IT-02-54-R77.5
D1353-D1346
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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 the Former Yugoslavia since 1991	Case No.	IT-02-54-R77.5
		Date:	29 January 2009
		Original:	English

IN A SPECIALLY APPOINTED CHAMBER

Before: **Judge Carmel Agius, Presiding**
Judge Alphons Orie
Judge Bakone Justice Moloto

Acting Registrar: **Mr John Hocking**

Decision of: **29 January 2009**

IN THE CASE AGAINST

FLORENCE HARTMANN

PUBLIC

JOINT DECISION ON DEFENCE MOTION FOR RECONSIDERATION AND DEFENCE MOTION FOR VOIR-DIRE HEARING AND TERMINATION OF MANDATE OF THE *AMICUS* PROSECUTOR

***Amicus Curiae* Prosecutor**

Mr Bruce MacFarlane, QC

Counsel of the Accused

Mr Karim A. A. Khan, Lead Counsel
Mr Guénaël Mettraux, Co-Counsel

1. The Specially Appointed Chamber ("Chamber") is seized of the Defence "Motion for Voir-Dire Hearing and for Termination of Mandate of the *Amicus* Prosecutor", filed both publicly and confidentially on 9 January 2009 ("Motion for Voir-Dire"), and Defence "Motion for Reconsideration", filed both publicly and confidentially on 14 January 2009, and hereby renders its decision thereon.

A. Motion for Reconsideration

Procedural History

2. On 9 January 2009, the Defence filed a confidential motion requesting reconsideration or stay of proceedings, with a word count of 27,400.[1] On 13 January 2009, the Chamber ordered the Defence to re-submit the filing in accordance with the word limit prescribed in the Practice Direction on the Length of Briefs and Motions.[2]

3. On 14 January 2009, the Defence re-submitted the motion, both publicly and confidentially, limiting its submission to the issue of reconsideration.[3] By urgent order to the Registry on 15 January 2009, the Chamber instructed the Registry to reclassify as confidential the status of several Annexes attached to the public Motion as these Annexes were referred to only in the confidentially filed Motion.[4]

4. On 16 January, the Prosecution responded to the Motion for Voir-Dire.[5]

5. On 19 January 2009, the Prosecution responded to the Motion for Reconsideration.[6] The Defence filed a reply to the Response on 22 January 2009.[7] The Chamber does not grant leave to the Defence to reply as it considers the Motion and Response to satisfactorily address the issues before it.

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[1] Motion for Reconsideration or Stay of Proceedings, filed confidentially on 9 January 2009
[2] Practice Direction on the Length of Briefs and Motions, IT/184-Rev.2, 16 September 2005, section 5.
[3] Motion for Reconsideration, filed both publicly and confidentially on 14 January 2009, para. 5. The Defence formally withdrew its request for clarification from the Chamber as to what facts it is permitted to discuss in its public filings, as outlined in its "Motion for Clarification Pertaining to Confidential Status of Facts Relevant to the *Hartmann* Case," filed publicly on 9 January 2009, para. 2. Further, the Chamber considers the Motion for Reconsideration to constitute a formal withdrawal of the Motion for Reconsideration or Stay of Proceedings, filed confidentially on 9 January 2009.
[4] Urgent Order to the Registry, filed confidentially on 15 January 2009.
[5] Prosecution's Response to Defence Motion for Voir-Dire Hearing and Termination of Mandate of the *Amicus* Prosecutor, 16 January 2009.
[6] Prosecution's Response to Defence Motion for Reconsideration, 16 January 2009. A Public Redacted Version" of the Response was filed on 26 January 2009.
[7] Defence Reply Regarding Motion for Reconsideration, 22 January 2009.

