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-95-5/18-T

Date: 21 February 2013

Original: English

IN THE TRIAL CHAMBER

Before: **Judge O-Gon Kwon, Presiding Judge**
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: **Mr. John Hocking**

Decision of: **21 February 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION TO VARY LIST OF WITNESSES

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 Accused's "Motion to Vary List of Witnesses", filed on 23 January 2013 ("Motion"), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused moves for an order pursuant to Rule 73 *ter* (D) of the Tribunal's Rules of Procedure and Evidence ("Rules") allowing him to add witnesses ("Proposed Witnesses") to his list of witnesses submitted pursuant to Rule 65 *ter* ("65 *ter* list").[1] The Accused notes that the Proposed Witnesses are intercept operators who testified as witnesses in the case of the Office of the Prosecutor ("Prosecution").[2]

2. The Accused argues that he wishes to vary his 65 *ter* list to include the Proposed Witnesses so that they can establish the authenticity of intercepted conversations ("Intercepts") the admission of which was ultimately denied in the "Decision on Accused's Motion for Reconsideration of Denial of Defence Intercepts", issued on 22 January 2013 ("Reconsideration Decision").[3] The Accused contends that he did not initially present the Intercepts to the Witnesses during their testimony because of an "agreement" with the Prosecution "that he believed obviated the need to individually authenticate the defence intercepts."[4] The Accused thus argues that, having relied upon this "agreement", he did not include the witnesses on his 65 *ter* list, but now that the Chamber "has declined to give that agreement the intended effect," he has exhausted all efforts to authenticate the Intercepts without calling the Proposed Witnesses.[5]

3. The Accused contends that the evidence of the Proposed Witnesses is of high probative value because the Intercepts they would authenticate are exculpatory and "highly relevant" to his responsibility for crimes charged in the Third Amended Indictment ("Indictment").[6] In the Accused's submission, the Prosecution will not be prejudiced because it is "fully prepared to agree

[1] Motion, paras. 1, 13.

[2] Motion, paras. 5, 7, Confidential Annex.

[3] The Chamber notes that it denied admission of the Intercepts in the "Decision on the Accused's Bar Table Motion (Sarajevo Intercepts)", issued on 9 October 2012, and the "Decision on Accused's Motions to Admit Documents Previously Marked for Identification and Publicly Redacted Version of D1938", issued on 7 December 2012. In the Reconsideration Decision the Chamber then denied the Accused's request that the Chamber reconsider the denial of the Intercepts. Reconsideration Decision, para. 10.

[4] Motion, para. 7.

[5] Motion, paras. 7–8.

[6] Motion, para. 9.

to" the authenticity of the Intercepts. Accordingly, it is in the interests of justice to allow the addition of the Proposed Witnesses to the 65 *ter* list.[7]

4. In the "Prosecution Response to Karadžić's Motion to Vary List of Witnesses", filed on 29 January 2013, the Prosecution does not oppose the Motion.[8] In addition, the Prosecution clarifies its understanding of the "agreement" that the Accused refers to in the Motion.[9] In the Prosecution's submission, *inter alia*, it maintains that it will not object to the "authenticity of all intercepts from […] known sources" and that there was an "agreement" with the Accused only insofar as it conforms to that position.[10] The Prosecution states that it has conveyed this understanding in its oral submissions during the hearing of 15 March 2012 and the "Prosecution Response to Karadžić's Motion for Reconsideration of Denial of Defence Intercepts," filed on 24 December 2012, which was then reiterated by the Chamber in the Reconsideration Decision.[11]

II. Applicable Law

5. Rule 73 *ter* (D) of the Rules provides: "After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called". The Chamber may grant such a motion when it is in the interests of justice.[12] In making such determination, the Trial Chamber shall take into consideration several factors, including whether the proposed evidence is *prima facie* relevant and of probative value.[13] The Chamber should also balance the defence's right to present available evidence during his defence case with the Prosecution's right to have adequate time to prepare its cross-examination of the proposed new witnesses.[14] The Chamber will also consider whether the defence has shown good cause why it did not seek to add the witness to the list at an earlier stage of the proceedings.[15] Good cause may exist when witnesses have only recently become available to give evidence or the relevance of the evidence has only recently become apparent.[16]

