



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-05-87/1-T
Date: 14 August 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr. John Hocking

Order of: 14 August 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR THE
ADMISSION OF EVIDENCE FROM WITNESSES SHAUN
BYRNES AND MICHAEL PHILLIPS**

The Office of the Prosecutor:

Mr. Chester Stamp
Ms. Daniela Kravetz
Mr. Matthias Neuner

Counsel for the Accused:

Mr. Dragoljub Đorđević
Mr. Veljko Đurđić

THIS TRIAL CHAMBER (“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,

BEING SEIZED OF the “Prosecution’s Motion for the Admission of Evidence of Witnesses Shaun Byrnes and Michael Phillips pursuant to Rule 92 *Ter*” filed on 21 July 2009 (“Motion”), whereby the Prosecution seeks the admission into evidence, pursuant to Rule 92*ter* of the Rules of Procedure and Evidence (“Rules”), of the (a) transcript of the testimony of Shaun Byrnes in the case *Prosecutor v Milutinović et al* (bearing Rule 65*ter* no 05342), and the (b) transcript of the testimony of Michael Phillips in the case *Prosecutor v Milutinović et al* (bearing Rule 65*ter* no 05343),¹

NOTING that, in the Motion, the Prosecution submits that it intends to call these witnesses in the weeks commencing 17 August 2009 and 31 August 2009 respectively, and that it will conduct a brief oral examination of the witnesses in court to “highlight, supplement and clarify certain portions of their written evidence”, and may also ask the witnesses to comment on exhibits relating to their evidence,²

NOTING “Vlastimir Đorđević’s Response to Prosecution’s Motion for the Admission of Evidence of Witnesses Shaun Byrnes and Michael Phillips Pursuant Rule 92 *Ter*”, filed on 4 August 2009 (“Response”), whereby the Defence for Vlastimir Đorđević (“Defence”) does not oppose the Motion provided that “due time is granted for cross-examination on all the relevant issues testified to in the prior transcripts and new evidence”,³

NOTING that Rule 92*ter*(A) provides:

A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

- (i) the witness is present in court;
- (ii) the witness is available for cross-examination and any questioning by the Judges; and
- (iii) the witness attests that the written statement or transcript accurately reflects that witness’ declaration and what the witness would say if examined.

CONSIDERING that Shaun Byrnes and Michael Phillips will be present in court to attest that their respective transcripts of evidence sought for admission are accurate and reflect what they would say

¹ Motion, para 3.

² Motion, para 8.

³ Response, para 2.

if examined, and that they will be available for cross-examination and any questioning by the Judges,⁴

NOTING that the evidence sought to be admitted pursuant to Rule 92ter must also fulfill the general requirements of admissibility: that is, the proposed evidence must be relevant and have probative value, and the probative value must not be substantially outweighed by the need to ensure a fair trial,⁵

NOTING that Shaun Byrnes was head of the United States Kosovo Diplomatic Observer Mission from August 1998 until March 1999, and that his evidence relates to meetings with heads of sections of the Serbian Army ("VJ") and the Ministry of Interior ("MUP"), including about at least one personal meeting with Vlastimir Đorđević and about VJ and MUP operations in Kosovo in 1998 and 1999,⁶

NOTING that Michael Phillips was a Lieutenant-Colonel serving with the Kosovo Verification Mission in Kosovo from November 1998 until July 1999, and that his evidence relates to his meetings with members of the joint criminal enterprise alleged in the Indictment and to activities of the VJ and MUP in Kosovo,⁷

CONSIDERING that the evidence of both witnesses in the case *Prosecutor v Milutinović et al* is relevant and probative to issues in the present Indictment, and that the requirements of Rule 92ter have been met,

CONSIDERING that the Defence submits that the "direct testimony of these two witnesses could require considerable in-Court time" and thus does not oppose their admission into evidence under Rule 92ter,⁸

⁴ Motion, para 5.

⁵ *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, "Decision on Prosecution's Motion for the Admission of Evidence from Witness Fuat Haxhibeqiri", 1 July 2009, p 2; *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, "Decision on Prosecution's Motions for Admission of Evidence pursuant to Rule 92ter", 10 February 2009, para 6 and footnote 14 which cites the *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No.: IT-98-32/1-T, "Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses Pursuant to Rule 92 ter", 9 July 2008, para 20. and *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No.: IT-04-84-R77.4, "Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis and/or 92 ter", 2 September 2008, para 13.

⁶ *Prosecutor v Vlastimir Đorđević*, Case No. IT-05-87/1-T, Public with Confidential Annex A "Decision on Prosecution's Motion for Leave to Amend its Rule 65ter Witness List", 14 May 2009 ("14 May 2009 Decision"), para 7; See also transcript of the testimony of Shaun Byrnes in the case *Prosecutor v Milutinović et al*, bearing Rule 65ter no 05342.

⁷ 14 May 2009 Decision, para 7; See also transcript of the testimony of Michael Phillips in the case *Prosecutor v Milutinović et al*, bearing Rule 65ter no 05343.

⁸ Response, para 2.

RECALLING the Chamber's decision of 14 May 2009 which sets out certain limitations and conditions affecting the testimony respectively of Shaun Byrnes and Michael Phillips in view of their status as Rule 70 witnesses,⁹

PURSUANT TO Rules 54 and 92ter(A) of the Rules, and subject to compliance with those Rules, **DECIDES** to admit the following documents:

- a) the transcript of the testimony of Shaun Byrnes in the case *Prosecutor v Milutinović et al*, bearing Rule 65ter no 05342, and
- b) the transcript of the testimony of Michael Phillips in the case *Prosecutor v Milutinović et al*, bearing Rule 65ter no 05343,

provided, in each case, that the transcript of the testimony complies with the limitations and conditions set out in the Chamber's decision of 14 May 2009.

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



Judge Kevin Parker
Presiding

Dated this 14th day of August 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

⁹ 14 May 2009 Decision, Disposition point 2.