



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: 28 January 2010
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 28 January 2010

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

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

Office of the Prosecutor

Mr Dermot Groome

Counsel for Jovica Stanišić

Mr Geert-Jan Alexander Knoops
Mr Wayne Jordash

Counsel for Franko Simatović

Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 12 December 2008, the Prosecution filed its second motion for judicial notice of adjudicated facts.¹
2. On 29 December 2008, the Simatović Defence filed its response.² On 23 December 2008, the Stanišić Defence filed a request for extension of time to respond which was partly granted on 23 April 2009.³ On 7 May 2009, the Stanišić Defence response to the Motion was filed.⁴
3. On 5 January 2009, the Prosecution requested leave to reply and filed its reply to the Simatović Response.⁵ On 13 May 2009, the Prosecution requested leave to reply to Stanišić Response⁶ and on 20 May 2009, filed its reply.⁷
4. During the status conferences held on 11 March and 12 May 2009, the Chamber encouraged the parties to conduct additional analysis of the adjudicated facts motions in the view to find further compromise.⁸ Following this invitation, on 8 June 2009, the Simatović Defence filed its second response to the Motion,⁹ and on 15 June 2009, the Stanišić Defence filed its second response to the Motion.¹⁰

¹ Second Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 12 December 2008 (“Motion”).

² Simatović Defence Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 29 December 2008 (“Simatović Response”).

³ Defence Request for Extension of Time to Respond to Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 23 December 2008; Decision on Defence Request for Extension of Time to Respond to Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 23 April 2009, granting the Stanišić Defence additional 14 days to respond. On 1 May 2009, the Stanišić Defence sought certification to appeal this decision – see “Defence Request for Certification to Appeal the Trial Chamber’s ‘Decision on Defence Request for Extension of Time to Respond to Second Prosecution Motion for Judicial Notice of Adjudicated Facts’”. The certification was denied by the Chamber on 20 May 2009 – see “Decision on Defence Request for Certification to Appeal the Trial Chamber’s ‘Decision on Defence Request for Extension of Time to Respond to Second Prosecution Motion for Judicial Notice of Adjudicated Facts’”.

⁴ Stanišić Defence Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 7 May 2009 (“Stanišić Response”).

⁵ Prosecution Request for Leave to Reply and Reply to Simatović Defence Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 5 January 2009 (“Reply to Simatović Response”).

⁶ Prosecution Request for Leave to Reply to Stanišić Defence Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts, 13 May 2009. Whereas the Trial Chamber decision to grant this request was informally communicated to the Stanišić Defence in the e-mail communication on 18 May 2009, it will be officially put on record in the present Decision.

⁷ Prosecution Reply to Stanišić Defence Response to Second Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 20 May 2009 (“Reply to Stanišić Response”).

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

⁹ 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”).

¹⁰ 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”).

II. SUBMISSIONS

A. Motion

5. In its Motion, the Prosecution requests that the Chamber take judicial notice of 208 adjudicated facts from the *Martić* Trial Judgement (“Proffered Facts”).¹¹

6. The Prosecution submits that taking judicial notice of the Proffered Facts would allow the Chamber to devote a greater proportion of time to the core issues in the present case.¹² 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.¹³ Accordingly, the Prosecution submits that the Proffered Facts are relevant to the crimes charged in the Indictment, are clear, and have either not been appealed or have been upheld on appeal.¹⁴ Moreover, none of the Proffered Facts reflect legal conclusions drawn by the Trial Chamber or attest to the criminal responsibility of the Accused.¹⁵ Finally, the Prosecution points out that the Proffered Facts pertain to the historical, political and military context and developments which are relevant to these proceedings, as well as to the crimes that took place, often identifying the physical perpetrators of those crimes.¹⁶

B. Simatović Response

7. The Simatović Defence presents its general objection to adjudicated facts, arguing that “the Trial Chamber must not permit that the principle of efficiency and judicial economy of the trial prevails over the principle of [a] fair and public trial” and that “the Trial Chamber also should keep in mind that the volume and type of evidence to be presented by the Defence in rebuttal of contested adjudicated facts may place such a significant burden on the defence that it jeopardises the right to fair trial”.¹⁷

8. More specifically, the Simatović Defence objects to the admission of Proffered Facts Nos 1-60 as not relevant, further explaining its objections in regard to Proffered Facts Nos 1-8, 10, 14, 16-17, 21-22, 38-39, 41 and 59-60.¹⁸ The Simatović Defence also submits that Proffered Facts Nos 9,

¹¹ *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007. Initially, the Prosecution sought admission of 213 Facts, Motion, para. 4, Annex. However, subsequently it withdrew five of them (142-144, 167-168), Reply to Stanišić Response, paras 15, 28. See *infra* note, paras 20, 36.

¹² Motion, para. 3.

¹³ Motion, para. 8.

¹⁴ Motion, para. 5.

¹⁵ Motion, para. 5.

¹⁶ Motion, para. 6.

¹⁷ Simatović Response, paras 17-18.

¹⁸ Simatović Response, paras 10-12, 15.