Applicable law

6. According to the jurisprudence of the Tribunal, a Chamber has the inherent discretionary power to reconsider its previous decision in exceptional cases, if the requesting party satisfies the Chamber of the existence of a clear error of reasoning in the impugned decision, or if particular circumstances exist justifying its reconsideration in order to prevent an injustice.[8] New facts or arguments that arise after the issuance of the decision may constitute circumstances justifying reconsideration.[9]

Submissions

7. In its Motion, the Defence makes a number of arguments as to why, in their view, the decision to initiate contempt proceedings against Florence Hartmann ("the Accused") should be reconsidered, in order to prevent "a great injustice."[10] It submits that the facts raised in the Motion are all facts which "go to the legitimacy, propriety and legality of the proceedings", and therefore should have been considered by the Chamber when deciding to initiate proceedings.[11] On this basis, the Defence requests the Chamber to reconsider its Order in Lieu of Indictment against the Accused and to dismiss the charges against her.[12]

8. According to the Defence, the investigation conducted by the *amicus curiae* investigator ("*Amicus* Investigator") was flawed because it failed to put before the Chamber the fact that the information the Accused is alleged to have disclosed had already entered into the public domain by way of the Tribunal "and/or" the party which sought the protective measures ("Applicant").[13] As a result, the Defence contends, the Accused is being prosecuted for disclosing facts that have lost "any legitimate claim to confidentiality".[14] It submits that criminal prosecution for the disclosure of "public facts" is disproportionate and contrary to the public interest.[15]

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[8] *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Decision on Submissions of the Accused Concerning Legality of Arrest, 18 December 2008 ("*Tolimir* Decision"), para. 11; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Stojić Defence Request for Reconsideration, filed on 21 November 2008 ("*Prlić* Decision"), pp. 2-3; *Prosecutor v. Haraqija and 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 ("*Haraqija and Morina* Decision"), para. 11.
[9] *Prlić* Decision, pp. 2-3; *Haraqija and Morina* Decision, para. 11.
[10] Motion, paras 12-13.
[11] Motion, para. 11.
[12] Motion, para. 53.
[13] Motion, para. 7.
[14] Motion, para. 37.
[15] Motion, para. 9.

9. The Defence further submits that, in principle, the disclosure of confidential information already known to the public is not serious enough to warrant a conviction for contempt.[16] In addition, the Defence submits that none of the individuals who allegedly disclosed some or all of the same facts for which the Accused has been charged, have been indicted, and therefore a decision to initiate contempt proceedings against the Accused amounts to an unfair and unreasonable "exemplary prosecution".[17] Further, the Defence submits that the initiation of contempt proceedings in this case falls short of internationally recognized human rights standards.[18]

10. Finally, the Defence submits that the *Amicus* Investigator did not put before the Chamber, for consideration when making its decision to initiate contempt proceedings, the absence in this case of 1) any prejudice to the Applicant, 2) actual interference with the administration of justice, 3) disclosure of the content of protected material, and 4) intent by the Accused to damage the Tribunal's reputation or witness endangerment. Further, it submits, the *Amicus* did not address the familial and economic situation of the Accused.[19]

11. In his response, the *Amicus Curiae* Prosecutor *("Amicus* Prosecutor") submits that the Defence arguments seek to refute that the Accused committed the *actus reus* and possessed the *mens rea* required for contempt under Rule 77(A)(ii) of the Rules,[20] and that these matters are best left for trial. He nonetheless responds to a number of the Defence submissions.[21]

12. The *Amicus* Prosecutor submits 1) that he did in fact draw this to the Chamber's attention and thereby informed the Chamber of the possibility that information which the Accused is alleged to have disclosed was already in the public domain, and 2) that he was guided by the Tribunal's jurisprudence on the issue, *i.e.,* the entering of confidential information into the public domain by a third party does not mean that the information was no longer protected, that the court order had been *de facto* lifted, or that its violation would not interfere with the Tribunal's administration of justice.[22] According to the *Amicus* Prosecutor, the Defence submission (that the party which is the beneficiary of the protective orders can

[16] Motion, para. 19, 21; *see Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-R77.5, Decision on Motion for Acquittal Pursuant to Rule 98 *bis,* 19 March 2004 ("*Brđanin* Decision").
[17] Motion, paras 39-40.
[18] Motion, paras 48-50.
[19] Motion, para. 47.
[20] Response, para. 6.
[21] Response, para. 6.
[22] Response, para. 9, citing to the *Prosecutor v. Josip Jović,* Case No. IT-95-14&14/2-R77-A, Judgement, 15 March 2007 ("*Jović* Judgement"), para. 30.

