



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No.: IT-02-54-T

Date: 16 December 2003

Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Order of: 16 December 2003

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**PRELIMINARY DECISION ON THE ADMISSIBILITY
OF INTERCEPTED COMMUNICATIONS**

The Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice

Ms. Hildegard Uertz-Retzlaff
Mr. Dermot Groome

The Accused

Mr. Slobodan Milošević

Amici Curiae

Mr. Steven Kay, QC
Mr. Branislav Tapušković
Prof. Timothy L.H. McCormack

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 (“International Tribunal”),

BEING SEISED OF an application by the Prosecution to admit a number of intercepted communications (“intercepts”) concerning the Bosnia and Herzegovina (“BiH”) part of the trial,¹

NOTING the arguments of the Accused that

- (a) all the recordings were intercepted without the authority of the state agency in charge;²
- (b) the intercepts were maliciously manipulated and are not authentic representations of the conversations;³ and
- (c) most of the conversations took place in peace time,⁴

NOTING the arguments of the *Amici Curiae* that

- (a) the Prosecution has not established the legality of the process of recording the intercepts;⁵
- (b) the authenticity of the intercepts, and therefore the reliability of the evidence contained in them, has not be established beyond reasonable doubt, and expert analysis is required to establish this;⁶ and
- (c) consideration should be given to each intercept on a case-by-case basis,⁷

NOTING the arguments of the Prosecution that

- (a) interception of communications during wartime, whether or not in conformity with domestic law, are *per se* not subject to exclusion under Rule 95;⁸

¹ The first such application was made in its “Prosecution’s Response to Accused’s Objection to Admission of Intercepted Communications”, 31 October 2002 (“Prosecution Response”). Thereafter a number of intercepted communications have been led through different witnesses, and most recently the witness B-1793 was adduced in order to verify the procedure and authenticate all prior intercepts and a number of newly tendered intercepts (amounting to 245 intercepts in all): 4 December 2003, Transcript pages (“T”) 30097-30212.

² 30 Sept 2002, T. 10412.

³ 10 December 2003. The relevance of this argument is the question of whether, during wartime, the domestic laws regulating these matters are less applicable or not applicable at all.

⁴ *Ibid.*

⁵ 10 December 2003.

⁶ *Ibid.* The *Amici* submit that the Trial Chamber should apply Rule 89 (E) in this respect, which reads: “A Chamber may request verification of the authenticity of evidence obtained out of court.”

⁷ 19 Nov 2002, T. 13050; *Amici* Observations, paras 24 and 34.

⁸ Prosecution Response, para.5 (a).

- (b) there were lawful authorisations to intercept the communications during the pre-conflict period;⁹
- (c) even if the intercepted communications were obtained in violation of domestic law, they should be admitted in cases concerning serious violations of international humanitarian law;¹⁰ and
- (d) authenticity of the intercepts has been established *prima facie* and, at any rate, no “reasonable” argument has been raised to challenge the authenticity of the intercepts,¹¹

CONSIDERING that the Trial Chamber has marked for identification all tendered intercepts to date,

NOTING that the relevant provisions pertaining to the admissibility of the intercepts are Rule 89 and, in particular, Rule 95, of the Rules of Procedure and Evidence (“Rules”) which reads as follows:

Rule 95
Exclusion of Certain Evidence

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

CONSIDERING that the intercepts must be relevant to be admissible, and that the Prosecution has been ordered to produce a schedule showing why each of the intercepts is relevant,¹² which the Trial Chamber will consider further,

CONSIDERING that whether the process of recording the intercepts is in accordance with the domestic law of BiH does not necessarily determine whether the intercepts are admissible; but rather it is the law relating to the admissibility of evidence under the Statute and Rules of this Tribunal and international law which must be applied,

CONSIDERING that the Accused has raised a sufficient question as to the authenticity of the intercepts such that the Prosecution must establish their authenticity, and the Trial

⁹ Ibid, para. 5 (b).

¹⁰ Ibid, para. 5 (c).

¹¹ 10 December 2003.

¹² 4 December 2003, T. 30109.

Chamber must determine the procedure by which the authenticity of the intercepts is to be established,

CONSIDERING that where authenticity cannot be established beyond a reasonable doubt the intercept will be excluded,¹³

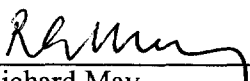
CONSIDERING HOWEVER that the Trial Chamber is satisfied that there are sufficient indicia of reliability to admit the 245 transcripts contained in exhibit 613 into evidence on a *prima facie* basis,¹⁴ the final decision on admissibility to be made once the Trial Chamber is satisfied as to the relevance and reliability of the intercepts,

PURSUANT TO RULES 89 AND 95 OF THE RULES

HEREBY ORDERS AS FOLLOWS:

- (1) The 245 transcripts contained in exhibit 613 are admitted into evidence on a *prima facie* basis; and
- (2) The Trial Chamber reserves its final ruling with respect to the admissibility subject to a determination as to the relevance and reliability of the intercepts.

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


Richard May
Presiding

Dated this sixteenth day of December 2003
At The Hague
The Netherlands

[Seal of the Tribunal]

¹³ In this respect, the Trial Chamber notes the position taken in the *Prosecutor v. Brdanin*, “Decision on the Defence ‘Objection to Intercept Evidence’”, 3 October 2003 (“*Brdanin Decision*”), at para. 66.

¹⁴ The Trial Chamber notes that this is the procedure followed in the *Brdanin Decision*, at para. 68.