IT-95-5/18-T
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UNITED
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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-95-5/18-T

Date: 31 March 2010

Original: English

IN THE TRIAL CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **31 March 2010**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON THE PROSECUTION'S FIRST MOTION FOR JUDICIAL NOTICE OF DOCUMENTARY EVIDENCE RELATED TO THE SARAJEVO COMPONENT

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed 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 Prosecution's "First Motion for Judicial Notice of Documentary Evidence Related to the Sarajevo Component" ("Motion"), filed on 19 October 2009 ("Motion"), and hereby renders its decision thereon.

I. Background and Submissions

1. In the Motion, the Prosecution requests the Trial Chamber to take judicial notice of 312 documents that were admitted into evidence in previous trials, relating to the alleged sniping and shelling campaign against the civilian population of Sarajevo.[1] The Prosecution submits that taking judicial notice of this documentary evidence would "benefit judicial economy by obviating the need to call the authors or providers of the documents to testify to their authenticity" and would not cause any prejudice to the Accused's right to a fair trial because "doing so would establish a presumption of authenticity, however, this presumption may be challenged at trial".[2] The Prosecution further submits that "the Trial Chamber would be obliged to assess the documentary evidence in light of all the evidence adduced at trial before drawing any factual conclusions from the content of each proposed item".[3]

2. On 22 December 2009, the Accused filed his "Response to Prosecution Motion for Judicial Notice of Documents and Motion for Further Extension of Time" ("Initial Response") in which he "contends that the taking of judicial notice of documents pursuant to Rule 94(B) pertains only to the existence and authenticity of the documents and not their contents".[4] The Accused requests additional time to respond to each document, should the Trial Chamber hold that it may take judicial notice of the content of the documents.[5] On 29 December 2009, the Accused filed a "Supplemental Response to Motion for Judicial Notice of Documents" ("Supplemental Response") in which he submits that he is "unable to retrieve and review the documents in question because the Registrar has not allocated sufficient funds for his defence".[6]

3. On 4 January 2010, the Prosecution filed its "Reply to Karadžić's Response to Prosecution Motion for Judicial Notice of Documents" ("Reply") in which it argues that the legal effect of taking judicial notice of documentary evidence under Rule 94(B) of the Tribunal's Rules of Procedure and Evidence ("Rules") is that the documents are admitted into

[1] Motion, para. 1.
[2] Motion, para. 7.
[3] Motion, para. 7.
[4] Initial Response, para. 9.
[5] Initial Response, para. 16.

evidence and used for their content, which it claims is similar to the legal effect of admitting documents under Rule 89(C).

4. After the Trial Chamber granted him more time to file his response to the Motion, the Accused filed his "Second Supplemental Response to Motion for Judicial Notice of Documents" on 11 March 2010 ("Second Supplemental Response"). In his Second Supplemental Response, the Accused objects to (i) the admission of intercepted conversations on the grounds that they are unreliable absent foundational testimony as to the manner and authority of the intercepts and that the intercepts were unlawful, particularly those taking place before the war; (ii) the admission of documents whose authors or recipients are on the Prosecution's witness list; (iii) the admission of the document with Rule 65 *ter* number 01243 on the grounds that its author is deceased and therefore cannot be cross-examined and its contents directly concern the acts, conduct, and mental state of the Accused; and (iv) the wholesale taking of judice notice because it violates the presumption of innocence and unfairly shifts the burden of proof to the Accused.[7] Subsequently, the Prosecution filed its "Reply to Karadžić's 'Second Supplemental Response to Motion for Judicial Notice of Document'" on 18 March 2010 ("Second Reply") in which it submits that the admission of intercepts in this manner does not require foundational testimony; illegally obtained intercepts are not excluded under Rule 95 of the Tribunal's Rules; the Prosecution is not required to seek admission of documents only through those documents' authors and recipients; and the Tribunal has no rule against hearsay evidence.[8]

II. Applicable Law

5. Rule 89 of the Rules is the general provision on the admission of evidence before the Tribunal, and provides, in paragraph (C), that "[a] Chamber may admit any relevant evidence which it deems to have probative value." While this is the general standard for the admission of evidence, there are a number of ways in which evidence can be tendered, and accepted, for admission in a particular case. Amongst these, Rule 94(B) provides as follows:

> At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

6. When a Chamber in a subsequent proceeding takes judicial notice of documentary evidence admitted in a prior proceeding under this Rule, the legal effect is to recognise a well-founded presumption for the reliability of the evidence so that it does not have to be established

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[6] Supplemental Response, para. 2.

[7] Second Supplemental Response, paras. 2-5.

