



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: 4 May 2012

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: 4 May 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THREE ACCUSED'S MOTIONS FOR RECONSIDERATION OF
DECISIONS ON JUDICIAL NOTICE OF ADJUDICATED FACTS**

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 “Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts”¹, filed on 12 March 2012 (“12 March Motion”), the “Fourth Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts”, filed on 26 March 2012 (“26 March Motion”), and the “Fifth Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts”, filed on 17 April 2012 (“17 April Motion”) (together, “Motions”), and hereby issues its decision thereon.

I. Background and Submissions

1. During the course of these proceedings, the Chamber issued a number of decisions granting in part motions filed by the Office of the Prosecutor (“Prosecution”) requesting that judicial notice of adjudicated facts be taken. Of relevance to the Motions are the “Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts” issued on 9 July 2009 (“Decision on Third Motion”), the “Decision on Second Motion for Judicial Notice of Adjudicated Facts (‘Decision on Second Motion’)” issued on 9 October 2009, and the “Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts” issued on 14 June 2010 (“Decision on Fourth Motion”) (together, “Judicial Notice Decisions”).

2. On 28 February 2012, 21 March 2012, and 13 April 2012, the Trial Chamber hearing the case against Ratko Mladić (“*Mladić* Chamber”) issued three decisions in which it took judicial notice of a number of adjudicated facts and denied taking judicial notice of others.²

3. In the Motions, the Accused requests that the Chamber reconsider the Judicial Notice Decisions given that the *Mladić* Chamber declined to take judicial notice of 423 facts previously “accepted” by this Chamber on the basis, *inter alia*, that they were not findings of the original Trial Chamber, they were subjective in nature, they overlapped or duplicated other adjudicated facts, they were contradictory, vague, and constituted legal conclusions.³ The Accused submits that while he acknowledges that this Chamber is not bound by the decisions of other Trial Chambers, “the *Mladic* [sic] decision, individually, and cumulatively with the *Tolimir* and *Stansic* [sic] &

¹ The Chamber notes that the Accused already filed a “Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts” on 30 August 2010.

² *Prosecutor v. Ratko Mladić*, Case IT-09-92-PT, First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 February 2012 (“First *Mladić* Decision”); *Prosecutor v. Ratko Mladić*, Case IT-09-92-PT, Second Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 21 March 2012 (“Second *Mladić* Decision”); *Prosecutor v. Ratko Mladić*, Case IT-09-92-PT, Third Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 13 April 2012 (“Third *Mladić* Decision”) (together, “*Mladić* Decisions”).

³ 12 March Motion, paras. 1–2; 26 March Motion, paras. 1–2; 17 April Motion, paras. 1–2.

Zupljanin [sic] decisions, ought to cause the Trial Chamber to rethink whether its expansive approach to judicial notice has created an injustice”.⁴ For the Accused, the fact that other Trial Chambers have found that approximately 423 facts “accepted” by this Chamber were flawed, “ought to convince the Trial Chamber that any reliance on those adjudicated facts in the judgement would be unsafe”.⁵

4. On 26 March 2012, the Prosecution filed the “Prosecution Response to Karadžić’s 12 March 2012 Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts” (“Response to 12 March Motion”); on 30 March 2012, it filed the “Prosecution Response to Karadžić’s 26 March 2012 Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts” (“Response to 26 March Motion”); and on 24 April 2012, it filed the “Prosecution Response to Karadžić’s 17 April 2012 Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts” (“Response to 17 April Motion”) (together, “Responses”). In the Responses, the Prosecution opposes the Motions, stressing that the Accused reiterates arguments previously made and has not met the requirements for reconsideration by failing to explain how the Chamber erred in assessing each of the adjudicated facts for which he now seeks reconsideration.

II. Applicable Law

5. The Chamber recalls that there is no provision in the Tribunal’s Rules of Procedure and Evidence (“Rules”) for requests for reconsideration, which are a product of the Tribunal’s jurisprudence, and are permissible only under certain conditions.⁶ The legal standard for reconsideration of a decision set forth by the Appeals Chamber is as follows: “a Chamber has inherent discretionary power to reconsider a previous interlocutory decision in exceptional cases ‘if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent injustice.’”⁷ Thus, the requesting party is under an obligation to satisfy the Chamber of the existence of a clear

⁴ 12 March Motion, para. 5; 26 March Motion, para. 5; 17 April Motion, para. 5.