24, 26, 30 and 42-58 relate to the acts, conduct or mental state of the Accused.¹⁹ Moreover, the Simatović Defence points out that Proffered Facts Nos 6 and 34-37 are unclear or misleading within the context in which they are placed by the Prosecution.²⁰

9. The Simatović Defence further argues that, apart from those facts clearly relating to the acts, conduct and mental state of the accused, the Chamber also should not accept facts where it is unable to readily identify whether the facts in question relate in that way to the accused.²¹ It further submits that all Proffered Facts “contained in the indictment raised against Simatović or in the Consolidated Pre-Trial Brief of the prosecution are in this category of the facts”.²²

10. The Simatović Defence disputes the crime base as stated in the Indictment and argues that the admission of Proffered Facts Nos 61-213 “would entirely mean the determination and adoption of the significant part of the crime base in relation to Simatović even before the trial begun thus violating the rights of the accused under Article 20 and 21 of the Statute of the Tribunal”.²³ It points out that “all these facts would be subject to a rebuttal of the Defence [therefore] their adoption at this moment would be completely made senseless”.²⁴

11. Finally, the Simatović Defence incorporates into its response “all claims of the factual and legal nature given in its “Defence Response on Prosecution Motion for Judicial Notice of Adjudicated Facts” of 28 May 2007”.²⁵

C. Stanišić Response

12. The Stanišić Defence submits that “it has not been able to obtain any instructions from Mr. Stanišić on the Prosecution proposed adjudicated facts from the Martić case or any instructions on vast swathes of the overall evidence to be adduced by the Prosecution”.²⁶

13. The Stanišić Defence incorporates into its response arguments it submitted in the “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” of 29 May 2007.²⁷ Accordingly, it argues that admission of such a large

¹⁹ Simatović Response, para. 13.

²⁰ Simatović Response, para. 14.

²¹ Simatović Response, para. 16.

²² Ibid.

²³ Simatović Response, paras 19-20, 21-26.

²⁴ Simatović Response, para. 20.

²⁵ Simatović Response, para. 27.

²⁶ Stanišić Response, para. 3.

²⁷ Stanišić Response, para. 4.

number of adjudicated facts in the underlying case would put too onerous a burden of rebuttal upon the Accused and violate the principle of a fair trial as enshrined in the Statute.²⁸

14. The Stanišić Defence points out that the Prosecution moves for the admission of many Proffered Facts based on the evidence given by Milan Babić, which is also sought for admission pursuant to Rule 92 *quater* of the Tribunal's Rules of Procedure and Evidence ("Rules").²⁹ The Stanišić Defence argues that admission of such evidence under Rule 94(B) of the Rules would therefore undermine the procedure of Rule 92 *quater* which was created for the admission of evidence of a deceased witness.³⁰ It concludes that "[i]t is unfair use of the adjudicated facts procedure to allow facts to be judicially noticed which would be ruled inadmissible through the Rule 92 *quater* procedure; especially given that the witness was not fully cross examined before his suicide in the UNDU".³¹

15. Alternatively, the Stanišić Defence requests the Chamber to withhold judicial notice of certain Proffered Facts as they

- (i) are not relevant to the case;³²
- (ii) differ in a substantial way from their formulation in the original judgement or are misleading or unclear in their proposed context;³³
- (iii) are too vague or insufficiently clear;³⁴
- (iv) go to the acts, conduct or mental state of the Accused;³⁵ or
- (v) are based on agreed facts.³⁶

D. Reply to Simatović Response

16. The Prosecution asks leave to reply.³⁷

²⁸ Stanišić Response, para. 5.

²⁹ Stanišić Response, para. 6.

³⁰ Ibid.

³¹ Ibid.

³² Stanišić Response, paras 18-20, referring to Proffered Facts Nos 140-144 and 167-168.

³³ Stanišić Response, paras 22-24, 26-27, referring to Proffered Facts Nos 58, 67, 95, 126 and 179.

³⁴ Stanišić Response, para. 25, referring to Proffered Facts Nos 108, 149, 152, 156 and 179.

³⁵ Stanišić Response, paras 10-17, referring to Proffered Facts Nos 9, 24-26, 28-33, 42, 51-56 and 58.

³⁶ Stanišić Response, para. 29, referring to Proffered Facts Nos 1, 3-5, 7, 10, 12-15, 17, 19 and 21-22.

³⁷ Reply to Simatović Response, para. 2.

17. The Prosecution incorporates into its reply its arguments submitted in the “Prosecution Request for Leave to Reply and Reply to Defence Responses to Prosecution Motion for Judicial Notice of Adjudicated Facts” of 5 June 2007.³⁸ Additionally, the Prosecution argues *inter alia* that the Proffered Facts relating to Milan Martić, as one of the alleged joint criminal enterprise (“JCE”) members, are of relevance and importance to the present case as he is alleged to be the link to the Accused. Finally, the Prosecution submits that the Simatović Defence does not give one concrete example that would raise any doubt about the accuracy of the Proffered Facts.³⁹

E. Reply to Stanišić Response

18. The Prosecution incorporates into its reply its arguments submitted in the “Prosecution Request for Leave to Reply and Reply to Defence Responses to Prosecution Motion for Judicial Notice of Adjudicated Facts” of 5 June 2007.⁴⁰ It also submits that nothing in the Rules indicates that an application under Rule 92 *quater* prevents an application of a Rule 94(B) procedure.⁴¹ It further argues that the fact that the Chamber in the *Martić* case relied to a large extent on the evidence of Milan Babić, notwithstanding the unfinished cross-examination of that witness, is strong support for the pending Rule 92 *quater* motion concerning Milan Babić’s evidence.⁴²

19. The Prosecution, in referring to the Stanišić objections, submits *inter alia* that certain redactions made by the Prosecution to the Proffered Facts in relation to the original text of the *Martić* Judgement, redacting the explicit references to the Accused, did not change the essence of the adjudicated facts but merely made these Proffered Facts more general.⁴³ It further addresses several Stanišić Defence objections concerning alleged inadmissibility of the Proffered Facts on the grounds that they go to the acts, conduct or mental state of the accused⁴⁴, and that they contain different formulation, misleading context or are insufficiently clear.⁴⁵ The Prosecution also argues that the jurisprudence only excludes judicial notice of facts that are solely based upon the agreement between the parties as opposed to facts based on various sources including agreed facts.⁴⁶

³⁸ Reply to Simatović Response, paras 3-4, 6, 10-11.

³⁹ See Reply to Simatović Response, paras 5, 7-8.

⁴⁰ Reply to Stanišić Response, paras 5, 14.

⁴¹ Reply to Stanišić Response, para. 8.

⁴² Reply to Stanišić Response, para. 9.

