the nature of the investigation *prior* to informing him of his right to counsel.<sup>108</sup> He submits that his initial response when asked whether he wished to proceed with the interview reflects he was not "in a position to assess whether he needed the assistance of legal counsel."<sup>109</sup> According to Morina, the Prosecution was obligated to again remind him of his right to counsel after informing him of the nature of the investigation rather than simply asking: "Are you still happy to proceed with the interview".<sup>110</sup> The Appeals Chamber does not agree.

37. A suspect should be informed of the nature of the investigation prior to an interview in order to make an informed decision about the waiver of his rights. A review of the interview transcript indicates that this was done. In this respect, the Prosecution informed Morina of his rights twice before asking him if he wished to waive his right to counsel. Having already acknowledged that he understood his rights, Morina responded by asking about the nature of the investigation, which the Prosecution provided immediately after informing Morina of his rights for a third time. The Appeals Chamber is not persuaded that the Prosecution was obligated to inform Morina a fourth time about his right to counsel, in particular after such a brief exchange. Morina's answer of "Yes, of course/ Yes, certainly" to the question of whether he wished to proceed is unequivocal.<sup>111</sup> Consequently, the Appeals Chamber is not persuaded that the Trial Chamber erred in concluding that all procedural safeguards were respected and that Morina voluntarily waived his right to counsel.

38. Accordingly, these grounds of appeal are dismissed.

#### IV. THE APPEAL OF BAJRUSH MORINA

##### A. Alleged Errors in Misconstruing Intercept Evidence (Morina Ground 1B)

39. The Trial Chamber relied on the secretly recorded conversation of 10 July 2007 in concluding that Morina used intimidation in order to appeal to Witness 2 not to testify against Ramush Haradinaj.<sup>112</sup> In this respect, the Trial Chamber found that Morina alluded to "severe

<sup>107</sup> See *supra* fn. 78.

<sup>108</sup> Morina Appeal Brief, paras 42, 45-47, 49.

<sup>109</sup> Morina Appeal Brief, para. 45.

<sup>110</sup> Morina Appeal Brief, paras 45, 46, 49.

<sup>111</sup> Morina suggests that his response was simply "OK". See Morina Appeal Brief, para. 45. The revised transcript, quoted above, clarifies that he said "Yes, of course/ Yes, certainly". In any event, "OK" would still be an affirmative response in the context.

<sup>112</sup> Trial Judgement, paras 48, 56, 58, 60.

negative consequences” for testifying, in particular, by mentioning a protected witness who refused to testify in the *Haradinaj et al.* case “since all the witnesses have been killed” and the witness’s family.<sup>113</sup> According to the Trial Chamber, after referring to this, “Morina additionally mentioned other specific examples of witnesses being threatened or even killed.”<sup>114</sup>

40. Morina submits that the Trial Chamber erred in fact by misinterpreting the content of the conversation.<sup>115</sup> According to Morina, it “simply shows two friends from Kosovo discussing the political situation and developments in their home country” and contains no suggestion of any “negative consequences” for Witness 2 for testifying in the *Haradinaj et al.* case.<sup>116</sup> He also argues that there was no corroborating evidence for this point.<sup>117</sup> Morina further submits that the Trial Chamber erroneously described him as referring to the other specific examples of witnesses being threatened or killed when in fact Witness 2 was the person who provided further examples.<sup>118</sup>

41. The Prosecution responds that the Trial Chamber did not misconstrue Morina’s comments.<sup>119</sup> According to the Prosecution, Morina’s submissions “ignore that Morina told Witness 2 that he was sent to convince him not to testify.”<sup>120</sup> The Prosecution further contends that Morina did refer to at least one other example of a witness who refused to testify, but that, even if the Trial Chamber erred in that footnote, its ultimate finding was based on an undisputed statement by Morina.<sup>121</sup>

42. A review of the transcript of the conversation of 10 July 2007 clearly reflects that Morina mentioned a protected witness withdrawing from testifying in the *Haradinaj et al.* case “since all the witnesses had been killed”.<sup>122</sup> Taken in isolation, this comment could be construed, as Morina suggests, as two old friends discussing the political situation in Kosovo. However, shortly before making this comment, Morina recounted that a group of individuals in Kosovo were “trying to find a way how to protect Ramush Haradinaj”.<sup>123</sup> He noted that three individuals had been identified,

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<sup>113</sup> Trial Judgement, para. 48, quoting Prosecution Exhibit 12 (conversation of 10 July 2007), p. 23 (“[a witness] withdrew from testifying, [after having testified in another case] as a protected witness, against Ramush he came up openly and said he didn’t want to give evidence because all kind of crimes have happened in Kosovo, what I have written stands, I now /inaudible/ since all the witnesses have been killed, I have a family and I don’t want to give evidence [...]”).

<sup>114</sup> Trial Judgement, para. 48, fn. 92.

<sup>115</sup> Morina Notice of Appeal, para. 4; Morina Appeal Brief, paras 38-41.

<sup>116</sup> Morina Appeal Brief, para. 39.

<sup>117</sup> Morina Appeal Brief, para. 39.

<sup>118</sup> Morina Appeal Brief, paras 40, 41.

<sup>119</sup> Prosecution Response Brief, paras 30-35.

<sup>120</sup> Prosecution Response Brief, para. 32.

<sup>121</sup> Prosecution Response Brief, para. 34.

<sup>122</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), p. 23.

