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-99-36-T
		Date:	3 October 2003
		Original:	English

IN TRIAL CHAMBER II

Before: **Judge Carmel Agius, Presiding**
Judge Ivana Janu
Judge Chikako Taya

Registrar: **Mr. Hans Holthuis**

Decision of: **3 October 2003**

PROSECUTOR

v.

RADOSLAV BRĐANIN

DECISION ON THE DEFENCE "OBJECTION TO INTERCEPT EVIDENCE"

The Office of the Prosecutor:

Ms. Joanna Korner

Counsel for the Accused:

Mr. John Ackerman
Mr. David Cunningham

TRIAL CHAMBER II ("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 ("International Tribunal") is seised of an "Objection to Intercept Evidence" ("Objection") and a "Supplemented Objection to Intercept Evidence" ("Supplemental Objection"), filed by the Defence on 3 July 2003 and 18 July 2003 respectively, objecting to the admission of evidence obtained through the allegedly illegal interception of telephone conversations.

I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") has submitted for admission several transcripts of intercepted telephone conversations, recorded by internal security personnel of the government of the Republic of Bosnia and Herzegovina ("BiH") before and during the war.

2. Counsel for the Accused Radoslav Brđanin ("Defence") has objected to the admission into evidence of all intercepted conversations on the grounds that they were obtained illegally.

3. The Prosecution asserts that the intercepts were legally obtained, but even if illegally obtained, they are still admissible.

II. SUBMISSIONS

A. Defence Submissions

4. The Defence submits two written objections, the Objection and the Supplemental Objection, with Exhibits[1]. A hearing was held before this Trial Chamber on 18 July 2003 to receive arguments from the parties on this issue.

5. In its written submissions and oral argument, the Defence argues that the intercepts were illegally obtained in that their authorisation did not conform with the then-existing law of BiH.

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[1] The Objection contains four exhibits:
- Exhibit A is a document in which the Under-Secretary of the SDB on 8 April 1991 proposes technical measures against "Zoran" for reasons set out therein. The authorisation which follows is signed by Alija Delimustafić, BiH Minister of the Interior.
- Exhibit B is a similar document dated 23 August 1991 requesting that the SDB be allowed to implement measures against "Latas" (the same person as "Zoran", but with a new code name).
- Exhibit C was provided to the Defence by the Prosecution and is a copy of an excerpt from the BiH Law on the Foundations of the System of State Security and
- Exhibit D is an excerpt from the BiH Law on Internal Affairs.

The Supplemental Objection also contains four exhibits which are outlined *in extenso* in footnote 13 *q.v.*

6. The Objection asserts that "[t]he telephone monitoring in this case was performed by Muslim authorities, members of, or closely tied to, the SDA party. Such monitoring was done during a time of essential inter-party cooperation and inter-party agreements. It is crucial to an understanding of these intercepts to understand that based upon these inter-party agreements, the Minister of Interior of the Republic of Bosnia and Herzegivina at all times relevant was the Muslim, Alija Delimustafić. None of the procedures utilized in establishing these intercepts required any notice to, or approval from, anyone outside the Muslim personnel or the MUP, persons who were members of, or associated closely with, the SDA party."[2]

7. The BiH Constitution was amended on 31 July 1990 to further protect the right to privacy.[3] The Defence argues that, as a result, the intercepts now in question were authorised only under an older, unconstitutional law.[4]

8. The Law on Internal Affairs authorized the Secretary of the Republic to suspend confidentiality of communications in certain instances provided he informed the Presidency of the Socialist Republic of Bosnia and Herzegovina ("SRBH"). The purported authorizations for the intercepts[5] are signed by the Minister of the Interior[6]. Therefore, they do not comply with the requirement of the July 1990 amendment to the Constitution of the Republic which provides, in Article 39, that the authorization must be granted by the Secretary of the Republic.

9. Not only did the purported authorizations fail to include the signature of the Secretary of the Republic, but, in addition, there is no indication that the required notice was given to the Presidency[7]. Thus, the intercepts sought to be tendered in evidence were obtained illegally.

10. Both the International Covenant on Civil and Political Rights[8] ("ICCPR") and the European Convention on Human Rights[9] ("ECHR") provide a framework in which the right to privacy may be protected. Under both instruments, legality for this kind of measure is of the essence.

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[2] Objection, Paragraph 6.
[3] The Defence included this excerpt from the amended Constitution (Amendment LXIX):

> . . .
> 3. A man's privacy is inviolable
> 4. Once [sic] can prescribe only by means of a law that, solely on the basis of the Court's decision, one may deviate from the principle of inviolability of the secrecy of letters and other means of communication, it is necessary for conducting of criminal proceedings or for the security of the country.

[4] Objection, Paragraph 9.
[5] Objection, Exhibits A and B.
[6] The Minister of the Interior, at the time the intercepts were made, was Alija Delimustafić.
[7] Objection, Paragraph 13.
[8] Article 17 of the ICCPR states:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

11. Admission of illegally intercepted evidence, in contravention of the laws of the State of BiH, and conventional and customary international law would therefore contravene Rules 89[10] and 95[11] of the Rules of Procedure and Evidence ("Rules") in that it would seriously damage the integrity of the proceedings.

12. In its Supplemental Objection, the Defence further elaborates on the position of international law which it submits is in its favour,[12] and includes four additional exhibits[13].

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[9] Article 8 of the ECHR states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[10] Rule 89 states, in the pertinent part:

> (C) A Chamber may admit any relevant evidence which it deems to have probative value
> (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

[11] Rule 95 of the Rules states:

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

[12] The Supplemental Objection also refers to the following additional provisions of international law: ECHR Article 6 (*vide* footnote 27 *infra*) and Article 13.

[13] Exhibit A accompanying the Supplemental Objection is a letter from Srdjan Arnaut, the General Secretary, indicating that there is no record of any notification to the Presidency relating to wiretap authorization for Momcilo Krajisnik and others from June 1, 1991 to April 6, 1992. Exhibit B accompanying the Supplemental Objection is an excerpt from Constitutions of the Countries of the World edited by Albert P. Blaustein & Gisbert H. Flanz citing Article 185 of the Yugoslavia Constitution which provides that:

> Secrecy of mail and of other means of communication shall be inviolable. Provisions to depart from the principle of inviolability of secrecy of mail and of other means of communication, pursuant to an order by a competent authority, may only be made by statute if this is indispensable for the conduct of criminal proceedings or for the security of the country.

Exhibit C accompanying the Supplemental Objection is an unofficial translation of the Law on Internal affairs. It states:

> If necessary for criminal prosecution or for the security of the country, the Republic Prosecutor or the Minister may make a proposal (to deviate from the principle of secrecy) and the Supreme Court of the Republic can issue findings regarding the subject persons. Based on those findings there can be an exception permitting deviation from the principle of the secrecy of letters/other communications. The decision shall be made by the President of the Supreme Court of the Republic or the judge he delegates, and shall be issued within 24 hours after the Prosecutor or the Minister submits his written proposal (to infringe on secrecy.)
> Based on the judge's decision the Minister shall decide the type of measure, the measures and the time period of the violation of inviolability of secrecy of letters/communication. The information involved in the decision making process is confidential.

