



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: 30 September 2010

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: 30 September 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S MOTION TO EXCLUDE INTERCEPTED
CONVERSATIONS**

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 “Motion to Exclude Intercepted Conversations”, filed by the Accused on 17 August 2010 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 19 October 2009, the Office of the Prosecutor (“Prosecution”) filed its “First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component” (“First Motion”) in which it requested the Chamber to take judicial notice of a number of documents, amongst which were 164 intercepts of telephone conversations involving various individuals, including the Accused, in the period relevant to the Indictment.¹ On 11 March 2010, the Accused filed his “Second Supplemental Response to Motion for Judicial Notice of Documents” (“Second Response”) in which he objected to the admission of intercepted conversations on the grounds that they are “unreliable absent foundational testimony as to the manner and authority of the intercepts”.² The Accused further argued that the intercepts were unlawful; particularly those taking place before the war, and should be excluded pursuant to Rule 95 of the Tribunal’s Rules of Procedure and Evidence (“Rules”).³

2. On 31 March 2010, the Chamber issued its “Decision on the Prosecution’s First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component” (“First Decision”) in which it held that “the admission of an intercept into evidence does not depend on whether it was obtained legally or illegally; rather, the Chamber must simply be satisfied that the requirements for admissibility of evidence provided by Rule 89 are met and that there are no grounds for exclusion under Rule 95”.⁴ Moreover, the Chamber noted that it “considers intercepts to be a special category of evidence given that they bear no indicia or authenticity or reliability on their face. [...] [T]he authenticity and reliability of intercepts is established by further evidence, such as hearing from the relevant intercept operators or the participants in the

¹ First Motion, para. 1.

² Second Response, para. 2. On 23 December 2009, the Accused filed his “Response to Prosecution Motion for Judicial Notice of Documents and Motion for Further Extension of Time” (“First Response”) in which he provided a partial response to the Prosecution’s First Notice. The Accused was then granted additional time in which to file the Second Response.

³ Second Response, para. 2.

⁴ First Decision, para. 10 citing *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, 16 December 2009, para. 14; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on the Defence “Objection to Intercept Evidence” (“*Brđanin* Decision”) 3 October 2003, paras. 53–55.

intercepted conversation themselves.”⁵ On 1 July 2010, during the testimony of Momčilo Mandić, the Accused objected to the admission of two intercepts pursuant to Rule 95,⁶ at which time the Accused’s legal adviser, Peter Robinson, stated that “if for some reason we don’t feel that we’ve made all of the arguments under Rule 95 that we would like to, we can make a written submission”.⁷

3. In the Motion, the Accused moves, pursuant to Rule 95, for the exclusion from the record of all pre-war intercepted conversations obtained by the Bosnian government on the grounds that they were intercepted in violation of Bosnian law and universal principles of the right to privacy.⁸ The Accused argues that their admission would be antithetical to the integrity of the proceedings, would violate the privacy of Bosnia’s citizens, and would reward “ethnic divisionism”.⁹ The Accused maintains that the Chamber has not yet had the opportunity to consider in detail arguments related to the illegality of the intercepted conversations in this case, and whether such illegality rises to the level whereby the evidence should be excluded pursuant to Rule 95.¹⁰ Moreover, he argues that previous Trial Chambers have only examined whether certain intercepted conversations should be excluded on the sole basis of their illegality.¹¹

4. On 30 August 2010, the Prosecution filed the “Prosecution Response to Accused’s Motion to Exclude Intercepted Conversations” (“Response”) in which it argues that the Motion should be dismissed as an abuse of process in that the principle of *res judicata* prevents the Accused from seeking to relitigate the application of Rule 95 to evidence of intercepted telephone conversations.¹² In the alternative, the Prosecution argues that the Motion should be dismissed on the merits because the Accused has failed to establish either that the intercepts were obtained illegally or that any illegality would render them inadmissible pursuant to Rule 95.¹³

5. On 6 September 2010, the Chamber issued its “Decision on the Accused’s Motion for Leave to Reply: Intercepted Conversations” in which it granted the Accused leave to reply to the Prosecution’s Response. On 6 September 2010, the Accused filed his “Reply Brief: Motion to Exclude Intercepted Conversations” (“Reply”) in which he argues that because none of the intercepts now challenged were admitted pursuant to the Chamber’s First Decision, the Chamber

⁵ First Decision, para. 9.

⁶ Hearing of 1 July 2010 (T. 4476–4477).

⁷ Hearing of 1 July 2010 (T. 4477–4478).

⁸ Motion, para. 1.

⁹ Motion, paras. 13, 24.

¹⁰ Motion, para. 2.

¹¹ Motion, para. 24.

¹² Response, para. 1.

¹³ Response, para. 2.

should consider his arguments on the merits, rather than under the standard for reconsideration.¹⁴ In addition, the Accused further details his arguments on the merits.¹⁵

II. Applicable Law

6. The admission of evidence before this Tribunal is governed primarily by Rules 89 and 95 of the Rules. Rule 89(C) provides that a Chamber “may admit any relevant evidence which it deems to have probative value”. Rule 89(D) provides that a Chamber “may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”. Further, pursuant to Rule 95, evidence is not 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”.

