



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: 2 August 2010

Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. John Hocking

Decision of: 2 August 2010

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON SECOND DEFENCE MOTION FOR
JUDICIAL NOTICE OF ADJUDICATED FACTS**

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 seised of the “Second Defence Motion for Judicial Notice of Adjudicated Facts, with Public Annex A,” filed publicly on 16 June 2010 (“Motion”), and hereby renders its Decision.

I. SUBMISSIONS

A. Motion

1. In the Motion, the Defence requests the Trial Chamber to take judicial notice, pursuant to Rule 94(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), of 38 facts listed in Annex A to the Motion (“Proposed Facts”).¹ The Proposed Facts were adjudicated in the cases of *Prosecutor v. Hadžihasanović and Kubura*;² *Prosecutor v. Halilović*;³ *Prosecutor v. Krajišnik*;⁴ *Prosecutor v. Dragomir Milošević*;⁵ and *Prosecutor v. Krstić*.⁶

2. The Defence generally submits that taking judicial notice of the Proposed Facts will allow the parties and Trial Chamber to focus on the contentious issues, reduce the length and support the efficiency of the trial.⁷ The Defence further argues that granting the Motion will preserve consistency and harmonise the judgments of the Tribunal.⁸

3. The Defence submits that all of the Proposed Facts meet the requirements for taking judicial notice of adjudicated facts as enumerated in the jurisprudence of the Tribunal.⁹

B. Response

4. In its “Response to Second Defence Motion for Judicial Notice of Adjudicated Facts”, filed publicly on 30 June 2010 (“Response”), the Prosecution specifically objects to 23 of the Proposed Facts¹⁰ and states that it takes no position in relation to the remainder of the Proposed Facts.¹¹

¹ Motion, para. 4.

² *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47, Trial Judgment, 15 March 2006; Appeal Judgement, 22 April 2008; Motion paras 4-5.

³ *Prosecutor v. Halilović*, Case No. IT-01-48, Trial Judgment, 15 November 2005; Appeal Judgment, 16 October 2007; Motion paras 4-5.

⁴ *Prosecutor v. Krajišnik*, Case No. IT-00-39, Trial Judgment, 27 September 2006; Appeal Judgment, 17 March 2009; Motion paras 4-5.

⁵ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1, Trial Judgment, 12 December 2007; Appeal Judgment, 12 November 2009; Motion paras 4-5.

⁶ *Prosecutor v. Krstić*, Case No. IT-98-33, Trial Judgment, 2 August 2001; Appeal Judgment, 19 April 2004; Motion paras 4-5.

⁷ Motion, para. 8.

⁸ Motion, para. 9.

⁹ Motion, para. 14.

5. The Prosecution argues that Proposed Facts 55, 58-64, 66, 68-70, 78, 80, 87 and 89-91 are vague as to time.¹² It further submits that Proposed Facts 75, 76, 78 and 90 are impermissibly vague in their content.¹³

6. The Prosecution submits that Proposed Fact 73 consists of a formulation which does not appear in any of the judgments on which the Defence relies.¹⁴ Further, the Prosecution argues that Proposed Fact 80 is inconsistent with Proposed Fact 73 and also potentially misleading.¹⁵

7. The Prosecution asserts that Proposed Fact 79 is taken out of context; in its proper context it is a statement of intent which is not relevant to the present case.¹⁶

8. Moreover, the Prosecution adds that Proposed Fact 85 is taken out of context and cannot be considered a factual finding of the *Dragomir Milošević* Trial Chamber, but merely a part of a discussion of evidence before it. Extracting the statement from its original context imbues it with a meaning and significance not originally intended.¹⁷

9. Finally, the Prosecution submits that Proposed Fact 73 is based on a voluntarily admission by the *Krajišnik* Defence.¹⁸ In addition, Proposed Fact 80 is based on a factual finding in the *Dragomir Milošević* Trial Judgment which cites a number of sources, including agreed and adjudicated facts.¹⁹ The Prosecution thereby contends that an agreement between the parties of a previous case cannot form the basis of adjudicated facts.²⁰

C. Reply

10. On 7 July 2010, the Defence publicly filed its “Request for Leave to File Reply and Reply to Prosecution Response to Defence Motion for Judicial Notice of Adjudicated Facts” (“Reply”). The Defence reiterates that it is submitting adjudicated facts for the purpose of expediting the trial and points out that many of the Proposed Facts are based on Prosecution evidence.²¹

¹⁰ Response, paras 6-16. The Prosecution objects to the admission of Proposed Facts 55, 58-64, 66, 68-70, 73, 75, 76, 78-80, 85, 87 and 89-91.

