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UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991	Case No:	IT-08-91-T
	Date:	16 December 2009
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IN TRIAL CHAMBER II

Before: **Judge Burton Hall, Presiding**
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: **Mr. John Hocking**

Decision of: **16 December 2009**

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

DECISION DENYING THE STANIŠIĆ MOTION FOR EXCLUSION OF RECORDED INTERCEPTS

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Igor Pantelić and Mr. Dragan Krgović for Stojan Župljanin

1. **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 ("Tribunal") is seized of the "Motion for exclusion of records of intercepts of conversations, with annex A", filed by the Defence of Mićo Stanišić ("Stanišić Defence") on 15 October 2009 in which it objects against admission of 183 intercepts tendered by the Prosecution ("Motion").

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

2. On 6 October 2009, in response to a Prosecution motion for leave to add two documents to its exhibit list, the Stanišić Defence submitted that it objected to "the admissibility of all intercepts proffered by the Prosecution [...] on the basis that these intercepts were illegally obtained and that they do not demonstrate any indicia of reliability that would support their admission into evidence".[1] In its decision on the motion, the Trial Chamber stated that it "will decide on issues regarding admissibility of intercepts, including issues relating to their authenticity or reliability, at a later stage once both parties have made their submissions on the matter."[2]

3. On 15 October 2009, the Stanšić Defence filed the Motion in which it requests that the Trial Chamber deny admission into evidence of the 183 recordings included on the Prosecution's exhibit list "which purport to be intercepts of telephone conversations".[3] The Stanišić Defence submits, as a preliminary consideration, that "[t]he burden of establishing the admissibility of items of evidence belongs to the party that seeks to tender it, in this case the Prosecutor."[4] The Stanišić Defence continues that the "Prosecution has failed to bear the onus of establishing the facts relevant to the admission of the impugned proposed exhibits."[5]

4. The Stanišić Defence submits that the Prosecution has failed to establish the authenticity of the intercepts.[6] It asserts that "[t]he Prosecution will not call any witness capable of testifying about the process [...] that was used to make those recordings."[7] The Stanišić Defence further states that "[a]s a result of the Prosecution's failure to call such witnesses, the Defence is being denied its fundamental right to confront the evidence" about the authenticity, process of recording, legality,

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[1] Mr. Stanišić's response to the Prosecution's motion for leave to amend Rule 65 *ter* exhibit list to add documents related to Witness ST092, with annex", 6 Oct 2009, p. 2.
[2] Decision granting Prosecution's motion for leave to amend Rule 65 *ter* list to add documents related to Witness ST092, 20 Oct 2009, para. 8.
[3] Motion, paras 2, 38. The Trial Chamber notes that the list provided by the Stanišić Defence includes 191 Rule 65 *ter* numbers eight of which are duplicates.
[4] Motion, para. 5.
[5] Motion, para. 5.
[6] Motion, para. 6.
[7] Motion, para. 7.

possible interference or tampering, reliability, accuracy and completeness, safe-keeping, or legality of the process of recording of the intercepts.[8] The Stanišić Defence avers that "[t]he ability of the Defence to cross-examine a member of the Office of the Prosecutor who received such material who is familiar with its content would be no remedy to its inability to cross-examine a witness capable of giving evidence about the actual recording process, its reliability and the circumstances thereof as well as issues pertaining to the safe-keeping of that material."[9] It submits that this violates the European Court of Human Rights jurisprudence which states "that in the case of intercepts, the ability of the accused to confront that material [...] is a critical factor to and a condition of the protection of his right to a fair trial."[10] The Stanišić Defence further asserts that the admission of the intercepts without the abovementioned evidence "would have the practical effect of undermining Mr. Stanisic's right to remain silent as it would force him to consider the necessity of testifying with a view to give evidence in relation to these recordings and their content."[11]