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[7] Motion, paras. 10–11.
[8] Response, para. 1
[9] Response, paras. 2–4.
[10] Response, paras. 3–4.
[11] Response, paras. 2–3.
[12] *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Čermak Defence's Second and Third Motions to Add a Witness to Its Rule 65 *ter* (G) Witness List, 22 September 2009 ("*Gotovina* Decision"), para. 7; *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-T, Decision on Stanišić Defence Motion to Add Witness DST-081 to Its Rule 65 *ter* Witness List, 20 October 2011 ("*Stanišić* Decision"), para. 4.
[13] *Gotovina* Decision, para. 7; *Stanišić* Decision, para. 4.
[14] *Gotovina* Decision, para. 7; *Stanišić* Decision, para. 4.
[15] *Gotovina* Decision, para. 7; *Stanišić* Decision, para. 4.
[16] *Gotovina* Decision, para. 7; *Stanišić* Decision, para. 4.

III. Discussion

6. As a preliminary matter, the Chamber recalls its consistent position with regard to the permissible methods of intercept authentication and will not repeat it here.[17] The Chamber also recalls its ruling in the Reconsideration Decision that the exchange during the hearing of 15 March 2012 did not warrant reconsideration of the Chamber's denial of the Intercepts.[18]

7. Turning now to the merits of the request in the Motion, the Chamber is satisfied as to the *prima facie* relevance and probative value of the anticipated evidence of the Proposed Witnesses in light of the Accused's submissions and the Chamber's familiarity with the nature of testimony of the Proposed Witnesses during the Prosecution case. It is also satisfied as to the importance of the Proposed Witnesses' anticipated evidence to the Accused's case, and considers that the probative value of the anticipated evidence is not substantially outweighed by the need to ensure a fair trial. The Chamber also considers that, given the stage of this trial[19] and the limited anticipated cross-examination by the Prosecution, if any, the addition of the Proposed Witnesses would not negatively affect the Prosecution's right to have adequate time to prepare its cross-examination of the Proposed Witnesses.

8. The Chamber notes that it has some reservations about the validity of the Accused's reasons for not including the Proposed Witnesses on his Rule 65 *ter* witness list, especially in light of the Chamber's consistent practice with regard to the authentication of intercepts. At the same time, however, the Chamber considers that the addition of the Prospective Witnesses would not cause an undue delay to these proceedings nor should it require an extension of the 300 hours of time allocated to the Accused for the presentation of his defence case. Thus, taking all of the above factors into account, the Trial Chamber considers that it is in the interests of justice that the Proposed Witnesses be added to the Accused's 65 *ter* list.

9. Finally, the Chamber notes that the Motion makes reference to the place of employment of two of the Proposed Witnesses, both of whom testified in closed session and whose relevant filings were either confidential or confidential in part. The Chamber thus finds that the Motion must be reclassified as confidential and instructs the Accused to file a public redacted version of the Motion.

[17] *See, e.g.*, Reconsideration Decision, para. 8.

[18] Reconsideration Decision, paras. 8–10.

[19] The Chamber notes that the Defence phase of the case began on 16 October 2012 and that, as of 1 February 2013, the Accused had spent about 68 hours of the 300 hours he has been given for the presentation of his defence case.

IV. Disposition

10. Accordingly, the Chamber, pursuant to Rules 54 and 73 *bis* (F) of the Rules, hereby:

a) **GRANTS** the Motion;

b) **ORDERS** the Accused to file a revised 65 *ter* witness list by 26 February 2013;

c) **ORDERS** the Registry to reclassify the Motion as confidential; and

d) **INSTRUCTS** the Accused to file a public redacted version of the Motion by 26 February 2013.

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

Judge O-Gon Kwon
Presiding

Dated this twenty-first day of February 2013
At The Hague
The Netherlands

[Seal of the Tribunal]