

IT-96-23/2-PT
D 2215 - D 2208
16 MAY 2003

2215
Pk

**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-96-23/2-PT

Date: 16 May 2003

Original: English

IN THE TRIAL CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Amin El Mahdi
Judge Alphons Orié

Registrar: Mr. Hans Holthuis

Decision of: 16 May 2003

PROSECUTOR

v.

RADOVAN STANKOVIĆ

**DECISION ON PROSECUTION'S MOTION FOR JUDICIAL NOTICE
PURSUANT TO RULE 94(B)**

Office of the Prosecutor

Mr Upawansa Yapa

Counsel for the Accused

Mr Milenko Radović

INTRODUCTION

1. Trial Chamber I (“the 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 (the “Tribunal”) is seized with the “Prosecution’s Motion for Judicial Notice Pursuant to Rule 94(B)”, filed by the Office of the Prosecutor (“Prosecution”) on 13 February 2003 (the “Motion”), in which the Prosecution requests the Trial Chamber to take judicial notice of 37 (thirty-seven)¹ adjudicated facts (the “proposed facts”) derived from the judgements in *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23-T & IT-96-23/1-T of 22 February 2001 (“Kunarac Judgement”) and in *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, IT-96-23-A & IT-96-23/1-A of 12 June 2002 (“Kunarac Appeal”).

SUBMISSIONS OF THE PARTIES

2. The Prosecution alleges that Radovan Stanković (“the Accused”) was originally indicted in the case IT-96-23, and the crimes alleged in the indictment of the present case (“the Indictment”) concern the same type of crimes, committed in the same geographic area, at the same time and, with one exception,² against the same victims as proven in the Kunarac Judgement and in the Kunarac Appeal.

3. The Prosecution submits that Rule 94(B) of the Tribunal’s Rules of Procedure and Evidence (“the Rules”) permits a Trial Chamber to take judicial notice of adjudicated facts from other proceedings of the Tribunal. Relying on a decision in the *Kupreškić* case by the Appeals Chamber³ and on a decision in the *Milošević* case by Trial Chamber III,⁴ the Prosecution’s position appears to be that facts are “adjudicated” when they are:

¹ The Motion refers to “87 proposed facts as adjudicated” (para 2), although the Chamber finds only 37 of them stated in paras 4 and 5 of the Motion and will therefore only deal with these.

² One victim (named J.B.) cited in para 4.1 of the Indictment had not been named in the indictment of *Prosecutor v. Dragoljub Kunarac et al.*

³ Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, *Prosecutor v. Kupreškić et al.*, para 6.

⁴ Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Relevant to the Municipality of Brčko, *Prosecutor v. Milošević*, 5 June 2002, para 3, stating that “the Trial Chamber is willing to

- a) contained in a Trial Chamber's Judgement against which no appeal has been lodged;
- b) contained in a Trial Chamber's Judgement against which an appeal has been lodged, but when the factual findings in question are not the subject of the appeal;
- c) contained in an Appeal Chamber's Judgement that has ruled on them.

4. The Prosecution finally states that, before addressing the Chamber with the Motion, it had sought a response on the issue of admission of the adjudicated facts from Radovan Stanković's Defence ("the Defence"), but no written response was received concerning the proposed admissions.⁵

5. The Defence, in its Defence's Response to Prosecution Request submitted Pursuant to Rule 94(B), filed on 14 March 2003, (the "Response") requests the Chamber to reject the Motion. The Chamber understands the first ground for rejection proposed by the Defence to be that, in criminal matters, no decision is really final; therefore, no fact can be really deemed as adjudicated for the purpose of admitting it into another trial.⁶ Second, different judgements could, in principle, reach different conclusions as to the same fact; because two finders of fact can reasonably reach different conclusions, the Defence seemingly infers that it is not allowed for a Chamber to take judicial notice of another Chamber's finding.⁷ Third, the Defence argues that in respect of some of the proposed facts cannot be accepted because "Mr Stanković is in no relation with anyone convicted in case *The Prosecution v. Kunarac et al*, therefore facts offered by the Prosecution cannot be accepted."⁸ The other grounds for rejection put forward by the Defence relate individually to one of more of the 37 proposed facts,⁹ and will be dealt by the Chamber by grouping these grounds according to homogeneous categories.

consider the admission of truly adjudicated facts, *particularly* where such facts are extracted from cases for which the Appeals Chamber has ruled on the merits or has not been called upon to do so."

⁵ Motion, para 2.

⁶ Response, paras 7.

⁷ Response, paras 8 and 11.

⁸ Response, para 12.

⁹ Response, paras 9 and 12.

DISCUSSION AND FINDINGS ON RULE 94(B)

6. Rule 94(B) states:

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.

7. The Chamber finds that Rule 94(B) is intended to achieve judicial economy under Articles 20(1) and 21(4)(c) of the Statute.¹⁰ This purpose must be reconciled with the overarching Tribunal's obligation to assure a fair trial to the Accused, who is presumed innocent. The Tribunal has already dealt in previous decisions with the issue of judicial notice, as well as with arguments similar to those raised by the Defence and the interaction between judicial economy and fairness to the Accused.