7. It is well-settled that the approach adopted in Rule 89(C) is one which favours the admission of evidence so long as it is relevant and is deemed to have probative value which is not substantially outweighed by the need to ensure a fair trial.¹⁶ Accordingly, the Chamber must balance the fundamental rights of the accused with the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.¹⁷ Additionally, the Chamber need not consider whether evidence was obtained in conformity with the law of a particular domestic jurisdiction when determining its admissibility.¹⁸ Rule 89(A) provides that “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 generally principles of law”.

8. Tribunal jurisprudence is clear that evidence obtained illegally is not, *a priori*, inadmissible, but rather that the manner and surrounding circumstances in which the evidence was obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility.¹⁹ Accordingly, in applying Rule 95, the Chamber must consider all

¹⁴ Reply, paras. 3–4.

¹⁵ Reply, paras. 7–11.

¹⁶ *Prosecutor v. Haraqija and Morina*, Case No. 04-84-R77.4, Decision on Morina and Haraqija Request for a Declaration of Inadmissibility and Exclusion of Evidence (“*Morina* Decision”), 27 November 2008, para. 12; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Decision on the Admissibility into Evidence of Intercept-Related Materials (“*Blagojević* Decision”), 19 December 2003, para. 15; *Brđanin* Decision, para. 62; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Order on the Standards Governing the Admission of Evidence, 15 February 2002, para. 11; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 16.

¹⁷ *Brđanin* Decision, para. 61.

¹⁸ *Prosecutor v. Haraqija and Morina*, Case No. IT-04-84-R77.4-A, Judgement (“*Morina* Judgement”), 23 July 2009, para. 24.

¹⁹ *Brđanin* Decision, para. 55.

relevant circumstances and only exclude evidence if the integrity of the proceedings would otherwise be seriously damaged.²⁰

III. Discussion

9. As stated above, the Accused argues that the Chamber must exclude the proffered intercept evidence from the record not simply because it was obtained illegally, but because such illegality rises to a level which warrants exclusion of evidence pursuant to Rule 95.²¹ Specifically, the Accused contends that the intercepts are illegal because, by failing to inform the Presidency of Bosnia and Herzegovina pursuant to Bosnian law, the authorities conducting the interceptions bypassed important procedural safeguards as part of a deliberate plan to use the organs of a multi-ethnic State against a single ethnic group.²² The Accused refers to several instances where Trial Chambers have excluded evidence involving accused persons and obtained in violation of procedural safeguards set forth by the Tribunal, such as statements or transcripts of suspect interviews, and argues that the same position should be adopted regarding conversations with an accused which are intercepted electronically.²³

10. The Chamber considers the Accused's interpretation of the Rules and of the Tribunal's jurisprudence to be misplaced. Contrary to the Accused's submissions, Rule 95 does not serve to exclude evidence based on violations of procedural safeguards set forth in domestic law. In his analysis of Tribunal jurisprudence, the Accused fails to demonstrate how the admission of evidence allegedly obtained in contravention of Bosnian domestic law by Bosnian authorities would be so grave so as to result in damaging the integrity of the proceedings before the Chamber. In light of the Tribunal's mandate to prosecute persons allegedly responsible for serious violations of international humanitarian law, it would be inappropriate to exclude relevant and probative evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.²⁴

11. The Chamber does not consider that admitting intercepts of conversations involving the Accused that may have been obtained in contravention of domestic law would violate the Accused's right to privacy to such an extent that the integrity of these proceedings would be damaged. As acknowledged by the Accused, the fundamental right to privacy is not absolute,

²⁰ *Brđanin* Decision, para. 61; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, T. 13670.

²¹ Motion, para. 2.

²² Motion, paras. 15, 24.

²³ Motion, paras. 25–28.

²⁴ *Brđanin* Decision, paras. 63(7), 63(8); *see also* Statute, preamble.

and may be derogated from in times of emergency.²⁵ Likewise, the Chamber does not consider the admission of evidence that may have been obtained illegally to conflict with the need to ensure a fair trial.²⁶

12. Considering the jurisdiction that this Tribunal has to prosecute and adjudicate serious violations of international law as well as the charges brought against the Accused, the Chamber considers 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. As stated in the previous paragraph, the Chamber is also not satisfied that the Accused has established that admitting the intercepted conversations into evidence would be antithetical to, or would seriously damage, the integrity of these proceedings.

IV. Disposition

13. Based on the foregoing reasons, the Chamber, pursuant to Rules 54, 89 and 95 of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this 30 day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁵ *Brđanin* Decision, paras. 30, 63(3) (noting that Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights, and Article 11 of the American Convention on Human Rights recognise the right of States in times of public emergency which threatens the life of a nation to derogate from their obligation to guarantee the right to privacy, that there is enough evidence to prove on a *prima facie* basis that the country was on the brink of an armed conflict, and that the purpose of the proposed interceptions was to uncover the extent of the threat to the internal security of Bosnia and Herzegovina).

²⁶ *Morina* Judgement, para. 27 (noting that the admission of secretly taped material, even when taken in violation of Article 8 of the ECHR, does not *per se* conflict with the requirements of a fair trial); *Brđanin* Decision, para 25 (noting that Article 8 of the ECHR does not conflict with the requirement of a fair trial guaranteed by Article 6(1) of the ECHR).