



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-PT

Date: 26 June 2008

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding Judge
Judge Christine Van Den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Decision of: 26 June 2008

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

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

The Office of the Prosecutor

Mr. Mark Harmon

Counsel for the Defence

Mr. James Castle
Mr. Novak Lukić

1. **TRIAL CHAMBER I** (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo” (“Motion”), filed by the Prosecution on 6 February 2007, and hereby renders its decision.

I. SUBMISSIONS

A. Prosecution

2. In the Motion, the Prosecution requests the Trial Chamber to take judicial notice, pursuant to Rule 94(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), of 314 facts listed in Annex A to the Motion (“Proposed Facts”), which were adjudicated in the case of *Prosecutor v. Galić*, Case, No. IT-98-29 (“*Galić* case”) and based on the Trial and Appeals Chamber Judgements rendered in that case (“*Galić* Trial Judgement” and “*Galić* Appeals Judgement” respectively). The Prosecution submits that the taking of judicial notice of the Proposed Facts would obviate the need to recall many witnesses in relation to the events in Sarajevo and will contribute to a fair and expeditious trial.¹

3. The Prosecution recalls in the Motion the principles guiding the discretion to take judicial notice of adjudicated facts.² In particular, the Prosecution notes that judicial notice under Rule 94(B) “is in fact available *only* for adjudicated facts that bear, at least in some respect, on the criminal responsibility of the accused”, although it would be inappropriate for a Trial Chamber “to take judicial notice of facts which are in themselves sufficient to establish the accused’s criminal responsibility.”³ Furthermore, the Prosecution submits that there is no requirement that adjudicated facts be beyond reasonable dispute, and contends that procedural safeguards exist to reduce any risk of prejudice to Momčilo Perišić (“Accused”) such as “rescinding judicial notice as to a particular fact, admitting other evidence it might deem probative pursuant to Rule 89 (C)”, ordering the production of “additional evidence pursuant to Rule 98”, or finally “adjusting the evidentiary weight assigned to an adjudicated fact at a later time”.⁴ The Prosecution also argues that “the opposing party may present evidence to rebut the facts during the course of the trial” and that

¹ Motion, paras 3-6.

² Motion, paras 7-8 referring to *Prosecutor v. Krajišnik*, IT-00-39-T, Decision on Third and Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 24 March 2005 (“*Krajišnik* Decision”) and *Karamera et al.* ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2007 (« *Karamera et al.* Appeal Decision »).

³ Motion, para. 10, citing *Karamera et al.* Appeal Decision, para. 48.

⁴ Motion, paras 12-14.

“judicial notice under Rule 94 (B) does not shift the ultimate burden of persuasion, but only the initial burden of production”.⁵

4. Next, the Prosecution submits that it has included in Annex A Proposed Facts related to sniping and shelling which took place before the period of the indictment against the Accused (“Indictment”) to show that “at the time of his appointment as Chief of the General Staff of the VJ in August 1993”, the Accused inherited a situation in which “crimes were being committed on a routine basis against the civilian population of Sarajevo, and he helped to perpetuate that situation”.⁶ The Prosecution recalls Rule 93 (A) of the Rules related to the admission of evidence of a consistent pattern of conduct and argues that these Proposed Facts are relevant to the allegation that the Accused “knew by August 1993 that the assistance he provided would be used in the commission of crimes against the civilian population of Sarajevo”.⁷

5. Finally the Prosecution submits that the Proposed Facts meet the criteria which must be satisfied in order for the Trial Chamber to take judicial notice thereof pursuant to Rule 94(B) of the Rules and that the judicial notice thereof would enable “the Trial Chamber to fairly devote a greater proportion of its time and attention to examining the liability of the Accused in respect of the events that took place in Sarajevo, rather than the events themselves”.⁸

B. Defence

6. On 12 February 2007, the Defence filed a “Request for Additional Time to Respond to Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo”, wherein the Defence sought leave to file its response only after having received confidential materials from the *Galić* case. The same day, the Defence filed a “Requests to Exceed Word Limit”, by which it requested to file a response of 6,000 words. On 23 February 2007, the Trial Chamber issued “Order on Confidential Materials and Defence Requests for Additional Time and to Exceed Word Limit” (“Order”) by which the Trial Chamber granted the Defence request to exceed word limit and to extend the time-limit for the filing of its response and ordered the Defence to file a first response within seven days of the Order, setting out its submissions on Rule 94 (B) of the Rules and a second response within 14 days of the Prosecution’s notice confirming that disclosure of the *Galić* materials had been made, addressing each of the facts proposed in the Motion.