⁵ 12 March Motion, para. 6; 26 March Motion, para. 6; 17 April Motion, para. 6.

⁶ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Regarding Requests Filed by the Parties for Reconsideration of Decisions by the Chamber, 26 March 2009 (“*Prlić* Decision on Reconsideration”), p. 2.

⁷ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.3, confidential Decision on Request of Serbia and Montenegro for Review of the Trial Chamber’s Decision of 6 December 2005, 6 April 2006, para. 25, note 40 (quoting *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, paras. 203–204); see also *Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Decision on Defence “Requête de l’Appelant en Reconsidération de la Décision du 4 avril 2006 en Raison d’une Erreur Matérielle”, 14 June 2006, para. 2.

error in reasoning, or the existence of particular circumstances justifying reconsideration in order to prevent an injustice.⁸

6. The Chamber has outlined the law applicable to motions made pursuant to Rule 94(B) of the Rules in its Judicial Notice Decisions and will not reiterate it herein.⁹

III. Discussion

7. As a preliminary matter, the Chamber first notes that the Motions contain a number of errors, some of which have been noted by the Prosecution in the Response to 12 March Motion,¹⁰ and others in the Response to 17 April Motion.¹¹

8. Turning now to the substance of the Motions, the Chamber notes that the Accused does not allege that there is an error in the reasoning of the Judicial Notice Decisions. Rather, the Accused submits that the Chamber should “rethink its expansive approach to judicial notice” in light of the Mladić Decisions and argues that the Judicial Notice Decisions create an injustice.¹² The Chamber has already held, on a number of occasions, that the Accused suffers no injustice through the approach to judicial notice taken by it.¹³ For the sake of completeness, however, the Chamber will examine each of the Accused’s challenges in turn to determine whether reconsideration of the decision to take judicial notice of any of the facts referred to in the Motions is warranted.

9. In relation to the Accused’s submission in Annex A to the 12 March Motion that Karadžić Facts 2105 and 2184 are “duplicative of documents”, the Chamber is of the view that reconsideration of its decision to take judicial notice of these two facts which fulfilled all the

⁸ *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2; *see also Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić’s Motion for Reconsideration and Order for Issuance of a Subpoena Duces Tecum, 2 April 2009, p. 2; *Prlić* Decision on Reconsideration, pp. 2–3.

⁹ Decision on Second Motion, paras. 13–16; Decision on Third Motion, paras. 9–12; Decision on Fourth Motion, paras. 13–16.

¹⁰ Response to 12 March Motion, para. 6. The Chamber also notes that in the 26 March Motion the Accused challenges Karadžić Adjudicated Facts 1570, 1663, 1667, 1669, 1749, and 1750 (Mladić Adjudicated Facts 1417, 1494, 1500, 1504, 1567, and 1568) on the basis that the Mladić Chamber rejected them as being duplicative; however, the Mladić Chamber rejected them on the basis that they overlap with other proposed adjudicated facts. *See Second Mladić Decision*, para. 15.

¹¹ Response to 17 April Motion, para. 6. The Chamber also notes that Mladić Fact 1965 is slightly different from Karadžić Fact 2834 and that the same applies to Mladić Fact 2341 and Karadžić Fact 2989.

¹² 12 March Motion, para. 5; 26 March Motion, para. 5; 17 April Motion, para. 5.

¹³ Decision on Accused’s Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts, 14 June 2010, paras. 21–22; Decision on Accused’s Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts, 14 September 2010, para. 11.

elements of the legal test set out by the Chamber is not warranted to prevent an injustice on the sole basis that these facts may be “duplicative of documents”.¹⁴

