

**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-04-81-PT
Date: 1 September
2008
Original: English

IN THE TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding Judge
Judge Christine Van Den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr Hans Holthuis

Decision: 1 September 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR JUDICIAL
NOTICE OF SREBENICA INTERCEPTS WITH
CONFIDENTIAL ANNEXES**

The Office of the Prosecutor:

Mr Mark Harmon

Counsel for the Accused:

Mr Novak Lukić
Mr Gregor Guy-Smith
Mr James Castle

1. 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 Prosecution’s “Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes”¹ (“Motion”), filed on 17 July 2008, whereby the Prosecution requests that the Trial Chamber take judicial notice of 57 documents that are transcripts and notes relating to 27² intercepted conversations, all of which have been admitted in previous proceedings before the Tribunal. The Defence has indicated that it does not oppose the Motion.³

I. SUBMISSIONS

2. The Prosecution submits that the documents relate to the period relevant to the Srebrenica crime-base alleged in the Indictment.⁴ It further submits that all of the requirements for admissibility under Rule 94(B) of the Rules of Procedure and Evidence (“Rules”) have been met in respect of the documents, in that they have been admitted in prior proceedings, and that they are relevant to the current proceedings.⁵ The Prosecution further argues that the admission of the documents into evidence at this stage will not prejudice the right of the accused, Momčilo Perišić (“Accused”), to a fair trial,⁶ but rather expedite the proceedings as it would obviate the need to call 11 Prosecution witnesses.⁷

II. APPLICABLE LAW

3. Rule 94(B) of the Rules provides that:

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.

¹ Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes, 17 July 2008 (partly confidential). Confidential Annex A contains a list of 57 documents with Rule 65*ter* number, short description, date and ERN-number of each document, exhibit number in other cases in which the document has been admitted, and a reference to Confidential Annex B which provides a more detailed description of the document. The Chamber notes that, by e-mail of 23 July 2008 to the Chamber’s legal staff, the Prosecution made corrections to the Prosecution’s Motion, Annex A. In this e-mail, the Prosecution clarified that, in the case *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88, intercept no. 2 was admitted as Exhibit P1147, intercept no. 4 was admitted as Exhibit P1387, intercept no. 39 was admitted as Exhibit P1234, and intercept no. 41 was admitted as Exhibit P1164.

² In its Motion, the Prosecution refers to 26 intercepted conversations. In a corrigendum filed on 11 August 2008, the Prosecution seeks to have another intercepted conversation added to its Motion. Thus, the documents in the Motion relate to a total of 27 intercepted conversations.

³ E-mails dated 22 July, 28 July and 14 August 2008.

⁴ Motion, para. 3.

⁵ Motion, para. 11. Rule 94(B) of the Rules provides that “[a]t 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 Motion, para. 16.

⁷ Motion, para. 20.

4. The rationale behind Rule 94(B) with respect to documentary evidence is that judicial economy is served by not having to recreate findings in relation to a document's reliability, which has already been made by a prior Chamber.⁸ Rule 94(B) aims at "achieving judicial economy and harmonising 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 that this power 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".⁹

5. The legal effect of judicial notice of documentary evidence is that "documents will be admitted into evidence and used precisely for their contents, and not merely for their existence and authenticity".¹⁰ By taking judicial notice of a document, the moving party is relieved of its duty to seek admission into evidence of the document as relevant and of probative value. It further establishes a well-founded presumption of authenticity, which may be challenged at trial. Although admission in the other trial, especially if the prior Chamber relied on the document for the establishment of relevant facts, may assist the Trial Chamber in weighing the probative value of the document as to its contents, the Trial Chamber emphasises that it is for the Bench in the current proceedings to finally make determinations in this respect, in view of the totality of the evidence before it.

6. The party seeking judicial notice must establish that the document (i) was admitted into evidence in a previous trial and (ii) relates to matters at issue in the current proceedings.¹¹ With respect to the second requirement, the fact that a document was deemed relevant in another trial does not mean that it is automatically relevant to the present case and that the Trial Chamber must still find that each document is relevant to matters at issue in the current proceedings.¹² As a consequence, the moving party must discharge its burden with regard to relevance as though it were offering the evidence in the usual manner under Rule 89(C).¹³ More specifically, the moving party must ensure that the documents have more than a merely remote connection to the current proceedings, and the imperative factor will be identifying the precise portions of documents for

⁸ *Prosecutor v. Milan Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006 ("*Milutinović et al.* Decision"), para. 30.

⁹ *Prosecutor v. Rasim 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* Decision"), p. 3. See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 41.

¹⁰ *Milutinović et al.* Decision, para. 31.

¹¹ *Delić* Decision, p. 4; *Milutinović et al.* Decision, para. 16. See also *Nikolić* Appeal Decision, para. 11.

