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16 December 2010

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| 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 2010 |
| | Original: | English |

**IN TRIAL CHAMBER II**

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

**Registrar:** **Mr. John Hocking**

**Decision of:** **16 December 2010**

**PROSECUTOR**

***v.***

**MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN**

***PUBLIC***

# DECISION DENYING DEFENCE MOTION FOR CERTIFICATION OF THE 'DECISION RECONSIDERING IN PART, AND PROVIDING WRITTEN REASONS, FOR THE TRIAL CHAMBER'S ORAL DECISION' OF 26 MARCH 2010

**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. Dragan Krgović and Mr. Igor Pantelić for Stojan Župljanin

**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 seised of a motion filed jointly by the Defence of Mićo Stanišić and the Defence of Stojan Župljanin (jointly "Defence"), on 1 April 2010 ("Motion"),[1] whereby they seek certification to appeal the Trial Chamber's oral decision of 26 March 2010, admitting 147 intercepts ("Intercepts") into evidence through witness ST108 ("Impugned Decision").[2] On 14 April 2010, the Prosecution responded opposing the Motion ("Response").[3] On 20 April 2010, the Defence sought leave to reply and filed a joint reply ("Reply").[4]

## I. APPLICABLE LAW

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), two criteria need to be satisfied before a Trial Chamber may certify a decision for interlocutory appeal: (1) that the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial ("first prong"), and (2) that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings ("second prong").[5] The Trial Chamber recalls that "even when an important point of law is raised [...] the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied".[6] It is also recalled that certification remains at the discretion of the Chamber even where both prongs are met.[7]

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[1] Motion for certification of the "Decision reconsidering in part, and providing written reasons, for the Trial Chamber's oral decision" of 26 March 2010, 1 Apr 2010.

[2] Decision reconsidering in part, and providing written reasons for, the Trial Chamber's oral decision admitting into evidence documents through ST108, 26 Mar 2010.

[3] Prosecution's response to motion for certification of the "Decision reconsidering in part, and providing written reasons, for the Trial Chamber's oral decision" of 26 March 2010, 14 Apr 2010.

[4] Joint Defence motion for leave to reply and proposed reply to Prosecution response to motion for certification of the "Decision reconsidering in part, and providing written reasons, for the Trial Chamber's oral decision" of 26 March 2010, 20 Apr 2010.

[5] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision on Prosecution request for certification for interlocutory appeal of "Decision on Prosecutor's motion seeking leave to amend the indictment", 12 Jan 2005 ("*Halilović* Decision"), p. 1.

[6] Decision to deny the joint Defence motion for certification to appeal the order to supplement the pre-trial briefs, 23 Jul 2009, para. 6; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's application for certification to appeal decision on motions for extension of time: Rule 92*bis* and response schedule, 8 Jul 2009 ("*Karadžić* Decision"), para. 11; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber's Decision on Motion for Admission Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para. 42; *Prosecutor v. Milutinović et. al.*, Case No. IT-05-87-PT, Decision on Prosecution's Request for Certification of Appeal of Decision on Vladimir Lazarević and Sreten Lukić's Preliminary Motions on Form of the Indictment, 19 August 2005, p. 3; *Prosecutor v. Milošević*, Case No. IT-03-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para 2.

[7] Decision denying the Prosecution's request for certification to appeal the "Decision granting in part Prosecution's motion for judicial notice of adjudicated facts pursuant to rule 94(B), 14 July 2010, para. 7; *Karadžić* Decision, para. 11; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić motion for reconsideration of Trial Chamber's decision on motion for admission documents from bar table and decision on Defence request for extension

## II. SUBMISSIONS

### A. Motion

#### 1. First Prong

2. With regard to the first prong of Rule 73(B), the Defence identify the admission of "unreliable" evidence, in a manner inconsistent with the Trial Chamber's own earlier rulings, as the issue directly affecting the fairness of the proceedings.[8]

