



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: 20 January 2012

Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 20 January 2012

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

**DECISION ON PROSECUTION'S MOTION
FOR ADMISSION OF 28 INTERCEPTS FROM THE BAR TABLE**

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”) is seised of the “Prosecution’s Motion for Admission of 28 Intercepts from the Bar Table, with Confidential Appendices”, filed confidentially on 27 September 2011 (“Motion”), and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

1. In the Motion, the Prosecution seeks the admission of 28 intercepted conversations (“Proposed Intercepts”) from the bar table pursuant to Rules 73 and 89(C) of the Rules of Procedure and Evidence (“Rules”).

2. The Prosecution submits that the Proposed Intercepts are highly relevant to and probative of material facts in the Indictment, as they comprise communications from within the VRS chain of command, including within and among the Main Staff, Drina Corps, and subordinate units, intercepted by the ABiH Anti-Electronic Warfare units and the Bosnian MUP during the period referred to in the Indictment.¹ The Prosecution has set out the relevance of each of the individual Proposed Intercepts in more detail in Appendix B to the Motion.² It divides the Proposed Intercepts into three broad categories: (1) intercepts that do not involve the acts or conduct of the Accused, but which form an important component of the narrative of events relevant to the period in the Indictment, including events related to the murder of Muslim men from Srebrenica and the forcible transfer of the Muslim population from Srebrenica and Žepa (“Category 1”); (2) intercepts involving the acts or conduct of the Accused (“Category 2”); and (3) additional versions of intercepts that corroborate intercepts that have already been admitted into evidence in this case (“Category 3”).³

3. The Prosecution further submits that each of the Proposed Intercepts bears the requisite indicia of reliability and authenticity for admission from the bar table.⁴ In this regard, the Prosecution submits that the Proposed Intercepts form part of the same collection of evidence as the ABiH and Bosnian MUP intercepts already admitted in this case, which the Chamber has already determined to be *prima facie* reliable and authentic.⁵ As such, the Prosecution argues that the reliability of the Proposed Intercepts is derived from this general collection of intercepts.⁶ Additionally, the Prosecution is of the view that the reliability of the proposed intercepts is

¹ Motion, paras. 2, 7.

² Motion, paras. 7, 17.

³ Motion, para. 8, Appendix B.

⁴ Motion, para. 2.

⁵ Motion, para. 9.

⁶ Motion, para. 9.

established by the evidence of numerous trained ABiH and MUP intercept operators, as well as by corroboration evidence provided by Prosecution Analyst Stefanie Frease.⁷ The Prosecution further submits that the Proposed Intercepts are the product of interception programs governed by well-defined standards and protocols and that experienced and trained operators were mindful of the need for accuracy in their work, which overall contributes to the reliability of the Proposed Intercepts.⁸

4. Concerning the authenticity of the Proposed Intercepts, the Prosecution submits that 19 of 28 of the Proposed Intercepts were admitted in the case of *Prosecutor v. Popović et al.* (“*Popović case*”) and that the Chamber “could very well take judicial notice of their authenticity pursuant to Rule 94(B)”.⁹ According to the Prosecution, moreover, the authenticity of the Proposed Intercepts is established “beyond any reasonable dispute” by the fact that first, many of the Proposed Intercepts come from authenticated and admitted notebooks in this case, and second, they form part of a collection of intercepts of which the authenticity has been confirmed by 23 ABiH intercept operators and supervisors, as well as by MUP operators and supervisors, whose evidence has been admitted in this case.¹⁰ Furthermore, the Prosecution submits that it has conducted a careful analysis of the intercepts tendered in this case, and in this regard, that Prosecution Analyst Stefanie Frease has testified extensively about her evaluation of the internal consistency and reliability of such intercept material.¹¹

5. In addition to these general submissions, the Prosecution makes specific submissions concerning the reliability of the intercepts in Category 2, relating to the acts and conduct of the Accused. The Prosecution argues that the intercept assigned Rule 65 *ter* numbers 03150a/03150b was intercepted by Witness PW-048 and its reliability has already been established by PW-048’s testimony about the interception procedures he followed, as well as by three additional operators and supervisors from the same unit who testified in this case.¹² The second intercept, assigned Rule 65 *ter* number 05640, is an ABiH report containing a MUP intercept which was intercepted by Witness PW-025 and transcribed by his supervisor, Witness PW-024.¹³ The Prosecution submits that the reliability of this report and intercept is established through the cross-examined testimony of these witnesses.¹⁴ In the Prosecution’s view, further testimony from these witnesses would not

⁷ Motion, paras. 10, 13

⁸ Motion, paras. 11, 13.

⁹ Motion, para. 14.

¹⁰ Motion, para. 15.

¹¹ Motion, paras. 15–16.

¹² Motion, para. 18. The Prosecution submits that Witnesses PW-032, PW-030, and PW-050 also testified about the interception procedures followed in the same unit for the purposes of establishing the reliability of this intercept. *Ibid.*

¹³ Motion, para. 19.

