



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: 27 November 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: 27 November 2008

PROSECUTOR

v.

**ASTRIT HARAQIJA
and
BAJRUSH MORINA**

AMENDED PUBLIC REDACTED VERSION

**DECISION ON MORINA AND HARAQIJA SECOND REQUEST
FOR A DECLARATION OF INADMISSIBILITY
AND EXCLUSION OF EVIDENCE**

The Office of the Prosecutor:

Mr. Daniel Saxon

Counsel for the Accused:

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

TRIAL CHAMBER I (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (“Tribunal”) is seised of “Bajrush Morina’s Second Request for a Declaration of Inadmissibility and Exclusion of Evidence”, filed confidentially on 18 August 2008 (“Motion”) and hereby renders its Decision.

A. Background

1. The allegations in this case concern a meeting held on 10 and 11 July 2007 in REDACTED [a third country], during which the Accused Morina allegedly attempted to dissuade PW-17, a protected witness from the proceedings *Prosecutor v. Haradinaj et al.*, from giving evidence in that trial.¹ The conversations on both days were subject to covert audio and video recording by REDACTED [a third country’s] police, who had outfitted PW-17 with hidden electronic recording devices.²

2. On 12 February 2008, Judge Moloto confirmed an indictment against Astrit Haraqija and Bajrush Morina (“Accused”) for contempt of the Tribunal (“Indictment”).³ In the Indictment, both Accused are charged with contempt of the Tribunal pursuant to Rule 77(A)(iv) of the Tribunal’s Rules of Procedure and Evidence (“Rules”) for allegedly interfering with PW-17 (Count 1). The Accused Haraqija is also charged in the alternative with incitement to contempt of the Tribunal (Count 2).⁴ On 25 April 2008, the confidentiality of the Indictment was lifted,⁵ and on 29 April 2008, both Accused pleaded not guilty to the charges against them.⁶

3. On 18 August 2008, the Morina Defence confidentially filed the present Motion, requesting leave to exceed the word limit applicable to motions⁷ and a declaration of inadmissibility and exclusion from the evidence pursuant to Rule 89(D) and Rule 95 of the Rules of the following materials:⁸

- the audio and video recordings of the intercepted conversations between PW-17 and the Accused Morina on 10 and 11 July 2007 (Prosecution Rule 65ter Nos 1(A) – 2(C));

¹ Prosecution Pre-Trial Brief, pp 1-2. Eventually, PW-17 did give evidence in the *Haradinaj et al.* trial.

² Prosecution’s Response to “Bajrush Morina’s Second Request for a Declaration of Inadmissibility and Exclusion of Evidence” with Confidential Annexes A through J, 26 August 2008, Confidential Annex B, Witness Statement of PW-17, 20 September 2007, para. 19.

³ Decision on Review of Indictment, 12 February 2008.

⁴ Indictment, 8 January 2008.

⁵ Order Lifting Confidentiality of the Indictment, 25 April 2008.

⁶ Hearing 29 April 2008, Transcript pp 7-8.

⁷ “Motions and replies and responses before a Chamber will not exceed 10 pages or 3,000 words, whichever is greater”, Practice Direction on Length of Briefs and Motions, IT/184/Rev.1, 16 September 2005.

⁸ Motion, para. 28.

- the transcripts of the audio recordings (Prosecution 65^{ter} Nos. 1(A) and 2(A); and
- the two still images from the video recordings (Prosecution 65^{ter} Nos. 29 and 30).

4. On 25 August 2008, the Haraqija Defence confidentially filed the “Astrit Haraqija’s Request to Join Bajrush Morina’s Second Request for a Declaration of Inadmissibility and Exclusion of Evidence Dated 18 August 2008” (“Joinder Motion”), in which it requests permission to join the Motion, with all arguments set forth therein to be considered on behalf of the Accused Haraqija, and the relief resulting from a decision on the Motion to be equally applied to the Accused Haraqija.⁹

5. On 26 August 2008, the Prosecution confidentially filed the “Prosecution’s Response to Bajrush Morina’s Second Request for a Declaration of Inadmissibility and Exclusion of Evidence” with Confidential Annexes A through J” (“Response”), requesting leave of the Trial Chamber to file a Response in excess of the applicable word limit, and a dismissal of the Motion.¹⁰

6. On 1 September 2008, the “Astrit Haraqija’s and Bajrush Morina’s Joint Application for Leave to Reply and Joint Reply to ‘Prosecution’s Response to Bajrush Morina’s Second Request for a Declaration of Inadmissibility and Exclusion of Evidence’ with Confidential Annexes A through J” was filed confidentially (“Joint Reply”), whereby both Defences request leave to file a reply to the Response in order to clarify alleged misinterpretations of the law or incorrect assertions.

