IT-05-88/2-PT
D 5661 - D 5657
18 JANUARY 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-PT

Date: 18 January 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**

Decision of: **18 January 2010**

PROSECUTOR

v.

ZDRAVKO TOLIMIR

PUBLIC

DECISION ON THE ACCUSED'S REQUEST FOR LEAVE TO APPEAL THE DECISION ON PROSECUTION'S MOTION FOR ADMISSION OF EVIDENCE PURSUANT TO RULE 92 *QUATER*

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 "Application to the Chamber for Leave to Appeal the Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater*", submitted by the Accused Zdravko Tolimir ("Accused") on 7 December 2009 and filed in English on 9 December 2009 ("Request for Leave"), in which the Accused seeks leave to appeal the "Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater*", filed on 25 November 2009 ("Impugned Decision");

RECALLING that in the Impugned Decision, the Chamber granted the Prosecution's motion to admit the transcripts of three witnesses' testimony in previous proceedings, as well as the exhibits which were used in connection with that testimony, pursuant to Rule 92 *quater*;

NOTING that in the Request for Leave, the Accused states that the grounds for the appeal that would be set out are:

(1) the Chamber "did not take into consideration some of the key arguments, or did not attach the appropriate weight to them";[1]

(2) the Chamber utilised an incorrect standard in its analysis of the reliability of the transcripts;[2]

NOTING the further arguments of the Accused that:

(1) "[e]ffectively, the only criteria to which the Chamber devoted attention was that the statements were given under oath and that the witnesses were cross-examined";[3]

(2) pursuant to Rule 92 *quater*, evidence may only be admitted if there are clear criteria of reliability at the time the decision is made;[4]

(3) the Impugned Decision necessarily affects the outcome of the trial, as "[i]t is unquestionable that decisions admitting the statement of some witness can influence the

1 Request for Leave, para. 4.
2 *Ibid.*
3 Request for Leave, para. 6.
4 *Ibid.*

outcome of the trial", and "[t]he fact that the Chamber will decide subsequently as to the weight to be given to the evidence . . . clearly supports [this proposition]";[5] and

(4) "uncertainty [regarding the reliability of evidence] is to the detriment of all the parties . . . and the resolution of such a 'situation' requires significant time and resources" ;[6]

NOTING the "Prosecution's Consolidated Response to Two Requests for Certification", filed confidentially on 15 December 2009 ("Response"), in which the Prosecution asserts that the Chamber's decision to admit the three transcripts has, at this stage of the proceedings, "no impact on the fair and expeditious conduct of the proceedings or the outcome of the trial" because the Accused may challenge the transcripts or address any issue arising from their admission during the course of the trial, and the Prosecution notes that the Appeals Chamber has already ruled on an interlocutory appeal on the admission of this evidence in the case of *Prosecutor v. Popović et al.*;[7]

NOTING "Zdravko Tolimir's Request for Leave to File a Reply and a Reply to the Prosecution's Consolidated Response to Two Requests for Certification", submitted on 15 December 2009 and filed in English on 18 December 2009 ("Reply"), in which he

(1) seeks leave to file a reply to the Response;[8]

(2) submits that the admission of Rule 92 *quater* evidence necessarily "has a great significance and may play an important role in the further conduct of the proceedings and their possible outcome" because the evidence was "provided by witnesses whom it will not be possible even theoretically to cross-examine";[9]

(3) asserts that the fact that some of the *Popović* accused "were granted leave to file an appeal . . . clearly supports the argument that the same opportunity must also be granted" in the instant case;[10] and

(4) claims that the admission of evidence pursuant to Rule 92 *quater* transfers a "burden that the Accused originally did not have . . . to him", and that therefore "such evidence could be admitted only if there were reasons that clearly indicate that it is reliable";[11]

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5 Request for Leave, para. 7.
6 Request for Leave, para. 8.
7 Response, para. 4.
8 Reply, para. 1.
9 Reply, para. 2.
10 *Ibid.*
11 Reply, para. 3.

NOTING that Rule 73 (B) of the Rules provides that "[d]ecisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings";

NOTING that certification is precluded unless the Chamber finds that the conditions for certification are satisfied; that even where the conditions are satisfied, certification remains in the discretion of the Chamber;[12] and that a request for certification is not concerned with whether the decision was correctly reasoned;[13]

CONSIDERING that, in the view of the Chamber, the mere fact that a decision admits the testimony of a witness, even where that witness is unequivocally unavailable for cross-examination, does not mean that the decision necessarily involves an issue which satisfies the conditions for certification outlined in Rule 73 (B);

NOTING that when the Trial Chamber in *Prosecutor v. Popović et al.* granted certification of a decision to admit evidence that is the subject of the Impugned Decision pursuant to Rule 92 *quater*, it found that since the evidence went to the acts and conduct of the *Popović* accused, the issue was one that would significantly affect the fair and expeditious conduct of the proceedings and that an immediate resolution of the issue by the Appeals Chamber might have materially advanced the proceedings, because, had the decision of the Trial Chamber been reversed, the accused would not have needed to adduce additional evidence and the Defence cases of one or more accused would thereby have been reduced;[14]

CONSIDERING that the circumstances which led the Trial Chamber in *Prosecutor v. Popović et al.* to grant certification are different from those in the instant case and that there is no corresponding justification for certification here;

CONSIDERING that the other arguments presented by the Accused, such as the reliability of the evidence admitted, relate to the merits of the Impugned Decision and do not explain how an issue presented by the Impugned Decision relates to the criteria for certification set forth in Rule 73 (B);

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12 *Prosecutor v. Strugar*, Case No. IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, para. 2.

13 *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, para. 4.

14 *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić and Beara Motions for Certification of the Rule 92 *quater* Decision, 19 May 2008, paras. 19-20.

CONSIDERING that the criteria for certification set forth in Rule 73 (B) have not been met;

PURSUANT TO Rules 73 (B) and 126 *bis*;

HEREBY GRANTS the Accused leave to file the Reply and **DENIES** the Motion in all other respects.

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

Christoph Flügge
Presiding Judge

Dated this 18th day of January 2010
At The Hague
The Netherlands

[Seal of the Tribunal]