¹⁴ Motion, para. 19.

yield any meaningful evidence concerning the contents of these two intercepts.¹⁵ In relation to the third intercept in Category 2, assigned Rule 65 *ter* numbers 03103a/03103b, the Prosecution submits that although the operator who intercepted this conversation, Witness PW-028, did not ultimately testify in this case, the reliability of the intercept was established by the testimony of four other witnesses in this case.¹⁶ Furthermore, the Prosecution avers that requiring the operator who intercepted this conversation to testify about its contents would not be fruitful, as during his testimony in the *Popović* case, he could not recall the individual communications he intercepted.¹⁷

6. The Prosecution argues that there is no general rule prohibiting the admission of documents merely because their source is not called to appear at trial.¹⁸ Moreover, the Accused has already extensively cross-examined numerous witnesses concerning the authenticity and reliability of the interception process and no further information will be gained from requiring additional testimony from intercept operators to authenticate the Proposed Intercepts when, in the Prosecution's view, their reliability and authenticity has already been established.¹⁹ Any objections by the Accused to the authenticity and reliability of the Proposed Intercepts are matters of weight, and not admissibility.²⁰ For these reasons, the Prosecution argues that the admission of the Proposed Intercepts does not prejudice the Accused.²¹

7. Finally, according to the Prosecution, the admission of the Proposed Intercepts from the bar table will further an expeditious trial and advance the interests of justice by putting before the Chamber the most comprehensive and complete collection of evidence without compromising the rights of the Accused.²²

8. The Defence did not file a response to the Motion.

II. APPLICABLE LAW

9. Rule 89 provides, in relevant part:

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

¹⁵ Motion, paras. 18–19.

¹⁶ Motion, para. 20. The Prosecution submits that the reliability of this intercept was established during the testimony of Commander Hazrudin Kišić, which authenticates the intercepts from this location at the “Northern Facility”, and was then corroborated by the testimony of Witnesses PW-033, PW-031, and PW-029. *Ibid.*

¹⁷ Motion, para. 20.

¹⁸ Motion, para. 21.

¹⁹ Motion, para. 21.

²⁰ Motion, para. 21.

²¹ Motion, para. 21.

²² Motion, para. 22.

10. The admission of evidence from the bar table is a practice established in the case law of the Tribunal.²³ Evidence may be admitted from the bar table if it is considered to fulfill the requirements set out in Rule 89. Furthermore, for the admission of evidence from the bar table, “the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case”.²⁴ Once these requirements are satisfied, the Chamber maintains discretion over the admission of evidence under Rule 89.

III. DISCUSSION

11. The Chamber recalls its “Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties during Trial”, filed on 24 February 2010, wherein it stated that the “preferred method for tendering evidence is for the evidence to be tendered through a witness while the witness is on the stand”.²⁵ The Chamber considers, nonetheless, that the admission of evidence through the bar table is an efficient method by which contemporaneous, documentary evidence can be considered for admission if all requirements for admission are satisfied.

12. The Chamber has first analysed the relevance and probative value of the Category 2 intercepts, relating to the acts and conduct of the Accused, under Rule 89(C), as well as whether the Prosecution has satisfactorily demonstrated how they fit into its case. The Chamber finds that the Category 2 intercepts satisfy these requirements. Furthermore, the Chamber has the duty under Rule 89(D) to assess whether it should exercise its discretion and deny admission of such evidence if the probative value is outweighed by the need to ensure a fair trial. On the basis of the Chamber’s review of these intercepts and absent a response by the Accused objecting to their admission, the Chamber does not find that the probative value of the Category 2 intercepts is outweighed by the need to ensure a fair trial, and therefore, will not deny their admission into evidence based on the fact that they relate to the acts and conduct of the Accused.

13. Second, the Chamber has reviewed the remaining intercepts from Category 1 and Category 3. It notes that there is no English translation uploaded into eCourt for Rule 65 *ter* numbers 02937b and 03058b, and that Rule 65 *ter* number 02936b is not available in eCourt. The Prosecution has submitted that Rule 65 *ter* number 02937b is an alternate version of an exhibit already admitted in

²³ See, e.g., *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution’s First Bar Table Motion, 13 April 2010; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution’s Motion to Re-Open the Case and Exceed the Word Limit and Second Motion to Admit Exhibits from the Bar Table, 7 December 2009 (“*Đorđević* Decision”); *Prosecutor v. 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 Table Motion, and Oral Motion for Admission of Additional Exhibit, 14 March 2008; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006 (“*Milutinović* Decision”).

