

93.

**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-03-69-T
Date: 25 November 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 25 November 2009

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR JUDICIAL
NOTICE OF ADJUDICATED FACTS**

Office of the Prosecutor

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I. PROCEDURAL HISTORY

1. On 1 May 2007, the Prosecution filed its motion for judicial notice of adjudicated facts.¹ However, due to technical problems with filing an attachment, the Prosecution refiled the motion on 14 May 2007.² For the purpose of Rule 126 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Chamber will treat the Motion as filed on 14 May 2007.
2. On 29 May 2007, the Simatović Defence and the Stanišić Defence filed their responses.³ On 6 June 2007, the Prosecution filed a consolidated reply.⁴ On 12 June 2007, the Stanišić Defence filed a motion objecting to the Reply.⁵ On 18 June 2009, the Prosecution filed its response to Stanišić Objection Motion.⁶
3. During the status conferences held on 11 March 2009 and 12 May 2009, the Chamber encouraged the parties to conduct additional analysis of the adjudicated fact motions in the view of finding a compromise.⁷ Following this invitation, on 8 June 2009, the Simatović Defence filed its second response to the Motion,⁸ and on 15 June 2008, the Stanišić Defence filed its second response to the Motion.⁹

II. SUBMISSIONS

A. Motion

4. In its Motion, the Prosecution requests that the Chamber take judicial notice of 533 adjudicated facts¹⁰ from the *Brđanin* Trial Judgement,¹¹ *Brđanin* Appeals Judgement,¹² *Čelebići*

¹ Prosecution's Motion for Judicial Notice of Adjudicated Facts, 1 May 2007 ("Initial Motion").

² Prosecution's Notification on Motion for Judicial Notice of Adjudicated Facts, 14 May 2007 ("Supplementary Motion", collectively with Initial Motion - "Motion").

³ Defence Response on Prosecution Motion for Judicial Notice of Adjudicated Facts, 29 May 2007 ("Simatović Response"); Defence Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts of 1 May 2007, and to Prosecution's Notification on Motion for Judicial Notice of Adjudicated Facts of 14 May 2007 with Confidential Annex I, 29 May 2007 ("Stanišić Response").

⁴ Prosecution Request for Leave to Reply and Reply to Defence Responses to Prosecution Motion for Judicial Notice of Adjudicated Facts, 6 June 2007 ("Reply").

⁵ Defence Motion to Object to Prosecution Request for Leave to Reply and Reply to Stanišić Defence Response to Prosecution Motion for Judicial Notice of Adjudicated Facts, 12 June 2007 ("Stanišić Objection Motion").

⁶ Response to Defence Motion Challenging Prosecution's Reply Concerning Judicial Notice of Adjudicated Facts, 18 June 2009 ("Response to Stanišić Motion").

⁷ 12 March 2009, T. 1324 *et seq.*; 12 May 2009, T. 1357-1361.

⁸ Simatović Defence Second Response to 'Prosecution Motion for Judicial Notice of Adjudicated Facts' of 2 May 2007 and 'Second Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex' of 12 December 2008, 8 June 2009 ("Second Simatović Response").

⁹ Stanišić Defence Response to "Prosecution Motion for Judicial Notice of Adjudicated Facts" of 2 May 2007 and 'Second Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex' of 12 December 2008, 15 June 2009 ("Second Stanišić Response").

¹⁰ Initial Motion, paras 1, 20; Supplementary Motion, Annex A.

Trial Judgement,¹³ *Krstić* Trial Judgement,¹⁴ *Krstić* Appeals Judgement,¹⁵ *Kupreškić* Trial Judgement,¹⁶ *Kvočka* Trial Judgement,¹⁷ *Simić* Trial Judgement,¹⁸ *Simić* Appeals Judgement,¹⁹ *Stakić* Trial Judgement,²⁰ *Strugar* Trial Judgement,²¹ *Tadić* Trial Judgement²², as well as *Blagojević* Trial Judgement²³ (collectively “Proffered Facts”).²⁴

5. The Prosecution submits that taking judicial notice of the Proffered Facts will enable it to streamline the evidence to be presented at trial, thereby promoting judicial economy.²⁵ Accordingly, the Prosecution argues that it would likely be able to reduce the overall length of the trial proceedings and at the same time spare some witnesses the difficult experience of testifying yet again at trial.²⁶

6. The Prosecution further argues that taking judicial notice of the Proffered Facts in no way infringes upon the right of the Accused to a fair trial.²⁷ The Prosecution argues that the Proffered Facts are relevant to the crimes charged in the Indictment, are clear and either have not been appealed or have been upheld on appeal.²⁸ Moreover, the Prosecution submits none of the Proffered Facts incorporate or reflect legal conclusions drawn by the Trial Chamber or attest to the criminal responsibility of the Accused.²⁹ Finally, the Prosecution submits that the Proffered Facts pertain to the historical, political and military context and developments, and to the crimes that took place, often identifying the physical perpetrators of those crimes.³⁰

¹¹ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004.

¹² *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Appeal Judgement, 3 April 2007.

¹³ *Prosecutor v. Zejnil Delalić, Zdravko Mucić aka “Pavo”, Hazim Delić, Esad Landžo aka “Zenga”*, Case No. IT-96-21-T, Judgement, 16 November 1998.

¹⁴ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001.

¹⁵ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgement, 19 April 2004.

¹⁶ *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić aka “Vlado”*, Case No. IT-95-16-T, Judgement, 14 January 2000.

¹⁷ *Prosecutor v. Miroslav Kvočka, Milošica Kos, Mlađo Radić, Zoran Žigić, Dragoljub Procać*, Case No. IT-98-30/I-T, Judgement, 2 November 2001.

¹⁸ *Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003.

¹⁹ *Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić*, Case No. IT-95-9-A, Appeal Judgement, 28 November 2006.

²⁰ *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003.

²¹ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005.

²² *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997.

²³ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 1995.

²⁴ The Trial Chamber notes that the numbering of the Proffered Facts in the Annex to the Motion is flawed as the Proffered Fact No. 526 is followed by 530, 531 and 532 (referring to Sanski Most), which in turn are followed by Nos 530-533 (referring to forcible transfer). For the sake of clarity, for the purpose of the present Decision the Trial Chamber will refer to the Proffered Facts Nos 530-532 (Sanski Most) as Nos. 527-529.

²⁵ Initial Motion, para. 2.

²⁶ Initial Motion, paras 8-9.

²⁷ See Initial Motion, paras 14-19.

²⁸ Initial Motion, para. 14.

²⁹ Ibid.

³⁰ Initial Motion, para. 15.

7. The Prosecution also points out that judicial notice does not preclude the Defence from offering evidence to rebut adjudicated facts and that the Chamber retains the obligation of assessing the weight of the fact taking into consideration the evidence of the case in its entirety.³¹

B. Simatović Response

8. The Simatović Defence presents a general objection to taking notice of adjudicated facts submitting that “facts established in one trial were, perhaps, of secondary importance with respect to the issue of guilt or innocence of the accused”.³² As a consequence, it argues that “the judgement in those proceedings represents the factual finding on the basis of evidence the parties presented *inter se*, and not with respect [to] later proceedings”.³³

9. The Simatović Defence objects to the Proffered Facts established in the *Tadić* Trial Judgement (and for the same reasons partly also in the *Čelebići* Trial Judgement), arguing that the proceedings against Duško Tadić before the Tribunal were conducted against an accused who had the lowest level of responsibility and related to the events in a limited time and geographic framework.³⁴ According to the Simatović Defence, “[a]ll of the proposed adjudicated facts in the *Tadić* case are actually of secondary importance; however they can be of essential relevance in the present case taking into account that Franko Simatović was [charged with] participation in a ‘large crime base and a joint criminal enterprise [“JCE”] between many actors’”.³⁵ Finally, the Simatović Defence points out that some findings in the *Tadić* Judgement are challenged by a judgement of the International Court of Justice (“ICJ”).³⁶

10. The Simatović Defence also objects to certain Proffered Facts established in the *Strugar* Judgement³⁷ claiming that this Judgement was rendered in a case with a very limited temporal and geographical scope.³⁸

11. The Simatović Defence objects to the Proffered Facts concerning the events which took place in Bosnia and Herzegovina “after the multiparty elections, after the creation of the Serbian entity, formation of the crisis staff, Proclamation of SeBiH/RS, Armed forces in BiH and Structure

³¹ Initial Motions, para. 18.

³² Simatović Response, para. 8.

³³ Ibid.

³⁴ Simatović Response, paras 15-16.

³⁵ Simatović Response, para. 16.

³⁶ Simatović Response, para. 18, referring to the ICJ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgement, 26 February 2007 (“ICJ Judgement”), para. 403.