8. As regards the general argument that the Accused "is in no relation" with anyone of the persons convicted in the Kunarac Judgement and in the Kunarac Appeal,¹¹ the Chamber finds that, on the contrary, according to the charges brought against the Accused, there is a clear connection. It is true that, only after hearing the evidence at trial, the Chamber will be in a position to establish with complete knowledge whether or not the Accused is related to any person convicted in the Kunarac Judgement and in the Kunarac Appeal; and that this finding may have a bearing on the judgement. At the present moment, however, the issue before the Chamber is whether the charges relate the Accused to these facts. The Chamber therefore dismisses this argument.

9. The argument raised by the Defence that no judgement of the Tribunal is final goes beyond the point, since the principle enshrined in Rule 94(B) of the Rules does not necessarily rely on the absolute definitive nature of a finding of fact. An adjudicated fact admitted into evidence according to Rule 94(B) should not be looked at as *presumptio juris et de jure*, an irrebuttable presumption. In this respect, the Chamber recalls its findings in previous decisions, according to which a fact admitted into

¹⁰ See, among others, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000, *Prosecutor v. Duško Sikirica et al.*, IT-95-8-PT.

¹¹ Response, para 12.

evidence pursuant to Rule 94(B) is open to refutation or qualification.¹² Even if different fact-finders might reach different conclusions with respect to the same facts, the application of Rule 94(B) as provided for by the Rules is not impeded.

10. The Chamber agrees with the Defence that great caution should be exercised when assessing whether to admit adjudicated facts according to Rule 94(B) of the Rules, lest the right of the accused to a fair trial be compromised. The request for judicial notice should be dismissed if related to adjudicated facts which, directly or indirectly, tend to incriminate the Accused.

11. The Chamber deems that all of the 37 facts proposed by the Prosecution appear accurately to represent factual findings made by the Trial Chamber and the Appeals Chamber in the Kunarac Judgement and in the Kunarac Appeal, respectively, although with some caveats. Also, all proposed facts seem to be of some relevance to the present case, for they tend to introduce the broader picture within which the events alleged in the Indictment took place.

12. In most cases (namely, from the Kunarac Appeal, proposed facts A in part, B, D in part, E, F, G and, from the Kunarac Judgement, proposed facts A, C, D, E, F, J, K, L, M, O, P, Q, S, T, W, X, Y, Z, AA) the Defence opposes judicial notice of the proposed facts contesting the veracity and reliability of the sources. In one case (proposed fact I from the Kunarac Judgement) the Defence even argues that the finding contained in para 573 of the Kunarac Judgement “has not been established.” As already stated, in all cases of judicial notice under Rule 94(B) of the Rules, parties are allowed to bring evidence during trial contesting any admitted fact.

13. Three specific challenges from the Defence should be dealt with. With regard to proposed fact P, the Defence argues that the Decision on Motion for Acquittal of 3 July 2000 in the *Kunarac* case, para 16, implied that “neither one house was burnt down intentionally, *nor it was proved that it was ransacked.*” (Emphasis provided). The Chamber notes, on the contrary, that the decision merely clarified how the theft did not

¹² Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts, 23 January 2003, *Prosecutor v. Paško Ljubičić*, IT-00-41-PT, at 5; Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and Admission of Written Statements of Witnesses Pursuant to Rule 92bis, 28 February 2003, *Prosecutor v. Momčilo Krajišnik*, IT-00-39-PT, para 16.

amount to plunder under the jurisdiction of the Tribunal.¹³ At this moment, the Chamber does not therefore see an issue in this respect and accepts the expression “ransacked” in its ordinary meaning, without drawing any legal consequences from it. The Defence’s contention with respect to the burning of the houses also has no merit. With regard to proposed fact W, and in particular to the word “Srbinje”, the Chamber concurs that the word does not mean *literally* “the town of the Serbs” and therefore does not adopt the translation of the word “Srbinje.” Although the Chamber does not accept this translation, it does however accept that the name of the town was changed and that there is a relation between the new name and Serbian roots and heritage. With regard to the reliability of the witness cited in para 37 of the Kunarac Judgement (proposed fact AA), it is sufficient that she was deemed credible in respect of that specific incident.

14. Therefore, in light of the above, the Chamber finds that these proposed facts have actually been established by the Kunarac Appeal and/or by the Kunarac Judgement.

15. In other cases (namely, from the Kunarac Appeal, proposed fact C in part, and, from the Kunarac Judgement, proposed facts B, G, H, N) the Defence challenges the relevance of the proposed facts to the instant proceedings, or the relation of the Accused with the proposed facts. The Chamber, instead, as already stated *supra* (para 8), sees a clear connection in all these instances between the situations described in the Indictment and the proposed facts. Whether this connection will be confirmed by evidence led at trial is an altogether different matter.