Exhibit D accompanying the Supplemental Objection is an excerpt from the BiH Official Gazette No. 37, Dec 23 1991, (unofficial translation) which states:

> Article 12: All the members of the Presidency have to be informed of all matters under the jurisdiction of the Presidency.

13. On 18 July 2003 oral argument was presented to the Trial Chamber by Counsel during which the Defence raised the following additional points:

1. The intercepts are not reliable since only one transcript, Prosecution Exhibit ("P") 2386, has been corroborated by a witness, BT99, with personal knowledge of what was said. The Compact Disks produced are incomplete, the same documents have different dates, and uninteresting matters have been omitted when transferring cassette tape intercepts to reel-to-reel storage tapes.[14]

2. The reel-to-reel storage tapes were in the unsupervised possession of someone for more than ten years and there are no logs or methods of keeping the reel-to-reels. The original recording cassettes were erased. Recordings were so unreliable that they were not admissible in criminal proceedings in BiH.[15]

3. The purported authority to conduct the intercept was invalid in that it did not contain the identity of the person to be subject to surveillance. The Presidency of the Republic of BiH was not notified of the proposed surveillance.[16]

B. Prosecution Submissions

14. The "Prosecution's Response to the Accused's Objection to Intercept Evidence" was filed on 3 July 2003 ("Prosecution's Response") and in it the following 8 points are made:

1. The intercepts were authorized by the Minister of Internal Affairs of the SRBH in accordance with statutory framework then in force;

2. The statutory framework was itself in accordance with the Socialist Federal Republic of Yugoslavia ("SFRY") Constitution and the BiH Law on Internal Affairs;

3. International Tribunal Rules providing for exclusion of evidence have not been satisfied;

Article 41: Minutes of the sessions of the Presidency must be delivered to all the members of the Presidency of Bosnia and to the member of the Presidency of Yugoslavia from Bosnia and to the President of the Bosnian Assembly.
Article 46: At least 5 members of the Presidency must vote for any decision of the Presidency in cases . . . (3) Questions of implementation of government policy in the area of . . . state security . . . at least 5 votes are needed to enact measures to implement the policy of state security.
Article 52: The Presidency gives direction to all departments concerned with state security, directing their activity in this area.

[14] Transcript page ("T") 19761.
[15] T 19762.
[16] T 19764.

4. Admissibility under domestic law does not determine whether evidence should be excluded under Rule 95 of the Rules;

5. Jurisprudence regarding Article 8 of the ECHR does not support the contention that illegally intercepted evidence should be excluded;

6. The Accused had no expectation of privacy when speaking on lines he knew to be intercepted;

7. Wartime intercepts are not subject to exclusion under Rules 89 and 95; and

8. Illegally obtained intercepts should be admitted in cases involving serious violations of international humanitarian law.

15. Intercepts by the Minister of Internal Affairs of BiH were authorized in accordance with the SFRY Law on the Bases of the State Security System[17] and the BiH Law on Internal Affairs[18]. Neither of these required court approval. After 31 July 1991, the BiH Law on Internal Affairs remained in accordance with the Constitution of the SFRY which required authorisation for intercepts by a *competent authority* and not necessarily by a court.[19]

16. Article 39 of the BiH Law on Internal Affairs[20] enables the Republic Minister to authorise measures that contravene the principle of inviolability of the secrecy of letters and other means of communication. It also requires the Republic Minister to *inform* the Presidency of the SRBH of such measures. It does not require the Minister to obtain *authorisation* from the Presidency. The article does not require that the notification to the President be in writing. Therefore, absence of a written notification would not amount to a breach of Article 39.

17. Amendment LXIX to the Constitution of BiH required a court's authorisation prior to the interception of communications. However, a one year "harmonisation" period which expired on 31 July 1991 extended the validity of the existing Law on Internal Affairs until that time. Draft

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[17] Published in the SFRY Official Gazette No. 15/84; entered into force on 7 April 1984.
[18] SRBH Official Gazette, 29 June 1990.
[19] *Vide* footnote 13 *supra*, under "Exhibit B" attached to the Accused's Supplemental Objection.
[20] Article 39 states:

> If it is essential for the conduct of criminal proceedings or for the security of the country, the Secretary of the Republic may, in keeping with the law, determine by decision that certain measures be undertaken with regard to individual persons, organisations of associated labour and other self-managed organisations and associations, whereby the principle shall be suspended that the confidentiality of written and other communications is inviolable. The Secretary of the Republic shall inform the Presidency of the SRBH of the measures undertaken. (Press and Publishing Organisation, Official Gazette of the SR/Socialist Republic of BiH Sarajevo 1990, attached to the Objection as Exhibit D - Translation numbers 03079267 – 03079269)

amendments had been prepared, but were not adopted due to the beginning of disintegration of BiH as a single republic.[21]

18. The pre-war intercepts from 8 April 1991 to 8 April 1992 conformed to domestic law[22] and to BiH and SFRY constitutional requirements then in force.

19. Armed conflict began in BiH in the first week of April 1992. All intercepts of Radovan Karadžić after 8 April 1992 took place in wartime and therefore are admissible under Rules 95 and 89 of the Rules.[23]

20. It is not clear whether the Law on Internal Affairs after 31 July 1991 was contrary to the BiH Constitution, but even if it were, since it was not contrary to the federal SFRY Constitution the admission of such an intercept under Rule 95 of the Rules cannot be said to be antithetical to, or seriously damage, the integrity of the proceedings.

21. Rule 89 of the Rules is one which "clearly" favours admissibility as long as the evidence is relevant and is deemed to have probative value (Rule 89 (c) of the Rules) which is not substantially outweighed by the need to ensure a fair trial (Rule 89 (d) of the Rules).[24]

22. All intercepts of the Accused were made freely since they were made in his leadership capacity within the Serbian Democratic Party ("SDS") and at a time when he was not in police custody.

23. There is nothing in the Rules concerning interceptions of telephone conversations.

24. As emphasised by Judge Robinson during the debate in *Prosecutor v. Kordić & Čerkez*, inadmissibility under Bosnian law does not necessarily make evidence inadmissible under Rule 89 or 95 of the Rules[25]. Allowing domestic law to determine admissibility would lead to the anomalous result that countries with lower protection of individual privacy would be more likely to

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[21] On 23 May 1991, Biljana Plavšić told Radovan Karadžić that "Bosnia is sliding into a civil war" and that there was a "major crisis" going on. Intercept 0207-8922-0207-8924 BCS ERN; 0305-5186-0305-5188 English ERN.

[22] Article 39 of the BiH Law of Internal Affairs and the SRBH constitution. *Vide* footnote 20 *supra*.

[23] The Prosecution refers to Judge May's oral decision delivered on 2 February 2000 in *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T at T 13694 in which the Judge states that

> [E]ven if the illegality was established [. . .] [w]e have come to the conclusion that [. . .] evidence obtained by eavesdropping on an enemy's telephone calls during the course of a war is certainly not within the conduct which is referred to in Rule 95. It's not antithetical to and certainly would not seriously damage the integrity of the proceedings.

