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

Case No.: IT-95-5/18-T

Date: 22 January 2013

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **22 January 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION FOR RECONSIDERATION OF DENIAL OF DEFENCE INTERCEPTS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Tribunal") is seised of the Accused's "Motion for Reconsideration of Denial of Defence Intercepts", filed on 10 December 2012 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused moves for the reconsideration of the portions of the Chamber's "Decision on the Accused's Bar Table Motion (Sarajevo Intercepts)", issued on 9 October 2012 ("Sarajevo Intercepts Decision") and "Decision on Accused's Motions to Admit Documents Previously Marked for Identification and Publicly Redacted Version of D1938", issued on 7 December 2012 ("MFI Decision") (together, "Decisions"), in which the Chamber denied the admission of transcripts of intercepted conversations tendered by the Accused ("Intercepts").[1] In the Sarajevo Intercepts Decision, the Chamber denied the admission of some of the Intercepts on the ground that, *inter alia*, the Accused did not make any showing that the authenticity of such intercepts had been established, either through an intercept operator or with judicial notice pursuant to Rule 94(B) of the Tribunal's Rules of Procedure and Evidence ("Rules").[2] In the MFI Decision, the Chamber denied admission of certain Intercepts on the same ground, as the Accused's only representation regarding authenticity was that such intercepts shared the "same provenance as other intercepts admitted into evidence at the request of the prosecution".[3]

2. The Accused contends that reconsideration is warranted because the Chamber failed to take into account an understanding that, in the Accused's submission, was reached between the parties and the Chamber on 15 March 2012, during the cross-examination of an intercept operator called to testify as a witness for the Office of the Prosecutor ("Prosecution").[4] That day, the Accused's legal adviser submitted that all of the intercept operators testifying on behalf of the Prosecution had declined the Accused's requests for a meeting and thus had not authenticated any of the intercepts that the Accused wished to tender into evidence.[5] The Accused's legal adviser thus suggested:

> [W]hether […] it's not necessary for us to show those documents to the witness, and that all of the documents that fall within the same general category as those tendered by the

[1] Motion, paras. 1, 5; Sarajevo Intercepts Decision, para. 12; MFI Decision, para. 26.
[2] Sarajevo Intercepts Decision, paras. 10–11.
[3] MFI Decision, para. 26.
[4] Motion, para. 2, referring to T. 26379–26380 (15 March 2012).
[5] Motion, para. 4, referring to T. 26379–26380 (15 March 2012).

> Prosecution may be admitted for the Defence under the same circumstances without the necessity of the witness commenting on the individual intercept.[6]

In response, the Prosecution orally agreed that it would not object to the intercepts if they came from the same category of notebooks.[7] The Prosecution also stated that it was establishing the authenticity of intercepts "as a body" and thus would not object to the authenticity of specific intercepts taken from those bodies of intercepts already authenticated.[8]

3. On the basis of this exchange, the Accused now maintains that the Chamber and parties reached an agreement that any intercepts the Defence tenders for admission would not be challenged on authenticity grounds, thus foregoing the "lengthy process" of requiring intercept operators to authenticate each individual transcript.[9]

4. Finally, the Accused notes that the Sarajevo Intercepts Decision denied his bar table motion on the ground that it should be made at the end of his case.[10] The Accused contends that he is approaching the end of the Sarajevo component of his case, and thus it would be more efficient to rule now instead of waiting for the Accused to refile it in January.[11]

5. In the "Prosecution Response to Karadžić's Motion for Reconsideration of Denial of Defence Intercepts", filed on 24 December 2012 ("Response"), the Prosecution opposes the Motion on the ground that the Accused has failed to demonstrate an error of reasoning in the Decisions or that reconsideration is necessary to prevent an injustice.[12] The Prosecution argues that the Accused has not provided any further information about the authenticity of the Intercepts.[13] Specifically, the Prosecution contends that the Accused has failed to demonstrate either that: (i) the Intercepts originate from the same bodies of intercepts that the Prosecution authenticated and which were admitted into evidence during the Prosecution case, or (ii) judicial notice could be taken of the authenticity of the Intercepts pursuant to Rule 94(B) of the Rules.[14]

6. The Prosecution also reiterates its position from the 15 March 2012 hearing, namely that the Prosecution does not object to the authenticity of any intercept that the Accused seeks to tender, provided that it is from the same bodies of intercepts which were already authenticated by

[6] T. 26380 (15 March 2012). *See also* Motion, para. 4.
[7] T. 26380 (15 March 2012). *See also* Motion, para. 4.
[8] T. 26380 (15 March 2012). *See also* Motion, para. 4.
[9] Motion, para. 2.
[10] Motion, para. 6.
[11] Motion, para. 6.
[12] Response, paras. 1, 5.
[13] Response, para. 4.
[14] Response, para. 4.