<sup>123</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), p. 20.

including Witness 2, who could “save” Haradinaj.<sup>124</sup> Morina added that, with respect to one of the individuals, it was said that he was “thick headed” and “one can only kill [him] because there is no one” presumably who could talk to him.<sup>125</sup> But as to Witness 2, they said “who can we find for him, who should we take”.<sup>126</sup> Morina noted that, since he knew Witness 2, Haraqija approached him to tell the witness “to withdraw the indictment against Ramush”.<sup>127</sup> Morina then said that he told Haraqija “not to spread the word that [Witness 2 was] giving evidence, it’s not good now, whether that’s the case or not”.<sup>128</sup> Immediately after saying this, Morina gave the illustration quoted by the Trial Chamber about a protected witness refusing to testify in the *Haradinaj et al.* case due to fear of being killed.

43. The Appeals Chamber is not persuaded by Morina’s benign explanation for the comment. It is clear that he was not there merely as an old friend to discuss politics, but to convey a message. When the comment is viewed in its proper context, the Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that it alluded to a “severe negative consequence” if Witness 2 testified.<sup>129</sup>

44. Morina’s suggestion that this finding lacked corroboration is without merit. In concluding that Morina’s acts constituted intimidation, the Trial Chamber relied on the evidence of Witness 2, which was subject to cross-examination, concerning the sequence of events.<sup>130</sup> In addition, the conversation which rests at the core of the crime was covertly recorded and transcribed, and its accuracy has not been challenged.<sup>131</sup> The transcripts were tendered along with copies of text messages from Morina related to the meeting through the testimony of Witness 1, who was responsible for Witness 2’s security and involved in the surveillance.<sup>132</sup> The Appeals Chamber is satisfied that the transcript of the conversation is sufficiently corroborated.

45. With respect to the “other specific examples of witnesses being threatened or even killed”,<sup>133</sup> the Appeals Chamber notes that, on two occasions in the relevant part of the transcript, Morina mentioned a witness who refused to testify.<sup>134</sup> Morina’s submissions seem to suggest that

<sup>124</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), p. 21.

<sup>125</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), p. 22.

<sup>126</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), p. 22.

<sup>127</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), p. 22.

<sup>128</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), p. 22.

<sup>129</sup> Trial Judgement, para. 60.

<sup>130</sup> Trial Judgement, paras 42-49.

<sup>131</sup> See *supra* Section III.A (Morina Grounds 1A and 2; Haraqija Ground 4: Alleged Error in Admitting Intercept Evidence).

<sup>132</sup> Trial Judgement, para. 45. See also T. 46, 52, 55.

<sup>133</sup> Trial Judgement, para. 48, fn. 92.

<sup>134</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), pp. 22, 23.

this is the same person, even though different names were used.<sup>135</sup> Contrary to the Prosecution's submissions, a close review of the transcript as well as the suspect interview related to that portion of the conversation reveals that there is merit in Morina's suggestion.<sup>136</sup> Instead, the transcript reflects that Witness 2 gave the additional specific example following Morina's comment.<sup>137</sup> However, even if the Trial Chamber erred in this respect, the observation was made in a footnote and does not appear to be the main basis of its findings. Hence, Morina has not shown that this error resulted in a miscarriage of justice.

46. Accordingly, this ground of appeal is dismissed.

**B. Alleged Errors in Finding that Morina Committed Contempt (Morina Grounds 4 to 7)**

47. The Trial Chamber found that Morina knew that Witness 2 was about to testify in the *Haradinaj et al.* case. It further found:

During the 10 July meeting, Bajrush Morina explained that he was sent to convince Witness 2 not to give evidence before the Tribunal. He also indicated that Witness 2 was the person who by refusing to testify could "save" Ramush Haradinaj. Finally, Bajrush Morina also mentioned the killings of the people who had decided to testify.<sup>138</sup>

The Trial Chamber thus concluded that "Bajrush Morina's words were intended and could only be understood as a strong and unequivocal call on Witness 2, invoking powerful authority of third parties and alluding to severe negative consequences, to refrain from testifying in the *Haradinaj et al.* case."<sup>139</sup> Accordingly, it concluded that Morina's behaviour during the meeting of 10 July 2007 constituted intimidation, which is proscribed by Rule 77(A)(iv) of the Rules.

48. Morina submits that the Trial Chamber erred in law and in fact in concluding that he committed contempt.<sup>140</sup> Morina challenges the finding that he had knowledge that Witness 2 was to appear in the *Haradinaj et al.* case by pointing to inconsistencies in Witness 2's statements to this effect.<sup>141</sup> He also disputes that the only reasonable conclusion from the evidence was that his behaviour constituted intimidation and that he acted with the requisite intent.<sup>142</sup> In this respect, Morina reiterates his objection to the admission of the transcripts of his suspect interview and the

<sup>135</sup> Morina Appeal Brief, para. 40.

<sup>136</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), p. 22, ln. 33, p. 23, ln. 2-12, 22-28; Prosecution Exhibit 19 (suspect interview), pp. 19, 20.

<sup>137</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), p. 23, ln. 29.

<sup>138</sup> Trial Judgement, para. 56 (internal citations omitted).

<sup>139</sup> Trial Judgement, para. 60.

<sup>140</sup> Morina Notice of Appeal, paras 9-14; Morina Appeal Brief, paras 51-72.

<sup>141</sup> Morina Appeal Brief, paras 56-59.