⁴³ Reply to Stanišić Response, paras 10-11.

⁴⁴ Reply to Stanišić Response, paras 12-13.

⁴⁵ Reply to Stanišić Response, paras 18, 20, 22-23, 25.

⁴⁶ Reply to Stanišić Response, para. 27.

20. Finally, in light of the arguments presented in the Stanišić Response, the Prosecution proposes certain modifications to several Proffered Facts and withdraws Proffered Facts 142-144 and 167-168.⁴⁷

F. Second Simatović Response

21. Having further analysed the Motion, the Simatović Response states, in its Second Response, that it does not oppose the admission of Proffered Facts Nos 1-8, 10-23, 61-67, 98, 102-104, 118-119, 137-140 and 180-182.⁴⁸

G. Second Stanišić Response

22. In its Second Response, after making new analyses of the Motion, the Stanišić Defence accepts the admission of the following Proffered Facts: 1-8, 10-23, 38-41, 46-47, 49-51, 57, 61-67, 70-74, 81-86, 88, 97-98, 59, 100-106, 113-124, 126, 129-131, 135-139, 141, 146-148, 150, 154-155, 157-160, 170, 172, 174, 177-178, 180-182, 190-191, 193, 207-213.⁴⁹

III. APPLICABLE LAW

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

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.

24. Decision on taking judicial notice of an adjudicated fact is a two-step process. Firstly, the Chamber has to consider if a purported adjudicated fact fulfils the admissibility requirements as developed by the jurisprudence of the Tribunal.⁵⁰ These are:

(i) The fact must be distinct, concrete and identifiable;⁵¹

(ii) It must be relevant to the case;⁵²

⁴⁷ Reply to Stanišić Response, paras 15-17, 19, 21, 24, 26, 28. The proposed modifications concern Proffered Facts Nos 67, 126, 129, 138, 141, 153, 156 and 210.

⁴⁸ Second Simatović Response, para. 4.

⁴⁹ Second Stanišić Response, paras 5-6.

⁵⁰ *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.

⁵¹ *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;

- (iii) It must not include findings or characterisations that are of an *essentially* legal nature;⁵³
- (iv) It must not be based on a plea agreement or on facts voluntarily admitted in a previous case;⁵⁴
- (v) It must not have been contested on appeal, or, if it has, the fact has been settled on appeal;⁵⁵
- (vi) It must not relate to the acts, conduct or mental state of the accused;⁵⁶
- (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.⁵⁷

25. Secondly, even if the Chamber is satisfied that a purported adjudicated fact fulfils the abovementioned criteria, it always retains the right to withhold judicial notice of a fact when it believes that such notice would not serve the interests of justice.⁵⁸ In this respect, the Appeals Chamber has held that, when applying Rule 94 of the Rules a balance between the purpose of taking judicial notice, namely to promote judicial economy, and the fundamental right of the accused to a fair trial must be achieved.⁵⁹

26. 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,

⁵² *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.

⁵³ *Dragomir Milošević* Appeal Decision, paras 19-22.

⁵⁴ *Perišić* Decision, para. 16; *Popović et al.* Decision, para. 11; *Prlić et al.* Decision, para. 18; *Krajišnik* Decision, para. 14.

⁵⁵ *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.

⁵⁶ *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.

⁵⁷ See *Karemera et al.* Appeal Decision, para. 55.

⁵⁸ *Perišić* Decision, para. 17; *Popović et al.* Decision, para. 15; *Krajišnik* Decision, para. 12.

⁵⁹ *Karemera et al.* Appeal Decision, para. 39.

subject to that presumption, may be challenged at that trial”.⁶⁰ 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”.⁶¹ Importantly, however, “the judicial notice of adjudicated facts does not shift the ultimate burden of persuasion which remains with the Prosecution”.⁶²

IV. DISCUSSION

A. Preliminary Issue

27. The Chamber finds that the technical character of the Rule 94(B) related litigation, the number of Proffered Facts and, as a consequence, the number of detailed objections thereto submitted in the Responses, militate in favour of allowing the Reply to the Simatović Response and the Reply to the Stanišić Response.

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

28. With regard to this requirement, 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”.⁶³ 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.⁶⁴

29. 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: 1-33, 38-107, 109-148, 150-151, 153-155, 157-178 and 180-213.

30. The Simatović Defence challenges Proffered Facts 34-37 as “unclear or misleading within the context in which they were placed by the prosecution”, submitting that they simplify otherwise very complex processes such as the positions expressed by some prominent Serb figures on the issue of the future of Serbs in Croatia.⁶⁵ The Chamber finds that these Proffered Facts are

⁶⁰ *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.

⁶¹ *Karemera et al.* Appeal Decision, para. 42.

⁶² *Dragomir Milošević* Appeal Decision, para. 16 citing *Karemera et al.* Appeal Decision, para. 42.

⁶³ *Krajišnik* Decision, para. 14, fn. 44.

⁶⁴ *Ibid.*

⁶⁵ Simatović Response, para. 14. See Reply to Simatović Response, para. 7; Second Simatović Response, para. 4, withdrawing *inter alia* the Simatović Defence objection to Proffered Fact No. 6.

sufficiently clear, distinct and identifiable, and that the Simatović Defence's objections are directed towards the substance of the *Martić* Chamber's findings which the Defence disputes, rather than towards pointing out the formal deficiencies of these Proffered Facts. However, the Chamber notes that in order to avoid overly argumentative expressions and rather to focus on the primarily factual elements, Proffered Fact 37 should be redrafted by deleting the first sentence and words "similarly" and "the same view" from its second and third sentences.⁶⁶

31. The Stanišić Defence submits that Proffered Facts Nos 108, 149, 152, 156 and 179⁶⁷ are too vague insofar as they relate to "Serb paramilitaries, paramilitaries or volunteers from Serbia".⁶⁸ The Chamber notes that although containing potentially generic terms, these Proffered Facts should be seen in the context of the whole case. The Chamber finds that being the result of limited findings made by the Trial Chamber in the *Martić* case, Proffered Facts Nos 108, 149, 152, 156 and 179 are sufficiently clear to be accepted for the purpose of Rule 94(B) procedure.