[24] *Prosecutor v. Delalić et al.*, Decision on the Motion of the Prosecution for the Admissibility of Evidence, Case No. IT-96-21-T, Tr. Ch., 19 Jan. 1998, para. 16; *Prosecutor v. Delalić et al.*, Decision on application of Zejnil Delalić for leave to appeal against the decision of the Trial Chamber of 19 January 1998 for the admissibility of evidence, case No. IT-96-21-AR73.2, App. Ch., 4 Mar. 1998.

[25] See *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, T 13670.

have their intercepts admitted into evidence before the International Tribunal. Instead, the International Tribunal should apply one standard to all situations where admissibility is an issue.

25. Jurisprudence regarding Article 8 of the ECHR does not support the contention that illegally intercepted evidence must be excluded[26]. Moreover, use of material obtained in violation of Article 8 of the ECHR does not conflict with the requirement of a fair trial guaranteed by Article 6(1) of the ECHR[27].

26. On 18 July 2003 during oral argument by Counsel for the Prosecution, the following additional points were made:

1. Illegal intercepts should be admitted in cases concerning serious violations of international humanitarian law since it would "constitute a dangerous obstacle to the administration of justice if evidence which is relevant and of probative value could not be admitted merely because of a minor breach of procedural rules which the Trial Chamber is not bound to apply."[28] Furthermore, applying such an exclusionary rule[29] as proposed by the Defence punishes countries with high standards for admission of intercept evidence, and rewards countries where the standards are lax.[30]

2. Intercepts of high-level individuals are prevalent throughout the world. Excluding the admission of such intercepts will in no way hinder, prevent or discourage intercepts from being taken. Exclusion would, therefore, only deny the court probative evidence.[31]

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[26] *Khan v. United Kingdom* (2001) 31 EHRR 45 ("Khan"), para. 40. *P.G. and J.H. v. United Kingdom*, Application No. 44787/98, Judgement of 25 September 2001 ("J.H. and P.G."), para. 81.

[27] Article 6(1) of the ECHR provides:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[28] *Prosecutor v. Delalić et. al.*, "Decision on the Tendering of Prosecution Exhibits 104 – 108", Case No. IT-96-21-T, 9 February 1998, at paras. 18-20.

[29] The exclusionary rule in the United States is based on the Fourth Amendment to the U.S. Constitution which protects Americans against unreasonable searches and seizures by government officials. It was first enunciated in *Boyd v. United States,* 116 U.S. 616 (1886) and later expanded in *Weeks v. United States,* 232 U.S. 383 (1914). Under this rule, evidence obtained in violation of the Fourth Amendment to the United States Constitution is ordinarily inadmissible in a criminal trial. In other jurisdictions, the exclusionary rule prevents illegally or improperly obtained evidence from being admitted into evidence at a criminal trial.

[30] Oral argument on motion made by Mr. Koumjian, 18 July 2003, T 19769.

[31] *Id.*

III. DISCUSSION

A. Historical Background

27. The Trial Chamber notes that it is important to establish first and foremost the sequence of events, this being of critical importance in understanding the application of the laws to the events. In this context the Trial Chamber notes the following:

1. 1990: Article 39 of the BiH Law on Internal Affairs (Final Revised Edition) authorizes the Secretary of the Republic, when essential for the conduct of criminal proceedings or for the security of the country and in keeping with the law, to suspend the principle that the confidentiality of communications is inviolable. According to the same Article, the Secretary of the Republic is also required to inform the Presidency of the SRBH of the measures undertaken.

2. 31 July 1990: The Constitution of the Republic of BiH was amended to increase the scope of the right of privacy in the Republic.[32] There was a one year period in which "harmonisation" of any laws which were repugnant to the amendment was to be effected.[33]

3. 8 April 1991: Proposal from Under-Secretary of State Security Service ("SDB") of the Ministry of Internal Affairs of the SRBH proposing technical measures against "Zoran" (Radovan Karadžić) due to alleged anti-constitutional activities, to wit: "advocacy of the forming of paramilitary armed formations and mass illegal arming of citizens"[34]. This document also contains a corresponding authorisation which is signed by Alija Delimustafić, Minister of the Interior and which was valid for one year.[35]

4. 31 July 1991: Deadline for harmonization between Article 39 of the BiH Law on Internal Affairs and Amendment LXIX.

5. 23 August 1991: Proposal from the Under-Secretary of SDB suggesting technical measures against "Latas" (also Radovan Karadžić) was made to the Minister of Internal

[32] Official Register of the SRBH, No. 21/90, July 31, 1990

[33] T 19764. Paragraph 11 of Prosecution's Response provides that:

> The BiH law on Internal Affairs was last amended in 1989 and an expurgated version was published on 29 June 1990. Amendment LXIX came into force on 31 July 1990. The Constitutional Law on the Implementation of the Constitutional Amendments expressly provided (at article 15) for a one-year grace period for the harmonisation of any laws which were repugnant to Amendment LXIX. . . . Draft amendments were prepared in June 1991 but were not adopted. The country was at that time already in crisis. . .

[34] Objection, Exhibit A.

Affairs. This request was based on "a number of interesting security contacts . . . encouraging, co-ordinating and directing activities regarding forming of paramilitary units" and encouragement of "terrorist activities by the Serbian Chetnik Movement ("SČP") . . ." amongst other allegations. The request was granted and signed by Alija Delimustafić, Minister of the Interior and was valid for one year.[36]

6. 23 December 1991: The Official Gazette of BiH, No. 37 under "Regulations Regarding Conduct of Meetings of the Presidency" (Unofficial Translation attached to Accused's Supplemental Objection as Exhibit D) require the notification and approval of the Presidency for all matters under its jurisdiction including state security.[37]

B. National laws and International Law

28. In reaching its decision, this Trial Chamber is guided first and foremost by what is provided in Rules 89 and 95. In order to highlight the real import of these two Rules in the context of the present case, the Trial Chamber considers it important to review the relevant national laws and international law and case law on the subject of admissibility of illegally or unlawfully obtained evidence. This exercise is being done because it is obvious that the standards established in Rules 89 and 95 of this Tribunal were not arrived at randomly or by chance, but reflect a specific choice which this Trial Chamber believes, and will attempt to show, is essential in trying cases such as the ones with which this Tribunal is tasked.

29. The right to privacy is enshrined in Article 17 of the ICCPR[38] which protects, among other rights, the right to be free from arbitrary or unlawful interference of privacy, family, home or correspondence. It also provides for the right to the protection of the law against such interference. The right to privacy is also protected by Article 8 of the ECHR[39] which provides for the right to respect for private and family life, home and correspondence. The same right is also incorporated in and protected by the American Convention on Human Rights in its Article 11.[40]

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[35] *Id.*
[36] Objection, Exhibit B.
[37] *Vide* footnote 13 *supra* in part regarding Exhibit D attached to the Supplemental Objection.
[38] *Vide* footnote 8 *supra.*
[39] *Vide* footnote 9 *supra.*
[40] Article 11 of the American Convention on Human Rights states:
1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

30. However, it must be noted that this fundamental right to privacy is not absolute, but may be derogated from in times of emergency of which wartime is an example *par excellence.* In fact under all of the three international instruments mentioned in the previous paragraph there is provision recognising the right of States in time of public emergency which threatens the life of the nation to take measures derogating from their obligation to guarantee this right to privacy.[41] In addition, in this specific context, the European Convention on Human Rights in Article 8 (2) specifically provides for possible interference with the right to privacy when this is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

31. There is no doubt, and this Trial Chamber certainly acknowledges, that intercepts of private conversations may breach the right to privacy when they are not executed according to law.