waive its protection) is contrary to Tribunal jurisprudence holding that a court order remains in force until a Chamber decides otherwise.[23]

13. With regard to the Defence submission that the disclosure of confidential information already in the public domain is insufficiently serious to warrant a conviction for contempt, the *Amicus* Prosecutor submits that *Haxhiu*, *Margetić*, and *Jović* were all convicted for disclosing facts already in the public domain, and further that the Defence proposition in this regard is unsupported by the case law relied upon by the Defence.[24] Regarding the allegation of "exemplary prosecution", the *Amicus* Prosecutor contends that the Defence has failed to discharge the burden set out by the Appeals Chamber which requires an accused to establish 1) the existence of an unlawful or improper motive for the prosecution, and 2) that other similarly placed persons were not prosecuted.[25]

14. Concerning the issue of freedom of expression, the *Amicus* Prosecutor submits that, as demonstrated by the findings of the Trial Chambers in the *Margetić* and *Jović* contempt cases, the freedom of expression of journalists is not unlimited in court proceedings.[26] Finally, with respect specifically to the question of actual interference with the administration of justice, the *Amicus* Prosecutor argues that this is not an element of contempt requiring proof.[27]

Discussion

15. The Chamber will deal with the submissions in turn, but will limit its analysis of the arguments raised by the Defence to those which are relevant to the applicable standard for reconsideration. With regard to the remaining matters raised by the Defence, the Chamber considers these are more appropriately dealt with at trial, and will therefore not seek to resolve them in this decision.

16. Pursuant to Rule 77, a Chamber has discretionary power to initiate contempt proceedings.[28] When exercising this discretion, a Chamber must carefully consider whether contempt proceedings "are the most effective and efficient way to ensure compliance with

[23] Response, paras 12-13.
[24] Response, paras 14-16.
[25] Response, para. 21, citing to the *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeals Judgement"), paras 607-611.
[26] Response, para. 22.
[27] Response, paras 17-18, citing to *Prosecutor v. Marijačić and Rebić*, Case No. IT-95-14-R77.2-A, 27 September 2006, para. 44 and *Prosecutor v. Jović*, Case No. IT-95-14&14/2-R77-A, 15 March 2007, para. 30.
[28] Rule 77(D) and Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal, IT/227, 6 May 2004 ("Practice Direction on Contempt"), Article 13.

obligations flowing from the Statute or the Rules in the specific circumstances of the case".[29] In exercising this discretion, when issuing the Order in lieu of Indictment on 27 August 2008, the Chamber conducted a *prima facie* evaluation of the indicia related to the *actus reus* and *mens rea* of the alleged contemptuous behaviour, and the harm caused by such behaviour to the credibility and functioning of the Tribunal. It especially considered the fact that there was *prima facie* evidence suggesting that the Accused had published the content of the confidential decisions.

17. Whether confidential information the Accused is alleged to have disclosed was already in the public domain, to the extent this is relevant, is an issue which was drawn to the attention of the Chamber by the *Amicus* Investigator, and may, moreover, be an issue more appropriately dealt with at trial. The Tribunal's jurisprudence on the disclosure of confidential information is clear; an order remains in force until a Chamber decides otherwise.[30] The fact that there is information in the public domain—which may include facts allegedly disclosed by the Accused —does not mean that an order has been lifted, that the information in the order is no longer protected, or that any person may disclose such information.[31]

18. As to whether the Applicant waived its right to protection of the protected information by disclosing that information into the public domain itself, the Chamber recalls that that even if the Applicant could waive the confidentiality of protected information, there is no indication that either of the two sources on which the Defence relies in support of its submission, were officially acknowledged by the Applicant.[32]

Conclusion

19. For the reasons discussed above, the Chamber does not find that there are particular circumstances exist to justify its reconsideration of the decision to initiate contempt proceedings in order to "prevent an injustice". Moreover, the Chamber is not satisfied of the existence of a clear error of reasoning in its decision to initiate contempt proceedings against the Accused. The requirements for reconsideration by the Chamber of its decision to proceed with an Order in lieu of Indictment against the Accused are therefore not met.