5. The Stanišić Defence submits that the Prosecution has not sought "scientific evidence that could have established the authenticity or otherwise of these recordings."[12] It further provides that it has submitted a number of the intercepts to the Netherlands Forensic Institute ("NFI") and that these findings support the view that "even from a scientific point of view, it cannot be excluded that these recordings are incomplete or that they have been tempered [*sic*] with."[13] The Stanišić Defence also submits that "[t]he Prosecution has produced no evidence as to the reliability of the process by which these recordings were allegedly made",[14] nor has the Prosecution produced a "chain of custody relating to that material from the time when it was produced."[15]

6. The Stanšić Defence adds that even if the Trial Chamber does not find that the Statute of the Tribunal and the Rules of Procedure and Evidence ("Rules") mandate the exclusion of the intercepts, the "Trial Chamber should use its discretionary power to exclude the material pursuant to Rules 89(D) and 95."[16] It asserts that the intercepts have no probative value because "the Prosecution has failed to establish the accuracy or authenticity of the material" and that the NFI testing "casts doubts upon the accuracy and reliability of the material."[17] It also asserts that "the

[8] Motion, para. 21.
[9] Motion, para. 24.
[10] Motion, para. 25, citing *Case of Khan v. The United Kingdom*, Application no. 35394/97, Judgment, European Court of Human Rights, 12 May 2000, paras 35, 38; *Case of Schenk v. Switzerland*, Application no. 10862/84, Judgment, European Court of Human Rights, 12 Jul 1988, paras 45-48.
[11] Motion, para. 26.
[12] Motion, para. 8.
[13] Motion, para. 8.
[14] Motion, para. 13.
[15] Motion, para. 16.
[16] Motion, para. 28.
[17] Motion, para. 29.

material in question would, at most, have a very remote relevance to the Prosecution."[18] Therefore, "the admission of that material would far outweigh any evidential benefit as might result from its admission" and it is "against the interests of justice and a threat to the fairness of the proceedings to admit that material."[19]

7. Finally, the Stanišić Defence submits that the "Prosecution has failed to establish that the recordings were done legally."[20] The Stanišić Defence recognises that according to the jurisprudence this does not in itself mean that the evidence should be excluded, but argues that it "further militates against admission."[21] It explains that the Prosecution has "failed to establish that the recordings were made in compliance with the relevant local laws and regulations" which provides "further evidence of the lack of reliability of that material and the consequences that its admission would have on the fundamental rights of the accused".[22]

8. The Prosecution filed a response on 27 October 2009 in which it opposes the Motion.[23] The Prosecution first submits that the Motion is in the incorrect form because "the Trial Chamber has already determined that 179 of the intercepts satisfy the requirements for admissibility and will be admitted along with the 92*ter* packages of ST-108 and ST-187 when those packages are tendered through the witnesses."[24] In its view, the correct form of any motion seeking the exclusion of these 179 intercepts would be a motion for reconsideration.[25] Further, the Prosecution submits that the arguments raised by the Stanišić Defence "could have been made at the time the 92*ter* Response was filed", "there are no new arguments for the exclusion of these intercepts that could not have been made before the 92*ter* Decision was rendered", and that "such a motion presenting only arguments that were, or could have been, made before the previous decision was rendered would be considered frivolous."[26] In relation to the remaining 15 intercepts, the Prosecution argues that the Motion is premature and that "the proper time for challenging the admissibility of the intercepts is when they are sought to be tendered, and not before."[27] The Prosecution submits that when it chooses to tender the intercepts, it "will be done through appropriate witnesses, which will allow the Trial Chamber to assess the evidence before it and determine whether the threshold for

[18] Motion, para. 30.
[19] Motion, para. 31.
[20] Motion, para. 32.
[21] Motion, paras 32-33.
[22] Motion, para. 33.
[23] Prosecution response to Stanišić's motion for exclusion of records of intercepts of conversations, with annex A and confidential annex B, 27 Oct 2009 ("Response"), para. 1.
[24] Response, para. 5
[25] Response, para. 6.
[26] Response, paras 6-8, citing *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-AR72.1, Decision on motion for reconsideration of the "Decision on the interlocutory appeal concerning jurisdiction" Dated 31 August 2004, 15 Jun 2006, para. 28.
[27] Response, para. 9.