32. As a result, it is not surprising at all that the laws of some countries and the domestic courts of some others, have occupied themselves with trying to establish what should be the guiding principles on the admissibility of such illegally or unlawfully obtained information.

33. There is a variety of approaches which the law might adopt when dealing with the question as to whether evidence which has been obtained by illegal, unlawful or sometimes by questionable methods, should be admitted in criminal proceedings:

1. Firstly, the law itself may specifically provide for the automatic exclusion of any evidence which has been illegally or otherwise inappropriately obtained;

2. Secondly, the issue of exclusion or admission of such evidence may be left as a matter for the discretion of the judge who has the judicial duty to ensure fairness to the accused;

3. Thirdly, the courts might concern themselves only with the quality of the evidence and not consider its provenance at all; in other words the courts would only seek to find out if the evidence is relevant, reliable and having probative value irrespective of questions whether that evidence was obtained lawfully or unlawfully.

34. As will be explained further down, the common law tradition generally embraced the last of these three approaches but there is a substantial divergence in the position taken by the English and the American courts.

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[41] *Vide* Article 4 of the ICCPR, Article 15 of the ECHR and Article 27 of the American Convention on Human Rights.

35. The English position can be synthesized in the following points which are based on a fairly constant case law.[42]

1. Under English law the overriding rule is that the judge has a discretion to exclude admissible evidence tendered by the Crown where its prejudicial effect outweighs its probative value.[43] In *Noor Mohamed v. R.* ((1949) A.C. 182, 192) Lord du Parcq delivered the opinion of the Privy Council with the following words:

> In all such cases the judge ought to consider whether the evidence is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interests of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible.

2. If the evidence in question was relevant, it was admissible nothwithstanding its provenance. However, Judges still retained the discretion to exclude illegally or unfairly obtained evidence in certain rare circumstances.[44] Shortly afterwards, in *Sang* (1980) A.C. 402; (1979) 2 All E.R., 1222, the House of Lords reduced the scope of this judicial discretion still further. The effect of that judgment is that judicial discretion at common law is limited to ensuring that the probative value and therefore weight of the evidence in question sufficiently outweighs any prejudicial effect and to excluding tainted evidence that has been obtained unfairly. The function of the judge is to ensure that the accused has a fair trial and it is not the business or the function of the judge to exercise disciplinary powers over the police or the prosecution. In terms of the Sang judgment, the House of Lords showed willingness to exclude the product of illegal interrogations of the accused in this way protecting the accused's right of silence but was not ready to exclude the product of illegal searches in order to protect his or her right to privacy.

3. This kind of judicial discretion was eventually dealt with and somewhat limited, albeit in broad terms, by the Criminal Justice Act 1988 (ss 25 and 26) and more significantly by section 78 of the Police and Criminal Evidence Act of 1984 which in its first paragraph provides that "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to

[42] The English position is being referred to in some detail because it has been largely respected by the ECHR and also because the general overriding rule the English courts apply is similar in concept to the principle contained in Rule 89 of this Tribunal's Rules of Procedure and Evidence.
[43] This rule was first clearly enunciated in *R. v. Christie* (1914) 10 Cr. App. R. 141, H.L.
[44] In *Jeffery v. Black* (1977) 3 W.L.R. 895; 121 S.J. 662; (1978) 1 All E.R. 555 Lord Widgery affirmed this principle saying also that such a discretion was to be used rarely where there had been trickery, oppression or unfairness.

all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

4. In *Khan*, the Court of Appeal gave firm approval for bugging as a technique used in targeting known offences, even where this involved trespass. The test for admissibility is relevance and the product of this kind of activity is admissible if relevant. In other cases, there may well be more compelling considerations such as of invasion of privacy or even of tort through, for example, trespass and of criminal damage. But such considerations must be weighed against the probative value of the evidence.[45]

5. In addition, as a result of the Human Rights Act 1998, which incorporates the European Convention of Human Rights into domestic law, English case-law has been further brought into line with the standards established by the European Court of Human Rights, discussed in paragraphs 42 to 52 *infra*.[46]

36. The principle as discussed in Khan is basically where the difference in approach to the matter under review by the American courts lies. American courts show no reluctance at all to exclude tainted evidence which violates one's right to privacy.

37. The difference between the English and American courts reveal the differing public interests involved, namely that on the one hand, the proper determination of cases requires that all relevant and reliable evidence be adduced before the courts, while on the other hand, due process of law requires that the proper administration of justice demands respect for the rights of the accused. In the United States the concept has also been introduced that it is a central function of the courts to encourage lawful action by the State and therefore to deter state officials from committing illegal acts with the consequence that evidence obtained illegally is to be excluded.[47]

38. Even in the United States, however, a jurisdiction with a well established exclusionary rule for illegally obtained evidence, the Supreme Court has recognized the need for exceptions to said rule. The U.S. Supreme Court has "carved out exceptions to the exclusionary rule ... where the introduction of reliable and probative evidence would significantly further the truth-seeking

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[45] *Regina v. Khan (Sultan)* [1995] Q.B. 27 CA. This case eventually was considered by the ECHR and reference to it is made below when dealing with the decisions of that Court.
[46] *See e.g.*: *R v Mason and others*, 2002 EWCA Crim 385.
[47] As Mr Justice Holmes suggested in 1928 it is " a less evil that some criminals should escape than that the Government should play an ignoble part". *Olmstead v. United* States, 277 U.S. 438 (1928)(USSC+).

function of a criminal trial and the likelihood that admissibility of such evidence would encourage police misconduct is but a speculative possibility."[48]

39. The "impeachment exception" to the exclusionary rule allows, for example, the prosecution in criminal proceedings to introduce illegally obtained evidence to impeach a defendant's own testimony.[49] Other exceptions to the exclusionary rule include the "Independent Source Doctrine"[50] which allows the introduction into evidence of material seized in two different ways, one of which is illegal and one of which is legal; the "Inevitable Discovery Doctrine"[51] which allows illegally obtained information into evidence when the prosecution can show, by a preponderance of the evidence that the information would have been discovered legally, had it not first been obtained illegally; and the "Good Faith" exception to the exclusionary rule[52] which allows the introduction into evidence of material that was seized based on a good faith belief that proper authority was granted for the seizure.