<sup>142</sup> Morina Appeal Brief, paras 51-68.

recording of the conversation of 10 July 2007.<sup>143</sup> He further argues that the Trial Chamber disregarded evidence of his professionalism and that he had a legitimate purpose for travelling to the country where Witness 2 was located, namely publishing an article on his travels and checking the veracity of an earlier interview given to him by the witness.<sup>144</sup> Morina also points to evidence that he was not a supporter and in fact had previously written articles critical of Haradinaj.<sup>145</sup> Finally, he claims that the Trial Chamber failed to consider whether he had a motive for committing the offence.<sup>146</sup>

49. The Prosecution responds that Morina's submissions lack merit and fail to show that the Trial Chamber made any unreasonable findings.<sup>147</sup>

50. A review of the Trial Chamber's finding on Morina's knowledge that Witness 2 was a witness in the *Haradinaj et al.* case reflects that it relied principally on the transcripts of Morina's conversation of 10 July 2007 and his suspect interview, in addition to the evidence of Witness 2.<sup>148</sup> The Appeals Chamber has rejected Morina's challenges to the admission of the transcripts of the conversation and interview.<sup>149</sup> Furthermore, these documents amply demonstrate his knowledge of Witness 2's status. Consequently, he has not shown that the Trial Chamber's finding on his knowledge was unreasonable. In any event, the Trial Chamber considered and rejected the arguments concerning the differences in Witness 2's statements about whether Morina asked the witness before the meeting when he was going to The Hague.<sup>150</sup> The Appeals Chamber considers that the omission of this detail in one of Witness 2's statements does not preclude a reasonable Trial Chamber from relying on Witness 2's evidence.

51. The Trial Chamber also relied heavily on the transcripts of the conversation of 10 July 2007 and the suspect interview in finding that the only reasonable inference from the evidence was that Morina's conduct constituted intimidation and that he acted with the requisite intent.<sup>151</sup> The Appeals Chamber has already found that the Trial Chamber did not err in its interpretation of the conversation of 10 July 2007, which reflected that Morina alluded to a severe negative consequence

<sup>143</sup> Morina Appeal Brief, para. 62.

<sup>144</sup> Morina Appeal Brief, paras 53, 64, 65.

<sup>145</sup> Morina Appeal Brief, para. 67.

<sup>146</sup> Morina Appeal Brief, paras 69-72.

<sup>147</sup> Prosecution Response Brief, paras 43-49.

<sup>148</sup> Trial Judgement, paras 48, 49, 55.

<sup>149</sup> See *supra* Section III.A (Morina Grounds 1A and 2; Haraqija Ground 4: Alleged Error in Admitting Intercept Evidence); Section III.B (Morina Ground 3; Haraqija Ground 3: Alleged Error in Admitting Suspect Interview).

<sup>150</sup> Trial Judgement, para. 55.

<sup>151</sup> Trial Judgement, para. 60 ("Although the conduct of Bajrush Morina took the form of amicable advice and was staged in a friendly atmosphere, it is clear that Bajrush Morina's words *were intended* and *could only be understood* as a strong and unequivocal call on Witness 2 [...] to refrain from testifying in the *Haradinaj et al.* case.") (emphasis added).

if Witness 2 testified.<sup>152</sup> It follows from the Trial Judgement that, in making this finding, the Trial Chamber fully considered Morina's alternative reasons for meeting with Witness 2 as well as his purported lack of motive for assisting Haradinaj.<sup>153</sup>

52. In particular, the Trial Chamber noted that the content of the article written after the trip had nothing to do with the purpose indicated in the official travel request or the earlier article related to Witness 2 which Morina purportedly sought to clarify.<sup>154</sup> The Trial Chamber also did not find "it likely that Bajrush Morina would arrange an urgent and costly personal trip to obtain professional confirmation (which he could have obtained telephonically) of an article written five years earlier."<sup>155</sup> The Appeals Chamber considers that this is a reasonable basis for rejecting Morina's alternative explanations for travelling to meet Witness 2. In any case, the fact that he also wrote an article about his trip and confirmed details of an earlier interview does not alter the content and import of the key parts of the conversation which resulted in the finding of contempt.

53. Likewise, Morina's submissions concerning his lack of a personal motive to assist Haradinaj are unpersuasive. The Trial Chamber correctly placed minimal probative value on this evidence in light of strong and convincing nature of the transcripts of the conversation.<sup>156</sup> In any event, Morina's submissions fail to appreciate that the Trial Chamber found that he had been instructed by his superior to convey the message.<sup>157</sup> In such circumstances, the irrelevance of evidence concerning his lack of support for Haradinaj is manifest.

54. Accordingly, these grounds of appeal are dismissed.

## V. THE APPEAL OF ASTRIT HARAQIJA

### A. Alleged Errors in Law and Fact in the Trial Chamber's Findings on Corroboration of Evidence of the Suspect Interview (Haraqija Grounds 1 and 2)

55. The Trial Chamber found that Morina interfered with Witness 2's testimony in the *Haradinaj et al.* case by "invoking powerful authority of third parties and alluding to negative consequences" in order to call on him to refrain from testifying.<sup>158</sup> It concluded that such behaviour

<sup>152</sup> See *supra* Section IV.A (Morina Ground 1B: Alleged Errors in Misconstruing Intercept Evidence).

<sup>153</sup> Trial Judgement, paras 50-53, 59, 80, 98.

<sup>154</sup> Trial Judgement, para. 80.

<sup>155</sup> Trial Judgement, para. 98.

<sup>156</sup> Trial Judgement, para. 59.

<sup>157</sup> Trial Judgement, paras 49, 53, 100, 102, 110, 115.