32. In conclusion, the Chamber finds that the following Proffered Facts are sufficiently distinct, concrete and identifiable: 1-36, 38-213. The Chamber further finds that Proffered Facts No. 37 should be redrafted.

C. The Proffered Facts Must be Relevant to the Case

33. 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: 1-37, 40, 42-58, 61-139, 141, 145-166 and 169-213.

34. The Simatović Defence challenges several Proffered Facts as irrelevant to the allegations in the present case. Specifically, it points out Proffered Fact 38.⁶⁹ 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 a background allowing for a better understanding of

⁶⁶ Proffered Fact No. 37 shall read: "In early July 1992, Milan Martić stated that the *Milicija Krajine* were 'defending Serbian land and the Serbs' ethnic area'. On 19 August 1991, Milan Martić stated that he would accept no autonomy and that 'the territories controlled by the police and the Territorial Defence of the Serbian Autonomous Region of Krajina will forever remain Serbian'. On 5 September 1991, Milan Babić stated that 'the Serbs are recognised in every part of Yugoslav State territory as a nation, which they will continue to be [w]ithin the part of the state that remains as a whole following the secession of the former Socialist Republic of Croatia's real territory and all Slovenia.' On 12 December 1991, Milan Martić stated that 'nobody [...] has the right to deny the Serbian people the right to live in their own country'."

⁶⁷ The Trial Chamber notes that the Stanišić Response contains the reference to Proffered Fact 279 as opposed to Proffered Fact 179. However, the reading of the Defence objection clearly shows that the Stanišić Defence refers to the latter.

⁶⁸ Stanišić Response, para. 25; Reply to Stanišić Response, paras 20, 22-25.

⁶⁹ Simatović Response, para. 11; Reply to Simatović Response, para. 4; Second Simatović Response, para. 4, withdrawing *inter alia* the Simatović Defence objection to Proffered Facts Nos 1, 8, 10 and 16.

the issues in the present case. The same holds true for the facts describing the political system of the SAO Krajina or otherwise shedding a light on the background against which the crimes charged in the Indictment were committed. For these reasons, the Chamber does not see any merit in the Simatović Defence challenges to Proffered Fact 38.

35. Similarly, the Simatović Defence challenges Proffered Facts 39, 41 and 59-60 as relating to the actions and role of Milan Martić and therefore as irrelevant to the allegations in the present case.⁷⁰ The Prosecution argues that Milan Martić is an alleged member of the JCE together with the Accused as well as an alleged link to the Accused.⁷¹ The Chamber finds that the actions and state of mind of Milan Martić are relevant to the determination of the responsibility of the Accused in the present case.

36. The Stanišić Defence challenges Proffered Facts 140, 142-144 and 167-168 as referring to the crime base not forming part of the Indictment and therefore irrelevant to the present case.⁷² To address this concern the Prosecution withdrew Proffered Facts Nos 142-144 and 167-168 from its Motion. Moreover, the Prosecution suggested redacting Proffered Fact No. 141, deleting the first sentence thereof.⁷³

37. The Chamber finds that the third sentence of Proffered Fact No. 140 is sufficiently relevant to the present case to be considered for the purpose of the Rule 94(B) procedure. As a consequence, Proffered Fact No. 140 should be redacted by deleting the first and the second sentence.⁷⁴ Similarly, the second and third sentences of Proffered Fact No. 141 are sufficiently relevant. As a consequence, Proffered Fact No. 141 should be redacted by deleting the first sentence.⁷⁵ Moreover, in light of the Prosecution withdrawal of Proffered Facts Nos 142-144 and 167-168, the Stanišić Defence's objections thereto are moot.

38. In conclusion, the Chamber finds that the following Proffered Facts are sufficiently relevant to the present case: 1-139, 145-166 and 169-213. The Chamber further finds that Proffered Facts Nos 140 and 141 should be redrafted.

⁷⁰ Simatović Response, para. 12; Second Simatović Response, para. 4, withdrawing *inter alia* the Simatović Defence objection to Proffered Facts Nos 14, 17 and 21-22.

⁷¹ Reply to Simatović Response, para. 5.

⁷² Stanišić Response, paras 19-20; Second Stanišić Response, para. 5, withdrawing an objection to Proffered Fact No. 141.

⁷³ Reply to Stanišić Response, para. 15.

⁷⁴ Proffered Fact No. 140 shall read: "Croat villages were located to the south of Škabrnja, whereas predominantly Serb villages were located to the north-east of Škabrnja, towards Benkovac municipality".

⁷⁵ Proffered Fact No. 141 shall read: "Around September 1991, approximately 240 Croatian reserve police members and local volunteers were present in Škabrnja. In September 1991, Škabrnja and Nadin were shelled and subjected to aerial bombings, including by cluster bombs".

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

39. This requirement means that the Proffered Facts must represent *factual findings* of a Trial Chamber or of the Appeals Chamber.⁷⁶ In general, findings related to the *actus reus* or *mens rea* of a crime are deemed to be factual findings.⁷⁷ 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”.⁷⁸

40. The parties do not challenge any of the Proffered Facts on this ground. However, the Chamber is of the opinion that the following Proffered Facts: 50-52, 79, 99, 127, 149 and 179 contain impermissible reference to acts of looting. However, instead of rejecting these facts in their entirety, the Chamber decides that the appropriate remedy is: in the case of Proffered Fact No. 50 – deletion of the second sentence;⁷⁹ in the case of Proffered Fact No. 51 – deletion of the third sentence;⁸⁰ in the case of Proffered Fact No. 52 – deletion of the third sentence;⁸¹ in the case of Proffered Fact No. 99 – deletion of the third and the sixth sentence;⁸² in the case of Proffered Fact No. 127 – deletion of the second sentence;⁸³ and in the case of Proffered Fact No. 149 – deletion of the first and the third sentence.⁸⁴ At the same time, the Chamber finds that Proffered Facts Nos 79 and 179 cannot be cured by way of redaction and are therefore rejected.