⁵ Motion, para. 15.

⁶ Motion, para. 19.

⁷ Motion, para. 19, referring also to the fact that the Proposed Facts about the shelling and sniping before the Indictment period are relevant to para. 42 of the Indictment.

⁸ Motion, paras 20-21.

7. On 2 March 2007 the Defence filed its “Objection to Prosecution’s Motion for Judicial Notice of adjudicated Facts Concerning Sarajevo” (“First Defence Response”). On 8 March 2007, the Defence filed its “Second Set of Objections to Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo” (“Second Defence Response”).

8. On 13 June 2008, the Defence filed a “Defence Withdrew of Objection to Certain Paragraphs of Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo” (“Defence Withdrawal”) wherein the Defence, in the interest of assisting the Trial Chamber in streamlining the case, withdraws its objection to the admission of 110 of the Proposed Facts.⁹

9. As a general point, the Defence submits that Rule 94 (B) vests the Trial Chamber with the discretion to admit or deny the admission of previously adjudicated facts.¹⁰ In the view of the Defence, the wholesale admission of the Proposed Facts through the use of Rule 94 (B) “may place too onerous a burden of rebuttal upon the Accused and that such may offend the principle of a fair trial, as enshrined in Articles 20 and 21 of the Statute of the Trial.”¹¹ Hence, the Defence submits that the Trial Chamber should exercise its discretion to deny the admission of the Proposed Facts.¹²

10. The Defence further argues that the Prosecution misinterpreted the holding of *Karamera et al.* Appeal Decision “as they do not appreciate the full context of the [Appeals Chamber] opinion” which stated that “as to all other adjudicated facts relating to the criminal responsibility of the accused, it is for the Trial Chambers, in careful exercise of their discretion, to assess each particular fact in order to determine whether taking judicial notice of it – is consistent with the accused’s rights under the circumstances of the case”.¹³

11. The Defence further submits that the Prosecution seeks to “side step entire categories of evidence in this case under the claim of expediency” and that process “would violate the accused’s rights in this case.”¹⁴

⁹ The Proposed Facts for which the Defence filed its withdrawal are: 1-25, 35-37, 39, 40, 42, 46, 49, 51, 53, 55, 182-195, 208-224, 228-236, 243, 251-256, 261-264, 266-269, 271-277, 281-284, 288-292. In the Withdrawal Motion, the Defence also introduces new objections for the remaining Proposed Facts. These objections will not be considered by the Trial Chamber as they are filed out of the time prescribed by the Rules for the Responses to Motions.

¹⁰ First Response, paras 4-5 citing *Prosecutor v. Mejakić*, IT-02-65, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 April 2004.

¹¹ First Response, paras 7. The Defence further argues that the time constraints placed on it to present its case, would make it practically impossible for the Defence to rebut the evidence introduced by way of judicial notice, *Ibid*, paras 14-20.

¹² First Response, paras 5-8.

¹³ *Karamera et al* Appeal Decision, para 11. The Defence notes that this “includes [...] facts related to the conduct of physical perpetrators of a crime for which the accused is being held criminally responsible through some other mode of liability”, Second Response, paras 6-7.

¹⁴ Second Response, para. 8.

12. Finally, the Defence submits that some Proposed Facts (i) are not sufficiently clear;¹⁵ (ii) contain a legal characterisation;¹⁶ (iii) go, or potentially go, to the responsibility of the Accused;¹⁷ (iv) were not contested in the *Galić* Trial Judgement;¹⁸ (v) have no demonstrable relevance to the case;¹⁹ (vi) “are too broad, too tendentious, not sufficiently significant, too detailed, too numerous [or] repetitive”;²⁰ (vii) are subject of reasonable dispute between the parties;²¹ and (viii) contain characterisation of documents which themselves may be admitted as exhibits at trial.²²

II. APPLICABLE LAW

13. 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.