3. The Defence submit that the Trial Chamber erred, as a matter of law, by admitting intercepts through ST108 which are undated, involve unidentified interlocutors, are incomplete records of conversations, or where the chain of custody is not fully established, by attributing these factors to the weight to be accorded to, rather than the reliability and admissibility of, the Intercepts.[9]

4. The Defence assert that the error of law occurs at paragraphs 25 and 26 of the Impugned Decision, where the admission of the Intercepts "seems to be premised on the fact that ST108 is a technical witness who can give evidence about the system of recording of telephone conversation".[10] According to the Defence, ST108 is not qualified to be a technical witness on this matter.[11] The Defence argue that the Trial Chamber therefore erred by admitting these documents through ST108 even "when the actual method by which these particular documents were obtained could not be individually verified by ST108, as was evident from his testimony."[12] To avoid this error of law, the Trial Chamber should have admitted only those intercepts which ST108 "personally monitored, recorded, stored or otherwise directly facilitated."[13] The Defence submit that "the wholesale admission of an entire category of documents without a direct link to ST108's role, responsibilities or personal expertise is purely prejudicial."[14]

5. They further submit that, as the Intercepts are unreliable, admitting them contradicts the Trial Chamber's decision of 16 December 2009 ("Intercepts Decision"), wherein it held that "intercepts will be found to have probative value if the Trial Chamber finds that they are sufficiently reliable, authentic and relevant to issues in this case".[15]

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of time for filing of final trial briefs, 2 Jul 2008 ("*Milutinović* Decision"), para. 42; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution motion for certification of Trial Chamber decision on Prosecution motion for *voir dire* proceedings, 20 Jun 2005 ("*Milošević* Decision"), para. 2.

[8] Motion, para. 9.

[9] Motion, paras 8-9.

[10] Motion, para. 17.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] Motion, para. 17.

[15] Motion, para. 9, citing Decision denying Stanišić motion for exclusion of recorded intercepts, 16 Dec 2009, para. 14.

6. The Defence argue that they relied on the Intercepts Decision and other subsequent rulings,[16] which they summarise as the Trial Chamber ruling that intercepts are only admissible through "(a) a participant in the discussion; (b) [a person] physically present when the conversation took place, or (c) the technician who took the intercepts (i.e., the interceptor: 'the man in the basement')."[17] The Defence submit that, as ST108 was not one of these persons, the Trial Chamber erred in the Impugned Decision when it admitted the Intercepts through him.[18] The Defence argue that the Accused were, therefore, prejudiced by the Impugned Decision "as a result of [having tailored] cross-examination" of ST108 to avoid addressing the Intercepts "in the reasonable expectation that the Chamber would follow its previous rulings on the matter".[19]

7. In respect of the "expeditiousness of the proceedings" requirement of the first prong, the Defence submit that the resources, including time, needed to refute the Intercepts should be considered when evaluating the impact of having admitted them into evidence. The Defence argue that the Impugned Decision requires them to "expend enormous amounts of their limited time and resources in obtaining additional evidence to rebut these intercepts."[20]

2. Second Prong

8. With regard to the second prong of Rule 73(B), and although a request for certification is not concerned with whether a decision was correctly reasoned or not,[21] the Defence argue that "numerous trial chambers have inquired whether a request for certification discloses any ground to believe that the appeal might succeed."[22] The Defence state that there is some likelihood of success at appeal, and thus, a resolution by the Appeals Chamber would save court time which would otherwise be spent on calling additional evidence to rebut the Intercepts.[23] The Defence submit that