⁷⁶ *Dragomir Milošević* Appeal Decision, paras 19-22; *Krajišnik* Decision, para. 15.

⁷⁷ *Krajišnik* Decision, para. 16.

⁷⁸ *Krajišnik* Decision, para. 19. See also *Dragomir Milošević* Appeal Decision, paras 19-22.

⁷⁹ Accordingly, Proffered Fact No. 50 shall read: “The Catholic church in Kijevo was damaged during the attack, and was later destroyed”.

⁸⁰ Accordingly, Proffered Fact No. 51 shall read: “On 28 August 1991, TG-1 of the JNA 9th Corps also attacked the mixed Croat and Serb village of Vrlika, located south of Knin near Kijevo. After the attack, an SJB of the SAO Krajina MUP was established in Vrlika.”

⁸¹ Accordingly, Proffered Fact No. 52 shall read: “On 16 September 1991, Drniš, which is located near Knin and at the time was 75% Croat, was attacked by forces and artillery of TG-1 of the JNA 9th Corps. During the attack, and the following days, the centre of Drniš was almost completely destroyed. Approximately 10-15 days after the attack, an SJB of the SAO Krajina MUP was set up in Drniš.”

⁸² Accordingly, Proffered Fact No. 99 (mistakenly referred to as No. 59 in the Motion and placed between Proffered Facts Nos 98 and 100) shall read: “Prior to August 1993, a Catholic church in Hrvatska Dubica was razed to the ground and its foundations were removed. The Orthodox church remained intact and was still standing in 1995. By 1995, many houses in Hrvatska Dubica belonging to Croats had been destroyed. The part of the village which contained both Serb and Croat houses remained intact.”

⁸³ Accordingly, Proffered Fact No. 127 shall read: “After the attack, there were many Serb soldiers and policemen in the centre of Saborsko. An individual identified as “Peić” together with Željko “Buba” Mudrić and Nedeljko “Kiča” Trbojević, as well as “other Martić’s men” drove away in private cars they found in Saborsko.”

⁸⁴ Accordingly, Proffered Fact No. 149 shall read: “Volunteers from Serbia and BiH, who were joined to the Benkovac TO, participated during the attack on Škabrnja.”

41. Similarly, the Chamber notes that Proffered Fact No. 128 contains an impermissible reference to “plunderers”. However, instead of rejecting this fact in its entirety, the Chamber decides that the appropriate remedy is deletion of the first sentence.⁸⁵

42. The Chamber also finds that following Proffered Facts: 92, 112, 136, 166, 173-175 and 192 contain an impermissible reference to “intentional killings”, thus directly implying the legal finding of murder. However, instead of rejecting these facts in their entirety, the Chamber decides that the appropriate remedy is to redact each of them by deleting the qualification of killings as “intentional”.⁸⁶

43. In conclusion, the Chamber finds that the following Proffered Facts do not contain findings or characterisations that are of an essentially legal nature: 1-49, 53-78, 80-91, 93-98, 100-111, 113-126, 129-135, 137-148, 150-165, 167-172, 176-178, 180-191 and 193-213. The Chamber further finds that Proffered Facts Nos 50-52, 92, 99, 112, 127-128, 136, 149, 166, 173-175 and 192 should be redrafted.

⁸⁵ Accordingly, Proffered Fact No. 128 shall read: “More than 50 cattle from Saborsko were brought to Plaški and 17 sheep were taken to Kunić. Many houses in Saborsko were set alight and burnt after the attack. The perpetrators, who were engaged in the burning of the houses included Nedeljko “Kiča” Trbojević, “Peić”, Željko “Buba” Mudrić, as well as “other Martić’s men”. Houses in the hamlets of Tuk and Dumenčići, and in the Serb hamlet of Solaje, were also set alight. In Borik, both Croat and Serb houses were burned.”