14. Rule 94(B) aims at achieving judicial economy and harmonising judgements of the Tribunal by conferring the Trial Chamber with discretionary power to take judicial notice of facts or documents from other proceedings. This power has to be exercised “on the basis of a careful consideration of the accused’s right to a fair and expeditious trial”, that is in keeping with the principle of a fair trial enshrined in Articles 20 and 21 of the Statute.²³

15. The Appeals Chamber has clarified that a request for the admission of adjudicated facts “must specifically point out the paragraph(s) or parts of the judgement of which it wishes judicial notice to be taken, and refer to *facts*, as found by the trial chamber”.²⁴ In relation to the effects of taking judicial notice, the Appeals Chamber has further held that “by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact,

¹⁵ Second Response, para. 11, referring to Proposed Facts 38, 314.

¹⁶ *Ibid.*, referring to Proposed Facts 54, 314. In the Defence Withdrawal, the Defence adds Proposed Facts 77-78, 81, 132, 133, 135-137, 139-140, 164-167, 169-172, 312-313, Defence Withdrawal, para. 5.

¹⁷ *Ibid.*, referring to Proposed Facts 54, 77, 86, 182-298, 311. The Defence also took issue with the Prosecution’s assertion that the Proposed Facts would be relevant to determine, *inter alia*, the mental state of the Accused. In the Defence’s position, “as such [...] all facts as set forth in Annex [A]” should not be admitted.

¹⁸ *Ibid.*, referring to Proposed Facts 1-53, 55-76, 78, 80, 81, 82-84, 86-310. The Defence objections in relation to Proposed Facts 1-25, 35-37, 39, 40, 42, 46, 49, 51, 53, 55, 182-195, 208-224, 228-236, 243, 251-256, 261-264, 266-269, 271-277, 281-284, 288-292 are withdrawn, Defence Withdrawal, para. 4.

¹⁹ *Ibid.*, referring to Proposed Facts 2-5, 23-53, 58-179, 299-31. The Defence objections in relation to Proposed Facts 2-5, 23, 35-37, 39, 40, 42, 46, 49, 51, 53 are withdrawn, Defence Withdrawal, para. 4.

²⁰ *Ibid.* referring to Proposed Facts 54, 56, 311, 314.

²¹ *Ibid.*, referring to Proposed Facts 54, 58, 182-310, 311, 314. The Defence withdraws its objection in relation to Proposed Facts 182-195, 208-224, 228-236, 243, 251-256, 261-264, 266-269, 271-277, 281-284, 288-292, Defence Withdrawal, para. 4.

²² *Ibid.*, referring to Proposed Facts 36, 37, 39, 44-46, 57. However, in the Defence Withdrawal, the Defence withdraws its objection in relation to Proposed Facts 36-37, 39, 46, Defence Withdrawal, para. 4.

²³ *Karemera et al.* Appeal Decision, para. 41.

²⁴ See *Prosecutor v. Zoran Kupreškić et al.*, 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. 12.

which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial.”²⁵ 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.”²⁶ Importantly, however, “the judicial notice of adjudicated facts does not shift the “ultimate burden of persuasion which remains with the Prosecution”.”²⁷

16. According to the settled jurisprudence of the Tribunal, the Trial Chamber, in the exercise of its discretion to judicially notice adjudicated facts, has to consider whether the purported adjudicated facts meet at least the following requirements:

- (i) The fact must be distinct, concrete and identifiable;²⁸
- (ii) It must be pertinent and relevant to the case;²⁹
- (iii) It must not include findings or characterisations that are of an *essentially* legal nature;³⁰
- (iv) It must not be based on a plea agreement or on facts voluntarily admitted in a previous case;³¹
- (v) It must be “truly adjudicated” *i.e.* it must not have been contested on appeal, or, if it has, the fact has been settled on appeal;³²
- (vi) It must not go to the act, conduct or mental state of the accused;³³

²⁵ See *Prosecutor v. Slobodan Milošević*, 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, (“*Slobodan Milošević* Appeal Decision”), p. 4 (footnote omitted); *Karemera et al.* Appeal Decision, para. 42. See also *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 (“*Popović et al.* Decision”), para. 20.

²⁶ *Karemera et al.* Appeal Decision, para. 42.

²⁷ *Prosecutor v. Dragomir Milošević*, 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, paras 19-22 (“*Dragomir Milošević* Appeal Decision”), para. 16 citing *Karemera et al.* Appeal Decision, para. 42.