40. In the civil law tradition there is a limited number of jurisdictions (e.g. Germany, Italy, France)[53] where there is a remedy provided by law when evidence sought to be tendered is proved

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[48] *James v. Illinois,* 493 U.S. 307, referring to *Harris v. New York,* 401 U.S. 222.
[49] *Id.*
[50] See *Segura v. U.S,* 468 U.S. 796 (1984).
[51] See *Nix v. Williams,* 467 U.S. 431 (1984).
[52] See *U.S. v. Leon,* 468 U.S. 431 (1984) and *Mass. v. Sheppard, 468 U.S. 981 (1984).*
[53] In Germany, the exclusionary rule is found in the Strafprozessordnug, (StPO) paragraph 136(a) and 252. Paragraph 136(a) excludes evidence improperly obtained through hypnosis, sleep deprivation, mistreatment or other methods used to overcome the will. Paragraph 252 excludes evidence voluntarily given during investigation which is sought to be admitted at trial over the objections of the witness who provided the pretrial evidence. There are other rules under which one can obtain exclusion of evidence, but these other rules incorporate the exclusionary rule by practice, not by reference.

In Italy, the exclusionary rule can be found in the Codice di Procedura Penale under articles 188 and 191. Article 188 (Moral freedom of the person in the admission of evidence) states: 1. Methods or techniques that may influence the freedom of self-determination or may alter the ability to remember and evaluate the facts may not be used, even if consented to by the interested person. Article 191 states: 1. Evidence gathered in violation of prohibitions set by law may not be used; 2. The non-admissibility may be declared ex officio in every state of the proceedings. It is noted that this prohibition is interpreted in a very restrictive way; only prohibitions set out in the code of criminal procedure (or other norms relevant to the proceedings) that explicitly ban the admission of illegally-gathered evidence are considered.

In France, there is no single provision which amounts to an exclusionary rule. The Constitutional Court ruled (in 1994) that the right of privacy was implicit in the Constitution. Most of the protection from searches and seizures in France come from rules of procedure; these French versions of exclusionary rules are called "textual nullities." Article 59, for example, requires exclusion, or "nullite," (nullity) of evidence procured wrongly in domicile searches. (C. Pr. Pen. 109 & 110):

> Sauf réclamation faite de l'intérieur de la maison ou exceptions prévues par la loi, les perquisitions et les visites domiciliaires ne peuvent être commencées avant 6 heures et après 21 heures. (L. no. 93-1013 du 2 août 1993) "Les formalités mentionnées aux articles 56, 56-1, 57 et au présent article sont prescrites *à peine de nullité.*"

The French impose limits on identity checks (C. Pr. Pen. C. art. 78-3) and electronic surveillance (C. Pr. Pen. art. 100-7) as well. The French have other, lesser rules guiding criminal searches, such as a requirement that most residential searches must be witnessed by a resident or by two persons not subject to the administrative authority of the searching official. (This rule is found in articles 56 and 57 of the Code of Criminal Procedure, which are governed by Article 59.) Unlike the one, broad rule of exclusion in the United States, France relies on these more specific rules to guide the execution of criminal investigations. C. Pr. Pen. C. art. 477 also addresses the admission of evidence and calls for

to have been illegally or unlawfully obtained. This remedy is usually referred to as the exclusionary rule, as it amounts to the exclusion of such evidence from criminal trials and is statutorily provided for.

41. At the International Law level the only real sources that can be of use to this Trial Chamber are the previous case law of this Tribunal, that of the Rwanda Tribunal and the jurisprudence of the European Court of Human Rights.

42. As regards the decisions of the European Court of Human Rights, the general rule has been established that the assessment of evidence is a matter for national courts. In the absence of an express provision in the Convention, the Court has refused to set down evidentiary rules and has steadfastly maintained that its task is not to give a ruling on whether evidence was properly admitted at trial, which is principally a matter for regulation under national law, but rather to ascertain whether the proceedings as a whole were fair. In considering whether the trial was fair, the Court examines the manner in which evidence was obtained and, if evidence was gathered in violation of a Convention right, the nature of that violation. Weight is attached to whether the conviction was based solely or mainly on the impugned evidence and whether defence rights were sufficiently respected. Whilst the Convention tends to place emphasis on the trial rather than the pre-trial investigation, the European Court of Human Rights has shown a willingness to put the pre-trial actions of prosecuting authorities under close scrutiny. It has further shown reluctance to sanction the use of evidence on the ground that it was obtained in breach of internationally recognised procedural safeguards inherent in article 6. Similarly, the admission of evidence obtained as a result of police entrapment has been found to deprive the accused of a fair trial right from the outset.

43. The principle that evidentiary rules are a matter for regulation by national law was established in *Schenk v Switzerland*[54] and has been affirmed by the Court on many occasions afterwards. In *Schenk* the applicant complained that the unauthorised recording of a private telephone conversation, and its subsequent use in evidence violated his right to a fair trial. The Swiss government did not dispute that the recording was obtained unlawfully, but submitted that the public interest in establishing the truth in the matter of a serious criminal offence justified its admission and use in evidence. The Court held that:

"liberte de la preuve" (liberal admission of proof) except where specifically limited. Evidence subsequently obtained as a result of illegal evidence is not necessarily excluded.

[54] *Schenk v. Switzerland,* 13 EHRR 242.

> While Article 6 [...] of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible.

44. Finding no violation of article 6, the Court considered it relevant that the applicant had the opportunity to challenge the authenticity of the recording, to cross-examine the persons allegedly involved in its making, and noted that the conviction was not based solely on this evidence. However, in a joint dissenting opinion, Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo considered that in restricting itself to the particular facts of the case the Court had limited the scope and capacity of its judgment.[55]

45. As explained above, however, notwithstanding its reluctance to usurp the national court's role in the assessment of evidence, the Court has refused to sanction the use of evidence obtained in a manner which offends against fundamental principles of fairness. In *Saunders v United Kingdom*[56] the prosecution adduced in evidence incriminating statements taken from the accused by inspectors from the Department of Trade and Industry acting under statutory powers provided by s 432 of the Companies Act 1985. The Court held that the use of these statements at trial violated the applicant's privilege against self-incrimination, which was linked to the presumption of innocence, and violated his right to a fair trial.

46. Again, whilst *Teixeira*[57] establishes that evidence obtained by entrapment cannot be adduced in evidence without violating fair trial rights, the Court has rejected an exclusionary rule for evidence obtained in breach of Convention rights. In *Khan v. United Kingdom*,[58] the applicant complained that a tape recording of a conversation acquired by the use of a listening device attached to a private house without the knowledge of the owners or occupiers was obtained in violation his respect to respect for his private and family life, guaranteed by article 8, and that national law failed to provide a remedy for the breach as required by article 13. Furthermore, the use of this evidence at trial was incompatible with his right to a fair trial. The Court was satisfied that the circumstances of this case demonstrated that the law in force at the time in the United Kingdom did not meet the requirements of article 8, and held unanimously that the applicant's right to respect for private and family life had been violated, and furthermore, that he had been denied the right to an effective remedy. However, the Court took the view that the use of evidence obtained in

[55] "[C]ompliance with the law when obtaining evidence is not an abstract or formalistic requirement. On the contrary, we consider that it 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. If it does so, the trial cannot be fair within the meaning of the Convention".
[56] *Saunders v. United Kingdom* (1997) 23 EHRR 313.
[57] *Teixeira v. Portugal* (1999) 28 EHRR 101, para 35.
[58] *Khan, vide* footnote 26 *supra*.

breach of Convention rights did not necessarily conflict with the right to a fair trial and rejected his claim.