³⁷ Proffered Facts Nos 78-79.

³⁸ Simatović Response, para. 19.

of security services in Republica Srpska”.³⁹ It argues that the Prosecution Pre-Trial Brief suggests that the Accused is “also charged, on the grounds of his alleged acting within the [JCE] and within his acting in accordance with Article 7(1) of the Statute, with direct or indirect participation in the disintegration of the SFRY, as well as in all later events in Croatia and BiH, in setting up the authorities of local Serbs, and of territories controlled by the authorities of local Serbs”.⁴⁰ As a consequence, it submits that the Proffered Facts “which could be brought into the context of the consequences of the accused’s acting through the JCE, are not acceptable under Rule 94(B) in the present case”.⁴¹

12. The Simatović Defence objects to the Proffered Facts grouped by the Prosecution under the heading “JNA”.⁴² In support of its objection, it submits that it plans to file a joint expert report with the Stanišić Defence “the subject of which will be the JNA and the JNA attitude towards the DB department of the MUP of Serbia and the accused with respect to the events mentioned in the Indictment”.⁴³

13. The Simatović Defence also objects to various Proffered Facts concerning crime bases. Specifically, it submits that the Prosecution’s position is that the “RS MUP, DB Department and the [A]ccused, by acting within the JCE participated in the events in Bosanski Šamac” and that “practically all facts established by the judgement in the *Prosecutor v. Simić et al.* case are also the consequence of [Simatović’s] either direct or indirect acting within the meaning of Article 7(1) of the Statute.”⁴⁴ As a consequence, the Simatović Defence argues that the relevance of such Proffered Facts for “determination of the guilt or innocence of the accused is of the nature which inevitably requires [them] to be proved in the present case”.⁴⁵ It further submits that based on the same reasons the Chamber should refuse to take judicial notice of the Proffered Facts from the *Brđanin* case and concerning events in Sanski Most.⁴⁶

14. Finally, the Simatović Defence submits that the Proffered Facts from the *Krstić* and *Blagojević* cases and concerning events in Srebrenica are irrelevant since Franko Simatović is not charged with the attack on Srebrenica.⁴⁷

³⁹ Simatović Response, para. 20, referring to Proffered Facts Nos 92-185.

⁴⁰ Simatović Response, paras 21-22.

⁴¹ Simatović Response, para. 23.

⁴² Simatović Response, para. 24, referring to Proffered Facts Nos 186-273.

⁴³ Simatović Response, para. 24.

⁴⁴ Simatović Response, para. 26.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

C. Stanišić Response

15. The Stanišić Defence asks leave for exceeding the word limit in its Response which addresses the issues raised in the Motion and its 99 page Annex.⁴⁸

16. The Stanišić Defence objects to all the Proffered Facts arguing that admittance of such a large number of adjudicated facts in the underlying case would be a clear violation of the fair trial rights of the Accused and that attempts by the Accused to rebut these facts will absorb considerable time and resources, thereby not promoting judicial economy.⁴⁹ Moreover, according to the Stanišić Defence, such admission would also breach the Accused's right to a fair and public hearing, his right to be tried in his presence, as well as his right to examine the witnesses against him.⁵⁰

17. The Stanišić Defence points out that the Prosecution moves for the admission of certain Proffered Facts based on the evidence which is also sought for admission pursuant to Rule 92 *quater*.⁵¹ The Stanišić Defence argues that as a consequence, "admittance of such evidence under Rule 94(B) would therefore *de facto* undermine the procedure of Rule 92 *quater* that was created for the admittance of evidence of a deceased witness".⁵²

18. The Stanišić Defence challenges certain Proffered Facts as based on the testimony of the accused Blagoje Simić, Miroslav Tadić and Simo Zarić who all testified in their own trial.⁵³ Accordingly, it submits that such evidence should be regarded as unreliable without any proper testing through cross-examination conducted by the Stanišić Defence.⁵⁴

19. Alternatively to its objections to taking judicial notice of adjudicated facts presented above, the Stanišić Defence requests that the Chamber withhold judicial notice of certain Proffered Facts⁵⁵ as they

- (i) are not relevant to the case,⁵⁶

⁴⁸ Stanišić Response, para. 4.

⁴⁹ Stanišić Response, paras 6-7.

⁵⁰ Stanišić Response, paras 8-9.

⁵¹ Stanišić Response, paras 10-11, Annex I.

⁵² Stanišić Response, para. 11.

⁵³ Stanišić Response, para. 12, referring to Proffered Facts Nos 278, 280, 282-283, 287, 317-318 and 353.

⁵⁴ Stanišić Response, para. 12.

⁵⁵ Proffered Facts Nos 5-22, 24-31, 34, 36-37, 39, 45-46, 48-57, 61-66, 71-72, 75, 80, 90-92, 94-95, 102, 104-105, 111, 118-124, 126-133, 138, 140, 142, 147-150, 169-170, 176-180, 182-184, 199-200, 222, 227, 230-231, 234-236, 239-240, 244-245, 247, 259-261, 263-264, 282, 284-285, 287-288, 294, 300, 305-306, 310, 323-325, 327-328, 334-345, 350-352, 355, 358, 365-366, 380-382, 403-526 and 533, see Stanišić Response, para. 63.

⁵⁶ Stanišić Response, paras 16-27, referring to Proffered Facts Nos 5-22, 24-31, 48-57, 61-66, 72, 122-123, 227 and 403-526.

- (ii) differ in a substantial way from their formulation in the original judgement or are misleading or unclear in their proposed context;⁵⁷
- (iii) are too vague or insufficiently clear;⁵⁸
- (iv) go to the acts, conduct or mental state of the accused;⁵⁹
- (v) include findings or characterisations that are of an essentially legal nature;⁶⁰ and
- (vi) are based on agreed facts.⁶¹

D. Reply

20. The Prosecution asks leave to reply and to exceed the word limit. It argues that such leaves are justified as there is a significant amount of facts to discuss.⁶²

21. In its Reply, the Prosecution, while addressing the specific objections against the Proffered Facts by both the Stanišić and Simatović Defences, submits *inter alia* that

- (i) both historical facts⁶³ and crime base facts⁶⁴ are relevant to the present case;
- (ii) facts based on the testimony of an accused testifying in his own trial are reliable;⁶⁵
- (iii) notwithstanding a lightly altered formulation at times, the Proffered Facts comply with the criteria for judicial notice;⁶⁶

⁵⁷ Stanišić Response, paras 28-43, referring to Proffered Facts Nos 37, 48, 80, 94-95, 102, 105, 111, 124, 148, 176-180, 223, 239, 284-285, 287-288, 300, 305-306, 334, 345, 365, 381, 442, 458, 464, 475-476, 481, 496, 509, 514-515 and 522.

⁵⁸ Stanišić Response, paras 44-52, referring to Proffered Facts Nos 13, 39, 71, 74, 90, 92, 118-121, 126-133, 138, 140, 142, 147, 150, 169-170, 182-184, 199-200, 210, 220, 230-231, 245, 247, 259-261, 263, 300, 325, 351-352, 355, 358, 380, 403, 405, 410, 422, 425, 437-439, 444, 446, 486, 492, 503 and 517.

⁵⁹ Stanišić Response, paras 53-55, referring to Proffered Facts Nos 34, 36, 45-46, 240, 244 and 294.

⁶⁰ Stanišić Response, paras 56-60, referring to Proffered Facts Nos 91, 104, 149, 170, 222, 234-236, 264, 323-324, 327-328, 350, 366, 382, 447, 484, 497-502, 510, 514, 520-521, 524-526 and 533.

⁶¹ Stanišić Response, paras 61-62, referring to Proffered Facts Nos 282 and 310.

⁶² Reply, paras 3, 94.

⁶³ The Prosecution further submits that the JCE and its alleged common plan can only be fully understood in light of the history of the country, Reply, paras 13-16.

⁶⁴ The Prosecution argues that the Proffered Facts are relevant with respect to the existence of the JCE, the implementation of the common plan, the concept of Greater Serbia, the pattern of events and crimes, and the cooperation of military forces. As a consequence, the mere fact that the Proffered Facts pertain to a crime base not charged against the Accused in this case is not enough to preclude the application of judicial notice, Reply, paras 17-20.

⁶⁵ Reply, paras 21-27, referring specifically to the challenges in relation to Proffered Facts Nos 278, 280, 282-283, 287, 317-318 and 353. The Prosecution withdraws the second sentence of Proffered Fact No. 282 from its Motion, Reply, para. 27.