B. Submissions of the Morina Defence

7. The Morina Defence contends that the secret audio surveillance of the alleged conversations between the Accused Morina and PW-17, on 10 and 11 July 2007, conducted by REDACTED [a third country’s] police, lacks a legal basis in REDACTED domestic law.¹¹ In addition, it is alleged that the secret video surveillance of those conversations conducted by the REDACTED police was carried out without a court order, as required by REDACTED domestic law.¹²

8. The Morina Defence requests that, as a result of the illegality of the obtained audio and video recordings of the two intercepted conversations between the Accused Morina and PW-17, including the two still images from these video recordings, as well as the respective transcripts, the Trial Chamber should declare this evidence inadmissible on two grounds:

⁹ Joinder Motion, paras 1-2.

¹⁰ See fn. 7 *supra*.

¹¹ Motion, paras 10-16.

¹² Motion, para. 17.

- (a) Pursuant to Rule 89(D) of the Rules, the probative value of the obtained evidence is substantially outweighed by the need to ensure that the fundamental rights of both the Accused to a fair trial are not violated;¹³ and
- (b) Pursuant to Rule 95 of the Rules, the admission of the obtained evidence would be antithetical to, and would seriously damage the integrity of the proceedings.¹⁴

9. The Morina Defence specifically avers that the standard enunciated in the Tribunal's jurisprudence on exclusion of evidence pursuant to Rules 89(D) and 95 does not apply when an accused is charged with contempt, rather than with crimes under the Tribunal's Statute.¹⁵ Moreover, the Morina Defence submits that the circumstances under which the audio and video recordings were taken in the present case, unlike in most other cases before the Tribunal, are unrelated to an armed conflict. Rather, the audio and video recordings "were illegally taken in times of peace in a member state of the European Union [...]"¹⁶

C. Submissions of the Prosecution

10. The Prosecution contends that the Motion should be denied on the grounds that the audio and video recordings of the two conversations between PW-17 and the Accused Morina were "not secret" and obtained lawfully by REDACTED [a third country's] police as this was carried out with the knowledge and consent of PW-17.¹⁷ Furthermore, the Prosecution avers that Rules 89(D) and 95 of the Rules do not bar the admission of evidence obtained in violation of national laws.¹⁸

D. Discussion

11. The Trial Chamber needs to determine whether grounds exist under Rule 89(D) and Rule 95 of the Rules to declare inadmissible the materials gathered by the audio and video surveillance.

(a) Rule 89

12. Rule 89(C) of the Rules provides that "[a] Chamber may admit any relevant evidence which it deems to have probative value". Rule 89(D) of the Rules sets forth that "[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair

¹³ Motion, paras 19-21.

¹⁴ Motion, paras 22-27.

¹⁵ Motion, para. 20.

¹⁶ Motion, para. 23.

¹⁷ Response, paras 2-11.

¹⁸ Response, paras 12-21.

trial". The Trial Chamber is thus required to adopt a balancing test to ensure that the right of an accused to a fair trial is not violated as a result of the admission of the evidence.¹⁹

13. To assess the appropriate application of this standard to the present case, the Trial Chamber had regard to the jurisprudence of this Tribunal and took into account the case-law of the ECtHR relevant to the right to a fair trial guaranteed under Article 6 of the ECHR.

14. The Trial Chamber in *Brdanin* held that

[...] it is obvious that the drafters of the Rules specifically chose not to set out a rule providing for the automatic exclusion of evidence illegally or unlawfully obtained and opted instead to leave the matter of admissibility of evidence irrespective of its provenance to be dealt with under and in accordance with Rules 89 and 95 [...]²⁰

15. According to the jurisprudence of the Tribunal, the approach adopted by the Rules is clearly one in favour of admissibility as long as the evidence is relevant and is deemed to have probative value (Rule 89(C)), and its probative value is not substantially outweighed by the need to ensure a fair trial (Rule 89(D)).²¹ Specifically in respect of evidence obtained in violation of domestic law, the Trial Chamber endorses the conclusion of the *Brdanin* Trial Chamber:

It is clear from the review of national laws and international law, and the Rules and practice of this International Tribunal, that 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.²²

16. In response to the argument proffered that intercept evidence would be inadmissible under the existing law of Bosnia and Herzegovina, Judge Robinson in the *Kordić* case stated that "[i]ts inadmissibility under Bosnian law wouldn't necessarily make it inadmissible in these proceedings".²³

17. The Trial Chamber disagrees with the Morina Defence that these principles should not also apply to cases of contempt of court under Rule 77 of the Rules. The Rules, and the jurisprudence interpreting them, are not tailored for specific types of cases, but have to be followed irrespective of the charges brought.²⁴

18. In the ECtHR, the general rule has been established that

¹⁹ *Brdanin* Decision, para. 62.