[16] Motion, para. 10, citing Oral ruling, 28 Jan 2010, T. 5673-5674 ("First Oral Ruling") and the transcript of 3 March 2010, T. 7184-7188, which contains discussion between the Trial Chamber and the parties regarding the nature of the presented evidence.
[17] Motion, para. 10.
[18] *Ibid.*
[19] Motion, para. 10.
[20] Motion, para. 11.
[21] *Ibid.*, citing *Prosecutor v. S. Milošević,* Case No. IT-02-54-T, Decision on Prosecution motion for certification of Trial Chamber decision on Prosecution motion for voir dire proceedings, 20 Jun 2005; *Prosecutor v. Čermak and Markać* and *Prosecutor v. Gotovina et al.*, Case No. IT-03-73-PT and Case No. IT-01-45-PT, Decision on Defence application for certification to appeal decision on Prosecution's consolidated indictment and for joinder, 14 Aug 2006, para. 10; *Prosecutor v. Milutinović et. al.,* Case No. IT-05-87-T, Decision on Defence application for certification of interlocutory appeal of Rule 98 *bis* decision, 14 Jun 2007, para. 4.
[22] Motion, para. 16 citing *Prosecutor v. Prlić et. al.*, Case No. IT-04-74-PT, Decision on Milijov Petković's application for certification to appeal decision on motions alleging defects in the form of the indictment, 19 Sep 2005, p. 4; *Prosecutor v. Strugar,* Case No. IT-01-42-T, Decision on Defence motion for certification, 17 Jun 2004, para. 8 and Decision on the Defence's request for a separate trial in order to schedule pre-trial conference and the start of the trial date against Pavle Strugar, 12 Dec 2003, paras 7-8; *Prosecutor v. Hadžihasanović and Kubura,* Case No. IT-01-47-T, Decision on the request for certification to appeal the decision rendered pursuant to Rule 98 *bis* of the Rules, 26 Oct 2004, p. 6.
[23] Motion, para. 16.

the Motion "meets the threshold of materiality" since there is reason to believe the Trial Chamber committed an error on the applicable law.[24]

9. The Defence submit that leaving the matter to be resolved during any later appeal proceeding creates the risk of unnecessary complication and delay that can be avoided by having the matter resolved "at this stage" of the trial, since most of the Intercepts were to be used with witnesses scheduled to be heard after May 2010.[25] In its view, resolving the status of the Intercepts prior to that point in time would avoid the "continued and repetitive argumentation on this matter every time one of these Intercepts are sought to be used", thereby materially advancing the proceedings.[26] If certification is not granted, the Defence argue that they would have to expend time and resources obtaining additional evidence to rebut the Intercepts which will likely cause a delay in the presentation of the Defence cases.[27]

### B. Response

10. The Prosecution responds that the Motion does not meet the Rule 73(B) criteria.[28] The Prosecution asserts that admitting the Intercepts was a proper exercise of the Trial Chamber's discretion under Rule 89(C)[29] and that the Motion does not identify any discernable legal or factual error in the Impugned Decision, other than citing the Trial Chamber's remark that, in some cases, "not every detail regarding an intercept was known".[30]

11. The Prosecution further submits that the Defence's interpretation of the Trial Chamber's previous rulings on admissibility of intercepts is incorrect and that the Intercepts Decision provided a non-exhaustive list of categories of witnesses through whom intercepts could be tendered.[31] The Intercepts Decision stated that ST108 "may also serve to authenticate the relevant intercepts".[32] The Prosecution argues that the Trial Chamber was, therefore, fully aware of the nature of ST108's testimony from the Rule 65 *ter* summary provided.[33] Any oversight in addressing the Intercepts in the course of the Defence's cross-examination is the Defence's own error, since there could have been no reasonable expectation of exclusion,[34] nor have the Defence shown how this expectation affected the form of their cross-examination.[35]

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[24] Motion, para. 16.
[25] Motion, para. 13.
[26] Motion, para. 14.
[27] Motion, para. 15.
[28] Response, paras 1-6.
[29] Response, paras 5-9.
[30] Response, para. 6.
[31] Response, paras 14-17.
[32] Response, paras 13-14.
[33] Response, paras 13-14.
[34] Response, paras 17-18.
[35] Response, paras 17-18.