10. With regard to the Accused’s submission in Annexes A to the Motions that a number of Karadžić Facts are “not a finding”, the Chamber first notes that contrary to what the 12 March Motion argues, it did not take judicial notice of Karadžić Facts 448 and 450 to 458. In relation to Karadžić Fact 519, the Chamber agrees that the source of this fact is paragraph 2 of the Trial Judgement in the *Brđanin* case which summarises the charges against the accused in that case and is therefore not a finding by a Chamber of which judicial notice may be taken. The Chamber will thus reconsider its decision to take judicial notice of Karadžić Fact 519 in order to prevent an injustice. In relation to those Karadžić Facts that the *Mladić* Chamber did not adopt because they were located in a section of the Trial Judgement in the *Kunarac* case (“*Kunarac* Judgement”) entitled “Evidence”,¹⁵ the Chamber does not consider that the structure of the *Kunarac* Judgement is so clear that it can conclude that *all* the factual findings are made in the “Findings of the Trial Chamber” section. Rather, the section entitled “Findings of the Trial Chamber” appears to only cover legal findings and findings on the responsibility of the accused in the *Kunarac* case, and it cannot therefore be said that no factual findings are made in the “Evidence” section. Consequently, the Chamber does not consider that reconsideration of these facts is warranted in order to prevent an injustice, with the exception of Karadžić Fact 798. The primary authority for Karadžić Fact 798 is a stipulation made by the accused Kunarac in that case,¹⁶ and therefore does not qualify for judicial notice, as a proposed fact must not be based on an agreement between the parties to the original proceedings.¹⁷ The Chamber will thus reconsider its decision to take judicial notice of Karadžić Fact 798 in order to prevent an injustice. In relation to Karadžić Fact 1867, the Chamber notes that the source authority is the Trial Judgement in the *Blagojević* case. In that judgement, the *Blagojević* Trial Chamber stated:

The Trial Chamber has heard evidence that members of the Zvornik Brigade Engineering Company exhumed bodies in primary graves and transported them to the new graves, using Zvornik Brigade equipment. The evidence, however, also indicates that Lieutenant Colonel Popović brought in other, non-Zvornik Brigade troops to dig the secondary graves. According to Witness P-130, Damjan Lazarević, who had also been involved in the primary burials, was the contact person within the Engineering Company during the reburial operation. Miloš Mitrović, a member of the Zvornik Brigade Engineering Company who had been involved in the primary burial of the bodies, testified that he was

¹⁴ In particular for Karadžić Fact 2105, *see* Decision on Fourth Motion, paras. 67, 98.

¹⁵ These are Karadžić Facts 788–799, 803, and 815–820.

¹⁶ *See Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23-T&IT-96-23/1-T, Judgement, para. 49, referring to Prosecution Submission Regarding Admissions and Contested Matters, 1 February 2000, paras. 5–6.

¹⁷ *See* Decision on Fourth Motion, paras. 16, 81.

not asked to take part in the reburial operation and did not hear that any members of the Zvornik Brigade Engineering Company took part in the reburial operation.¹⁸

From the above, it cannot be said that Karadžić Fact 1867 is a factual finding adopted by the *Blagojević* Trial Chamber. The Chamber will thus reconsider its decision to take judicial notice of Karadžić Fact 1867 in order to prevent an injustice. With regard to the remaining Karadžić Facts challenged in the “Not a finding” category of Annexes A to the Motions, the Chamber considers that different Trial Chambers present their judgements differently and sometimes do not explicitly make a finding on the evidence but instead refer to the evidence given by the relevant witnesses.¹⁹ However, unless a contradiction is expressly noted or evidence is excluded, this type of fact may be said to be a “factual finding” for the purpose of judicial notice. The Chamber therefore does not consider that reconsideration is necessary in order to prevent an injustice.

11. With regard to the Accused’s submission in Annexes A to the 12 March Motion and the 26 March Motion that a number of Karadžić Facts contain subjective materials/qualifications, the Chamber is of the view that Karadžić Facts 1114 and 1437 do indeed contain such subjective qualifications. The Chamber will thus reconsider its decision to admit Karadžić Facts 1114 and 1437 in order to prevent an injustice. For the remaining facts in that category, the Chamber does not consider that they contain such subjective qualifications and will therefore not reconsider its decision to take their judicial notice in order to prevent an injustice.

12. In relation to the Accused’s submission in Annexes A to the Motions that a number of Karadžić Facts overlap or are repetitive, the Chamber first notes that Karadžić Facts 2, 145, 146, 182, 2223, 1315, and 1749 do not overlap with any other Karadžić Facts. The Chamber notes that Karadžić Facts 18 and 397 are repetitive and that Karadžić Fact 397 is more specific. For the purpose of not overburdening the trial record, the Chamber will therefore reconsider its decision to take judicial notice of Karadžić Fact 18. The same reasoning applies to Karadžić Fact 2848,²⁰ in relation to Karadžić Facts 101 and 102, and the Chamber will therefore reconsider its decision to admit Karadžić Fact 2848 as it is more vague. Similarly, albeit not specifically challenged by the Accused, the Chamber will reconsider its decision to take judicial notice of Karadžić Fact 193, as Karadžić Fact 168 is more specific. The Chamber will also reconsider its decision to take judicial

¹⁸ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case. No. IT-02-60-T, Judgement (“*Blagojević* Judgement”), para. 389 (fn omitted).