²⁸ See, for example, *Krajišnik* Decision, para. 14.

²⁹ *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on Appellant’s Motion for Judicial Notice, 1 April 2005 (“*Nikolić* Appeal Decision”), para. 52.

³⁰ *Dragomir Milošević* Appeal Decision, paras 19-22.

³¹ *Popović et al.* Decision, para. 11.

³² *Kupreškić et al.* Decision, para. 6; *Krajišnik* Decision, para. 14; *Prosecutor v. Prlić et al.*, IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 14 March 2006, (“*Prlić et al.* Pre-Trial Decision”), paras 12, 15.

³³ *Karemera et al.* Appeal Decision, para. 51.

- (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.³⁴

17. It is not required that the proposed facts be beyond reasonable dispute between the parties.³⁵ However, as taking of judicial notice under Rule 94(B) is discretionary, the Trial Chamber always retains the right to withhold judicial notice of a fact even if it fulfils all the requirements above, when it believes that such notice would not serve the interests of justice.³⁶ Indeed, as held by the Appeals Chamber, a key factor in the Trial Chamber's determination as to the admission of adjudicated facts lies in the consideration that taking judicial notice of such facts will achieve judicial economy while preserving the right of the accused to a fair, public and expeditious trial.³⁷

III. DISCUSSION

A. The Proposed Fact Must be Distinct, Concrete and Identifiable

18. A fact of which judicial notice is sought should be distinct, concrete and identifiable in the findings of the original judgement.³⁸ In particular, 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".³⁹ It follows that when adjudicated facts proposed for admission are insufficiently clear even in their original context, the Trial Chamber should not take judicial notice of them.⁴⁰

19. In its submissions, the Defence claims that Proposed Facts 54, 311, 314 are not sufficiently clear or "too broad, tendentious, too detailed, too numerous [or] repetitive".⁴¹ The Trial Chamber notes that Proposed Fact 54 is repeated in Proposed Fact 131. Proposed Fact 54 should therefore not be admitted. In the view of the Trial Chamber, the other Proposed Facts indicated by the Defence are sufficiently clear in the *Galić* Trial Judgement and distinct, concrete and identifiable. However, the Trial Chamber finds that Proposed Facts 48, 79, 80, 81, 85, 87, 95-97, 106, 107, 119, 139, 200,

³⁴ *Krajišnik* Decision, para. 14; *Prlić et al.* Pre-Trial Decision, para. 21.

³⁵ *Karemera et al.* Appeal Decision, para. 40. See also *Dragomir Milošević* Appeal Decision, para. 27; *Popović et al.* Decision, fn. 19.

³⁶ *Karemera et al.* Appeal Decision, para. 41; *Popović et al.* Decision, para. 16.

³⁷ *Nikolić* Appeal Decision, para. 11, with further references.

³⁸ *Krajišnik* Decision, para. 14. See also *Prlić et al.* Pre-Trial Decision, para. 21; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003 ("*Blagojević and Jokić* Trial Decision"), para. 16.

³⁹ *Krajišnik* Decision, para. 14, fn. 44.

⁴⁰ *Ibid.*

⁴¹ See *supra* para. 12.

201, 244, 247, 250, 257, 311, 312 fall short of the requirement under examination.⁴² It will therefore not take judicial notice of them.

20. The Defence further argues that several Proposed Facts constitute a characterisation of documents admitted in the *Galić* Trial Judgement. The Trial Chamber is of the view that a factual finding of the Trial Chamber may be based on the content of a specific document or witness' testimony insofar as the finding is distinct, concrete and identifiable. The Trial Chamber finds, in this regard, that Proposed Fact 58 in referring generically to "UN sources" is excessively vague to meet the requirement.⁴³

21. Furthermore, the Trial Chamber notes that if the fact proposed for notice contains only a minor inaccuracy or ambiguity as a result of its abstraction from the context of the original judgement, a Trial Chamber may, in its discretion, correct the inaccuracy or ambiguity.⁴⁴ The Trial Chamber has therefore typographically corrected a few Proposed Facts in order to render these facts consistent with the meaning intended in the *Galić* Trial Judgement as follows: in Proposed Fact 24, the words "in early March 1992" should be introduced at the beginning of the Proposed Fact in order to clarify the time-frame of the events described therein;⁴⁵ in Proposed Fact 26, the date "6 April" should be replaced with "6 April 1992" in order to avoid any ambiguity with regard to the time-frame of the fact;⁴⁶ Proposed Fact 109 should be corrected by replacing the word "it" with