admissibility has been met."[28] The Prosecution states that it will be calling a witness who can give evidence about the process of making and the safe-keeping of the intercepts and "the Accused will have a full opportunity to confront these witnesses."[29]

9. On the issues of authenticity and reliability, the Prosecution submits that the evidence of ST108 will include "an overview of the legal, mechanical and technical process by which the intercepts were made" which will establish the authenticity and reliability of those intercepts.[30] This witness will be called pursuant to Rule 92 *ter* and will, therefore, be available to the Defence for cross-examination.[31] Further, the Prosecution asserts that the NFI report "does not raise any substantial doubts as to the authenticity of the intercept recordings" but "merely acknowledges the hypothetical possibility that the recordings *could* have been tampered with, due to the absence of technical means to unequivocally verify authenticity."[32] The Prosecution adds that the intercepts have previously been admitted in the *Brđanin* and *Slobodan Milošević* cases and that the evidence available to the Trial Chambers in those cases was the same as will be heard in the present case.[33]

10. The Prosecution submits that ST108 will also offer evidence as to the legality of the recordings by testifying that the intercepts "were in fact authorised by the Minister of Internal Affairs of BiH in accordance with the Law on the Bases of the State Security System and the Law on Internal Affairs.[34] However, the Prosecution argues that "whether the process of recording the intercepts in is [*sic*] accordance with the domestic law does not determine whether the intercepts are admissible."[35] "Rather, it is the law relating to the admissibility of evidence under the Statute and Rules of the Tribunal and international law which must be applied."[36] The Prosecution submits that the jurisprudence of the Tribunal states that "Rule 95 does not apply to *every* illegality, but only those which would seriously damage the integrity of the proceedings".[37] The Prosecution asserts that the "Accused has failed to offer any evidence that the intercepts in question were obtained by methods which cast *any* doubt – let alone substantial doubt – on their reliability, or which suggest that their admission would seriously damage the integrity of the proceedings."[38]

11. Finally, the Prosecution submits that Rule 89(D) does not serve as a basis for exclusion because "the approach adopted by the Rules is clearly one in favour of admissibility as long as the

[28] Response, para. 11.
[29] Response, paras 11, 13.
[30] Response, paras 16, 23.
[31] Response, para. 16.
[32] Response, para. 18, emphasis in original.
[33] Response, para. 22.
[34] Response, para. 25, internal citations omitted.
[35] Response, para. 26.
[36] Response, para. 26.
[37] Response, para. 28, emphasis in original.

evidence is relevant and is deemed to have probative value [...] and its probative value is not substantially outweighed by the need to ensure a fair trial".[39] The Prosecution asserts that the Stanišić Defence argument that the intercepts have no probative value is premature and that it offers no basis for its claim that the intercepts have only remote relevance to the Prosecution.[40]

II. APPLICABLE LAW

12. Pursuant to Rule 89(C) of the Rules, the Trial Chamber may admit any relevant evidence that it deems to have probative value. Rule 95 provides that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if admission is antithetical to, and would seriously damage the integrity of the proceedings. Once admitted into evidence, the Trial Chamber may pursuant to Rule 89(D) exclude evidence from the trial record if its probative value is substantially outweighed by the need to ensure a fair trial.

III. DISCUSSION

13. As a preliminary matter, the Trial Chamber considers that contrary to the Prosecution contention, the Motion would not be more appropriately filed as a motion for reconsideration in regards to the documents to be tendered through a Rule 92 *ter* witness. The Trial Chamber notes that it has simply ruled that the documents meet the requirements for admission pursuant to the rule. This means that the documents are eligible for admission once the remaining requirements of Rule 92 *ter* are met. This does not mean that no other challenge to the admission of the documents may be raised.