⁸⁶ Accordingly, Proffered Fact No. 92 shall read: “The following persons from Cerovljani were killed on or around 20 or 21 October 1991 either by the Milicija Krajine, or units of the JNA or the TO, or a combination of some of them: Marija Antolović, Ana Blinja, Josip Blinja, Katarina Blinja, Nikola Blinja, Andrija Likić, Ana Lončar, Antun Lončar, and Kata Lončar (born 1906).”; Proffered Fact No. 112 shall read: “These killings were perpetrated by Serb paramilitary forces.”; Proffered Fact No. 136 shall read: “20 persons were killed in Saborsko on 12 November 1991: Ana Bičanić, Milan Bičanić, Nikola Bičanić, Petar Bičanić, Darko Dumenčić, Ivica Dumenčić, Kata Dumenčić, Nikola Dumenčić, Kata Matovina (born 1920), Mate Matovina (born 1895), Milan Matovina, Slavko Sertić, Mate Špehar, Josip Štrk, Jure/Juraj Štrk, Ivan Vuković, Jeka/Jela Vuković, Jure Vuković (born 1929), Jure Vuković (born 1930), and Petar Vuković.”; Proffered Fact No. 166 shall read: “Jozo Brkić, Jozo Miljanić, Slavka Miljanić, Petar Pavičić, Mile Pavičić, Ilija Ražov, Kata “Soka” Rogić, Ivica Šegarić, Rade Šegarić and Vice Šegarić were killed outside Petar Pavičić’s house in Škabrnja on 18 November 1991. The perpetrators of these killings were members of local paramilitary units, who participated, together with other SAO Krajina forces, in the attack on Škabrnja and who wore camouflage uniforms and different sorts of headgear.”; Proffered Fact No. 173 shall read: “These victims, with the exception of Petar Rogić, were killed by members of the units, including JNA and TO units, which took part in the attack on Škabrnja and Nadin on 18 and 19 November 1991.”; Proffered Fact No. 174 shall read: “Petar Rogić...was killed in Benkovac by unidentified perpetrators after having been taken from Škabrnja.”; Proffered Fact No. 175 shall read: “The following that the following members of the Croatian defence forces present in Škabrnja and Nadin were killed on 18 and 19 November 1991: Vladimir Horvat, Nediljko Jurić, Slavko Miljanić, Gašpar Perica, Ante Ražov, Marko Rogić, Bude Šegarić, Miljenko Šegarić, Šime Šegarić, Nediljko Škara and Stanko Vicković. Ante Ražov, Šime Šegarić, Miljenko Šegarić, Vladimir Horvat, Gašpar Perica, and Marko Rogić were not taking an active part in the hostilities at the time of their deaths. These victims, with the exception of Šime Šegarić and Miljenko Šegarić, were killed by members of the units, including JNA and TO units, which took part in the attack on Škabrnja and Nadin on 18 and 19 November 1991. Miljenko Šegarić was killed in Benkovac by unidentified perpetrators after having been taken from Škabrnja. Šime Šegarić was killed in Knin by unidentified perpetrators after having been put by paramilitary soldiers in a JNA APC in Škabrnja.”; Proffered Fact No. 192 shall read: “Sveto Drača, Dragan Marinović, Draginja Marinović, Dušan Marinović, Ika Marinović, Krsto Marinović, Manda Marinović, Petar Marinović, Roko Marinović and Stana Marinović were killed in Bruška on 21 December 1991 by the *Milicija Krajine*.”

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

44. The parties do not challenge any of the Proffered Facts on this ground.⁸⁷ However, the Chamber notes that Proffered Facts Nos 1, 3-5, 7, 10, 12-15, 17, 19 and 21-22 are, to a different extent, based on agreed facts between the parties in the *Martić* case.⁸⁸

45. The Chamber notes that the limitation imposed on the proposed adjudicated fact in the regime of Rule 94(B) of the Rules concerns facts (or parts of facts) based entirely (or in a 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 or, using different wording for the similar concept, where the particular fact based on an agreed fact is sufficiently corroborated by other evidence.⁸⁹

46. The sources of Proffered Facts Nos 1, 3-5, 7, 10, 12-15, 17, 19 and 21-22 as identified in the relevant footnotes of the *Martić* Trial Judgement reveal that although these facts are based on agreed facts, they are also sufficiently corroborated by other evidence. The Chamber therefore finds that these Proffered Facts fulfil the requirements of the Rule 94(B) procedure.

47. In conclusion, the Chamber finds that the following Proffered Facts are not based on an agreement between the parties to the original proceedings: 1-213.

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

48. The parties do not challenge any of the Proffered Facts on this ground. The Chamber notes that all the Proffered Facts have either 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

49. A Trial Chamber must withhold judicial notice of any alleged adjudicated fact relating to the acts, conduct or mental state of the accused. Two factors warrant this “complete exclusion”. First, it

⁸⁷ See Stanišić Response, para. 29; Reply to Stanišić Response, para. 27; Second Stanišić Response, para. 5, withdrawing objections to Proffered Fact Nos 1, 3-5, 7, 10, 12-15, 17, 19 and 21-22; Second Simatović Response, para. 4.

⁸⁸ See Stanišić Response, para. 29; Reply to Stanišić Response, para. 27; Second Stanišić Response, para. 5, withdrawing objections to Proffered Fact Nos 1, 3-5, 7, 10, 12-15, 17, 19 and 21-22.

⁸⁹ See also *Popović et al.* Decision, para. 11.

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*”.⁹⁰ Second, the Appeals Chamber held:

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 [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.⁹¹

50. 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)”.⁹² It is for Trial Chambers, in the careful exercise of their discretion, to assess each particular fact in order to determine whether taking judicial notice of it—and thus shifting the burden of producing evidence rebutting it 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.⁹³

51. 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 through one or more of the forms of liability in Article 7(1) or (3) of the Statute.⁹⁴

52. 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 mental state of the Accused: 1-8, 10-23, 27, 34-41 and 59-213.

53. The Chamber notes that some of the Proffered Facts refer to the acts and conduct, potentially pertinent to the existence of the JCE, of groups of persons of whom one or both of the Accused were or may have been a part (e.g. “MUP of Serbia”, “SDB of Serbia”, “government of Serbia”, “leadership of Serbia” – indirectly also – “cooperation with Serbia” or “military support from Serbia”).⁹⁵ The Chamber finds that admission of several of these Proffered Facts would not be consistent with the rights of the Accused in the present case. The following Proffered Facts are

⁹⁰ *Karemera et al.* Appeal Decision, para. 51.

⁹¹ *Ibid.*

⁹² *Karemera et al.* Appeal Decision, para. 47.

⁹³ *Karemera et al.* Appeal Decision, para. 52.

⁹⁴ *Karemera et al.* Appeal Decision, para. 48.

⁹⁵ See *Popović et al.* Decision, fn. 62.

therefore rejected: 24-26, 29-33 and 53-54.⁹⁶ The Chamber is however of the opinion that Proffered Facts Nos 9, 28, 42 and 55-58 do not suffer from this deficiency.⁹⁷

54. The Chamber also notes that Proffered Facts Nos 42-52 relate not to conduct of the Accused as claimed by the Simatović Defence, but rather to conduct of persons for whose criminal acts and omissions the Accused are alleged to be responsible.⁹⁸ As a consequence, the Chamber finds that they are admissible pursuant to Rule 94(B) of the Rules.

55. In conclusion, the Chamber finds that the following Proffered Facts do not relate to the acts, conduct, or mental state of the Accused: 1-23, 27-28, 34-52 and 55-213.