²⁰ *Brdanin* Decision, para. 54. See also *Brdanin* Decision, para. 63, sub-para. 9; and Judge Robinson during the debate in *Prosecutor v. Kordić and Cerkez*, Case No. IT-95-14/2-T, 2 February 2000, ("*Kordić and Cerkez*") T. 13670, arguing that inadmissibility under the law of Bosnia and Herzegovina does not necessarily make evidence inadmissible under Rule 89 or 95 of the Rules.

²¹ *Prosecutor v. Delalić, et al.*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, Case No. IT-96-21-T, 19 January 1998, para. 16; *Brdanin* Decision, para. 21.

²² *Brdanin* Decision, para. 55.

²³ *Kordić and Cerkez*, Transcript p. 13670. See also fn. 20 *supra*; *Brdanin* Decision, para. 63, sub-para. 4, endorsing this statement.

[...] the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair [...]²⁵

In the case of *Schenk*, the ECtHR held that Article 6 of the ECHR, which guarantees the right to a fair trial, does not set out any rules on the admissibility of evidence, which is a matter left primarily to national law: "The court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence [...] may be admissible".²⁶ In the *Khan* Judgement, the ECtHR took the view that the use of secretly taped material, obtained in breach of ECHR rights, "did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention".²⁷ In *P.G. and J.H. v. United Kingdom*, the ECtHR found that the use of a covert listening device to record conversations, although in violation of Article 8 ECHR, did not violate the right to a fair trial.²⁸

19 Considering the case law referred to above, the Trial Chamber does not find it necessary to determine whether the audio and video surveillance of the two conversations between the Accused Morina and PW-17 on 10 and 11 July 2007 met the requirements under REDACTED [a third country] law, an issue on which the parties disagree. Even if those requirements were not met, this would not dispose of the issues raised in the Motion. Following the approach taken in *Brđanin*, the Trial Chamber will therefore examine "the manner and surrounding circumstances in which evidence is obtained", as well as the criteria for admission under the Rules, in order to determine whether it should be declared inadmissible. This enquiry will be conducted in three steps: (i) an overall assessment of the circumstances of the audio and video recordings; (ii) the relevance of the evidence; and (iii) the probative value of the evidence.

20 The Trial Chamber is satisfied that the surrounding circumstances show that the REDACTED police carried out the surveillance in good faith to protect the security of PW-17.²⁹

²⁴ See also Rule 77(E): "The rules of procedure and evidence [...] shall apply *mutatis mutandis* to proceedings under this Rule".

²⁵ *Van Mechelen and Others v. The Netherlands*, 25 EHRR 647, 1998, para. 50. See also *Schenk v. Switzerland*, Application no. 10862/84, Judgement, 12 July 1988, ("Schenk Judgement"), para. 46; *Khan* Judgement, para. 34; and *P.G. and J.H. v. United Kingdom*, Application no. 44787/98, Judgement, 25 September 2001, ("P.G. and J.H. Judgement"), para. 76.

²⁶ *Schenk* Judgement, para. 46. *But see*, the joint dissenting opinion of Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo who emphasised that "compliance with the law when obtaining evidence [...] is of the first importance for the fairness of a criminal trial. No court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means but, above all, unlawfully" (cited in the Motion, para. 21).

²⁷ *Khan* Judgement, para. 40. *But see*, the partly concurring, partly dissenting opinion of Judge Loucaides who argued that a trial could not be considered to be a fair trial "if a person's guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by this Convention" (cited in the Motion, para. 21).

²⁸ *P.G. and J.H. Judgement*, para. 81, *but see* the partially dissenting opinion of Judge Tulkens: "I do not think a trial can be described as "fair" where evidence obtained in breach of a fundamental right guaranteed by the Convention has been admitted during that trial. [...] Fairness presupposes compliance with the law and thus also, *a fortiori*, respect for the rights guaranteed by the Convention" (cited in the Motion, para. 21).

²⁹ See *Brđanin* Decision, para. 63, sub-para. 1, noting the relevance of "good faith" in obtaining evidence.

The *Haradinaj* Trial Chamber found itself under “a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe”.³⁰ It is in this context that the surveillance action taken by the REDACTED police must be understood. In addition, the Trial Chamber at this stage has no reason to assume that it was *not* Morina who initiated the meeting with PW-17, which would remove any suggestion that Morina was somehow entrapped or coerced into participating in the conversations.³¹

21. The Trial Chamber is also satisfied as to the relevance of the audio and video surveillance evidence as to the charges in the present case. The Trial Chamber notes that the Defence has not challenged the admissibility of this evidence on the ground of its relevance.

