

THE INTERNATIONAL CRIMINAL TRIBUNAL  
FOR THE FORMER YUGOSLAVIA

CASE No. IT-95-5/18-T

IN TRIAL CHAMBER No. 3

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

Registrar: Mr. John Hocking

Date: 6 January 2011

THE PROSECUTOR

v.

RADOVAN KARADZIC

*Public*

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SUPPLEMENTAL RESPONSE TO MOTION FOR JUDICIAL  
NOTICE OF INTERCEPTED CONVERSATIONS  
RELATING TO SARAJEVO

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The Office of the Prosecutor:  
Mr. Alan Tieger  
Ms. Hildegard Uertz-Retzlaff

The Accused:  
Radovan Karadzic

1. Dr. Radovan Karadzic agrees with the prosecution that the December 2010 amendment to Rule 94(B) limits the effect of judicial notice of documents to a finding of the authenticity of the document and not to admission of its contents.<sup>1</sup>

2. Because this is the first opportunity for a Chamber to interpret the new Rule 94(B), Dr. Karadzic believes that the Chamber should examine and establish the elements for taking judicial notice of the authenticity of a document.

3. The Trial Chamber might first wish to consider whether the Rule, which speaks of “documents”, applies to recordings, which is the subject of the instant motion. The plain meaning of the term “documents” does not include recordings. Dr. Karadzic contends that if the Plenary of Judges had intended that other forms of evidence besides documents could be the subject of judicial notice as to their authenticity it would have said so in Rule 94(B). Other provisions of the Rules speak of “tangible objects” (Rule 66(B)), “exhibits” (Rule 65 *ter* (E)), or “evidence” (Rule 89(C)). This demonstrates that the Judges know how to describe items which would include recordings when they mean to include them.

4. Should the Trial Chamber nevertheless find that the term “documents” encompasses recordings, it should go on to determine the requirements of judicial notice of the authenticity of documents.

5. The consideration of judicial notice of adjudicated facts is a two-step process. First, the Trial Chamber must determine whether the fact fulfills the admissibility requirements: (A) relevance; (B) distinct, concrete, and identifiable; (C) not differ from the fact as formulated in the judgement; (D) not be unclear or misleading; (E) identified with adequate precision; (F) not contain an essentially legal characterization; (G) not be based on an agreement in the original proceeding; (H) not relate to the acts, conduct or mental state of the accused; (I) not be subject to pending appeal or review. Second, for each fact that fulfills these requirements, the Trial Chamber must determine whether in its discretion, it should nonetheless withhold judicial notice, on the ground that judicially noticing the fact in question would not serve the interests of justice.<sup>2</sup>

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<sup>1</sup> *Prosecution Supplemental Submission to Motion for Judicial Notice of Intercepts Related to the Sarajevo Component* (17 December 2010)

<sup>2</sup> *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (26 September 2006) at paras. 4-14; *Prosecutor v Lukic & Lukic*, No IT-98-32/1-T,

6. The Trial Chamber should determine which of these criteria apply to the judicial notice of the authenticity of documents.

7. Dr. Karadzic contends that the elements of (A) relevance, (G) not be based upon an agreement in the original proceeding; (H) not relate to the acts, conduct, or mental state of the accused, and (I) not be subject to pending appeal or review, should also apply to judicial notice of the authenticity of documents. In addition, the Trial Chamber should retain the discretion not to take judicial notice of the authenticity of a document even where the above criteria are fulfilled.

8. With respect to the **relevance** requirement, there is simply no point to taking judicial notice of the authenticity of a document which is not relevant, since the document could not be admitted under Rule 89(C) even if authentic.

9. The requirement that the finding of authenticity of the document not be based upon an **agreement** in the original proceeding serves the same purpose for documents as it does for adjudicated facts—eliminating from judicial notice those documents as to which no decision on the merits of their authenticity has truly been made.

10. This makes sense as parties may often find it in their interests not to object to admission of a document which may help, or at least not damage its case, even if the authenticity of that document is questionable. The admission of a document under such circumstances in a previous case should be entitled to no weight in the evaluation of its authenticity since no *bona fide* determination has been made in the prior proceeding that the document is authentic.

