IT-05-88/2-T
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31 May 2010

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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-05-88/2-T

Date: 31 May 2010

Original: English

IN TRIAL CHAMBER II

Before: **Judge Christoph Flügge, Presiding**
Judge Antoine Kesia-Mbe Mindua
Judge Prisca Matimba Nyambe

Registrar: **Mr. John Hocking**

Order/Decision of: **31 May 2010**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

DECISION ON PROSECUTION'S MOTION TO CONVERT EIGHT RULE 92 *BIS* WITNESSES TO RULE 92 *TER* WITNESSES

Office of the Prosecutor
Mr. Peter McCloskey

The Accused
Zdravko Tolimir

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");

BEING SEISED OF the "Prosecution's Motion to Convert Eight Proposed Rule 92 *bis* Intercept Operator Witnesses to Rule 92 *ter* Witnesses, Notice of Continuation of Protective Measures, and Confidential Appendix" filed confidentially by the Prosecution on 20 May 2010 ("Motion"), in which the Prosecution seeks the admission pursuant to Rule 92 *ter* of the Rules of Procedure and Evidence of the Tribunal ("Rules"), of the transcripts of the prior testimony and associated exhibits previously tendered pursuant to Rule 92 *bis* for the following eight intercept operator witnesses: Witnesses Nos. 92, 94, 100, 102, 105, 107, 110, and 117 ("proposed evidence");[1]

NOTING the Prosecution's submission that upon its further assessment of the proposed evidence, the Prosecution noted that it pertained to conversations referring to the Accused or directly implicating subordinates of the Accused;[2]

NOTING that, in the view of the Prosecution, it is therefore warranted that the proposed evidence be tendered pursuant to Rule 92 *ter* in order to permit the Accused to cross-examine the witnesses,[3] and accordingly, the Accused will not be prejudiced by the granting of this request;[4]

NOTING that the Prosecution states that (i) the witnesses will be present in court and will attest that their written evidence is accurate and reflects what they would say if examined and (ii) any examination-in-chief will be brief, as few of them remember any specific intercepts from the time;[5]

NOTING the Prosecution's request for the continuation of protective measures from previous cases;[6]

NOTING the "Response to the Prosecution's Motion Concerning Eight Intercept Operator Witnesses" submitted by the Accused Zdravko Tolimir ("Accused") on 25 May 2010 and filed confidentially in the English version on 27 May 2010 ("Response"), in which the Accused opposes the admission of the proposed evidence pursuant to Rule 92 *ter*;[7]

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1 "Prosecution's Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", 13 February 2009 ("Rule 92 *bis* Motion").

2 Motion, para. 4.

3 Motion, para. 4.

4 Motion, para. 7.

5 Motion, paras. 6 and 8.

6 Motion, para. 9.

7 Response, para. 3.

NOTING the Accused's submission that the proposed evidence should not be admitted because adjudicated facts 595 to 604[8] already cover all of the subjects about which these witnesses have testified or will testify;[9]

NOTING the Accused's submission that because the purpose of adjudicated facts is to shorten the proceedings it is inappropriate for the Prosecution to propose evidence that is already covered by such adjudicated facts;[10]

NOTING the Accused's submission that the Prosecution's 65 *ter* list of witnesses has a total of 24 intercept witnesses;[11]

NOTING the Accused's submission that with regard to the evidence of intercept operator witnesses, the Prosecution's cumulative use of Rules 92 *bis,* 92 *ter*, and 94(B), the purpose of which is to increase the efficiency of the proceedings, leads to a complete violation of the right to a defence;[12]

NOTING Rule 75(F)(i), which states that once ordered in respect of a victim or witness in any proceedings before the Tribunal, protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal, unless or until they are rescinded, varied, or augmented in accordance with the procedure set out in the Rule;[13]

CONSIDERING that it is regrettable that the Prosecution filed the Motion at a very late stage in the proceedings relative to the proposed dates of appearance of the witnesses;

CONSIDERING that in the view of the Chamber, while adjudicated facts 595 to 604 cover some of the same subjects as the proposed evidence, these adjudicated facts are general in nature whereas much of the proposed evidence relates to matters specific to each of the eight intercept operator witnesses;

CONSIDERING that Rule 89(C) which requires that evidence be relevant and have probative value, and Rule 89(D) which permits the exclusion of evidence if its probative value is substantially

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[8] Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B), 17 December 2009, paras. 595-604.

[9] Response, para. 4.

[10] Response, paras. 7–8.

[11] Response, para. 4.

[12] Response, para. 12.

[13] Rule 75(F)(i).

outweighed by the need to ensure a fair trial, also apply to the admission of evidence pursuant to Rule 92 *ter;* [14]

CONSIDERING that in the view of the Chamber the proposed evidence is relevant and has probative value not substantially outweighed by the need to ensure a fair trial;

CONSIDERING that Rule 92 *ter* affords the Chamber discretion as to whether to admit evidence proffered pursuant to this Rule;[15]

CONSIDERING that the admission of the proposed evidence pursuant to Rule 92 *ter* would not prejudice the Accused because of the opportunity available for him to cross-examine each of the eight intercept operator witnesses;

NOTING that transcripts forming part of the proposed evidence are headed "Not Official; Not Corrected";

CONSIDERING that the Chamber finds that it would be in the interest of justice to receive the proposed evidence pursuant to Rule 92 *ter*, subject to the replacement of the transcripts headed "Not Official; Not Corrected" by transcripts reflecting the official record;

PURSUANT TO Rules 54, 75, 89, and 92 *ter* of the Rules,

HEREBY ORDERS as follows:

1. The Motion is granted.

2. The transcripts of the prior testimony of the eight intercept operator witnesses that had been proposed for admission in the Rule 92 *bis* Motion shall be provisionally admitted into evidence, provided that the transcripts headed "Not Official; Not Corrected" are replaced by transcripts reflecting the official record and the witnesses appear for cross-examination and fulfil the conditions of Rule 92 *ter;*

3. The associated exhibits which were admitted through each of the eight intercept operator witnesses during their previous testimony shall be provisionally admitted, subject to the witnesses appearing for cross-examination and fulfilling the conditions of Rule 92 *ter;*

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[14] *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 *ter*, 10 February 2009, para. 6; *Prosecutor v. Lukić and 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.

[15] Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A – C, 3 November 2009, p. 2 n. 14.

and the Prosecution identifying for each of the eight intercept operator witness, the following:

a. all exhibits admitted through the relevant witness in the prior proceeding;

b. all exhibits used with the relevant witness, but admitted through a different witness in the prior proceeding;

c. all documents used with the relevant witness, but not admitted in the prior proceeding; and

d. the corresponding 65 *ter* numbers for each document in the instant case.

4. The Registry shall mark for identification all of the proposed evidence.

5. For those documents, as identified in 3(b) and (c) above, which were not admitted through the relevant witness in the prior proceeding, the Chamber will require an additional showing of relevance in relation to the present case prior to admitting such documents.

6. The protective measures for the eight intercept operator witnesses from prior proceedings shall continue in the instant case.

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

Judge Christoph Flügge
Presiding Judge

Dated this thirty-first day of May 2010
At The Hague
The Netherlands

[Seal of the Tribunal]