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

56. 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 the way they are formulated – 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.⁹⁹ Finally, a proposed fact also has to be examined in the context of the other Proffered Facts in the motion. It follows that the Trial 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.¹⁰⁰

57. 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: 1-57, 59-66, 68-94, 96-107, 109-125, 127-155, 157-178 and 180-213.

58. The Stanišić Defence challenges Proffered Fact No. 67 as misstating the finding made in the *Martić* case.¹⁰¹ The Prosecution addressing this concern proposes to amend this fact by replacing the reference to year “1991” with “1990”.¹⁰² The Chamber finds that Proffered Fact No. 67 in the

⁹⁶ For the Defence objection – see Simatović Response, para. 13; Reply to Simatović Response, para. 6; Stanišić Response, paras 11-15; Reply to Stanišić Response, paras 10-13;

⁹⁷ For the Defence objection – see Simatović Response, para. 13; Reply to Simatović Response, para. 6; Stanišić Response, paras 13-16; Reply to Stanišić Response, paras 10-12.

⁹⁸ See Simatović Response, para. 13; Reply to Simatović Response, para. 6; Stanišić Response, para. 13; Second Stanišić Response, para. 5, withdrawing an objection to Proffered Fact No. 51.

⁹⁹ *Karemera et al.* Appeal Decision, para. 55; *Popović et al.* Decision, para. 8.

¹⁰⁰ See *Popović et al.* Decision, para. 8.

¹⁰¹ Stanišić Response, para. 22. See also Second Stanišić Response, para. 5.

¹⁰² Reply to Stanišić Response, para. 16; See Stanišić Response, para. 22 and Second Stanišić Response, para. 5, withdrawing an objection to Proffered Fact No. 67.

amended form as proposed by the Prosecution does not differ substantially from the formulation in the original judgement.¹⁰³

59. The Stanišić Defence challenges Proffered Fact No. 95 as containing the misleading phrase “these victims from Baćin”.¹⁰⁴ The Prosecution addressing this concern proposes to amend this fact by replacing the phrase “these victims” with the more general “the victims”.¹⁰⁵ The Chamber finds that Proffered Fact No. 95 in the amended form as proposed by the Prosecution is not misleading and does not differ substantially from the formulation in the original judgement.¹⁰⁶

60. The Stanišić Defence challenges Proffered Facts No. 126 as containing a misleading reference to the shelling of churches.¹⁰⁷ The Prosecution proposes to address this concern by amending this fact and deleting its last two sentences.¹⁰⁸ Similarly, the Prosecution proposes to redact Proffered Fact No. 129 by deleting its first sentence.¹⁰⁹ The Chamber finds that Proffered Facts Nos 126 and 129 in the amended form as proposed by the Prosecution are not misleading and do not differ substantially from the formulation in the original judgement.¹¹⁰

61. The Stanišić Defence challenges Proffered Fact No. 108 as it refers to the “Serb paramilitary units” but omits the fact that for the witness on whose testimony this finding was made, “a paramilitary unit is the same thing as a reserve force or the TO”.¹¹¹ The Prosecution argues that this Fact refers to “armed units including Serb paramilitary units” and that in this context a clear definition of paramilitary units is not required as armed units would include reserve and TO forces in any event.¹¹² The Chamber finds that, having regard to the nature of the allegations in the Indictment, the term “Serb paramilitary units” should be used as precisely as possible. For this reason, the Chamber is not satisfied that Proffered Fact No. 108 fulfils the requirements of Rule 94(B) procedure.

¹⁰³ Proffered Fact No. 67 shall read: “In 1990 the population in Baćin was 95% Croat, and 1,5 % Serb”.

¹⁰⁴ Stanišić Response, para. 23.

¹⁰⁵ Reply to Stanišić Response, para. 19.

¹⁰⁶ Proffered Fact No. 95 shall read: “The victims from Baćin were killed around October 1991 either by the *Milicija Krajine*, or units of the JNA or the TO, or a combination of some of them”.

¹⁰⁷ Stanišić Response, para. 24. See Second Stanišić Response, para. 5.

¹⁰⁸ Reply to Stanišić Response, para. 21.

¹⁰⁹ Ibid.

¹¹⁰ Proffered Fact No. 126 shall read: “The attack commenced with aerial bombing followed by an artillery attack. Afterwards, ground units, including tanks, moved in on Saborsko from three axes”. Accordingly, Proffered Fact No. 129 shall read: “By 1995, the whole of Saborsko, including the school, had been destroyed. The only houses left standing were two Serb houses, which had been very badly damaged”.

¹¹¹ Stanišić Response, para. 25.

¹¹² Reply to Stanišić Response, para. 20.

62. The Stanišić Defence challenges Proffered Fact No. 156 as omitting further specification from the *Martić* Judgement.¹¹³ Accordingly, the Prosecution, in addressing this concern, proposes to amend this fact by adding the missing element.¹¹⁴ The Chamber finds that Proffered Fact No. 156 in the amended form as proposed by the Prosecution is not misleading and does not differ substantially from the formulation in the original judgement.¹¹⁵

63. The Stanišić Defence challenges Proffered Fact No. 179 as omitting to take into account the finding of the Trial Chamber in the *Martić* case that it was not established that soldiers under the command of the Benkovac TO were involved in the burning of houses in Škabrnja.¹¹⁶ The Prosecution submits that the Stanišić Defence's argument is misleading.¹¹⁷ The Chamber notes that the *Martić* Chamber expressed no doubt that looting was committed in Škabrnja by soldiers under the command of the Benkovac TO and its reservations were only directed towards the nature or scale of such looting – an element necessary to establish the crime of plunder of public or private property punishable under 3(e) of the Statute. The Chamber is therefore satisfied that Proffered Fact No. 179 does not differ substantially from the formulation in the original judgement.