⁴² In Proposed Fact 48, the time-period of the events described therein is not clear (*i.e.* the staffing of RSK by the JNA). The *Galić* Trial Judgement did not provide a clear temporal indication either; Proposed Fact 79 is repetitive of fact 145 and it seems to be reporting the opinion of a witness rather than a factual finding of the Trial Chamber; Proposed Fact 80 is repeated in Proposed Fact 144; Proposed Fact 81 refers to the period between September 1992 and August 1994, however this temporal framework is not clear in the original finding in the *Galić* Trial Judgement; Proposed Fact 85 is repeated in Proposed Fact 148; Proposed Facts 87, 95-97, 106, 107 are repeated in Proposed Facts 280, 260, 265, 287, 298, 310 respectively. Proposed Fact 119 should be corrected by introducing the words "some of" at the beginning of the sentence to make it consistent with the Appeals Chamber's finding of para. 351 of the *Galić* Appeals Judgement. However, Proposed Fact 119 is repeated in Proposed Fact 312 which is vague as to which attacks on the hospital constituted examples of attacks on civilians. Proposed Fact 139 is excessively vague by referring to "most populated areas", without explaining which they were and using the vague formulation "seemed to be"; Proposed Fact 200 is not a *factual* finding of the Trial Chamber as it asserts that "the precise location [...] from which the three shells were fired is not critical to the Prosecution case;" similarly, Proposed Fact 201 refers to the fact that "Mirza Sabljica employed the correct methodology to determine the direction from which the shells had landed," and is more a determination on evidentiary issue; the same holds true for Proposed Fact 257 as it refers to whether "the absence of more detailed medical documentation on the point of entry of the bullet into the victims is [...] crucial for determining the source of fire"; Proposed Facts 244, 247, and 250 are repetitive of 230, 248, 249 respectively; finally Proposed Fact 311 is vague when it refers that indiscriminate fire against civilians at the Sarajevo Airport was "an accepted and known fact".

⁴³ Proposed Fact 58 reads as follows: "Between September 1992 and August 1994, on other occasions, UN sources attributed civilian injuries and deaths to SRK actions, including deliberate targeting."

⁴⁴ *Popović et al.* Decision, para. 7.

⁴⁵ The Proposed Fact should read as follows: "In March 1992, forces loyal to the BiH Presidency seized strategic buildings and military equipment, while the SDS gradually took control of much of the city's western and northern suburbs".

⁴⁶ The Proposed Fact should read as follows: "On 6 April 1992, the JNA attacked the Ministry of Training Academy in Vrace, the central tramway depot, and the Old Town district with mortar, artillery, and tank fire, and JNA units seized control of Sarajevo's airport".

“Dobrinja”;⁴⁷ Proposed Fact 302 should be corrected by deleting the word “was” which was inadvertently repeated in the Proposed Fact;⁴⁸ Proposed Fact 296 should refer to paragraph 288 instead of paragraph 287 of the *Galić* Trial Judgement.

B. The Proposed Facts Must be Pertinent and Relevant to the Case

22. The proposed facts must be relevant to a matter at issue in the current proceedings. As the Appeals Chamber has noted, “Rule 94 of the Rules is not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted.”⁴⁹ The Defence submits that the following Proposed Facts lack relevance: 26-34, 38, 41, 43-44, 47-48, 50, 52, 58-179, 299-311. The Trial Chamber notes that Proposed Facts 1-18 go to the general historical background of the case, as described in paragraphs 63-68 of the Indictment (“General Allegations”), whereas Proposed Facts 19-53 go to the background of the alleged crimes in Sarajevo with which the accused is charged and which is described in paragraphs 40-46 of the Indictment. Therefore, these Proposed Facts are relevant to the case.