- (iv) it is important to distinguish between a scenario where a fact is overly vague and a scenario where the finding of the Trial Chamber is simply limited and as a consequence the Proffered Facts when viewed within their full context, do not suffer from any deficiency;⁶⁷
- (iv) the exclusion of the Proffered Facts relating to the acts and conduct of the Accused is limited to those facts that are the “basis for proving the [Accused’s] criminal responsibility” and as a consequence there is a clear distinction between the actually charged crimes and background and pattern evidence;⁶⁸
- (v) “in general, findings related to the *actus reus* or the *mens rea* of a crime are deemed to be factual findings”;⁶⁹
- (vi) notwithstanding that the agreed fact is allegedly a primary source of authority, “where an additional judgement exists with a different source, the fact may be judicially noticed”;⁷⁰
- (vii) a finding of the ICJ, under no circumstances, can affect the findings of the Tribunal and that the ICJ judgement refers to the overall control test applied by the Appeals Chamber, not to any particular findings;⁷¹ and
- (viii) the possible future submission of a report from an alleged expert of an evidentiary weight to be determined later, does not divest the Chamber of its discretion under Rule 94(B) to rely on previous judgements’ findings of fact.⁷²

⁶⁶ Reply, paras 28-42, referring specifically to the challenges in relation to Proffered Facts Nos 37, 102, 111, 148, 222, 334, 365, 381, 512 and 522. The Prosecution further submits that the Chamber may, in its discretion, correct the inaccuracy or ambiguity *proprio motu* (see e.g. the Prosecution’s editing suggestions – Reply, paras 34, 38) and that the fact must be substantially similar to the formulation used in the original judgement – not be exactly the same, Reply, paras 28, 30. Moreover, it argues that the headings according to which the Proffered Facts were organised in the Motion are not meant to have any legal significance; rather they are for ease of reference of the Trial Chamber, Reply, para. 33. Finally, the Prosecution submits that the fact that the Trial Chamber refers to the witness does not make the finding itself any less final, Reply, para. 36.

⁶⁷ Reply, paras 43-64, referring specifically to the challenges in relation to Proffered Facts Nos 13, 39, 71, 74, 90, 92, 118-120, 126-133, 138, 140, 142, 147, 150, 169, 171, 182-184, 199-200, 210, 220, 230-231, 245, 247, 259-261, 263, 300, 325, 351-352, 355, 358, 380, 403, 405, 410, 422, 425, 437-439, 444, 446, 486, 492, 503 and 517.

⁶⁸ Reply, paras 65-70, referring specifically to the challenges in relation to Proffered Facts Nos 34, 36, 45-46, 240, 244 and 294. The Prosecution further submits that “the Accused is not charged – in a strictly legal sense – for their participation in the disintegration of the SFRY or the general implementation of the common plan of the [JCE], but rather with very specific crimes [...] Rule 94(B) especially allows for judicial notice of facts that form a pattern evidence or deliver background information, such as these facts in relation to BiH [Nos 92-185]”, Reply, para. 66.

⁶⁹ Reply, paras 71-86, referring specifically to the challenges in relation to Proffered Facts Nos 91, 104, 149, 170, 222, 234-236, 264, 323-324, 327-328, 350, 366, 382, 447, 484, 497-502, 510, 514, 520-521, 524-526 and 533.

⁷⁰ Reply, paras 87-89, referring specifically to the challenges in relation to Proffered Facts Nos 282 and 310.

⁷¹ Reply, paras 90-92.

⁷² Reply, para. 93.

E. Stanišić Objection Motion

22. In its Objection Motion, the Stanišić Defence objects to the Reply arguing that it is excessive as it contains almost 25 pages of submissions, including many new arguments that should have been raised by the Prosecution in its original motion.⁷³ It further submits that it no longer has a possibility to respond to these new and additional Prosecution arguments.⁷⁴

F. Response to Stanišić Objection Motion

23. In its Response to Stanišić Objection Motion the Prosecution argues that it has not made any new arguments in its Reply.⁷⁵ Instead, the Prosecution submits that it merely exercised its right as a moving party to reply to the Defence challenges, not all of which could be anticipated at the outset.⁷⁶

G. Second Simatović Response

24. In its Second Response, the Simatović Defence withdraws its objections to Proffered Facts Nos 1-4, 6-25, 48-55, 58-70, 76-84, 86-89, 92-101, 103, 105-117, 120, 122-125, 134-135, 137-138, 141, 143-146, 148-153, 155, 157, 159-161, 171, 173-182, 185-197, 203-205, 207, 211, 213, 216, 218, 224-227, 237-238, 255-256, 262-273, 274-293, 309-322, 329-330, 342-348 and 403.⁷⁷

H. Second Stanišić Response

25. In its Second Response, after making new analyses of the Motion, the Stanišić Defence accepts the admission of the following Proffered Facts: 1-25, 48-71, 77-89, 92-103, 105-110, 112-117, 122-125, 134-141, 143-153, 155-157, 159-161, 171-175, 181-183, 185-197, 203-209, 211-218, 224-229, 237-238, 250-256, 262-293, 307-322, 329-330, 338, 342-348, 350, 371, 373-375, 379, 381-382, 386-389, 391-404, 406-409, 411-422, 425-429, 431-436, 438-445, 447-480, 485-486, 530-533.⁷⁸

III. APPLICABLE LAW

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

⁷³ Stanišić Motion, paras 3-4.

⁷⁴ Stanišić Motion, para. 3.

⁷⁵ Reply to Stanišić Motion, para. 2.

⁷⁶ Reply to Stanišić Motion, paras 2-3.

⁷⁷ Second Simatović Response, para. 4.

⁷⁸ Second Stanišić Response, paras 4, 6.

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.

27. Taking judicial notice of adjudicated facts is a two-step process. The Chamber first has to consider whether a purported adjudicated fact fulfils the admissibility requirements as developed by the jurisprudence of the Tribunal.⁷⁹ These are:

- (i) The fact must be distinct, concrete and identifiable;⁸⁰
- (ii) It must be relevant to the case;⁸¹
- (iii) It must not include findings or characterisations that are of an *essentially* legal nature;⁸²
- (iv) It must not be based on a plea agreement or on facts voluntarily admitted in a previous case;⁸³
- (v) It must not have been contested on appeal, or, if it has, the fact has been settled on appeal;⁸⁴
- (vi) It must not relate to the acts, conduct or mental state of the accused;⁸⁵
- (vii) The formulation proposed in the moving party's motion for admission must not differ in any significant way from the way the fact was expressed when adjudicated in the previous proceeding.⁸⁶

⁷⁹ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008 ("Perišić Decision"), para. 16. See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 ("Popović et al. Decision"), paras 4-15.

⁸⁰ *Perišić Decision*, para. 16; *Popović et al. Decision*, para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006, 7 September 2006 ("Prlić et al. Decision"), para. 18; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 24 March 2005 ("Krajišnik Decision"), para. 14;

⁸¹ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007 ("Dragomir Milošević Appeal Decision"), para. 13; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 ("Nikolić Appeal Decision"), paras 11, 48, 56.

⁸² *Dragomir Milošević Appeal Decision*, paras 19-22.

⁸³ *Perišić Decision*, para. 16; *Popović et al. Decision*, para. 11; *Prlić et al. Decision*, para. 18; *Krajišnik Decision*, para. 14.

⁸⁴ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Jospović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice Taken Pursuant to Rule 94(B), 8 May 2001 ("Kupreškić et al. Decision") para. 6.

28. Second, even when the Chamber is satisfied that a purported adjudicated fact fulfils the abovementioned criteria, it always retains the discretion to withhold judicial notice of a fact when it believes that such notice would not serve the interests of justice.⁸⁷ In this respect, the Appeals Chamber has held that, when applying Rule 94, a balance must be achieved between the purpose of taking judicial notice, namely to promote judicial economy, and the fundamental right of the accused to a fair trial.⁸⁸

29. In relation to the effects of taking judicial notice, the Appeals Chamber has held that “by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial”.⁸⁹ Thus, “in the case of judicial notice under Rule 94(B), the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary”.⁹⁰ Importantly however, “the judicial notice of adjudicated facts does not shift the ultimate burden of persuasion which remains with the Prosecution”.⁹¹

IV. DISCUSSION

A. Preliminary Issues

30. The Chamber finds that the size and importance of the Prosecution’s Motion justifies exceeding the word limit, as set by the practice direction, for the Response filed by the Stanišić Defence.⁹²

31. The Prosecution filed its consolidated Reply to both Defence Responses and this Reply exceeds the required word limit.⁹³ The Chamber is of the view that the technical character of Rule 94(B) related litigation, the number of Proffered Facts, and, as a consequence, the number of detailed and lengthy objections thereto submitted by the Defence in their Responses, militate in

⁸⁵ *Dragomir Milošević* Appeal Decision, para. 16, referring to *Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2007 (“*Karemera et al.* Appeal Decision”), paras 50-51, 53.