16. In other cases (namely, from the Kunarac Appeal, proposed facts A in part, C in part, D in part, and, from the Kunarac Judgement, proposed facts R, U, V, Z) the Defence challenges the precision of the formulation of the proposed fact. As far as proposed fact R from the Kunarac Judgement is concerned, the Chamber rejects the argument, since the request of the Prosecution is clearly referring to the findings contained in paras 574-575 of the Kunarac Judgement, as contained in proposed facts L, M, N, O, P, Q. As far as proposed fact Z from the Kunarac Judgement is concerned, it is also clear from a comprehensive reading of para 37 of the Kunarac Judgement, that women were taken to Partizan Sports Hall from the High school; therefore, the

¹³ This specific issue was dealt with by the Judgement of 31 March 2003, *Prosecutor v. Mladen Naletilić*

Defence's challenge on this issue is moot. The other instances of alleged lack of precision on the part of the Prosecution are the use of the denomination "Foča" in various proposed facts.¹⁴ It is indeed true that the denomination "Foča" in the Kunarac Appeal and Kunarac Judgement describes not only the town, but, at times, also its municipality or even a wider area around it, comprising at least two other municipalities (Gačko and Kalinovik). The Prosecution in its Motion should have been more accurate in its use of the term, making reference in each instance to the exact scope of the term "Foča." The Chamber has supplied the missing qualifications, according to its understanding of the Kunarac Appeal, of the Kunarac Judgement and of the Motion.

17. As far as proposed facts BB from the Kunarac Judgement, however, after a *prima facie* analysis of paragraph 4.1 of the Indictment and of the relevant portion of the Kunarac Judgement, the Chamber finds that it tends indirectly to incriminate the Accused.¹⁵ The Chamber therefore deems that judicial notice of it should not be taken.

FOR THE FOREGOING REASONS,

PURSUANT TO Rule 94(B) of the Rules,

THE CHAMBER HEREBY,

ALLOWS the Motion in respect of the following proposed facts, subject to the qualifications expressed in the accompanying footnotes:

1) From the Kunarac Appeal:

A,¹⁶ B, C, D,¹⁷ E, F, G.¹⁸

and Vinko Martinović, IT-98-34-T, para 613.

¹⁴ From the Kunarac Appeal, the Defence explicitly refers to proposed facts A, D, G, and, from the Kunarac Judgement, to proposed facts U, V.

¹⁵ For the requirements mentioned in this paragraph, in addition to the other mentioned decisions, see Decision on the Pre-trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 March 1999, *Prosecutor v. Blagoje Simić et al.*, IT-95-9-PT; Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000, *Prosecutor v. Duško Sikirica et al.*, IT-95-8-PT.

¹⁶ The "area of Foča" here refers to Foča and the surrounding villages and municipalities (cfr. paras 21 and 47 of the Kunarac Judgement).

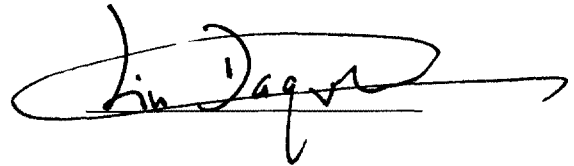
¹⁷ The "wider area of the municipality of Foča" here refers to the municipality of Foča and surrounding municipalities, including the municipalities of Gačko and Kalinovik (cf. paras 3, 61-64 of the Kunarac Appeal and 47 of the Kunarac Judgement).

2) From the Kunarac Judgement:

A,¹⁹ B, C, D,²⁰ E, F, G, H, I, J,²¹ K, L, M, N, O, P, Q, R,²² S, T,²³ U,²⁴ V,²⁵ W,²⁶ X, Y, Z,²⁷ AA, CC, DD.²⁸

DENIES the Motion in all other respects.

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



Judge Liu Daqun

Presiding

Dated this sixteenth day of May 2003
The Hague
The Netherlands

[Seal of the Tribunal]

¹⁸ "Foča" here refers to the municipality of Foča (cf. paras 97 of the Kunarac Appeal and 570 of the Kunarac Judgement).

¹⁹ The Chamber understands the submission of the Prosecution in this instance as limiting the request for judicial notice to the finding in para 571 of the Kunarac Judgement within the municipality of Foča.

²⁰ "Foča" here refers to the municipality of Foča (para 567 of the Kunarac Judgement).

²¹ "Foča" here refers to the municipality of Foča (paras 570-578 of the Kunarac Judgement).

²² As specified in para 14 above.

²³ "Foča" here refers to the municipality of Foča (paras 570-578 of the Kunarac Judgement).

²⁴ "Foča" here refers to the municipality of Foča (paras 570-578 of the Kunarac Judgement).

²⁵ "Foča" here refers to the municipality of Foča (paras 570-578 of the Kunarac Judgement).

²⁶ This fact is accepted by the Chamber in the meaning set out above, in para 13.

²⁷ As specified in para 14 above.

²⁸ Judicial notice of this fact does not imply any assessment by the Chamber of the legal value of the 1991 Census, or of its contents, which remain to be determined during trial.