



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: 17 February 2011

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: 17 February 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR CERTIFICATION TO APPEAL DECISION
ON JUDICIAL NOTICE OF THE AUTHENTICITY OF INTERCEPTS**

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 “Application for Certification to Appeal Decision on Judicial Notice of Intercepts”, filed by the Accused on 7 February 2011 (“Application”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 4 February 2011, the Chamber issued a “Decision on the Prosecution’s Motion for Judicial Notice of Intercepts Related to the Sarajevo Component and Request for Leave to Add one Document to the Rule 65 *ter* Exhibit List” (“Impugned Decision”), wherein it took judicial notice of the authenticity of 43 intercepts which were admitted in previous proceedings (“Impugned Material”), and admitted them into evidence in these proceedings.¹

2. In his Application, the Accused seeks leave to appeal the portion of the Impugned Decision in which the Chamber considered that the requirements for taking judicial notice of adjudicated facts are not applicable to judicial notice of documentary evidence and where it held that the term “documentary evidence”, as set forth in Rule 94(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), encompasses recordings.² The Accused first submits that the criteria to be applied to judicial notice of documentary evidence involve an issue which affects both the fair and expeditious conduct of the proceedings as the Impugned Decision opens the door to taking judicial notice of the authenticity of hundreds of intercepts related to the municipalities and Srebrenica components of the case.³ The Accused maintains that it is unfair to “admit exhibits” which have been admitted in prior proceedings by agreement of the parties and to take judicial notice of evidence pertaining to the acts and conduct of the accused or of documents admitted in previous proceedings which are not yet final.⁴ The Accused further alleges that, in order to have certainty on whether or not judicial notice of the authenticity of the said evidence and potential future evidence may be taken, an immediate decision by the Appeals Chamber would materially advance the proceedings.⁵ The Accused also claims that an immediate decision of the Appeals Chamber will advance the jurisprudence of the Tribunal for other cases as the issues raised by the Impugned Decision are novel.⁶

¹ Impugned Decision, para. 31. The Chamber also took judicial notice of the authenticity of two spreadsheets prepared by an intercept operator and related to the said intercept.

² Application, paras. 2–3.

³ Application, para. 5.

⁴ Application, para. 6.

⁵ Application, para. 8.

⁶ Application, para. 10.

3. On 9 February 2011, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution’s Response to Karadžić’s Application for Certification to Appeal Decision on Judicial Notice of Intercepts” (“Response”). In the Response, the Prosecution first submits the two-prong test for certification to appeal the Impugned Decision has not been met.⁷ The Prosecution then avers that the Accused has failed to articulate why the criteria applied by the Chamber in the Impugned Decision, and which are in accordance with those applied by other Chambers, are not sufficient to safeguard the fairness of the trial.⁸ The Prosecution further maintains that the Application also fails to demonstrate that granting leave to appeal would materially advance the proceedings as the arguments therein “contravene relevant precedent and widely recognised rules of statutory interpretation and evidence”.⁹ The Prosecution finally asserts that the Chamber should in any case exercise its discretion not to grant the Application as the Accused failed to advance relevant arguments in a timely manner.¹⁰

II. Applicable Law

4. Decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.¹¹ Under Rule 73(B) of the Rules, a Trial Chamber may grant certification to appeal if the said 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.”

5. A request for certification is “not concerned with whether a decision was correctly reasoned or not.”¹² Furthermore, it has previously been held that “even when an important point

⁷ Response, para. 1.

⁸ Response, para. 2.

⁹ Response, para. 3.

¹⁰ Response, para. 5.

¹¹ See Rule 72(B), 73(C) of the Rules.

¹² *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber’s Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para. 42; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98bis Decision, 14 June 2007, para. 4; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić and Beara Motions for Certification of the Rule 92quater Motion, 19 May 2008, para. 16; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Motion for Certification of Rule 98bis Decision, 15 April 2008, para. 8; *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.

of law is raised [...], the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied”.¹³

III. Discussion

6. As a preliminary matter, the Chamber considers that the decisions relied upon by the Accused in the Application are not applicable to the issues examined by the Chamber in the Impugned Decision. The decisions issued by the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone referred to by the Accused dealt primarily with taking judicial notice of facts of common knowledge under provisions similar to the Tribunal’s Rule 94(A) and were of such a scope to materially impact on the overall number of witnesses and trial time.¹⁴

7. With regard to the first prong of the test for certification, and whether or not the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial, the Chamber notes that the Impugned Decision takes judicial notice of the authenticity of 43 intercepts admitted in prior proceedings and which the Chamber considered had been sufficiently authenticated. As such, the impact of the Impugned Decision in a case in which more than 3,000 exhibits have already been admitted and more than 500 witnesses are expected to be heard or to have their evidence tendered is relatively minor. Further, as the Chamber mentioned in paragraph 12 of the Impugned Decision, Rule 94(B) only creates a well-founded presumption for the authenticity of the Impugned Material, thus allowing the Accused to present evidence to rebut its authenticity. Thus, the issue of judicial notice of the authenticity of the Impugned Material alone cannot be said to have any significant effect on the fair and expeditious conduct of these proceedings or the outcome of trial.

8. The Chamber considers that the second prong of the certification test, namely whether an immediate resolution by the Appeals Chamber may materially advance the proceedings, is also not met. The Chamber will examine any potential future Prosecution request for judicial notice of the authenticity of documentary evidence on the basis of the parties’ submissions and in accordance with the well-established applicable case law, part of which remains applicable after the recent amendment to Rule 94(B). The Chamber therefore does not consider that these

¹³ *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 12 January 2005, p. 1.

¹⁴ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Certification of Appeal Concerning Judicial Notice, 2 December 2005; *Prosecutor v. Norman et al.*, Case No. SCSL-04-140T, Decision on Joint Request for Leave to Appeal against Decision on Prosecution’s Motion for Judicial Notice, 19 October 2004.

proceedings may be materially advanced by an immediate resolution by the Appeals Chamber of the issue of judicial notice of the authenticity of the Impugned Material.

9. While neither prong of the Rule 73(C) test has been met and therefore the Application will be denied, in light of the Accused's argument that an immediate resolution from the Appeals Chamber on the "novel" issue raised in the Impugned Decision will materially advance other proceedings, the Chamber recalls its earlier finding that "in determining whether certification should be granted the Chamber is not concerned with facilitating the development of the jurisprudence for the benefit of other international courts and tribunals, falling as that purpose does outside the ambit of Rule 73(B)".¹⁵

IV. Disposition

10. Accordingly, the Trial Chamber, pursuant to Rule 54 and 73(C) of the Rules, hereby **DENIES** the Application.

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



Judge O-Gon Kwon
Presiding

Dated this seventeenth day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ Decision on the Accused's Application for Certification to Appeal Decision on Prosecution's Motion for Rule 70 Conditions and for Public Decision, 18 January 2010, para. 18.