¹² *Delić* Decision, p. 4; *Milutinović et al.* Decision, paras 30, 32.

which a party seeks judicial notice with clarity and specificity as well as proving their particular relevance to the current proceedings.¹⁴

7. Whether to finally take judicial notice of documentary evidence is under the discretionary power of the Trial Chamber. Although judicial economy may be served by taking judicial notice of documentary evidence, it should not affect the fairness of the trial, which is a fundamental right of the accused.¹⁵

III. DISCUSSION

8. Some of the documents referred to in the Motion have not been provided to the Trial Chamber.¹⁶ Other documents submitted before the Trial Chamber do not correspond with the description provided by the Prosecution.¹⁷ The Trial Chamber will not take judicial notice of these documents.

9. The Trial Chamber finds that all other documents are sufficiently relevant to issues in the current proceedings as they appear to relate to crimes alleged to have taken place in Srebrenica as well as the alleged participation of the subordinates of the Accused in these crimes. Further, the Trial Chamber finds that the documents are sufficiently specified,¹⁸ and that they have all previously been admitted in the case *Prosecutor v. Popović et al.*¹⁹

10. The Trial Chamber finds, however, that a number of the documents are identical. Where several documents are identical, the Trial Chamber will take judicial notice of one document only.²⁰

11. Further, the Trial Chamber finds that the taking of judicial notice, in view of the content, volume and specificity of the documents, would not compromise the right of the Accused to a fair

¹³ *Delić* Decision, p. 4, quoting *Milutinović et al.* Decision, para. 30.

¹⁴ *Delić* Decision, p. 4; *Milutinović et al.* Decision, para. 16. See also *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts Rule 94(B) of the Rules of Procedure and Evidence, 10 December 2004, para. 11. The Appeals Chamber in *Nikolić* held that "the mere reference to whole sections or paragraphs of "documentary evidence" of a previous judgment is insufficient to trigger the exercise of the Chamber's discretion under Rule 94(B) of the Rules", *Nikolić* Appeal Decision, para. 47.

¹⁵ See *Delić* Decision, p. 4.

¹⁶ Motion, Annex A, doc. 48 and doc. 51.

¹⁷ Motion, Annex A, doc. 8.

¹⁸ The Chamber observes that, in respect of doc. 17 and doc. 29, the times of the intercepted conversations given in Annex A, differ slightly from that on the document itself. As the time difference in each case is very minor, and the descriptions of these documents in Annex B correspond with the transcripts, the Chamber finds this to be a mistake inadvertently made by the Prosecution in Annex A, and takes judicial notice of the transcripts in doc. 17 and doc. 29.

¹⁹ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Admissibility of Intercepted Communications, 7 December 2007, para. 79 and Appendix I.

²⁰ Doc. 3 is identical to doc. 2; doc. 11 is identical to doc. 10; doc. 15, doc. 46, doc. 53 and doc. 54 are identical to doc. 13; doc. 16, doc. 41 and doc. 45 are identical to doc. 14; doc. 19 and doc. 27 are identical to doc. 18; doc. 22 is identical to doc. 21; doc. 25 and doc. 55 are identical to doc. 24; doc. 26 and doc. 57 are identical to doc. 20; doc. 33 is identical to doc. 32; doc. 35 is identical to doc. 34; doc. 39 is identical to doc. 36; doc. 38 is identical to doc. 37; doc. 43 and doc. 44 are identical to doc. 42; doc. 47 is identical to doc. 31; and doc. 52 is identical to doc. 9.

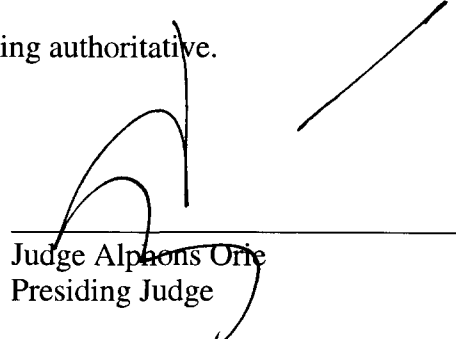
trial, and that taking judicial notice of the documents would expedite the proceedings in the present case as it would obviate the need to call a number of Prosecution witnesses.

IV. DISPOSITION

For the foregoing reasons and pursuant to Rules 54 and 94 of the Rules, the Trial Chamber grants the Motion **IN PART**, and decides as follows:

- (1) The Trial Chamber takes judicial notice of the following documents: 1, 2, 4, 5, 6, 7, 9, 10, 12, 13, 14, 17, 19, 20, 21, 23, 24, 28, 29, 30, 31, 32, 34, 36, 37, 40, 43, 49, 50, and 56;
- (2) The Trial Chamber will not take judicial notice of the remaining documents proposed for judicial notice in the Motion.

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



Judge Alpaons Ori
Presiding Judge

Dated this first day of September 2008
At The Hague
The Netherlands

[Seal of the Tribunal]