¹¹ Response, para. 17.

¹² Response, paras 7-9.

¹³ Response, para. 10.

¹⁴ The Prosecution submits that there is no reference of 17 December 1992 and 22 December 1996 in the cited sources, Response, para. 6.

¹⁵ Response, para. 7.

¹⁶ Response, para. 11.

¹⁷ Response, para. 13.

¹⁸ Response, para. 15.

¹⁹ Response, para. 16.

²⁰ Response, paras 15-16.

²¹ Reply, para. 5.

11. The Defence refers specifically to at least 27 Proposed Facts that the Prosecution declined to agree to and now opposes. According to the Defence, these were relied upon in whole or in part in previous Trial Chamber cases. Notwithstanding that the Prosecution does not agree with the Defence's propositions, the Prosecution has previously presented evidence and obtained judgements based on the very same facts that are presented in the case at hand.²²

12. The Defence withdraws Proposed Fact 79²³ and the first two sentences of Proposed Fact 80.²⁴ The Defence also amends Proposed Fact 73 by adding paragraph 181 of the *Krajišnik* Trial Judgment as a source, while continuing to rely on the arguments put forth in the Motion for the remainder of the paragraph.²⁵ Furthermore, the Defence revises Proposed Facts 75, 76, and 78.²⁶

13. The Defence adds a time frame for Proposed Facts 63 and 64. It does maintain, however, that in relation to Proposed Facts 55, 58, 59, 60, 61, 62, 66, 68, 69, 70, 78, 87, 89, 90, and 91, the original judgments placed no temporal limitations as to the applicability of those facts and, in particular, "there is no indication in any of the judgments that there was not a time where the Proposed Facts were not the case".²⁷

14. The Defence submits that the Proposed Fact 85 is not taken out of context; rather the Trial Chamber in the *Dragomir Milošević* case "created an overview of the evidence regarding the weaponry available to both the VRS and ABiH during the conflict period".²⁸

15. Finally, the Defence asserts that the other sources of evidence in Proposed Fact 73 prove the factual assertion beyond reasonable doubt.²⁹

II. APPLICABLE LAW

16. Rule 94(B) provides as follows:

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.

17. The Trial Chamber recalls that it has previously discussed at length the settled jurisprudence of the Tribunal with respect to the judicial notice of adjudicated facts, which the Trial Chamber fully incorporates here by reference.³⁰

²² Reply, para. 6.

²³ Reply, para. 12.

²⁴ Reply, para. 9.

²⁵ Reply, para. 8.

²⁶ Reply, para. 11.

²⁷ Reply, para. 10.

III. DISCUSSION

18. At the outset, the Trial Chamber finds that the technical character of Rule 94(B) related litigation militates in favour of allowing the Reply.

A. Preliminary Remarks

19. The Trial Chamber recalls that if the fact proposed for notice contains only a minor inaccuracy or ambiguity as a result of its abstraction from the context of the original judgement, a Trial Chamber may, at its discretion, correct the inaccuracy or ambiguity.³¹ It must be noted that the Prosecution did not take any position as to 15 of the Proposed Facts.³² While the Trial Chamber is willing to take judicial notice of the above mentioned facts, it will only do so after typographically correcting a few Proposed Facts in order to render these facts consistent with the requirements. The minor corrections are as follows: Proposed Fact 64 in the last sentence of the paragraph states “citizens would usually spend one day digging trenches and before being released”. The word “and” seems unnecessary in the sentence; consequently it should be expunged.³³ The abbreviations contained in Proposed Fact 67 such as “CSB” “SJB” and “SDB” should be explained in order to avoid any ambiguity with regard to what those abbreviations stand for.³⁴ Similarly, the abbreviation “IKM” in Proposed Fact 71 should be explained.³⁵ In Proposed Fact 76, the date “27 March” should be replaced with “27 March 1992” in order to avoid any ambiguity with regard the time-frame of the fact.³⁶ Proposed Fact 77 should be corrected by deleting the word “thus” at the beginning of the

²⁸ Reply, para. 13.

²⁹ Reply, paras 16-17.

³⁰ See Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008 (“26 June 2008 Decision”), paras 13-17, 18, 22, 25, 27-30 and 32.