<sup>158</sup> Trial Judgement, para. 60.

constituted intimidation and thus contempt as proscribed by Rule 77(A)(iv) of the Rules.<sup>159</sup> In connecting Haraqija to this crime, the Trial Chamber found that Haraqija knew that Witness 2 was a witness in the *Haradinaj et al.* trial and that he exercised his influence over Morina to instruct him to meet with Witness 2 with the specific task of interfering with his testimony.<sup>160</sup>

56. In reaching this conclusion, the Trial Chamber stated: “[w]hereas Haraqija’s involvement follows most directly from Bajrush Morina’s Suspect Interview and the Intercepts of the meetings between Bajrush Morina and Witness 2, it is also established by the totality of the evidence.”<sup>161</sup> Morina did not testify and thus could not be cross-examined on this material.<sup>162</sup> Following Appeals Chamber jurisprudence, the Trial Chamber noted that “evidence of a witness who has not been subject to cross-examination and which is relevant to the acts and conduct of the accused will require ‘sufficient corroboration’ if relied upon to establish a conviction.”<sup>163</sup> The Trial Chamber thus reviewed the jurisprudence of the Appeals Chamber, the European Court of Human Rights, and several national jurisdictions in order to determine what constitutes “sufficient evidence” for purposes of corroboration:<sup>164</sup>

In the view of the Trial Chamber, in order for a piece of evidence to be able to corroborate untested evidence, it must not only induce a strong belief of truthfulness of the latter, i.e. enhance its probative value, but must be obtained in an independent manner. Rejecting a technical approach to this issue, the Trial Chamber holds that corroborating evidence may include pieces of evidence that, although originating from the same source, arose under different circumstances, at different times and for different purposes.<sup>165</sup>

In relying on the suspect interview, the Trial Chamber added that it gave “due regard to whether the information contained therein is corroborated by independent evidence, either derived from the same source, but in an independent manner, or originating from different sources altogether.”<sup>166</sup>

57. Haraqija submits that the Trial Chamber erred in law in applying this standard and further erred in law and fact in finding that the evidence was corroborative and independent.<sup>167</sup> He takes issue with the legal authority relied on by the Trial Chamber in adopting its test, questioning the extent of the national practice and submitting that the Trial Chamber’s analysis was superficial and

<sup>159</sup> Trial Judgement, paras 60, 61.

<sup>160</sup> Trial Judgement, paras 100, 102.

<sup>161</sup> Trial Judgement, para. 86.

<sup>162</sup> Trial Judgement, paras 12, 21.

<sup>163</sup> Trial Judgement, para. 23, referring to *Prosecutor v. Jadranko Prlić*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007 (“*Prlić* Appeal Decision”), paras 58-59 and *Prosecutor v. Vujadin Popović*, Case No. IT-05-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovčanin’s Questioning, 14 December 2007 (“*Popović* Appeal Decision”), para. 48.

<sup>164</sup> Trial Judgement, paras 25-40.

<sup>165</sup> Trial Judgement, para. 41.

<sup>166</sup> Trial Judgement, para. 86 (internal citation omitted).

<sup>167</sup> Haraqija Notice of Appeal, paras 4-9; Haraqija Appeal Brief, paras 7-33; Haraqija Reply Brief, paras 5-11.

that many of the surveyed cases dealt with specialized areas such as sexual assault crimes.<sup>168</sup> According to Haraqija, his conviction relies decisively on hearsay evidence which was generated by his co-accused, Morina, either through the recorded conversations, the suspect interview, information given to other witnesses, or documents Morina prepared.<sup>169</sup> Haraqija argues that the Trial Chamber's test "obliterates adequate protection afforded to Accused persons from the non-challengeable statements from a co[-]accused"<sup>170</sup> and confuses "the quantity of the corroborative evidence with the quality of this evidence".<sup>171</sup>

58. Furthermore, Haraqija challenges the Trial Chamber's description of the corroborating evidence as independent since, while originating from Morina, it arose under different circumstances.<sup>172</sup> Haraqija argues that the evidence could not be viewed as independent since it ultimately came from the same source.<sup>173</sup> In this respect, he notes that Witness 2 and Angelina Krasniqi, who testified at trial about statements made by Morina, admitted that Morina was their sole source and that they never spoke directly with Haraqija.<sup>174</sup> In this respect, Haraqija claims that "[t]he Trial Chamber erred in equating consistency of repetition with truthfulness."<sup>175</sup>

59. Finally, Haraqija notes that the corroborating evidence is not even consistent, which should have prompted the Trial Chamber to explore other alternatives consistent with Haraqija's innocence.<sup>176</sup>

60. The Prosecution responds that the Trial Chamber reached the only reasonable conclusion on Haraqija's involvement after a careful analysis of the evidence under the relevant criteria.<sup>177</sup> It submits that the Trial Chamber stated the correct test for determining corroborating evidence.<sup>178</sup> The Prosecution rejects Haraqija's proposed technical and mechanical approach and emphasizes that the Trial Chamber focused on the quality of the evidence not the quantity.<sup>179</sup> According to the Prosecution, the Trial Chamber correctly assessed the corroborative evidence, noting its

<sup>168</sup> Haraqija Appeal Brief, paras 20-24.

<sup>169</sup> Haraqija Appeal Brief, paras 9, 37-30.

<sup>170</sup> Haraqija Appeal Brief, para. 9.

<sup>171</sup> Haraqija Appeal Brief, para. 15.

<sup>172</sup> Haraqija Appeal Brief, para. 25.

<sup>173</sup> Haraqija Appeal Brief, paras 26-31.

<sup>174</sup> Haraqija Appeal Brief, paras 28-30.

<sup>175</sup> Haraqija Appeal Brief, para. 31.

<sup>176</sup> Haraqija Appeal Brief, paras 32, 33.

<sup>177</sup> Prosecution Response Brief, paras 67-107.

<sup>178</sup> Prosecution Response Brief, paras 70-77.

