

UNITED
NATIONS



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-T

Date: 11 February 2009

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Acting Registrar: Mr. John Hocking

Decision of: 11 February 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON DEFENCE MOTION *IN LIMINE* FOR
PROSECUTION WITNESS BRETTON RANDALL**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“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 seized of the “Motion in Limine for Prosecution Witness Bretton Randall”, filed publicly on 14 January 2009 (“Motion”) and hereby renders its Decision.

A. Procedural Background

1. On 23 February 2007, the Prosecution filed its initial list of witnesses, witness summaries and exhibit list pursuant to Rule 65 *ter*(E) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).¹ On 10 November 2008, it sought to augment the Rule 65 *ter* witness summary in respect of Witness Bretton Randall to include references to two categories of documents that would have been introduced by a witness who was no longer included in the revised Rule 65 *ter* witness list of 29 September 2008² as well as two categories of documents not included in Mr. Randall’s original Rule 65 *ter* summary.³

2. On 26 November 2008, the Trial Chamber allowed the Prosecution to augment the Rule 65 *ter* summary in respect of Mr. Randall and ordered the Prosecution to submit a list of the documents it intended to use for the examination-in-chief of Mr. Randall by no later than ten working days before the start of his testimony.⁴

B. Submissions of the Parties

3. In its Motion, the Defence submits that Mr. Randall’s testimony should be limited in scope and nature to the provenance and chain of custody of the documents being introduced to the Trial Chamber through him.⁵ The Defence argues that Mr. Randall is neither testifying as a “contemporary fact witness” nor as an “expert”, but as an “OTP Investigator” and that there is no evidence that he was in the former Yugoslavia during the conflict period or saw the documents in question before his employment with the Office of the Prosecutor (“OTP”).⁶ As such, the Defence contends that Mr. Randall’s relationship with the documents consists merely of having read them

¹ Prosecution’s Rule 65 *ter* Submission, 23 February 2007 (confidential).

² Submission of Revised Witness List, with Confidential Annex A, 29 September 2008 (partly confidential).

³ Prosecution’s Supplemental 65*ter* Summary for Witness Bretton Randall, 10 November 2008, para. 3.

⁴ Decision on Prosecutor’s Motion to Augment the Rule 65 *ter* Witness Summary in Respect of Witness Bretton Randall, 26 November 2008 (“26 November 2008 Decision”), p. 4.

⁵ Motion, paras 6, 18, 23.

⁶ Motion, paras 7-8.

because of his employment with the OTP and that he has knowledge of the provenance of at least some of them.⁷

4. According to the Defence, only expert witnesses are permitted to present opinions or draw conclusions.⁸ Because of the tenuous relation between Mr. Randall and the documents, the Defence puts forward that, in his expected testimony, “anything beyond the mere provenance of the documents can be nothing more than summary evidence, the submission of which has been criticized at this Tribunal, especially the summary evidence of Prosecution investigators”.⁹ Moreover, the Defence submits that it is not beyond the Trial Chamber’s capability to do the same analysis that Mr. Randall has done and that the “addition of another layer of hearsay is unnecessary and antithetical to a fair trial”.¹⁰

5. Finally, the Defence requests that potential exhibits collectively entitled “Open Source Material” and contained in annexes B and C of Mr. Randall’s statement be excluded from his testimony and not admitted, since “Mr. Randall is not in a position to authenticate or verify documents in the public domain”.¹¹

6. In the “Prosecution’s Response to Defence Motion *in Limine* (Evidence of Bretton Randall)”, the public version of which was filed on 29 January 2009 (“Response”), the Prosecution contends that the Defence Motion is “both premature and speculative” since the Prosecution has not yet commenced its examination of the witness.¹² Moreover, the Prosecution submits that there is no bar to the admission of “summary evidence” and that the determination of its admissibility should be rather based on its helpfulness as opposed to its necessity.¹³ Furthermore, the Prosecution argues that it is bound to present its case under strict time limits. Thus, allowing Mr. Randall to give summary evidence would promote trial expediency by enabling the Prosecution to “present a large body of documentary evidence in a comprehensible fashion, in the shortest possible time”.¹⁴ Finally, the Prosecution points out that the Defence has not demonstrated that the admission of the evidence would unfairly prejudice Momčilo Perišić (“Accused”).¹⁵

7. With regard to the media reports in the public domain, the Prosecution submits that the Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court

⁷ Motion, paras 8-9.