³¹ *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 (“*Popović et al.* Decision”), para. 7.

³² Proposed Facts 54, 56, 57, 65, 67, 71, 72, 74, 77, 81-84, 86 and 88.

³³ The Proposed Fact should read as follows: “Prior to September 1993, soldiers from the ABiH 9th Brigade’s assault company would often surround the Markale market place in the Old Town of Sarajevo, introduce themselves as members of the military police company and check the identity cards of civilians. They would release those with military identity cards but would take the rest by truck to the front line to dig trenches. Citizens would usually spend one day digging trenches before being released”.

³⁴ The Proposed Fact should read as follows: “The BiH Government MUP was located in Sarajevo in September 1993. MUP was divided into two segments, one managing public security and the other concerned with state security. The public security segment administered the civilian police, which consisted of several CSB (Public Security Centre) each responsible for a region. Each CSB was responsible for several SJB (Public Security Sections), effectively police stations, located within the CSB’s region. The state security segment included the SDB (State Security Service), headed by Jozo Jozić. This was a powerful institution as the Chief of the SDB enjoyed substantial autonomy to command the work of the secret services”.

³⁵ The Proposed Fact should read as follows: “The situation became very difficult for the ABiH during the first two weeks of August. On 18 August 1993, Vahid Karavelić ordered the further detachment of troops to ensure the consolidation of the defence of Mt. Igman. These reinforcements included one company from 9th Brigade and one company of the 10th Brigade. The IKM (Forward Command Post) at Mt. Igman was responsible for more than 10,000 troops”.

³⁶ The Proposed Fact should read as follows: “On 27 March 1992, the Constitution of the Bosnian-Serb Republic was adopted by the Bosnian-Serb Assembly. No operational plan was on the agenda that day. The operational plan for

sentence, since there is no previous sentence which it is connected to.³⁷ Proposed Fact 86 should be corrected by replacing the words “that area” at the beginning of the sentence with the word “Grbavica” in order to avoid any ambiguity with regard to the specific place which the Proposed Fact refers to.³⁸ The Proposed Fact 73 refers to the words “until 22 December 1996” which do not appear even in the amended sources. The Trial Chamber in its discretion therefore deletes the words “until 22 December 1996” and takes judicial notice of the rest of the Proposed Fact 73.³⁹ Finally, in order to avoid any ambiguity with regard to the time-frame of the fact, the Trial Chamber deletes the last sentence in Proposed Fact 91 and takes judicial notice of the rest of Proposed Fact 91.⁴⁰

B. The Proposed Fact Must Be Distinct, Concrete and Identifiable

20. The Trial Chamber notes that the contested Proposed Facts 55, 58-64, 66, 68-70 derive from the *Halilović* Trial Judgment, which covers only a short time span, *i.e.* events in September 1993. With the exception of the amended versions of Proposed Facts 63 and 64, there is no specific reference as to the time in any of the Proposed Facts mentioned above; thus leaving the Proposed Facts with an unclear temporal scope. For that reason and considering the limited temporal scope of the *Halilović* Trial Judgment, the Trial Chamber, in exercising its discretion, declines to take judicial notice of the said Proposed Facts.

21. Proposed Fact 78, even as amended, falls short of fulfilling the specific time reference requirement. The Trial Chamber will therefore not take judicial notice of Proposed Facts 78. Similarly, Proposed Facts 87 and 89 fail to show any specific time reference; hence, the Trial Chamber, in the exercise of its discretion, decides not to take judicial notice of these facts.

“assuming power, that is for establishing power and rendering operational the authorities in the territory of the [Bosnian-Serb Republic] and in particular in the field of internal affairs” was eventually issued on 26 April 1992”.

³⁷ The Proposed Fact should read as follows: “In addition, to the TO units and the VRS, the MUP personnel played a major role in the armed conflict of 1992, both as combatants and as the responsible organs of security in the daily lives of the population”.

³⁸ The Proposed Fact should read as follows: “North of the Grbavica, Marindvor was ABiH-held territory. The separation line along the Miljacka River was about 200 to 300 metres from the Holiday Inn, on the street named Zmaja od Bosne, also known as “Sniper Alley”. The stretch of land opposite Grbavica, and between the confrontation line and the Zmaja od Bosne, was quite heavily built and was controlled by the ABiH”.