[8] Second Reply, paras. 2-7.

again at trial.[9] The document in question is thus admitted into evidence in the second proceeding, given that the status of any document in a trial is a binary one–admitted or not admitted.[10] However, simply because a document is admitted into evidence does not suggest that the content of that document is accepted as true by the Chamber, and it is for the Chamber to assess the weight to be given to the content of the document in its overall assessment of the evidence in the case as a whole. Thus, it remains open to the opposing party to challenge the content of the document and to present contrary evidence, all of which will be taken into account by the Chamber when attributing appropriate weight to it.[11]

7. The rationale behind the process of judicial notice is that judicial economy is better served by not having to recreate findings in relation to a document's reliability, which have already been made by a prior Chamber.[12] Rule 94(B) aims at "achieving judicial economy and harmonizing judgements of the Tribunal by conferring the Trial Chamber with the discretionary power to take judicial notice of facts or documents from other proceedings" and the power of a Chamber to take judicial notice "has to be exercised on the basis of a careful consideration of the right of the accused to a fair and expeditious trial, that is in keeping with the principle of a fair trial enshrined in Articles 20 and 21 of the Statute".[13] If taking judicial notice of documents would compromise the principle of a fair trial, the Trial Chamber will exercise its discretion not to do so.[14]

8. The party seeking judicial notice of a document must establish that the document (a) was admitted into evidence in a previous trial and (b) relates to matters at issue in the current proceedings.[15] Regarding the first prong, the documents sought for judicial notice must have been tendered and received as evidence in another case before the Tribunal, having met the requirements of Rule 89 as to their reliability, relevancy, and authenticity.[16] The Chamber notes that Rule 95 also has some bearing on this prong, as it provides that evidence is not admissible "if obtained by methods which cast substantial doubt on its reliability or if its admission is

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[9] *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes, 1 September 2008, para. 5; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006 ("*Milutinović* Decision"), para. 15, citing *Prosecutor v. Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, para. 11.

[10] *See Milutinović* Decision, para. 31.

[11] *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motions for Judicial Notice of Documents Pursuant to Rule 94(B), 16 June 2008, para. 27.

[12] *Milutinović* Decision, para 30.

[13] *Prosecutor v. Delić*, Case No. IT-04-83-PT, Decision on Prosecution's Motion for Admission of Documentary Evidence Pursuant to Rule 94 (B), 9 July 2007 ("*Delić* Pre-Trial Decision"), p. 3.

[14] *Delić* Pre-Trial Decision, p.4, *Milutinović* Decision, para. 17

[15] *Delić* Pre-Trial Decision, p.4; *Milutinović* Decision, para. 16.

[16] *Delić* Pre-Trial Decision, p.4; *Milutinović* Decision, para. 16.

antithetical to, and would seriously damage, the integrity of the proceedings." With regard to the second prong, the moving party must identify, with clarity and specificity, the precise portions of the documents for which it seeks judicial notice and prove their particular relevance to the second proceedings.[17] The documents must have more than a remote connection to these proceedings.[18]

III. Discussion

9. Of the 312 items offered for judicial notice by the Prosecution in the Motion, 164 are intercepts of telephone conversations between a variety of actors, including the Accused, in the period relevant to the Indictment. The remaining 148 include orders, reports, cables, and other miscellaneous items. The Chamber considers intercepts to be a special category of evidence given that they bear no indicia of authenticity or reliability on their face. Unlike documents that are *prima facie* authentic and reliable and therefore potentially admissible through a bar table motion, the authenticity and reliability of intercepts is established by further evidence, such as hearing from the relevant intercept operators or the participants in the intercepted conversation themselves. Thus, it would be in the interests of judicial economy to admit these intercepts into evidence pursuant to Rule 94(B) so that the intercept operators do not have to return to the Tribunal to testify to the same again. The Chamber must, however, balance interests of judicial economy against the right of the Accused to a fair and expeditious trial.

10. While the Accused challenges the lawfulness of the intercepts offered by the Prosecution, the admission of an intercept into evidence does not depend on whether it was obtained legally or illegally; rather, the Chamber must simply be satisfied that the requirements for admissibility of evidence provided by Rule 89 are met and that there are no grounds for exclusion under Rule 95.[19]

11. As noted above, before it will take judicial notice of a particular intercept, the Trial Chamber must be satisfied that it was indeed admitted into evidence in prior proceedings. Having reviewed the intercepts listed by the Prosecution in Appendix A to the Motion, and the information provided therein in relation to their prior admission, the Chamber is concerned that,

[17] *Delić* Pre-Trial Decision, p.4; *Milutinović* Decision, para. 16.

[18] *Delić* Pre-Trial Decision, p.4; *Milutinović* Decision, para. 16.