⁸⁶ See *Karemera et al.* Appeal Decision, para. 55.

⁸⁷ *Perišić* Decision, para. 17; *Popović et al.* Decision, para. 15; *Krajišnik* Decision, para. 12.

⁸⁸ *Karemera et al.* Appeal Decision, para. 39.

⁸⁹ *Nikolić* Appeal Decision, para. 11, referring to *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution’s Interlocutory Appeal against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, p. 4 (footnote omitted); *Karemera et al.* Appeal Decision, para. 42.

⁹⁰ *Karemera et al.* Appeal Decision, para. 42.

⁹¹ *Dragomir Milošević* Appeal Decision, para. 16 citing *Karemera et al.* Appeal Decision, para. 42.

⁹² See Practice Direction on the Length of Briefs and Motions, IT-184/Rev.2, 16 September 2005, paras 5, 7.

⁹³ *Stanišić* Motion, paras 3-4.

favour of allowing the Prosecution Reply and granting leave to exceed the word limit set out for the Reply.

B. The Proffered Fact Must be Distinct, Concrete and Identifiable

32. All purported adjudicated facts should be understood in the context of the judgement “with specific reference to the place referred to in the judgement and to the indictment period of that case”.⁹⁴ It follows that when adjudicated facts proposed for admission are insufficiently clear even in their original context, the Chamber should not take judicial notice of them.⁹⁵

33. Based on this criterion, the parties do not challenge the following Proffered Facts which in the view of the Chamber are sufficiently distinct, concrete and identifiable: 1-12, 14-38, 40-70, 72-73, 75-89, 91-117, 121-123, 125, 134-141, 143-146, 148-167, 169-177, 181-183, 185-198, 201-209, 211-219, 221-229, 232-244, 246, 248-258, 162-299, 301-305, 307-324, 326-333, 335-350, 353-354, 356-357, 359-379, 381-404, 406-409, 411-421, 423-424, 426-436, 438-445, 447-485, 487-491, 493-502, 504-513, 515-516, 518-533.

34. The Chamber notes that Proffered Fact No. 114 is a duplicate of Proffered Fact No. 101 and hence should be excluded from further considerations.

35. The Chamber is satisfied that the expressions “MUP Unit/s” or “MUP Forces”, as used in Proffered Facts Nos 178-180, 503 and 514, are sufficiently distinct and concrete when placed in the general context of these facts.⁹⁶

36. Similarly in the case of Proffered Facts Nos 169, 245, 247 and 259-261, the use of the expressions “the Federal Republic of Yugoslavia”, “the FRY” or “Belgrade” as an entity/actor for, when placed in the general context of these facts, does not make them unclear so as to preclude their admission.⁹⁷ Analogously, the use of the expression “Bosnian Serb leadership” when seen in its overall context, does not militate against admitting Proffered Fact No. 142.⁹⁸

37. The Defence challenges Proffered Facts Nos 210, 351 and 352 as using general expressions such as “paramilitaries from Serbia”, “Serb police and military” and “Serbian paramilitary groups”

⁹⁴ *Krajišnik* Decision, para. 14, fn. 44.

⁹⁵ *Ibid.*

⁹⁶ See Defence objection, Stanišić Response, paras 34, 46; Reply, para. 59. See Second Stanišić Response, para. 4, withdrawing objections as to the Proffered Facts Nos 171 and 263.

⁹⁷ See Defence objection, Stanišić Response, para. 46; Reply, paras 57-58.

⁹⁸ See Defence objection, Stanišić Response, para. 50; Reply, para. 63. See Second Stanišić Response, para. 4, withdrawing an objection as to the Proffered Fact No. 140.

in an impermissibly vague way.⁹⁹ The Chamber notes that although the precise meaning of these terms cannot be determined from the facts alone, they nevertheless contain sufficiently clear information to be supplemented in the future by additional evidence. The same holds true for Proffered Facts Nos 220, 231, 355, 358, 380 and 405.¹⁰⁰

38. The Chamber is satisfied that Proffered Facts Nos 300 and 306, referring to the positions held by Dragan Đorđević and Slobodan Milković, are clear and not inconsistent with each other.¹⁰¹

39. The Chamber notes that Proffered Fact No. 334 is not sufficiently clear as it does not contain any additional information about the order it refers to. Moreover, such information cannot be found in any of the surrounding facts.¹⁰² However, instead of rejecting the fact in its entirety, after consulting the *Simić et al.* Trial Judgement, the Chamber decides that the appropriate remedy would be a replacement of the word “order” by “order of Lt. Col. Nikolić of 17 April 1992 to collect weapons”.¹⁰³

40. The Chamber finds that although the following Proffered Facts contain some general statements, the precise meaning of which is not always identifiable, they are not of a character that precludes their admission: 74, 90, 119, 120, 129, 199, 200, 230, 300, 325, 410, 437, 446 and 492.¹⁰⁴ Furthermore, the Chamber is satisfied that Proffered Facts Nos 126, 130, 133¹⁰⁵ and 184¹⁰⁶ are sufficiently distinct and concrete.

41. The Chamber also finds that Proffered Facts 104, 118, 131 and 422 contain unclear, vague or unduly broad statements.¹⁰⁷ However, instead of rejecting these facts in their entirety, the Chamber decides that the appropriate remedy would be: in the case of Proffered Fact No. 104 – deletion of the last sentence;¹⁰⁸ in the case of Proffered Fact No. 118 – a deletion of the second

⁹⁹ Ibid. See Second Stanišić Response, para. 4, withdrawing objections as to the Proffered Facts Nos 438-439 and 444.

¹⁰⁰ See Stanišić Response, para. 51; Reply, para. 64.

¹⁰¹ See Stanišić Response, para. 38; Reply, para. 37.

¹⁰² See Stanišić Response, para. 39; Reply, para. 38.

¹⁰³ Accordingly, Proffered Fact No. 334 shall read: “The order of Lt. Col. Nikolić of 17 April 1992 to collect weapons was carried out by the 4th Detachment on 17, 18 and 19 April 1992 in the 4th District. Paramilitaries and the police also participated in the collection of weapons in Bosanski Šamac”. See *Simić et al.* Trial Judgement, para. 451.

¹⁰⁴ See Stanišić Response, paras 45, 48; Reply, paras 44-50, 52, 54-55, 61. See Second Stanišić Response, para. 4, withdrawing objections as to Proffered Facts Nos 92, 138, 150 and 403.

¹⁰⁵ See Stanišić Response, para. 48; Reply, para. 61.

¹⁰⁶ See Stanišić Response, para. 49; Reply, para. 62. See Second Stanišić Response, para. 4, withdrawing objections as to Proffered Facts Nos 182 and 183.

¹⁰⁷ See Stanišić Response, paras 45, 48; Reply, para. 61. See Second Stanišić Response, para. 4, withdrawing an objection as to Proffered Fact No. 422.

¹⁰⁸ Accordingly, Proffered Fact No. 104 shall read: “The SDS established Bosnian Serb controlled areas by linking Bosnian Serb populated municipalities together and by establishing parallel government bodies, with a view to removing that territory from the effective control of the authorities of the SRBH.”

sentence;¹⁰⁹ in the case of Proffered Fact No. 422 – a deletion of the second sentence.¹¹⁰ Similarly, the Chamber finds that Proffered Facts 407 and 432 also contain some unclear statements. However, instead of rejecting them in their entirety, the Chamber decides that the appropriate remedy would be: in the case of Proffered Fact No. 407 – a deletion of the word “vulnerable”;¹¹¹ and in the case of Proffered Fact No. 432 – a deletion of the word “triumphant”.¹¹² At the same time, the Chamber is not satisfied that Proffered Fact No. 124 in the present form is sufficiently clear. However, instead of rejecting the fact in its entirety, the Chamber decides that the appropriate remedy would be a deletion of the second part of the first sentence.¹¹³

42. The Chamber finds that Proffered Facts Nos 127-128, 130-133 lack in giving any precise definition of “Variants A and B”.¹¹⁴ However, instead of rejecting these facts, the Chamber considers that the appropriate remedy would be to take, *proprio motu*, judicial notice of the following fact coming from the *Brđanin* Trial Judgement (para. 69) that should be logically placed between Proffered Facts Nos 126 and 127:

These instructions provided for the conduct of specified activities in all municipalities in which Serbs lived, and essentially mapped out the take-over of power by Bosnian Serbs in municipalities where they constituted a majority of the population (“Variant A”) and where they were in a minority (“Variant B”).