³⁹ The Proposed Fact should read as follows: “Ratko Mladić, and in turn the VRS Main Staff, was directly subordinated to the RS Presidency, from 12 May 1992 until 17 December 1992, and to the President of Republika Srpska from 17 December 1992”.

⁴⁰ The Proposed Fact should read as follows: “If a commander in the SRK became aware of a violation of the international laws of war, he had a duty to report that up the chain of command. If a violation was reported to the corps commander, the commander was obliged to initiate proceeding and send an appropriate document to the military prosecutor. Information on such violations was also included in regular reports”.

22. Further, the Chamber finds that in relation to Proposed Fact 80, even in its amended version, the use of the word “*much*” in the sentence lacks the sufficient concreteness to be permissible for judicial notice.⁴¹

23. The remainder of the Proposed Facts⁴² fulfil the applicable standard.

C. The Formulation of a Proposed Fact Must Not Differ Substantially From the Formulation in the Original Judgment

24. The Prosecution objects to Proposed Fact 85 as arising from a discussion of the evidence on record as opposed to being factual findings of the Chambers.⁴³ The Trial Chamber considers this ground of objection as having to do with whether the facts are characterised accurately and are not misleading, as such will evaluate it in this section. The Defence argues that the Prosecution has provided “a specious reasoning or support for the basis of this objection and that the Proposed Fact meets the criteria enumerated in the jurisprudence of the Tribunal”.⁴⁴

25. The Trial Chamber recalls that a statement from a judgment which arises from a discussion of the evidence presented during the course of a trial is not necessarily inadmissible as an adjudicated fact. Such an assessment must be made on a case-by-case basis, taking into account such factors as the overall context of the Proposed Fact as well as whether or not the ultimate findings of the Trial Chamber dispute the veracity of the evidence under discussion. The Trial Chamber notes that a statement arising from a discussion of evidence is sometimes presented in a judgment as a finding of fact. Such a statement, however, can also be invoked in a judgment to provide context for a Chamber’s decision-making and can eventually be refuted by the findings of the Chamber.⁴⁵

26. Proposed Fact 85 posits:

“From the beginning of the war, the ABiH and the SRK had essentially the same type of weaponry, depending on the depots that were under their control.”⁴⁶

Although this Proposed Fact is taken verbatim from the *Dragomir Milošević* Trial Judgment, it is removed from the context in which it was originally included, which is as part of a broader summary of evidence in which the *Dragomir Milošević* Trial Chamber juxtaposed this fact with other evidentiary statements regarding the weaponry available to the VRS and ABiH. Extracting the

⁴¹ Proposed Fact 80 states: “Gen. Mladić commanded the VRS from the centre and did not delegate *much*”.

⁴² Referring also to the amended versions of Proposed Facts 63, 64, 75, 76 and 90.

⁴³ Response, paras 12 and 13.

⁴⁴ Response, para. 13.

⁴⁵ Decision on Defence Motion for Judicial Notice of Adjudicated Facts, 04 May 2010, para. 28.

⁴⁶ Motion Annex A, citing *Dragomir Milošević* Trial Judgment, para. 78.

statement from its original context imbues it with a meaning and significance not originally intended. Therefore, the Trial Chamber concludes that Proposed Fact 85 is not a finding of fact attaining the threshold required for judicial notice.

D. Remaining Requirements

27. The Trial Chamber has also analysed the Proposed Facts in light of the remaining requirements enumerated in the jurisprudence, namely, that, (a) the proposed fact must be relevant to the current proceedings, (b) the proposed fact must not contain characterisations or findings of an essentially legal nature, (c) the proposed fact must not be based on an agreement between the parties to the original proceedings, (d) the proposed fact must not be subject to pending appellate review, and (e) the proposed fact must not relate to acts, conduct or mental state of the accused. The Trial Chamber is satisfied that all Proposed Facts meet these requirements.

IV. DISPOSITION

28. On the basis of the reasoning set forth above and pursuant to Rules 54, 94(B) and 126 *bis*, the Trial Chamber hereby

GRANTS leave to file a Reply;

GRANTS the Motion in part and takes judicial notice of the following Proposed Facts:

- a) 54, 56, 57, 63, 65, 72, 74, 75, 81-84, 88 and 90;
- b) 64, 67, 71, 73, 76, 77, 86 and 91 subject to the changes indicated in the present Decision;

DISMISSES the remainder of the Motion.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this second day of August 2010

At The Hague

The Netherlands

[Seal of the Tribunal]