[19] *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, 16 December 2009, para. 14; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on the Defence "Objection to Intercept Evidence", 3 October 2003, paras. 53-55.

for some, the relevant references provided are either incorrect or unclear.[20] The Chamber is also not able to ascertain from the Motion the basis upon which the intercepts were admitted in the prior proceedings; in other words, whether the relevant intercept operators were indeed brought to testify as to their authenticity and reliability or whether they were admitted through some other witness, or even by agreement of the parties to the prior proceedings. In the present case, the Accused has specifically challenged the reliability of the intercepts offered by the Prosecution.[21] Because taking judicial notice of documentary evidence effectively presumes the authenticity and reliability of the document, on the basis that this has been established in the prior proceedings, in light of the Accused's objection, the Chamber considers it necessary for it to be satisfied that each of these intercepts was not only admitted in the prior proceedings but also sufficiently authenticated and found to be reliable, before it can take judicial notice of any of them. It will therefore deny the Motion insofar as it relates to the 164 proffered intercepts, without prejudice, so that the Prosecution may resubmit it in relation to these intercepts, clearly directing the Chamber to the manner in which each was authenticated, in addition to where they were admitted, in the prior proceedings.[22]

12. For other types of documents, the authenticity and reliability of which can be readily established without having to rely on Rule 94(B), judicial economy would be equally served by their admission from the bar table, or indeed by being shown to a witness who is testifying about events relevant to the Indictment. Having considered all of the items listed in Appendix A to the Motion, and mindful of its obligation to ensure that the fair trial rights of the Accused are not compromised, the Chamber will exercise its discretion not to take judicial notice of the aforementioned items which are not telephone intercepts. It remains open to the Prosecution to seek the admission of these items into evidence either through witnesses brought at trial, or from the bar table, pursuant to Rule 89(C).

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[20] For example, for item bearing Rule 65 *ter* number 30481, the Prosecution fails to cite the specific page numbers of the transcript where the *Krajišnik* Trial Chamber admitted the document. In addition, for several items, such as items bearing Rule 65 *ter* numbers 30228, 30650, 30756, 30824, and 32616, the written or oral decision admitting the document in a prior proceeding does not provide enough information to verify that the admitted document's content corresponds with the description provided by the Prosecution.

[21] Second Supplemental Response, para. 2.

[22] Further, having analysed the offered intercepts, the Chamber is mindful that the substance of many of them is not evident, particularly at this stage of the proceedings, and that the participants in the intercepted conversations do not always identify themselves with sufficient clarity for the Chamber to be convinced of who they are. Thus, even if it is not necessary for the intercept operators to be brought to testify as to the authenticity and reliability of the intercepts themselves, it will be essential for there to be other evidence on the record which confirms who the

IV. Disposition

13. For the foregoing reasons, pursuant to Articles 20(1) and 21(4)(b) of the Statute of the Tribunal and Rule 94(B) of the Rules, the Chamber hereby:

(a) **DENIES** the Motion with respect to the items with Rules 65 *ter* numbers 00368, 01065, 01243, 01248, 01291, 01302, 01355, 01538, 01549, 01560, 01561, 01622, 01629, 01631, 01638, 01643, 01666, 01864, 01868, 01879, 06877, 06882, 06886, 06911, 06913, 06923, 07082, 07403, 07737, 08091, 08223, 08353, 08480, 09066, 09067, 09080, 09095, 09102, 09105, 09139, 09143, 09162, 09185, 09218, 09227, 09232, 09241, 09267, 09273, 09313, 09317, 09324, 09337, 09515, 09529, 09578, 09580, 09582–84, 09603, 09640, 09663, 09674, 09690, 09696, 09705, 09733, 09759, 09782, 09850, 09864, 09916, 10565, 10572, 10582, 10583, 10864, 10929, 11076, 11332, 11340, 11342, 11344, 11345, 11349–52, 11354, 11356, 11357, 11359, 11401, 11405, 11409, 11410, 11804, 11816, 11817, 11819, 12123, 14797, 15353, 15412, 15435, 15507, 15573, 15592, 15602, 15611, 15647, 15725, 15741, 15758, 15891, 17016, 20818–20, 20822–24, 20826, 20827, 20829–32, 20835, 20841, 20843–53, 20855–57, 20859, and 21128;

(b) **DENIES** the Motion without prejudice with respect to the remaining items listed in Appendix A; and

participants are and the meaning of what is being discussed in order for the Chamber to place any weight on them.

(c) **REMINDS** the Prosecution that, should it choose to resubmit the Motion in relation to the intercepts it should ensure that (i) each intercept is in fact available to the Chamber in English, in ecourt, (ii) for each intercept there is a complete and correct citation to the written or oral decision admitting it in the prior proceedings, and (iii) for each intercept there is an explanation of how it was authenticated and determined to be reliable in the prior proceedings, including references to the relevant transcripts.

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

Judge O-Gon Kwon,
Presiding

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

[Seal of the Tribunal]