The parties are therefore requested to submit their position as to this contemplated course of action within two weeks of the present decision being issued. Moreover, the Chamber notes that in the case of Proffered Fact No. 131 – the word “Consequently” should be deleted.¹¹⁵

¹⁰⁹ Accordingly, Proffered Fact No. 118 shall read: “The outcome of the plebiscite purported to be 100 percent in favour. The plebiscite was cited as justification for all subsequent moves such as the ultimate walk-out of the SDS representatives from the Bosnia and Herzegovina Assembly, the various negotiations conducted at the federal and international levels and the proclamation, on 9 January 1992, of the Republic of the Serbian People of Bosnia and Herzegovina”.

¹¹⁰ Accordingly, Proffered Fact No. 422 shall read: “In March and April, the Dutch soldiers noticed a build-up of Bosnian Serb forces near two of the observation posts, OP Romeo and OP Quebec.”

¹¹¹ Accordingly, Proffered Fact No. 407 shall read: “By January 1993 the Srebrenica enclave reached its peak size of 900 square kilometers, although it was never linked to the main area of Bosnian-held land in the west and remained an island amid Serb-controlled territory.”

¹¹² Accordingly, Proffered Fact No. 432 shall read: “Late in the afternoon of 11 July 1995, General Mladić, accompanied by General Živanović (then Commander of the Drina Corps), General Krstić (then Deputy Commander and Chief of Staff of the Drina Corps) and other VRS officers, took a walk through the empty streets of Srebrenica town”.

¹¹³ Accordingly, Proffered Fact No. 124 shall read: “For example, Lieutenant-General Momir Talić, Commander of the 5th Corps (which became the 1st Krajina Corps), was a member of the Crisis staff in Banja Luka (“ARK Crisis Staff”). The ARK Crisis Staff, which had jurisdiction over opština Prijedor, was established in April or May 1992 as an organ of the Autonomous Region of Krajina”. See Stanišić Response, para. 31; but see Second Stanišić Response, para. 4, withdrawing this objection.

¹¹⁴ See also Stanišić Response, para. 48; Reply, para. 61.

¹¹⁵ Accordingly, Proffered Fact No. 131 shall read: “The existence of Serbian municipalities was declared even in municipalities where the SDS did not have overall control (“Variant B municipalities”)”.

43. As a consequence, the Chamber defers its ruling on Proffered Facts Nos 127-128, 130-133 until the issue of taking judicial notice *proprio motu* is finalised.

44. At the same time, the Chamber finds that the following Proffered Facts contain vague or unduly broad statements that preclude their admission: 13, 39, 71, 91, 147, 425, 486 and 517.¹¹⁶

45. In conclusion, the Chamber finds that the following Proffered Facts are sufficiently distinct, concrete and identifiable: 1-12, 14-38, 40-70, 72-90, 92-103, 105-117, 119-126, 129, 134-146, 148-406, 408-424, 426-431, 433-485, 487-516 and 518-533. At the same time, the Chamber orders that Proffered Facts Nos 104, 118, 124, 334, 407, 422 and 432 be redrafted as identified in paragraphs 39 and 41-42 above.

C. The Proffered Facts Must be Relevant to the Case

46. Based on this criterion, the parties do not challenge the following Proffered Facts which in the view of the Chamber are sufficiently relevant to the present case: 1-4, 6-25, 32-55, 58-71, 73-402 and 527-531.

47. The Stanišić Defence challenges several Proffered Facts relating to the historical background of the conflict in the former Yugoslavia. It claims that the facts relating to issues predating the allegations of the underlying case are irrelevant.¹¹⁷ Moreover, both the Stanišić Defence and the Simatović Defence oppose some Proffered Facts as coming from the *Tadić* and *Čelebići* cases – cases concerning a limited crime base that differs substantially from that in the present case. Accordingly, it is claimed that the historical background given in these cases is limited to facts that were necessary to situate the evaluation of these cases.¹¹⁸ Similarly, the Stanišić Defence challenges the relevance of certain Proffered Facts adjudicated in several other cases before the Tribunal that have a different crime base from the current proceedings. Accordingly, such facts are claimed to be too limited in scope to be relevant to the present case.¹¹⁹

48. The Chamber is satisfied that the Proffered Facts describing the events preceding the allegations against the Accused can be of assistance to the Chamber insofar as they set the background allowing for a better understanding of the issues in the present case. Moreover, the

¹¹⁶ See Stanišić Response, paras 45, 47; Reply, paras 44, 51, 53, 56, 60. See Second Stanišić Response, para. 4, withdrawing objections as to the Proffered Facts Nos 13, 71, 147, 425 and 486.

¹¹⁷ See Stanišić Response, paras 17-18; Reply, paras 13-14.

¹¹⁸ See Stanišić Response, paras 19-20; Simatović Response, paras 15-16; Reply, paras 15-16. See also Simatović Response, para. 19, challenging Proffered Facts 78-79; Reply, para. 15; Second Simatović Response, para. 4, withdrawing these objections.

¹¹⁹ See Stanišić Response, paras 22-27; Reply, paras 17-20.

Chamber is of the opinion that the mere fact that the Proffered Facts come from cases dealing with separate crime bases does not automatically mean that they are not relevant to the present case. The Chamber is satisfied of the relevance of the following Proffered Facts concerning the historical background and of their general application making them also relevant to the present case: 5, 26-30 and 56-57.¹²⁰ Moreover, the Chamber finds that the following Proffered Facts are also relevant to the present proceedings as they contain information of sufficiently general scope and are pertinent to understanding the idea of a “Greater Serbia” and developments in the region in the early days of the conflict: 26-31 and 72.¹²¹ Finally, the Chamber, while aware that in relation to the Srebrenica crime base, the Accused are only charged with murder with respect to six prisoners allegedly killed in Trnovo, nevertheless considers the following Proffered Facts relating to the Srebrenica crime base relevant to placing Trnovo allegations in the context and to the understanding of the alleged JCE in the present case: 403, 405-409, 412-414, 417-424, 426-434, 447, 468-469, 489, 491-495.¹²²

49. In conclusion, the Chamber finds that the following Proffered Facts are sufficiently relevant to the present case: 1-403, 405-409, 412-414, 417-424, 426-434, 447, 468-469, 489, 491-495, 527-533.

D. The Proffered Facts Must not Contain any Findings or Characterisations that are of an Essentially Legal Nature

50. This requirement means that the Proffered Facts must represent *factual findings* of a Trial Chamber or of the Appeals Chamber.¹²³ In general, findings related to the *actus reus* or *mens rea* of a crime are deemed to be factual findings.¹²⁴ In determining whether a Proffered Fact is truly a factual finding, it has been observed that “many findings have a legal aspect, if one is to construe this expression broadly. It is therefore necessary to determine on a case-by-case basis whether the Proffered Fact contains findings or characterisations of an essentially legal nature and which must, therefore, be excluded”.¹²⁵

¹²⁰ See Second Stanišić Response, para. 4, withdrawing objections as to the Proffered Facts Nos 1-25 and 48-66; Second Simatović Response, para. 4, withdrawing objections as to the Proffered Facts Nos 1-4, 6-25, 48-55, 58-66.

¹²¹ See Second Stanišić Response, para. 4 and Second Simatović Response, para. 4, withdrawing objections as to the Proffered Facts Nos 14-15, 61-66, 122-123 and 227.

¹²² See Stanišić Response, paras 25-26; Simatović Response, para. 26; Reply, para. 20. See See Second Stanišić Response, para. 4, withdrawing an objection as to the Proffered Fact No. 403; Second Stanišić Response, para. 4, withdrawing objections as to the Proffered Facts Nos 403-404, 406-409, 411-422, 425-429, 431-436, 438-445, 447-480 and 485-486.

¹²³ *Dragomir Milošević* Appeal Decision, paras 19-22; *Krajišnik* Decision, para. 15.

¹²⁴ *Krajišnik* Decision, para. 16.

¹²⁵ *Krajišnik* Decision, para. 19. See also *Dragomir Milošević* Appeal Decision, paras 19-22.

51. Based on this criterion, the parties do not challenge the following Proffered Facts which in the view of the Chamber do not contain findings or characterisations of an essentially legal nature: 1-90, 92-103, 105-169, 171-221, 223-233, 237-322, 325-326, 329-349, 351-365, 367-381, 383-483, 485-496, 503-509, 511-513, 515-519, 522-523, 527-532.