<sup>179</sup> Prosecution Response Brief, paras 78-83.

independence and high degree of consistency supporting Haraqija's involvement.<sup>180</sup> Finally, the Prosecution argues that the alternative explanations advanced by Haraqija were not reasonable.<sup>181</sup>

61. The right to cross-examination is not absolute.<sup>182</sup> The Appeals Chamber has held that "as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination."<sup>183</sup> Nevertheless, the Appeals Chamber has recognized that "[u]nacceptable infringements of the rights of the defence [...] occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial."<sup>184</sup> Therefore, "[i]t would run counter to the principles of fairness [...] to allow a conviction based on evidence of this kind without sufficient corroboration."<sup>185</sup>

62. Whether untested evidence is sufficiently corroborated is necessarily a fact specific inquiry and varies from case to case. Accordingly, the Appeals Chamber declines to impose any specific legal requirement as to the source of the corroboration. Therefore, the Appeals Chamber can identify no error of law in the above quoted legal principles adopted by the Trial Chamber for assessing untested evidence. The main question, however, is whether the conviction rests decisively on untested evidence. Furthermore, it follows from jurisprudence that not all evidence characterized as hearsay can be considered untested or unreliable.<sup>186</sup> Indeed, as a matter of law, it is permissible to base a conviction on hearsay or circumstantial evidence, but caution is warranted in such circumstances.<sup>187</sup>

63. The Appeals Chamber recalls that the underlying act of intimidation was Morina's invocation of the "powerful authority of third parties" and allusion to "severe negative consequences" in order to call on Witness 2 to refrain from testifying.<sup>188</sup> The Appeals Chamber has already found in connection with Morina's appeal that this finding was sufficiently corroborated

<sup>180</sup> Prosecution Response Brief, paras 84-95.

<sup>181</sup> Prosecution Response Brief, paras 96-103.

<sup>182</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, para. 12. See also *Prlić* Appeal Decision, para. 41; *Popović* Appeal Decision, para. 48.

<sup>183</sup> *Prlić* Appeal Decision, para. 55. See also *Popović* Appeal Decision, para. 48.

<sup>184</sup> *Prlić* Appeal Decision, para. 53.

<sup>185</sup> *Prlić* Appeal Decision, para. 59. See also *Popović* Appeal Decision, para. 48.

<sup>186</sup> See, e.g., *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("Kordić and Čerkez Appeal Judgement"), paras 276, 281-284, 291-294; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, paras 15, 19, 27. See also *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, para. 287.

<sup>187</sup> *Kordić and Čerkez* Appeal Judgement, para 294 (affirming conviction based on hearsay and circumstantial evidence where Trial Chamber exhaustively considered credibility issues and surrounding circumstances). See also *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008, para. 70 (overturning a conviction based on hearsay and circumstantial evidence where hearsay lacked detail).

and reasonable.<sup>189</sup> Nothing in Haraqija's submissions calls this into question. The material question therefore is whether Haraqija has shown that the Trial Chamber's conclusion that Haraqija exercised his influence over Morina and instructed him to commit the crime rests decisively on untested evidence and is thus unfair.

64. It is apparent from the Trial Chamber's assessment of Haraqija's role in the crime that it only expressly considered whether the suspect interview was sufficiently corroborated.<sup>190</sup> However, as the Trial Chamber noted, the requirement of sufficient corroboration is not limited only to suspect interviews of a non-testifying co-accused, but to all untested evidence underpinning a conviction.<sup>191</sup> In this respect, the Appeals Chamber considers that some key aspects of the other pieces of evidence emanating from Morina which the Trial Chamber relied on as corroboration for the suspect interview were equally untested. While there is reliable and tested evidence concerning the content of Morina's conversations with Witness 2 and Angjelina Krasniqi, the content of Morina's exchanges with Haraqija which were recounted to those witnesses is double or even triple<sup>192</sup> hearsay and effectively remains untested. The fact that Morina might have discussed his various conversations with Haraqija consistently and under different circumstances does not alter this. While consistency is certainly an appropriate consideration, it alone does not make the untested evidence inherently more reliable.

65. It follows from the Trial Judgement that the Trial Chamber attached considerable weight to the consistency of Morina's invocation of Haraqija during the relevant sequence of events.<sup>193</sup> Although the Trial Chamber considered this material along with other circumstantial evidence,<sup>194</sup> the Appeals Chamber can only describe its reliance on the untested evidence of Morina as decisive.

66. In this respect, the Trial Chamber gave insufficient weight to a number of deficiencies in the evidence emanating from Morina. For example, there is considerable vagueness with regard to Morina's description of the circumstances surrounding Haraqija's purported instruction to interfere with Witness 2. During the suspect interview, Morina alluded to two or three possible

<sup>188</sup> Trial Judgement, para. 60.

<sup>189</sup> See *supra* Section IV.A (Morina Ground 1B: Alleged Errors in Misconstruing Intercept Evidence); Section IV.B (Morina Grounds 4 to 7: Alleged Errors in Finding that Morina Committed Contempt).

<sup>190</sup> Trial Judgement, paras 86, 91.

<sup>191</sup> Trial Judgement, para. 41.

<sup>192</sup> In this respect, the Appeals Chamber notes that Morina's allusions to the involvement of Steven Schook, the Deputy Special Representative of the United Nations Mission in Kosovo, in the interference is based on an apparent conversation that Schook had with Haraqija outside of Morina's presence. During the suspect interview, Morina acknowledged that he had some doubts about Schook's involvement. See Prosecution Exhibit 12 (conversation of 10 July 2007), pp. 20-21; Prosecution Exhibit 19 (suspect interview), p. 23.