14. The admission of an intercept does not depend, *per se*, on whether it was obtained legally or illegally under the domestic law in force at the time the intercept was recorded.[41] Rather, the Trial Chamber must be satisfied that the requirements for admissibility of evidence provided by Rule 89 of the Rules are met and that there are no grounds for exclusion under Rule 95. Tribunal jurisprudence indicates that there should be sufficient indicia of reliability to make out a *prima facie* case for intercepts to be admissible.[42] The intercepts will be found to have probative value if the

[38] Response, para. 29.
[39] Response, para. 30, quoting *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the motion of the Prosecution for the admissibility of evidence, 19 Jan 1998, para. 19, affirmed by *Prosecutor v. Delalić et al.*, Case No. IT-96-21-AR73.2, Decision on application of Defendant Zejnil Delalić for leave to appeal against the decision of the Trial Chamber of 19 January 1998 for the admissibility of evidence, 4 Mar 1998.
[40] Response, para. 31.
[41] *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on the Defence "Objection to intercept evidence", 3 Oct 2003, paras 28-68.
[42] *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on admissibility of intercepted communications, 7 Dec 2007, para. 32.

Trial Chamber finds that they are sufficiently reliable, authentic and relevant to the issues in this case.[43]

15. The Stanišić Defence argues that the Prosecution has failed to establish the admissibility of the intercepts asserting that the Prosecution will produce no evidence which goes to the authenticity or reliability of the intercepts. However, the Prosecution indicates that at the time it tenders the intercepts, it will do so through an appropriate witness who is able to provide evidence which will allow the Trial Chamber to determine whether the threshold for admissibility has been met. The Trial Chamber recalls that eight intercepts have been tendered for admission and that at the time of tendering the Prosecution sought testimony from a witness so as to authenticate the intercepts.[44] The Prosecution argues, the Stanišić Defence concedes, and the Trial Chamber accepts that where a witness is able to identify his or her own voice on an intercept and absent conflicting evidence, the relevant intercept may be sufficiently authenticated.[45]

16. Further, the Rule 65 *ter* witness summary provided by the Prosecution for ST108 states that he will provide evidence on "the legislation and practice by which monitoring of conversations was carried out during the period of the Indictment", "generally where the telephone intercepts were monitored from, whose telephones were being monitored, and what system was used to record conversations" and "the chain of custody of the original tapes containing particular intercepted conversations". The Trial Chamber finds that this testimony may also serve to authenticate the relevant intercepts.

17. The Stanišić Defence asserts that the Prosecution has not brought scientific evidence to establish the authenticity of the intercepts and submits the NFI report in support of the view that it cannot be excluded that the intercepts were incomplete or have been tampered with. The Trial Chamber notes that the NFI report is inconclusive, stating that "it is impossible to conclude whether or not those recordings are authentic".[46] Therefore, the Trial Chamber finds that it is unable to consider the NFI report when assessing the authenticity or reliability of the intercepts.

18. Intercepts, like all tendered exhibits, will only be admitted if and when the tendering party has provided the evidence necessary for the Trial Chamber to determine that the threshold for

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[43] *Prosecutor v. Vujadin Popović et al*, Case No. IT-05-88-T, Decision on Prosecution's motion for admission of exhibits from the bar table, motion to amend the bar motion, and oral motion for admission of additional exhibits, 14 Mar 2008, para. 14.
[44] Five intercepts were sought for admission through the testimony of Branko Đerić, Hearing, 30 Oct 2009, T.2338-2347, and three intercepts were sought for admission and admitted as part of the 92 *ter* package of Milan Trbojević, Hearing, 2 Dec 2009, T.4080.
[45] Hearing, 30 Oct 2009, T.2339.
[46] Motion, annex A.

admissibility has been met. For the reasons outlined above, the Trial Chamber considers that the Prosecution has provided the necessary evidence for it to make this evaluation in relation to the intercepts tendered. In relation to the intercepts yet to be tendered, the Prosecution indicates that it will provide the necessary evidence at the time admission is sought. The Stanišić Defence argument that the Accused is being denied his fundamental right to confront the evidence against him must therefore fail. The Defence will have adequate opportunity to challenge the admission of any given intercept at the time that it is tendered as well as the opportunity to challenge the assertions supported by the intercepts during the presentation of its case in chief.