52. The Chamber finds that the following Proffered Facts contain findings or characterisations of an essentially legal nature: 327 and 533. However, instead of rejecting these facts in their entirety, the Chamber decides that the appropriate remedy is: in the case of Proffered Fact No. 327 – deletion of the words “both systematic and widespread”;¹²⁶ and in the case of Proffered Fact No. 533 – deletion of the last sentence.¹²⁷

53. The Chamber finds that the following Proffered Facts contain findings or characterisations of an essentially legal nature that preclude their admission: 222, 328, 340, 341, 350, 366, 382 and 510.¹²⁸

54. Further, the Chamber does not see merit in the Stanišić Defence’s challenges on this ground to the following Proffered Facts: 91, 104, 170, 234-236, 323-324, 484, 497-502, 514, 520-521 and 524-526.¹²⁹

55. In conclusion, the Chamber finds that the following Proffered Facts do not contain findings or characterisations that are of an essentially legal nature: 1-221, 223-326, 329-339, 342-349, 351-365, 367-381, 383-509 and 511-532. At the same time, the Chamber orders that Proffered Facts Nos 327 and 533 be redrafted as identified in paragraph 52 above.

E. The Proffered Fact Must not be Based on an Agreement Between the Parties to the Original Proceedings

56. Based on this criterion, the parties do not challenge the following Proffered Facts which in the view of the Chamber are not based on an agreement between the parties to the original proceedings: 1-281, 283-309 and 311-533.

¹²⁶ Accordingly, Proffered Fact No. 327 shall read: “The attack against non-Serb civilians in the Bosanski Šamac and Odžak Municipalities was preceded by a series of acts, which indicate that it was planned and carried out in an organized fashion. These acts include military training of Serb men from Bosanski Šamac at a camp near Ilok in mid March 1992, securing the presence of Serb paramilitary forces who arrived in Batkusa on 11 April 1992, and the establishment of the Crisis Staff on 15 April 1992.”

¹²⁷ Accordingly, Proffered Fact No. 533 shall read: “Bosnian Muslim representatives met with Bosnian Serb municipal authorities on several different occasions to discuss the movement of Bosnian Muslim populations from Bosanski Novi for security reasons, including to Karlovac”.

¹²⁸ See Stanišić Response, paras 57-58; Reply, paras 76-79, 81-82, 84.

¹²⁹ See Stanišić Response, paras 57-59; Reply, paras 72-75, 80, 83, 86. See Second Stanišić Response, para. 4, withdrawing objections as to the Proffered Facts Nos 149, 264 and 447.

57. The Chamber notes that part of Proffered Facts No. 282 is based entirely on agreed facts between the parties in the *Simić et al.* case.¹³⁰ However, instead of rejecting Proffered Fact No. 282 in its entirety, the Chamber finds that the appropriate remedy would be deleting its first sentence.¹³¹

58. The Chamber further notes that one of the sources of Proffered Fact No. 310 is the agreed fact between the parties in the *Simić et al.* case.¹³² However, the relevant references in the *Simić et al.* Trial Judgement reveal that this reference is entirely corroborated by other sources. The limitation imposed on proposed adjudicated fact in the regime of Rule 94(B) of the Rules concerns facts (or parts of facts) based entirely (or in substantial part) on the facts agreed by the parties in other proceedings. It follows that the limitation does not encompass the situation where the particular fact is merely corroborated by the agreed fact.¹³³ Therefore, the Chamber finds that Proffered Fact No. 310 is not inadmissible within the meaning of Rule 94(B) of the Rules.

59. In conclusion, the Chamber finds that the following Proffered Facts are not based on an agreement between the parties to the original proceedings: 1-533. At the same time, the Chamber orders that Proffered Fact No. 282 be redrafted.

F. The Proffered Fact Must not have been Contested on Appeal, or, if it has, the Fact has been Settled on Appeal

60. The parties do not challenge any of the Proffered Facts on this ground. The Chamber notes that all the Proffered Facts were fully adjudicated. In other words, they either have not been contested on appeal or have been settled on appeal.

G. The Proffered Fact Must not Relate to Acts, Conduct, or Mental State of the Accused

61. A Trial Chamber must withhold judicial notice of any fact relating to the acts, conduct or mental state of the accused. Two factors warrant this “complete exclusion”. First, it strikes a “balance between the procedural rights of the Accused and the interest of expediency that is consistent with the one expressly struck in Rule 92 *bis*”.¹³⁴ Second, the Appeals Chamber held that:

there is reason to be particularly sceptical of facts adjudicated in other cases when they bear specifically on the actions, omissions, or mental state of an individual not on trial in those cases

¹³⁰ See Stanišić Response, paras 61-62; Reply, paras 87-88. See Second Stanišić Response, para. 4, withdrawing this objection.

¹³¹ Consequently, this fact shall read “Blagoje Simić was heading the SDS list in the elections of 1990. He was Vice-Chairman of the Municipal Assembly from 1991 through 17 April 1992”. See Reply, para. 27.

¹³² Stanišić Response, paras 61-62; Reply, paras 87, 89. See Second Stanišić Response, para. 4, withdrawing this objection.

¹³³ See also *Popović et al.* Decision, para. 11.

¹³⁴ *Karemera et al.* Appeal Decision, para. 51.

[as] the defendants in those other cases would have had significantly less incentive to contest those facts than they would facts related to their own actions; indeed, in some cases such defendants might affirmatively choose to allow blame to fall on another.¹³⁵

62. Moreover, the Appeals Chamber held that “it would plainly be improper for facts judicially noticed to be the ‘basis for proving the Appellant’s criminal responsibility’ (in the sense of being *sufficient* to establish that responsibility)”.¹³⁶ It is for the Chambers, in the careful exercise of their discretion, to assess each particular fact in order to determine whether taking judicial notice—and thus shifting the burden of producing evidence rebutting that fact to the accused—is consistent with the accused’s rights under the circumstances of the case. This includes *inter alia* facts related to the existence of a JCE.¹³⁷

63. The requirement discussed in this section does not, however, apply to the conduct of other persons for whose criminal acts and omissions the accused is alleged to be responsible for through one or more of the forms of liability in Article 7(1) or (3) of the Statute.¹³⁸

64. Based on this criterion, the parties do not challenge the following Proffered Facts which in the view of the Chamber do not relate to acts, conduct, or the mental state of the Accused: 1-33, 35, 37-44, 47-239, 241-243, 245-293 and 295-533.

65. The Chamber notes that some of the Proffered Facts refer to the acts and conduct, potentially pertinent to the existence of a JCE, of groups of persons of whom one or both of the Accused may have been a part (e.g. “Serbian leaders”).¹³⁹ The Chamber finds that several of these Proffered Facts do not meet the standard to be applied under Rule 94(B). The following Proffered Facts are therefore rejected: 34, 36, 45 and 46. At the same time, the Chamber is of the opinion that, contrary to the Stanišić Defence claim, Proffered Facts Nos 240, 244 and 294 do not suffer from this deficiency.¹⁴⁰

66. In conclusion, the Chamber finds that the following Proffered Facts do not relate to acts, conduct, or mental state of the Accused: 1-33, 35, 37-44 and 47-533.

¹³⁵ Ibid.

¹³⁶ *Karemera et al.* Appeal Decision, para. 47.

¹³⁷ *Karemera et al.* Appeal Decision, para. 52.

¹³⁸ *Karemera et al.* Appeal Decision, para. 48.

¹³⁹ See *Popović et al.* Decision, fn. 62.

¹⁴⁰ For the Defence objection – see Stanišić Response, paras 53-55; Reply, paras 65-70.

H. The Formulation of a Proffered Fact Must not Differ Substantially From the Formulation in the Original Judgement

67. It follows from this requirement that a Trial Chamber can, and indeed, must decline to take judicial notice of facts which are “out of context” if it considers that their formulation—abstracted from the context in the judgement from where they came—is misleading or inconsistent with the facts actually adjudicated in the cases in question.¹⁴¹ Finally, a proposed fact has to also be examined in the context of the other Proffered Facts in the motion. It follows that the Chamber must deny judicial notice if the Proffered Fact is either unclear in that context or has become unclear because one or more of the surrounding Proffered Facts will be denied judicial notice.¹⁴²

68. Based on this criterion, the parties do not challenge the following Proffered Facts which in the view of the Chamber do not differ substantially from the formulation in the original judgement: 1-36, 38-110, 112-175, 181-208, 210-222, 224-238, 240-304, 306-350, 352-364, 366-454, 456-465, 467-480, 482-495, 497-508, 511-514, 516-521, 523-533.¹⁴³

69. The Chamber finds that Proffered Fact No. 37, although combining the findings made by the Chambers in *Brđanin* and in *Tadić*, does so correctly without changing their meaning and specific context.¹⁴⁴

70. The Chamber notes that Proffered Fact No. 111 is erroneously placed by the Prosecution among the facts pertaining to October 1991.¹⁴⁵ Moreover, it contains several vague statements not fully comprehensible when removed from the logical flow of facts as presented in the Motion and is therefore inadmissible.