47. In that case it was not suggested that fair trial rights necessitated the automatic exclusion of evidence obtained in breach of article 8, rather that a conviction obtained *solely* on the basis of evidence obtained in consequence of the unlawful acts of prosecuting authorities, was contrary to the rule of law and incompatible with article 6. The applicant also claimed that if evidence obtained in breach of article 8 did not satisfy the requirements of the domestic exclusionary rules and this evidence is adduced at trial, then national law has failed to provide an effective remedy to enforce the substance of the rights and freedoms guaranteed by the Convention. Acknowledging that the tape recording was, in effect, the only evidence tendered by the prosecution, the Court considered it relevant that there was no suggestion that this evidence was unreliable and so the need for the Court to look for supporting evidence was less important. In rejecting the applicant's claim, the Court noted that he had had ample opportunity to challenge the authenticity of the recording and the domestic courts had a discretionary power to exclude the evidence if they considered its admission would render the trial unfair.[59]

48. Recently, in *P.G. and J.H. v. United Kingdom*[60] the Court held unanimously that using a covert listening device to record conversations in the applicant's home was a violation of article 8, because it was not "in accordance with the law". Observing that the government acknowledged that police surveillance of the applicant's apartment was not in accordance with the law existing at the time, and noting that there was no statutory scheme to regulate the use of listening devices at the police station, the Court was satisfied that article 8 had been violated on both occasions. However, the monitoring of telephone calls was considered to be necessary in a democratic society and thus did not violate article 8. Acknowledging that this case was similar to *Khan v. United Kingdom*, the majority of the Court was satisfied that the use in evidence of material obtained in this manner did not violate the right to a fair trial.[61]

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[59] Disagreeing with the finding of the majority, Judge Loucaides considered that the term "fairness", when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention. He felt that one cannot speak of a "fair" trial if it is conducted in breach of the law. Furthermore, by refusing to censure the gathering of evidence in this manner, the Court was offering encouragement to police officers to continue gathering evidence without consideration for, and in breach of, the accused's rights. He urged that the exclusion of evidence obtained contrary to a Convention right should be considered as "an essential corollary of the right". Rejecting the suggestion that the trial court's discretionary power to exclude evidence under s 78 of the Police and Criminal Evidence Act 1984 provided the applicant with sufficient guarantees, he noted that "under English law the concept of "fairness" as regards the relevant test of admissibility of evidence, was never incompatible with illegality".

[60] *P.G. and J.H.* ,*vide* footnote 26 *supra*.

[61] The complaint concerned the monitoring and recording of conversations by means of a covert listening device which was placed in the home of one of the applicants, the monitoring of calls made on the applicant's telephone and the use of listening devices to obtain voice samples while the applicants were at a police station. The Court was asked to

49. In further rejecting the applicants' submission that the use at trial of the taped evidence obtained in breach of article 8 amounted to breach of fair trial rights, the Court observed that the tape recording of conversations was not the only evidence against the applicants.[62] In addition, the applicants had been given the opportunity to challenge both the authenticity and the use of the tape. Further, the domestic court retained the discretionary power to exclude evidence if it formed the view that its admission would give rise to substantive unfairness.

50. Dissenting from the majority opinion, Judge Tulkens would not accept that a trial could be described as fair if based on evidence obtained in breach of a Convention right. Agreeing with the dissenting view expressed by Judge Loucaides in *Khan,* she considered that a requirement of lawfulness was implicit in the criterion of fairness referred to in Article 6.[63]

51. In *Chinoy v. United Kingdom,*[64] the applicant complained that his committal to prison was made on the basis of evidence obtained in violation of a Convention right and amounted to a violation of article 5. The impugned evidence consisted of transcripts of telephone conversations intercepted in France without the knowledge of French authorities, in breach of French sovereignty and without recourse to mutual legal assistance provisions which the applicant claimed violated article 8. In finding this application manifestly ill founded, the Commission noted that the domestic court's decision to allow the prosecution to rely on unlawfully obtained evidence complied with national rules and thus his detention could not be considered arbitrary.

52. In *Van Mechelen and Others v. The Netherlands,*[65] the Court reiterated that "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

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consider whether these activities amounted to an interference with the applicants' right to private life. Further, the applicants complained that the non-disclosure of evidence relating to the authorisation of the listening device; the hearing of oral evidence by the judge in private; the use in evidence of information obtained from the listening device at the applicant's home, and the manner in which voice samples were obtained amounted to a violation of article 6.

[62] The prosecution had called 45 witnesses and incriminating evidence was found at the address of one of the applicant's and in the car which the applicants were driving.

[63] The requirement of fairness "presupposes compliance with the law and thus also, *a fortiori,* respect for the rights guaranteed by the Convention, which it is the Court's very task to scrutinise". Although accepting that it is not generally the Court's function to lay down rules of admissibility, she was of the opinion that the position is different if evidence is obtained in breach of a Convention right. In these circumstances "it is the Court's very duty, where the taking of evidence is concerned, to ensure that the commitments entered into under the Convention are honoured by the Contracting States". Challenging the majority view that the Court was obliged to follow the precedent established in *Schenk* and *Khan,* Judge Tulkens remarked that the Court had missed an opportunity to settle Convention jurisprudence on this issue. In her opinion the Court should have "reiterated clearly that what is forbidden under one provision (Article 8) cannot be permitted under another provision (Article 6)". *Vide* footnote 26 *supra P.G. and J.H. v. United Kingdom,* Partially dissenting opinion of Judge Tulkens, para 1 - 4.

[64] *Chinoy v. United Kingdom.* Application No. 15199/89, Judgment of 4 September 1991.

[65] *Van Mechelen and Others v. The Netherlands* (1998) 25 EHRR 647

rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair."

53. As regards the jurisprudence of this Tribunal, the position is as submitted by the Prosecution in its Response, namely that there is nothing in the Rules concerning the exclusion of illegally obtained evidence and that, as affirmed in the *Kordić* case,[66] "even if the illegality was established [...] [w]e have come to the conclusion that [...] evidence obtained by eavesdropping on an enemy's telephone calls during the course of a war is certainly not within the conduct which is referred to in Rule 95. It's not antithetical to and certainly would not seriously damage the integrity of the proceedings." This Trial Chamber cannot but agree that communications intercepted during an armed conflict are not as such subject to exclusion under Rule 95 and should therefore be admitted upon a challenge based on the grounds laid down in that Rule.

54. This Trial Chamber is convinced 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. This will be dealt with more *in extenso* in part D of this Decision.