12. The Prosecution also submits that the Defence have not shown that they are likely to succeed on appeal since the Intercepts have been admitted in many cases before the Tribunal and they all came from the same source and were recorded in the same way.[36] Further, even in the event that the Trial Chamber finds that the Motion satisfies the requirements of Rule 73(B), it should refrain from exercising its discretion to certify an appeal because an appeal of the Impugned Decision would only serve to delay the trial.[37]

### C. Reply

13. The Defence, in the Reply, reiterate that the Trial Chamber has committed a discernible legal error in the Impugned Decision, wrongfully admitting the Intercepts which are unreliable and lack probative value.[38]

## III. DISCUSSION

14. The Defence submission that the Trial Chamber erred by admitting the Intercepts through ST108, purportedly contradicting prior rulings on which the Defence had relied,[39] stems from a misunderstanding of the Trial Chamber's previous rulings. In the First Oral Ruling, the Trial Chamber answered the limited question of the competence of the witness then testifying, Vitomir Žepinić, to authenticate sufficiently intercepts presented to him for admission. The Trial Chamber specifically found that this witness, who was not involved in any manner with the production of intercepts, had to be either a participant or physically present during the intercepted conversations in order to authenticate them.[40] The Trial Chamber had already noted in the Intercepts Decision, in relation to the anticipated testimony of ST108, "that this testimony may also serve to authenticate the relevant intercepts."[41] Thereafter, in the Impugned Decision, the Trial Chamber specifically considered ST108's competence to authenticate the Intercepts sufficiently for admission.[42]

15. It is erroneous, therefore, to assert that either the Intercepts Decision or the First Oral Ruling created any "reasonable expectation" of exclusion of the Intercepts. The Defence are obliged to prepare their cases, with diligence and promptness, to challenge material presented by the Prosecution and such preparation cannot be predicated on whether they expect the Trial Chamber

[36] Response, para. 23.
[37] Response, para. 25.
[38] Reply, paras 1-2.
[39] Motion, paras 8-10, citing Intercepts Decision, para. 14; First Oral Ruling; ST108, 3 Mar 2010, T. 7184-7188.
[40] "The Chamber is satisfied that the witness can only satisfy the requirements of Rule 89, in respect of those intercepts where he was either, A, a participate in the discussion; or, B, physically present when the conversation took place, in which case he can only address the statements made by the person in who is [*sic*] presence he was at that time", First Oral Ruling, 28 Jan 2010, T. 5666.
[41] Intercepts Decision, para. 16.
[42] Impugned Decision, paras 25 and 26.

subsequently to permit or deny the admission into evidence of such material.[43] Consequently, the Defence submissions regarding the need to expend additional time and resources for the rebuttal of the Intercepts have no foundation.

16. The Defence submissions that go to establishing whether the Trial Chamber committed errors of reasoning or of law are arguments for any eventual appeal and will not be addressed here.[44]

17. The Trial Chamber finds that the Defence have not shown that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The first prong of Rule 73(B) has thus not been met. Since the prongs are cumulative,[45] the Trial Chamber will not address submissions as to the second prong.

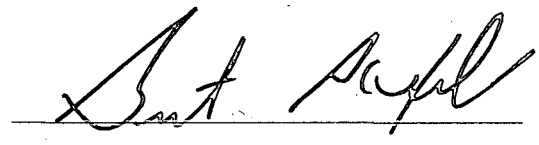
## IV. DISPOSITION

18. Pursuant to Rule 73(B), the Trial Chamber:

**GRANTS** the Defence leave to reply and accepts the Reply on record; and

**DENIES** the Motion.

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



Judge Burton Hall
Presiding

Dated this sixteenth day of December 2010
At The Hague
The Netherlands

**[Seal of the Tribunal]**

[43] Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, Article 11.
[44] *Prosecutor v. Tolimir*, Case No. IT-05-82/2-PT, Decision on request for certification of decision on Prosecution motion for judicial notice of adjudicated facts, 23 Feb 2010, p. 2; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on defence motion for certification to appeal decision on prosecution motion for judicial notice of adjudicated facts, 20 Oct 2006, p. 2; *Milošević* Decision, para. 4.
[45] *Prosecutor v. Gotovina et al*, Case No. IT-06-90-T, Decision on Gotovina Defence request for certification to appeal the Trial Chamber decision of 4 November 2009, 20 Jan 2010, para.2; *Halilović* Decision, p. 1; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence motion for certification, 17 Jun 2004, para. 2.