11. The Appeals Chamber has stated that documents do not need to be adjudicated in the sense that a specific decision on the admissibility of the document was pronounced.<sup>3</sup> However, this does not mean that documents which were admitted by agreement should be entitled to judicial notice of their authenticity. To the extent that the Appeals Chamber's decision is so interpreted, it is contended that the amendment of Rule

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*Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts* (22 August 2008) at para. 20; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on First Prosecution's Motion for Judicial Notice of Adjudicated Facts* (5 June 2009) at para. 9; *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (17 December 2009) at para. 8; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (1 April 2010) at para. 24  
<sup>3</sup> *Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Motion for Judicial Notice* (1 April 2005) at para. 45

94(B) to limit the effect of judicial notice of documents to their authenticity requires that some finding of authenticity in the prior proceeding, explicit or implicit, has been made.

12. Therefore, the prosecution should be required to demonstrate that the documents which are the subject of the instant motion were not admitted by agreement. Where it cannot be determined that the document was not admitted based upon an agreement of the parties, the Chamber must refrain from taking judicial notice of that document.<sup>4</sup>

13. The requirement that the judicially noticed fact not relate to the **acts, conduct, or mental state of the accused** should also be maintained for judicially noticed documents. This is an important safeguard which protects an accused from the shifting of the burden of proof which might result in his or her being convicted upon evidence that s/he could not test. It applies likewise to shifting the burden of proof which might result in him or her being convicted based upon the contents of a document whose authenticity s/he could not challenge.

14. This is particularly true where judicial notice is sought of the authenticity of the accused's own utterances, as captured on allegedly intercepted conversations. The party to the prior proceeding may well have lacked information or incentive to challenge the authenticity of such intercepted conversations. Allowing the authenticity to be established based upon admission into evidence in a prior proceeding involving a different accused would be unfair and unnecessarily infringe upon the right of an accused to confront the evidence against him or her.

15. Therefore judicial notice should not be taken of the authenticity of any intercepted conversations which go to the acts, conduct, or mental state of the accused.

16. The requirement that the decision to take judicial notice of a fact in the prior proceeding be based upon a **final** decision in the prior proceeding applies equally to the decision to take judicial notice of the authenticity of a document. Given that the decision on admissibility can be reversed, thus undermining the finding of authenticity made in the prior proceeding, the taking of judicial notice of a non-final decision to admit a document would be unsound.

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<sup>4</sup> *Prosecutor v Stanasic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (1 April 2010) at para. 38

17. Dr. Karadzic notes that some of the intercepted conversations sought to be the subject of judicial notice in this case are based upon decisions in cases which are still in the trial stage, such as the *Stanisic & Zupljanin* case. Judicial notice of the authenticity of such documents should be denied.

18. The Appeals Chamber has held that while Rule 94(A) is mandatory with respect to facts of common knowledge, section (B) confers a discretionary power on the Chamber to decide whether or not to take judicial notice of adjudicated facts or documentary evidence.<sup>5</sup> Therefore, even if the Trial Chamber were to find that the requirements of taking judicial notice of some intercepted conversations were met, it retains the discretion to decline to take judicial notice of those documents.

19. In that respect, Dr. Karadzic notes that the intercepted conversations which are the subject of the instant motion are only a portion of those conversations intercepted by the Bosnian Muslims which the prosecution seeks to offer into evidence. Therefore, Witness KDZ145 will have to be called as a witness in any event, and a determination of the reliability and authenticity of the intercepted conversations will have to be made. It would be incongruous and a waste of resources for the Trial Chamber to take judicial notice of the authenticity of some intercepted conversations and later determine that the methods or procedures used do not establish the authenticity or reliability of intercepted conversations obtained in the same manner.

20. Therefore, since the judicial economy in taking judicial notice of the authenticity of the intercepted conversations which are the subject of the instant motion is dubious, the Trial Chamber should exercise its discretion not to take judicial notice.

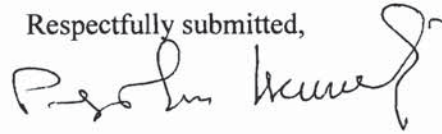
21. Finally, the prosecution recognizes that the amended rule does not authorize the admission of the documents, only a finding of authenticity. Therefore, should the Trial Chamber decide to take judicial notice of any of the proposed recordings, it should defer a decision on the admission of such recordings until the recordings are offered either through a live witness or by bar table motion.

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<sup>5</sup>*Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Motion for Judicial Notice* (1 April 2005) at para 11; *Prosecutor v Niyitegeka*, No. ICTR-96-14-A, *Reasons for Oral Decision Rendered 21 April 2004 on Appellant's Motion for Additional Evidence and for Judicial Notice* (17 May 2004) at para. 16

Word count: 1733

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Radovan Karadzic". The signature is written in a cursive style with a large, stylized initial 'R' and a long, sweeping tail that loops back to the end of the name.

Radovan Karadzic