Prosecution witnesses and from which the Chamber previously admitted intercepts.[15] The Prosecution reserves the right, however, to object to the authenticity of any intercept which it believes is of suspect authenticity.[16]

II. Applicable Law

7. The Chamber recalls that there is no provision in the Rules for requests for reconsideration, which are a product of the Tribunal's jurisprudence, and are permissible only under certain conditions.[17] The Chamber has "inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases 'if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.'"[18] Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.[19]

III. Discussion

8. With regard to the Accused's core argument that the Chamber should reconsider denying admission of the Intercepts because of the discussion during the hearing on 15 March 2012, the Chamber recalls that since that date it has reiterated its consistent approach to evaluating the authenticity of intercepts and has denied admission on authenticity grounds on several occasions.[20] This consistent practice, applied in similar terms to both the Prosecution and the Accused, was restated to the parties in very clear terms as recently as 17 January 2013.[21] The Chamber considers that it will not deviate from this practice and that it is incumbent for the Accused to establish authenticity of a particular intercept through a participant in the intercepted conversation, the

[15] Response, paras. 7–8.

[16] Response, para. 8.

[17] *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 ("*Prlić* Decision on Reconsideration"), p. 2.

[18] *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence "Requête de l'Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d'une Erreur Matérielle", 14 June 2006, para. 2.

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

[20] MFI Decision, para. 26; Sarajevo Intercepts Decision, paras. 9–11; Decision Prosecution's Motion for the Admission of Two Intercepts from the Bar Table, 22 May 2012, paras. 6–9; Decision on Prosecution's Motion for the Admission of Evidence from the Bar Table, 22 May 2012, para. 10; Prosecution's Third Bar Table Motion for the Admission of Intercepts, 24 May 2012, paras. 11–14, 16; Decision on Prosecution's Motion for the Admission of Documents from the Bar Table (Municipalities), 25 May 2012, para. 7; Decision on Prosecution's Second Bar Table Motion for the Admission of Intercepts, 25 May 2012, paras. 8–9.

[21] T. 32150–32151 (17 January 2013).

relevant intercept operator, or the use of Rule 94(B) of the Rules.[22] The Chamber therefore finds that the Accused has neither presented the existence of a clear error in reasoning, nor of particular circumstances justifying reconsideration in order to prevent an injustice.[23]

9. Furthermore, the Chamber considers that, even if it were to reconsider the process through which intercepts are authenticated for purposes of admission into evidence, the Motion would fail because it does not establish that the Intercepts originate from the same bodies of intercepts for which authentication evidence was presented through Prosecution witnesses and from which the specific intercepts already admitted were derived. The Chamber thus considers that the Motion shares a similar defect to those in his "Bar Table Motion: Sarajevo Intercepts", filed on 3 October 2012 ("Sarajevo Intercepts Motion")—in which he stated that the intercepts were "under conditions already found to be reliable"—and "Motion to Admit Documents Previously Marked for Identification", filed on 24 September 2012 ("MFI Motion")—in which he argued that the intercepts "share the same provenance" as other intercepts that the Prosecution tendered and which were subsequently admitted into evidence.[24]

IV. Disposition

10. Accordingly, the Chamber, pursuant to Rule 89 of the Rules, hereby **DENIES** the Motion.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-second day of January 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

[22] Sarajevo Intercepts Decision, paras. 9–10; MFI Decision, para. 26.

[23] Given its ruling above, the Chamber will not consider the Accused's argument regarding the appropriateness of ruling on the Motion at this stage of the proceedings.

[24] Sarajevo Intercepts Motion, Annex A; MFI Motion, para. 2.