<sup>193</sup> Trial Judgement, para. 91.

<sup>194</sup> Trial Judgement, paras 86-99.

conversations, which occurred in either Peja or Pristina.<sup>195</sup> Although, the Appeals Chamber agrees that it was not necessarily essential to prove the exact timing and location of the issuance of the instruction,<sup>196</sup> the ambiguity in Morina's hearsay evidence on this point should have been cause for concern. In this respect, the suspect interview occurred only a few months after the meeting, and, as the Trial Chamber noted, it was the reason that Morina took a significant professional risk in submitting a travel request in violation of Ministry rules.<sup>197</sup> Morina's suspect interview also reveals his willingness to misrepresent or overstate facts in his conversation with Witness 2. For example, he conveyed to Witness 2 that he spoke with Haraqija between the conversations of 10 and 11 July 2007, when he later acknowledged to investigators that he only spoke with the Ministry spokesperson.<sup>198</sup> In addition, he also alluded to Steven Schook in his conversation, but told investigators that he had doubts as to whether Haraqija in fact had received instructions from Schook or even interacted with him.<sup>199</sup>

67. Furthermore, the Trial Chamber gave undue weight to the circumstances surrounding the travel authorization. As the Trial Chamber acknowledged, it would have been "palpably unwise" for Morina to have implicated Haraqija in a mission taken in violation of Ministry rules.<sup>200</sup> The submission of a subsequent request only mentioning Morina significantly tempers any negative inference that can be drawn from the first request, in particular bearing in mind that the second request is the only one that was formally approved.<sup>201</sup>

68. Finally, the Trial Chamber also gave undue weight to the evidence surrounding Morina and Haraqija's various respective motives for committing the crime. Although the Trial Chamber reasonably concluded that Morina's personal situation as well as the content of his conversation with Witness 2 suggested that he was pressured,<sup>202</sup> it does not necessarily follow that this pressure came from Haraqija. In this respect, the Appeals Chamber also notes that the Trial Chamber equally found that Morina's reference to being pressured by others "was aimed at evoking Witness 2's compassion for him" and thus was in furtherance of the interference.<sup>203</sup> In addition, while Haraqija's participation in a committee to assist the Haradinaj defence does suggest some motive to

<sup>195</sup> Prosecution Exhibit 19 (suspect interview), pp. 18, 22, 30.

<sup>196</sup> In the *Galić* Appeal Judgement, the Appeals Chamber held that a mode of liability such as ordering can be proven by circumstantial evidence and affirmed a Trial Chamber's conviction for ordering even in the absence of direct evidence of when and where a particular order was issued. See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement"), paras 177, 178, 389.

<sup>197</sup> Trial Judgement, paras 65, 78, 81, 93, 94, 96.

<sup>198</sup> Prosecution Exhibit 12 (conversation of 10 July 2007), pp. 20-21; Prosecution Exhibit 19 (suspect interview), p. 23.

<sup>199</sup> Prosecution Exhibit 19 (suspect interview), p. 23.

<sup>200</sup> Trial Judgement, para. 96.

<sup>201</sup> Trial Judgement, para. 67, fn. 130.

<sup>202</sup> Trial Judgement, paras 94, 98.

<sup>203</sup> Trial Judgement, para. 58.

interfere with Witness 2, the Trial Chamber equally noted that he was not a political ally of Haradinaj and did not actively participate in this group after the second meeting.<sup>204</sup> His statements in opposition to the trials of Kosovars also do not reasonably suggest that he would thus interfere with them.

69. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in placing decisive weight in convicting Haraqija on the untested evidence emanating from Morina. Accordingly, it allows Haraqija's second ground of appeal challenging the sufficiency of the corroborating evidence and reverses Haraqija's conviction for contempt. As a result, the Appeals Chamber does not need to consider his remaining grounds of appeal or the Prosecution's appeal against his sentence. Furthermore, this finding has no impact on Morina's conviction for contempt. It is immaterial for the purposes of Morina's conviction whether Haraqija in fact instructed him to interfere with Witness 2. What is relevant is that Morina conveyed the interest of powerful authorities, which is reflected in the conversations.

## VI. THE APPEALS AGAINST SENTENCE

70. Having found Morina guilty of contempt, the Trial Chamber sentenced him to a sentence of three months of imprisonment.<sup>205</sup> In doing so, it considered that interfering with the administration of justice by intimidating a witness is "particularly grave".<sup>206</sup> It also considered aggravating and mitigating factors. The Trial Chamber found no aggravating factors.<sup>207</sup> It considered in mitigation his good character, professionalism, absence of a criminal record, the pressure he faced to commit the offence, and his apology for his behaviour to Witness 2.<sup>208</sup>

71. The Appeals Chamber recalls that Trial Chambers are vested with broad discretion in determining an appropriate sentence.<sup>209</sup> In general, the Appeals Chamber will not revise a sentence unless the appellant demonstrates that the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.<sup>210</sup>

<sup>204</sup> Trial Judgement, paras 82, 85.

<sup>205</sup> Trial Judgement, para. 122.

<sup>206</sup> Trial Judgement, para. 105.

<sup>207</sup> Trial Judgement, para. 107.

<sup>208</sup> Trial Judgement, paras 109-111.

<sup>209</sup> *Dragan Jokić* Appeal Judgement, para. 40; *Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Jović* Appeal Judgement, para. 38; *Marjačić and Rebić* Appeal Judgement, para. 53.

<sup>210</sup> *Dragan Jokić* Appeal Judgement, para. 40; *Mrkšić and Šljivančanin* Appeal Judgement, para. 353; *Jović* Appeal Judgement, para. 38, *Marjačić and Rebić* Appeal Judgement, para. 53.