23. As for the remaining Proposed Facts 54-314, the Trial Chamber recalls the “Decision on Application of Rule 73 *bis* and Amendment of Indictment”, issued on 15 May 2007 (“73 *bis* Decision”), wherein the Chamber ordered the Prosecution in relation to the Sarajevo part of the Indictment not to lead evidence on the crime of terror (which is not charged), as well as in respect of any unscheduled incidents, unless it “can show that such incidents are essential to prove an important aspect of its case”.⁵⁰ In accordance with the 73 *bis* Decision, the Trial Chamber finds irrelevant the Proposed Facts 300, 307-310 (related to unscheduled incidents which occurred during the Indictment period in this case) and 129,165-169, 171, 177-179 (related to the crime of terror), as the Prosecution has failed to demonstrate their relevance to prove an important aspect of its case.

24. Finally, the Trial Chamber finds that in relation to Proposed Facts 86, 299, 301-306, which are related to unscheduled incidents in the period preceding the Indictment, the Prosecution has sufficiently demonstrated how these Proposed Facts might be relevant to prove the *mens rea* of the Accused in relation to the crimes charged within the Indictment period. However, the burden remains on the Prosecution to establish at trial whether the Accused knew of the commission of the

⁴⁷ The Proposed Fact should read as follows: “In the early stages of the conflict prior to the period between September 1992 and August 1994, Dobrinja was isolated from the rest of the city”.

⁴⁸ The Proposed Fact should read as follows: “In August 1993 civilian Vildana Kapur was deliberately targeted from SRK-controlled territory”.

⁴⁹ *Prosecutor v. Semanza*, ICTR-97-20-I, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 Nov 2000, para. 24; *Nikolić* Appeal Decision, para. 52.

⁵⁰ 73 *bis* Decision, para. 17.

crimes committed in the pre-Indictment period. In other words, as held by the Appeals Chamber, the evidence of the Accused's notice of these crimes has to be produced separately from judicial notice of their existence.⁵¹ In conclusion, the Trial Chamber finds relevant to the background of the case and to the allegations raised in relation to Counts 1 to 4 of the Indictment the following Proposed Facts: 1-128, 130-164, 170, 172-176, 179-299, 301- 306, 311-314.

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

25. The proposed facts must not contain any findings or characterisations that are of an essentially legal nature. In other words, they must represent *factual findings* of a Trial Chamber or Appeals Chamber.⁵² In general, findings related to the *actus reus* or the *mens rea* of a crime are deemed to be factual findings.⁵³ In determining whether a proposed 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 proposed fact contains findings or characterizations that are of an essentially legal nature and which must, therefore, be excluded".⁵⁴

26. The Defence argues that Proposed Facts 54 and 314 contain a legal characterisation. The Trial Chamber concurs with the Defence that Proposed Facts 54 and 314 contain a legal characterisation. Proposed Fact 54 refers to "a widespread or systematic shelling and sniping of civilians resulting in their death or injury" and it appears essentially a legal characterisation of the *chapeau* element of crimes against humanity. Proposed fact 314 refers to the crimes of "terror, murder and inhumane acts" and its legal characterisation is also clear from the fact that it is taken from paragraphs 594 to 602 of the *Galić* Trial Judgement which belong to the chapter "legal findings". The Trial Chamber also finds that Proposed Facts 129, 131, 179, 207, 227, 249 and 312 are also findings of an essentially legal nature. Proposed Fact 129 contains a legal characterisation by referring to the attack on the city of Sarajevo "not justified by military necessity"; Proposed Facts 131 and 179 are almost identical to Proposed Fact 54 discussed above; Proposed Fact 207 refers to an attack "indiscriminate as to its target" and "carried out recklessly, resulting in civilian casualties" and appears a legal finding on the crime of "attacks on civilians"; Proposed 227 is almost identical to 207; the same holds true for Proposed Fact 249 which refers to an "example of shelling that deliberately targeted civilians"; Proposed Fact 312 refers to "attacks on a legitimate

⁵¹ *Dragomir Milošević* Appeal Decision, para. 16.

⁵² *Dragomir Milošević* Appeal Decision, para. 19-22; *Krajišnik* Decision, para. 15.

⁵³ *Krajišnik* Decision, para. 16.

⁵⁴ *Krajišnik* Decision, para. 19. See also *Dragomir Milošević* Appeal Decision, paras 19-22.

a legitimate military target”, implying essentially a legal finding. The Trial Chamber will not therefore take judicial notice of Proposed Facts 54, 129, 131, 179, 207, 227, 249, 312 and 314.

