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UNITED
NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

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

Date: 24 September 2008

Original: English

**IN TRIAL CHAMBER I**

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

**Registrar:** **Mr. Hans Holthuis**

**Decision of:** **24 September 2008**

**PROSECUTOR**

**v.**

**ASTRIT HARAQIJA**

**and**

**BAJRUSH MORINA**

*PUBLIC*

# DECISION ON ASTRIT HARAQIJA AND BAJRUSH MORINA'S JOINT REQUEST FOR RECONSIDERATION OF THE TRIAL CHAMBER'S DECISION OF 4 SEPTEMBER 2008

**The Office of the Prosecutor:**

Mr. Dan Saxon

**Counsel for the Accused:**

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

**Trial Chamber I** ("Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 ("Tribunal") is seised of the "Astrit Haraqija and Bajrush Morina's Joint Request for Reconsideration of the Trial Chamber's Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence Dated 4 September 2008", filed confidentially on 4 September 2008 ("Joint Request") and hereby renders its Decision.

# I. SUBMISSIONS OF THE PARTIES

## A. Defence

1. The Defence for Astrit Haraqija and the Defence for Bajrush Morina ("Defence") in the Joint Request seek a reconsideration of the "Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence", issued confidentially by the Trial Chamber on 4 September 2008 ("Impugned Decision") insofar as it declined to exclude as evidence, the audio and video recordings of the intercepted conversations between Witness 2 and the Accused Bajrush Morina on 10 and 11 July 2007, the transcripts of these audio recordings and the still images from the video recordings ("Audio and Video Recordings").[1]

2. The Defence submits that reconsideration by the Trial Chamber is warranted because of the new facts which arose during trial after the Impugned Decision was rendered.[2] In this regard, the Defence submits that, during the testimony of a Prosecution witness, who appeared on 8 September 2008 under the pseudonym of "Witness 1", the Trial Chamber was provided with "critical testimony regarding the correct law and practice relating to surveillance in [a third country]".[3] In particular, the Defence contends that Witness 1 explained in court that "ordinarily, a court order would be required in [a third country] in order to record conversations between a person who is informed that such a recording is carried out and a suspect of [...] a crime".[4]

3. The Defence further contends that Witness 1 testified to the fact that the third country's police agreed to audio and video record the meeting only after they received "a letter from the Prosecution inviting them to do so".[5] In the Defence's position, Witness 1's testimony demonstrates that the meeting which took place between the Accused Bajrush Morina and Witness 2 was audio

[1] Joint Request, para. 1.
[2] Joint Request, paras 2, 9.
[3] Joint Request, para. 9.
[4] Joint Request, para. 10, citing the Hearing of 8 September, T. 101, lines 4-10.
[5] Joint Request, para. 12.

and video recorded in a "complete legal vacuum".[6] The Defence submits that this warrants reconsideration of the Impugned Decision to prevent an injustice. In its view, "had the Trial Chamber fully appreciated the existence of such legal vacuum at the time it rendered its impugned Decision, it would have decided otherwise".[7]

### B. Prosecution

4. The Prosecution filed confidentially on 16 September 2008 its "Prosecution's Response to Second Joint Defence Request for Reconsideration of 'Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence Dated 4 September 2008'" with Confidential Annexes A and B, ("Response").

5. In the Response, the Prosecution argues that the Defence ignored the legal basis for the Chamber's decision and that "nothing in the testimony of witness 1 creates new circumstances that warrant a reconsideration of the Trial Chamber's decision".[8] In the Prosecution's view, even assuming that the audio and video surveillance violated the domestic law, that "would not change the Trial Chamber's reasoning or its findings in the [Impugned Decision]".[9]

6. The Prosecution further argues that the Defence misinterpreted the testimony of Witness 1 when it contended that the witness testified that the meetings between the Accused Morina and Witness 2 could occur only if the police "received a letter from the Prosecution *inviting* them to do so".[10] In the Prosecution's view, Witness 1 testified that "his superviser [*sic*] told the witness that the meetings *could* occur if the [ third country's] police received a letter from the OTP saying that the meeting could take place if it was monitored by the police".[11]

7. Finally the Prosecution argues that the surveillance did not occur within a "legal vacuum" and that it was in compliance with "[domestic] law and policy" as well as the European Convention for the Protection of Human Rights and Fundamental Freedom ("ECHR").[12]

## II. DISCUSSION

8. According to the jurisprudence of the Tribunal, the Trial Chamber has inherent discretionary power to reconsider a previous decision if there has been a clear error of reasoning or if particular

[6] Joint Request, paras 18-19.
[7] Joint Request, para.19.
[8] Response, para. 3.
[9] Response, paras 2-3.
[10] Response, para. 4.
[11] Response, para. 4 referring to Confidential Annexes A and B.

circumstances exist that justify reconsideration in order to prevent an injustice,[13] and that such circumstances may include new facts or arguments that have arisen since the issuance of a decision.[14]

9. The Trial Chamber notes that the Defence arguments for reconsideration of the Impugned Decision pertain to the issue as to whether audio and video surveillance was unlawful under domestic law. However, such issue has been already addressed by the Trial Chamber in its Impugned Decision. In that Decision, the Trial Chamber, in recalling the practice of the Tribunal and the ECHR, dismissed the Defence contention that the Audio and Video Recordings were inadmissible as they had been obtained unlawfully or without a court order.[15] In particular, the Trial Chamber recalled the jurisprudence according to which "before this Tribunal evidence obtained illegally is not, *a priori*, inadmissible, but rather that the manner and surrounding circumstances, in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility".[16] It found, in light of the surrounding circumstances of the Audio and Video Recordings that the admission thereof was not contrary to Rules 89 and 95 of the Rules of Procedure and Evidence ("Rules"). The Trial Chamber also found that "even on the assumption that the audio and video surveillance was unlawful under domestic law,[...] admitting such material into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings".[17]

10. The Trial Chamber further notes that the testimony of Witness 1 relating to the communication between the Prosecution and the police of the third country does not amount to a new fact which justifies reconsideration of the Trial Chamber's conclusion in relation to the circumstances under which the evidence was obtained and its impact on the integrity of the proceedings.

11. In light of the foregoing, the Trial Chamber is satisfied that the Defence has failed to offer new facts or arguments that have arisen since the issuance of a decision and which justify reconsideration in order to prevent an injustice. The Trial Chamber is also satisfied that the

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[12] Response, para. 5.
[13] *See Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Motion for Reconsideration of Oral Decision Issued on 29 February 2008, 10 March 2008 para. 5; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, Confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 25, fn. 40.
[14] *See Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Decision on the Prosecution's Motion for Reconsideration of the Chamber's Decision on Admission of Documentary Evidence, 13 February 2008, para. 9; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Second Decision on the Admission of Documentary Evidence submitted by the Prosecution (Dretelj and Gabela), 12 December 2007, p. 4 fn. 4 with further references.
[15] Impugned Decision, paras 7-9, 11-30.
[16] Impugned Decision, para. 15.
[17] Impugned Decision, para. 25.

Impugned Decision does not contain a clear error of reasoning. It therefore finds that the test for reconsideration has not been met.

## III. DISPOSITION

12. For the reasons set forth above, and pursuant to Rule 54, 89 and 95 of the Rules, the Trial Chamber

**DENIES** the Joint Request for reconsideration of the Impugned Decision.

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

Dated this twenty-fourth day of September 2008

At The Hague
The Netherlands

**Alphons Orie**
**Presiding Judge**

**[Seal of the Tribunal]**