



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-08-91-T
Date: 14 July 2010
Original: English

IN TRIAL CHAMBER II

Before: Judge Burton Hall, Presiding
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: Mr. John Hocking

Decision of: 14 July 2010

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION DENYING THE PROSECUTION'S REQUEST FOR
CERTIFICATION TO APPEAL THE "DECISION GRANTING IN PART
PROSECUTION'S MOTIONS FOR JUDICIAL NOTICE OF ADJUDICATED
FACTS PURSUANT TO RULE 94(B)"**

The Office of the Prosecutor

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Counsel for the Accused

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TRIAL CHAMBER II (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of “Prosecution’s request for certification to appeal the ‘Decision granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B)’”, filed on 7 April 2010 (“Motion”),¹ whereby the Prosecution requests certification to appeal the Trial Chamber’s Decision of 1 April 2010 regarding adjudicated facts (“Impugned Decision”).²

1. Neither the Defence of Mićo Stanišić nor the Defence of Stojan Župljanin responded to the Motion.

I. PROCEDURAL HISTORY

2. On 14 December 2007, prior to the joinder of the cases against Mićo Stanišić and Stojan Župljanin (collectively, “Accused”), the Trial Chamber then seised of the case against Mićo Stanišić issued a “Decision on judicial notice” (“First Decision”),³ whereby it took judicial notice of 853 facts.⁴

3. Subsequently, the Prosecution filed four further motions for judicial notice of adjudicated facts and, following joinder of the cases against the two Accused,⁵ a notice seeking the application to Stojan Župljanin of the adjudicated facts from the First Decision relating to Mićo Stanišić (collectively, “Prosecution Motions for Judicial Notice”).⁶

4. On 1 April 2010, this Trial Chamber issued the Impugned Decision, addressing the Prosecution Motions for Judicial Notice, in which it took judicial notice of 1086 adjudicated facts,

¹ Prosecution’s request for certification to appeal the “Decision granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B)”, 7 Apr 2010.

² Decision granting in part Prosecution’s motions for judicial notice of adjudicated facts pursuant to Rule 94(B), 1 Apr 2010.

³ *Prosecutor v Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Judicial Notice, 14 December 2007, which decided the following motions: Prosecution’s motion for judicial notice of facts of common knowledge and adjudicated facts, with annex, 31 Aug 2006 (“First Motion”); Defence motion for judicial notice of adjudicated facts with annex, 1 Feb 2007 (“Stanišić Defence Motion”); and Prosecution’s second motion for judicial notice of adjudicated facts, with revised and consolidated annex, 10 May 2007 (“Second Motion”).

⁴ First Decision, para. 28.

⁵ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT and *Prosecutor v. Stojan Župljanin*, Case No. IT-99-36/2-PT, Decision on Prosecution motion for joinder and leave to consolidate and amend indictments, 26 Sep 2008 (“Joinder Decision”).

⁶ Prosecution’s third motion for judicial notice of adjudicated facts, with annex, 25 Jan 2008 (“Third Motion”); Prosecution’s fourth motion for judicial notice of adjudicated facts, with annex, 24 Apr 2008 (“Fourth Motion”); Prosecution’s request and notice regarding application of adjudicated facts to Stojan Župljanin with annex, 23 Feb 2009 (“Notice”); Prosecution’s fifth motion for judicial notice of adjudicated facts, with annex, 21 Aug 2009 (“Fifth

as formulated in Annex A thereto,⁷ and declined to take judicial notice of 239 facts on the basis that they “do not fulfil at least one of the *Popović* Requirements” or “because taking judicial notice of them would not serve the interests of justice”.⁸

5. In the Impugned Decision, the Trial Chamber also reviewed the adjudicated facts of which the previous Trial Chamber took judicial notice in the case against Mićo Stanišić, in order to determine whether it should also take judicial notice of them in relation to Stojan Župljanin. Where, in the Trial Chamber’s view, a proposed fact failed to meet the admissibility requirements in relation to Stojan Župljanin, the Trial Chamber declined to take judicial notice of the fact in respect of either of the Accused.⁹ Of the adjudicated facts denied or redacted in the Impugned Decision, 233 facts had been accepted by the First Decision.

II. APPLICABLE LAW

6. In order to challenge a decision by way of interlocutory appeal, Rule 73(B) requires the Prosecution to show that the Impugned Decision meets both requirements of that Rule:¹⁰ that it involves, first, “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial” (“first prong”) and second, that “an immediate resolution by the Appeals Chamber may materially advance the proceedings” (“second prong”).