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[29] *Prosecutor v. Karemera et al.*, Case ICTR-98-44-AR.91, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony" and on Motion for Oral Arguments, 22 January 2009, paras 18, 21.
[30] *Prosecutor v. Josip Jović*, Case No. IT-95-14 &14/2-R-77-A, Judgement, 15 March 2007 ("*Jović* Appeals Judgement"), para. 30.
[31] *see Jović* Appeals Judgement, para. 30.

B. Motion for Voir-Dire

20. The Chamber considers, in light of its conclusion relating to the Motion for Reconsideration, that the request for a voir-dire hearing is rendered moot. However, the Motion for Voir-Dire also raised a parallel issue relating to the appointment of the *Amicus* as Prosecutor in this case. The Defence submits that he was appointed in violation of the relevant regulations, and submits further that his appointment "fall[s] foul of the Statute" as it creates an appearance of lack of independence and impartiality of the proceedings.[33]

21. The Defence submit that neither the Statute or the Rules gives any authority to the Registrar to appoint as *Amicus* Prosecutor the person who has investigated the charges as *Amicus* Investigator, relying on Articles 14 and 15(ii) of the Practice Direction on Contempt[34] in support.[35]

22. Article 14 of the Practice Direction provides that in accordance with Rule 77(D) of the Rules, where the *amicus curiae* investigator was appointed to investigate the allegation pursuant to Rule 77(C)(ii) of the Rules, the adjudicating Chamber may direct the *amicus curiae* to prosecute the matter. Pursuant to Article 15(ii) of the Practice Direction, where the adjudicating Chamber decides to issue an order in lieu of an indictment, it may direct the Registrar to appoint, on behalf of the adjudicating Chamber, an impartial party as the *Amicus* Prosecutor to prosecute the charges detailed by the adjudicating Chamber. Neither Articles 14 nor 15(ii) of the Practice Direction suggest that the authority of the Registrar to appoint an *Amicus* Prosecutor is limited to those cases where the person assigned to that role is different from the person who investigated the matter. Moreover, the Chamber notes that Article 16 of the Practice Direction on Contempt sets out that it is the Registrar, pursuant to the directive stated in Article 15(ii), who shall identify the *Amicus* Prosecutor.

23. Furthermore, the Chamber notes that pursuant to Rule 77(C)(ii) and (iii) of the Rules, it may initiate an investigation into an allegation of contempt itself. The same Chamber, pursuant to Rule 77(D)(ii) of the Rules, may then proceed with prosecution of the alleged contempt. It sees no reason, therefore, why an *Amicus* investigator could not be appointed as an *Amicus* Prosecutor in the same case. There is no rule stating that a person who took part in the investigation of a case may not then take part in its prosecution.

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[32] These sources were included in confidential annexes (14 and 24) of the Defence Motion for Reconsideration.
[33] Motion for Voir-Dire, paras 9-10, 13-24.
[34] Motion for Voir-Dire, para. 17.
[35] Motion for Voir-Dire, paras 18-21.

24. Concerning the Defence submission that the *Amicus* Investigator's appointment would give rise to an appearance of lack of independence and impartiality, the Chamber is of the view that the considerations outlined by the Defence in this respect fail to consider that the Rules, as well as the Practice Direction on Contempt allow for an appointed *Amicus* Investigator to be appointed the *Amicus* Prosecutor in the same case. Moreover, the Defence submission appears to rely on the inadequacy of the *Amicus* Investigator's report. As noted in Section A of this decision dealing with the Motion for Reconsideration, however, the Chamber does not find that the report was inadequate.

C. Disposition

25. For the foregoing reasons, and **PURSUANT** to Rules 54, 77 and the Practice Direction on Contempt;

DENIES the Motion;

DENIES the Motion for Voir-Dire, relating to the issue of illegitimate appointment of the *Amicus* Prosecutor and the appearance of a lack of impartiality and independence; and

RENDERS as moot the request in the Motion for Voir-Dire for a voir-dire proceeding.

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

Judge Carmel Agius
Presiding Judge

Dated this twenty-ninth day of January 2009
At The Hague
The Netherlands

[Seal of the Tribunal]