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

27. The Defence objects to several Proposed Facts on the grounds that they were not contested at the *Galić* Trial Judgement.⁵⁵ However, the Trial Chamber notes that the requirement applicable to the Proposed Facts is whether these facts are “adjudicated”, that is not based on an agreement between the parties to the original proceedings, such as a plea agreement under Rules 62 *bis* and 62 *ter*, or an agreement between the parties on matters of fact in accordance with Rule 65 *ter* (H). Whether the facts are based on an agreement between the parties, as noted in the jurisprudence, is clear where the structure of the relevant footnote in the original judgement cites the agreed facts between the parties as a primary source of authority.⁵⁶ In applying this requirement, the Trial Chamber does not find that any of the Proposed Facts are based on an agreement between the parties.

E. The Proposed Fact Must not be Subject to Pending Appeal or Review

28. The proposed facts must not be contested on appeal. Thus, “[o]nly facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed “adjudicated facts” within the meaning of Rule 94(B)”.⁵⁷ The Proposed Facts under examination are not subject to pending appeal. The Trial Chamber finds therefore that all Proposed Facts satisfy this requirement.

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

29. A Trial Chamber must withhold judicial notice of any alleged adjudicated fact relating to the acts, conduct and 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*”.⁵⁸ Second, “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

⁵⁵ See *supra*, para. 12.

⁵⁶ *Popović et al.* Decision, para. 11.

⁵⁷ *Kupreškić et al.* Decision, para. 6; *Krajišnik* Decision, para. 14; *Prlić et al.* Pre-Trial Decision, paras 12, 15.

⁵⁸ *Karemera et al.* Appeal Decision, para. 51.

related to their own actions; indeed, in some cases such defendants might affirmatively choose to allow blame to fall on another”.⁵⁹

30. This requirement 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.⁶⁰

31. The Trial Chamber notes that the Defence argues that Proposed Facts 54, 77, 86, 182-298, 311 potentially go to the responsibility of the Accused. The Trial Chamber notes that these Proposed Facts refer to criminal acts carried out by SRK forces, that is conduct of persons other than the Accused in this case. Thus, the Trial Chamber finds that they meet the requirement in exam. The same holds true for the remaining Proposed Facts.

G. The Formulation of a Proposed Fact Must not Differ Substantially From the Formulation in the Original Judgement

32. The facts of which judicial notice is sought must be formulated by the moving party in the same way – or at least in a substantially similar way – as the formulation used in the original judgement.⁶¹ Furthermore, a Trial Chamber can and indeed must decline to take judicial notice of facts which are “out of the 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.⁶² Finally, a proposed fact also has to be examined in the context of the other Proposed Facts in the motion. It follows that the Trial Chamber must deny judicial notice if the proposed fact is either unclear in that context or has become unclear because one or more of the surrounding purported facts will be denied judicial notice.⁶³ The Trial Chamber finds that Proposed Facts 60, 63, 167, 168, 170, 172, 225, 242, 296 substantially differ from the Trial Judgment or are unclear in the context of the other Proposed Facts.⁶⁴ Thus, they fall short of the requirement.

⁵⁹ *Karemera et al.* Appeal Decision, para. 51.

⁶⁰ *Karemera et al.* Appeal Decision, para. 48.

⁶¹ *Krajišnik* Decision, para. 14; *Prlić et al.* Pre-Trial Decision, para. 21.

⁶² *Karemera et al.* Appeal Decision, para. 55; *Popović et al.* Decision, para. 8.

⁶³ See *Popović et al.*, para. 8.

⁶⁴ Proposed Fact 60 states that “Between September 1992 and August 1994, civilian patients received at the State Hospital out-numbered combatants by at least four to one” and it is taken from para. 216 of the *Galić* Trial Judgement. However the finding in that Judgement seems quite different and taken out of the context as it reads as follows: “Akif Mukanović, soldier with the ABiH, said that he felt more secure at the frontline than elsewhere in Sarajevo because “fire was opened less often” at the confrontation lines. This is concordant with the explanation given by Milan Mandilović, surgeon at the State Hospital, as to why civilian patients received at the State Hospital out-numbered combatants at least four to one.” Proposed Fact 63 states that “Between September 1992 and August 1994, the Commander of the Ilija Brigade of the SRK gave orders to his mortar battery to target ambulances, a marketplace, funeral processions, and cemeteries”, referring to para. 219 of the *Galić* Trial Judgement. However, that paragraph does