Motion”); and Prosecution’s sixth motion for judicial notice of adjudicated facts, with annex, 2 Feb 2010 (“Sixth Motion”).

⁷ The Trial Chamber has taken judicial notice of adjudicated facts from the following judgements: *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 Sep 2006; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 Sep 2004; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Appeals Judgement, 3 Apr 2007; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 Jul 2003; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 Nov 2001; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement, 5 Dec 2003; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-T, Judgement, 17 Oct 2003; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgement, 29 Nov 2002; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 Nov 1998 and *Prosecutor v. Duško Tadić*, Case No. IT-94-24-T, Judgement, 7 May 1997, Impugned Decision, Annex A.

⁸ Impugned Decision, para. 50.

⁹ Impugned Decision, para. 26 and fn 96 referring to *Prosecutor v. Popović et al.*, No. IT-05-88-T, Decision of Prosecution motion of judicial notice of adjudicated facts with annex, 26 Sep 2006 (“*Popović* Decision”), para. 22(d), where the Trial Chamber withheld judicial notice of purported facts that “relate to the acts, conduct, or mental state of one or more of the Accused” (emphasis added).

¹⁰ *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Gotovina Defence request for certification to appeal the Trial Chamber decision of 4 November 2009, 20 Jan 2010, para. 2; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-PT, Decision on Prosecution request for certification for interlocutory appeal of “Decision on Prosecutor’s motion seeking leave to amend the indictment”, 12 Jan 2005 (“*Halilović* Decision”), p. 2; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence motion for certification, 17 Jun 2004, para. 2; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on two Prosecution requests for certification of appeal against decisions of the Trial Chamber, 6 May 2003, p. 3.

7. Decisions on certification are not concerned with whether or not an impugned decision was correctly reasoned.¹¹ Rule 73(B) permits certification only where the Trial Chamber finds both requirements of the Rule are satisfied.¹² However, even where both requirements are satisfied, certification remains within the Trial Chamber's discretion.¹³

III. SUBMISSIONS

8. The Prosecution submits that because the Impugned Decision was not issued until "seven months after the commencement of trial",¹⁴ even though all but one of the Prosecution Motions for Judicial Notice had been filed before the trial began, it had "to decide upon, prepare, and present its case in the absence of any ruling by the Trial Chamber on [the] proposed adjudicated facts"¹⁵ and "to tailor its case in the absence of any certainty as to which adjudicated facts it could rely on".¹⁶

9. The Prosecution further asserts that the Impugned Decision "affects the fair conduct of the proceedings" as it "deprive[s] the Prosecution of its ability to rely on the proposed and previously granted adjudicated facts at this point of the trial".¹⁷

10. The Prosecution adds that "at the very least", it should have been able to rely on the adjudicated facts granted in the First Decision.¹⁸ The Prosecution contends that it has relied upon these facts in the presentation of its case so far and further that it "proceeded to present its case on the assumption that [they] would also be admissible as evidence against [Stojan Župljanin]"¹⁹ as indicated by the Trial Chamber at the pre-trial conference on 4 September 2009.²⁰

¹¹ *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-82/2-PT, Decision on request for certification of decision on Prosecution motion for judicial notice of adjudicated facts, 23 Feb 2010, p. 2; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence motion for certification to appeal decision on Prosecution motion for judicial notice of adjudicated facts, 20 Oct 2006, p. 2; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution motion for certification of Trial Chamber decision on Prosecution motion for *voir dire* proceedings, 20 Jun 2005 ("Milošević Decision"), para. 4.

¹² *Halilović* Decision, p. 1.

¹³ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Accused's application for certification to appeal decision on motions for extension of time: Rule 92bis and response schedule, 8 Jul 2009, para. 11; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution's request for certification of appeal of decision on Vladimir Lazarević and Sreten Lukić's preliminary motions on form of the indictment, 19 Aug 2005, p. 3; *Milošević* Decision, para. 2.

¹⁴ Motion, para. 4.

¹⁵ *Ibid.*

¹⁶ *Id.*, para. 6.

¹⁷ *Id.*, para. 9.

¹⁸ *Ibid.*

¹⁹ *Id.*, para. 8.

²⁰ *Id.*, para. 7, citing the following statement of the bench during the pre-trial conference: "It would be difficult now that the cases have been joined not to apply them to Župljanin. So what was admitted for Stanišić will cover Župljanin as well", Pre-trial conference, 4 Sep 2009, T. 143.