**A. Morina's Appeal Against His Sentence (Grounds 8 and 9)**

72. Morina submits that the Trial Chamber imposed a “manifestly excessive sentence” in view of its discernible errors in failing to consider relevant mitigating circumstances and in assessing the gravity of the offence.<sup>211</sup> Specifically, he argues that the Trial Chamber failed to consider as a mitigating factor the fact that the meeting between Morina and Witness 2 took place “in a friendly atmosphere” at Witness 2’s insistence with the approval of local police and that Witness 2 did not feel threatened or intimidated at any stage.<sup>212</sup> In addition, Morina contends that the Trial Chamber erred in finding, without explanation, that the intimidation of witnesses is graver than any other method of interfering with the administration of justice.<sup>213</sup>

73. The Prosecution responds that Morina has not identified a discernible error in the Trial Chamber’s assessment of mitigating circumstances or of the gravity of the offence.<sup>214</sup>

74. The Appeals Chamber notes that Morina did not refer in his submissions on mitigation at trial to the “friendly” circumstances surrounding the conversation of 10 July 2007.<sup>215</sup> As a general rule, a Trial Chamber is not under an obligation to seek out information that counsel did not see fit to put before it at the appropriate time.<sup>216</sup> Furthermore, contrary to Morina’s submissions, his various interactions with Witness 2 were not entirely free of fear on the witness’s part. After noting that Witness 2 “didn’t feel intimidated or under pressure because the meeting [of 10 July 2007] with Bajrush was friendly”,<sup>217</sup> the Trial Chamber viewed this in conjunction with the witness’s reaction to Morina’s initial telephone call to set up the meeting, which resulted in feelings of “immediate fear” and a sense of “danger”.<sup>218</sup> Notwithstanding this, the Trial Chamber implicitly considered Morina’s friendly disposition towards Witness 2 during the meeting of 10 July 2007 when it acknowledged his good character and apology to the witness.<sup>219</sup> Consequently, Morina has not identified any discernible error on the part of the Trial Chamber in assessing his mitigating circumstances.

<sup>211</sup> Morina Notice of Appeal, paras 16, 17; Morina Appeal Brief, paras 74-83.

<sup>212</sup> Morina Appeal Brief, paras 75-79.

<sup>213</sup> Morina Appeal Brief, paras 80-83; Morina Reply Brief, para. 12.

<sup>214</sup> Prosecution Response Brief, paras 50-66.

<sup>215</sup> Trial Judgement, para. 108; T. 348.

<sup>216</sup> *Mrkšić and Šljivančanin* Appeal Judgement, para. 359. See also *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007, para. 231.

<sup>217</sup> Trial Judgement, para. 57, quoting Witness 2, T. 140.

<sup>218</sup> Trial Judgement, para. 57, quoting Prosecution Exhibit 8, paras 13, 14.

<sup>219</sup> Trial Judgement, paras 109, 111.

75. The Appeals Chamber also sees no error in the Trial Chamber's finding that the intimidation of a witness is particularly grave.<sup>220</sup> Contrary to Morina's submission, the Trial Chamber expressly stated that "[i]n assessing the gravity of the offence, the Trial Chamber took into account the importance of ensuring the proper administration of justice by protecting witnesses from any interference aimed at changing their testimony or even withdrawal from testifying."<sup>221</sup> This remark followed its acknowledgment that the problems that the *Haradinaj et al.* case "faced in securing witness testimony in an atmosphere that many witnesses perceived to be unsafe."<sup>222</sup> Furthermore, the seriousness of the offence is axiomatic from the International Tribunal's significant reliance on testimonial evidence and its obligation in the Statute and Rules to put in place measures to protect witnesses and ensure the integrity of the proceedings.<sup>223</sup>

76. Accordingly, these grounds of appeal are dismissed.

### **B. Prosecution Appeal**

77. The Prosecution submits that the Trial Chamber abused its discretion in imposing a manifestly inadequate sentence on Morina after convicting him of a particularly serious form of contempt in the form of witness intimidation.<sup>224</sup> It points out that, although the Trial Chamber noted that the two most important factors to be taken into account in sentencing are the gravity of the offence and the need to deter future misconduct, it ignored these factors in imposing the sentence.<sup>225</sup> According to the Prosecution, merely articulating this standard did not fulfil the Trial Chamber's sentencing obligation.<sup>226</sup>

78. With respect to the gravity of the offence, the Prosecution notes that, in December 1998, the Rules were amended to separate the contempt of threatening, intimidating or otherwise interfering

<sup>220</sup> See *Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005 ("Beqaj Trial Judgement"), para. 60 ("Acts intended to prevent a witness from giving evidence or influence the evidence that he is to give amount to a serious interference with the due administration of justice.").

<sup>221</sup> Trial Judgement, para. 107.

<sup>222</sup> Trial Judgement, para. 106.

<sup>223</sup> See *Beqaj* Trial Judgement, para. 60.

<sup>224</sup> Prosecution Notice of Appeal, pp. 1, 2; Prosecution Appeal Brief, paras 2-17; Prosecution Reply Brief, paras 10, 11. The Prosecution's Notice of Appeal contains two grounds of appeal, one in respect of Haraqija and another for Morina. The Prosecution Appeal Brief, however, argues both grounds together. In view of the Appeal Chamber's findings with respect to Haraqija's appeal, it will only consider the Prosecution's arguments against Morina.

<sup>225</sup> Prosecution Appeal Brief, para. 6; Prosecution Reply Brief, paras 4, 17.