19. The Stanišić Defence argument that Mićo Stanišić's right to remain silent is being violated must also fail. As with all evidence brought by the Prosecution against him, Mićo Stanišić must weigh the consequences of testifying to give oral evidence in contradiction to Prosecution evidence against the consequences of remaining silent and only presenting alternative evidence. The fact that the evidence in question consists of intercepts of conversations that he may have participated in, therefore, does not make any difference in this respect.

20. The Stanišić Defence also requests that the Trial Chamber uses its discretionary power to exclude the intercepts under either Rule 89(D) or Rule 95 of the Rules because the intercepts have no probative value, have only remote relevance to the indictment, and the admission of the intercepts would violate the fundamental rights of the Accused. The Trial Chamber notes that the Stanišić Defence does not provide any argument to support its assertion that the intercepts are not relevant to the indictment. The arguments raised in support of the assertion that the intercepts have no probative value and violate the rights of the accused are the same arguments raised in support of the assertion that the intercepts do not meet the requirements for admission under Rule 89(C) and have been dismissed above.

21. Finally, the Stanišić Defence contends that the intercepts should not be admitted because they were illegally obtained which casts doubt on the reliability of the intercepts. The Trial Chamber recalls that the jurisprudence of the Tribunal is clear that Rule 95 does not require that illegally obtained material be automatically and necessarily excluded.[47] The jurisprudence is equally clear that even if the intercepts were obtained illegally, the illegality would not rise to the level that it would seriously damage the integrity of the proceedings such that they must be

[47] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Oral decision of Judge May, 2 Feb 2000, T. 13684-13685. See also *Prosecution v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Decision on the admission of MFI 1D247 and MFI 1D248, confidential, 20 Mar 2008, para. 6; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on Defence motion to exclude certain intercepted communications, confidential, 29 Jan 2004, para. 9; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Preliminary decision on the admissibility of intercepted communications, 16 Dec 2003, p. 3; and *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on the Defence "Objection to intercept evidence", 3 Oct 2003, paras 28-68.

excluded.[48] Therefore, the Trial Chamber will not deny admission into evidence of the intercepts based on an allegation that they were illegally obtained.

22. For the foregoing reasons, the Trial Chamber finds that the intercepts are not inadmissible on any of the grounds raised in the Motion.

23. The Trial Chamber recalls that the Prosecution sought the admission into evidence of five intercepts through Branko Đerić and that the Trial Chamber reserved its decision on these intercepts pending the outcome of this decision.[49] During the testimony of Branko Đerić and pursuant to an oral ruling of the Trial Chamber regarding the admission of documents through this witness, the Prosecution presented four intercepts as a sampling of the five intercepts sought for admission through this witness.[50] Branko Đerić was able to identify the speakers in three of the four intercepts but was unable to identify the speakers in the remaining intercept.[51] The Trial Chamber finds that, the three intercepts for which Branko Đerić was able to recognize the speakers are admissible and will be admitted into evidence at this time. The remaining two documents for which Branko Đerić did not state that he could identify the speakers will remain marked for identification.

[48] *Ibid.*
[49] Hearing, 26 Nov 2009, T. 3900-3901. The Trial Chamber notes that the oral ruling included six documents which were to be marked for identification pending this decision. However, Rule 65 *ter* number 1070 is an incomplete draft translation of the same conversation which is transcribed in Rule 65 *ter* number 2877. Therefore, 1070 should not have been included in the list of documents to be marked for identification and it will not be admitted into evidence.
[50] Hearing, 30 Oct 2009, T. 2338-2347.
[51] *Id.*

IV. DISPOSITION

24. For the foregoing reasons, and pursuant to Rule 89 and Rule 95 of the Rules, the Trial Chamber:

DENIES the Motion; and

ADMITS INTO EVIDENCE the intercepts with Rule 65 *ter* numbers 2877, 3231, and 3237.

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

Judge Burton Hall
Presiding

Dated this sixteenth day of December 2009
At The Hague
The Netherlands

[Seal of the Tribunal]