11. The Prosecution argues that the Impugned Decision “clearly affects the expeditiousness of the trial” for the reason that it “is now in a position where it must apply to the Trial Chamber either to recall witnesses, or to call additional witnesses and additional evidence to address factual issues that were covered by the proposed adjudicated facts” and “to seek adjournments to gather the necessary material.”²¹

12. The Prosecution asserts that immediate resolution by the Appeals Chamber will “remove the need for the Prosecution to seek leave to call additional witnesses, recall witnesses, seek adjournments of the trial in order to accomplish this, or seek substantial additional time for the presentation of its case”.²² In its view, “an immediate Decision would remove any element of uncertainty into the precise nature of the case that both Accused must face, and in turn, assist the Accused in preparing their defence.”²³

IV. DISCUSSION

13. The Prosecution states that, as a result of indications given by the Trial Chamber at the pre-trial stage,²⁴ it continued to rely on the adjudicated facts admitted in the First Decision as applicable in the joint case. Indeed, those indications might have led the Prosecution to expect that it could rely on those facts, and to present its case accordingly. However, a decision ignoring the impact of a joinder on the admissibility of the evidence proposed by the Prosecution through adjudicated facts could not only have been unfair to the Accused but also contrary to the existing jurisprudence on Rule 94(B).²⁵ In its preparations, therefore, the Prosecution should have considered that its request to join the two cases would, if granted, have an impact on the adjudicated facts accepted by the First Decision. The Trial Chamber is of the view that it is not the Impugned Decision but the Prosecution’s reliance on the indications provided by the Trial Chamber on the subject-matter in the pre-trial phase that may have affected to some extent the fair conduct of the proceedings.

14. Although, once again, this is not an issue flowing from the Impugned Decision itself, the Trial Chamber is also mindful of the Prosecution having had to prepare its case and present evidence over several months at trial without knowing which of the proposed adjudicated facts would be judicially noticed in the joined case.

²¹ Motion, para. 11.

²² *Id.*, para. 14.

²³ *Ibid.*

²⁴ As referred to by the Prosecution in the Motion, para. 7 and in the Motion for 53 additional witnesses, paras 20, 22-23, 25-27 (see fn 27 *infra*).

²⁵ As referred to in the Impugned Decision, paras 24-26. See also *supra* fn 9.

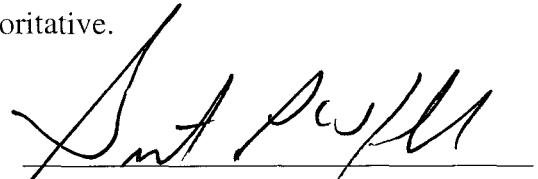
15. For all these reasons, the Trial Chamber is of the view that the Prosecution's attempts to remedy the situation created by its reliance on the Trial Chamber's indications during pre-trial and the timing of the Impugned Decision are justified. The Trial Chamber is, today, issuing a decision on the Prosecution's motion to add 53 witnesses, whereby it, *inter alia*, grants leave to add up to 44 witnesses to the Prosecution's witness list in order to fill "evidentiary gaps caused by the denial of adjudicated facts."²⁶ Accordingly, any unfairness that might have arisen from the context in which the Impugned Decision was issued is now mitigated.

16. The Prosecution's contention that the implementation of the Impugned Decision may extend the length of the proceedings has merit. However, Rule 73(B) requires that the issue in question significantly affect both the fair *and* the expeditious conduct of the proceedings, conditions which are intertwined.²⁷ The Trial Chamber finds, therefore, that the first prong is not met. Accordingly, the Trial Chamber will not address the Prosecution's submissions regarding the second prong.

V. DISPOSITION

17. Pursuant to Rule 73(B), the Trial Chamber **DENIES** the Motion.

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



Judge Burton Hall
Presiding

Dated this fourteenth day of July 2010

At The Hague

The Netherlands

[Seal of the Tribunal]

²⁶ Decision granting in part Prosecution's motion to amend its Rule 65 *ter* witness list as a result of the Trial Chamber's 1 April 2010 decision concerning judicial notice of adjudicated facts, 14 July 2010; Prosecution's motion to amend its Rule 65*ter* witness list as a result of the Trial Chamber's 1 April 2010 [decision] granting in part Prosecution's motions for judicial notice of adjudicated facts pursuant to Rule 94(B), with confidential annex, 27 May 2010, para. 18.

²⁷ *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Momčilo Krajišnik request to self-represent, on counsel's motions in relation to appointment of *amicus curiae*, and on the Prosecution motion of 16 February 2007, Fundamentally dissenting opinion of Judge Schomburg on the right to self-representation, 11 May 2007, paras 67-68.