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-95-5/18-T

Date: 18 April 2012

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **18 April 2012**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION FOR RECONSIDERATION OF CHAMBER'S DECISION ON MOTION TO EXCLUDE INTERCEPTED COMMUNICATIONS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER 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 ("Tribunal") is seised of the Accused's "Motion for Reconsideration of Decision on Motion to Exclude Intercepted Communications", filed on 22 March 2012 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. On 30 September 2010, the Chamber issued the "Decision on the Accused's Motion to Exclude Intercepted Conversations" ("Decision on Intercepts"), in which it denied the Accused's motion to exclude from the record pre-war intercepted conversations on the ground that they were intercepted in violation of Bosnian law and universal principles of the right to privacy.[1] The Chamber found that the Accused had failed to establish—pursuant to Rules 89(C), 89(D), and 95 of the Tribunal's Rules of Procedure and Evidence ("Rules")—that admitting the intercepted conversations into evidence would be antithetical to or seriously damage the integrity of the proceedings.[2] The Chamber also considered that "intercepted evidence, even if it may have been obtained in violation of applicable domestic law, should not automatically be excluded from admission into evidence".[3]

2. In the Motion, the Accused now moves for reconsideration of the Decision on Intercepts and requests the exclusion of all intercepted conversations prior to 6 April 1992 ("Intercepted Conversations").[4] He argues that reconsideration is necessary in light of evidence received by the Chamber that the Intercepted Conversations were not authorised by court order and that this lack of authorisation means that the intercepts contravene the Constitution of Bosnia and Herzegovina ("BiH Constitution").[5] According to the Accused, Amendment 69(4) of the BiH Constitution states that "only by law and based on a court order is it possible to regulate the departure from the principle of inviolability of confidentiality of a letter and other means of communications, should it be deemed necessary for conducting criminal proceedings, or it being an issue of the country's security".[6] The Accused argues that the Intercepted Conversations were made without a court order and were therefore in violation of Amendment 69(4), thus warranting reconsideration of the

[1] Decision on Intercepts, paras. 3, 13.
[2] Decision on Intercepts, paras. 6, 12.
[3] Decision on Intercepts, para. 12.
[4] Motion, paras. 1, 2, 13.
[5] Motion, paras. 1, 5–6, 13.
[6] Motion, para. 5.

Decision on Intercepts.[7] He submits that reconsideration is necessary to prevent an injustice, namely "rewarding those who violated the law by allowing the fruits of their illegal wiretapping to be used as evidence in an international criminal proceeding".[8]

3. In the "Prosecution Response to Motion for Reconsideration of Decision Denying Motion to Exclude Intercepted Conversations", filed confidentially on 30 March 2012 ("Response"), the Office of the Prosecutor ("Prosecution") argues that the Motion should be denied because it only "provides further particulars" supporting arguments that the Chamber already dismissed in the Decision on Intercepts.[9] The Prosecution thus contends that there is nothing to demonstrate the existence of particular circumstances justifying reconsideration.[10] The Prosecution further argues that, pursuant to well-established Tribunal case law, the admissibility of evidence before the Tribunal is a distinct determination from the question of whether the evidence was obtained legally pursuant to domestic law.[11] Finally, the Prosecution contends that the Motion should be reclassified because it refers to closed session testimony.[12]

II. Applicable Law

4. The Chamber recalls that there is no provision in the Rules for requests for reconsideration. Such requests are the product of the Tribunal's jurisprudence and are permissible only under certain conditions.[13] The standard for reconsideration of a decision set forth by the Appeals Chamber is that "a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice'".[14] Thus, the requesting party is under an obligation to satisfy the Chamber

[7] Motion, paras. 6–9.
[8] Motion, para. 9.
[9] Response, paras. 1–6.
[10] Response, para. 3.
[11] Response, para. 4.
[12] Response, note 1.
[13] *See Prosecutor v. Prlić et al*., Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.
[14] Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, para. 12, citing *Prosecutor v. S. Milošević*, Case No. IT-02-54-AR108*bis*.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 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); *see also Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[15]

III. Discussion

5. The Chamber notes that in the Motion, the Accused only reiterates the challenge he has already raised regarding the alleged illegality of intercepts pursuant to Bosnian law, this time arguing that the intercepts are in violation of the BiH Constitution. The Chamber also notes that the Accused's Legal Adviser, by his own admission, acknowledges that the Chamber would likely deny the Motion, thus leaving the Chamber unclear as to the utility of filing the Motion in the first place.[16] For the sake of completeness, the Chamber will nevertheless examine whether the test for reconsideration is met.

6. The Chamber reiterates that intercepted evidence should not automatically be excluded from admission into evidence if obtained in violation of domestic law. Once again, the Accused has failed to establish how the fairness of his trial may be hindered from the admission of evidence that may have been obtained in violation of applicable domestic law. Thus, even assuming *arguendo* that such intercepts were obtained in contravention of the BiH Constitution, the Accused has failed to satisfy the Chamber of the existence of a clear error in reasoning in the Decision on Intercepts. The Accused has also failed to demonstrate the existence of particular circumstances justifying reconsideration in order to prevent an injustice.

7. Finally, the Chamber notes that the Motion does refer to evidence received by the Chamber in closed session. The Chamber recalls that it is not for the parties to decide by themselves what can be confidential or not when protective measures are in place pursuant to an existing Chamber's order to that effect.[17] The Chamber thus informs the Accused that he ought not refer to evidence received in closed session in the future unless prior authorisation has been sought from the Chamber. However, due to the vagueness of the Motion in that respect and the fact that the information contained therein may not identify any protected witness, the Chamber does not consider that in this specific instance reclassification of the Motion as confidential is warranted. Furthermore, given that the Response does not provide any additional information in relation to the

[15] *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004, p. 2; *see also Prosecutor v. Popović et al*., Case No. IT-05-88-T, Decision on Nikolić's Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2–3.

[16] T. 26524–26525 (closed session) (21 March 2012).

[17] *See In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 52; *Prosecutor v. Šešelj*, Case. No. IT-03-67-R77.3, Public Redacted Version of "Judgement" Issued on 31 October 2011, 31 October 2011, paras. 3031.

closed session evidence than that provided in the Motion, the Chamber considers that it should be reclassified as public.

IV. Disposition

8. Accordingly, the Chamber, pursuant to Rules 54, 89, and 95 of the Rules, hereby **DENIES** the Motion and **ORDERS** the Registry to reclassify the Response as public.

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

Judge O-Gon Kwon
Presiding

Dated this eighteenth day of April 2012
At The Hague
The Netherlands

[Seal of the Tribunal]