²⁴ *Đorđević* Decision, para. 4; *Milutinović* Decision, para. 18.

this case, namely Ex. P01564a.²⁶ However, the contents of these two intercepts do not appear to be the same and the Chamber is therefore unable to assess the relevance of Rule 65 *ter* number 02937b given that it does not have an English translation uploaded into eCourt.²⁷ With respect to Rule 65 *ter* number 03058b, the Chamber notes that it is an alternate version of Rule 65 *ter* number 03058a for which there is a translation uploaded into eCourt and the Chamber is therefore able to assess its relevance. Therefore, save for Rule 65 *ter* number 02937b and Rule 65 *ter* number 02936b, the Chamber is satisfied of the relevance of the remaining intercepts in Category 1 and Category 3.²⁸ It also finds that the Prosecution has satisfactorily demonstrated how they fit into its case.

14. With regard to the reliability and authenticity of the Proposed Intercepts, the Chamber considers intercepts to be a special category of evidence in that in and of themselves, they bear no *prima facie* indicia of authenticity or reliability, and as such these requirements must generally be fulfilled by hearing from the relevant intercept operators or the participants in the intercepted conversation. In this regard, the Chamber notes, as submitted by the Prosecution, that a large collection of intercepts have already been admitted in this case as a result of the testimony of numerous experienced and trained ABiH and MUP intercept operators who have established the reliability of the interception process and have been able to speak to the authenticity of the intercepts.²⁹ The Chamber finds, therefore, that the reliability and authenticity of this general collection of intercepts has already been established. The Proposed Intercepts form part of the general collection of intercepts already admitted in this case and as such, the Chamber is satisfied that the reliability and authenticity of the Proposed Intercepts was sufficiently established for the purposes of admitting them into evidence from the bar table.

15. Finally, the Chamber considers important the fact that the Accused has had ample opportunity to challenge the authenticity and reliability of this general collection of intercepts during the cross-examination of intercept operators called by the Prosecution to testify. Moreover, the Accused did not object to the reliability or authenticity of the Proposed Intercepts tendered for

²⁵ Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties during Trial, 24 February 2010, para. 20.

²⁶ See Motion, Appendix B, Number 3.

²⁷ Rule 65 *ter* 02397b is a five page document, while Ex. P01564a consists of one page, relaying the contents of a conversation between Krstić and Krsmanović to the effect that “Krstić wants the buses to start moving right away”.

²⁸ The Chamber notes that there are a number of intercepts which, on their face, cannot be understood independently. This applies, for example, to the intercepts in Category 1 assigned Rule 65 *ter* numbers 06183a/06183b and 02995a/02995b. However, given the date of these intercepted conversations, references to members of the alleged JCE, or locations on the ground, the Chamber is satisfied that the contents of even these intercepts provide context of the events on the ground and are therefore relevant to this case.

²⁹ In this regard, the Chamber notes the evidence provided by numerous ABiH and MUP intercept operators and supervisors, including, *inter alia*, Witnesses PW-024, PW-025, PW-029, PW-025, PW-041, PW-047, PW-048, as well as the corroboration evidence provided by Prosecution Analyst, Stefanie Frease, who testified as a witness in this case.

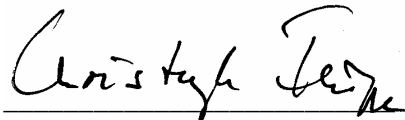
admission by the Prosecution in the Motion. Therefore, the Chamber does not consider that any prejudice to the Accused will result from the admission of the Proposed Intercepts discussed above.

IV. DISPOSITION

Accordingly, for the reasons set out above, pursuant to Rule 89 of the Rules, the Trial Chamber hereby **GRANTS** the Motion, **IN PART**, and:

- (1) **ADMITS** into evidence the documents assigned Rule 65 *ter* numbers: 00890a (under seal), 00890b, 02512a, 02512b (under seal), 02910a, 02910b (under seal), 02936a, 02962a, 02962b (under seal), 02975a, 02975b (under seal), 02977a, 02977b (under seal), 02983a, 02983b (under seal), 02988a, 02988b (under seal), 02995a, 02995b (under seal), 02997a, 03023a, 03023b (under seal), 03047a, 03047b (under seal), 03058a (under seal), 03102a, 03102b (under seal), 03103a, 03103b (under seal), 03130a, 03130b (under seal), 03150a, 03150b (under seal), 03161a, 03161b (under seal), 03162a, 03162b (under seal), 03169a, 03169b (under seal), 03174a, 03174b (under seal), 03207a, 03207b (under seal), 03208b (under seal), 05640 (under seal), 06175, 06183a, and 06183b (under seal), and requests the Registry to assign exhibit numbers for each of these documents;
- (2) **ADMITS** into evidence the document assigned Rule 65 *ter* number 03058b as marked for identification, pending translation, and requests the Registry to assign it an exhibit number MFI; and
- (3) **DENIES**, without prejudice, the admission into evidence of the documents assigned Rule 65 *ter* numbers 02936b and 02937b.

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



Judge Christoph Flügge

Presiding Judge

Dated this twentieth day of January 2012
At The Hague
The Netherlands

[Seal of the Tribunal]