55. The Defence argues that the Trial Chamber must reject the proffered intercept evidence simply because it was obtained illegally. It also tries to present a picture whereby there is, or should be, a universal exclusion from evidence of information that is obtained illegally or unlawfully. This Trial Chamber does not agree that this is so. 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. Illegally obtained evidence may, therefore, be admitted under Rule 95 since the jurisprudence of the International Tribunal has never endorsed the exclusionary rule as a matter of principle.

56. The Trial Chamber acknowledges that there are instances when it is not realistic or practical to request permission to conduct covert interceptions. Therefore, even if obtained without legal authority, or in contravention to existing law, this Trial Chamber acknowledges the principle that there may be exceptional circumstances where it is impossible to obtain legal approval of covert surveillance, for example, when the surveillance is targeted at the body from which permission is to be given. Thus, for example, in a country where interception of telephone conversations can only be

authorised by the Minister of Home Affairs, it does not make sense at all if his or her authority is still required when he himself or she herself is the suspect that needs to be the subject of surveillance.

C. Was the Evidence obtained legally?

57. As explained earlier, this Trial Chamber does not agree with the proposition that the evidence, if illegally obtained must necessarily be excluded. The Trial Chamber, however, is of the opinion, that once raised as a ground for non-admission in terms of Rules 89 and 95, is seised of the matter and needs to consider the alleged illegality because if there is illegality and such illegality would be antithetical to and seriously damage the integrity of the proceedings if the evidence fruit of that illegality is admitted; then it has the duty not to admit that evidence. In the exercise that follows, this Trial Chamber will explain how it cannot come to the conclusion that the intercepts in question were obtained illegally and why, arguendo, had they been obtained illegally, they would still be admissible in evidence both under the law and practice of this Tribunal as well as in view of the special circumstances and events obtaining at the time they were carried out. The Trial Chamber will explain, first, why it is not satisfied that the specific intercept evidence at issue in this case was obtained illegally.

58. The Defence submits that the intercepts in question were obtained illegally because they did not conform with the law of Bosnia and Herzegovina at the time. As is evident from both parties' submissions, there is disagreement between them as to the state of the law in the country at the time the intercepts were authorized.[67] This is not surprising at all considering the problems involved in interpreting domestic law, particularly with reference to a period in which a country is on the brink of, or involved in, armed conflict. Apart from this, however, this Trial Chamber wishes to make it clear that it is beyond its mandate to adjudicate foreign constitutional questions and address issues which arise as a result of the succession of States. Therefore, such an exercise will not be undertaken in this decision.

59. It has also been submitted by the Defence that the fact that the Presidency was not informed of the request for and the decision to intercept the communications in question should lead to the conclusion that the intercepts were illegally obtained. The Trial Chamber cannot agree with this line of reasoning. The relevant domestic law at the time does not seem to require the approval of the Presidency for the intercepts to be made and before they are made but only that it is informed and

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[66] *Vide* footnotes 23 and 25 *supra*.
[67] See Objection, paras. 8-10 and Prosecution's Response, paras. 8–12.

there is nothing to show that this was a requirement *ad validitatem.* In addition, the introduction of the Regulations Regarding the Conduct of Meetings of the Presidency in December 1991 postdate the latter of the two authorisations and came into force when the interception procedure was already in place.

60. The Trial Chamber considers the submissions of the Prosecution in favour of legality as strong enough to be accepted. It appears, in fact, that when the first of the authorisations was signed by the Minister of the Interior Alija Delimustafić on 8 April 1991, the amendment of 31 July 1990 to the Constitution had not yet had the effect of abrogating Article 39 of the BiH Law on Internal Affairs in terms of which the said authorisation was legal. As regards the second authorisation, namely that of 23 August 1991, the position is not exactly clear. It seems that efforts to harmonise Article 39 with the 1990 amendment were not concluded although the draft amendments had been prepared. It would appear that they had not been concluded because of the situation in the country at the time which was already rapidly approaching that of armed conflict.[68] There is in addition to this the existing Constitution of the federal SFRY, which as submitted by the Prosecution, would have provided such authorisation with legality. For these reasons, the Trial Chamber finds no basis for declaring that the intercepts in question were illegally obtained. It also is of the opinion, that for the reasons that follow, the matter of legality in this case does not deserve more attention than it has been given.

D. Is the Evidence Admissible?

61. The first point that the Trial Chamber makes is that admitting illegally obtained intercepts into evidence does not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings. Rather, in situations of armed conflict, intelligence which may be the result of illegal activity may prove to be essential in uncovering the truth; all the more so when this information is not available from other sources. As stated above, 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. [69] Such an approach is consistent with and in the same spirit as that set out by the Appeals Chamber in the case *Prosecutor v. Nikolić* when analysing the circumstances under which a violation of human rights would require a court to set aside jurisdiction:

> Although the assessment of the seriousness of the human rights violations depends on the circumstances of each case and cannot be made *in abstracto*, certain human rights violations are of such a serious nature that they require that the exercise of jurisdiction be declined. It would be inappropriate for a court of law to try the victims of these abuses. Apart from such exceptional

[68] *Vide* para. 17 *supra.*
[69] *Vide* para. 30 *supra.*

> cases, however, the remedy of setting aside jurisdiction will, in the Appeals Chamber's view, usually be disproportionate. The correct balance must therefore be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.

62. Rule 89(d) of the Rules requires the Trial Chamber to use 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 intercepts. The correct balance must, therefore, be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.[70] The ECHR held that "the use at the applicant's trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6§1 of the Convention"[71]. This Trial Chamber agrees with this pronouncement without hesitation.

63. The Trial Chamber is satisfied that, even if it were to concede for argument's sake only that there is definitive proof that the intercepts in question were illegally obtained, there are several circumstances which militate towards their admission in evidence this notwithstanding:

1. A formal request to conduct interceptions was made and approved.[72] Thus, the intercepts were carried out in "good faith".

2. Although notification to the Presidency cannot be established[73] the high level target and need for secrecy, as well as the potentially catastrophic events at which the intercepts were targeted, lead this Trial Chamber to conclude that under these circumstances, it was neither practical nor possible to notify the Presidency of the intercepts. It would not have made any sense at all to notify the entire Presidency when this would have undoubtedly thwarted the attempt to establish what was going on and neutralised the whole raison d'être of the proposed exercise. In any case, there is nothing to indicate that notice to the Presidency was required *ad validitatem* when these two authorisations were issued.

3. There is enough evidence to prove on a *prima facie* basis that the country was, at the time, on the brink of armed conflict and the purpose of the proposed interceptions was to uncover the extent or the suspected extent of the threat to the internal security of Bosnia and Herzegovina. Thus, the utility of such interceptions at that time cannot be underestimated.

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[70] *Id.*
[71] *Vide* footnote 26 *supra*, *Khan*, para. 40.
[72] Exhibits A and B to Objection.
[73] Exhibit A to Supplemental Objection.

4. There is a *prima facie* indication from some of the transcripts themselves that the accused believed that his telephone was bugged and that this did not stop him from telephoning, for example, Radovan Karadžić. In addition, neither of them was in custody or coerced or entrapped into engaging into the telephone conversations that the Prosecution alleges to have taken place.