64. The Stanišić Defence challenges Proffered Fact No. 58 as substantially different from the findings in the *Martić* Judgement.¹¹⁸ The Prosecution submits that although some sentences from the original paragraph were omitted, such omitted parts referred to broader facts.¹¹⁹ As a consequence, according to the Prosecution, such amendments do not prevent judicial notice of the factual findings as proposed.¹²⁰ A careful reading of the original paragraph of the *Martić* Judgement reveals that while preparing Proffered Fact No. 58, the Prosecution did omit some material that further qualifies the information contained therein. However, the Chamber is satisfied that the findings contained in Proffered Fact No. 58 are sufficiently clear and distinct and presenting them in this form does not change the original meaning given to them in the *Martić* Judgement.

65. In conclusion, the Chamber finds that the following Proffered Facts do not differ substantially from the formulation in the original judgement: 1-66, 68-94, 96-107, 109-125, 127-

¹¹³ Stanišić Response, para. 25.

¹¹⁴ Reply to Stanišić Response, para. 24.

¹¹⁵ Proffered Fact No. 156 shall read: "Paramilitary units, often referred to simply as 'Chetniks', were present in Škabrnja and wore various kinds of JNA uniforms, some with an insignia with four Cyrillic 'S', and different kinds of hats, including berets, fur hats with cockades and hats. Their faces were painted, however the evidence shows that at least some of them appeared to be local".

¹¹⁶ Stanišić Response, para. 27.

¹¹⁷ Reply to Stanišić Response, para. 25.

¹¹⁸ Stanišić Response, para. 26.

¹¹⁹ Reply to Stanišić Response, para. 18.

¹²⁰ Ibid.

128, 130-155 and 157-213. The Chamber further finds that Proffered Facts Nos 67, 95, 126, 129 and 156 should be redrafted.

I. Chamber's Residual Discretion

66. Besides the application of the above-analysed requirements, 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.

67. Both the Stanišić and Simatović Defence, often by way of incorporating its arguments presented in their litigation on the previous adjudicated motion of the Prosecution,¹²¹ 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.¹²²

68. The Chamber already dismissed several of these arguments in its "Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts" of 25 November 2009 ("First Adjudicated Facts Decision") and therefore directs the Parties to its findings in that decision.¹²³

69. The Chamber notes the Defence submissions that the admittance of such a large number of adjudicated facts puts too onerous a burden of rebuttal upon the Accused and violates the principle of a fair trial.¹²⁴ The Chamber finds that although the Prosecution seeks admission of a large amount of Proffered Facts and even though the Motion was preceded by a similar one seeking admission of 533 facts, in the context of the whole trial, the Proffered Facts are still manageable. As a consequence, the mere number of Proffered Facts does not militate against their admission.

70. Besides its general objection regarding the co-existence of the regimes of Rule 92 *quater* and Rule 94(B) which was already addressed by the Chamber in its First Adjudicated Facts Decision,¹²⁵ the Stanišić Defence argues that acceptance of the Proffered Facts based on the only partly cross-examined evidence of Milan Babić, and thus inadmissible through the procedure of Rule 92 *quater*, would be unfair to the Accused.¹²⁶

¹²¹ Prosecution's Motion for Judicial Notice of Adjudicated Facts of 1 May 2007 and the Prosecution's Notification on Motion for Judicial Notice of Adjudicated Facts of 14 May 2007.

¹²² See Simatović Response, paras 17-18, 20, 27; Stanišić Response, paras 4, 6.

¹²³ First Adjudicated Facts Decision, paras 82 et seq.

¹²⁴ See Stanišić Response, para. 5. See also Simatović Response, paras 17-18 and 20-26.

¹²⁵ First Adjudicated Facts Decision, paras 86-87.

¹²⁶ See Stanišić Response, para. 6.

71. The Chamber notes that the mere fact that the evidence could be seen as inadmissible or – as in the present case – where there are procedural reasons unfavourable to such admission under the regime of one rule, does not automatically mean that the same evidence cannot be admitted under another rule. The Chamber notes that although the lack of full cross-examination of Milan Babić's evidence may to a certain degree be unfavourable to its admission pursuant to Rule 92 *quater*,¹²⁷ the Chamber in the *Martić* case found the evidence of Milan Babić of sufficient probative value and even though the cross-examination was not completed, relied extensively on this evidence in its judgement. Therefore, the Chamber finds that there is no reason why such evidence cannot be admitted through Rule 94(B) of the Rules. Finally, the Chamber recalls that taking judicial notice of adjudicated facts does not preclude the Defence from offering evidence to rebut such facts and that the Chamber retains the obligation of assessing the weight of the facts taking into consideration the evidence of the case in its entirety.

¹²⁷ The Chamber notes that the requirement of cross-examination is just one of several elements that should be taken into account in deciding on admission pursuant to Rule 92 *quater* of the Rules and cannot be treated as a *conditio sine qua non*.

V. DISPOSITION

72. Based on the reasoning set forth above and pursuant to Rules 54, 94(B) and 126 *bis* of the Rules, the Chamber:

GRANTS leave to file a Reply to the Simatović Response;

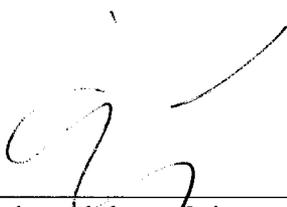
GRANTS leave to file a Reply to the Stanišić Response;

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

- 1) 1-23, 27-28, 34-36, 38-49, 55-66, 68-78, 80-91, 93-94, 96-98, 100-107, 109-111, 113-125, 130-135, 137-139, 145-148, 150-155, 157-165, 169-172, 176-178, 180-191 and 193-213;
- 2) 37, 50-52, 67, 92, 95, 99, 112, 126-129, 136, 140-141, 149, 156, 166, 173-175 and 192 subject to the changes indicated in the text 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-eight day of January 2010
At The Hague
The Netherlands

[Seal of the Tribunal]