<sup>226</sup> Prosecution Appeal Brief, para. 16.

with witnesses from other forms of contempt and to increase the penalties to seven years in order to reflect the seriousness of the offences.<sup>227</sup>

79. The Prosecution further submits that deterrence requires a higher sentence since an individual may consider that a sentence of three to five months for interference is an acceptable risk to help someone facing a possible life sentence.<sup>228</sup> It further points to acts of interference arising in both the *Haradinaj et al.* and *Limaj et al.* cases, which underscore the need for an appropriate deterrent effect.<sup>229</sup> The Prosecution thus requests that Haraqija and Morina's sentences be increased to two and one year's imprisonment respectively.<sup>230</sup>

80. According to Morina, the Prosecution has not shown that interference with witnesses is the most serious form of contempt.<sup>231</sup> He challenges the Prosecution's reliance on the change to the Rules in 1998 to provide for separate sentencing structures, noting that three years later the regime was changed again returning to uniform penalties.<sup>232</sup> He further emphasizes the need to individualize sentences.<sup>233</sup> He also submits that the Trial Chamber took full account of the need for deterrence in reaching its sentence and that it is only one factor for consideration, not an overriding one as the Prosecution suggests.<sup>234</sup> Finally, he emphasizes that his sentence is already severe considering his individual circumstances and that it is one of the highest handed down by the International Tribunal for contempt.<sup>235</sup>

81. As the Prosecution concedes, the Trial Chamber correctly noted the importance of the gravity of the offence and the need to deter similar action in considering an appropriate sentence.<sup>236</sup> In this respect, in assessing the gravity of the offence, the Trial Chamber considered the Prosecution's submission that the intimidation of Witness 2 was "particularly egregious" given that it occurred in the context of a trial where many witnesses were afraid to testify.<sup>237</sup> As a result, the Appeals Chamber is not convinced that the Trial Chamber failed to appreciate the gravity of the crime in sentencing Morina and Haraqija. In addition, while deterrence and retribution may be

<sup>227</sup> Prosecution Appeal Brief, para. 9, quoting Sixth Annual Report 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, UN Doc. A/54/187, S/1999/846, p. 30, para. 114; Prosecution Reply Brief, para. 5.

<sup>228</sup> Prosecution Appeal Brief, para. 14; Prosecution Reply, para. 6.

<sup>229</sup> Prosecution Appeal Brief, para. 15.

<sup>230</sup> Prosecution Notice of Appeal, pp. 1, 2. Prosecution Appeal Brief, para. 17.

<sup>231</sup> Morina Response Brief, paras 8-13.

<sup>232</sup> Morina Response Brief, para. 10.

<sup>233</sup> Morina Response Brief, paras 12, 13.

<sup>234</sup> Morina Response Brief, paras 14-16.

<sup>235</sup> Morina Response Brief, para. 17.

<sup>236</sup> Trial Judgement, paras 103, 112, 114.

<sup>237</sup> See Trial Judgement, paras 106, 107. The Trial Chamber further observed that this problem was acknowledged in *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgement, 3 April 2008, para. 6.

taken into account in sentencing, those factors must not be given undue weight in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.<sup>238</sup>

82. Ultimately, the Prosecution's argument fails to appreciate that Trial Chambers have an overriding obligation to individualize a sentence to fit the circumstances of the accused as well as the gravity of the crime.<sup>239</sup> In this respect, as noted above, the Trial Chamber found a number of mitigating circumstances in favour of Morina. It identified no aggravating circumstances for Morina. The Prosecution does not challenge these conclusions, nor does it convincingly show why no reasonable Trial Chamber, taking due account of the numerous mitigating circumstances, could have imposed the sentences contained in the Trial Judgement, notwithstanding the gravity of the offence.

83. Accordingly, the Prosecution's sentencing appeal is dismissed.

## VII. DISPOSITION

84. For the foregoing reasons, the Appeals Chamber,

**PURSUANT** to Article 25 of the Statute and Rules 77, 77bis, 116bis, 117, and 118 of the Rules;

**NOTING** the submissions of the parties;

**REMINDS** the parties to file public versions of their briefs on appeal, if they have not done so;

**DENIES** Haraqija's request for oral argument;

**GRANTS** Ground 2 of Haraqija's appeal and **REVERSES** his conviction for contempt;

**DISMISSES** the grounds of appeal filed by Morina and the Prosecution;

**NOTING** that Astrit Haraqija and Bajrush Morina have been provisionally released after serving the duration of their sentences imposed by the Trial Chamber;

**ORDERS** the termination of the conditions of their provisional release;

**NOTING** that Bajrush Morina is entitled to credit for the time already spent in detention;

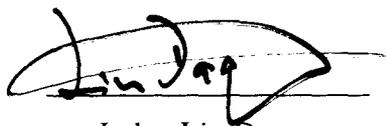
**DECLARES** the sentence of imprisonment of Bajrush Morina fully served.

<sup>238</sup> *Galić* Appeal Judgement, para. 442.

<sup>239</sup> *Galić* Appeal Judgement, para. 442.

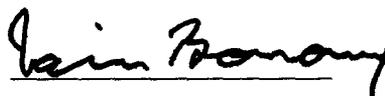
Done in English and French, the English text being authoritative.

Dated the 23rd day of July 2009, At The Hague, The Netherlands.



Judge Liu Daqun

Presiding



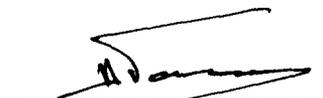
Judge Iain Bonomy



Judge Mehmet Güney



Judge Fausto Pocar



Judge Andréia Vaz

[Seal of the International Tribunal]