5. There is no indication that the intercepted evidence could have been available through any other source.

6. In direct response to a similar argument in Kordić, namely that a proferred intercepted communication would be inadmissible under the existing law of Bosnia and Herzegovina, Judge Robinson specifically emphasized that, "Its inadmissibility under Bosnian law wouldn't necessarily make it inadmissible in these proceedings".[74]

7. This Trial Chamber agrees with the dictum of the Trial Chamber in Delalić, namely that "The Trial Chamber is of the opinion that it would constitute a dangerous obstacle to the administration of justice if evidence which is relevant and of probative value could not be admitted merely because of a minor breach of procedural rules which the Trial Chamber is not bound to apply.[75] This Tribunal has a mandate to bring to justice persons allegedly responsible for serious violations of international law, to render justice to the victims, to deter further similar crimes and to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia. This mandate imposes on this Tribunal a tremendously heavy burden which it needs to carry in an efficient and successful manner. In the light of this responsibility under the Statute towards the international community and considering the seriousness of the crimes that this Tribunal is entrusted to adjudicate, it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.

8. This Trial Chamber believes that in the light of the gravity of the charges brought against the accused and the jurisdiction that this Tribunal has to adjudicate serious violations of international law, intercepted evidence, even where obtained in a pre-armed conflict period in violation of the applicable domestic law, should be admitted in evidence. The Trial Chamber also believes that in a situation identical to the one existing in Bosnia and Herzegovina at the time these intercepts were made, that is, at a time when the nation was on the brink of armed conflict, the principle which should apply is

[74] Transcript, *Prosecutor v. Kordic and Čerkez*, T 13670.

that mentioned earlier, namely that such intercepts would not be *per se* subject to exclusion under Rule 95.

9. Domestic exclusionary rules are based, in part, on the principle of discouraging and punishing over-reaching law enforcement. The Trial Chamber does not think for a moment that by taking a different approach to the one it is taking, it would in any event discourage the use of interception of communications in times of crisis or in time of armed conflict. By excluding what would appear to be on a *prima facie* basis relevant and important evidence, it would only be denying itself the possibility of having available evidence which would be otherwise difficult, if not impossible, to obtain. The function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence. At the same time, this Trial Chamber wishes to state that should the intercepts in question have been obtained illegally, their admission into evidence does not mean, and should not in any way be interpreted, as implying approval by this Tribunal of the way in which they were obtained. This is also in line with what Judge May noted in Kordić namely that "It's not the duty of this Tribunal to discipline armies or anything of that sort. Its duty is to determine whether the accused is guilty or not... I'm not accepting that we are approving or disapproving the conduct. All we are deciding is whether this evidence is admissible under Rule 95."[76]

10. The Prosecution in the present case is accusing Brđanin of direct involvement and participation in a joint criminal enterprise with amongst others Radovan Karadžić and with criminal responsibility under both Article 7 (1) and 7 (3) of the Statute. Against this backdrop and considering that there is the allegation that the Accused was a leading public political figure and that he engaged in telephone conversations with amongst others Radovan Karadžić, the relevance and importance of the intercepts in question is indisputable.

64. In addition to the above considerations, under Rule 89 of the Rules, admissible evidence must be both relevant and have a probative value which is not substantially outweighed by the need to ensure a fair trial.

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[75] *Prosecutor v. Zejnil Delalić et al.*, IT-96-21-T, "Decision On The Tendering Of Prosecution Exhibits 104 – 108", 9 February 1998, at pars. 18-20.
[76] Transcript, *Prosecutor v. Kordić and Čerkez*, T 13671-T 13672.

65. The intercept evidence proffered by the Prosecution was obtained as a result of intercepts of the telephone and fax lines of Radovan Karadžić. In some of these conversations the voice of the Accused is also heard. It is alleged by the Prosecution that these and other conversations will prove helpful in establishing facts upon which the indictment of the Accused is based. The Defence has not challenged the admissibility of these intercepts on the grounds of their relevance. On this score the Trial Chamber finds that the documents being tendered for admission are relevant to the issues in this case.

66. In addition to relevance, the Trial Chamber must also determine whether the material has probative value, which requires an assessment of the reliability of the material. The Trial Chamber has no doubt at all that intercepts, the authenticity of which cannot be proved beyond a reasonable doubt, should be excluded.

67. This Trial Chamber has previously addressed the issue of admissibility and has provided standards governing the admissibility of evidence.

1. On 15 February 2002, this Trial Chamber issued an Order on the Standards Governing the Admissibility of Evidence in this trial[77]. That Order on Standards notes the approach adopted by the Rules as one in favour of admissibility[78]. It also notes that a "Trial Chamber shall not be bound by national rules of evidence whether representing the common law or civil law"[79] and that "legal admissibility" is distinct from the weight that the evidence is given.

2. Also noted in the Order on Standards is the following language: "statements, which are not voluntary but are obtained from suspects by oppressive conduct, cannot pass the test under Rule 95 of the Rules."[80]

3. Noting the "overriding principle in matters of admissibility of evidence" which places the Trial Chamber in the position of "guardian and guarantor of the procedural and substantive rights of the accused" and acknowledging its delicate task of balancing an accused's rights against the rights of victims and witnesses, it is this International Tribunal's "inherent right and duty to insure that evidence which qualifies for admission under the Rules will be admitted."[81]

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[77] Order on the Standards Governing the Admissibility of Evidence ("Order on Standards"), 15 February 2002, para. 6.
[78] *Id.* para. 11
[79] *Id.* para. 10.
[80] *Id.* para. 23.
[81] *Id.* para. 25.

68. As stated, intercepts that are not proved authentic beyond a reasonable doubt will be eventually excluded. Other intercepts will be subject to the same interrogation as every other piece of evidence whose reliability will be determined at the end of the trial. The Trial Chamber is able to objectively examine the proposed evidence and determine its appropriate weight in the context of the entire trial. For these reasons, and saving what has just been said, the Trial Chamber finds that it is necessary, even at this stage, to be satisfied that there is a prima facie indication of reliability failing which it would be incumbent on it to exclude them straightaway. In this context the Trial Chamber is satisfied that on a prima facie basis there is enough to warrant their admission at this stage subject to the overall examination of the evidence in due course and that there is a prima facie explanation for the fact that in the process of transferring the contents of the conversations from the cassette tapes to the reel-to-reel tapes some parts were omitted. There is also a *prima facie* explanation for the discrepancies in the dates of some of the tapes. Overall, at this stage the Trial Chamber is satisfied that the intercept evidence in question meets the standards previously set by this Trial Chamber for admission, and consequently it is going to admit them.

IV. DISPOSITION

PURSUANT to the foregoing discussion,

TRIAL CHAMBER II HEREBY

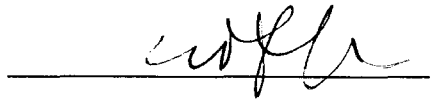
REJECTS the Objection and Supplemental Objection. The proposed evidence will be admitted in accordance with the previous guidelines established in the Order on Standards dated 15 February 2002 and as further elaborated in this decision.

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

Dated this 3rd day of October 2003,

At The Hague

The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]