71. The Chamber notes that Proffered Facts Nos 176-180, in the form proposed by the Prosecution, are suggested as having a general temporal application.¹⁴⁶ However, reading the *Blagojević* Trial Judgement reveals that they were originally aimed at describing the situation in July 1995. The Chamber therefore instead of rejecting these facts in their entirety, finds that the

¹⁴¹ *Karemera et al.* Appeal Decision, para. 55; *Popović et al.* Decision, para. 8.

¹⁴² See *Popović et al.* Decision, para. 8.

¹⁴³ See Stanišić Response, para. 30; Reply, para. 30; Second Stanišić Response, para. 4., withdrawing objections as to the Proffered Facts Nos 80, 94, 95 and 105. See also Defence objection, Stanišić Response, para. 33; Reply, para. 33; Second Stanišić Response, para. 4., withdrawing an objection as to the Proffered Fact No. 148.

¹⁴⁴ The Trial Chamber notes that the function Radoslav Brđanin held in 1992 is explained in para. 323 of the *Brđanin* Trial Judgement as well as in para. 89 of the *Tadić* Trial Judgement. See Stanišić Response, para. 29; Reply, para. 29.

¹⁴⁵ See Stanišić Response, para. 32; Reply, para. 32.

¹⁴⁶ See Stanišić Response, para. 34; Reply, para. 34.

appropriate remedy would be to put them in their original context by adding the words “At least as of July 1995”, preceding each of these facts.¹⁴⁷

72. The Chamber notes that the *Tadić* and *Čelebići* Trial Judgements reveal an irregularity with respect to Proffered Fact No. 209; specifically regarding whether the JNA troops had access to 50 or 500 helicopters. Rather than rejecting this fact in its entirety, the Chamber finds that the appropriate remedy would be redrafting the reference to helicopters in Proffered Fact No. 209.¹⁴⁸

73. The Chamber notes that Proffered Fact No. 223 does not reflect its original wording, impermissibly changing its meaning.¹⁴⁹ Instead of rejecting this fact in its entirety, the Chamber finds that the appropriate remedy would be replacing the words “Some Serbian paramilitaries” by the words “some of the Bosnian Serb and Croatian Serb paramilitary forces”.¹⁵⁰ Moreover, having reviewed the *Tadić* Trial Judgement, the Chamber finds that the *Tadić* Chamber’s reference to the testimony of the witness amounts to the final finding of that Chamber.

74. The Chamber notes that the *Brđanin* Trial Judgement reveals that the temporal scope of Proffered Fact No. 239 is erroneously placed by the Prosecution between April and December 1992.¹⁵¹ However, instead of rejecting this fact in its entirety, the Chamber finds that the appropriate remedy would be putting this fact in its original context by replacing the words “Between April and December 1992”, with “In the months preceding April 1992”.¹⁵²

¹⁴⁷ Consequently, Proffered Fact No. 176 shall read: “At least as of July 1995, Public Security Centres (“CJBs”) co-ordinated the activities of local Public Security Stations (“SJBs”), i.e. police stations, within their region”; Proffered Fact No. 177 shall read “As of July 1995, in addition to ordinary police duties relating to law and order, some members of the regular police force also had duties within special police forces or PJP companies. PJP companies were trained for combat operations and were set up when needed. Members of the PJP Companies generally wore blue camouflage uniforms and were issued standard military weapons”; Proffered Fact No. 178 shall read: “As of July 1995, in accordance with the law in effect in the RS, MUP units could be re-subordinated to the VRS for various purposes, including to reinforce the VRS during combat activities. When re-subordinated, the MUP forces followed orders issued by the VRS”; Proffered Fact No. 179 shall read: “As of July 1995, the commander of the VRS unit to which the MUP unit was re-subordinated and the commander of the MUP unit coordinated their work in carrying out the tasks assigned by the VRS”; and Proffered Fact No. 180 shall read: “As of July 1995, MUP forces were engaged in combat operations for a specific time to carry out a precisely described task. During their re-subordination, MUP forces retained their formation and could not be disintegrated or separated”.

¹⁴⁸ Accordingly, Proffered Fact No. 209 shall read: “By early 1992 there were some 100,000 JNA troops in Bosnia and Herzegovina with over 700 tanks, 1,000 armoured personnel carriers, much heavy weaponry, 100 planes and a substantial number of helicopters, all under the command of the General Staff of the JNA in Belgrade.”

¹⁴⁹ See Stanišić Response, para. 35; Reply, para. 35.

¹⁵⁰ Consequently, Proffered Fact No. 223 shall read: “Some of the Bosnian Serb and Croatian Serb paramilitary forces were even given training in the compounds of the 5th JNA Corps in Banja Luka. The reliance placed on such forces by the JNA reflected a general manpower shortage. Whilst the JNA was prepared to use its artillery in operations, it relied on paramilitary groups to go into built up areas and to act as a substituted infantry. Air support was given to such paramilitary forces which continued into 1992”.

¹⁵¹ See Stanišić Response, para. 36.

¹⁵² Consequently, Proffered Fact No. 239 shall read: “In the months preceding April 1992, the SFRY was already making preparations to cover-up the ‘overall control’ it planned to exercise on the Bosnian Serb Army once the BiH gained independence and that this plan needed to be put in place as international pressure on Belgrade mounted”.

75. The Chamber is also satisfied that alterations to the text of the original findings do not make the following Proffered Facts unclear or misleading: 515, 522,¹⁵³ as well as 509.¹⁵⁴

76. The Chamber notes that Proffered Fact No. 365 does not reflect its original wording, impermissibly changing its meaning.¹⁵⁵ Instead of rejecting this fact in its entirety, the Chamber finds that the appropriate remedy would be deleting the second sentence of the Proffered Fact.¹⁵⁶

77. The Chamber notes that the *Krstić* and *Blagojević* Trial Judgements reveal a discrepancy with respect to Proffered Fact No. 455; specifically regarding whether the events described in the fact took place on 10 July 1995 or 11 July 1995. Consequently, the Chamber considers Proffered Fact No. 455 inadmissible.

78. The Chamber notes that there is a variation between Proffered Fact No. 466 as formulated in the Motion and its original formulation in the *Krstić* Trial Judgement referring to “Sandi Meadow” instead of the correct one - “Sandići Meadow”. However, the Chamber notes that the Proffered Fact was already found as not sufficiently relevant for the purpose of Rule 94(B).¹⁵⁷

79. The Stanišić Defence challenges several Proffered Facts on the basis that when adjudicated in other trials, they were formulated as a mere recollection of the testimony of the witness(es) as opposed to a final finding made by the Chamber. Consequently, it argues that the Prosecution’s presentation of such facts as absolute findings is misleading.¹⁵⁸

80. The Chamber notes that this issue should be decided on a case-by case basis and the mere fact of referring to the testimony of a witness does not necessarily mean that the Chamber refrained from making a finding. After careful analysis of the overall context of the Proffered Facts in question, the Chamber is satisfied that the following Facts represent absolute findings made by the Chamber: 305, 351, 481, 496, 510 and 515.

81. In conclusion, the Chamber finds that the following Proffered Facts do not differ substantially from their formulation in the original judgements: 1-110, 112-175, 181-208, 210-222,

See the *Brđanin* Trial Judgement, para. 151 referring to “the months preceding the period covered in the Indictment”.

¹⁵³ See Stanišić Response, paras 41-42; Reply, paras 40-42. See Second Stanišić Response, para. 4.

¹⁵⁴ See Stanišić Response, para. 40.

¹⁵⁵ See Stanišić Response, para. 41; Reply, para. 40.

¹⁵⁶ Consequently, Proffered Fact No. 365 shall read: “The detention of non-Serb civilians in facilities within Bosanski Šamac, namely, the SUP, TO and primary and secondary schools, was also arbitrary and unlawful. The detainees in these facilities were not given any lawful reasons for their detention, and they were confined for considerable amounts of time without being charged. The legality of their detention was never reviewed by the Serb authorities.”

¹⁵⁷ See supra note, paras 48-49.

224-238, 240-364, 366-454, 456-465, 467-533. At the same time, the Chamber orders that Proffered Facts Nos 176-180, 209, 223, 239 and 365 be redrafted.

I. Trial Chamber's Residual Discretion

82. Besides the application of the requirements analysed above, in exercising its discretion the Chamber has carefully assessed whether the admission of the Proffered Facts would advance judicial economy while still safeguarding the rights of the accused.