H. Trial Chamber's Residual Discretion

33. Besides the application of these requirements, in exercising its discretion the Trial Chamber has carefully assessed whether the admission of the Proposed Facts would advance judicial economy while still safeguarding the rights of the accused. The Trial Chamber notes that the Defence objects to Proposed Facts 54, 58, 182-310, 311, 314 as they are subject to a reasonable dispute between the parties and their admission would infringe the right of the Accused to a fair trial.⁶⁵

34. The Trial Chamber has already found that Proposed Facts 54, 58, 200-201, 207, 225, 227, 242, 244, 247, 249, 250, 257, 296, 307-312 and 314 do not meet the requirements for judicial notice pursuant to Rule 94 (B). Therefore, it will not discuss these facts further. As regards the remaining Proposed Facts, the Trial Chamber notes that they relate to both scheduled and unscheduled incidents in Sarajevo described in Annex A to the Indictment. In relation to these facts, the Trial Chamber does not agree with the Defence that the taking of judicial notice thereof would violate the rights of the Accused and may place "too onerous a burden of rebuttal upon [him]."⁶⁶ Indeed, the taking of judicial notice of these Proposed Facts will only shift the initial production of evidence to the Defence, while the ultimate burden of persuasion remains with the Prosecution. Furthermore, these Proposed Facts will only go to prove the commission of crimes in Sarajevo. More importantly, the Prosecution will have to prove, during the course of the trial, the existence of facts aiming at establishing the chain of command in relation to the units who perpetrated such crimes as well as the Accused's notice in relation thereto.

35. For the foregoing reasons, the Trial Chamber finds that the taking of judicial notice of Proposed Facts 182-199, 202-206, 208-224, 226, 228-241, 243, 245, 246, 248, 251-256, 258-295, 297-306 will further the interest of justice and expedite the proceedings while guaranteeing the rights of the Accused to a fair trial.

not appear to be related to a factual finding of the Trial Chamber: "Witness AD, an SRK soldier, testified that the Commander of the Ilijaš Brigade gave orders [...]" Similarly, Proposed Facts 167, 168, 170 and 172 refer to para. 519 of the Trial Judgement which reports the impression of the witnesses: "Mole noticed[...]", "Tucker believed[...]", "For Witness Y[...]", "Van Baal even emphasised[...]" Proposed Fact 225 is unclear in the context of the other Proposed Facts as it refers to the origin of fire "in relation to two shells that were investigated in detail" without clarifying to which incidents these two shells refer; Proposed Fact 242 refers to the fact that "10-12 mortars fell around Markale market" but it seems to be taken out of the context as in the *Galić* Trial Judgement this appears the opinion of a witness while Trial Chamber also refers to other evidence indicating that "four mortar rounds were fired" (*Galić* Trial Judgement, para. 459); Proposed Fact 296 refers to "bullets [which] were fired [...] from the same location". However the Proposed Facts 288-298 which are related to the event refer only to one bullet, so the Proposed Fact is unclear in the new context of the adjudicated facts.

⁶⁵ In the Defence Withdrawal, the Defence withdrew its objections to some of the Proposed Facts related to scheduled incidents in Sarajevo described in Annex A to the Indictment, *see supra*, paras 8, 12.

⁶⁶ *See supra* para. 12.

IV. DISPOSITION

36. On the basis of the reasoning set forth above, and recalling the discretionary power of the Trial Chamber in relation to adjudicated facts, the Trial Chamber pursuant to 94(B) of the Rules **GRANTS** the Motion in part and will take judicial notice of the following Proposed Facts:

- 1) 1-23, 25, 27- 47, 49-53, 55-57, 59, 61-62, 64-78, 82-84, 86, 88-94, 98-105, 108, 110-118, 120-128, 130, 132 -138, 140-164, 173-176, 182-199, 202-206, 208-224, 226, 229-241, 243, 245-246, 248, 250-256, 258-295, 297-299, 301, 303-306, 313;
- 2) 24, 26, 109, 302 subject to the changes indicated in paragraph 21 above.

37. The Trial Chamber will not take judicial notice of the remaining Proposed Facts.

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

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-sixth day of June 2008

At The Hague

The Netherlands

[Seal of the Tribunal]