⁸ Motion, para. 19.

⁹ Motion, para. 11.

¹⁰ Motion, para. 16.

¹¹ Motion, para. 22.

¹² Response, para. 3(i).

¹³ Response, paras 3(ii), 9-10.

¹⁴ Response, paras 3(iii), 7, 22-23.

¹⁵ Response, paras 3(iv), 11, 28.

("Guidelines")¹⁶ favour their admission. The Prosecution further contends that the authenticity of the documents can be verified by resort to public sources and that it would be impractical and time-consuming as well as an unduly onerous burden to require the Prosecution to produce the author, publisher or broadcasters of the articles or video clips in question to provide "traditional" evidence of authenticity.¹⁷

8. On 5 February 2009, the Defence filed a public "Request for Leave to File a Reply and Reply to the Prosecution's Response to Defence Motion *in Limine* (Evidence of Bretton Randall)" ("Request for Leave"), in which it seeks leave to file a reply "because of the importance of the issue at hand in this case and to clarify several points".¹⁸

C. Applicable Law and Principles

9. Pursuant to Rule 89(C), a Trial Chamber "may admit any relevant evidence which it deems to have probative value". The relative weight of the evidence admitted, however, will be assessed by the Trial Chamber at a later stage in the context of the entire trial record. It is settled jurisprudence that hearsay evidence is admissible as long as it is of probative value.¹⁹ The Appeals Chamber has acknowledged the admission of "summary evidence" – the summarising of materials relevant to issues of the case – on many occasions, holding that the appropriateness in a particular case would depend upon its circumstances.²⁰ The "basic issue" in determining the appropriateness of admitting summary evidence is whether the material being summarised would itself be admissible.²¹

10. According to this Trial Chamber's Guidelines, a Party seeking the admission of a document through a witness must demonstrate to the Trial Chamber the relation between the witness and the document. The Trial Chamber may not allow admission, through that particular witness, of documents which lack such relation.²² Based on the basic distinction between the admissibility of documentary evidence and the weight to be attached to it in the Trial Chamber's evaluation of evidence, the Guidelines promote a practice in favour of admissibility.²³ This is also true with

¹⁶ Order on Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October 2008, Annex.

¹⁷ Response, paras 3(v), 30-32.

¹⁸ Request for Leave, para. 2.

¹⁹ See, e.g., *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 509; *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Appeal Judgement, 3 May 2006, para. 217; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 281.

²⁰ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002 ("*Milošević Decision*"), para. 21.

²¹ *Milošević Decision*, para. 21.

²² Guidelines, para. 27.

²³ Guidelines, para. 31.

regard to documents whose purported authors have not been called to testify,²⁴ or when objections are raised on grounds of authenticity or reliability.²⁵

D. Discussion

11. At the outset, the Trial Chamber notes that the Prosecution Response was originally filed confidentially on 28 January 2009.²⁶ The Defence Reply was filed on 5 February 2009 and thus after the expiry of the seven days provided for in Rule 126 *bis* of the Rules. The Defence has not shown good cause for the untimely filing. Therefore, the Trial Chamber will not grant leave to reply.

12. The Trial Chamber agrees with the Defence that Mr. Randall is not called to testify as an expert witness and therefore should not be permitted to present his opinions or draw conclusions on the contents and interpretation of documents with which he familiarised himself only by virtue of having reviewed them in the context of his employment with the OTP. The Trial Chamber notes the Prosecution's undertaking that it "does not intend to ask Mr. Randall to express opinions or conclusions about the documents he has reviewed".²⁷ Nonetheless, the Trial Chamber is concerned that the Prosecution's intention to "ask Mr. Randall to summarize the contents of collections of documents and individual documents, and to assist the Chamber in identifying relevant passages in others"²⁸ would necessarily be based upon a selection of passages and documents Mr. Randall deems most pertinent and therefore entail giving opinions and conclusions on the relevance and contents of the documents in question.