83. Both the Stanišić Defence and Simatović Defence presented several specific arguments, which if accepted, could militate in favour of using the Chamber's discretion in rejecting certain Proffered Facts that otherwise fulfil the specific criteria discussed above.

84. The Stanišić Defence submits that the admission of such large number of adjudicated facts puts too onerous burden of rebuttal upon the Accused and violates the principle of a fair trial.¹⁵⁹ The Chamber finds that although the Prosecution seeks admission of this large amount of facts, in the context of the whole trial, they are still manageable and of sufficient relevance. As a consequence, the mere number of the Proffered Facts does not militate against their admission.

85. The Stanišić Defence also submits that by admitting the Proffered Facts, the right of the Accused to examine the witnesses against him will be violated. Accordingly, it claims that although these witnesses may have been cross-examined in other cases, these cross-examinations have been limited to issues often only relevant to those cases. The Chamber notes that similarly to the procedure of Rule 92 *bis*, the regime of Rule 94(B) of the Rules allows for the admission of certain material without granting the accused a right to cross-examine a witness. The Chamber recalls that there are certain mechanisms in place to safeguard the rights of the accused in these procedures – one of the most important being the exclusion of evidence going to the proof of acts and conduct of the accused.¹⁶⁰ Furthermore, the Chamber notes that the Defence may consider the possibility of calling these witnesses, when available, during the presentation of its case.

86. The Stanišić Defence also claims that in a situation where the evidence of a certain witness can be presented in the form of Rule 92 *quater* material, taking judicial notice of the facts adjudicated in the other trial and based on the evidence of the witness would *de facto* undermine the

¹⁵⁸ See Stanišić Response, para. 37; Reply, para. 36. See Second Stanišić Response, para. 4, withdrawing objections as to Proffered Facts Nos 284-285, 287-288, 345, 442, 458, 464 and 475-476.

¹⁵⁹ See Stanišić Response, paras 6-7.

¹⁶⁰ See also *Karemera et al.* Appeal Decision, para. 51.

Rule 92 *quater* procedure.¹⁶¹ The Chamber fails to see any merit in this submission and recalls that both these procedures can coexist.

87. The Chamber notes in this respect that the Rules afford the parties various ways of presenting evidence to the Chamber.¹⁶² Depending on the character of such evidentiary material some of the procedures may be more suitable than others. The Chamber does not consider it improper for the Prosecution to pursue these different avenues, especially as, when the Motion was filed, the Chamber had not rendered any decisions on the admission of evidence in the present case.

88. The Simatović Defence argues that many of the Proffered Facts “could be brought into context of the consequences of the accused’s acting through the JCE” or are “the consequence of his either direct or indirect acting within the meaning of Article 7(1) of the Statute”. As a consequence, it claims that their importance to the determination of the guilt or innocence of the Accused is of a nature which inevitably requires the facts to be proved in the present case.¹⁶³ The Chamber is of the opinion that the situation where a particular Proffered Fact is merely relevant to establishing the existence of the JCE does not automatically warrant its exclusion. Such an approach, in the view of the Chamber, would impermissibly limit the application of the regime of Rule 94(B) of the Rules. Moreover, the Chamber recalls that it screened all the Proffered Facts and excluded all facts relating to the acts, conduct or mental state of the Accused, including some that it deemed to be potentially pertinent to the existence of the alleged JCE.¹⁶⁴

89. Finally, the Stanišić Defence notes that some of the Proffered Facts are to a large extent based on the testimony of accused persons testifying in their own trials. It is therefore submitted that such evidence should be regarded as unreliable for the case against Mr Stanišić without any proper testing of this evidence by cross-examination by the Stanišić Defence.¹⁶⁵ The Chamber is of the opinion that the mere fact that evidence comes from one of the accused testifying in his own trial does not make it automatically unreliable, although certainly such evidence should be treated with great caution. The Chamber notes that these considerations were certainly taken into account by the Trial Chamber in the *Simić et al.* case that found the evidence in question reliable. Moreover, reading the *Simić et al.* Trial Judgement reveals that some of the Proffered Facts challenged by the Stanišić Defence are corroborated by evidence of other witnesses;¹⁶⁶ whereas some, although

¹⁶¹ See Stanišić Response, para. 11, Confidential Annex I; Reply, para. 10.

¹⁶² Compare e.g. the procedures of Rules 92 *bis*, 92 *ter*, 92 *quater*, 94(A), 94(B) and 94 *bis*.

¹⁶³ See Simatović Response, paras 20-23, 26; Reply, para. 66.

¹⁶⁴ See *supra*, paras 65-66.

¹⁶⁵ See Stanišić Response, para. 12; Reply, paras 21-27.

¹⁶⁶ See Proffered Facts Nos 280, 287, 317-318 and to a large extent also 353.

entirely based on the testimony of the accused, pertain to such matters that would not easily raise concerns as to their reliability.¹⁶⁷

90. The Simatović Defence submits that some findings in the *Tadić* Judgement are challenged by the ICJ.¹⁶⁸ However, a careful reading of the ICJ Judgement reveals that the ICJ did not challenge any factual findings made by the Chamber in the *Tadić* case. Rather, it challenged the finding made by the ICTY Appeals Chamber pertaining to issues of general international law. Consequently, the Simatović Defence's argument is dismissed.¹⁶⁹

91. Finally, the Simatović Defence objects to certain Proffered Facts grouped by the Prosecution under the heading "JNA". It submits that the information contained therein will be dealt with in detail in one of the expert reports it is planning to present to the Chamber.¹⁷⁰ The Chamber notes that the concept of adjudicated facts allows for the admission of material that is contested by one of the parties. In doing so, the Chamber should balance the promotion of judicial economy with the safeguarding of the rights of the Accused. The Simatović Defence fails to substantiate its claim that admission of Proffered Facts 198-202, 206, 208-210, 121, 214-215, 217, 219-223, 228-236, 239-254, 257-261 would not serve the interest of judicial economy, forcing the Defence to spend disproportionate amount of time and resources to rebut them. The Chamber finds that the Simatović Defence is free to seek admission of any evidence complementing or rebutting any of the adjudicated facts, however, the mere expectation of such evidentiary material does not automatically preclude the acceptance of Proffered Facts Nos 198-202, 206, 208-210, 121, 214-215, 217, 219-223, 228-236, 239-254, 257-261.

¹⁶⁷ See Proffered Facts Nos 278, 282-283.

¹⁶⁸ Simatović Response, para. 18.

¹⁶⁹ See ICJ Judgement, para. 403 which reads: "The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it." See also *ibid.*, para. 402.

¹⁷⁰ Simatović Response, para. 24, referring to Proffered Facts Nos 198-202, 206, 208-210, 121, 214-215, 217, 219-223, 228-236, 239-254, 257-261, see Second Simatović Response, para. 4.

V. DISPOSITION

92. Based on the reasoning set forth above and pursuant to Rules 54 and 94(B) of the Rules, the Chamber:

GRANTS leave to exceed the word limit for the Stanišić Response;

GRANTS leave to file a Reply;

GRANTS leave to exceed the word limit for the Reply;

DISMISSES the Stanišić Objection Motion;

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

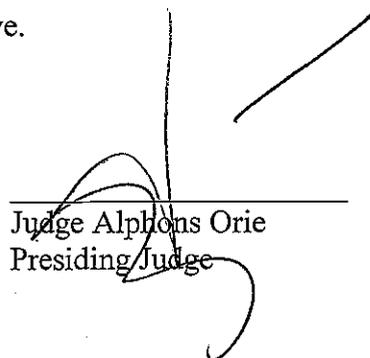
- 1) 1-12, 14-33, 35, 37-38, 40-44, 47-70, 72-90, 92-103, 105-110, 112-113, 115-117, 119-123, 125-126, 129, 134-146, 148-175, 181-208, 210-221, 224-238, 240-281, 283-326, 329-333, 335-339, 342-349, 351-364, 367-381, 383-403, 405-406, 408-409, 412-414, 417-421, 423-424, 426-431, 433-434, 447, 468-469, 489, 491-495, 527-532;
- 2) 104, 118, 124, 176-180, 209, 223, 239, 282, 327, 334, 365, 407, 422, 432 and 533 subject to the changes indicated in the present decision;

DEFERS its ruling on Proffered Facts Nos 127-128, 130-133;

INVITES the parties to submit their positions on the issue of taking *proprio motu* judicial notice of one fact within two weeks of the rendering of the present decision;

DISMISSES the remainder of the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-fifth day of November 2009
At The Hague
The Netherlands

[Seal of the Tribunal]