¹⁹ Furthermore, the Chamber notes that Karadžić Fact 3005 actually stems from the “Findings” section of the Judgement in the *D. Milošević* case, see *Prosecutor v. Dragomir Milošević*, Case. No. IT-98-29-1, Judgement, 12 December 2007, para. 378; and that Karadžić Fact 300 stems from the Judgement in the *Galić* case in which the Trial Chamber made a clear finding, see *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement, 5 December 2003, para. 341.

²⁰ The Chamber notes that the 17 April Motion erroneously states that Mladić Fact 1987 corresponds to Karadžić Fact 2858 when the correct corresponding Karadžić Fact is 2848.

notice of Karadžić Fact 337 as Karadžić Fact 338 is more specific. For the remaining facts in this category, the Chamber does not consider that they overlap or are repetitive, and that their admission creates an injustice which needs to be redressed through a reconsideration of the Judicial Notice Decisions.

13. As regards the Accused's submission in Annex A to the 12 March Motion and the 26 March Motion that a number of Karadžić Facts are duplicates, the Chamber notes that this is incorrect in relation to Karadžić Facts 841, 2410, 2411, and 2523. For the two remaining facts,²¹ namely Karadžić Facts 1099 and 1570, the issue is more one of potential overlap,²² which does not warrant reconsideration. The Chamber will therefore not reconsider its decision to take judicial notice of these Karadžić Facts in order to prevent an injustice.

14. The Chamber does not consider that Karadžić Facts 422 and 485 are contradictory, as argued by the Accused in Annex A to the 12 March Motion, and will therefore not reconsider its decision to take judicial notice of these facts.

15. In relation to the Accused's submission in Annexes A to the Motions that certain Karadžić Facts are unclear or vague, the Chamber first notes that contrary to what is indicated in the 12 March Motion, Karadžić Fact 920 is different from Mladić Fact 262. With regard to the remaining facts, the Chamber does not consider that they are impermissibly vague and will therefore not reconsider its decision to take their judicial notice.

16. As to the Accused's submissions in Annexes A to the 12 March Motion and the 17 April Motion that certain Karadžić Facts constitute legal conclusions, the Chamber first notes that Karadžić Facts 44, 45, and 46 partially overlap. The Chamber is of the view that Karadžić Fact 46 is a legal conclusion and will therefore reconsider its decision to take its judicial notice in order to prevent an injustice. The Chamber will also reconsider its decision to take judicial notice of Karadžić Facts 44 and 45 on the basis that they are impermissibly vague and unclear. The Chamber is also of the view that it should reconsider Karadžić Facts 103, 131, 270, 739, and 1104, in order to prevent an injustice, on the basis that they constitute legal conclusions.

17. Finally, in relation to the Accused's submission in Annex A to the 26 March Motion that Karadžić Fact 1409 is "not supported by Judgement", it suffices for the Chamber to recall its previous finding in the Decision on Third Motion that "if the Chamber to the original proceedings has made a factual finding based on evidence during the proceedings, it is irrelevant whether this

²¹ See also fn. 10 *supra*.

²² Karadžić Fact 1099 partially overlaps with Karadžić Fact 1096, and Karadžić Fact 1570 potentially partly overlaps with Karadžić Fact 1568.

evidence was contested at trial or not”,²³ and note paragraph 15 of the Judgement in the *Krštić* case.²⁴ The Chamber will therefore not reconsider its decision to take judicial notice of Karadžić Fact 1409.

IV. Disposition

18. Accordingly, the Chamber, pursuant to Rules 54 and 94(B) of the Rules, hereby:
- a) **GRANTS** the Motions in part, **RECONSIDERS** the Judicial Notice Decisions in part, and **ORDERS** that judicial notice of Karadžić Facts 18, 44, 45, 46, 103, 131, 193, 270, 337, 519, 739, 798, 1104, 1114, 1437, 1867, and 2848 shall not be taken; and
 - b) **DENIES** the Motions in all other respects.

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



Judge O-Gon Kwon
Presiding

Dated this fourth day of May 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²³ Decision on Third Motion, para. 46.

²⁴ *Prosecutor v. Radislav Krštić*, Case No. IT-98-33-T, Judgement, 2 August 2001, para. 15.