13. The Trial Chamber concurs with the Prosecution that "[t]here is no rule or guideline prohibiting the use of summary witnesses or other summary evidence"²⁹ in this Tribunal and recalls that it has indeed been admitted in previous trials, including when provided by investigators of the OTP.³⁰ In the *Milošević* Decision, upon which the Defence relies to a significant degree, the Appeals Chamber, however, upheld the inadmissibility of a compilation of witness summaries. Yet in that particular case, the underlying material was inadmissible pursuant to Rule 92 *bis* of the Rules. In other words, the compiled summary, if admitted, would have circumvented the stringent

²⁴ Guidelines, para. 34.

²⁵ Guidelines, para. 35.

²⁶ Prosecution's Response to Defence Motion *in Limine* (Evidence of Bretton Randall), 28 January 2009 (confidential).

²⁷ Response, para. 8.

²⁸ Response, para. 7.

²⁹ Response, para. 9.

³⁰ *Milošević* Decision, para. 21. See, e.g., *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Joint Defence Motion Requesting Determination as to the Admissibility of the Testimony of Jean Rene Ruez, 6 September 2006.

requirements of Rule 92 *bis* of the Rules.³¹ Moreover, the compilation of summaries in question contained conclusions regarding the commission of crimes.³²

14. Although the present instance is clearly distinguishable from the *Milošević* Decision and Mr. Randall's summary evidence is not *ipso facto* inadmissible, the question is whether such evidence *should* be admitted. The Prosecution has indicated its intention to "tender all of the underlying documents into evidence such that they will be available for use by the Defence during cross-examination and will also be available for inspection by the court".³³ The Trial Chamber will therefore determine the relevance of the evidence and the weight to be attached to it on the basis of its own evaluation, in the context of the whole trial record, and without relying on a summary.

15. The Trial Chamber notes that, as an investigator, Mr. Randall may testify as a fact witness only in relation to provenance and chain of custody of the documents he has obtained in the context of his employment with the OTP, since no other relation between Mr. Randall and the documents has been established. Given the voluminous amount of "thousands of pages of documents"³⁴ the Prosecution intends to introduce through Mr. Randall, the Trial Chamber finds that trial expediency – the Prosecution's paramount reason for Mr. Randall's projected presentation of summary evidence – would be best served by limiting Mr. Randall's examination-in-chief strictly to those issues that can be of assistance to the Trial Chamber. Considering its concern regarding selective summarisation expressed above and given the Trial Chamber's duty to thoroughly analyse the evidence and familiarise itself with it, the Trial Chamber fails to see how Mr. Randall could assist it on matters going beyond provenance and chain of custody of the documents in question.

16. With regard to the open source materials, the Trial Chamber considers that its Guidelines and the practice of the Tribunal do not bar, in principle, the admission of such documents without the presence of the author.³⁵ As with the other documents, the Trial Chamber does not deem it appropriate for Mr. Randall to discuss or summarise the merits of the open source documents.

³¹ *Milošević* Decision, paras 18-24. The other Decision referred to by the Defence, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Decision on the Prosecution Application to Admit the Tulića Report and Dossier in to Evidence, 29 July 1999 ("*Kordić* Decision"), concerned a similar collation of statements and other materials, *see Kordić* Decision, para. 20.

³² *Milošević* Decision, para. 16.

³³ Response, para. 27.

³⁴ Response, para. 5.

³⁵ Guidelines, para. 34.

E. Disposition

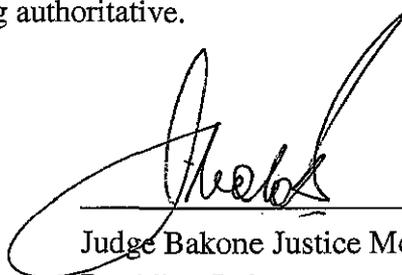
17. **FOR THE FOREGOING REASONS** and **PURSUANT TO** Rules 54 and 126 *bis* of the Rules, the Trial Chamber

DENIES the request for leave to file a reply;

GRANTS the Defence Motion in part; and

ORDERS the Prosecution to limit Mr. Randall's examination-in-chief to issues of provenance and chain of custody of the documents to which he has a relation due to his professional involvement.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this eleventh day of February 2009

At The Hague

The Netherlands

[Seal of the Tribunal]