22. Finally, the Trial Chamber is satisfied that the audio and video recording has probative value. The determination of whether evidence has probative value requires an assessment of the reliability of the evidence.³² Evidence, the authenticity of which cannot be proved beyond reasonable doubt, will be eventually excluded.³³ In this context, the Trial Chamber notes that the Defence does not challenge the authenticity of the audio and video surveillance.

23. For these reasons, the Trial Chamber finds that the admission of the audio and video surveillance evidence would not be contrary to Rule 89 of the Rules.

(b) Rule 95

24. Rule 95 of the Rules sets forth:

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

25. Rule 95 of the Rules provides for the exclusion of improperly obtained evidence. It declares 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. Even on the assumption that the audio and video surveillance was unlawful under domestic law, the Trial Chamber is of the view that admitting such material into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings under Rule 95 of the Rules.³⁴

³⁰ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgement, 3 April 2008, para. 6.

³¹ Response, para. 18.

³² *Brdanin* Decision, para. 66.

³³ *Ibid.*, para. 68.

³⁴ Judge May during the debate in *Kordić and Cerkez*, Transcript p. 13694, stated that the admission of a telephone intercept recording in violation of the law of Bosnia and Herzegovina was “not antithetical to and certainly would not seriously damage the integrity of the proceedings”.

26. In this regard, the Trial Chamber is again guided by the holding of Trial Chamber in *Brdanin* that:

[...] in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged [...]³⁵

As found earlier, the circumstances of the audio and video recordings are such as to militate towards the admission of the evidence.³⁶

27. The Morina Defence specifically argues that the use of one of the audio recordings by the Prosecution's investigators when the Accused Morina was interviewed as a suspect, without pointing out the illegality of the evidence, indicates that the use of this material "significantly affected and still affects the fairness and integrity of the proceedings".³⁷ The Prosecution responds that the audio recordings were played so as to provide the Accused Morina with a fair chance to be aware of the information in the possession of the Prosecution and that the Morina Defence has failed to explain how the criticism by the REDACTED police is relevant to the issue of the admission or exclusion of this evidence.³⁸

28. The Trial Chamber has previously denied a request to declare inadmissible and exclude from the evidence the suspect interview of the Accused Morina.³⁹ Then, the Morina Defence did not argue that the suspect interview should be excluded because the Accused Morina had not been made aware of the illegality of the audio recording.

29. Recalling the elementary distinction between the admissibility of documentary evidence and the weight ultimately accorded to it under the principle of free evaluation of evidence,⁴⁰ the Trial Chamber finds that the Morina Defence objections are more directed to the weight to be attributed to the suspect interview, rather than the admissibility of the audio and video recordings.

30. In light of the preceding analysis, the Trial Chamber finds that the admission of the audio and video surveillance evidence would not be contrary to Rule 95 of the Rules.

³⁵ *Ibid.*, para. 61.

³⁶ See para. 33 *supra*.

³⁷ Motion, para. 26. In addition, the Defence draws attention to criticism made by the [REDACTED] police about the Prosecution's use of the recording during the suspect interview, Motion, para. 27.

³⁸ Response, paras 19-20.

³⁹ Decision on Bajrush Morina's Request for a Declaration of Inadmissibility and Exclusion of Evidence, 28 August 2008.

⁴⁰ *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, 19 January 2006, Annex A, para. 2; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Decision on Admission into Evidence of Documents Tendered during Witness Salko Gusić's Testimony in Court, 24 February 2005; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-PT, Provisional Order on the Standards Governing the Admission of Evidence and Identification, 25 February 2002, Annex, para. 1.

E. Disposition

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

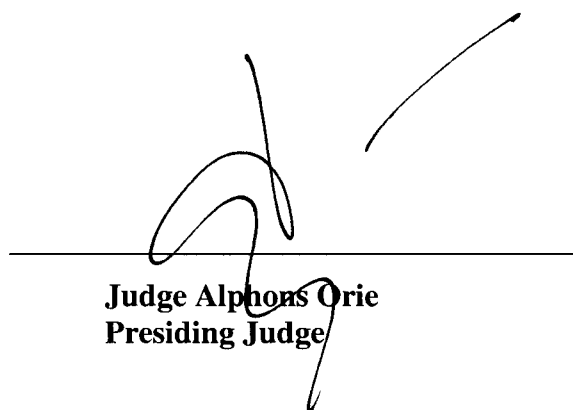
GRANTS permission for the Motion and the Response to exceed the specified word limit for such requests; and

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

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

Dated this twenty-seventh day of November 2008

At The Hague
The Netherlands



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over a solid horizontal line. The signature is positioned to the right of the center of the page.

Judge Alphons Orie
Presiding Judge

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